GOVERNANCE

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Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique

Legal analysis

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1 Introduction

The anti-corruption package[1] of Mozambique has been reviewed in accordance to the international treaties the country has ratified and other soft law mechanisms. As such, the present report was written taking into account the international standards to prevent and combat corruption, to which Mozambique is party to – the United Nations Convention Against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AU Convention) and the Southern Africa Development Community Protocol Against Corruption (SADC Protocol).

Specific international standards and other soft law mechanisms pertaining to the combating and prevention of money laundering were also taken into consideration, in particular the OECD's Financial Action Task Force (FATF) 40 recommendations on money laundering. Although Mozambique is not party to the OECD, it is a member of the FATF Regional Style Body (FATFRSB) for Eastern and Southern Africa, known as the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG).

The instruments mentioned in the previous paragraphs were also utilised to benchmark Mozambican legislation with regards to international co-operation. Finally, the proposed Mozambican regulation on witness protection was reviewed and benchmarked with, upon request of USAID, the United Nations Convention against Transnational Organised Crime (UNTOC) and its supplementing protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

Attention should be given to the fact that any international standard which Mozambique is party to is to observe the provisions contained in article 18 of the Constitution of Mozambique. As such, any international regulation that Mozambique has obliged itself to comply has to be interpreted in accordance to the constitutional provisions of the country and shall have the value of law, but not of a constitutional norm (article 18, No. 2). Thus, the Constitution of Mozambique shall prevail in the event that there is any divergence between the Constitution and any international obligation of Mozambique, be it treaty or soft law.

It should be stated that the present anti-corruption package, currently tabled before the Mozambican Parliament, comes at a timely moment. Mozambique is also under review within the context of the implementation review mechanism of the UNCAC, for the cycle year of 2011-2012. This peer review mechanism seeks to identify the compliance of both legislative and practical aspects of the anti-corruption framework in the country. In that regard, the peer reviewers for Mozambique are, in accordance to the United Nations Office on Drugs and Crime (UNODC) website[2], Burkina Faso and the Dominican Republic. The on-site analysis by the peer reviewers is expected to take place in 2012.

USAID and DfID funded the assessment, overview and analysis of the anti-corruption legislative package of Mozambique.

The methodology utilised for the production of the report included both (i) a desk review of the anti-corruption package, as well as (ii) an on-site visit to interview relevant authorities which either drafted the legislation which comprise the anti-corruption package or relevant authorities whose workflow will be directly affected with the legislative changes. It should be underscored, however, that the experts did not have the opportunity to meet and interview officials from the Mozambican financial

[1] The anti-corruption package contains: (i) a revised and consolidated Criminal Code, which would replace the one currently in force; (ii) a revised Criminal Procedure Code; (iii) a Code of Ethics for Public Officials – which includes rules on conduct, conflict of interest and declaration of assets; (iv) a witness protection law; and (v) minor legislative changes on laws currently in force, e.g., the Organic Law of the Prosecution Service, the Organic Law of the Judiciary.

[2] A list of the reviewing countries can be found in: http://www.unodc.org/documents/treaties/UNCAC/Review-Mechanism/CountryPairingSchedule/Country_pairings_-_Year_14_rev2011_IRG_rev-FINAL_October_2011.pdf.

intelligence unit (FIU). The experts also took the opportunity of the on-site visit to interview with the development assistance community based in Maputo and share with them their initial findings.

Any Mozambican legislation mentioned throughout the text of the present report shall be directly interpreted into English within the text, with reference to the corresponding articles of the applicable legislation.

The present report is divided as follows: (i) introduction, in which a brief overview of the international standards and methodology is explained; (ii) code of conduct, regarding the proposed Code of Conduct for public officials, which comprises rules on conduct and ethics, conflict of interest and the declaration of assets; (iii) criminalisation, comprising the relevant anti-corruption provisiong and offences in the proposed Criminal Code, as well as rules pertaining to immunities of public officials, special investigative techniques, whistleblower protection, international co-operation and asset recovery provisions; (iv) anti-money laundering, the interaction of the anti-corruption legislation with the anti-money laundering regulation in Mozambique; and (v) international co-operation, which seeks to analyse the Mozambican capacities to engage with other jurisdictions for the effective combating crime with transnational effects.

2 Code of conduct for public officials and conflict of interest regulation

The proposed Code of Ethics is to be applied to all public officials of Mozambique (article 2, No. 1), including elected officials. Moreover, individuals (whether natural or legal) who are not public officials may also be considered as such for the purposes of the code of ethics, in the event that they have been invested with public powers (article 2, No. 2), e.g., assisting public authorities during elections. Its applicability also extends to the natural or legal persons that have been invested with public powers, e.g., utilities companies.

The proposed Code of Ethics is subdivided into five main parts: (i) general part, containing definitions and principles; (ii) code of conduct for public officials; (iii) conflict of interest regulation; (iv) asset declaration; and (v) sanctions.

The general part contains basic definitions for the applicability of the code of ethics. Article 3, No. 1 defines a public official as, "the person that exercises a term, position, job or function in a public entity, by virtue of election, appointment, hiring or any other way of investing or attachment, even in a transitionary or unpaid way." The definition contained in article 3, No. 1 of the Code of Conduct is compliant with the definitions of public official contained in article 2(a) of the UNCAC, article 1(1) of the AU Convention, and article 1 of the SADC Protocol.

This aforementioned definition is further clarified in article 3, No. 2 of Code of Conduct, in which the term public official contained in article 3, No. 1 is to be considered as synonym to any other term used in other Mozambican legislation. Thus, the Code of Conduct seeks to harmonise any possible terminology used to define a public official in current legislation and avoid the inapplicablity of said regulation to all public officials. This is due to the fact that, due to historical considerations of the anti-corruption legislation in Mozambique (which was first introduced in 1990), it was previously unclear whether the applicability of anti-corruption legislation would encompass also members of the judiciary and the legislative, and when it did, it only referred to senior public officials of the Judiciary and Legislative branches.

To clarify this situation and to ensure its compatibility with international standards (in particular with the UNCAC), the proposed Code of Conduct introduced in its article 3, No. 3 an exhaustive list of specific positions, which include public officials from all powers and from all levels of Government, including also publicly-owned companies and companies which perform public functions. The function of article 3, No. 3 of the Code of Conduct appears to be twofold: (i) to reaffirm that the Code of Conduct is applicable to all public officials, regardless of seniority, branch of power or level of government, and (ii) to introduce the list of authorities which are subject to annual asset declarations, in accordance to the articles 3 and 4 of the proposed Code of Conduct.

Article 3 No. 3 exists due to the reason that previous anti-corruption legislation in Mozambique did not make clear its scope of applicability of the anti-corruption legislation and the extent to which one was to be considered a public official. Moreover, this exhaustive list contained in article 3 No. 3 (as well as its article 4) of the proposed Code of Conduct seems to stem from the fact that the current anti-corruption legislation in Mozambique (Law No. 4/1990, regulated by Decree No. 55/2000, and Law No. 7/98, regulated by Decree No. 48/2000) did not make it clear whether it was applicable to public officials belonging to the Judiciary and Legislative branches[3]. The proposed Code of Conduct seems to thus bridge this gap by explicitly informing that such authorities are to be considered public officials. Moreover, as will be seen in the appropriate section below, this exhaustive list of public officials will be made reference to in the provisions pertaining to the declaration of assets.

[3] Centro de Integridade Pública Moçambique (CIP). Legislação Anti-Corrupção em Moçambique: contributos para uma melhoria do quadro legal anti-corrupção em Moçambique. 2008.

It should be noted that the general definition of public official used for civil and administrative purposes, contained in article 3 No. 1 and 2 of the proposed Code of Conduct, matches precisely the definition of public official for criminal purposes, contained in article 337 of the proposed Criminal Code. However, due to the fact that the definition of public officials for criminal purposes does not contain the exhaustive lists contained in article 3 No. 3 and article 4 of the draft Code of Conduct (for the reasons set forth above), this may be interpreted by the courts, once in force, that the public officials listed are not criminally liable for corruption-related acts, but only liable in civil or administrative courts. While this is not the intention of the drafters of the bill, such argument could be utilised in a court of law by the defence.

For this reason, it is suggested that the exhaustive list of public officials contained in articles 3, No. 3 and 4 be transposed to Title III (Declaration of assets) of the proposed Criminal Code, so as to avoid any misinterpretation of the legislation.

2.1 Code of conduct

Standards of ethical standards and integrity in the public service are important to prevent corruption and strengthen the trust of the public in State institutions[4]. As such, codes of conduct are a key element to establish such an ethic regime, as they clearly define the duties, responsibilities and rights of public officials. Thus, codes of conduct should be established for all elected and non-elected public officials, containing all relevant information and expectations[5].

Article 8(2) of the UNCAC requires the establishment of codes and standards of conduct for the correct, honourable and proper performance of public functions. These codes should clearly formulate how the public officials should behave by emphasising certain core values that can help the officials to make decisions in specific situations. Those core values should include fairness, impartiality, non-discrimination, independence, honesty and integrity, loyalty towards organisation, diligence, propriety of personal conduct, transparency, accountability, responsible use of organisational resources and appropriate conduct towards the public (UNODC, 2009).

The code should treat the questions of public service and political activities and establish rules regarding the dealing with financial as well as non-financial conflicts of interests. This includes regulations concerning the acceptance and rejection of gifts, hospitality, and other benefits, any outside employment, the use of government resources and post-employment restrictions (UNODC, 2009).

Summarising all-important rules for the behaviour of public officials in a code guarantees that the all public officials are aware of their duties and rights. Therefore the regulations should be clear and unambiguous to set out precise boundaries between desirable behaviour and misconduct. Thus, the disciplinary measures cannot be misused to intimidate or remove public officials (UNODC, 2009).

A code of conduct, however, does not necessarily need to have a legal status, which has been the path chosen by Mozambique. Taking into account that the codes may be applicable to a great amount of people, it is not recommendable to make it entirely binding, because if there are too many cases, the enforcement of the code cannot be guaranteed. Therefore, it should be differentiated between rules that cover the performance of the functions of office and the dealing with conflict of interests. The latter should be treated more formally and shall eventually be legally binding. These rules include the declaration of assets, gifts, secondary employment, post-employment, hospitality or other benefits (UNODC, 2009).

With regards to the implementation of the codes of conduct, article 8(6) of the UNCAC requires States Parties to consider establishing disciplinary and other measures for the violation of the code. These measures should be unified and inter alia

[4] Stapenhurst, Rick/Pelizzo, Riccardo, "Legislative Ethics and Codes of Conduct", World Bank Institute, Washington 2004, p.18.
[5] Moilanen, Timo, "The Adoption of the Ethics Framework in EU Member States", SIGMA, 2007, p. 3.

include the dismissal of the delinquent (UNODC, 2009). Other possible sanctions range from warnings, reprimands, admonitions, censures, loss of seniority and orders to withdraw to the loss of mandate, suspension, expulsion, fines and even imprisonment[6].

In any case, States Parties have to decide whom or which agencies guarantee the implementation of the code of conduct. They should designate at least one authority to receive, verify and investigate allegations concerning assets, gifts or hospitalities (UNODC, 2009). Should the States choose to have more than one authority, they must ensure proper mechanisms of communication amongst them to ensure effectiveness. There must also be somebody or an agency responsible for the adjudication of breaches. For example, in the United States, the judgment about breaches of the House Rules of the Congress has been assigned to the judiciary. This is not a breach of the separation of powers, because the Congress wilfully transferred the right to the judiciary.[7]

Article 5 of the proposed Code of Conduct contains a statement of purpose and ethical duties which are to be observed by the public official, whether elected, appointed or hired. A list of ethical duties is provided in Article 6 of the proposed Code of Conduct, and said ethical duties are explained in more detail in articles 7 through 21. Of these, special attention is given to articles 16 (duty to respect the public patrimony) and 21 (duty to declare assets), as these will be of special importance for the present report.

Articles 22 through 26 of the proposed Code of Conduct provide for the general prohibitions for public officials under the proposed standards of conduct. These are without prejudice, in accordance to article 22, to the rules of conflict of interest contained in the proposed Code of Conduct as well as on other legislation (e.g., the proposed Criminal Code).

An extensive list of prohibitions for public officials is contained in article 23 of the proposed Criminal Code. These include, but are not limited to: (i) the use of official power or influence to grant or obtain special services which may imply a personal benefit or privilege to the public official himself or herself, his or her family members, friends or any other person; (ii) to use the services of a subordinate employee, as well as any of the services provided by the institution for personal benefit, those of family members or friends, with the exception of the privileges to which the public official is entitled; and (iii) to derive benefits, besides those which the public official is legally entitled to, and abuse of, for personal ends or for third parties, the means which have been entrusted to the public official for the exercise of his or her functions, namely budgetary funds, vehicles, photocopying machines, phones, computers, fax machines, scanners and other equipments. Article 24 contains an extensive list of prohibitions that public officials must observe in relation to persons utilising the public service.

In this regard, and in particular to item (ii) above, it should be underscored that, e.g., article 3, Nos. 2 and 3 of Law No. 21/92; article 113, No. 1, g) of Law No. 22/07; and article 18, No. 1, f) Law No. 6/2006, all provide high-level public officials the right of use of vehicles, and in most cases their alienation. In such cases, and in accordance to the proposed Code of Conduct, these high officials may only use such vehicles for official purposes and may not use them for personal purposes (e.g., on weekends for travelling for private reasons, or to take children to and from school). Such use should be deemed a breach to the ethical duties contained in articles 6 through 21 and such public officials should be punished accordingly.

2.2 Conflict of interest

The first objective of a conflict of interest policy – or even legislation – is to uphold integrity in political and administrative decisions emanating from public officials and the public management since non-resolved conflicts of interest can cause an abuse of office (OECD, 2003). Conflict of interest does not necessarily involve corruption, but the risk that a conflict of interest

[6] Stapenhurst, Rick/Pelizzo, Riccardo, "Legislative Ethics and Codes of Conduct", World Bank Institute, Washington 2004, p.13.
[7] U.S. v. Charles G. Rose III, United States Court of Appeals, District of Columbia, No. 92-5241, July 12, 1994.

leads to a wrongful behaviour is even bigger when the situation is managed inadequately. Thus, the question is not to forbid every conflict of interest – an almost impossible project – but to handle them in an effective way on the basis of a framework of pertinent provisions and measures. Considering that the interests are in the centre of the problematic, their mandatory disclosure on behalf of transparency is a fundamental element of an adequate conflict of interest management. There are different types of interests including investments, debts, positions occupied in a business, employment or professional activities outside the public function or even gifts and honoraries.

The management of conflicts of interest consists of preventive measures including transparency requirements as well as of controlling mechanisms and sanctions. The preventive measures can consist of prohibitions or incompatibility provisions (e.g., holding of multiple posts). Transparency requirements oblige the public officials to declare their financial situation and their private interests.

There are two fundamentally different approaches to regulate conflict of interest: one provides binding regulations; the other does not. In the first case the legal instruments regarding conflicts of interest may either address a specific institution or have a general scope; furthermore, the provisions and measures can take the form of specific or general laws, regulations or other legally binding acts. In case the measures are not binding the provisions aim to encourage the integrity of public officials – they may address one or several institutions.

The conflict of interest regime in Mozambique is established under articles 6, n) and 20 of the proposed Code of Conduct. It is a binding regulation with a general scope, to be applied to all level of public service in the country. Articles 39 through 41 provide the general definitions of what is to be understood as conflict of interest in Mozambique, "when the public official finds himself or herself in circumstances in which his or her personal interests interfere or may interfere in fulfilling his or her duties of impartiality and neutrality in the pursuit of the public interest". These rules on conflict of interest seek to identify circumstances in which such conflicts may occur, how to manage them, as well as the administrative, judicial and political assurances which are applicable to the public official and to citizens, as well as the sanctioning regime. In the event of infringement of the rules on conflict of interest (article 40). It should be noted that the definition contained in the proposed Code of Conduct is compliant with the understanding provided in paragraphs 10 and 12 of the OECD Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service.

The proposed Code of Conduct prescribes in its article 53 that the identification and management of personal situations in which conflict of interest may arise are of the individual responsibility of the public official himself or herself. Thus, if a situation of conflict of interest is perceived (article 41), the public official must abstain from making any decision, take any actions (other than informing to the appropriate persons the situation of conflict) or sign contracts.

Notwithstanding, the public administration, in accordance to article 54, is responsible for ensuring the dissemination of the rules of conduct amongst public officials and the public in general (article 54, No.1). The same article further prescribes that it is the personal responsibility of public officials in managerial positions to put in place public policies, procedures and support systems seeking to ensure the identification and management of conflict of interest (article 54, No. 2).

Articles 42 through 49 of the proposed Code of Conduct specify the types of conflicts of interest in Mozambique. These include, in accordance to article 42, conflicts of interest arising from: (i) family relations; (ii) patrimonial relations; (iii) offers or rewards; and (iv) unlawful use of the position for self-benefit. Article 42 also provides for rules pertaining to conflict of interest of public officials which have left their position. Notwithstanding, it should be noted that these are not exhaustive categories of conflict of interest. Rather, article 42, No. 2 of the proposed Code of Conduct informs that any other situation in which the public official perceives a possible conflict of interest should be notified to the ethics commissions or, in their absence, to the immediate supervisor. This is due to the fact that it is not possible to identify all forms of conflict of interest; legislation

pertaining to conflict of interest should, nevertheless, seek to provide general provisions on the matter to provide guidance to public officials in such cases.

With regards to conflict of interest stemming from family relations, article 43 defines them as when the public official, on having to make a decision, takes action or signs a contract in which a family member has any financial or other interest that may influence the neutrality and impartiality of said public official. According to the proposed Code of Conduct, a family member is understood as a partner (be it a spouse or a person is a similar situation), parents, grandparents, children, brothers, sisters uncles, aunts, brothers-in-law, sisters-in-law, mother-in-law, father-in-law, nephews, nieces, adoptive children, among others. Article 44 provides for an exception to the rule contained in article 43, informing that a public official will not be in a situation of conflict of interest when he or she is in a teaching capacity to a family member, or is providing medical assistance.

Conflict of interest in patrimonial relationships is defined in article 45 of the proposed Code of Conduct. These situations may arise when the public official: (i) is the owner or is a representative of another person in a commercial venture, who he or she has an interest in a decision, action, business or any other patrimonial interest with the agency the public official belongs to and who has an interest in the decision to be taken; (ii) exercises a professional activity (either as self-employed or hired) which relates directly to the agency in which he or she provides services; (iii) provides services, even if sporadically, to a company whose activity is controlled, supervised or regulated by the public agency to which he or she works for; (iv) exercises consultancy, independently or through a third party (be it natural or legal), to a private firm in matters which he or she should intervene, or has intervened on due to his or her status as a public official; (v) has a business relation or exercises activities which, directly or indirectly, result in the support of a service providing relationship with a person (whether natural or legal) that has an interest in the decision of the agency which he or she work for; (vi) is a creditor or debtor of a person (whether natural or legal) which has as interest in his or her decision or in the decision of the agency he or she works for.

Article 46 of the proposed Code of Conduct contains a specific provision which informs that a public official will incur in conflict of interest (regardless of potential criminal liabilities which the misconduct may also entail) if he or she demands or receives offers, directly or indirectly, of legal persons of Mozambican or foreign law, for the purpose of exercising his or her public duty. Notwithstanding, article 47 provides for certain exceptions which are not considered to be conflict of interest in patrimonial relations, which are: (i) when the offer is destined to be integrated to the patrimony of the State or any public entity with patrimonial autonomy, if such offers are over 200 minimum wages (ranging from USD 12.800,00 to USD 34.000,00) and they do not occur in the 365 days preceding or after those in which the agency is to practice any act which produces effects in the sphere of the person which offers such offer; (ii) offers which fulfil protocol and which are not damaging to the good image of the State and public persons; (iii) presents for occasion of festivities (birthdays, wedding, religious celebrations) insofar as they do not exceed the limits establish in the proposed Code of Conduct.

Article 48 of the proposed Code of Conduct contains provisions on the unlawful use of the position for the benefit of the public official. These include: (i) the use of public function for individual gains; (ii) the use of privileged or classified information in the public official's individual advantage or for the advantage of third parties, during the period in which such information is unavailable to the general public; (iii) use of public assets for private advantage, except for specific cases otherwise provided in law; (iv) use of work hours or the duration of the public mandate to obtain personal advantages, namely the rendering of paid or unpaid activities outside the public administration; (v) perform an act in the interest of a legal person in which the public official participates as a partner or member, as well as en benefit of any person included in the conflict of interest regime due to family ties; (vi) taking advantage of any type of contract, affairs, operations or activities in order to prepare or facilitate any form of direct or indirect participation in it; (vii) acting as advisor, consultant, agent or intermediary of private interests in a public agency to which the public official is linked or which he or she has a relationship of hierarchical dependency or guardianship.

Article 49 of the proposed Code of Conduct contains provisions for preventing the unlawful use of the position as a public official. As such, prevention mechanisms the prohibition of a public official: (i) using, for private purposes, public presentations, pronouncements, publishing books or other writings on matters pertaining to the agency to which they are subordinate to without mentioning that his or her ideas do not necessarily represent those of the agency for which they work for; (ii) to endorse or make public, in benefit of a product, service or company, including for the benefit of family members and friends or to a person with whom the public official is connected to by virtue of civic organisations, except in cases in which such circumstances result from the nature of the functions of the public official; (iii) to create the public impression that the agency to which the public official is subordinate to approves or endorses his or her private actions or interventions as a citizen; (iv) to make use of official letterheads or mention his or her public title in recommendation letters for employment of third parties, except in cases in which the person has had a professional relationship in the public entity, or if such person is applying for a position in public agencies; (v) to make use of the public position to induce any citizen, including their subordinates, to give him or her any financial benefit or of any other nature to himself or herself or for third parties with whom the public official is connected to.

Article 50 of the proposed Code of Conduct refers to duties a public official has prior to leaving his or her position in government. As such, the public official must (i) avoid that his or her plans our job offers affect his or her integrity; and (ii) inform, in writing, to the Ethics Commission (or to the immediate supervisor if such Commission does not exist), any job offer which may put him or her in a position of potential conflict of interest prior to and after the end of his or her public duties.

Article 51 of the proposed Code of Conduct contains provisions regarding the specific duties a former public official has. These include: (i) not acting in a way such that will not allow him or her to obtain undue advantages to himself or herself and third parties; (ii) not participating in any business or contractual procedures with the public agency which he or she served, in his or her benefit or in representation of interest of third parties; and (iii) not making use, in his or her own benefit or of third parties, of confidential information pertaining to the entity to which he of she worked. Moreover, for a period of two years, the former public official must not: (i) render any type of services to natural and legal persons with whom he or she established relevant professional relationship due to his or her previous position; and (ii) accept a position in the board of directors of a legal person or as an independent provider of services to natural or legal person whose purpose or activity is related to his or her previous public employment or position; and (iii) conduct business for himself or herself our to broker deals in favour of third parties with the agency to which he or she provided services.

Article 61 of the proposed Code of Conduct provides for the rules on conflict of interest in parliamentary activities. These refer strictly to the activities of the member of parliament while conducting his legislative activities. As such, these do not conflict with the rules contained in articles 43 through 49, which is member of parliament must also observe in all circumstances of his position as a public official. It should be noted, however, that the conflict of interest regulation does not contain any provisions pertaining to lobbying or the funding of political financing. With regards to the latter, it should be underscored that article 10 of the AU Convention requires its States Parties to adopt legislative and other measures to ensure transparency in party financing.

Finally, in accordance to article 52 of the proposed Code of Conduct, the former public official must return all privileges (e.g., housing, vehicles) to the agency which, by virtue of his or her position, were made available to him or her. This is an important provision, as several different laws (e.g., Laws No. 6/2006, No. 22/2007 and No. 21/92, mentioned above) allow for the public official to alienate certain movable property when leaving the position, which may in turn conflict with the provisions contained in the proposed Code of Conduct.

2.3 Ethics commissions

In order to ensure the integrity of the system, as well as the management of the conflict of interests, the proposed Code of Conduct provides for the creation of the Ethics Commissions (*Comissões de Ética Pública*), which are comprised by the Central Ethics Commission (*Comissão Central de Ética Pública* – CCEP) and the Ethics Commissions (*Comissão de Ética Pública* – CEP). The CCEP is defined in article 55 of the proposed Code of Conduct, and is responsible for, among others, the administration of the conflict of interest systems defined in the proposed Code of Conduct, establish rules, procedures and mechanisms which seek to prevent possible conflict of interest, to supervise the occurrences of conflict of interest and determine the appropriate measures to eliminate them, as well as to present formal complaints to the Prosecutor-General's Office; and ensure the protection of persons who blow the whistle in conflict of interest situations, in accordance to the general rules of witness protection (this proposed legislation will be reviewed in a separate section below). The CCEP is comprised of nine members, three of which belonging to each branch of power, for a period of three years.

On the other hand (and as mentioned previously), article 56 of the proposed Code of Conduct foresees the creation of the CEPs in the main agencies of Government, which will act under the guidance and in co-ordination with the CCEP, ensuring the application and application of the rules of conflict of interest. The CEPs are comprised of three persons, two of which are elected by the employees of the agency and one by the highest member of the agency. Members of the CCEP are those which are Mozambican citizens of high moral standing and which are suitable to hold the position. Members of the CEP must be public officials for at least five years and must not have had any disciplinary sanctions in the last five years (article 57 of the proposed Code of Conduct).

This provisions pertaining to the CCEP and the CEPs seem compliant with article 8(4) of the UNCAC, article 7(2) of the AU Convention. It should be highlighted, notwithstanding, that transparency for both the list of selected appointeed and for the election processes must be ensured. Furthermore, an effective system of communication and co-ordination amongst them must be ensured, due to the fact that they may independently send communications to the *Gabinete Central de Combate à* Corrupçã – GCCC o (in the case of the CCEP) and to the *Gabinetes Provinciais de Combate à Corrupção* – GPCC (in the case of the CEPs) and to each other, which may ultimately create the duplication of information and jeopardise the overall effectiveness of the system.

2.4 Asset declaration

The declaration of assets public officials has existed in Mozambican legislation since Law No. 4/1990.[8] Said Law mandated in its article 3, high ranking public officials (*dirigentes superiores do Estado*), to declare their active assets, debts, positions which they exercised or had exercised in private and public companies, indication of the their complementary net worth (for purposes of tax deductions), and the declaration of assets of their spouses or partners. This declaration was to be annually reviewed.

In the proposed Code of Conduct, the declaration of assets by public officials is contained in Title III (articles 62 through 74). The declaration of assets (both in Mozambique and abroad) is, in accordance to article 62, a necessary condition to exercise a public function. However, not all public officials are subject to asset declaration – only those specified in article 63. In this regard, the drafting of article 63 of the proposed Code of Conduct may cause some confusion. While, on the one hand, the persons listed under article 63 are contained in the broad definition of public officials contained in articles 3 and 4 of the proposed Code of Conduct, the persons listed under article 63 are a broad definition of the exhaustive list contained in articles 3, No. 3 and 4 of the proposed Code of Conduct.

[8] Centro de Integridade Pública Moçambique (CIP). Legislação Anti-Corrupção em Moçambique: contributos para uma melhoria do quadro legal anti-corrupção em Moçambique. 2008.

Thus, when defining the persons subject to the declaration of assets and the responsble authorities for receiving them, in article 66, reference is made not to the list of persons contained in article 63, but also to the authorities listed in articles 3, No. 3 and 4. This seemingly complex structure may hinder the correct reading of the legislation and make way for a margin of error in its application. Furthermore, a harmonisation will facilitate the interpretation of the legislation and avoid restrictive interpretations which may cause for injustice or inequality in the treatment of identical conducts.

Notwithstanding this fact, it should be underscored that the declaration of assets is an ethical duty of the public official, as per articles 6, o) and 21 of the proposed Code of Conduct. Failure to provide the asset declaration form will result in the commission of the offence contained in article 76 of the proposed Code of Conduct. In such cases, the public official will receive a fine surmounting to double of his or her monthly salary, and the suspension of payment of the salary until such time that the public official provides his or her asset declaration form.

Article 64 provides for the contents of the asset declaration – although a specific model for the asset declaration form is to be prepared by the CCEP and approved by Government (article 84). It is possible to infer from article 62 of the proposed Code of Conduct that the declaration of assets must be done prior to taking office and, as per article 67, must subsequently be updated in a yearly basis, should there be no cause to update it previously (e.g., transferring from one public position to another, re-election, etc.). If no changes occurred with regards to the assets from one calendar year to the next, the public official is to so declare (this situation is difficult to imagine, as it is expected that the public official, which is receiving a salary, will naturally have changes to his or her declaration, to include the income received from the State).

The declaration of assets must include not only the assets of the public official, but also of spouses, minors and other legal dependants. Furthermore, the declaration of assets is to be done in print (article 65). Although there is an obligation of close family members and other dependants to declare their assets with the public official, it does not seem possible to apply any of the sanctions contained in the proposed Criminal Code to these persons, as the regulation seems to apply exclusively to public officials. If this is the case, it is suggested that this gap be closed by ensuring the applicability of the sanctions also to the close family members.

The asset declaration forms are to contain two parts (article 64). The first part will refer to the identification of the public official making the declaration and of the spouse, minors and other legal dependants. The second part will contain elements that allow a rigorous analysis of the assets the public official and of his or her spouse, minors and other legal dependants have at the moment of the declaration, both in Mozambique and abroad. It should be noted that, while the asset declaration forms, in their entirety, are to be made available to the public official who made the declaration, the judicial authorities, the GCCC and the investigative authorities.

However, according to article 72, any person, whether natural or legal, shall have access to the first part of the asset declaration. These persons may also have access to the second part of the asset declaration, insofar as they present a relevant interest to review such declaration. In such cases, this fact is to be brought to the attention of the public official who made the declaration so he or she may oppose to the request for review of the second part of his or her asset declaration form. Should such opposition be made, the head of the *Comissão de Recepção e Verificação* (CRP) will make an administrative decision granting or denying access to the second part of the declaration of assets.

It should be noted that, as a general rule, the asset declaration forms could be reviewed only within the CRP (although in exceptional circumstances copies can be made available to the requesting party). Furthermore, it is not permitted to make public or disclose the contents of the second part of the asset declaration forms (articles 73 and 74 of the proposed Code of Conduct).

The asset declaration forms are to be deposited, as per article 66, before the: *Tribunal Supremo*, *Tribunal Administrativo* or the Provincial Prosecutor-General's Office (when no local administrative courts are available) depending on the position the public official holds. The declaration is to be presented to the CRP, as per article 69. CRPs are to be established in each one of the depositing authorities mentioned in article 66. It should be noted, however, that the multiplicity of places in which the assets declarations forms are to be deposited, as mentioned previously, might render the duplication of efforts and lessen the overall effectiveness of the system. The common elements to all of the CRPs are the Prosecutors, which must evaluate the asset declaration system. As such, the Prosecutor-General's Office should strive to maintain a centralised database of all of the asset declarations (an issue to also be addressed, as the asset declaration themselves, are to be produced in paper and not in digital format), to facilitate the communication of the intelligence gathering with the CCEP, the CEPs the GCCC and the GPCCs, as well as the Mozambican FIU, the *Gabinete de Inteligência Financiera* – GIFiM.

2.5 Sanctions

Articles 75 through 83 provide the sanctioning regime for the proposed Code of Conduct. It should be noted that these sanctions are administrative in nature, and are not criminal, although the information produced for the sanctioning regime may be of use to initiate a criminal investigation into the breaches of conduct and conflict of interests which were committed by a public official (article 83 of the proposed Code of Conduct). Special attention should be given to the fact that the evidence produced in these administrative proceedings may not be transferred to a criminal proceeding, as the threshold needed for convicting in an administrative proceeding is lower than the one required from a criminal conviction (e.g., balance of probabilities vs. beyond reasonable doubt).

It should further be noted that Mozambique contains specific provisions – which were not the object of analysis of the present report – for administrative disciplinary proceedings regarding infractions conducted by public officials (as provided for by article 81, and article 99 through 114 of Law No. 14/2009). This fact is highlighted in article 82 of the proposed Code of Conduct. The administrative disciplinary proceedings may produce proceedings which at times may either duplicate the work carried out by the CCEP and the CEPs or may intertwine their administrative investigations and actions. It is for this reason that the provisions contained in the proposed Code of Conduct should be harmonised to ensure that the best outcome for the public administration is sought with the minimum waste of human and financial resources.

The sanctions contained in articles 75 through 78 of the proposed Code of Conduct refer to offences that may be committed by persons in breach of the right to access the information contained in the asset declaration forms. Article 78 refers to cases in which the public official provides a fraudulent asset declaration form. In such cases, the public official is punishable with the loss of his or her job, impossibility to assume a public position for five years, as well as any other civil or criminal responsibility that he or she may incur.

3 Criminalisation of corruption in the current and proposed criminal legislation

The new proposed Criminal Code determines under its article 2 that a fact is considered a crime (in accordance to the *nullum crime sine lege* principle contained in its article 7) when the criminal legislation foresees a determined result when an adequate action is taken by the agent, as well as the omission of the adequate action to avoid it, unless otherwise stated in the criminal legislation. It should be noted, however, that the omission is only punishable when so expressed in law or the contract. Article 7 of the proposed Criminal Code is to be also read in conjunction with article 60 of the Constitution of Mozambique. A person (whether natural or legal, which will be analysed in more detail in a separate section of the present report) may only be criminally convicted for actions which have been qualified as a criminal offence by Mozambican law before having been practiced by the perpetrator.

Even though the international standards – used as benchmarks for the current report – contain substantive criminal norms, these can only be considered as such within the Mozambican legal framework once appropriate criminal legislation has been approved by Parliament, and not when the treaties which contain these international standards have been ratified by Mozambique. This understanding stems from the fact that the approval and ratification procedures of a treaty differs from those pertaining to local legislation – thus, the principle of legality under article 60 of the Constitution is to be observed.

As such, while most of the criminal provisions contained in Chapter III of the UNCAC and other international standards are contained in the proposed Criminal Code, those which have not been included and which are not in specific criminal legislation in Mozambique (e.g., anti-money laundering legislation) may not be applied directly from the international treaties to which Mozambique is party to (e.g., the criminal offence of active bribery of foreign public officials, or officials of international organisations) due to the understanding mentioned in the previous paragraph as well as due to to the fact that the criminal offences described in the international treaties do not contain the sanctions, as these are left to be determined by each State.

Article 3 of the the proposed Criminal Code informs a person may commit a crime when: (i) he or she has the intent to commit such a crime, when the elements of the crime have been met in the commission (or omission) of the offence; (ii) the elements of the crime which have been met are a necessary consequence for the commission or omission of an action; and (iii) there is a possible consequence of meeting all of the elements of the offence when committing an action, and the person accepts the results of such action. With regards to the criminal liability of legal persons, found in article 34 of the Criminal Code, they shall be criminally liable when their representatives commit an offence. This responsibility is autonomous from those of the natural persons themselves.

Article 8 of the proposed Criminal Code considers the crime having occurred in the moment that the agent acted or refrained from acting, regardless of the result. Article 9 of the proposed Criminal Code considers the place of commission of a criminal offence the one which, totally or partially, the person acted or refrained from acting, as well as in the place in which the result was committed (territorial jurisdiction). Article 30 and 32 of the Criminal Procedure Code further informs rules pertaining to the applicability of the territorial jurisdiction in Mozambique.

While article 8 of the proposed Criminal Code is of special importance to determine the locus standing for investigating and prosecution a criminal fact, article 11 deals with the application of the Mozambican criminal legislation in space, providing for the rules for the extraterritorial and personal jurisdiction. In the event that the criminal offence partially took place in Mozambique, the rules contained in article 31 of the Criminal Procedure Code are applicable, and Mozambican courts are competent to adjudicate such cases. Thus, the Mozambican criminal legislation is applicable – unless stated otherwise in treaties:

i. In criminal facts which have occurred in Mozambique, regardless of the nationality of the person committing the offence;
ii. In crimes committed on board a ship bearing a Mozambican flag in international waters, Mozambican war ships in foreign ports, or merchant ships bearing the Mozambican flag in foreign ports, whensoever the crimes have been committed amongst crew member, and which have not disturbed the peace of the port;
iii. In crimes committed by a Mozambican national in foreign countries, against the Mozambican homeland or external security, of forgery of public seals and stamps, Mozambican currency, public credit papers or notes of the Mozambican National Bank, should the offenders not have been tried in the country which they have committed the offence;
iv. To foreigners which have committed any of the crimes mentioned in the previous paragraph, once in Mozambican territory, or if their surrender to Mozambique is possible;
v. Any other crime committed by a Mozambican national committed abroad, if: (i) the offender is found in Mozambique; (ii) If the criminal fact is also an offence in the country which the offence was carried out; and (iii) if the offender was not tried in the country which the offence was committed.

In this regard, it should be noted that the provisions of territorial, extraterritorial and personal jurisdiction contained in the proposed Criminal Code and enumerated above are compliant with article 42 of the UNCAC, article 5 of the SADC Protocol and article 13 of the AU Convention. These international standards mandate States Parties to ensure they have jurisdiction to investigate and prosecute the corruption-related offences they criminalise. As such, a state party must ensure that it retains territorial jurisdiction to investigate or prosecute offences (e.g., for crimes that have happened within their national borders) (i) that are committed in their territory, as well as (ii) on board a vessel (e.g., a plane or boat) flying its flag or registered under its laws.

Article 42(5) of the UNCAC also contains an important provision regarding transnational corruption. In the event that a State Party, which has jurisdiction over the investigation or prosecution of a corruption-related offence, learns that another State Party also has jurisdiction in the matter (e.g., a public official of a country is bribed by a Mozambican company for favourable contracts with the government. In such a case, both countries should co-operate and co-ordinate their actions to ensure maximum efficiency of both investigations and prosecutions and also to avoid the duplication of efforts, since the facts are interconnected), it should make efforts to co-ordinate its actions (by using one of the international co-operation mechanisms provided for in Chapter IV of UNCAC, which will be explained in more detail below) so as to ensure the maximum efficiency of the investigation and prosecution in all the jurisdictions involved. While Mozambique has the necessary rules and regulations for the extraterritorial application of its jurisdiction to comply with the rules of article 42(5) of the UNCAC, a shortcoming is the fact that Mozambique does not have, as a criminal offence, active or passive bribery of foreign public officials and officials of international public organisations established as a criminal offence under its laws. Thus, the effectiveness of application of this rule for these circumstances may be hindered due to the lack of a criminal offence and the dual criminality principle (which will be reviewed in more detail in the section pertaining to international co-operation).

Notwithstanding, it should be highlighted that article 11 of the proposed Criminal Code may have some shortcomings, when considering the international standards. Article 11, No. 1 informs that any person, regardless of their nationality, is subject to Mozambican law. It is unclear, however, whether this provision would be applicable to stateless persons, as set forth by article 42(2)(b) of the UNCAC. It seems likely, however, that this provision cannot be applicable to stateless persons due to the impossibility of analogous application of the criminal law (as prescribed by article 23 of the proposed Criminal Code). Other specific aspects pertaining to extraterritorial application of the Mozambican criminal law, specifically in relation to money laundering, shall be reviewed in the specific section of this report which deals with money laundering.

Article 10 of the proposed Criminal Code brings forth the rules of application of the criminal law in time. These rules are of particular importance to this report, as the proposed anti-corruption package seeks to review the entire criminal system in Mozambique. As such, any new criminal legislation will not have retroactive effect – in order to comply with the constitutional principle of legality and the principle contained under article 7 of the proposed Criminal Code – and shall also be interpreted to be most favourable to the person who has committed the offence. This is the standard interpretation of modern criminal law theory and as such the proposed Mozambican law is in line with it.

In accordance to article 13 of the proposed Criminal Code, all criminal offences that have been committed by a person, as well as the frustrated and the attempted ones are punishable under criminal law. Whenever the criminal legislation designates a punishment to a crime without declaring whether it is a crime which has been committed, a frustrated crime or its attempt, it is to be understood that the punishment will be imposed to the crime which as been committed (article 14).

A frustrated crime is defined when the perpetrator wilfully practices all of the acts for the execution of the crime, but is unable to produce the results for circumstances which are independent to his or her will (article 15). Attempt, on the other hand, is understood by the draft Criminal Code (article 16) as the (i) intent of the perpetrator; (ii) which is initiated and the incomplete execution of the actions which should have produced the committed criminal offence; (iii) the suspension of the execution through independent circumstances of the will of the perpetrator, with the exception of the rule contained in article 18; and (iv) when the law expressly declares punishable the attempt of such crime. Notwithstanding, it should be noted that preparatory acts, understood as the external acts which seek to facilitate or prepare for the execution of the offence, are not punishable, unless the actions which led to the preparatory acts are themselves criminal offences (article 19).

Moreover, article 24 of the proposed Criminal Code informs that, along with the author of the criminal offence, there are also, under Mozambican law, participation on a criminal offence of the accomplice, assistance or instigator. Mozambican law considers, under article 25, that authors are: (i) the persons which execute the criminal offence; (ii) the persons which, through the use of force, compelled a person to commit a criminal offence; (iii) the persons which determined another person to commit the offence; (iv) the instigators of the offence; and (v) the persons who facilitated or prepared for the execution of the crime. These provisions meet the standards set forth in article 27 of the UNCAC, with the exception of those pertaining to the participatory actions, unless the actions which led to the preparatory acts are themselves criminal offences. Nevertheless, the preparation for an offence is not a mandatory offence under the UNCAC. The AU Convention and the SADC Protocol contain no specific provisions on the participation and attempt of corruption-related offences.

3.1 Prosecution, adjudication and sanctions

The UNCAC, the AU Convention and the SADC Protocol do not specify the sanctions that States Parties must provide for in their national legislation to punish corruption-related offences. Notwithstanding, it provides some guidance when article 30 of the UNCAC prescribes that States Parties are to have sanctions that are proportionate to the gravity of the offence, and that they must be sufficient to act as a deterrent. The general rules for sanctions for criminal offences in Mozambique are provided in the proposed Criminal Code from articles 62 through 68 (sanctions for the deprivation of liberty) and from articles 69 through 72 (accessory sanctions). Article 62 informs that the sanctions for the deprivation of liberty are temporary, which seems to indicate that there is neither the death penalty nor the life imprisonment penalty in Mozambique. This is an important provision, especially pertaining to the rules of international co-operation (which have been analysed in the appropriate section of the report) as countries which prescribe either sentence to their corruption-related offences (e.g., China) will have to either have to agree commute their sentencing to the limits imposed by Mozambican legislation or see their requests for international co-operation denied, as such prescribed sentences would conflict with the fundamental principles of Mozambique.

Article 63 and 65 inform that the sentencing can range from a minimum of three days to a maximum of 24 years. Furthermore, the sentence can be suspended, in accordance to article 66, 67, 117, 119 and 140 of the proposed Criminal Code, if the defendant meets the criteria for such benefit. Notwithstanding, it should be highlighted that the sanctioning regime in Mozambique, for corruption-related offences, does not exceed 8 years. Thus, unless there is the commission of several offences by the defendant, or the same offence is committed several times by the defendant (under the rules prescribed in articles 44 through 46 of the proposed Criminal Code), a defendant for a corruption-related offence will benefit from a suspension of the execution of the criminal sentence as long as the imprisonment does not exceed 5 years, among other provisions.

Article 69 of the proposed Criminal Code informs that no criminal punishment has, as a general rule, the loss of civil, professional or political rights, and does not deprive the offender of his or her fundamental rights, with the exception of the inherent limitations to give meaning to the criminal sanction. The exception to this general rule is contained in article 70, which informs that a person who performs a public activity or is holding public office, and which has been convicted of an offence whose sanction period is contained in Nos. 1 through 4 of article 63, cannot exercise the public function if one of the following conditions are met: (i) the crime has been practiced with manifest and grave abuse of function of the duties which are inherent to the public official; (ii) the behaviour of the convicted person reveals indignity to the public activity; (iii) results from the loss of confidence in the exercise of the public function; or (iv) any other provision expressly stated in specific legislation. The accessory punishment is a prohibition to exercise a public function for a period from two to six years (article 70, No. 2).

Unless there are specific provisions in the current Mozambican legal system, article 70, No. 1, b) and c) of the proposed Criminal Code will need to be clarified further, either through specific regulation or legislation which would define objective criteria to those provisions. This is because these two provisions may allow for the misuse of the proposed Criminal Code for political purposes, as their definitions — "behaviour […] reveals indignity," for article 70, No. 1, b); and "results in the loss of trust for the exercise of public functions," for article 70, No. 1 c) — are based upon subjective criteria.

Article 72 of the proposed Criminal Code, refers to the suspension of the exercise of public functions. It should, for this reason, be read in together with article 70 of the proposed Criminal Code. Article 72, No. 1 states that whomsoever is criminally convicted to serve a prison term and which has not been fired from the public position which is being held through a disciplinary proceedings, will have his or her function suspended throughout the time in which he or she is serving the prison sentence.

Another sanction that can be imposed is fines, defined in article 135 and 136 of the proposed Criminal Code. In such cases, if the criminal offence does not exceed two years imprisonment (e.g., the criminal offence of trading in influence), the prison term must (regardless of the criminal background of the perpetrator) be commuted to a fine. If this were the case, this specific section of the proposed Criminal Code, with regards to the international standards to combat corruption, would not be met, as article 30(1) of the UNCAC requires sanctions to be effective and dissuasive.

In that regard, while article 30 (1) prescribes the need for taking into account the gravity of the offence, article 30 (6) UNCAC allows for additional procedures with a view to protecting the national administration from corrupt public officials. Under this article, States Parties should consider establishing procedures through which a public official may, where appropriate, be removed, suspended or reassigned from their position, or be disqualified for a period of time if convicted of corruption. These are commonly referred to as administrative sanctions. There must be clear guidelines and rules pertaining to the removal, suspension or reassignment from office of public officials: while they provide a useful tool prevent the maintenance of the public official in the position being held by him or her, it also may become an instrument of manipulation of the system, through which a public official who does not conform with the corrupt practices of a senior public official and may be

immobilised or neutralised, as he or she may be considered to be a threat (UNODC, 2009). These rules are contained in the proposed Code of Conduct.

3.2 Seizure and confiscation of assets

Key elements of punishing corruption-related offences are, on the one hand, to sanction the involved public official and the person that has corrupted or requested to corrupt the public official with prison terms and/or monetary fines and, on the other, to deprive the criminals of the illegal gains (these may be of monetary nature or other properties such as houses, yachts, etc.) arising from the corruption. Thus, investigations and prosecutions must not only track down the offenders but also trace and identify the assets which have been illicitly obtained by the offenders (article 31(2) of the UNCAC) to ensure they will not be able to benefit from the crimes committed, including after a potential prison term has expired.

Thus, seizure and confiscation are legal remedies to remove criminal assets from the hands of the criminals. Several challenges, however, arise in the context of these processes:

i. In corruption-related offences, the assets subject to seizure and confiscation are seldom found in only one jurisdiction. Rather, the offender launders the proceeds and instrumentalities by way of money laundering, dispersing the assets in several different jurisdictions and to hide their true origin, nature and ownership. The investigation and prosecution depends heavily on tools for international co-operation for the seizure of assets, and on the procedures within the asset recovery process for their confiscation and return.
ii. Secondly, the complexities of the criminal process itself come into play. Since the seizure and confiscation are attached to the criminal proceeding, e.g., for criminal confiscation a court must have lawfully convicted the offender, the prosecution must use the criminal threshold (beyond a reasonable doubt) to prove that the assets are not legitimate; however, identifying the criminal assets is highly complex and linking them to the crime for which the criminal has been prosecuted is sometimes extremely difficult.
iii. Another difficulty relates to the administration of the seized assets during the duration of the criminal process which can take years to conclude. This can present law enforcement with considerable challenges (e.g., if the seized property includes immovable assets. Questions arise such as who will pay the property tax or maintain the property). If the seized property is movable assets (e.g., a vehicle, livestock, etc.), keeping them in storage could considerably depreciate the value of the assets and supplemental costs could arise. These costs can easily overburden the financial costs of the prosecution.

    To remedy these problems, some countries allow for the anticipated sale of the seized assets, especially movable assets. The money that arises from the sale of these assets is then put into an escrow account pending a final judgment from the court. Other countries also allow for the use of the seized assets by law enforcement, though it has been found that this opens opportunities for corruption (the manager of the seized assets may seek undue advantages to allow third parties to use the assets) or can cause excessive depreciation of the asset if it is not maintained properly by those utilising the seized property). Other countries, finally, opt for leaving the asset with the offender, with the strict provision that he or she will not destroy or sell the asset and will maintain it throughout the course of the criminal proceedings.

The Criminal Procedure Code of Mozambique sets the rules for seizure and confiscation of assets in its articles 215 through 241. In particular, article 215 informs that objects which are to be seized include those (i) which have served as instrumentalities of crime; (ii) that were left by the persons which committed the criminal offence; or (iii) any other objects whose examination is necessary for the instruction of the criminal proceeding is necessary, are to be seized. These rules for seizure, however, seem to indicate the seizure of objects that were found in the crime scene and which could be used as evidence in the criminal proceedings, and do not directly refer to the seizure of the proceeds and instrumentalities of crimes

whose primary objective is financial gain. It should be underscored the importance of having appropriate regulation on the seizure and confiscation of proceeds and instrumentalities of crime, as well as intermingled and transformed assets. These are instrumental and must ensure that such assets are seized without the knowledge of the investigated person.

Seizing assets after the investigation has been brought to the attention of the defendant may, and often does reduce the possibility of seizing the assets – as the defendant will be in a position to transfer such assets to a different location and reducing the overall effectiveness of the financial investigation, which will have to be reinitiated with regards to the new location of the assets. Appropriate regulation must also be put in place to ensure compliance with the international standards set out in article 31(2) of the UNCAC and ensure the identification, tracing or seizure of the proceeds and instrumentalities of crime, as well as intermingles and transformed assets.

Notwithstanding, even though there seems to be no specific provisions for the seizure and confiscation of proceeds and instrumentalities of crime in the Criminal Procedure Code, its article 2 informs of the subsidiary application of the Civil Procedure Code in the event of any omission of provisions by the Criminal Procedure Code. As such, specific provisions which may be contained in the Civil Procedure Code for the seizure and confiscation of assets may be applicable although, due to the different nature of the proceedings and the tresholds of proof (e.g., balance of probabilities vs. beyond reasonable doubt), may prove to be insufficient.

Article 234 of the Criminal Procedure Code of Mozambique allows the courts to seize monies and objects which have been deposited in financial institutions if there are grounds to believe that these are the proceeds or the instrumentalities of crime. However, the Criminal Procedure Code does not seem to mention this possibility for other proceeds and instrumentalities of crime which are not found in financial institutions. Furthermore, articles 5, 6, 7 and 8 of Law No. 7/2002 (Law against money laundering) contain specific provisions for the confiscation of proceeds and instrumentalities of crime, as well as intermingled and transformed assets. It should be noted that the anti-money laundering legislation considers not only the proceeds and instrumentalities of crime (article 31(1) of the UNCAC), but also the intermingled and transformed assets (article (31)(4), (5) and (6) of the UNCAC). These provisions seem to be in line with the provisions contained in article 31(1) of the UNCAC.

As such, the current procedural legislation in Mozambique partially meets the international standards in the sense that these have been met for the offence on money laundering, but not independently for the predicate offences to money laundering. The anti-money laundering legislation in Mozambique seem to be partially in line with Recommendation 3 FATF, in which States are required to adopt measures to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

The Criminal Procedure Code of Mozambique does not have provisions for the management of seized assets. It does, however, contain provisions regarding the anticipated sale of perishable objects (e.g., agricultural produce) and the destruction of dangerous objects (article 235). As mentioned previously, due to the nature of the proceedings and the time that normally takes to conclude them, it is important to have appropriate rules for the management of seized assets so these are not depreciated over the course of the proceedings. It is also an important measure to comply with the international standard set out in article 31(3) of the UNCAC.

Articles 79 through 81 refer to the effects of the criminal conviction. Article 80 of the proposed Criminal Code, which refers to the non-criminal effects of the conviction, informs that the instrumentalities of crime are to be confiscated in favour of the state, and the victim or a third person (regardless of whether they are bona fide or not) have a right to restitution of assets which are considered to be the instrumentalities of crime (article 80, No. 1). Thus, this rule is applicable to both assets that have been seized prior or during the course of the proceedings, as well as those that have not been seized at all, if they can be

found. Moreover, the convicted person has the obligation to restitute the things which he or she deprived the victim from or to pay is value if restitution is not possible (article 80, No. 2). Furthermore, the person who has been convicted of the criminal offence has the obligation to pay punitive damages for the damage caused to the victim (article 80, No. 3), as well as the obligation to pay the court fees (article 80, No. 4).

3.3 Statutes of limitation

Statutes of limitation are the legal time limits within which the investigation and prosecution will have to carry out the investigation and prosecution. This is done to ensure due process and human rights of the defence, as a person cannot be held liable for the commission of an offence indefinitely. This legal time limit is prescribed by each legal tradition and state party and, for this reason, cannot be objectively identified in UNCAC. Other international standards such as the AU Convention and the SADC Protocol do not contain provisions pertaining to the statutes of limitation.

UNCAC does however provide guidance for States Parties in this matter. For this reason article 29 of the UNCAC informs that sufficiently long statutes of limitation must be put in place, which take into account the difficulties which arise from the investigation and prosecution of corruption. Moreover, said article also provides for the possibility of allowing that statutes of limitations be suspended whenever the offender has evaded justice.

The proposed Criminal Code provides for rules pertaining to the statutes of limitation in its article 110, paragraphs 2 and 4. It informs that the statute of limitations for offences under No. 1 through 4 of article 63 of the proposed Criminal Code (from eight to 24 years imprisonment) are 15 years, while the offences under article 63, No. 5 (from two to eight years imprisonment) have statutes of limitation of 5 years. The statutes of limitation begin from the moment the crime has been committed, or if the crime occurs in a determined period of time, when the offence ceases to take place.

While it is not possible to assess whether these statutes of limitation are sufficiently long – as the average time for investigation of criminal offences in Mozambique would have to be considered, as well as the effectiveness of such investigations – it should noted that the statutes of limitation are suspended from the moment that the defendant is indicted in a court of law and lasts while the case is ongoing in the court. The statutes of limitation are also suspended when the actions necessary for the preparation of the criminal proceedings are taking place (e.g., criminal investigation). While these rules contained in Mozambican legislation seem to meet the international standards, it should be highlighted that article 4 of the Fundaments of the Criminal Process ensures celerity in the criminal proceedings, which must be observed by the Mozambican authorities during the criminal investigation and trial.

An important point for consideration concerns the rules on immunity of certain public officials (the rules on immunity shall be analysed in more detail in the section below). It is not clear whether in such cases the statutes of limitation would also be suspended during the course of the reasons of immunity of the public official. In that regard, specific provisions should be put in place to ensure that, in such cases of immunity, the statutes of limitations are suspended until such time that the immunity ceases to exist, in order to ensure the appropriate outcome of justice, and to comply with the regulation set out in article 30(1) of the UNCAC.

3.4 Immunities under the laws of Mozambique

Many countries establish that certain public officials (especially those holding an elected public office or are high level officials such as cabinet ministers and parliamentarians) may enjoy some form of immunity from criminal prosecution during their term in office. Immunities commonly refer either to the non-liability of the public official or to the inviolability of the public official. The first category refers to opinions expressed in the course of certain public officials performing their functions, so as to

ensure the independence and freedom of expression. The second category refers to the protection of certain public officials when discharging their duties (UNODC, 2009). This immunity should not be understood as impunity, but rather as a form of protection of the public official from the pressures which he or she may receive during the exercise of his or her term so as to appropriately perform his or her duties. These immunities and privileges are commonly granted so as to safeguard the functioning of states institutions, although they can create difficulties when dealing with corrupt public officials, as these may usurp this privilege.

It is for this reason that article 30(2) of the UNCAC informs that immunities and privileges must be appropriately balanced with the right to investigate and prosecute the public official for any wrongdoing. Under the UNCAC, States Parties should seek to adopt clear guidelines regarding which conditions should be met and procedures should be taken to lift immunities, in which the commission of corruption related offences would constitute a legal reason for the lifting of immunities. These procedures should be designed in a way that allows for swift decision-making on the matter to prevent the offender from obstructing the investigations.

In that regard, immunities can be found in several different laws of Mozambique. The Criminal Procedure Code, in its article 345 informs that members of Parliament have inviolability immunity. As such, they cannot be arrested and may only be prosecuted with the previous consent from Parliament. The Criminal Procedure Code is not clear, however, if this immunity is also applicable to the investigation. Article 346 of the Criminal Procedure Code, on the other hand, provides for the immunity of Judges and Prosecutors. Although no formal permission to prosecute is necessary in such cases, they must be prosecuted or arrested by a hierarchical superior. Law No. 7/2009 (Statute of Judges), informs in its article 48 that judges may not be arrested with probable cause and by a judge which is his or her hierarchical superior. Furthermore, article 49 informs that any authority may only give notice to judges with the previous consent given by the *Conselho Superior da Magistratura Judicial*. Similar provisions are also found in the Statute of the Prosecution Service (Law No. 22/2007).

As can be seen, the current regulation in Mozambique does not fully comply with the international standards pertaining to immunities. There appears to be no objective criteria in place which the prosecution may lift immunities of public officials. This fact should be addressed and a comprehensive package pertaining to immunities of certain persons should clearly define these criteria.

3.5 Liability of Legal Persons

Corruption-related offences have shifted from almost solely individual perpetrators to also include legal persons. That is, serious and sophisticated crime is frequently committed by, through or under the cover of legal entities, e.g., companies, corporations or charitable organisations. These reasons have re-sparked the international debate on whether legal persons can bear criminal responsibility. More and more it has been seen that legal persons which have corrupted public officials, whether at home or abroad, should bear responsibility for their actions; this becomes particularly relevant because it is difficult to precisely pinpoint who, within a large multinational enterprise for example, had the authority and gave the order to corrupt a public official, especially when the corrupt practices take place over a long period of time. The decision-making processes in particular in large companies are increasingly sophisticated, making it difficult to interpret the responsible natural person.

The proposed Criminal Code allows for the criminal responsibility of legal persons in its article 34. Legal persons are responsible for the criminal actions when committed by its representatives in the name of the legal person and in its interest. However, the criminal responsibility of the legal person is excluded when its representative acted against orders or instructions (article 34, No. 2). The criminal responsibility of legal persons is autonomous to the criminal liability of its agents (article 34, No. 3), although the legal person shall bear joint responsibility to pay fines, indemnities and other benefits in which the persons are convicted (article 35, No. 4).

Of the international standards that are being used in the present report, only UNCAC (in its article 26) and FATF, provides for the liability of legal persons. In accordance to article 26(2) of the UNCAC, this liability can be criminal, civil or administrative in order to be consistent with the legal principles of the State Party (article 26(1) of the UNCAC), and is to be without prejudice to the criminal liability of the natural persons who have committed the offences (article 26(3) of the UNCAC). Finally, the UNCAC requires that the liability of the legal persons are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (article 26(4) of the UNCAC).

Article 34 of the proposed Criminal Code of Mozambique meets the requirements of the international standards. However, with specific regards to article 26(4) of the UNCAC, an assessment of the effective, proportionate and dissuasive sanction can only be analysed once cases are brought to court and decisions in that regard are rendered.

Notwithstanding the above, special attention should also be given to the fact that the current study is focusing only on the anti-corruption package and, for this reason, it is not possible to determine whether or not there are other civil or administrative sanctions which a legal entity can be subject to according to the laws of Mozambique, regardless of any criminal prosecution brought forth against a legal person. This is of special importance as article 56 of the proposed Criminal Code determines that the criminal responsibility is autonomous from the civil responsibility.

Finally, with regards to money laundering, Recommendation 2 FATF requires States to ensure that criminal, civil or administrative liability should be apply to legal persons, not precluding parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Such measures should be without prejudice to the criminal liability of individuals. Thus, the provisions contained in the proposed Criminal Code of Mozambique seem also to meet the requirements contained in the FATF standards.

3.6 Knowledge, intent and purpose as elements of an offence

Article 28 of the UNCAC requires States Parties to require, as an element of the offence of corruption-related offences, knowledge, intent or pupose, which may be inferred from objective factual circumstances. The AU Convention and the SADC Protocol do not contain specific provisions on the matter. This provision relates to the use of circumstantial or indirect evidence. Indirect evidence is to be understood as circumstances which are known and proven, and which, by induction, are possible to conclude for the existence of another or other circumstances. This is of particular importance to corruption-related offences in which it is difficult to use direct methods of proof (e.g., a recording or a public official receiving monies for a person), in order to prove the commission of an offence.

Although there is no specific provision in the Criminal Procedure Code of Mozambique pertaining to the use of indirect methods of proof in the criminal proceedings, such can be inferred as the corresponding word for circumstantial evidence in Portuguese is *indício*, which is used throughout the procedural provisions for the production of evidence in the Criminal Procedure Code.

With regards specifically to money laundering, it should be noted that Recommendation 2 FATF also requires States to ensure that intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in UNTOC and UNCAC (among others), including the concept that such mental state may be inferred from objective factual circumstances.

Thus, it seems that Mozambique is compliant with the provisions relating to article 28 of the UNCAC and Recommendation 2 of FATF, although ultimately this can only be fully analysed by reviewing and assessing the effectiveness of the use of *indícios* in Mozambican case law.

3.7 Protection of witnesses, experts and victims

States Parties of the UNCAC are required to provide, under its article 32, effective protection for witnesses and persons who report corruption-related offences (article 33) which include, but are not limited to: (i) physical protection; (ii) domestic and foreign relocation; and (iii) special arrangements for giving evidence. UNCAC also contains provisions for States Parties to consider entering into foreign relocation agreements, and also to provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law. The AU Convention and the SADC contain similar provisions (article 5(5) and 4(1)(e), respectively), requiring States Parties to adopt legislative and other measures to protect witnesses and informants in corruption-related offences.

The legislation is in compliance with the international standards. However, due to the nature of the subject matter, as well as the intense resources needed to maintain a person under protection, it is strongly recommended that appropriate support and technical assistance is provided to Mozambique in order to ensure the success and effectiveness of the programme.

The draft legislation on witness protection creates, in its article 22 the *Gabinete Central de Proteção à Vítima* (GPCV), which will be responsible – upon approval of the bill and the creation of the bureau – for the Mozambican witness protection programme. The service of protecting witnesses is to be provided free of charge by the state, with regards to the support and service to the persons under protection (article 10). The GPCV has not only a co-ordination function with national judicial, police and prison authorities, but is also responsible for executing and accompanying the execution of the special measures of protection of the witnesses, as well as any phsycological support needed by specially vulnerable persons (article 16).

The GPCV is to be created under the Ministry of Justice (article 22, No. 1 of the draft bill). It is not clear from the text of the bill, however, if the GPCV retains either some independence or autonomy from the Ministry of Justice. While not mandatory in the international standards, due consideration should be given in this regard, as potential conflicts or the possibility to effectively provide for the protection of witnesses may be hindered if the annual budget of the GPCV is unilaterally reduced of its head is changed for political reasons. To this end, attention should be given for the elaboration of appropriate regulation in this regard once the draft legislation is passed into law – as such, the Mozambican authorities may choose to adopt a GPCV (and the provincial bureaus) comprised of representatives of the judiciary (both judges and prosecutors) and the Police in order to ensure its appropriate independence or autonomy.

Article 1 of the draft bill informs that it is applicable to victims, persons reporting criminal activity, witnesses or experts, when their lives, physical or mental integrity, personal or patrimonial freedom are put in danger due to the information provided in order to initiate the criminal investigation or the production of evidence during the trial stage of the criminal process. The witness protection can be granted in cases which the criminal offence under investigation has a minimum penalty of at least two years imprisonment, in accordance to article 2.

The draft bill explicitly informs that the protection can be granted, in accordance to article 4, upon request of the person seeking protection, the prosecution or the judge (depending in which stage of the criminal proceedings the request is made), during the pre-trial investigation phase, the criminal proceedings and the appeals process, and is to last until such time that the situation of risk or danger which motivated the protection remain (article 11). Furthermore, the protection programme can be extended to family members and persons who are living with the persons under protection.

It is unclear, however, if witness protection can be granted prior to the formal initiation of the criminal proceedings (e.g., during the data collection phase done by the Financial Intelligence Unit of the Anti-Corruption Bureau – the *Gabinete Central de Combate à Corrupção*). Although the legislation is not clear in that regard, it should be noted that the Prosecution appears to be enabled to request witness protection prior to a formal investigation, as contained in article 4 of the draft legislation and also the role performed by the Prosecution of upholding the rule of law and supervising the legality performance of the police.

In order to grant a request for the protection of witnesses, the requirements under article 5. As such and among other reasons, there must be both reason to believe (*presunção fundamentada*) that there is a risk or danger to the life, to the physical or to the patrimonial liberty of the person, by reason of the evidence given to the facts of the case and the consent of the person who is to be protected. The protection, however, is to be used as a last resource, as article 5, b) informs that one of the criteria is the impossibility of protecting the person under conventional means.

The available measures to protect witnesses and other reporting persons falls under articles 13 (for procedural matters), 16 (for extra-procedural matters) and 17. These include change of identity of the person under protection, masking the image or voice of the protected person when producing oral evidence, either in court or through videoconferencing (article 14), and the anticipated production of evidence. It should be noted that these elements have to be thoroughly analysed in the appropriate regulation on the matter upon signing into law of the bill, as due process requirements (which are ensured under article 6), as well as elements pertaining to the chain of custody of the evidence must be ensured.

In order to ensure the safety and physical integrity of the person under protection, article 16 ensures the possibility of, among others, offer safe transportation, relocation and extended safety measures while in court or in prison, in the event that the protected person is under arrest. In special circumstances, the measures in article 17 may be applied. These include: the change of identity of the person under protection, family members and persons who live with the person under protection, relocation nationally or abroad, change of physical appearance, and an allowance to ensure minimum individual or family maintenance. It should be noted, however, that the bill presumes that it will be possible to return to the status quo upon conclusion of the criminal proceedings, which might not always be the case. As such, it is recommended that in the regulation of the GPCV it is included that the bureau will attempt to reinsert the person under protection into its new condition or provide them with training courses for new employment, so as to ensure that they are able to find new jobs and, consequently, reduce the costs of the overall programme to the State.

Finally, article 18 ensures added protection to specially vulnerable persons (*Programa especial de segurança*), to those persons which, in advanced or small age, due to their state of health, or if they are producing evidence against his or her own family, or a closed social group in which the person is inserted in a role of subordination or dependency – this definition appears to encompass also the definition of criminal organisation in article 280 of the proposed Criminal Code, in order to ensure sincerity and spontaneity of the evidence which is to be produced. In such cases, the person which is especially vulnerable is to have appropriate psychological counselling.

Articles 7 and 8 deal with confidentiality issues. Confidentiality is an important component to witness protection and, as such, the appropriate mechanisms need to be put in place in order to ensure that the witness protection system is not usurped.

The draft bill has also be reviewed pertaining to trafficking in persons, using as the international standard the UNTOC and its supplementing protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The specific legislation on the matter in Mozambique, Law No. 6/2008, shall also be reviewed.

Persons that have been trafficked normally face the prejudice in both the country in which they have been trafficked to and their home country (or, if this is done at a local level, between the place to which the person had been trafficked and the place

were the person originates from). It is for this and other reasons that the supplementing protocol to UNTOC has as a statement of purpose, in its article 2(b), the need to protect and assist the victims of such trafficking, with full respect for their human rights. As such, countries should offer appropriate psychological counselling and support to the victims upon their return to their original setting.

The draft bill on the protection of witnesses can also be used for the victims of the offence of trafficking in persons. However, it should be underscored that the draft bill focuses on the need for the commission of an offence and the need to ensure the security of a reporting person, a witness or a victim. There needs to be grounds to ensure that there is a need for such protection, and their needs to have initiated a criminal file for the offence under investigation. The law is not clear whether it would be applicable for instances in which a investigation has not been yet opened, as might be the case of certain situations of trafficking in persons (especially for the immediate protection and support which are required to remove them from the condition in which they have been trafficked).

The draft bill on witness protection focuses on protecting persons which report a criminal offence and which may be under duress if some protection is not afforded to them. While this also holds true to victims of trafficking in persons (as the evidence they provide may prove invaluable for a criminal investigation), the protection which needs to be afforded to them extends beyond the capabilities of the current draft bill, even when interpreted with articles 20 and 21 of Law No. 6/2008. It is for this reason that, while the present draft bill enhances the protection afforded to victims of trafficking in persons, in particular when read in together with article 20 of Law No. 6/2008, the protections given focuses of the criminal proceedings which would ensue, and not provisions for the recuperation, rehabilitation and reintegration of the victims to society.

3.8 Special investigative techniques

The production of evidence in an anti-corruption investigation is often difficult, time consuming and resource intensive. Due to the secret nature of corruption and money laundering, investigating these types of criminal offences relies heavily on intelligence gathering and indirect methods of proof (as mentioned in section 3.6 above). As such, articles 52 (relating to the prevention and detection of the proceeds of crime. This article will be reviewed and benchmarked with the Mozambican legislation in more detail in the specific section dealing with anti-money laundering) and 58 (pertaining to FIUs. This article will likewise be reviewed and benchmarked with the Mozambican legislation in the specific section below dealing with anti-money laundering) of the UNCAC provide for several steps pertaining to the gathering of intelligence which may be of use for future corruption-related and anti-money laundering investigations. These include, but are not limited to, identification of customers in financial and non-financial bank institutions, customer due diligence and enhanced due diligence, know-your-customer rules, suspicious transaction reports and asset declaration forms.

This intelligence gathering seeks to give investigative authorities leads to potential criminal offences which have or are occurring, as well as assisting in the financial investigation to trace the true nature, origin and ownership of the proceeds and instrumentalities of crime, so that they can be seized and confiscated. Once the criminal and financial investigations have begun, they must collect appropriate evidence which will prove the elements of the criminal offence and pinpoint a persons (or specific persons) to the commission of such an offence. However, as it is difficult to obtain direct evidence to prove the elements of the offence, investigative authorities must also be empowered to use indirect methods of proof (explained above in the section on knowledge, intent and purpose as elements of an offence) as well as special investigative techniques.

With regards to the latter, article 50 of the UNCAC[9] provides for the international standards. As such, the UNCAC endorses the investigative techniques for (i) controlled delivery; (ii) electronic surveillance; and (iii) undercover operations. It should be noted, however, that there may be other forms of special investigative techniques which investigative authorities may make use of in

[9] The AU Convention and the SADC Protocol do not contain provisions regarding special investigative techniques.

certain jurisdictions. While the international standards contain the minimum standards for these, and should the legal system of the State allow, other special investigative techniques may be utilised. Special investigative techniques are useful when dealing with sophisticated and complex forms of criminality, as well as organised criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in prosecutions. In many cases, less intrusive methods (e.g., traditional investigative methods) do not prove effective, or cannot be carried out without unacceptable risks to those involved.

It should be noted that such intrusive methods of investigation may conflict with the rights of privacy of investigated persons and, as such, appropriate legislative measures need to be put in place to present the legal circumstances in which the right to privacy of a person may be limited. Also, appropriate mechanisms must be put in place to ensure due process (article 269-L) and the rule of law (article 269-K), as these investigative techniques are done without the knowledge or consent of the person under investigation, who will only be in a position to present a defence after the use of such techniques have taken place.

The first of such techniques mentioned in the international standards are controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organisation. Controlled delivery is especially useful as it will allow not only identify the couriers, but also the higher echelons within the criminal organisation. Examples for the use of effective use controlled delivery to curb criminality include using it in drug trafficking operations, as well as money laundering operations, when the chosen method for money laundering is cash smuggling. There is no mention to the controlled delivery in the legislation that was analysed for the production of this report.

The second of such special investigative techniques is the electronic surveillance. These include, but are not limited to the use of listening or video-recording devices, or the interception of communications, which can be used when a criminal organisation cannot be penetrated or where the risks of allowing physical infiltration by law enforcement or the physical surveillance of the criminal group would outweigh beneficial costs for the investigation. Finally, the third technique contained in the international standards is undercover operations, in which there is a physical infiltration by law enforcement of the criminal organisation.

Electronic surveillance is provided for in the proposed articles 249-A and 249-M of the Criminal Procedure Code. Undercover operations are provided for in the proposed article 249-Q of the Criminal Procedure Code. Furthermore, Law No. 7/2002 (Prevention and combating of money laundering) provides for five other types of special investigative techniques when the investigation deals with money laundering: (i) inspection of banking information and bank accounts; (ii) wiretapping; (iii) access to computer systems where the bank accounts have been made; (iv) access to information databases on the client, his or her legal representative; and (v) access to contracts or arrangements which are referenced to the events under investigation. These techniques contained in the anti-money laundering legislation can be done through, e.g., processes of data mining. Although these processes would appear to be enabled, at first glance, in accordance to the rules contained in articles 175 (collection of any evidence admitted in law) and 234 (seizure of objects in a banking institution) of the Criminal Procedure Code, it should be highlighted that article 234 itself refers to objects which are kept in a financial institution, and not the information regarding its clients. Moreover, due to the fact that most – if not all – of this information will be kept in electronic databases, and the necessary expertise and know-how is necessary to appropriately extract electronic evidence from such databases without tampering with them – an issue which may ultimately nullify an entire procedure due to inappropriately collected electronic evidence.

It should be noted that the electronic surveillance may only take place if the criminal offence under investigation is punishable by imprisonment of at least two years, if there are reasons to believe that the electronic surveillance is essential for the discovery of the truth and it would have been impossible or very difficult to obtain such evidence in any other legally

admissible way, and is authorised by the investigating magistrate (article 249-A, No. 1). Moreover, the electronic surveillance is only permissible regarding the person under investigation, other persons which may act as intermediaries to receive or transmit information to the person under investigation, and the victim which consents such electronic surveillance (article 249-A, No. 2). The electronic surveillance will last 90 days and may be renewed indefinitely for such period, insofar as the conditions remain the same and justify the maintenance of the order (article 249-B). Finally, electronic surveillance cannot be used in cases in which the investigated person is communicating with his or her legal counsel, unless there is reason to believe that the legal counsel is conspiring with the investigated person.

Differently from the provisions contained in the proposed article 249-A, the proposed article 249-M deals with electronic video surveillance. While the law informs that the production of video-surveillance in public spaces does not require consent, although it requires either the authorisation of the prosecutor or the judge, depending on the stage of the criminal proceeding.

Undercover operations are provided for in the proposed article 249-Q, and are defined as the action undertaken by law enforcement agents or persons acting under the control of law enforcement (e.g., informants). The names of the persons undertaking undercover operations shall be concealed and fictitious names are to be used if necessary (article 249-V) for a period of one year. It is unclear whether this fictitious name can be extended if necessary. Undercover operations may only be used in certain offences, listed in the proposed article 249-R which includes corruption-related offences and money laundering offences, among others. Undercover operations are to be authorised by the prosecutor (article 249-U) and is to be used solely for the prevention of criminal offences and exceptionally for pre-trial investigations (article 249-S).

For the reasons set forth above, the provisions pertaining to special investigative techniques do not seem to fully meet the international standards.

3.9 Specialised authorities

As mentioned in the preceding section, successful investigation and prosecution of corruption-related offences and money laundering is dependant on the gathering and production of intelligence, be it financial intelligence (through the Financial Intelligence Unit), drug-trafficking related intelligence (through appropriate police intelligence or specialised authorities responsible for the collection of drug-related intelligence) or corruption-related intelligence (through anti-corruption bureaus).

Articles 6 and 36 of the UNCAC contain provisions regarding the establishment of anti-corruption bureaus for the prevention and criminalisation of corruption. The language of the UNCAC obliges States Parties to ensure the existence of a body or bodies for the prevention of corruption. It highlights prevention of corruption can be the task of one or more institutions. The single agency approach, adopted by some countries (e.g., Hong Kong), seeks to establish an agency with the broad mandate to prevent corruption, to raise awareness about the issue and to investigate and to prosecute corruption allegations. It is based on key pillars of prevention and enforcement, such as policy, analysis and technical assistance in prevention, public outreach and information, monitoring, and investigation.

Law No. 6/2004 created, in its article 19, the Mozambican anti-corruption bureau (*Gabinete Central de Combate à Corrupção* – GCCC). The GCCC is responsible for, on the one hand, raising awareness towards combating corruption (although in practice this role is carried out by the GCCC, this is unclear in the legislation) and, on the other hand, conducting pre-trial investigation and preparation of a corruption-related investigation, which is then forwarded to the prosecutor who will lead the investigation and prosecution. The GCCC does not have a co-ordinating role and cannot for this reason articulate the different intelligence gathering, investigating and prosecuting actors with regards to combating corruption.

With the anti-corruption package, the GCCC would gain a more central role. Apart from the functions it already has, it would be responsible for centralising all intelligence and gathering information pertaining to corruption-related cases, including the preparation for both the financial and criminal investigations. Thus, in accordance to the current laws and the anti-corruption package, the GCCC would have greater interacting with the GIFiM, and CCPE, as well as their current interaction with the tax authorities, the investigative police, etc.

Attention should be given to the fact that the necessary capacities and resources will need to be given to the GCCC in order to carry out and fully implement all of its functions, once the anti-corruption package is approved (e.g., appropriate capacity building with regards to financial investigations to ensure effective cross-breeding of intelligence to ensure the most effective outcomes). One of such immediate needs that the GCCC will have in particular, and the criminal investigation system in general, is the need to make the investigative police autonomous from the general police force. This gap was highlighted during interviews – in its current form, it appears that the police force of Mozambique is considered as one and, as such, a police investigator may be requested at any moment to conduct other policing activities (such as border control), which consequently strains the criminal justice system and the ability for conducting effective and efficient criminal and financial investigations.

3.10 Corruption-related offences under the proposed Criminal Code

3.10.1 Bribery of national public officials

The offence of bribery of national public officials is subdivided into two different categories: (i) active bribery, in which a person (whether natural or legal) promises, offers or gives an undue advantage to a public official, directly or indirectly; and (ii) passive bribery, in which the public official solicits or accepts an undue advantage from a person (whether natural or legal). Active and passive bribery are parallel offences: while one criminalises the actions of the person offering the undue advantage – active bribery – the other criminalises the actions of the public official that solicits or accepts an undue advantage – passive bribery.

Active and passive bribery share common elements: both transcend the element of time. Thus, it should not matter whether the undue advantage is given to the public official or to a third person after he or she has left office, as long as it can be shown that the intention to offer, promise or give, or to solicit or to accept an undue advantage occurred while the at least of the persons in the offence was, at the time of the offence, a public official. As such, courts should interpret in this way the current criminal offence contained in the proposed Criminal Code.

Furthermore, both active and passive bribery must cover, as an offence, the circumstances in which no gift or tangible item is promised, offered or given to the public official. Thus, the undue advantage may be either tangible or intangible, pecuniary or non-pecuniary (UNODC, 2007). Lastly, the offences of active and passive bribery occur when there is an intention to corrupt a public official, or for a public official to be corrupted.

Passive bribery is contained in articles 317 and 318 of the proposed Criminal Code of Mozambique. The definition of passive bribery contained in these articles is similar to those contained in article 15(b) of the UNCAC, article 4(1)(a) of the AU Convention, and article 3(1)(a) of the SADC Protocol.

The actions contained in proposed Criminal Code of Mozambique — to solicit or to accept — are those contained in international standards, as is the case of an undue advantage — which takes the form in the Criminal Code of "monies or promise of monies or any patrimonial or non-patrimonial advantage which is not due", which is similar to the definition contained in both the SADC Protocol and the AU Convention. These two actions differ from one another (OECD, 2008):

i. "Solicitation" occurs when a public official indicates to another person that the latter must pay a bribe in order that the official act or refrain from acting.
ii. "Acceptance" occurs when the public official takes the undue advantage.

Under the international standards, however, the beneficiary or beneficiaries of the undue advantage solicited or accepted by the public official may either be himself or herself, or another person (whether natural or legal). On the other hand, Articles 317 and 318 of the proposed Criminal Code seem to indicate that only the public official himself or herself may be the beneficiary of the undue advantage, excluding the possibility that a third person (e.g., family members of the public official), may benefit from the passive corruption solicited or accepted by the public official.

Articles 317, No. 4 and 318, No. 4 of the proposed Criminal Code contain exclusion clauses to the act of passive corruption under Mozambican criminal law. According to these exclusion clauses – which do not appear in any of the international standards, especially in relation to the intention, as mentioned above – the public official is exempt from criminal charges should he or she, without being obligated to do so regardless of his or her will: (i) voluntarily rejects the pecuniary undue advantage; or (ii) restitutes the monies or pecuniary patrimonial advantage prior to the commission or omission of the act. It should be noted that, while this exclusion clause seems not to be in line with the international standards – as the intention of being corrupted or of corruption has been met and the international standards require the proportionate sanctioning of the persons involved in the perpetration of the crime – it only refers to pecuniary undue advantage as, in Portuguese, it mentions only the *vantagem patrimonial*, and not the *vantagem patrimonial e não-patrimonial* formula contained in the remaining subsections of articles 317 and 318 of the proposed Criminal Code.

Furthermore, the legislator in Mozambique chose to separate the criminal offences of passive corruption for the omission or the commission of an unlawful act (article 317 of the proposed Criminal Code), and for lawful acts (article 318 of the proposed Criminal Code). It should be noted that the international standards make no distinction of acts of corruption according to the lawfulness of the action committed by the public official. Notwithstanding, and regardless of this separation, most of the requirements of the international standards have been met through this legislative technique.

It should be noted that, in the aggravated circumstances of passive corruption contained in articles 317, No. 3, and 318, No. 3, when the person is considered an *empregado público*. In this regard, it was explained that throughout the years different terms were used to refer to public officials in different laws. As such, article 337 of the Criminal Code seems to indicate that an *empregado público* is a public official and as such it would be important to clarify the extent of this aggravated circumstance for passive bribery, as the proposed Criminal Code seems to define a public official in article 337, but later chooses a specific category whose acts of corruption are to be punished more severely.

Lastly with regards to passive bribery, it should be noted that the proposed Criminal Code also contains the offence of *concussão* in its article 327. This offence is not contained in international standards, but is mentioned in this report as the difference between *concussão* and passive bribery is the action: while passive bribery entails a request for a bribe, the public official demands it in *concussão*.

The definition of active bribery under article 15(a) of the UNCAC requires States Parties to criminalise three actions: promising, offering or giving of an undue advantage to a public official (article 4(1)(b) of the AU Convention and article 3(1)(b) of the SADC Protocol use the actions of "offering" and "granting", but not the action of promising, like the UNCAC. For this reason, the definition contained in the UNCAC will be utilised as it is more complete). It should be noted that these three actions differ from one another (OECD, 2008):

i. "Promising" is the action of a person agreeing to provide the public official with an undue advantage.
ii. "Offering" occurs when a person indicates that he or she is ready to provide an undue advantage to the public official.
iii. "Giving" is when the transfer of an undue advantage to the public official actually takes place.

Unlike passive bribery, whose subject can only be a public official, the offence of active bribery is not targeted at the public official, but rather criminalises the conduct of any person that promises, offers or gives an undue advantage to the public official. The purpose of the undue advantage is to persuade the public official to perform an official act in a specific manner, or to have the public official refrain from acting altogether.

The offence will only take place insofar as there is an intention by the person wishing to corrupt a public official. Thus, the crime will only be committed when a person has the intention to promise, offer or give an undue advantage to the public official. Furthermore, the promising, offering or giving of an undue advantage to a public official may be done either directly or indirectly. Moreover, the undue advantage which is promised, offered or given to a public official may benefit either the public official himself or herself or a third person (whether natural or legal). It is paramount to note that offering or giving an undue advantage does not require there to be an agreement between the person offering or giving the bribe and the public official. In other words, the public official does not have to have accepted or even be aware of the undue advantage that is being offered, promised or given to him or her.

Active bribery is defined in article 329 of the proposed Criminal Code. Article 329, No. 1 indicates the actions of "giving" and "promising to give" and undue advantage. While this is in line with both the AU Convention and the SADC Protocol, it is not fully compliant with the standards of the UNCAC, as it is missing the action of "offering". As seen above, there is a subtle, but notwithstanding important difference between "offering" as "promising". In this specific regard, there was much debate at to the extent of the meaning, in Portuguese, of the actions *dar* and *prometer dar*. While it could be argued that promising encompasses offering – as a person who promises to do something must offer to do so – it seems that the international standards has given a clear indication that both these actions are to be seen differently and independently, more notably the fact of the person agreeing to provide a public official with an undue advantage. Notwithstanding, this interpretation will ultimately depend on the interpretation of the courts in the matter.

Special attention should be given to both article 329, No. 4 and No. 5 of the proposed Criminal Code. Article 329, No. 4, similarly to articles 317, No. 4 and 318, No. 4, indicates that the person who gives or promises to give an undue advantage to the public official is excluded of the criminal offence if he or she refuses to comply with the promise, or restitutes the undue advantage given to the public official. In that regard, it should be noted that this seems not to be in line with the international standards, as the intention to promise of give a bribe is sufficient to have committed the offence of active bribery.

Article 329, No. 5, on the other hand informs that the person who commits active corruption is exempted from criminal liability if he or she proves that the commission of the offence was due to the solicitation or demand of an undue advantage and that such a fact was shared with the relevant authorities.

3.10.2 Bribery of foreign public officials and officials of public international organisations

The offence of active and passive bribery of foreign public officials and officials of public international organisations is similar to the offence of active and passive bribery, although it focuses not on the national public officials, but rather on (i) acts carried out by, or conducted with the intention to corrupt foreign public official and officials of public international organisations (as opposed to national public officials); and (ii) the result arising from the bribery is to obtain or retain business or another undue advantage in relation to the conduct of international business (as opposed to a more broadly defined undue advantage).

The definition of active and passive bribery of foreign public officials and officials of public international organisations is contained in article 16 of the UNCAC; and in article 1(1) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), the latter focusing solely on the active bribery of a foreign and international public officials. It is also referred to in article 6 of the SADC Protocol. There are no provisions for the active and passive bribery of foreign public officials and officials of public international organisations in the AU Convention.

The proposed Criminal Code of Mozambique does not contain any provisions for either the active (mandatory under the UNCAC) and passive (non-mandatory under the UNCAC) bribery of foreign public officials and officials of public international organisations. This is an important gap which should be bridged as quickly as possible in order for Mozambique to meet the international standards in the matter and ensure appropriate transparency for the prevention of corruption in the country. In order to bridge this gap, a definition of what a foreign public official and an official of a public international organisation are in terms of Mozambican criminal legislation, as well as specific reference of what would entail the active and passive bribery of foreign public officials and officials of public international organisations.

3.10.3 Embezzlement, misappropriation or other diversion of property by a public official

Embezzlement or misappropriation is a specialised form of theft. Only public officials can carry out embezzlement or misappropriation of public funds or funds which are entrusted to the public official by virtue of his or her position. The public official must intentionally use these funds for his or her benefit, or for the benefit of a third person or entity. The actions under this offence are:

i. "Embezzlement," which is the act of fraudulently appropriating assets by a public official which has been entrusted with such assets. In this case, the assets are converted in an attempt to transfer the ownership to the public official; and
ii. "Misappropriation", which is the intentional and illegal act of using property or funds of another person for an unauthorised purpose. Here, there is no conversion of the property, but rather misuse of the property or funds.

The main difference of these offences when compared to active and passive bribery (whether of national public officials or of foreign public officials or officials of public international organisations) is that they are not related to gaining an undue advantage from another person or entity. Instead, they relate to the direct embezzlement or misappropriation of funds which are public (e.g., stripping monies from the public treasury for personal use, or using the government monies or property for personal expenses which are not work-related expenses), or which are not public but entrusted to the public official (e.g., the judge, prosecutor or law enforcement agent using a seized vehicle for personal use). It only requires one person for the act to be committed, while bribery involves a minimum of two persons (the active and passive briber).

Articles 331, 332 and 333 of the proposed Criminal Code contain the criminal provisions against embezzlement, misappropriation or other diversion of property by a public official. These are divided into four forms of embezzlement or misappropriation of funds, which are known in Portuguese as:

i. *Peculato-desvio*, when the public official allows the use of public funds for reasons other than those that are in the public interest. This form of embezzlement is contained in article 333 of the proposed Criminal Code.
ii. *Peculato de uso*, when the public official uses, or allows a third person to use property (whether public or private but entrusted to the public official) for reasons other than those for which were they were entrusted to the public official or the Government. It should be noted that this definition should be for any tangible property (movable or immovable), although the definition contained in article 332 of the proposed Criminal Code mentions only movable property. This is a gap that should be bridged in the current definition of this form of misappropriation.

iii. *Peculato-apropriação*, when the public official takes ownership of any tangible property (movable or immovable, including monies), whether public or which were entrusted to the public official or the Government. This definition of embezzlement is contained in article 331, No. 1, first figure of the proposed Criminal Code.
iv. *Peculato-furto*, when the public official fraudulently appropriates of any tangible property (movable or immovable property, including monies), whether public or which were entrusted to the public official or the Government. This definition of embezzlement is contained in article 331, No. 1, *in fine* of the proposed Criminal Code

The definition of embezzlement, misappropriation or other diversion of property is defined, in the international standards, under the UNCAC in its article 17, article 4(1)(d) of the AU Convention, and article 3(1)(d) of the SADC Protocol. The definition contained in the proposed Criminal Code appears to be compliant with the international standards.

3.10.4 Trading in influence

Unlike active and passive bribery, active and passive trading in influence (defined in the proposed Criminal Code in article 330) must must be linked to the official's influence — whether real or supposed — over an administration or public authority (UNODC, 2007). The proposed Criminal Code contains both the provisions for active trading in influence (article 330, No. 2) and passive trading in influence (article 330, No. 1). This definition is in line with that of the non-mandatory provisions of active and passive trading in influence contained under the UNCAC in its article 18, article 4(1)(f) of the AU Convention, and article 3(1)(f) of the SADC Protocol. The definition contained in the proposed Criminal Code complies with the international standards.

The action of active trading in influence (article 18(a) of the UNCAC) provides for three actions:

i. To promise, which is the action of a person agreeing to provide the public official with an undue advantage.
ii. To offer, which occurs when a person indicates that he or she is ready to provide an undue advantage to the public official.
iii. To give, which occurs when the transfer of an undue advantage to the public official actually takes place.

One of the many aspects of trading in influence refers to patronage networks. In such a scenario, the public official seeks to favour his or her supporters by rewarding them for their support. Although patronage systems can be legal (as is the case of many countries in which the head of government may appoint his cabinet without consent from the legislature), it becomes an act of corruption when favouritism is given to an individual or a group as a form or reward (e.g., government contracts are awarded to specific individuals fraudulently).

As in active bribery, the undue advantage does not have to be given immediately or directly to a public official. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organisation. The undue advantage must be linked to the official's influence over an administration or public authority of the State (UNODC, 2007). Moreover, the conduct of this offence must be intentional (active trading in influence), and some link must be established between the offer or advantage and the act of inducing the official to abuse his or her influence in order to obtain from an administration or public authority of the state party an undue advantage for the instigator of the act or a third party. On the other hand, in passive trading in influence, the conduct for the commission of the offence is the intention of soliciting or accepting the undue advantage for the purpose of abusing one's in to obtain an undue advantage for a third person from an administration or public authority of the State.

It should be noted that, despite the fact that the proposed Criminal Code does not have provisions for the active or passive bribery of foreign public officials or officials from public international organisations, and even though the international

standards do not consider it necessary to include these under the offences of active and passive trading in influence, Mozambique has chosen to do so. Notwithstanding, these provisions would not be currently applicable as Mozambican criminal legislation does not appear to have a definition of what a foreign public official is.

3.10.5 Illicit enrichment

One of the main problems faced by investigation and prosecution of corruption-related offences is the difficulty in finding proof of a criminal conduct. Unlike traditional forms of crime, in corruption-related offences there are no identifiable victims and thus no one will naturally come forward to report the crime: both the person corrupting the public official and the public official himself or herself have agreed to committing the criminal offence. Illicit enrichment thus seeks to address the difficulties related to successful investigation and prosecution of corruption-related offences.

Illicit enrichment is a particularly powerful element to combat corruption as it eases the burden of evidence on the prosecution without reversing it. Under the definition of illicit enrichment in article 20 of UNCAC and article 2 and 8 of the AU Convention[10], investigators and prosecutors are still required to conduct an investigation, to demonstrate that they were not able to determine the legal origin of the assets, and that therefore they cannot demonstrate that the legitimate income of a person under investigation explains his or hers increase in assets. There are no provisions for illicit enrichment under the SADC Protocol. The provisions under the proposed Criminal Code appear to comply with the international standards.

In illicit enrichment, the prosecution no longer is required to determine the unlawful origin of the assets. Instead, if they have proven that they cannot determine the legal origin of the assets, they can require the person under investigation to explain how this property derived from legal sources. There is thus no reversal of the burden of proof but an easing of the burden of proof on the prosecution: the prosecution does not have to demonstrate that the assets are criminal in nature, but it has to demonstrate that they cannot determine the legal origin of the assets (article 31(8) of the UNCAC). Furthermore, it preserves the right to non self-incrimination by the defence.

In Mozambique, illicit enrichment is a criminal offence under article 320 of the Criminal Code. As such, two conditions have to be met under the laws of Mozambique to consider the commission of the offence of illicit enrichment: (i) having assets whose origin cannot be reasonably justified (article 320, No. 1, first figure); and (ii) it is proven that these assets do not correspond to the lawful earnings which have been declared to the tax authorities (article 320, No. 1, second figure). The definition contained in article 320 is in line with the international standards.

The Mozambican legislation seems to indicate that if there is reason to believe that the origin of the assets cannot be determined and that an investigation to determine their legality — through the annual income declarations to the tax authorities — concludes that the earnings cannot be lawfully determined, the investigated person will be invited to justify the lawful origin of their assets. It should be noted, however, that article 320, No. 1, *in fine*, indicates that the punishment for the crime of illicit enrichment is the confiscation of assets surmounting to the total of the value of the illicit assets that have been determined in the case. Thus, the prosecution in Mozambique will still have to determine the unlawful assets belonging to the person under investigation.

The method chosen by Mozambique in these cases differs from value-based confiscation, in which the prosecution has to determine the amount that the unlawful assets surmount to, and not the assets themselves. This confiscation will reach both the proceeds and the instrumentalities of crime, the latter due to the provisions contained in article 80 of the Criminal Code. It is not clear, however, if article 320 of the Criminal Code could also be applied for intermingled and transformed assets.

[10] Attention should be given to the fact that, under the UNCAC, illicit enrichment is a non-mandatory offence. On the other hand, illicit enrichment is a mandatory offence under the AU Convention.

Although this seems possible, case law will determine this possible. In any event, it is of fundamental importance that not only proceeds and instrumentalities of crime be included, but also intermingled and transformed assets.

Lastly, it should be noted that the crime of illicit enrichment seems to be applicable not only to public officials, but any person who has practiced an act of corruption and has benefitted from the proceeds of crime. Furthermore, the crime of illicit enrichment, however, seems not to be applicable to any other criminal offence other than the corruption-related offences, as it is contained in a specific section of the Criminal Code (*Seção VI — Crimes de Corrupção e Crimes Conexos*) which deal specifically with corruption-related offences.

3.10.6 Concealment

Article 24 of the UNCAC requires States Parties to criminalise the offence of concealment, which refers to the concealment or continued retention of property known to be a result of one of the corruption-related offences contained in the UNCAC. This offence is also to be independent from the criminal offence of money laundering. The criminal offence of concealment is also contained in article 4(1)(h) of the AU Convention and article 3(1)(g) of the SADC Protocol.

The Mozambican legislation does not seem to be in conformity with the international standards with regards to the criminal offence of concealment. While the offence of concealment is contained in the anti-money laundering legislation of Mozambique, it is not contained as a specific criminal offence in the proposed Criminal Code, as required as a non-mandatory offence under the UNCAC. The act of concealment includes, but is not necessarily limited to, the action of acquiring, receiving, transporting, hiding, for the perpetrator's own benefit or for the benefit or a third party, a thing which is known to be the proceeds of crime. The criminal offence may also be committed when the perpetrator induces a bona fide third party to acquire, receive or hide the proceeds of crime. Finally, the criminal offence of concealment may also take place when a person assists the perpetrator of a criminal offence in making the proceeds of crime secure.

Notwithstanding the above, it should be noted that article 28, No. 5 of the proposed Criminal Code informs that a person who acquires or receives, without previous knowledge of the legitimate origin of a thing, which by its quality, by the condition of the person which offers the thing or by the price which the thing is offered, should reasonably suspect originates from a crime. While this definition may fit closely to the definition of concealment contained in the international standards, one should bear in mind that it is not an autonomous criminal offence, but rather a definition of a person which is assisting in masking a criminal offence. Moreover, article 28, sole paragraph informs that close family members, e.g., spouse, children, etc. are not to be considered as persons which assist in masking a criminal offence in such cases. In that regard, corruption-related offences, especially when dealing with grand corruption, there is a high degree of complicity between the perpetrator of the criminal offence and the family members. For the reasons set forth, article 28 appears not to fulfil the requirements of the international standards.

3.10.7 Obstruction of justice

Both the corrupt public official and the person giving the undue advantage maintain or expand their wealth, power and influence by seeking to undermine the criminal justice system. No justice can be expected or done if judges, jurors, witnesses or victims are intimidated, threatened or corrupted. No serious crimes can be detected and punished if the evidence is prevented from reaching investigators, prosecutors and the court (UNODC, 2007).

For this reason, UNCAC requires measures ensuring the integrity of the justice process. Article 25 of UNCAC mandates States Parties to criminalise the use of threats or force in order to interfere with witnesses and officials, whose role would be to produce accurate evidence and testimony (UNODC, 2007). Specifically, article 25 requires the establishment of two offences (UNODC, 2007):

i. The first offence relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. Any person, whether they are or not a public official can commit it. States Parties are required to criminalise the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences established in accordance with UNCAC (UNODC, 2007).
ii. The second offence, the use of force, threats, intimidation and inducements for false testimony or for the interference with the exercise of official duties by the courts, prosecutors and law enforcement can happen at any time prior to the commencement of the trial, regardless of whether formal proceedings are or not in progress. For this reason, the term "proceedings" must be interpreted broadly and cover all the stages of the criminal process (investigation, prosecution, appeals, sentencing and execution of the sentence).

The AU Convention and the SADC Protocol do not contain a provision for obstruction of justice. While in the proposed Criminal Code obstruction of justice can be found in different criminal offences, such as perjury (article 267) and bribe in order to obtain perjury (article 269), there appears to be no criminal offence with regards to the use of force, intimidation, etc. Notwithstanding, the anti-money laundering legislation (Law No. 7/2002) contains a definition for obstruction of justice in its article 31. It should be noted that this definition could only be used explicitly for cases which relate for prosecutions for money laundering and would not necessarily apply to the predicate offences to money laundering or criminal offences independently of the offence of money laundering.

Thus, the Mozambican proposed Criminal Code does not appear to fully meet the international standards with regards to the obstruction of justice and, as such, attention should be given in order to fully comply with them.

3.10.8 Abuse of functions

The abuse of functions is the performance, or failure to perform an act in violation of the law by a public official in order to obtain an undue advantage. It is contained in Article 19 of the UNCAC, article 3(1)(c) of the SADC Protocol, and article 4(1)(c) of the AU Convention. It is defined in the proposed Criminal Code of Mozambique in its article 323. This definition appears to meet the international standards.

3.10.9 Bribery and embezzlement of property in the private sector

Article 21 of the UNCAC provides for the criminal offences of active and passive bribery in the private sector. In turn, article 22 of the UNCAC provides for the criminal offence of embezzlement in the private sector. It should be noted that these provisions are non-mandatory and States Parties should consider adopting these into their national criminal legislation. The AU Convention and the SADC Protocol do not contain such provisions.

Many of these criminal offences may be contained in the Commercial Code or other specific legislation of Mozambique. Notwithstanding, with regards to the proposed Criminal Code, the offences contained in articles 425, 426, 451 and 452 of the Criminal Code seem to be applicable to the situations contained in article 22 of the UNCAC. On the other hand the proposed Criminal Code and other legislation that was analysed for the present report does not appear to have specific provisions that would meet the requirements of article 21 of the UNCAC.

3.10.10 Anti-money laundering legislation

While the exact definition of money laundering is ultimately dependent upon each country's legislation, some general considerations based on international standards can be made. As a result, money laundering is often defined as the process

whereby a person seeks to conceal, hide or disguise the true origin, nature and ownership of property derived from a criminal activity. A money laundering scheme will usually be comprised of three steps which often overlap and are not seen separately. These are known as placement, layering and integration. Thus, a person will first place the money in the financial system; then he or she will create several layers between himself or herself and the funds in an attempt to hide the true origin, nature and ownership of the funds; and finally, once the trace has been lost through the layering phase, he or she will integrate the funds into the regular economy giving it the appearance of being legitimate funds.

Money laundering is dependent on two factors. These are, on the one hand, a person who is seeking to hide the true origin, nature and ownership of their proceeds of crime, and on the other hand the need to identify an underlying offence which determines that the criminal assets are in fact proceeds of crime. This underlying offence (also known as predicate offence) must be established as such in legislation.

Money laundering and corruption are intrinsically linked. Corruption-related offences are generally committed for the purpose of obtaining an undue advantage, whether that is represented through active and passive bribery, embezzlement or another act of corruption. In turn, money laundering is the process of concealing and disguising these illicit gains that were generated from the corrupt activity. The advantage of money laundering, from the point of view of the corrupt person, is that only when the proceeds of a corruption offence have been successfully laundered can they be enjoyed without fear of being detected and confiscated (OECD, 2010). These schemes are essential especially in grand corruption cases where large sums of money are at play that quickly can attract the attention of prosecuting authorities if not properly disguised.

In the context of globalisation, criminals take advantage of easier capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant diversity of legal provisions in various jurisdictions. As a result, assets can be transferred from one place to another through both formal (bank transfer) and informal (smuggling) channels. Another form of money laundering include, for example, under- and over-invoicing of goods and services. Here, there is a misrepresentation of the price of a good or service so that an additional value can cross borders and consequently be hidden from government scrutiny.

UNCAC and the AU Convention (there is no mention to money laundering in the SADC protocol) make the connection between money laundering and corruption-related offences. Article 23(2)(a) of the UNCAC provides that the widest range of offences should be predicate offences to money laundering. As a minimum, therefore, the mandatory offences as well as the non-mandatory offences adopted by a State Party should be included as predicate offences to money laundering (article 23(2)(b) of the UNCAC).

Article 23 of UNCAC establishes money laundering as the actions below. Article 6 of the AU Convention contains similar provisions, with the execption of item iv below:

i. Property converted (action of changing the proceeds of crime so that they appear to be legitimate) or transferred (action of moving the proceeds of crime from one place to another), when it is known that such property is the proceeds of crime, for the purposes of concealing (action of preventing that the proceeds of crime be known or noticed) or disguising (action of giving a different appearance to the proceeds of crime to hide their illegal nature or existence) the illicit origin of the property, or helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action (article 23(a)(i) of the UNCAC);
ii. The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (article 23(a)(ii) of the UNCAC)

iii. The acquisition (action of obtaining the proceeds of crime), possession (action of having the proceeds of crime) or use (action of making use or consuming the proceeds of crime) of property, knowing, at the time of receipt, that such property is the proceeds of crime (article 23(b)(i) of the UNCAC)
iv. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article (article 23(b)(ii) of the UNCAC).

Any person, whether a public official or not, who has committed a predicate offence to money laundering, as defined by article 4 of Law No. 7/2002, can commit the criminal offence of money laundering. Therefore, money laundering will affect not only the public official that has accepted an undue advantage, but also all the persons which assisted the public official to launder it, e.g., accountants (to fraud any information such as income tax declarations or asset declaration forms), lawyers (to assist in creating complex legal structures to mask the true nature, origin and ownership of the assets), bank managers (which can assist in opening accounts in jurisdictions which may have more favourable conditions to protect the proceeds of crime), etc.

Another important aspect to consider is that money laundering often involves several jurisdictions (e.g., the country where the corruption offence was committed, and the country to which the proceeds were laundered to). In this context it is particularly important that UNCAC article 23(2)(c) requires States Parties to investigate and prosecute money laundering offences regardless of whether the predicate offence took place in their own jurisdiction or in another – a provision contained in Mozambican legislation under article 4, No. 2 of Law No. 7/2002. This gives greater flexibility for the investigation and prosecution, although it may ultimately be limited due to requirements of the principle of dual criminality under article 46 (9), which will be explained in more detail in the specific section pertaining to international co-operation.

According to the criminal definition definition for money laundering under Mozambican law, the offences of corruption, among others, are predicate offence to money laundering. Moreover, the definition contained in article 4 seems to be in line with the definition contained in article 23 of the UNCAC and article 6 of the AU Convention, as well as Recommendation 1 FATF (which requires countries to have as a predicate offence to money laundering all serious offences, and should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically). It should be underscored that, regardless of whether the predicate offence was committed outside Mozambican jurisdiction (but not the offence of money laundering itself), the offence of money laundering is still punishable under Mozambican law. This seems to demonstrate that the offence of money laundering is autonomous to its predicate offence. The extent of this autonomy, however, it is not clear, and it cannot be directly inferred from the legislation whether a person may be punishable for the commission of money laundering but not the predicate offence (e.g., the prosecution demonstrates the connection with the predicate offence of the money laundering offence, but chooses not to prosecute for the predicate offence as well).

Law No. 7/2002 (article 2) and its Regulation (article 2) contain a comprehensive list of reporting entities (both financial institutions and non-financial bank institutions) which include, but are not limited to: financial institutions, credit institutions, financial unions, insurance companies, pension funds, stock exchange, mutual companies, bureaux de change, payment services, individual and collective companies, leasing companies, credit unions, investment firms, factoring, casinos, amongst others. It should be noted that certain gatekeepers (defined by FATF as, "individuals that 'protect the gates to the financial system' through which potential users of the system, including launderers, must pass in order to be successful"), such as lawyers, notaries and accountants, do not have the obligation to report under the anti-money laundering legislation of Mozambique. In that regard, due consideration should be given to include them in such list as reporting entities. Reporting entities should have an obligation to report money laundering offences under articles 14 of UNCAC.

With regards to the prevention of money laundering, article 40 of the UNCAC as well as Recommendation 4 FATF require States to have appropriate mechanisms to overcome obstacles that may arise out of the application of bank secrecy laws. This provision is contained in article 10 of Law No. 7/2002 and articles 11 and 13 of the Regulation to Law No. 7/2002. This customer due diligence (CDD) requirement and record-keeping measures (article 15 of Law No. 7/2002) seem to be mostly in line with international standards. However, special attention should be given to article 10, No. 2 of Law No. 7/2002, which informs that the obligation to identify and to verify the identity of customers for certain transactions when these are equal or superior to 441 times the minimum wage. In this regard, it is not possible to identify a precise amount which represents the minimum wage in the country, as Mozambique adopts a range of minimum wages for 11 different sectors of the economy. As such, the amount defined in the money laundering legislation for reporting purposes would range from over USD 88,000.00 (when considering the minimum wage for the financial sector industry for 2011) to USD 33,000.00 (when considering the the minimum wage for the agriculture and fishing industries for 2011). These amounts appear to be excessively large, especially when considering that most countries (many of which have a higher GDP per capita than Mozambique) make this reporting obligation for amounts which are in excess of USD 10,000.00. Moreover, the fact that the country has a range of minimum wages, and not one amount which is to be defined as a minimum wage may make the interpretation of the legislation by the reporting entities more difficult, which in turn demonstrates a weakness of the anti-money laundering in Mozambique. Nevertheless, the identification requirement seem to be in compliance with Recommendation 5 FATF (pertaining to CDD and record-keeping) and Recommendation 11 FATF, which deals with complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.

It should be highlighted that the record-keeping measures contained in article 15 of Law No. 7/2002 are in line with the provisions of Recommendation 10 FATF, which requires the retention of all customer identification and financial transaction records for at least five years. In that regard, the Mozambican legislation requires the retention of records 15 years after the termination of the relationship with the client. This provision is to be understood that no records can be destroyed while the relationship is ongoing, regardless of how long the relationship has been.

Recommendation 6 FATF pertains to enhanced due diligence requirements (EDD) to politically exposed persons (PEPs). UNCAC contains a similar provision in article 52 UNCAC. The difference in the provisions is that while the former requires EDD only for domestic PEPs, the latter requires EDD for both foreign and national PEP. Notwithstanding, it appears that Mozambique does not have explicit provisions for EDD requirements, be it for national or foreign PEPs. Thus, Mozambique should strive to create appropriate mechanisms to ensure that there are appropriate risk management systems that determine whether the customer is a PEP and to take reasonable measures to establish the source of wealth and of the funds, and to conduct enhanced ongoing monitoring of the business relationship with said PEP.

The anti-money laundering legislation of Mozambique and its respective Regulation do not seem to contain provisions with regards to Recommendations 7 (cross-border correspondent banking) and 8 (money laundering threats) FATF. It is not know whether there is specific regulation on the matter in Mozambique. Nevertheless, reporting entities should, with regards to Recommendation 7 FATF, gather sufficient information (from publicly available sources) about a respondent institution to understand fully the nature of the respondent's business and obtain approval from senior management, among others. With regards to Recommendation 8 FATF, financial institutions should financial institutions should have policies and procedures in place to address any specific risks associated with non- face to face business relationships or transactions.

Recommendation 26 FATF and article 58 of the UNCAC requires states to establish Financial Intelligence Unit (FIUs) that serves as a national centre for the receiving, requesting, analysing and disseminating of suspicious transaction reports (STR) and other information regarding potential money laundering. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STRs. Furthermore, under Recommendation 13 FATF, reporting entities are required to to report promptly its

suspicions to the FIU. In that regard, articles 16 and 20 of Law No. 7/2002 and article 17 of the Regulation to Law No. 7/2002 establishes that STRs should be channeled to the Prosecutor's Office – which is not the Mozambican FIU.

At first glance, it appears that the Mozambican anti-money laundering legislation does not seem to comply with the above-mentioned FATF Recommendations. This is because, on the one hand, while the Prosecutor's Office is not the Mozambican FIU; on the other hand, it should be highlighted that STRs are financial intelligence, and not evidence which can be utilised in a criminal investigation or prosecution. STRs are to be used as sources of intelligence, which lead law enforcement and prosecutorial authorities to potential offences which have been committed and need to be investigated. In that regard, Law No. 7/2002 indicates that both reporting entities and supervising authorities are obliged to inform the Prosecutor's office of any suspicions of the commission of money laundering, but are to do so in accordance to the rules set out by the Criminal Procedure Code. Thus, this it appears that this information provided by both the supervising authorities and the reporting entities are not financial intelligence, but rather actual evidence which can be brought forth as such to a court.

Notwithstanding the above, Law No. 14/2007 seems to bring greater clarity on the matter. Its article 1 creates the Mozambican FIU, known as the *Gabinete de Informação Financeira de Moçambique* – GIFiM, which is created under the Council of Ministers and has administrative (but not financial) autonomy. Article 2 of said law defines the competencies of GIFiM, which has the attributions of a FIU, as defined by Recommendation 26 FATF and article 58 of the UNCAC. Thus, it is responsible for receiving, requesting, analysing, and disseminating STRs.

Moreover, the functions of the GIFiM are not, according to Law No. 14/2007, incompatible with the provisions of communication, directly with the Prosecutor's office, by the reporting entities of the supervising authorities, as its article 11 (suspicious reporting) informs that the functions of the FIU are independent of those of the reporting obligations by other entities directly to the Prosecutor's office. Thus, it can be inferred that while the same information may be transmitted directly to the Prosecutor's office (which in turn could apparently use it as evidence, insofar as the rules on evidence from the Criminal Procedure Code are observed), the same information may be dealt as financial intelligence which cannot be used as evidence if it has been channeled through the FIU. While this may seem as a loss due to the lack of evidentiary standards, it should be taken into consideration that the FIU is better placed to process an analyse the information and produce meaningful intelligence which will result in more efficient and effective investigations and prosecution, as it may cross-check said information with other national and international authorities. Due to the enactment of Law No. 14/2007, it seems that Mozambique meets standards set forth in Recommendation 26 FATF.

4 International co-operation

International co-operation is important in a number of procedures and mechanisms in relation to the investigation and prosecution of corruption cases, especially as they have an international dimension. Notably, states may seek extradition (article 44 of the UNCAC) of a corrupt official or bribe giver to stand trial. Conversely, the case may benefit from a joint investigation between the involved countries (article 49 of the UNCAC), as the offender may have committed criminal activities in several jurisdictions (e.g., corruption in the victim country and money laundering in the third country which has received the proceeds from corruption).

More commonly, however, is the need to: (i) produce evidence in the requested country to substantiate the investigation or the prosecution in the requesting country; (ii) to preserve the proceeds and instrumentalities of corruption found in the requesting country through the enforcement of seizure orders from the requesting country to the requested country; or (iii) to perform a specific act of the criminal proceedings of the requesting country in the requested country, e.g., service of process of the defendant of a criminal proceeding taking place in a country different from where he or she is residing. As a consequence, UNCAC sets standards in several different types of international co- operation, including extradition (article 44), transfer of sentenced persons (article 45), mutual legal assistance (article 46), transfer of criminal proceedings (article 47), and joint investigations (article 49).

In addition, UNCAC informs in its article 43 that States Parties to consider affording international co-operation also in investigations of and proceedings in civil and administrative matters relating to corruption. This is because experience has shown the advantages of using civil litigation and non-criminal forms of seizure and confiscation of assets in combating corruption. The reasons for this are manifold, e.g., in a non-criminal case a state party can claim ownership of property stolen from it through corrupt practices or seek compensation for the harm caused by corruption and mismanagement. Another reason is that some countries do not have criminal liability of legal persons as discussed above and thus rely on civil or administrative sanctions to punish legal persons for corrupt practices. Another reason is the fact that some countries may have non-conviction based forfeiture (of which Mozambique appears to have not provisions). This type of forfeiture, although dependent on an underlying criminal fact, is both civil in nature and procedurally autonomous from the criminal proceedings against the perpetrator of the criminal act. The direct result is that the standard of proof is lower. Thus, it is important to allow for international co-operation in these matters so that the States Parties may have sufficient evidence to confiscate the proceeds of crime.

The UNCAC also contains provisions regarding the dual criminality standard (article 44 (9) of the UNCAC). Traditionally for one state to afford co-operation in legal matters to another state, the offence under investigation or prosecution in the country requesting the co-operation must also be considered an offence in the country that is asked to assist. This can cause problems due to the different legal traditions and conceptions of criminal law from one country to another. Whereas today most legal traditions still require that the dual criminal standard be met for certain acts of international co- operation, including seizing proceeds of corruption or extraditing the defendant, UNCAC and several other conventions that preceded it require states to abstain from denying assistance to each based on dual criminality requirements, although the abstention of the dual criminality requirement itself is a non-mandatory provision under UNCAC.

Even in cases in which a country may invoke the dual criminality standard (article 43 (2)), UNCAC provides that it be fulfilled if the offence falls under the same category in both the requesting and the requested countries. Thus, if the basic concept of the criminal act is similar in both the requesting and requested country but the name of the offence is different, the dual criminality standard should be deemed as fulfilled.

When it comes to the seizure and confiscation of proceeds of corruption, the main challenge is the enforcement of the confiscation order produced by the requesting country in the requested country. In an attempt to facilitate the confiscation and repatriation of assets to the victim country, UNCAC in its article 54 introduced procedures that allow the requested country to confiscate assets on behalf of the requesting country. Article 55 establishes a specific regime for international co-operation regarding asset recovery. This will be explained in more detail in the next section.

An important element that existed in previous conventions and was repeated by UNCAC is the rule that mutual legal assistance cannot be declined by the requested state on grounds of banking secrecy. This means that regardless of the legislation of the requested country pertaining to banking secrecy, such a provision cannot be invoked in order to deny assistance to the requesting country.

Article 74, No. 3, b) of the Criminal Procedure Code of Mozambique informs that letters are to be utilised by the judiciary authorities when an procedural act is to be practiced outside the jurisdiction of the territorial competency of said judiciary authority, and the letter rogatory is to be used when the act is to be done out of the country.

There appears to be no direct regulation on how the letter rogatory is to be used in criminal procedures – article 387, No. 1 of the Criminal Procedure Code informs that the depositions and declarations of witnesses, victims or other persons outside the jurisdiction of the court are to be done through letters rogatory, although no procedural rule is given (certain procedures could perhaps be found in the Civil Procedure Code of Mozambique, which has subsidiary application to the criminal procedure, as stated in article 2 of the Criminal Procedure Code. It is furthermore unclear if this provision could also be extended for the seizure and confiscation of the proceeds and instrumentalities of crime – a requirement for international cooperation under article 46 of the UNCAC, article 18 of the AU Convention and article article 10 of the SADC Protocol. The Mozambican legislation appears to have several gaps in relation to rules and applicability of international co-operation, whenther Mozambique is ther requesting or requested country.

Nothwithstanding, it should be noted that Mozambique would still have three mechanisms which would allow for international co-operation: (i) reciprocity undertaking; (ii) use of international treaties in which both Mozambique and the requested country have ratified; or (iii) the use of the internal legislation of the requested country for international co-operation, if the requested country has such legislation (e.g., the UK and Switzerland, among others). The application of these mechanisms will be explained in the following sections of the present report.

4.1 Extradition

Extradition is regulated in article 67 of the Constitution of Mozambique, which in turn contains its basic principles. The Constitution of Mozambique informs that extradition is not possible (i) for political purposes (article 67, No. 2 of the Constitution); (ii) for crimes which are punishable with the death penalty of life imprisonment sentences (article 67, No. 3, first figure, of the Constitution); (iv) if there is reason to believe that the person subject to the request for extradition may be subject to torture, or inhuman, degrading or cruel treatment (article 67, No. 3, *in fine*, of the Constitution); and (v) if the person which extradition is sought is a Mozambican national (article 67, No. 4 of the Constitution). Extradition is provided for in article 44 of the UNCAC, article 15 of the AU Convention and article 9 of the SADC Protocol.

Thus, the Constitution of Mozambique contains the reasons for which it will deny requests for extradition from a foreign jurisidictions. However, no specific provisions regarding the procedural aspects for extradition are contained in the Constitution of Mozambique, the Criminal Procedure Code or the proposed Criminal Code. Notwithstanding, extradition may be sought by, or requested to Mozambique through: (i) reciprocity undertaking; (ii) use of specific provisions for extradition

contained in the country which Mozambique requests the extradition; or (iii) through the use of bilateral or international treaties (e.g., the UNCAC), which have been ratified by Mozambique.

Due to the fact that there appears to be no further regulation on extradition in Mozambique, the country also binds itself, in general terms, to international customs relating to the matter. As such, it is bound both by (i) dual criminality requirements, in which the criminal offence in which extradition is sought, or is requested to Mozambique, must be a criminal offence in both countries; and (ii) by the *aut dedere aut iudicare* (to extradite or to prosecute) principle. This principle informs that, in the event that a person is not extradited, the state that denies the extradition commits itself to investigate and prosecute the person according to its own laws. Therefore, even if a Mozambican national cannot be extradited due to the provision contained in article 67, No. 4 of the Constitution of Mozambique, he or she must still face the criminal justice system of his own country. This provision is in line with article 44(12) of the UNCAC.

Other operational elements concerning extradition are not clear in the text of the Constitution. It is not clear, for example, if Mozambique may accept a request for extradition of a person that is still under investigation or prosecution in the requesting country, or if it would only allow the extradition of persons after a court has issued a conviction. It should be noted that this element is of particular importance since most countries do not allow for *in absentia* trials, that is, trials in which the investigated person has not been adequately served of process. This, in turn, may impact the effectiveness of the criminal justice system of the requesting country and give rise to impunity, as a denial to extradite may represent that the statutes of limitation for the prosecution of an offence has been met, which in turn would deem the prosecution futile.

With regards to extradition through reciprocity undertaking, extradition will only be possible if the four conditions set out in article 67 of the Constitution of Mozambique are met. Furthermore, the use of specific provisions pertaining to extradition contained in the legislation of another jurisdiction may only be applied in the event that Mozambique is requesting the extradition of a person that is to be found in the requested jurisdiction. Another jurisdiction, however, may not make use of its own legislation to request extradition to Mozambique, as this would represent and offence to Mozambican sovereignty.

Requests for extradition, either to or from Mozambique, may be done through the use of a bilateral agreement between both countries, or through an international treaty which has been ratified by both countries. As such, the UNCAC offers extensive regulation and procedures for extradition, which may be used by Mozambique due to the current lack of this specific regulation, since article 18, No. 2 of the Constitution informs that the UNCAC is a law in Mozambique as it has been regularly ratified by the country. Thus, for the specific case of combating corruption, there is ample regulation to be found in the UNCAC — however, this regulation will not be possible for offences which are not contained under Chapter III of the UNCAC, as well as those criminal offences which are not considered as such under the Mozambican laws.

Article 44(1) of the UNCAC informs that the dual criminality requirement is to be met for requests for extradition. Notwithstanding, article 44(1) has to be read in conjunction with article 43(2) of the UNCAC, meaning that Mozambique should consider the underlying factors of the criminal offence of the requested country and verify whether the elements of the offence are seeking to protect the same legal interest.

Even though article 44(2) of the UNCAC informs that extradition may be granted without the need for dual criminality, it appears that this may not be possible under the Constitution of Mozambique, as it may be understood by its courts as one of the exceptions contained in article 67, No. 2 or 3. Although a court in Mozambique may interpret otherwise, Mozambican authorities should strive to clarify in appropriate regulation whether the application of article 44(2) of the UNCAC is applicable in Mozambique.

Article 44(3) of the UNCAC contains an important provision seeking to reduce the denial of requests for extradition. As such, if the request for extradition to Mozambique refers to several offences, of which some of them may carry the punishment of a death penalty or of life imprisonment, Mozambique may deny the extradition for those offences, but grant the extradition for the remaining offences. This article does not seem to contradict article 67, No. 3, first figure, of the Constitution, as requests for extradition based on offences which carry such sentences will be rejected by Mozambican courts. Furthermore, to ensure that this will be respected, Mozambique, prior to handing the person to be extradited to the requesting country, will ensure the effectiveness of its extradition request by obtaining an undertaking from the requesting country that the person extradited will not be subject to proceedings pertaining to those offences.

Although Mozambique would be in a position to apply the rules contained in article 44 for requesting or authorising the extradition of persons without further regulation, it would be beneficial if such rules, as well as any other deemed necessary by Mozambique and which are in line with the international standards, were contained in the Criminal Procedure Code or other appropriate regulation.

4.2 Mutual legal assistance

Mutual legal assistance (MLA) is a modern response to the challenges of criminal activity which crosses the border of a country. While the century-old international practice of extradition sought to ensure that the criminal which fled one jurisdiction was brought to justice, countries relied on official written requests sent through diplomatic channels of communications, known as letters rogatory (mentioned in article 188 of the Civil Procedure Code of Mozambique), for the transmission of acts from the judicial system in one country to another. Through such a tradition, a country requested through diplomatic channels that the other recognised the legitimacy and jurisdiction of their judicial system in another country, and further requested it to enforce the act contained in the letter rogatory.

However, apart from the fact that the transmission of these requests often takes a long time, another fundamental problem arose: the requested state was only willing to carry out the request contained in the letter rogatory if it did not have an executing nature. As such, the executing nature of a request (which is ultimately dependent on each country's national legislation) may include elements ranging from obtaining oral evidence from a witness who is not willing to provide it, obtaining bank documents or even seizing assets. As one of the main elements of combating corruption is to deprive the criminal elements from their unlawful financial gains, it is of paramount importance to secure evidence and stolen wealth, thus heightening the chances of a successful prosecution.

MLA seeks to fill the gap between letter rogatories and extradition requests. Through MLA it is possible not only to carry out the non-executing nature of the letter rogatory, but it goes beyond it in the sense that it allows for the requested country to execute specific requests from the requesting country, such as obtaining banking information, essential to following the trail of proceeds of crime in order to later seize them. The full, non-exhaustive list of assistance that can be rendered via MLA is contained in article 46 (3). Note that ultimately anything that is not contrary to the fundamental principles and legislation of the requested country may be requested through MLA. More importantly, MLA enables the applicability of the asset recovery for the seizure, confiscation and return of the proceeds and instrumentalities of crime (contained in Chapter V of the UNCAC).

Despite this broad application of MLA, it should not be mistaken for a transfer of the responsibility to investigate to another country (commonly known as "fishing expedition"). Instead, the requesting country must conduct its own investigation and draft requests for assistance must be sufficiently clear, detailed and based on preliminary findings from its own investigation. The preliminary investigations of the requesting state must have shown evidence that this is the case and provided details about the bank in which the account is held.

Morever, MLA no longer primarily depends on the transmission of requests through diplomatic channels. Rather, it makes use of central authorities (article 46 (13) UNCAC), which are bodies designated to receive and either execute requests or transmit them to the appropriate executing authority.[11] This specialised body, knowing the requirements for MLA in its own jurisdiction, is both tasked with assisting foreign authorities to formulate and structure MLA in such a way that they are admissible in its jurisdiction, and with assisting its own local authorities to make appropriate requests based on the international treaties its country has ratified. Central authorities are therefore an important element of MLA as they assist in improving the incoming and outgoing requests for MLA. Moreover, they act as a central hub of communication for foreign authorities which may not know whom to contact within the country to execute the request. Ultimately, however, central authorities are an additional administrative step in international co-operation which may unnecessarily delay the assistance sought.

Generally, MLA depends on the requesting country transmitting an appropriate MLA request to the requested state, which puts the requested state in a passive position. Realising the lost potential of this for effective international legal cooperation, UNCAC through Articles 46(4) and 56 encourages States Parties to take a pro-active approach to MLA. Notably, it encourages state parties to allow the spontaneous transmission of information to another country that may be investigating the crime to which the information is related, in the hope that this will assist the investigating authorities in the formulation of a request for assistance.

Articles 46(9) through 46(29) contain basic procedures for obtaining MLA. They focus mainly on what countries cannot do in MLA as well as some general provisions which are elementary to MLA. For example, under articles 46 (10), (11) and (18), MLA may be sought to obtain evidence from persons detained or which are experts in the requested country, either by travelling to the requested country to provide evidence, or by utilising a video link so that it may be done via a video-conference. Article 46 (15) provides for the basic information which must be contained in a request for MLA. Article 46 (21) contains provisions in which a request for MLA may be refused, which are: (i) if the request is not made pursuant to the provisions of UNCAC, (ii) if the execution of the request offends the sovereignty, security, public order or other essential interests of the requested state; (iii) if the authorities of the requested state would be prohibited by its domestic law from carrying out the action requested, had the offence taken place in the requested state; (iv) if it is contrary to the legal system of the requested state.

Finally, it should be noted that the return of the proceeds and instrumentalities of crime is a fundamental principle of the UNCAC (article 51). It is for this reason that the States Parties must afford one another the widest scope for assistance in relation to the confiscation and repatriation of assets. As such, article 55 of the UNCAC inform that the rules of international co-operation (article 46 of the UNCAC) are to be applicable also for ensuring also the confiscation of proceeds and instrumentalities of crime. Moreover, under article 54 of the UNCAC, States Parties are to ensure that measures to order the confiscation of property of foreign origin and consider taking measures to allow for the confiscation of assets without a criminal conviction (article 54 of the UNCAC).

Mozambique does not appear to have domestic rules for mutual legal assistance and asset recovery. For this reason, and as mentioned in the previous section, Mozambique may request or grant requests for mutual legal assistance if these are done through reciprocity undertaking or through the rules contained in the UNCAC, insofar as the request stems from a corruption-related criminal proceeding. Due to the fact that Mozambique does not seem to meet the international standards in this regard, it is recommended that enabling regulation for mutual legal assistance be put in place in the Criminal Procedure Code of Mozambique.

[11] Mozambique has informed, upon deposit of the instrument of ratification of the UNCAC, the United Nations Office on Drugs and Crime (UNODC) that its the central authority for the purposes of MLA is the Attorney-General's Office.

4.3 Other forms of international co-operation

The UNCAC also contains non-mandatory provisions for other forms of international co-operation: (i) transfer of criminal proceedings (article 47); (ii) law enforcement co-operation (article 48); and (iii) joint investigations (article 49). Mozambican law does not appear to contain provisions for any of these forms of international co-operation, and should consider adopting enabling legislation in that regard.

There are times in international co-operation in which it is noted that more than one jurisdiction may have an interest or jurisdiction in the investigation or prosecution of a certain public official (e.g., country A for the offence of passive bribery and money laundering, while country B, where the proceeds are, would have jurisdiction over the money laundering offence as well). In such cases, article 47 allows for a country to consider transferring the proceedings from their own investigation and prosecution to another jurisdiction which is investigating or prosecuting the same person or case. In practice, when such transfers occur the proceedings are transferred to the jurisdiction that has the most evidence, as a successful prosecution in that jurisdiction is considered to be most likely.

Article 48 UNCAC provides for the effective co-operation between law enforcement authorities to identify persons and the movement of the proceeds of crime and other property. It is essential for a successful and effective investigation that this information travels as quickly as possible between law enforcement authorities not only within the country, but also to all affected countries to allow the quick and appropriate response from the necessary authorities. As such, the use of the International Criminal Police (INTERPOL) could be a channel through which effective law enforcement co-operation could be obtained.

Unlike article 47 UNCAC, in which a country renounces its jurisdiction to investigate and prosecute a person for a corruption-related offence, article 49 deals with the fact that there may be an interest from both countries to investigate the same fact for different reasons, of that two jurisdictions are investigating connecting offences (e.g., Country A is investigating a corrupt official, while Country B is investigating the company which offered the bribe to the public official of Country A) and may benefit from joint investigations. The effectiveness of the investigation and prosecution from both countries can be enhanced if they choose to conduct a joint investigation, sharing the evidence gathered by both countries in order to determine the facts more expeditiously.

5 Conclusion

The Mozambique anti-corruption package provides a comprehensive update of the current framework to more effectively prevent and combat corruption. While some specific aspects of this legislative package may fully meet the international standards, it is nonetheless of paramount importance that the anti-corruption package be approved in full by the Mozambican parliament as it currently stands, to ensure a comprehensive anti-corruption system in the country.

A separate document entitled, "Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique," had been previously prepared by the experts and contains a list of findings and recommendations. These findings and recommendations have been examined in detail in the present legal analysis. Thus, said document has been attached as an annex to the present legal analysis.

6 Bibliography

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