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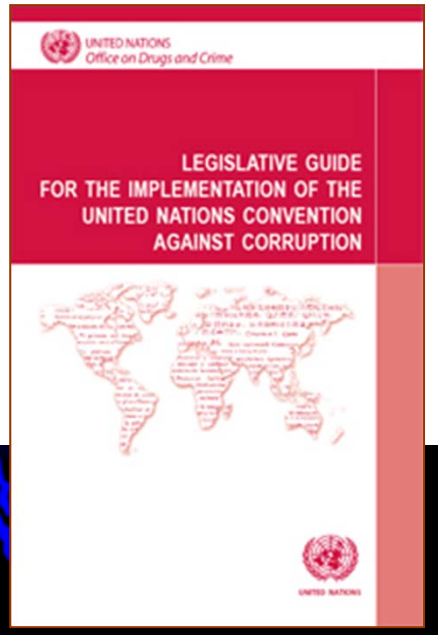

Legislative Guide: An Effective Implementation Tool

Regional Training of Governmental Experts of Arab Countries on the Mechanism for Reviewing Implementation of the United Nations Convention against Corruption

Rabat, 27-29 September 2010

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Purpose of the Legislative Guide, to:

- Assist States in ratifying and implementing UNCAC
- Identify legislative requirements and options for States drafting legislation
- Accommodate different legal traditions and levels of development
- Promote flexibility in implementing UNCAC while ensuring consistency

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Legislative Guide to be used during country reviews process

- Paragraph 10.b, Guidelines for governmental experts and the secretariat in the conduct of country reviews:

"The governmental experts shall prepare themselves by …familiarizing themselves with the *Legislative Guide for the implementation of the UNCAC* and with the *travaux préparatoires* of the negotiation of the Convention"

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Product of a Broad Participatory Process

- First draft developed by UNODC, experts of countries and observers from UN entities, and other international organizations
- Comments, inputs, proposals
- Published in 6 UN languages in 2006
- Updated Legislative Guide will be available on UNCAC website soon

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Content

- general provisions
- preventive measures
- criminalization, law enforcement and jurisdiction
- international cooperation
- asset recovery

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Each chapter contains

- introduction to the relevant article(s)
- summary of main requirements
- level of obligation
  - *-mandatory requirement*
  - *- optional requirement*
  - *-optional measure*
- related provisions and instruments
- examples

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Chapter II: Preventive Measures

- Focusing on
  - preventive anti-corruption policies and practices (arts. 5, 6, 10, 13)
  - transparency measures and systems in public sector (arts. 7, 8, 9)
  - judiciary and prosecution (art. 11)
  - private sector (art. 12)
  - prevention of money-laundering (art. 14)

- Drawing attention on level of obligation (mandatory requirements, optional requirements, optional measures)

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Chapter III: Criminalization

- Focusing on
  - mandatory criminalization (arts. 15, 16.1, 17, 23, 25)
  - non-mandatory offences (arts. 16.2, 18, 22, 24)
  - liability of legal persons (art. 26)
  - participation and attempt (art. 27)
  - law enforcement (arts. 28-41)
  - jurisdiction (art. 42)

- Drawing attention on
  - definition of “public official” (broader in UNCAC than in UNTOC)
  - criminalization of offences in private sector (only under UNCAC, not under UNTOC)

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Chapter IV: International Cooperation

- Focusing on

  - assistance in investigations and proceedings; dual criminality (art. 43)
  - extradition (art. 44)
  - mutual legal assistance (art. 46)
  - mandatory requirements (arts. 47, 48, 50)
  - optional requirements (arts. 45, 49)

- Drawing attention on obligation to afford the widest measures of MLA in investigations, prosecutions and proceedings

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Chapter V: Asset Recovery

- Focusing on
  - prevention and detection of transfer of proceeds of crime (art. 52)
  - direct recovery (art. 53)
  - mechanisms for recovery (art. 54), international cooperation (art. 55)
  - special cooperation (art. 56), FIUs (art. 58)
  - return and disposal of assets (art. 57)

- Drawing attention on UNCAC innovative provisions (direct recovery, return and disposal of assets)

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Examples of national legislation in the Legislative Guide

- Characteristics
  - from different regions
  - from various legal traditions
  - not taking in account legal, social, economic and cultural aspects

- Consequence
  - not being considered as model provisions

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Cross references in the Legislative Guide

- Relevant international instruments (UNTOC, UN Convention against illicit traffic in narcotic drugs and psychotropic substances, etc.)
- International standards, recommendations (FATF 40+9 recommendations, etc.)
- Relevant regional and sub-regional instruments (OECD, Latin-America, Africa)

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Level of obligation in UNCAC

- Mandatory requirement (obligation to take legislative or other measures)
  - "each State party *shall* adopt"

- Optional requirement (obligation to consider)
  - "each State party *shall consider* adopting"
  - "each State party *shall endeavour* to"

- Optional measure (measure that State party may wish to consider)
  - "each State party *may* adopt/consider"

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Examples of safeguard clauses in UNCAC (1)

- "Subject to Constitution and fundamental principles of legal system" (art. 20)
- "Subject to the basic concepts of legal system" (art. 23.1(b))
- "Consistent with legal principles" (art. 26)
- "In accordance with legal system and constitutional principles" (art. 30.2)
- "To the extent consistent with fundamental principles of legal system" (art. 30.6)
- "Subject to the provisions of domestic law and extradition treaties" (art. 44.10);

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Examples of safeguard clauses in UNCAC (2)

- "A State party whose law so permits" (art. 44.4)
- "If the domestic law so permits and in conformity with the requirements of such law" (art. 44.13)
- "To the extent not contrary to the domestic law…" (art. 46.17)
- "To the extent permitted by the basic principles of domestic legal system and in accordance with the conditions prescribed by domestic law" (art. 50.1)
- "To the extent that such a requirement is consistent with the fundamental principles of domestic law and with the nature of judicial and other proceedings" (art. 31.8)

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Implementation requirements of UNCAC

- Article 65, paragraph 2, UNCAC:

  "Each State party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption"

- Interpretative note on chapter III, UNCAC *Travaux Préparatoires*:

  "It is recognized that States may criminalize or have already criminalized conduct other than the offences listed in chapter III as corrupt conduct"

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Conclusion

- Governmental experts should familiarize themselves with Legislative Guide
- Legislative Guide will assist in promoting the understanding of chapters under review
- Legislative Guide is not mandatory
- Legislative Guide is available in Arabic
- For any question, contact:

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