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State of implementation of the United Nations
Convention against Corruption

Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Tonga

1. Introduction: overview of the legal and institutional framework of Tonga in the context of implementation of the United Nations Convention against Corruption

Tonga acceded to the United Nations Convention against Corruption on 6 February 2020. The country’s legal system follows the common law tradition. Treaties, once ratified, are not automatically incorporated into domestic law but domesticated through the enactment of legislation.

Tonga is a constitutional monarchy, where the King is the Head of State and is assisted by the Privy Council, which comprises persons appointed by him pursuant to clause 51 of the Constitution.

The reformed Constitution was agreed upon by the Legislative Assembly in December 2009 and implemented through legislation passed in 2010. The government structure comprises the executive (the Cabinet), the Legislative Assembly and the judiciary.

The Legislative Assembly, a unicameral legislature, is composed of representatives of the nobles, who are elected from among the holders of the country’s noble titles, representatives of the people, and all members of the Cabinet.

The executive comprises the Prime Minister, who is appointed by the King on the recommendation of the Legislative Assembly, and the Cabinet, which consists of the other ministers nominated by the Prime Minister and appointed by the King.

The judicial power is vested in the Court of Appeal, the Supreme Court, the Land Court and the Magistrate’s Court.

The main anti-corruption bodies are the Ministry of Justice, the Attorney General’s Office, Tonga Police, the Transaction Reporting Authority of the National Reserve Bank of Tonga, the Public Service Commission, the Tonga Auditor General’s Office and the Office of the Ombudsman.

The legal framework against corruption principally comprises the Criminal Offences Act [Cap. 4.04], the Public Service Act [Cap. 2.11], the Public Audit Act [Cap. 11.06], the Money Laundering and Proceeds of Crime Act [Cap. 4.07], the Tonga Police Act [Cap. 7.07] and the Anti-Corruption Commissioner Act [Cap. 2.01]. Several legislative measures have also been developed recently, including amendments to the Anti-Corruption Commissioner Act [Cap. 2.01].

2. Chapter III: criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

As a cross-cutting observation, it is noted that the criminal laws of Tonga refer to various categories of public officials, not all of which correspond to the categories set out in article 2 of the Convention, such as unpaid persons and those exercising public functions, including in State-owned enterprises. Although the Criminal Offences Act [Cap. 4.04] applies to government servants, described according to case law as “any person in the service of the Government”, including Cabinet ministers, the term is not defined for the purposes of the Act. In contrast, other specialized laws apply to a wider range of officials, such as the Counter Terrorism and Transnational Organised Crime Act [Cap. 4.03], which applies to “public officials” as defined in section 2 of the Anti-Corruption Commissioner Act [Cap. 2.01], comprising a wider range of persons.

1 Rex v. Tu’ivakano [2020] TOSC 5.
Bribery and trading in influence (arts. 15, 16, 18 and 21)

The Criminal Offences Act [Cap. 4.04] criminalizes active and passive bribery of government servants (sects. 50 and 51). Additional bribery offences are established under the Counter Terrorism and Transnational Organised Crime Act [Cap. 4.03] in respect of organized groups, the Anti-Corruption Commissioner Act [Cap. 2.01] in respect of officers of the Anti-Corruption Commissioner, the Electoral Act [Cap. 2.03] in respect of bribery in the election process, the Tonga Police Act [Cap. 7.07] in respect of active bribery of members of Tonga Police and the Customs and Excise Management Act [Cap. 11.03] in respect of passive bribery of customs officers.

Although the offences largely comply with the elements of article 15 of the Convention in their respective fields, the Criminal Offences Act [Cap. 4.04] does not include the element of “promising” in the case of active bribery or indirect commission of the offence; moreover, the element of “undue advantage” is limited to “money or valuable consideration”. The Electoral Act [Cap. 2.03] also covers only any “money or valuable gift”.

Transnational bribery is not established as a criminal offence in Tonga.

Active and passive trading in influence, although not explicitly criminalized, are partially covered by the provisions on bribery in the Criminal Offences Act [Cap. 4.04] (sects. 50 and 51) and the related bribery offences referred to above. The subjects of those offences do not include persons other than public officials and do not address the key element of abusing one’s real or supposed influence over the exercise of public administration.

Bribery in the private sector is not established as a criminal offence.

Money-laundering, concealment (arts. 23 and 24)

Section 17 of the Money Laundering and Proceeds of Crime Act [Cap. 4.07] criminalizes money-laundering. The Act applies in respect of proceeds of “serious offences” punishable by a term of imprisonment or other deprivation of liberty of 12 months or more (sect. 2 (1)), which includes corruption offences criminalized in Tonga. Participatory acts are punishable under sections 5 (attempt), 8 (abettment) and 15 (conspiracy) of the Criminal Offences Act [Cap. 4.04], in accordance with judicial precedent. Self-laundering is criminalized and there has been a conviction in relation thereto (sect. 17 (4) of the Money Laundering and Proceeds of Crime Act [Cap. 4.07]).

In Tonga, all offences, committed both within and outside the jurisdiction, for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months or a more severe penalty are recognized as predicate offences. The definition extends to conduct abroad that constitutes an offence in another country and would have constituted an offence in Tonga if it had been committed domestically. A range of offences established in accordance with the Convention fall within this threshold in Tonga, although there are shortcomings in the definition and elements of such offences.

Concealment and continued retention of proceeds of crime are covered pursuant to sections 148 (receiving) and 153 (possession of stolen property) of the Criminal Offences Act [Cap. 4.04].

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Section 53 of the Criminal Offences Act [Cap. 4.04] establishes an offence of fraudulent conversion by government servants, which is punishable by a term of imprisonment of 3 to 10 years and which covers the elements of embezzlement, misappropriation or other diversion of property. The offence covers money and all other property, both real and personal, including intangible property that is capable of being stolen.

Abuse of functions is not criminalized in Tonga.
Tonga has not established illicit enrichment as a criminal offence.

Sections 143, 158, 161 and 162 of the Criminal Offences Act [Cap. 4.04] provide for the criminalization of theft, embezzlement and fraudulent conversion of property in the private sector.

Obstruction of justice (art. 25)

The Criminal Offences Act [Cap. 4.04] covers offences such as perjury (sect. 63), false statements (sect. 64), obstruction of justice (sect. 65) and bribery of jurors. Furthermore, the Anti-Corruption Commissioner Act [Cap. 2.01] criminalizes acts relating to investigations conducted by the Commissioner, such as the giving of false and misleading evidence (sect. 62), offences relating to documents (sect. 63), the procurement of false testimony (sect. 64) and the obstruction and bribery of witnesses of the Commissioner (sects. 65–67).

The Criminal Offences Act [Cap. 4.04] criminalizes interference with the exercise by justice or law enforcement officials of official duties (sects. 55–57).

Liability of legal persons (art. 26)

Legal persons may be criminally liable under the Criminal Offences Act [Cap. 4.04] by virtue of the definition of “person” in section 2 of the Interpretation Act [Cap. 1.02], according to which the term “person” includes any body of persons corporate or unincorporate. The section also provides for the replacement of terms of imprisonment under the law by pecuniary penalties. There are no obstacles to holding legal persons criminally liable irrespective of the liability of the legal entity, and a case example was provided. Joint and several liability of directors and other officers is established.

Legal persons may be civilly liable in accordance with common law principles and are subject to administrative sanctions, such as debarment under the Public Procurement Regulations [Cap. 2.10.06] and cancellation of business licences pursuant to the Business Licences Act [Cap. 17.01].

Participation and attempt (art. 27)

Sections 8, 12 and 15 of the Criminal Offences Act [Cap. 4.04] establish as criminal offences various acts of participation, such as abetting, commanding, counselling, inciting, encouraging, procuring and conspiring in the commission of an offence. Attempt is covered in section 5 of the Act. Tonga has criminalized the preparation for an offence in the form of conspiracy.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Sanctions for the offences established in accordance with the Convention vary, and the laws primarily establish maximum ceilings, which include imprisonment for terms of 3 to 10 years, with or without a fine not exceeding $5,000 to $1 million. Terms of imprisonment may either be imposed in addition to or substituted by the payment of compensation (sect. 25 (3) of the Criminal Offences Act [Cap. 4.04] and community service (sect. 25A (9) of the Act). Authorities expressed an interest in developing sentencing guidelines for the judiciary, building on judicial precedent, and in reviewing and harmonizing the established range of sentences for offences established in accordance with the Convention in line with other specialized laws that establish higher penalties.

There are no criminal immunities for public officials in Tonga, except for the King. Clause 73 of the Constitution [Cap. 1.01] establishes personal immunity for members of the Legislative Assembly while it is sitting, except in relation to indictable offences, as well as legislative privilege for words spoken or written in the Assembly. Tonga has prosecuted Cabinet ministers, including a former Prime Minister, and members of the Legislative Assembly.
In accordance with clause 31A of the Constitution [Cap. 1.01], the Attorney General, who is appointed by the King, has complete discretion to exercise his or her legal powers and duties, independently and without any interference whatsoever from any person or authority. Prosecutorial discretion is guided, to some extent, by the Prosecution Code and the Director of Public Prosecution’s Guidance on Charging. Section VII of the Prosecution Code establishes general guidance on the selection of charges. In order to strengthen the independence of the prosecution, in particular in cases involving public officials, at the time of the review steps were under way to separate the office of the Director of Public Prosecutions from that of the Attorney General.

The Bail Act [Cap. 3.01] (sects. 3–6 and 10) and the Criminal Offences Act [Cap. 4.04] (sect. 201) address matters of release pending trial or appeal. In particular, sections 4, 4A and 4B of the Bail Act [Cap. 3.01] provide for conditions of bail that take into account the need to ensure the defendant’s presence at subsequent criminal proceedings.

The criteria for granting release on probation are regulated in section 198 of the Criminal Offences Act [Cap. 4.04]. They include the nature of the offence (severity) and the circumstances under which the offence was committed. The conditions for release on licence or parole, as stipulated in section 59 of the Prisons Act [Cap. 7.08], take into account the gravity of the offence. In accordance with the Constitution [Cap. 1.01], the King may also grant pardons (clause 37).

Section 7 (1) (b) of the Public Service Act [Cap. 2.11] gives the Public Service Commission the authority to suspend any public servant pending an investigation into the contravention of any law. The Public Service (Disciplinary Procedures) Regulations [Cap. 2.11.01] establish grounds and procedures for removing, suspending, transferring or reassigning public officials in cases where serious disciplinary offences are established and disciplinary proceedings are complete (regulations 5, 6, 9 and 10). Police officers may also be suspended if any disciplinary or criminal proceedings against them have commenced (sect. 79 (1) of the Tonga Police Act [Cap. 7.07]). Where it appears that a criminal offence may have been committed, the matter must be reported to the police (regulation 5 (4)).

Persons convicted of criminal offences and sentenced to a term of imprisonment of more than two years are disqualified from holding public office or standing for election to the Legislative Assembly unless they are pardoned by the King (clause 23 of the Constitution [Cap. 1.01]). Furthermore, section 7 (4) of the Public Service Act [Cap. 2.11] gives the Commission the authority to dismiss any public servant who is convicted of an offence, and no employee previously dismissed may be reappointed, even on a temporary basis, without the prior approval of the Commission (instruction 1B.5.2 of the Public Service Policy and Instructions). Section 14 (4) (c) of the Public Enterprises Act [Cap. 14.03] provides that persons who are prohibited from being appointed as directors under the Companies Act [Cap. 17.03] cannot be appointed as directors of public enterprises; this includes persons convicted of certain offences of dishonesty, but not corruption (sect. 386). State-owned enterprises, such as the Tonga Water Board, have established their own prohibitions on the hiring of convicted persons.

Prisoner reintegration programmes have been established and related measures are ordered during sentencing.

Immunity from prosecution may be granted by the Attorney General to cooperating offenders in accordance with section 31A of the Constitution [Cap. 1.01]. It was reported that immunities are rarely applied except in serious cases, and plea-bargaining agreements may be concluded under the final determination of the court. Furthermore, section 68 (2) of the Anti-Corruption Commissioner Act [Cap. 2.01] establishes that the Attorney General may provide written notice of immunity from prosecution to a person who may be implicated in the commission of an offence relating to a matter under investigation by the Commissioner if that person provides assistance to the Commissioner. The courts may mitigate the punishment of
an accused person on application by the Director of Public Prosecutions or by Tonga Police in cases involving informants. Cooperating offenders may be afforded protection in the same manner as witnesses.

Protection of witnesses and reporting persons (arts. 32 and 33)

Although there are no explicit provisions on the protection of witnesses and experts in criminal proceedings, the courts and law enforcement authorities have inherent powers to authorize necessary protection measures in specific cases, as also addressed in the Supreme Court Orders and Practice Directions. Furthermore, evidentiary measures allow for evidence to be given remotely and by audiovisual means. Section 42 of the Anti-Corruption Commissioner Act [Cap. 2.01] affords limited protection to witnesses and persons assisting the Commissioner, including arrangements for the safety of such persons and their protection from intimidation or harassment. In principle, victims are covered to the same extent as witnesses and in practice, the views and concerns of victims are considered during criminal proceedings, although there are no specific rules in this regard. Tonga has not entered into agreements with other States for the relocation of witnesses and victims, but it may grant protection to foreign persons pursuant to an ad hoc arrangement and has done so in the past.

Tonga has not established comprehensive provisions on the protection of persons who report corruption from unjustified treatment. It is unclear whether the provisions in the Anti-Corruption Commissioner Act [Cap. 2.01] protect persons who report acts of corruption to the Commissioner, and a prerequisite, in any case, is that the person “assist the Commissioner”, which sets the bar high for reporting persons.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

In accordance with part III (sects. 28, 29, 34 and 35) of the Money Laundering and Proceeds of Crime Act [Cap. 4.07], the Attorney General has discretionary power to apply, not later than two years after a conviction, to the Supreme Court for a confiscation order against tainted property, as defined in section 2 of the Act. The definition includes property derived from, used or destined for use in or obtained through the commission of an offence, as well as any unexplained property and property of corresponding value to the aforementioned instruments and proceeds of crime. The provisions apply in respect of any serious offence for which a person is convicted (including stand-alone corruption offences). The definition of “tainted property” provides for value-based confiscation, and confiscation is possible in cases where a person dies or absconds (sects. 32 and 33). Pecuniary penalty orders in respect of benefits derived from the commission of an offence may also be sought (part III, division 2).

Tonga has a range of measures in place to allow for the tracing and preliminary detention of property. While section 19C of the Money Laundering and Proceeds of Crime Act [Cap. 4.07] provides for the seizure of cash and section 21 deals with property tracking orders, part III, division 3, deals with the control of property (including powers to search for and seize tainted property), and division 4 covers restraining orders. Division 6 concerns production orders and other information-gathering powers. These measures apply to tainted property in respect of serious offences.

The Money Laundering and Proceeds of Crime Act [Cap. 4.07] provides for the establishment of a confiscated and forfeited assets fund (sect. 48A). Cash seized for more than 48 hours is placed in an interest-bearing account (sect. 19E). By court direction, the Attorney General or another person takes custody of restrained property and controls, manages or otherwise deals with it in accordance with the directions of the court (sect. 58 (2)). The court may appoint a receiver in respect of confiscated property pending realization (sect. 67). The Tonga Police Act [Cap. 7.07] contains additional provisions on search and seizure (part 4, division 7), the forfeiture of seized
objects and the management of property in police custody (part 6, division 1). Tonga Police applies a policy for the handling of exhibits and property.

The definition of the term “proceeds of crime” contained in section 2 of the Money Laundering and Proceeds of Crime Act [Cap. 4.07] is broad and covers intermingled, transformed or converted property and income and benefits derived therefrom. Moreover, Tonga may apply value-based confiscation, as well as confiscation of the benefits of tainted property.

Pursuant to sections 20 and 23 of the Money Laundering and Proceeds of Crime Act [Cap. 4.07], the Transaction Reporting Authority or an authorized police officer may apply for search warrants or property tracking and monitoring orders for any documents and orders, including those held by banks and other financial institutions. Pursuant to a memorandum of understanding with the Authority, or through the Serious Financial Crimes Committee, police officers can access financial and banking records.

Sections 42 and 43 of the Money Laundering and Proceeds of Crime Act [Cap. 4.07] contain an implied burden on the defendant to demonstrate the lawful origin of alleged benefits of serious offences. Furthermore, the broad definition of tainted property subject to confiscation includes, among other items, any unexplained income from sources unrelated to criminal activity and property of corresponding value to the instruments and proceeds of crime.

The protection of bona fide third parties is provided for in sections 19I, 19J and 37 of the Money Laundering and Proceeds of Crime Act [Cap. 4.07].

Bank secrecy obligations can be overridden by section 25 (1) of the Banking Act 2020 and section 23 of the Money Laundering and Proceeds of Crime Act [Cap. 4.07].

*Statute of limitations; criminal record (arts. 29 and 41)*

There is no statute of limitations for offences established in accordance with the Convention in Tonga.

Courts rely on previous foreign convictions in criminal proceedings (Rex v. Unga CR 84 of 2014).

*Jurisdiction (art. 42)*

With the exception of the Counter Terrorism and Transnational Organised Crime Act [Cap. 4.03], the country’s criminal law does not establish specific rules on jurisdiction. It was explained that jurisdiction under the Criminal Offences Act [Cap. 4.04] is specified by common law. Accordingly, Tonga exercises territorial jurisdiction over offences committed in Tonga and within a perimeter thereof, but not over crimes committed by or against nationals outside the jurisdiction.

However, although the Money Laundering and Proceeds of Crime Act [Cap. 4.07] does not contain rules on jurisdiction, it does, through its definition of “serious offence”, extend jurisdiction over any such offences regardless of the status of the offender and the location of the offence, provided that the dual criminality requirements are satisfied.

Tonga does not have any measures in place establishing jurisdiction over offences when the alleged offender is present in its territory and is not extradited, except where the offence falls within the scope of the Counter Terrorism and Transnational Organised Crime Act [Cap. 4.03] (sect. 87); in such cases, Tonga would not prosecute the offender unless the crime was committed in its territory.

Consultation and coordination with other States in exercising jurisdiction are not explicitly provided for in the legislation but may be carried out in practice.
Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Tonga does not have explicit legal provisions addressing the consequences of corruption. Under section 3 of the Civil Law Act [Cap. 5.01], the courts apply the common law of, and the rules of equity in force in, England. Thus, the principle of English law that contracts procured by corruption are voidable applies, and this is stipulated in the public procurement regulations. Business licences may be revoked under section 11 of the Business Licences Act [Cap. 17.01].

The Criminal Offences Act [Cap. 4.04] establishes the payment of compensation as an independent sanction that can be ordered either in addition to or as a substitute for other punishment (sects. 24 and 25). Section 25 of the Act stipulates that any person who is tried and convicted may be ordered to pay compensation to any injured person. The Minister of Finance may authorize payments from the Confiscated and Forfeited Assets Fund to compensate victims who have suffered losses as a result of serious offences (sect. 48A (3) of the Money Laundering and Proceeds of Crime Act [Cap. 4.07]). In addition to criminal compensation, injured persons can also claim compensation for damages caused by corruption in civil courts under the common law principles recognized in clause 103A of the Constitution [Cap.1.01].

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

The Anti-Corruption Commission, which was in the process of being established at the time of the country visit, is empowered to investigate and prosecute corruption cases (sect. 10 of the Anti-Corruption Commissioner Act [Cap. 2.01]). At the time of the country visit, the position of Anti-Corruption Commissioner remained unfilled.

The independence of the Commission is provided for in the Anti-Corruption Commissioner Act [Cap. 2.01], through various provisions on functional independence aimed at protecting the Commission’s operation from undue interference. At the time of the review, a budget for the Commission had been established, but measures for the training of personnel had not yet been developed.

The Attorney General is appointed and may be removed by the King in Privy Council, on the advice of the Judicial Appointments and Discipline Panel (clause 31A of the Constitution). At the time of the country visit, steps were under way to codify the same procedure for the appointment and removal of the Anti-Corruption Commissioner and the Tonga Police Commissioner in the Constitution [Cap.1.01].

The Ombudsman handles administrative grievances and may refer matters for criminal investigation. The appointment and removal of the Ombudsman are carried out by the Legislative Assembly (clause 31B of the Constitution; sects. 3 and 6 of the Ombudsman Act [Cap. 2.02]).

While some anti-corruption training is provided from overseas, primarily through the Pacific Islands Law Officers’ Network, authorities reported that there is a need to continue to strengthen the specialized capacity and resources of institutions tasked with combating corruption.

By law, the Anti-Corruption Commissioner is tasked with collaborating with law enforcement agencies, including the Attorney General, the Auditor General and the Police Commissioner, as well as other persons and bodies, as appropriate (sect. 11 of the Anti-Corruption Commissioner Act [Cap. 2.02]). Public officials are required to report to the Commissioner any suspected matter of corruption (sect. 9 of the Act). The Anti-Corruption Commissioner may require the relevant authority to submit a report, and the relevant authority must comply with the requirements and directions of the Commissioner (sect. 45 of the Act). There is also a duty for public servants and members of the police to report corruption under their respective codes of conduct.

The Cabinet Committee on Serious Financial Crimes has been established and meets when requested by any of its members. In addition, section 11A of the Money Laundering and Proceeds of Crime Act [Cap. 4.07] establishes a level of cooperation with government agencies required of the Transaction Reporting Authority.
No measures to encourage cooperation between national investigating and prosecuting authorities and the private sector were reported, besides the obligations under the Counter Terrorism and Transnational Organised Crime Act [Cap. 4.03] and the Money Laundering and Proceeds of Crime Act [Cap. 4.07]. In accordance with section 8 of the Anti-Corruption Commissioner Act [Cap. 2.01], any person may make a complaint to the Commissioner, including anonymously.

2.2. Successes and good practices

- The absence of a statute of limitations period for corruption offences (art. 29).
- The prosecution by Tonga of high-level officials, including Cabinet ministers, a former Prime Minister and members of the Legislative Assembly (art. 30, para. 2).

2.3. Challenges in implementation

To further strengthen existing anti-corruption measures, it is recommended that Tonga:

- In respect of offences established in accordance with the Convention, establish a clear and uniform legislative definition of public officials in line with article 2 of the Convention (general recommendation).
- Expand the scope of the offences of active and passive bribery in the relevant laws to include the element of “promise” for active bribery and indirect acts, and expand the scope of “undue advantage” to include all categories of advantages (art. 15).
- Criminalize active bribery of foreign public officials and officials of public international organizations and consider criminalizing passive bribery of such officials (art. 16).
- Consider criminalizing trading in influence in line with the Convention (art. 18).
- Consider criminalizing abuse of functions (art. 19).
- Consider criminalizing illicit enrichment (art. 20).
- Consider criminalizing bribery in the private sector (art. 21).
- Review and harmonize the range of sentences for offences established in accordance with the Convention in line with other specialized laws that prescribe higher penalties, and consider developing sentencing guidelines for the judiciary (art. 30, para. 1).
- Ensure that discretionary legal powers relating to the prosecution of persons for offences established in accordance with the Convention are exercised to maximize the effectiveness of law enforcement measures, and continue steps towards separating the office of the Director of Public Prosecutions from that of the Attorney General (art. 30, para. 3).
- Adopt measures to provide effective protection from retaliation or intimidation for witnesses, experts and victims, and their relatives and other persons close to them, as appropriate, as well as for cooperating offenders, in corruption cases, and measures to enable the views and concerns of victims to be considered at appropriate stages of criminal proceedings; furthermore, consider adopting effective mechanisms for the protection of reporting persons (arts. 32, 33 and 37, para. 4).
- Continue to strengthen the specialized capacity and resources of institutions tasked with combating corruption, including Tonga Police, the Attorney General’s Office and the Transaction Reporting Authority of the National Reserve Bank of Tonga; fully operationalize the Anti-Corruption Commission, including by appointing its Commissioner; and stipulate the procedure for the
appointment and removal of the Anti-Corruption Commissioner and the Police Commissioner in the Constitution (art. 36).

• Strengthen measures to encourage cooperation between national investigating and prosecuting authorities and the private sector (art. 39, para. 1).

• Stipulate the rules on jurisdiction over offences established in accordance with the Convention committed in its territory or on board domestic ships and aircraft (art. 42, para. 1); adopt measures to ensure jurisdiction over offences when the alleged offender is present in its territory and is not extradited (art. 42, para. 3); and consider establishing jurisdiction over offences established in accordance with the Convention in line with article 42, paragraphs 2 and 4.

2.4. **Technical assistance needs identified to improve implementation of the Convention**

Tonga requested the following technical assistance to implement the above recommendations:

• Specialized training and capacity-building for the institutions tasked with combating corruption through law enforcement (art. 36).

3. **Chapter IV: international cooperation**

3.1. **Observations on the implementation of the articles under review**

*Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)*

Extradition is governed by the Extradition Act [Cap. 3.07]. In accordance with section 4 of the Act, the Cabinet, by Cabinet Order, designates countries to which the Act applies. At the time of the country visit, the Cabinet’s Extradition (Designated Countries) Order [Cap. 3.07.01] included 50 jurisdictions, including most Pacific Island countries and countries with close economic and social ties with Tonga. Under section 5 (1) of the Act, dual criminality is required for offences punishable by a term of imprisonment of two years or more. This covers offences established in accordance with the Convention. The domestic legislation is supplemented by international agreements, one bilateral extradition treaty with the United States of America and the London Scheme for Extradition within the Commonwealth.

Authorities stressed that Tonga applies the dual criminality requirement in a flexible manner based on the underlying conduct in accordance with its obligations under the Convention, and provided an example of a completed extradition case involving conduct that has not been criminalized under Tongan law.

The Extradition Act [Cap. 3.07] does not provide for extradition for accessory offences. Nevertheless, section 6 (3) sets out conditions under which a person who is extradited can be proceeded against for an offence lesser than the offence in respect of which extradition was sought. A definition of “political offence” is contained in the same section. In accordance with section 6 (5) (d), offences established in accordance with the Convention are not considered political offences.

Tonga does not make extradition conditional upon the existence of a treaty, provided that the requesting country is included in the Extradition (Designated Countries) Order. Tonga recognizes the Convention as a legal basis for extradition.

The Extradition Act [Cap. 3.07] establishes various conditions for extradition, including the minimum penalty requirement and grounds for refusal (sects. 5, 6, 10 (3)–(5) and 11 (3)). Reciprocity is generally required for extradition, and decisions on refusal are taken by the Prime Minister, the court of committal or the Supreme Court (sect. 6). Section 5 (2) explicitly provides that fiscal matters are not grounds for refusing extradition.

Requests for extradition are submitted to the Attorney General through the Ministry of Foreign Affairs. A simplified evidentiary threshold (prima facie standard) applies
to extradition cases. However, there is no specific procedure or practice for expediting procedures, including through a case management system.

In Tonga, nationality is not a ground for refusing extradition, and the country has extradited its nationals. The Extradition Act [Cap. 3.07] allows for the unconditional extradition of Tongan nationals. However, the country would not prosecute a national whose extradition was refused, unless the crime was committed in Tonga or the offence fell within the scope of the Counter Terrorism and Transnational Organised Crime Act [Cap. 4.03].

Persons sought for extradition enjoy due process rights and guarantees (clause 4 of the Constitution [Cap. 1.01]; sect. 10 of the Extradition Act [Cap. 3.07]). Case examples were provided. Section 6 (1) of the Act provides for the refusal of extradition on the grounds of the discriminatory nature of the request. Gender and ethnic origin are not covered. Section 9 of the Act regulates foreign requests for the consensual transfer of detained persons.

Consultations are held in practice without the need for specific legislation. Case examples were provided.

There have been few requests for extradition; Tonga has never refused a request involving a corruption-related offence.

The Transfer of Prisoners Act [Cap. 7.10] and the Scheme for the Transfer of Convicted Offenders within the Commonwealth apply for the transfer of sentenced persons.

There is no law on the transfer of criminal proceedings, and Tonga enters into such agreements or arrangements with other States on a case-by-case basis.

**Mutual legal assistance (art. 46)**

The Mutual Assistance in Criminal Matters Act [Cap. 4.08] provides for a range of legal assistance that Tonga may provide to any foreign State in respect of investigations and proceedings relating to serious offences under Tongan law (sects. 2 and 4). The Act does not require a foreign State to enter into a treaty with Tonga, and Tonga may provide assistance in the absence of a treaty on the basis of reciprocity. A “serious offence” is defined in section 3 of the Act as an offence punishable by a term of imprisonment of not less than 12 months, subject to the requirement of dual criminality as a mandatory ground for legal assistance. Although this threshold covers offences established in accordance with the Convention, gaps in the criminalization of corruption offences may limit the country’s ability to provide cooperation in relation to Convention offences. Tonga has not entered into any bilateral treaties on mutual legal assistance, but the Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth is applicable to cooperation with Commonwealth countries. Tonga recognizes the Convention as a legal basis for mutual legal assistance.

In the past two to three years, only one request for mutual legal assistance has been received and successfully executed (not related to corruption). Tonga has never refused a request for mutual legal assistance.

Subject to the above-mentioned limits, Tonga can afford legal assistance in relation to offences for which a legal person may be held liable.

The range of assistance provided for in sections 8, 13 and 14 of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] covers most of the purposes contained in article 46, paragraph 3, of the Convention. Section 5 of the Act permits the provision of assistance of a wider nature and to a greater extent than that provided for in the Act.

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Although Tonga does not have a legal framework for the proactive transmission of information, the law does not preclude this type of assistance. Confidentiality is observed in such cases.

Tonga does not have any restrictive bank secrecy laws that would impede the provision of assistance, and case examples were provided.

Dual criminality is a strict condition under the Mutual Assistance in Criminal Matters Act [Cap. 4.08] and is applied in practice. However, the law does not provide for the provision of non-coercive assistance in the absence of dual criminality, or for the refusal of requests involving matters of a de minimis nature.

Section 9 of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] permits the transfer of sentenced persons for the purpose of giving evidence or assisting in investigations or proceedings in requesting States relating to serious offences, in accordance with sections 4 (2) and 9 (3) of the Act, which permit the Attorney General to determine the terms and conditions for the transfer and provide guarantees for return. Section 11 of the Act provides a guarantee of safe conduct to persons in Tonga, whether or not they are detained, in order to assist in investigations or proceedings.

Credit for service of the sentence is recognized.

The Attorney General is the central authority for mutual legal assistance, in accordance with section 4 of the Mutual Assistance in Criminal Matters Act [Cap. 4.08]. As an established practice, requests are sent through diplomatic channels via the Ministry of Foreign Affairs or, on request, through the International Criminal Police Organization (INTERPOL). There are no internal procedures to guide the handling of mutual legal assistance requests or to facilitate the making of requests by foreign States.

Requests for mutual legal assistance must normally be made in writing. For urgent requests, foreign States may contact the Attorney General for preparatory work pending receipt of the request. Section 7 of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] establishes the requirements for the content of requests, which are broadly in line with the Convention. Tonga has not notified the Secretary-General of the United Nations of its central authority for mutual legal assistance or of the acceptable languages for the submission of requests.

Individuals present in Tonga may be heard by videoconference or in the presence of a foreign judicial authority, in accordance with Supreme Court Practice Direction 2 of 2021, for remote appearances in court proceedings. Case examples were provided.

Section 17 of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] stipulates that the information obtained must be used in the proceedings disclosed in the request, unless the Attorney General consents to its use in other proceedings after consulting with the foreign State.

Confidentiality provisions are contained in sections 16 and 17 of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] and included in all requests. Grounds for refusal are stipulated in sections 4 (2) and 7 (2) of the Act and are broadly in line with article 46, paragraph 21, of the Convention.

The definition of “serious offence” in section 3 (1) of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] contains an explicit provision covering offences of a fiscal character. Accordingly, Tonga would not refuse a request if the offence involved fiscal matters, provided that the dual criminality condition was met.

Domestic law does not require that reasons be given for any refusal to provide mutual legal assistance. However, out of courtesy, reasons for refusal would be given.

No procedures exist to guide the execution of mutual legal assistance requests in a time-bound manner or to provide requesting States with information on the status and progress of the measures being undertaken.

Section 4 (2) (c) of the Mutual Assistance in Criminal Matters Act [Cap. 4.08] provides for the postponement of assistance after consultation with the appropriate
authority of the foreign State. However, there is no obligation to consult before refusing a request.

A request for mutual assistance must include an agreement on the question of the costs of fulfilling the request (sect. 7 (1) of the Mutual Assistance in Criminal Matters Act [Cap. 4.08]). Although in practice, Tonga bears the ordinary costs of executing requests, the law does not establish that the ordinary costs are to be borne by the requested State.

There is no limitation on the type of document that can be provided in response to a mutual legal assistance request under the Mutual Assistance in Criminal Matters Act [Cap. 4.08], which covers a wide range of documents (sect. 3(1)).

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

The country’s law enforcement agencies cooperate with their foreign counterparts through affiliation with regional and international bodies, and have close alliances with authorities in the Pacific, Australia and New Zealand. In the absence of legislative authority, memorandums of understanding are used, including with regard to the exchange of personnel. Tonga Police has close networking associations with the Pacific Transnational Crime Network under the Pacific Islands Chiefs of Police organization, the associated Pacific Transnational Crime Coordination Centre based in Samoa, the Transnational, Serious and Organized Crime Pacific Task Force (pursuant to a memorandum of understanding with Australia, Fiji and New Zealand), the Pacific Fusion Centre, the Pacific Immigration Development Community and INTERPOL. The Transaction Reporting Authority may cooperate with foreign counterparts pursuant to sections 11A and 11B of the Money Laundering and Proceeds of Crime Act [Cap. 4.07]. However, Tonga is not a member of the Egmont Group of Financial Intelligence Units. Tonga recognizes the Convention as a legal basis for law enforcement cooperation.

Joint investigations may be conducted with foreign States through ad hoc agreements or arrangements, and a case example involving the Transnational, Serious and Organised Crime Pacific Task Force established under the memorandum of understanding with Australia, Fiji and New Zealand was provided.

Tonga has specific legislation on the use of special investigative techniques. Provisions are found in the Illicit Drugs Control Act [Cap. 4.06] (for offences stipulated in that Act), the Money Laundering and Proceeds of Crime Act [Cap. 4.07] and the Magistrate’s Court Act [Cap. 3.12]. There are some limitations on the use of such techniques, namely, undercover operations and the interception of communications, which may be conducted in accordance with the Tonga Police Act [Cap. 7.07]. Controlled delivery is authorized in the case of offences established under the Illicit Drugs Control Act [Cap. 4.06]. Evidence derived from special techniques is admissible in court in accordance with section 54A, on electronic evidence, of the Evidence Act [Cap. 3.06].

3.2. Successes and good practices

- Close cooperation between law enforcement authorities and foreign counterparts, in particular in the Pacific (art. 48).

3.3. Challenges in implementation

To further strengthen existing anti-corruption measures, it is recommended that Tonga:

- Consider adopting a case management system to facilitate the expeditious processing, tracking and follow-up of requests for international cooperation (art. 44, para. 1, and art. 46, para. 1).
• Expand the scope of countries for the purposes of extradition beyond member countries of the Commonwealth and designated countries to all States parties to the Convention (art. 44, para. 1).

• In order to ensure that offences established in accordance with the Convention are extraditable, consider lowering the minimum imprisonment threshold to, for example, one year (art. 44, para. 1).

• Consider allowing accessory extradition for offences established in accordance with the Convention (art. 44, paras. 2 and 3).

• Endeavour to establish expedited extradition procedures for offences established in accordance with the Convention (art. 44, para. 9).

• Adopt measures to ensure the prosecution of nationals whose extradition is refused (art. 44, para. 11).

• Include sex and ethnic origin among the discriminatory grounds on the basis of which requests for extradition should be refused (art. 44, para. 15).

• Ensure that authorities can afford the widest measure of mutual legal assistance in criminal matters, including by criminalizing offences established in accordance with the Convention, as necessary (art. 46, para. 1).

• Adopt measures to ensure that non-coercive assistance is provided in the absence of dual criminality (art. 46, para. 9).

• Notify the Secretary-General of the United Nations of the central authority designated to deal with requests for mutual legal assistance and of the acceptable languages for the submission of requests (art. 46, paras. 13 and 14).

• Consider adopting internal procedures to guide the processing of mutual legal assistance requests and to facilitate the making of requests by foreign States. These procedures should ensure that reasons for any refusal of mutual legal assistance are given to the requesting State, and that requesting States are consulted before such refusal (art. 46, paras. 23 and 26). Furthermore, these procedures should guide the execution of mutual legal assistance requests in a time-bound manner and address the provision of information on the status and progress of the measures being undertaken to requesting States (art. 46, para. 24).

• Adopt measures providing that the ordinary costs of executing requests are to be borne by the requested State (art. 46, para. 28).

• Continue to strengthen mechanisms for law enforcement cooperation, such as bilateral or multilateral agreements or arrangements on direct cooperation and the exchange of personnel (art. 48).

• Consider expanding the use of special investigative techniques in cases involving offences established in accordance with the Convention (art. 50).