Improving the Human Rights dimension of the fight against corruption

Expert Consultation on the draft of a practitioner guide on corruption and human rights violations

11-12 June 2018, Geneva

Background Information

It is now widely admitted that corruption negatively effects the enjoyment of civil and political rights as well as economic social and cultural rights). It not only has a negative impact on the States that are not in position to implement the treaty based human rights obligations, but it also directly affects the population of such countries. This concern was raised several times by the various UN Treaty Bodies in charge of monitoring the main human rights treaties.

Moreover, in the context of the Sustainable Development Goal 16 "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels", the 2030 Agenda for development refers to concrete actions to fight against corruption, namely "significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime to corruption".

However, in the UN Human Rights Machinery and in particular in the UN Treaty Bodies and in the UN Human Rights Council the corruption issue is rarely addressed in a comprehensive and systematic manner. These gaps were discussed at length during an international conference organised on the 19th and 20th February 2018 by the Centre for Civil and Political Rights. At this occasion several anti-corruption

activists shared their willingness to better use the various human rights avenues within the UN and at the same time expressed their concerns about the difficulties to properly access the mechanisms. Members of Committees attending the conference strongly emphasized the necessity to receive more information and reports on corruption regarding the States scheduled to be reviewed by their respective body.

The expert consultation is designed to address the above-mentioned gaps and strengthen the participation of the anti-corruption groups within the UN Mechanisms and in particular the UN Treaty Bodies. It will build on previous research undertaken by the Geneva Academy and OHCHR, which tries to provide the substantive base for a practical user-friendly guide for anti-corruption practitioners which explores how a human rights –based approach – and the human rights system, can be used to strengthen anti-corruption efforts.

Goal and objective

Goal: To develop new advocacy tools for the UN HR mechanisms, in particular, the Treaty Bodies, to address the issue of corruption.

Objective: To develop a practitioner guide for CSOs – in particular anti-corruption groups – on how to report on corruption issues in the UN Machinery and establish a tool for strategic advocacy.

The development of a practitioner guide will be an important tool to ensure that anti-corruption groups are in a position to better address the issue of corruption before the UN HR Mechanisms.

The objective of the expert consultation is to develop and agree on an outline of the practitioner guide that will subsequently be further elaborated. It is expected that the guide will include a brief overview of the UN Machinery and specific sections on the UN Treaty Bodies and the UN Human Rights Council where best practices on findings on corruption as well as tips will be presented and analysed.

Agenda and overview of the discussions

Session I: Previous research and analysis on the link between corruption and human rights violations

- Presentation of the report of the Geneva Academy: "Human Rights and Countering Corruption" – Felix Kirchmeier / Divya Prasad (ADH)
- Presentation of the outcome document of the International Conference on human rights violations and corruption (February 2018) – Patrick Mutzenberg (CCPR)
- Presentation of the report of Raoul Wallenberg Institute: "Strengthening the nexus between human rights and anti-corruption" – TBC (RWI)
- Presentation of the UNCAC and the role of the CSO in the review process – Candice Welsch (UNCAC)

In this first session, the speakers mentioned the work and the research already carried out this field. They introduced the various documents already existing. The research undertaken by the Geneva Academy in 2016 was introduced. This research, which was intended to serve as the basis for an anti-corruption practitioner's guide, had three main objectives namely to:

1) clarify the conceptual relationship between human rights, good governance and anti-corruption;
2) demonstrate the negative impact of corruption on human rights;
3) provide guidance and make practical recommendations for effectively integrating human rights into anti-corruption efforts

This research proposes a human rights based approach to combating corruption, as opposed to the anti-corruption approach, which primarily focuses on prosecuting individuals for acts of corruption without considering the wider impact of their actions on society, and more specifically on human rights. To overcome this limitation, a victim-centred approach is proposed. **This 'human rights based' approach to anti-corruption requires putting the entitlements and claims of the people (the 'right-holders') and the corresponding obligations of the State (the 'duty-bearer') at the centre of the corruption and human rights violation nexus debate**.

As a result, more emphasis is placed on the formulation of preventive policies to combat corruption, both in the public and private sectors through engagement with both State and non-State actors including business enterprises, CSOs and international organisations, through the use of both UN mechanisms such as special procedures and UN Treaty Bodies (TBs), as well as non-UN mechanisms such as national human rights institutions. These policies include, inter-alia, reinforcing the independence of the judiciary, guaranteeing public access to information and adopting measures that target all stages of the anti-corruption process, ranging from prevention and suppression of corruption to detection and freezing of ill-gotten assets, and their return to the rightful owners, through steps including regulation of financial flows.

An overview of the International Conference on Human Rights Violations and Corruption, which took place in February 2018 in Geneva, was provided. The aim of the conference was to consider how the UN human rights mechanisms could address corruption in a more convincing manner. The main findings were that within all of the TBs a limited **increase in the reference to corruption was observed, most notably in State reports**. For the Human Rights Committee (HRCtte), in the 2007 to 2017 period, 39 recommendations were issued addressing corruption, which is still low. There seems to be a lack of engagement, both from the HRCtte itself and from different stakeholders, including civil society.

Another concern discussed during the conference was the lack of consistency in the wording of the Concluding Observations, either within a Committee or amongst the TBs. Moreover, the Concluding Observations often tend to be too vague and lack any practical suggestions as to how a State can concretely address the issue of corruption. Creating a common language, which is accepted and utilised by all the TBs, would undoubtedly be beneficial in dealing with corruption issues. Lastly, despite the fact that few individual complaints relating to issues of corruption were submitted to the TBs, none of them established a direct link between the act(s) of corruption alleged and the violations of the provisions of the concerned UN HR Treaty.

The research carried out by the Raoul Wallenberg Institute was also presented. The findings thereof, seem to indicate a **reluctance to use human rights terminology when discussing corruption in the international fora**. Furthermore, the limitations of civil society organisations (CSOs) were also highlighted, insofar as their recommendations may be confusing or unable to correctly address issues of corruption on the ground. Therefore, the Guide should be geared primarily towards these groups so that they are able to make more coherent written submissions to TBs, and are better equipped to engage with such UN mechanisms. Another important finding duly notes **that the link between corruption and the concerned human rights violation(s) is not clearly elaborated**. This is because, the anti-corruption and human rights communities are seen as working in different silos. To address this issue, a Special Rapporteur solely committed to work on this nexus would be highly desirable. This assessment poses a number of questions: is there any value in creating another UN mandate? How can human rights experts make an impact? Are UN guidelines useful for organizations existing outside the UN framework?

The first session concluded with a discussion regarding the limited role of the CSOs within the UNCAC review mechanism. The UNCAC is one of the most ratified treaties within the UN with 186 State Parties. In addition, analysis from the UNCAC review process shows that **94% of the States amended their laws according to the recommendations issued to them**. However, the CSOs' involvement in the review process remains quite restricted and inadequate, mainly due to the lack of specific space given to external stakeholders in that process.

Session II: Current practice of the UN Mechanisms regarding the issue of corruption and the human rights violations

- UN Treaty Bodies – Victor Rodriguez Rescia (CCPR)
- UN Human Rights Council - Marc Limon (URG)
- Special Procedures – Anita Ramasastry (University of Washington School of Law)

The analysis provided by the CCPR-Centre showed that the issue of corruption was not systematically taken into consideration by the TBs. CESCR (45,3% - 63/139 State reports), CMW (31% - 18/58 State reports), CRC (30,8% - 85/214 State reports), HR Committee (22,2% - 39/182 State reports) and CAT (17,8% - 30/169 State reports) are the TBs addressing the issue more frequently.

The specific subjects addressed by the TBs are of course related to the Treaty's specific provisions. Main subjects are as follow:

- CRPD: health care
- CMW: trafficking
- CERD: judiciary
- CEDAW: access to remedies
- CAT: judiciary, detention and law enforcement officials
- CRC: allocation of resources, and about corruption in general
- CESCR: corruption in general
- HRCtte: judiciary and detention
- SPT: detention
- CED: /

Conclusions from the analysis showed that none of the TBs have a systematic approach to corruption. CESCR and CRC are most concerned about corruption. CED is not concerned at all. CESCR is an example for the other TBs concerning the almost systematic approach in the recommendations, because this approach allows for the recommendation to be adapted to each State party and its particular situation. CRC gives the vaguest recommendations. The HRCtte and CAT are also quite concerned about corruption, and some of their recommendations are examples to be followed.

Most of the TBs have difficulties to issue clear and concrete recommendations. For instance, CESCR gives general recommendations on corruption, containing several elements that tackle different aspects of the issue. This approach is quite systematic, but can still become more concrete.

Example of good recommendations:
CESCR: **Uzbekistan, 2014:**
"The Committee recommends that the State party set up a comprehensive policy and mechanism to combat and prevent petty and systemic corruption, including by:
    (a) Streamlining the adoption of the draft anti-corruption law, national programme and action plans, as well as codes of conduct for public institutions;
    (b) Fostering transparent corruption monitoring, especially in the areas of health care, education and residence registration, and ensuring adequate investigation into corruption cases and prompt punishment of perpetrators with commensurate sanctions;
    (c) Ensuring safe, accessible and visible channels for reporting corruption, in particular in the areas of health care, education and residence registration, as well as effective protection of anti-corruption activists and human rights defenders involved;
    (d) Training politicians, lawmakers, judges, law enforcement officers, civil servants and public service personnel, especially in the areas of education, health-care and residence registration, on ethics and the economic and social costs of corruption;
    (e) Conducting awareness-raising campaigns."

HRCtte: **Cameroon, 2017:**
Independence of the judiciary and administration of justice
37. The Committee remains concerned about persistent allegations of corruption and interference by the executive branch with the judiciary. Of particular concern is the fact that the independence of the judiciary is not sufficiently guaranteed in law and in practice, especially with regard to: (a) procedures for the

selection of judges; (b) disciplinary measures against judges; and (c) the retention of section 64 of the Code of Criminal Procedure, which allows for intervention by the Ministry of Justice or the Attorney General to terminate criminal proceedings in certain instances. It is also concerned about: (a) reports of violations of the right to a fair trial, which have been substantiated by the opinions adopted by the Working Group on Arbitrary Detention in the cases of Paul Kingue, Christophe Désiré Bengono and Marafa Hamidou Yaya; and (b) the continued jurisdiction of military courts to try civilians, which was extended by Act No. 2017/12 of 12 July 2017 on the Code of Military Justice (para. 14). 38. The State party should take all necessary measures to safeguard the independence of the judiciary in law and in practice and, in particular, to:

> (a) eliminate all forms of interference by the executive branch in the judiciary and effectively investigate allegations of such acts;
> (b) intensify its efforts to combat corruption in the judicial system and to prosecute and punish perpetrators, including judges who may be complicit therein;
> (c) consider reviewing the composition and functioning of the Judicial Service Commission to ensure the impartiality of the justice system; and
> (d) reform its legislative framework to ensure that civilians cannot be tried by military courts.

SPT: Paraguay, 2011:

The Subcommittee deeply deplores these actions, which it condemns energetically and categorically. The Subcommittee recommends that an investigation of these actions be undertaken without delay and that the inmates and staff members involved be tried and, if found guilty, punished.

The Subcommittee reiterates its earlier recommendations and, in addition, recommends that the State party:

> (a) Undertake an independent audit without delay, starting with Tacumbú National Prison but including all prisons in the country, to investigate the corruption existing in this sector, identify corruption risks and develop recommendations for internal and external oversight. This audit should be followed up with regular inspections to ascertain the extent of compliance with the initial recommendations;
> (b) Carry out a campaign to sensitize staff and the general public to the need to combat corruption in the prison system and to make them aware of the adverse consequences of corruption;
> (c) Draft, approve and then distribute a code of conduct to prison staff;
> (d) Promote transparency in the administration of the prison system's resources by, inter alia, making public each prison's budget, budgetary decisions and the names of the responsible officials;
> (e) Increase the wages of prison staff in order to ensure that their pay levels are fair and adequate and raise the professional standards and status of prison workers by creating a correctional studies curriculum;
> (f) Investigate allegations of corruption and, in cases where it is suspected that a crime has been committed, provide the relevant information to the Office of the Public Prosecutor.

Any consideration of the Human Rights Council's engagement on the issue of corruption would be incomplete without highlighting its key resolution on corruption. **Only five resolutions regarding corruption have been adopted since the Council's first session in 2006**, namely:

- "The role of good governance in the promotion of human rights" Since 2000; Adopted without a vote (Since 2008, corruption is explicitly mentioned); A/HRC/RES/31/14 issued on 19 April 2016.
- "The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights" Since 2011; Adopted with a vote; A/HRC/RES/34/11 issued on 10 April 2017
- "The negative impact of corruption on the enjoyment of human rights" Since 2013; Adopted without a vote; A/HRC/RES/35/25 issued on 14 July 2017

- "The negative impact of corruption on the right to be free from torture and other cruel, inhuman or degrading treatment or punishment" (new; Denmark)
- "Promoting human rights and SDGs through transparent, accountable and efficient public service delivery" (new; Azerbaijan)

In respect of the work of the Special Procedures (SP), it was recalled that three channels may be used to address the issue of corruption within SP: firstly, via thematic reports, SP can raise awareness of the detrimental effects that corruption has on human rights at the local and international levels; Secondly, by **utilizing individual communications provided by SP**, CSOs can shift the UN's priorities towards reviewing cases of corruption more often; and thirdly, more can be achieved through country visits. However, most of the mandate holders are not corruption experts and their lack of knowledge on the functioning of UNCAC hinders their ability to make concrete recommendations.

Four measures can be envisaged to increase the visibility of corruption in SP: firstly, efforts to advocate for anti-corruption initiatives within SP need to be pursued more thoroughly; Secondly, training for mandate holders on corruption, is to be conducted preferably by CSOs with experience in this domain. Thirdly, considering the possibility of working with agencies outside of the UN system, such as the OECD with its longstanding record of investigating corruption, could be beneficial; and finally, taking advantage of international events such as the annual UN Forum on Business and Human Rights to highlight the importance of corruption and thus increase engagement on this issue.

Session III: Expectations and needs from the CSOs and in particular the anti-corruption groups

- Fatima Kanji (OSF)
- Juanita Olaya (Anti-corruption coalition)
- Egrun Cakal (Danish Institute Against Torture)

This session was intended to provide NGOs with the opportunity to express their expectations and needs in terms of content that would be useful to incorporate in the proposed Guide. Different NGOs were invited to speak, amongst them were: DIGNITY, OSF and the Anti-Corruption coalition of NGOs.

According to the Anti-corruption coalition, the main obstacle to increasing action against corruption is the lack of communication as well as the lack of links between the UNCAC and the UN human rights mechanisms. Furthermore, **the Guide should advocate for greater transparency in UN human rights mechanisms and greater access to their agenda (in particular, for the countries scheduled to be reviewed under the reporting procedure)**, which would facilitate greater access to information that can then be exploited by anti-corruption NGOs.

Similarly, DIGNITY, identified the lack of information provided and/or available to NGOs as a shortcoming in their quest to engage with human rights mechanisms. Indeed, **when they intend to submit a report, many NGOs are unsure which TB should be solicited**. Consequently, the need for adequate training to be provided to NGOs in this regard could be reflected in the proposed Guide. The opaqueness of often overlapping mandates between TBs and other mechanisms renders the process of writing and submitting a shadow report that much more challenging. The Guide should also shed light on this issue. **Moreover, attention must be paid to the audience this Guide will target. To this end, the information that it will contain needs to be packaged accordingly**. However, this raises two important questions: Should the Guide be in a "one size fits all" format, with thematic chapters?; or should it be published in several smaller pamphlets, with each being relevant to the different stakeholders involved in the UN review mechanisms?

To conclude, NGOs agreed **that the Guide should not be oversimplified and it should incorporate a large technical component.**

Day II: 12th June 2018

Presentation of the Guide's outline:
- Divya Prasad
- Patrick Mutzenberg

Chapter I: Introduction

Key concepts and relationships: corruption – governance – human rights
- A) Corruption
- B) Aligning and mainstreaming anti-corruption and human rights approaches
- C) Ensuring accountability for corruption - Rights-holders vs. duty-bearers (the State and non-State actors)
- D) Human rights impose obligations on States:
  - a. The obligation to respect
  - b. The obligation to protect
  - c. The obligation to fulfil

Chapter II: Corruption as a threat to the enjoyment of human rights

- A) Corruption, non-discrimination and equality
- B) Corruption as a threat to civil and political rights
  - a. Corruption as a threat to the right to life, liberty and security of person
  - b. Corruption and torture
  - c. Corruption as a threat to due process and the right to a remedy
  - d. The independence of judges, lawyers and prosecutors
  - e. Corruption as a threat to the freedom of expression, including access to information
  - f. Corruption as a violation of the right to political participation
- C) Corruption as a threat to economic, social and cultural rights
  - a. Corruption as a threat to the right to an adequate standard of living and to an education
  - b. Corruption as a threat to general legal obligations under economic, social and cultural rights
    - i. Limit the State's ability to provide essential goods and services.
    - ii. Arbitrarily denied access to socio-economic rights in several ways
    - iii. Avoid regulatory standards.
    - iv. Misappropriate funds intended for food, water, health, housing, and education programmes or they may divert materials bought for those programmes
    - v. Impair the economic, social and cultural rights of specific sectors of the population

Box I: The human rights responsibilities of business enterprises

Chapter III: Integrating international human rights standards and mechanisms into anti-corruption effort:

Using UN HR mechanisms to prevent and combat corruption

A)　　Charter-based mechanisms:
   a. The Human Rights Council
         i. Universal Periodic Review
         ii. Special procedures

B)　　Treaty-based mechanisms:
   a. The reporting procedure
   b. The complaints procedure

Chapter IV: Protecting the human rights of those involved in the fight against corruption
   A) Journalistic freedom and corruption
   B) Exposure of journalists and journalistic safeguards
   C) Anti-corruption activists and human rights defenders, including whistle blowers
   D) Social media fighting corruption

Sessions IV – VII: Review of the outline – Thematic issues and corruption

Petty Corruption and Grand Corruption:
- Gillian Dell (Transparency Int'l) and Richard Messick

Economic, social & cultural rights:
- Dzidek Kedzia (ESCR Ctte)

Civil and political rights:
- Ilze Brands Kheris (HR Ctte) and Nils Melzer (SR on Torture)

Groups in focus:
- Marion Bethel (CEDAW) and Cephas Lumina (CRC)

Specific issues to be addressed in the Guide:

It was suggested to take into consideration the following issues in the Guide:

- Link between corruption and the negative impact on SDGs.
- Link between corruption and the right to development.
- Link between corruption and gender inequalities, which in turn undermines sustainable growth etc.
- Link between corruption and torture as reflected by the 2018 Resolution of the HR Council, as corruption creates an environment conducive to torture and ill-treatment.
- Link between corruption and the right to self-determination, in particular regarding indigenous peoples.

- Extraterritoriality of obligations relating to corruption
- Useful to have correlation between corruption and its impact on individual human rights.
- Link between corruption and allocation of resources – efficient use of resources, which is impaired through corruption – public procurement processes; overpricing of contracts.
- Victim status – the need to identify the victim, which could pose problems particularly in the context of grand corruption.
- Necessity to submit individual communications and focus on strategic litigation regarding cases of corruption.
- Necessity to map the various HR Treaties and how compliance with their provisions is affected by corruption. For example, in the case of the ICCPR, disputes over land between international corporations and local minority groups, which often center around unlawful land grabbings facilitated by bribes, could be considered under article 27 of the Covenant which guarantees cultural, linguistic, and minority rights.
- Need to use HR indicators and the need to measure the impact of corruption on HR.

Methodology and format:

Several participants asked **questions about the target audience**, format, how to include all the various perspectives of the stakeholders; how to keep the Guide current and dynamic (including the option of an electronic format). Pictographic representations to get over language barriers was also proposed to reach a larger audience.

The participants agreed that **previous guides contained too much information**, and although relevant information should not be sacrificed for the sake of conciseness, information could be better condensed and more accessible to the general public via visual content. Some participants suggested that the Guide should be approximately 23 pages long, with 10 or 11 of them dedicated to thematic items.
Furthermore, it should be clearly mentioned in the Guide that **recommendations which tackle corruption need to be more detailed and provide concrete measures for its eradication**. Example of good recommendations should in integrated in the Guide.

It was further suggested to add the following information in the Guide:

- Summary of the procedures.
- Timelines for engaging with the UN HR Mechanisms
- Necessity to have credible sources and tangible proof of corruption in CSOs' reports.
- Parameters of a submission (restrictions of any kind on what cannot be included in the submission(s); suggestions on how to prepare a submission).
- A template for CSO reports and sample of "good" reports submitted by CSOs.
- Information on the follow-up procedure.
- Email list/ website for enabling exchanges of information

Some participants suggested the need for the Guide to highlight the **added value and the impact** of stakeholder engagement with the UN HR Mechanisms; and how CSOs' reports would make a practical difference on the ground, including at the regional level.

Alongside these recommendations for the Guide, it was proposed that a meeting of chairpersons from all TBs be held with the aim of adopting a list of exemplary corruption questions to ask State Parties. Additionally, a comprehensive dialogue between CSOs and members of TBs should also be organized, in

order for NGOs to understand what committee members are looking for in shadow reports, in relation to corruption. Finally, **workshops on corruption should be provided to TB Members, as not all of them are necessarily experts in this domain**.

As far as the HR Council's role is concerned, more effort needs to be made to incorporate corruption in the Council's agenda. Nonetheless, it is important that issues of corruption are raised not only within the HRC, but also by all other mandate holders since corruption negatively affects all human rights, regardless of thematic specialization.

Next steps:

In a final "tour de table" several recommendations were made to the persons in charge of drafting the Guide, in particular regarding the drafting process:
- The Guide should include, to the extent possible, practical examples of, inter alia, how the issue of corruption has been dealt with by the various UN treaty bodies.
- Research on the correlation between corruption and torture shall be provided by the participants for inclusion in the Guide.
- The participants agreed to consider and share successful innovative policies from developing countries, with a view to potentially incorporating the same in the Guide.
- Stress on the victim-centred approach, while simultaneously categorizing the different types of victims
- The Guide should capitalize on the momentum of corruption related debates undertaken in the UN HR Mechanisms, in particular the HR Council.

Timeline:

Review of the outline	July 2018
Drafting of the Guide	August – September 2018
Circulation of the draft among the experts	20 September 2018
Comments from the experts	20 October 2018
Finalisation	November 2018

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List of participants:

Autio Anna	World Bank	aautio@worldbank.org
Ayamdoo Charles	Ghana Commission on HR and Administrative Justice	cayamdoo@gmail.com
Bat-Erdene Ayush	OHCHR	abat-erdene@ohchr.org
Bethel Marion	CEDAW	bethelcedaw@gmail.com
Brands Kheris Ilze	HRCtte	ibrandskehris@gmail.com
Cakal Ergün	Danish Institute Dignity	erca@dignityinstitute.dk
Dell Gillian	Transparency International	gdell@transparency.org
Ilkhramov Alisher	OSF	alisher.ilkhamov@opensocietyfoundations.org
Kanji Fatima	International State Crime Initiative	f.kanji@qmul.ac.uk
Kedzia Djidek	ESCR Ctte	dkedzia3@gmail.com
Kirchmeier Felix	Geneva Academy	felix.kirchmeier@geneva-academy.ch
Kreutner Martin	International Anti-Corruption Academy (IACA)	martin.kreutner@iaca.int
Lapper Richard	OHCHR	rlapper@ohchr.org
Luminas Cephas	CRC	Clumina@ufh.ac.za
Melzer Niels	SP Torture	n.melzer@hotmail.com
Meraz Andrea	CCPR Centre	ameraz@ccprcentre.org
Messick Richard	The Global Anti-Corruption Blog	messickrick@gmail.com
Mutzenberg Patrick	CCPR-Centre	pmutzenberg@ccprcentre.org
Olaya Juanita	NGO Coalition	juanitaolaya@gmail.com
Prasad Divya	ADH / CCPR-Centre	divyaprsd@hotmail.com
Ramasastry Anita	United Nations Working Group on Business and Human Rights	arama@uw.edu
Rodriguez Rescia Victor	CCPR-Centre	vervicsa.racsa@gmail.com
Ryan Elaine	RWI	elaine.ryan@rwi.lu.se
Spenle Christoph	DFAE	christoph.spenle@eda.admin.ch
Timilsina Anga	UNDP Global Centre for Public Service Excellence	anga.timilsina@undp.org
Valiña Liliana	OHCHR Guatemala	lvalina@ohchr.org
Welsch Candice	Corruption and Economic Crime Branch / UNODC	candice.welsch@un.org