



# Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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## Working Group of Government Experts on Technical Assistance

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**Identification of technical assistance needs and good  
practices relating to the criminalization of obstruction of  
justice (article 23)**

### **Identification of technical assistance needs and good practices relating to the criminalization of obstruction of justice (article 23)**

**Background paper by the Secretariat**

#### **I. Introduction**

1. Organized criminal groups maintain or expand their wealth, power and influence by seeking to undermine justice systems. Justice cannot be achieved if judges, jurors, witnesses or victims are intimidated, threatened or corrupted, and national and international cooperation will not be effective if crucial participants in the investigation and law enforcement process are not protected sufficiently to allow them to perform their roles and provide their accounts without obstruction. To protect the integrity of the criminal justice process, article 23 of the United Nations Convention against Transnational Organized Crime penalizes the conduct of persons who intimidate, threaten, harm, or influence witnesses, victims, law enforcement officials, prosecutors and judges.<sup>1</sup>

2. The present background paper outlines the elements of the criminalization of obstruction of justice under article 23 of the Organized Crime Convention. It explores the rationale behind the article, identifies and explains the elements of the offences it sets out and discusses issues and challenges in the implementation of the criminalization provisions in the domestic laws of States parties.

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\* CTOC/COP/WG.2/2016/1.

<sup>1</sup> The United Nations Convention against Corruption contains an almost identical provision in its article 25.



## II. Issues for discussion

3. In its deliberations, the Working Group may wish to consider the following questions:

(a) What kind of domestic offences fall under the chapeau of obstruction of justice, as stipulated in the Organized Crime Convention?

(b) In the domestic context, what factors have led to successful investigations and prosecutions of obstruction of justice cases? What problems or challenges were encountered during investigations and prosecutions of obstruction of justice cases and how were they resolved?

(c) Do domestic offences cover obstruction of justice in relation to all official government proceedings, which may include the pretrial stage of a case, as stressed in the interpretative notes to article 23?<sup>2</sup>

(d) Do domestic obstruction of justice offences require proof of intention, or is proof of lesser mental elements, such as recklessness or negligence, sufficient?

(e) Against whom can domestic obstruction of justice offences be committed? Is the list of persons adequately comprehensive to protect all justice and law enforcement officials? Do domestic offences protect other persons, such as journalists and human rights activists and, if not, is legislation to this effect necessary to protect such persons for their role in exposing organized criminal activities?

(f) Do domestic obstruction of justice offences protect persons closely related to justice or law enforcement officials, other public officials and persons participating in the criminal justice process and, if not, is legislation to this effect necessary to prevent the obstruction of justice?

(g) Do domestic offences implementing article 23 criminalize both completed offences and attempts? In relation to offences criminalizing obstruction of justice through threats or intimidation, is it necessary for the object/victim of threats or intimidation to feel intimidated, threatened or put in fear for the elements of the offence to be established?

(h) How are the requirements of article 23 reconciled with domestic rights to silence in relation to situations where a person is provided an undue advantage to refrain from giving evidence?

(i) Have the sentences for obstruction of justice resulted in consecutive (as opposed to concurrent) prison time in addition to any underlying criminal conduct that resulted in conviction?

(j) What are the specific technical assistance needs of States in relation to the implementation of article 23 on the criminalization of obstruction of justice?

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<sup>2</sup> Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).

### III. Rationale

#### A. Purpose of article 23

4. The purpose of article 23 of the Organized Crime Convention is to protect those involved as witnesses and victims in criminal proceedings and those involved in bringing to justice the perpetrators of offences established in accordance with the Convention. In doing so, States parties must criminalize any threat, intimidation, harm or other undue influence on witnesses, victims, jurors, law enforcement and judicial officials, prosecutors and others participating and working in the criminal justice system.

5. Article 23 must be seen in connection with article 8 of the Convention, which criminalizes corruption in the public sector. Both articles contain mandatory provisions that recognize that the legitimacy of the whole criminal justice system, from the local to the global level, needs to be protected against the influence of criminals. Article 23 provides for an important measure to protect the integrity of the criminal justice system and judicial processes by punishing subversions of the course of justice by persons associated with organized criminal groups.

6. Article 23 must also be seen in the context of articles 24, 25 and 26, paragraph 4, which focus on the protection of witnesses and victims in criminal proceedings involving offences established by the Convention, and of “collaborators of justice” who supply useful information to competent authorities for investigative and evidentiary purposes.

#### B. Definitions

7. None of the terms used in article 23 are further defined in the Convention, which gives States parties greater flexibility in establishing the offences under article 23 (a) and (b) under their domestic law and translating relevant terms.

8. The references in article 23 (a) and (b) to “offences covered by this Convention” connects the obstruction of justice to the three other Convention offences relating to:

- (a) Participation in an organized criminal group (article 5);
- (b) Laundering of proceeds of crime (article 6);
- (c) Corruption (article 8);
- (d) Serious crimes, as defined in article 2 (b) of the Convention.

9. In States parties that are also parties to one or more of the protocols that supplement the Convention, the “offences covered by this Convention” also include:

(a) Trafficking in persons under article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, in accordance with article 1, paragraph 3, of that Protocol;

(b) Smuggling of migrants under article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, in accordance with article 1, paragraph 3, of that Protocol;

(c) Illicit manufacturing of and trafficking in firearms, their parts, components and ammunition and the falsifying or illicitly obliterating, removing or altering the markings on firearms under article 5 of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, in accordance with article 1, paragraph 3, of that Protocol.

### **C. Scope and application**

10. According to article 3, paragraph 1, the Convention applies to the prevention, investigation and prosecution of the four Convention offences under articles 5, 6, 8 and 23, and to serious crime as defined in article 2, where the offence is transnational in nature and involves an organized criminal group.

11. Under article 3, paragraph 2, an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;
- (d) It is committed in one State but has substantial effects in another State.

12. Article 34, paragraph 2, of the Convention stresses that in domestic laws, the criminalization of obstruction of justice, along with the other offences covered by the Convention, do not require the conduct to be transnational in nature. In other words, while the focus of the offence under article 23 is on the obstruction of justice in connection with transnational criminal activities, domestic law must not be limited in that way and must equally criminalize obstruction of justice that does not have a cross-border component, and independently of the involvement of an organized criminal group.

## **IV. Content and structure of article 23**

13. Article 23 requires that States parties criminalize the use of inducements, force, threats or intimidation to interfere with witnesses and officials whose role would be to produce accurate evidence and testimony, or with the actions of judicial or law enforcement officials.

14. Article 23 includes two separate offences:

- (a) Article 23 (a) relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. The obligation for States parties is to criminalize both the use of corrupt means, such as bribery, and of coercive means, such as threats or violence;

(b) Article 23 (b) requires the criminalization of conduct intended to pervert the course of justice by use of physical force, threats or intimidation against law enforcement and judicial officials.<sup>3</sup>

15. A further point of difference between the offences under article 23 (a) and those under article 23 (b) is the object of the offence. The conduct in offences that fall under paragraph (a) may be employed against any person, private individuals and public officials who participate in proceedings involving a Convention offence. The conduct in offences that fall under paragraph (b), on the other hand, is aimed at law enforcement and judicial officials, who are public officials.

## V. Elements

### A. Article 23 (a)

16. The elements of article 23 (a) can be separated into physical elements (*actus reus*), which describe the external appearance of the offence, and mental or subjective elements (*mens rea*), which relate to the mental state of the accused at the time he or she committed the offence.

Table 1

**Elements of article 23 (a) of the Organized Crime Convention**

<i>Type of element</i>	<i>Element</i>
Physical elements ( <i>actus reus</i> )	<ul style="list-style-type: none"> <li>• Use of physical force</li> <li>• Threats</li> <li>• Intimidation; or the promise, offering, or giving of an undue advantage</li> </ul> in relation to “a proceeding in relation to the commission of offences covered by this Convention”
Mental or subjective elements ( <i>mens rea</i> )	Intention to use coercive or corrupt means Coercive or corrupt means are used to: <ul style="list-style-type: none"> <li>• Induce false testimony</li> <li>• Interfere in the giving of testimony</li> <li>• Interfere in the production of evidence</li> </ul>

#### 1. Actus reus: physical elements of article 23 (a)

17. The principal element of article 23 (a) is the conduct by which the accused seeks to influence, pervert or otherwise obstruct the course of justice. The types of conduct covered by article 23 (a) include the use of physical force, threats, intimidation, promising, offering or giving of an undue advantage, although domestic laws may include additional types of conduct employed to interfere with the course of justice.

<sup>3</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, United Nations publication, Sales No. E.06.IV.16.

18. Article 23 (a) requires that the conduct stand in connection with “a proceeding in relation to the commission of offences covered by this Convention”. This includes the offences relating to participation in an organized criminal group under article 5, money-laundering under article 6 and corruption under article 8 of the Convention, as well as serious crimes established by each State party. In States parties that are parties to one or more of the three protocols that supplement the Convention, article 23 (a) also extends to proceedings involving offences established under the relevant Protocol(s).

19. Although the term “proceeding” generally refers to judicial proceedings before criminal courts, the scope of the offence or offences established in the domestic implementation of article 23 (a) does not need to be limited to the trial stage. The use of force, threats and inducements of false testimony or interference in the production of evidence can occur at any time before the commencement of the trial, whether formal proceedings are in progress or not. The term “proceeding” is intended to cover all official governmental proceedings, which may include the pretrial stage of a case and may be of particular significance in civil law systems.

## **2. Mens rea: mental elements of article 23 (a)**

20. Article 23 (a) requires that the conduct involving the use of force, threats, intimidation, or the promise, offering or giving of an undue advantage be employed by the accused to:

- (a) “Induce false testimony”, which would include giving false testimony; or
- (b) “Interfere in the giving of testimony”, which could include, for example, abducting or intimidating a witness; or
- (c) “Interfere in the production of evidence”, which includes the creation of false evidence such as forged documents.

21. The chapeau of article 23 also includes a requirement that the offences created by States parties to give effect to subsections (a) and (b) must be offences “committed intentionally”. This means that there is no requirement for States parties to criminalize situations that involve a lower level of culpability, although it does not prevent States parties from doing so. Indeed, under article 34, paragraph 3, of the Convention, States parties are at liberty to adopt stricter or more severe measures than those provided for in the Convention and thereby lower the mens rea requirement and expand liability to recklessness, negligence or even strict liability without proof of an element of intent.

22. Unlike article 5, paragraph 2, of the Convention, article 23 does not provide that the intent “may be inferred from objective factual circumstances”. Article 5, paragraph 2, recognizes that in many legal systems it is permissible to use circumstantial evidence to establish the mental elements of criminal offences. Although article 23 does not include that specific reference, the proof of the mens rea element will almost always require an inference from the circumstance in which the accused acted.<sup>4</sup> This is the approach adopted by the United Nations Convention

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<sup>4</sup> D. McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2007).

against Corruption, which, in its article 28, contains a general provision on this issue covering all offences that fall within its scope of application.

23. The term “undue advantage” should also be made sufficiently clear in national law. The concept of “undue advantage” is described in the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* as “something tangible or intangible, whether pecuniary or non-pecuniary.” Paragraph 197 of the *Legislative Guide* reads:

The undue advantage does not have to be given immediately or directly to a public official of the State. 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 organization. Some national legislation might cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the official’s duties.

## B. Article 23 (b)

24. Article 23 (b) requires States parties to criminalize interference with the actions of judicial or law enforcement officials in relation to one of the offences established under the Convention. The elements of article 23 (b) can be separated into physical elements (*actus reus*), which describe the external appearance of the offence, and mental or subjective elements (*mens rea*), which relate to the mental state of the accused at the time he or she committed the offence.

Table 2

### Elements of article 23 (b) of the Organized Crime Convention

<i>Type of element</i>	<i>Element</i>
Physical elements ( <i>actus reus</i> )	<ul style="list-style-type: none"> <li>• Use of physical force</li> <li>• Threats</li> <li>• Intimidation</li> </ul> in relation to “the commission of offences covered by this Convention”
Mental or subjective elements ( <i>mens rea</i> )	Intention to use force/threaten/intimidate Force/threat/intimidation is used to interfere with the exercise of official duties by a justice or law enforcement official

#### 1. Actus reus: physical elements of article 23 (b)

25. As mentioned earlier, article 23 (b) involves types of conduct that are employed to influence, pervert or obstruct the course of justice in addition to those covered under subparagraph (a). These include the use of physical force, threats and intimidation. Not included under article 23 (b) are “the promise, offering, or giving” of an undue advantage. This is because the law enforcement and judicial officials

who are the object of article 23 (b) are public officials, the bribery of whom would be covered by the offence of corruption under article 8 of the Convention.

26. Article 23 (b) also requires that the conduct be employed “in relation to the commission of offences covered by this Convention”. This includes the offences relating to participation in an organized criminal group under article 5, money-laundering under article 6 and corruption under article 8 of the Convention, as well as serious crimes established by the States parties. In States parties that are also parties to one or more of the three Protocols that supplement the Convention, article 23 (a) extends to proceedings involving offences established under the relevant Protocol(s).

## **2. Mens rea: mental elements of article 23 (b)**

27. The conduct involving force, threats or intimidation has to be employed “to interfere with the exercise of official duties by a justice or law enforcement official”. This would generally include police and other law enforcement personnel, as well as judges, magistrates, judicial officers and other members of the judiciary. Article 23 (b) also permits States parties to broaden the categories of public officials covered by domestic offences that give effect to article 23 (b).

28. The chapeau of article 23 also includes a requirement that the offences created by States parties to give effect to subparagraphs (a) and (b) must be offences “committed intentionally”. This also means that there is no requirement for States parties to criminalize situations that involve a lower level of culpability, although it does not prevent States parties from doing so.

## **C. Sanctions**

29. As an international treaty that needs to be adaptable to the laws and administrative and legal systems of individual States parties, the Convention does not determine set penalties for the offences under article 23. To offer guidance and ensure that States parties adequately recognize the seriousness of organized crime, article 23 has to be read together with article 11, paragraph 1, and article 10, paragraph 4, which provide that the established offences must be subject to “effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions” which “take into account the gravity of that offence”. Article 11, paragraph 4, requires that a State party “ensure that its courts or other competent authorities bear in mind the grave nature of the offences [...] when considering the eventuality of early release or parole of persons convicted of such offences”.

30. Article 26, paragraphs 2 and 3, encourage States parties to consider mitigating sentences and granting immunity and/or leniency to those individuals who decide to cooperate with the authorities. These provisions are not mandatory and are dependent on domestic legal principles and traditions. In jurisdictions where the prosecution of crimes is in principle mandatory, affording immunity from prosecution will require specific legislation.

## **D. Attempts**

31. Article 23 contains no explicit reference to situations in which an accused attempts to influence, pervert or obstruct the course of justice, but where his or her efforts fail to produce the desired outcome or fail to have the desired effect. This may be the case, for example, when the accused is stopped before his or her efforts have taken effect or where the person who is the object of the coercion or other undue influence resists the efforts of the accused.

32. The offences in subparagraphs (a) and (b) are sufficiently broad to cover both completed and attempted instances of the offence. This is achieved by making the intended effect of the conduct a mental element of the offence. In other words, it suffices to show that the accused acted with the intention “to induce false testimony or to interfere in the giving of testimony or the production of evidence”; it is not necessary to prove that, because of his or her conduct, false testimony was actually induced or given or that false evidence was produced. Equally, under article 23 (b) it is not required to show that the exercise of the official’s duties were actually interfered with; any intention to do so fulfils the elements of the offence.

## **VI. Issues and challenges**

### **A. The link to organized crime**

33. Pursuant to article 34, paragraph 2, of the Convention, domestic offences pertaining to obstruction of justice shall be established independently of the transnational nature or the involvement of an organized criminal group. Nevertheless, through article 23, the Convention recognizes that it is all too common for members of organized criminal groups to eliminate witnesses, use physical force against police investigators and threaten judges and prosecutors. Indeed, many people have lost their lives or faced serious attacks in their quest to bring organized criminal groups and their associates to justice.

### **B. Purpose of article 23 and national approaches**

34. A key characteristic of the offences indicated in article 23 is its unique purpose, which combines, on the one hand, the protection of the life, physical integrity and safety of the person with, on the other hand, the protection of the integrity of the criminal justice system and those participating and working within it. In this regard, article 23 pursues two equally important goals that are combined in a single provision stipulating two broad categories of offences, as specified above.

35. Many domestic laws, however, do not have special provisions that operate this way, and instead set out offences of a general nature against the safety of persons separate from those committed against the integrity of the State’s administrative and judicial systems. In many jurisdictions, offences relating to intimidation, threats and physical force apply to conduct directed against any person, and do not contain special provisions for the intimidation, threats or physical force against persons participating in criminal justice processes. In addition, there are cases in which

offences criminalizing undue influence and other unlawful interference with administrative and criminal justice processes focus on the offering or accepting of bribes and other forms of corruption, but make no special mention of the use of threats, intimidation or the like. In other cases, domestic laws create provisions for crimes concerning obstruction of the performance of official duties that include any form of obstruction and any interference with the execution of official duties by government officials, without specific mention of judicial processes or specific types of official duties.

36. As a result, persons engaging in the types of conduct set out in article 23 (a) and (b) may only be liable under more general offences that do not capture all the elements and nuances of article 23. However, in some jurisdictions it may be possible for prosecutors to include a variety of different offences in the indictment, which, in combination, capture the full scope and spirit of article 23.

37. In those jurisdictions that have specific offences that give effect to the purposes of article 23, “obstruction of justice” is usually not stated as an offence. Instead, under the laws of most countries there is a range of offences that criminalize various ways in which victims, witnesses, law enforcement officials, prosecutors, judges and others participating in the criminal justice process may be intimidated, threatened, harmed, and so forth. Indeed, given the many ways in which persons can interfere with a criminal justice system, it is uncommon for States parties to have a single offence that reflects all the elements of article 23.<sup>5</sup> Pursuant to article 11, paragraph 6, of the Convention, the description of the offences established in accordance with the Convention is reserved to the domestic law of States.

38. It is worth noting that, as reflected in the country reviews conducted within the framework of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, the tendency among States parties has been not to have an overarching offence encompassing all forms of obstruction of justice (article 25 of the Convention against Corruption), but to cover all the forms through a combination of multiple, partly overlapping provisions.<sup>6</sup> Several States seem to rely principally on general provisions on threat, or coercion to alarm or intimidate, regardless of a link to giving testimony, the production of evidence or the carrying out of judicial proceedings. Nevertheless, the existence of such a link may be considered as an aggravating circumstance.<sup>7</sup>

### **C. Scope and application**

39. A review of the scope and application of the obstruction of justice offences under domestic laws reveals a significant variation between States parties in the types of conduct and the types of persons/victims covered.

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<sup>5</sup> See [sherloc.unodc.org](http://sherloc.unodc.org), “Obstruction of justice”.

<sup>6</sup> See UNODC, *State of Implementation of the United Nations Convention Against Corruption* (New York, 2015), p. 69, available at [www.unodc.org/documents/treaties/UNCAC/COSP/session6/15-03457\\_ebook.pdf](http://www.unodc.org/documents/treaties/UNCAC/COSP/session6/15-03457_ebook.pdf).

<sup>7</sup> *Ibid.*, p. 70.

## 1. Types of conduct covered

40. In those jurisdictions that have offences that reflect the elements and purpose of article 23 in their entirety, there is some variation between the types of threats, interference and other conduct criminalized. Most jurisdictions include threats, intimidation and the use of physical force. Some jurisdictions also include conduct such as stalking, for example by “persistently or repeatedly following a justice system participant [...] including following that person in a disorderly manner on a highway”, “repeatedly communicating with, either directly or indirectly, a justice system participant” or “besetting or watching the place where a justice system participant [...] resides, works, attends school, carries on business or happens to be”. In such instances, the victim may also not be aware that he or she is being observed or followed by the accused.<sup>8</sup>

## 2. Object/victims of threats and intimidation

41. There is also great diversity in the types of justice and law enforcement officials covered by relevant domestic offences. In general, in domestic laws, separate definition or interpretation sections set out a list of positions or official duties that can be the object or victim of the use of force, intimidation, threats or other interference. Specific roles and titles vary, depending on the structure and operation of the domestic criminal justice system and those working within it. Recognizing these differences, article 23 (b) explicitly permits States parties to broaden the categories of public officials covered by domestic offences that give effect to article 23 (b).

42. In some countries, the offences also extend to selected persons outside government systems, for example journalists who may be threatened or harmed in the course of their journalistic investigations and revelations. Similarly, domestic laws may cover persons related, connected or known to the official or to the person participating in the criminal justice process.<sup>9</sup>

## D. Principal and participatory liability

43. The offence of obstruction of justice under article 23 (a) of the Convention must be distinguished from offences such as perjury, false oaths and fabricating evidence. The important difference is that the focus of article 23 (a) is on the person who incites, induces or causes another person to give false testimony or provide false evidence, not on the person who gives false evidence or the like. Similarly, a distinction must be made between “the promise, offering or giving of an undue advantage” under article 23 (a) and general offences relating to corruption and bribery.

### 1. Perjury, false statements and similar offences

44. An issue closely related to the obstruction of justice is perjury, which involves giving false testimony in court, especially when under oath. The criminal laws of most jurisdictions contain specific offences relating to perjury, giving false

<sup>8</sup> See article 423 of the Canadian Criminal Code, available at [sherloc.unodc.org](http://sherloc.unodc.org).

<sup>9</sup> UNODC, *Model Legislative Provisions against Organized Crime* (New York, 2012).

statements and producing false statements in court, which are an important and essential complement to the obstruction of justice offences indicated in article 23 of the Convention. Domestic offences relating to perjury vary greatly in scope and may not cover sworn witnesses only, but include, among others, experts or translators who deliberately give false or fraudulent evidence.

45. The relationship between obstruction of justice and perjury is not further addressed by the Convention or in any of the interpretative material accompanying the Convention, and a detailed assessment of domestic offences pertaining to perjury is beyond the scope of the present paper. What these offences and article 23 have in common is that they serve to protect criminal justice processes from undue interference. Unlike perjury, article 23 criminalizes the person who causes others to give false testimony or otherwise interfere in criminal proceedings involving one of the offences under the Convention. The Convention contains no provisions and no further guidance on the criminalization of the person who, for example, has been induced to give false testimony or who, because of threats or intimidation, interferes with or fails to give evidence or testimony.<sup>10</sup>

46. The type of liability for the person making false statements or producing false evidence in criminal proceedings is a matter for individual jurisdictions to determine. A further matter to be decided by domestic law is the question of whether and how persons who give false testimony under threat or because of intimidation should be criminalized. This may depend on the situation of the individual case, but defences relating to duress and coercion should be available to excuse that person from criminal liability for perjury and other related offences.

## 2. Participation

47. Because of the nexus with perjury, false statements and similar offences, the offence of obstruction of justice may pose a conceptual problem in some jurisdictions, as liability for offences based on article 23 may seem to overlap with liability as a participant in or accessory to the perjury, false statement or similar offence committed by another person. Indeed, some countries do not have a stand-alone offence that reflects the elements of article 23 but instead create liability for such offences based on general principles of participation in the commission of a criminal offence. Others have separate offences for conspiring to defeat justice or conspiring to bring false accusations.

48. The advantage and particularity of article 23 is that it creates primary liability for the person inducing or interfering, independent of the criminal liability, if any, of the other person giving false testimony or the like. Article 23 sets out a separate offence so that the person inducing the false testimony or interfering in the giving of testimony or production of evidence of another person can be held criminally

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<sup>10</sup> During the negotiations on article 23, it was understood that some countries may not cover cases where a person has the right not to give evidence and an undue advantage is provided for the exercise of that right. See *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations publication, Sales No. 06.V.5, p. 216. In the context of article 18 on mutual legal assistance, an interpretative note in the *travaux préparatoires* indicates, inter alia, that “domestic law of the requested State applies to perjury” (p. 199).

responsible even if no case against the other person can be made out or if the other person is found to be not criminally responsible.

49. For these reasons, it is important that States parties criminalize obstruction of justice in the manner envisaged by article 23 independently of offences relating to perjury, false oaths, false statements, fabrication of evidence and the like. Countries may, in addition, choose to create specific offences for situations in which the person inducing the obstruction of justice and the person giving false testimony collude or otherwise collaborate.

### **3. Obstruction of justice and offering bribes**

50. Article 23 (a) requires the criminalization of the offence of obstruction of justice using coercive as well as corrupt means, that is, through the promise, offering or giving of an undue advantage. This form of obstruction of justice needs to be considered in conjunction with the bribery offences. Although both categories of offence criminalize “the promise, offering or giving of an undue advantage” made by persons who try to influence official decision-making, cases of bribery relate to offers and promises made to persons acting in their official capacity, for example public officials, judges or prosecutors. The distinguishing feature of article 23 (a), on the other hand, is that “the promise, offering or giving of an undue advantage” is done specifically to interfere in the presentation of testimony or evidence in criminal justice proceedings by any person participating in the proceeding. The recipient of that promise or offer would thus often be private citizens or victims who appear as witnesses. However, depending on the domestic laws of the country involved, some overlaps might exist with offences criminalizing bribery of law enforcement officials (who testify in court), or of persons who give expert evidence. Some jurisdictions provide special offences for these situations.

51. It is also worth noting that, in the framework of the country reviews conducted under the Convention against Corruption, many jurisdictions fulfil the requirement to criminalize the use of corrupt means to interfere in the giving of testimony or the production of evidence through special provisions. Such provisions include “bribery of a witness or expert”, “attempting to induce false testimony or the giving of false expert evidence”, “attempted incitement to a false statement”, “attempted subornation of perjury” or “attempted corruption of witnesses”, and also the more general offence of “attempting to pervert justice”. Frequently these provisions coincide with the ones referring to the use of coercive means.<sup>11</sup>

52. Interpretation issues may arise in cases where the domestic law does not contain an explicit reference to the various corruptive means included in article 23, which requires the criminalization of each of the ways in which bribery can be committed: the “promise”, “offering” and “giving” of an undue advantage as an inducement. In many jurisdictions the corruptive means of the promising or offering of an undue advantage can be considered as preparatory acts or attempts.

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<sup>11</sup> See *State of Implementation of the United Nations Convention against Corruption*, p. 72.

## E. Reaction of the victim

53. In many jurisdictions there is an ongoing and often controversial debate about the interpretation of terms such as “intimidation” or “threat”. The main point of contention is whether the object of the intimidation or threat (the victim) has to subjectively feel intimidated or threatened or, in other words, has to be put in fear. The weight of judicial opinion and scholarship on this point suggests that the intimidation and threat has to be viewed from the perspective of the accused who seeks to intimidate, threaten or influence the other person. It does not matter whether violence is used in this context and whether the victim is put in fear.

54. The case of *R. v. Patrascu* in the United Kingdom of Great Britain and Northern Ireland,<sup>12</sup> for instance, offers the following interpretation, which reflects the view adopted in many other jurisdictions:

[A] person does an act which intimidates another person [...] if he puts the victim in fear. He also does so if he seeks to deter the victim from some relevant action by threat or violence. A threat unaccompanied by violence may be sufficient, and the threat need not necessarily be a threat of violence. The act must be intended to intimidate. The person doing the act has to know or believe that the victim is assisting in the investigation of an offence or is a witness or potential witness or juror or potential juror in proceedings for an offence. He has to do the act intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with. If the other ingredients are established, this intention is presumed unless the contrary is proved. The intimidation does not necessarily have to be successful in the sense that the victim does not have actually to be deterred or put in fear. But it will obviously be material evidence if the victim was not in fact deterred or put in fear. A person may intimidate another person without the victim being intimidated. This apparent contradiction arises from different shades of meaning of the active and passive use of the verb. An act may amount to intimidation and thus intimidate, even though the victim is sufficiently steadfast not to be intimidated.

## F. Right to silence

55. A literal reading of article 23 may lead to concerns that the Convention requires the criminalization of certain situations in which a person exercises his or her right to silence. In some legal systems, domestic law provides an absolute right to decline to give evidence in some circumstances. Because article 23, unlike other articles under the Convention, does not contain any reference to the legal principles of the State party, some States parties may find it difficult to criminalize obstruction of justice while also ensuring that the right to silence can be lawfully exercised.

56. For this reason, an interpretative note was added to “indicate that it was understood that some countries may not cover cases where a person has the right not

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<sup>12</sup> For more information, see [sherloc.unodc.org](http://sherloc.unodc.org).

to give evidence and an undue advantage is provided for the exercise of that right".<sup>13</sup>

## VII. Conclusion

57. The purpose of the obstruction of justice offences under article 23 of the Organized Crime Convention is to protect witnesses and victims in criminal proceedings, including proceedings at the pretrial stage, as well as those involved in bringing members of organized criminal groups to justice. Furthermore, the purpose is to criminalize any threat, intimidation, harm or other undue influence on law enforcement and judicial officials, prosecutors, witnesses, victims, jurors and others participating and working in the criminal justice system. Article 23 is an important provision in ensuring the integrity of the criminal justice system and judicial processes by punishing subversions of the course of justice by skilful manipulators associated with criminal groups.

58. The present background paper has outlined the purpose, scope and constituent elements of the offence of obstruction of justice as stipulated in article 23 (a) and (b) of the Convention, in order to shed light on the requirements, design and scope of the offence and assist States parties in tailoring implementing legislation for the relevant offences to their domestic needs. A range of challenges that States parties may experience in their implementation and enforcement efforts relating to offences based on article 23 of the Convention have also been identified. The main intention is to assist States in addressing common concerns and learning from the experience of other jurisdictions in the implementation of criminalization of obstruction of justice and possibly identify needs for technical assistance in the implementation of the provision.

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<sup>13</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 216.