

Université de Montréal

**The Relevancy and Effectiveness of the United  
Nations Convention Against Corruption**

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The Relevancy and Effectiveness of the United Nations Convention Against  
Corruption

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## Résumé

La Convention des Nations Unies contre la corruption, adoptée en 2003, est le premier outil international criminalisant la corruption de façon aussi détaillée. Ce mémoire tente d'évaluer sa portée en analysant les dispositions concernant la prévention, la criminalisation, la coopération internationale et le recouvrement d'avoirs. Il tente d'évaluer la pertinence et l'efficacité de la Convention en illustrant ses défis en matière de conformité, pour ensuite étudier d'autres outils internationaux existants qui lui font compétition. Malgré sa portée élargie, il est débattu que la Convention souffre de lacunes non négligeables qui pourraient restreindre son impact à l'égard de la conduite d'États Membres.

**Mots-clés** : droit international, anti-corruption, *Convention des Nations Unies contre la corruption*, mise en œuvre, conformité

## **Abstract**

The United Nations Convention Against Corruption (adopted in 2003) is the first global in-depth treaty on corruption. This work attempts to assess its significance by analyzing its provisions, in particular concerning the areas of prevention, criminalization, international cooperation and asset recovery. It then seeks to assess its relevancy and effectiveness by giving an overview of the Convention's main compliance challenges, as well as other existing initiatives that tackle corruption. Although the Convention innovates in many respects, it is argued that it also suffers from weaknesses that cannot be overlooked, preventing it from having a real impact on States' behavior.

**Keywords** : international law, anti-corruption convention, *United Nations Convention Against Corruption*, review mechanism, compliance

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## **Abbreviations**

<b>AML</b>	Anti-money Laundering
<b>AU</b>	African Union
<b>CLCC</b>	Criminal Law Convention against Corruption
<b>CPCC</b>	Convention on Preventing and Combating Corruption
<b>EU</b>	European Union
<b>FCPA</b>	Foreign Corrupt Practices Act
<b>FINTRAC</b>	Financial Transactions Reports Analysis Centre of Canada
<b>GA</b>	General Assembly
<b>GRECO</b>	Group of States Against Corruption
<b>IACAC</b>	Inter-American Convention Against Corruption
<b>ICC</b>	International Criminal Court
<b>NGO</b>	Non-governmental Organization
<b>OAS</b>	Organization of American States
<b>OECD</b>	Organization of Economic Co-operation and Development
<b>TI</b>	Transparency International
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention Against Corruption
<b>UNCTOC</b>	United Nations Convention on Transnational Organized Crime
<b>UNODC</b>	United Nations Office on Drugs and Crime

*For all who have suffered at the  
hands of violence and dictatorship*

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## Introduction

“Little did we suspect that our own people [...] would be as corrupt as the apartheid regime<sup>1</sup>”

‘Corruption’ stems from the Latin word *corruptus*, meaning ‘to break’<sup>2</sup>. Although corruption is a difficult concept to define, it is widely assimilated to “the abuse of public office for private gain<sup>3</sup>”. It is argued that to even attempt to define a vast concept such as corruption will inevitably encounter legal and political difficulties, and that defining specific types of corruption offers less challenges<sup>4</sup>.

The United Nations considers this issue by offering a "multi-layered"<sup>5</sup> definition of corruption in its *Anti-Corruption Toolkit*<sup>6</sup>. According to the UN, the more common types of corruption are grand corruption, petty corruption, passive and active corruption. Whereas petty corruption often refers to an exchange of small amounts of money or minor favors (such as grease or facilitation payments), grand corruption involves high-ranking officials and is “distinguished by the scale of wealth appropriated and the seniority of public officials involved<sup>7</sup>”. The following passage differentiates between both types of corruption:

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<sup>1</sup> Robert Guest, *The Shackled Continent*, Pan Books, Basingstoke and Oxford, 2005 at 232 (citing Nelson Mandela) [Guest].

<sup>2</sup> Colin Nicholls et al., *Corruption and Misuse of Public Office*, Oxford University Press, Oxford and New York, 2006 at 1 [Nicholls, *Corruption and Misuse of Public Office*].

<sup>3</sup> Margaret Beare, *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, Toronto, Buffalo and London, 2003 at 89 [Beare].

<sup>4</sup> Nicholas A. Goodling, "Nigeria's Crisis of Corruption: Can the UN Global Programme Hope to Resolve this Dilemma?", (2003) 36 *Vanderbilt Journal of Transnational Law*, 997 at 1001 [Goodling].

<sup>5</sup> *Ibid.* at 1002.

<sup>6</sup> UNODC, *Anti-corruption toolkit*, 3<sup>rd</sup> Edition, United Nations, Vienna, 2004.

<sup>7</sup> Simeon Aisabor Igbinedion, “A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders Under the United Nations Convention Against Corruption”, (2009) 6 *Manchester Journal of International Economic Law*, 56 at 58 [Igbinedion].

"The most critical difference between grand corruption and petty corruption is that the former involves the distortion or corruption of the central functions of Government, while the latter develops and exists within the context of established governance and social frameworks.<sup>8</sup>"

Active and passive corruption are often used to refer to the offering or acceptance of a bribe<sup>9</sup>. Although corruption is universally considered reprehensible and is criminalized around the world<sup>10</sup>, difficulties remain in the lack of a consensus in defining corrupt behavior<sup>11</sup>. Extrapolating on this argument, it is suggested that "while all cultures eschew corruption, culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label<sup>12</sup>". In other words, what may be considered an improper transaction in one country may be acceptable in another<sup>13</sup>. In order to successfully create a consensus among varying State opinions, international treaties must consider the many possible definitions of corruption<sup>14</sup>.

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<sup>8</sup> UNODC, *supra* note 6 at 10.

<sup>9</sup> *Ibid.* at 11.

<sup>10</sup> Philip M. Nichols, "The Myth of Anti-Bribery Laws as Transnational Intrusion", (2000) 33 *Cornell International Law Journal*, 627 at 629 [Nichols].

<sup>11</sup> Stephen R. Salbu, "Foreign Corrupt Practices Act as a Threat to Global Harmony", (1998-1999) 20 *Michigan Journal of International Law*, 423 at 422 [Salbu, "Foreign Corrupt Practices Act as a Threat to Global Harmony"]; Barbara Crutchfield George and Kathleen A. Lacey, "A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks and NGOs: A Pivotal Complement to Current Anti-Corruption Initiatives", (2000) 33 *Cornell International Law Journal*, 547 at 554 [George & Lacey].

<sup>12</sup> Salbu, *ibid.* at 423; George & Lacey, *ibid.* at 555 (The existence of this divergence is even said to have fuelled a "symbiotic relationship" often arising between developing and industrialized countries, whereby the latter profit from corrupt transactions).

<sup>13</sup> Joongi Kim and Jong Bum Kim, "Cultural Difference in the Crusade Against International Bribery: Rice-Cake Expenses In Korea and the Foreign Corrupt Practices Act, (1997) 6 *Pacific Rim Law and Policy Journal*, 549 at 557 [Kim & Kim].

<sup>14</sup> *Ibid.* at 557.

Corruption is more and more perceived as a cause of underdevelopment and poverty: "[c]orruption is now seen as a cause of poverty, not merely a consequence [...]. It is no longer possible to justify corruption and oppression on the ground that they are part of the culture<sup>15</sup>". It is suggested that corruption is a result of imposing western economic and political models onto developing societies: "it can be best described as a result of Western Structures being applied to cultures with very different traditions of political and economic organization<sup>16</sup>". Others argue that corruption prevails wherever wide discretionary powers are left in the hands of one individual, regardless of the prevalent political or social model<sup>17</sup>. Whatever the cause of corruption may be, the importance of putting a global anti-corruption convention in place is obvious when one considers its devastating consequences.

It is argued that three particular consequences flow from corruption: "diminished economic development and growth, increased social inequalities and a discredited government and rule of law<sup>18</sup>". Many developing countries rely on foreign direct investment as a sure method of obtaining investment. Corruption however deters such investment by acting as an added cost or tax for investors<sup>19</sup>. Government spending then becomes inefficient and public funds are often diverted away from

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<sup>15</sup> Claes Sandgren, "Combating Corruption: The Misunderstood Role of Law", (2005) 39 *The International Lawyer*, 717 at 717 [Sandgren].

<sup>16</sup> Andrea D. Bontrager Unzicker, "From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery", (1999-2000) 7 *Indiana Journal of Global Legal Studies*, 655 at 657 [Bontrager Unzicker].

<sup>17</sup> Dimitri Vlassis, "The United Nations Convention Against Corruption Origins and Negotiation Process", (2002) UNAFEI, 66 *Resource Material Series*, 126-131 at 126 [Vlassis].

<sup>18</sup> Patrick X. Delaney, "Transnational Corruption: Regulation Across Borders", (2007) 47 *Virginia Journal of International Law*, 413 at 9 [Delaney].

<sup>19</sup> *Ibid.* at 10.

needed areas, leading to poor infrastructure, health systems and education systems<sup>20</sup>: "[c]orruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign direct investment.<sup>21</sup>".

Corruption also has far reaching social and political consequences: persistent corruption erodes social equality, disadvantaging the vulnerable and poor. It also often results in an extensive distrust of political authorities, in developing and developed Nations alike<sup>22</sup>. Furthermore, corruption threatens the rule of law and is more and more connected to organized crime, terrorism, drug and human trafficking<sup>23</sup>: "the rule of law is dependent not only on formal rules, but also on cultural and institutional supports [that] are eroded through a culture of corruption, as institutions become tainted and the trust of citizens diminishes<sup>24</sup>". The benefits in trying to prevent and reduce corruption are vast and cannot be ignored:

"By reducing corruption, the quality of life for every person will improve; it allows society to make real progress, it establishes a foundation for future growth, and enables society to maintain provisions which, hopefully, will prevent any serious regression<sup>25</sup>".

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<sup>20</sup> Vlassis, *supra* note 17 at 126.

<sup>21</sup> Former UN Secretary General Kofi Annan, *Statement On The Adoption By The General Assembly Of The United Nations Convention Against Corruption*, New York, October 31<sup>st</sup> 2003, available at: <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> [Date consulted: July 19<sup>th</sup> 2010].

<sup>22</sup> Delaney, *supra* note 18 at 11.

<sup>23</sup> Eney Quinones, "L'évolution du droit international en matière de corruption: La Convention de l'OCDE", (2003) 49 *Annuaire français de droit international*, 563 at 563 [Quinones].

<sup>24</sup> *Ibid.*

<sup>25</sup> Gerald E. Caiden, "A Cautionary Tale: Ten Major Flaws in Combating Corruption", (2003-2004) 10 *Southwestern Journal of Law and Trade & Trade in the Americas*, 269 at 273 [Caiden].

The issue of corruption received unprecedented attention in recent years and is a testament to the urgency of the battle against corruption<sup>26</sup>. The priority assigned to the adoption of effective instruments to combat corruption is revealed by the following five international anti-corruption instruments created within a short period of time<sup>27</sup>: the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*<sup>28</sup>, the *Inter-American Convention Against Corruption*<sup>29</sup>, the *African Union Convention on Preventing and Combating Corruption*<sup>30</sup>, the *Council of Europe Criminal Law Convention on Corruption*<sup>31</sup>, and the *United Nations Convention Against Transnational Organized Crime*<sup>32</sup>. These agreements will be analyzed alongside the *United Nations Convention Against Corruption*<sup>33</sup>, which rests at the center of our analysis.

This thesis attempts to assess the relevancy and effectiveness of the UNCAC. The

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<sup>26</sup> Rajesh R. Babu, "The United Nations Convention Against Corruption: A Critical Overview", (2006) *Asian African Legal Consultative Organization*, New Delhi, available at: <http://ssrn.com/abstract=891898> at 2 [Babu].

<sup>27</sup> These instruments were adopted between 1996 and 2003.

<sup>28</sup> Organization for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, December 17<sup>th</sup> 1997, available at: [http://www.oecd.org/document/20/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html) [Date consulted: February 16<sup>th</sup> 2011] [*OECD Anti-Bribery Convention* or *OECD Convention*].

<sup>29</sup> Organization of American States, *Inter-American Convention against Corruption*, March 29<sup>th</sup> 1996, available at: <http://www.oas.org/juridico/english/treaties/b-58.html> [Date consulted: February 16<sup>th</sup> 2011] [IACAC].

<sup>30</sup> African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, available at: <http://www.unhcr.org/refworld/docid/493fe36a2.html> [Date consulted: February 16<sup>th</sup> 2011] [*AU Corruption Convention* or CPCC].

<sup>31</sup> Council of Europe, *Criminal Law Convention on Corruption*, 27 January 1999, available at: <http://conventions.coe.int/treaty/en/treaties/html/173.htm> [Date consulted: February 16<sup>th</sup> 2011] [*Council of Europe Criminal Law Convention* or CLCC].

<sup>32</sup> UN General Assembly, *United Nations Convention against Transnational Organized Crime*, A/RES/55/25 (2001) [UNCTOC].

<sup>33</sup> UN General Assembly, *United Nations Convention Against Corruption*, A/58/422 (2003) [UNCAC].

first part of this work offers an overview of the measures adopted by the Convention as well as the language used in its relevant provisions. The provisions which will be examined include preventive measures, anti-bribery and bribery related provisions, international cooperation measures and the more innovative asset recovery provisions.

The second part of this thesis illustrates two different types of challenges faced by the UNCAC: compliance challenges and existing multilateral anti-corruption treaties. While we argue that compliance is a measure of the Convention's effectiveness, relevancy is measured by the need for the adopted treaty. In our opinion, the UNCAC cannot be qualified as relevant if it has no purpose. Giving an overview of other existing multilateral agreements meant to tackle corruption will help evaluate the need for a global anti-corruption convention. Given the lengthy task that is the fight against corruption, short-term results should not be the only measure in assessing the effectiveness of anti-corruption tools. If the Convention is however unable to sustain compliance in the long run, then it cannot, in our view, be considered an effective tool.

# Part I - Analysis of the United Nations Convention against Corruption

*“[The United Nations Convention against Corruption] is balanced, strong and pragmatic, and it offers a new framework for effective action and international cooperation.”<sup>34</sup>”*

The battle against corruption has not only become more urgent, it has also become more obvious as the extent of its reach has become growingly apparent<sup>35</sup>. Not only does corruption impoverish economies, threaten democracy and undermine the rule of law, it channels terrorism, organized crime and human trafficking<sup>36</sup>. These far reaching consequences clearly indicate that the war against corruption cannot be fought at the national level alone<sup>37</sup>. Corruption is without a doubt a problem of international interest as it touches developed and developing countries alike and respects no borders.

The UNCAC is a product of this heightened consciousness of corruption as a growing and indiscriminate threat. In fact, the question of a convention against

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<sup>34</sup> Former UN Secretary General Kofi Annan, *supra* note 21.

<sup>35</sup> In recent years, growing public interest has encouraged international organizations, private organizations and governments to commission numerous studies illustrating the effects and more concretely, the scale of the problem. See for example Transparency International’s annual “Corruption Perception Index” released in 1995, which ranks more than 150 countries, [www.transparency.org/tools/measurement](http://www.transparency.org/tools/measurement) [Date consulted: March 12<sup>th</sup> 2009]. Transparency International (hereafter “TI”) was founded in 1993 and is a global civil society organization whose main goal is to tackle issues relating to corruption. TI has over ninety locally established national chapters. Considered a global network, these local chapters fight corruption in a number of ways, by bringing together relevant information from government, civil society, business and the media in order to promote transparency in elections, in public administration, in procurement and in business. TI also uses advocacy campaigns to convince governments to implement anti-corruption reforms ([www.transparencyinternational.com](http://www.transparencyinternational.com)).

<sup>36</sup> UNODC, *Compendium of International Legal Instruments on Corruption*, Second edition, New York, 2005 at V.

<sup>37</sup> Ndiva Kofele-Kale, “The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law”, (2000) 34 *The International Lawyer*, 149-178 at 152 [Kofele-Kale, “The Right to a Corruption-Free Society”].

corruption was initially debated during the negotiations for the *United Nations Convention against Transnational Organized Crime*<sup>38</sup>, adopted in November of 2000<sup>39</sup>. It was agreed that even though corruption was inherent to the matters included in the UNCTOC and should be dealt with<sup>40</sup>, it was also far too complex a problem to be exhaustively covered by the Convention. Limited provisions on corruption were included with the understanding that a separate treaty was to be envisaged in order to appropriately tackle the vast issue of corruption<sup>41</sup>. To that end, the General Assembly stated in 2001 that “an effective international legal instrument against corruption, independent of the *United Nations Convention against Transnational Organized Crime*<sup>42</sup>” was necessary. Member States agreed that preserving the “spirit achieved during the negotiation process for the UNCTOC<sup>43</sup>” and basing the negotiation process on shared objectives and views as to the scope of the future convention were all crucial in guarantying the success of the treaty.

The General Assembly established the “Ad Hoc Committee for the Negotiation of a Convention against Corruption” in the summer of 2001 in Vienna, at the United

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<sup>38</sup> *Ibid.*

<sup>39</sup> The UNCTOC entered into force on September 29<sup>th</sup> of 2003.

<sup>40</sup> Furthermore, it was also decided that corruption constitutes a crime in which organized criminal groups engage to fund their activities and therefore could not be overlooked in the UNCTOC.

<sup>41</sup> Vlassis, *supra* note 17 at 127.

<sup>42</sup> UN General Assembly, *United Nations General Assembly Resolution*, G.A. Res. 55/61, U.N. GAOR, 55th Session (2001) at Agenda Item 105. See also François Vincke, “L’anti-corruption après la Convention de Mérida”, (2005) 85 *Revue de Droit Pénal et de Criminologie*, 351-386 at 363 [Vincke].

<sup>43</sup> Vlassis, *supra* note 17 at 128.

Nations Office on Drugs and Crime's headquarters (hereafter "UNODC"<sup>44</sup>) and proceeded to develop terms of reference enabling the widest participation of Governments<sup>45</sup>. Apart from highlighting key issues of concern, the existing multilateral anti-corruption tools served as a foundation for the consensus to begin negotiations on a new global instrument<sup>46</sup>.

A preparatory meeting for the negotiation of the convention against corruption was held in December of 2001 in Buenos Aires, where representatives of fifty-eight States gathered to discuss its contents<sup>47</sup>. The purpose was for the participating States to make proposals regarding various provisions to be included in the

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<sup>44</sup> The UNODC is now what used to be called the United Nations Office for Drug Control and Crime Prevention.

<sup>45</sup> UN General Assembly, *supra* note 42, at points 5,6, and 7 respectively. An Intergovernmental open-ended expert group was convened and asked to prepare a draft of the terms of reference to serve as a basis for the negotiation of the future convention against corruption. The General Assembly requested that the Ad Hoc Committee consider the following as main elements for the drafting of the Convention: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation.

<sup>46</sup> Philippa Webb, "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?", (2005) 8 *Journal of International Economic Law*, 191-229 at 192 [Philippa Webb]. Among existing anti-corruption tools were the *OECD Anti-Bribery Convention*, the IACAC, and the *Council of Europe Criminal Law Convention*.

<sup>47</sup> The following States were present: Algeria, Angola, Argentina, Australia, Austria, Belarus, Belgium, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Greece, Guatemala, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Japan, Kenya, Mali, Mauritius, Mexico, Netherlands, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Russian Federation, Senegal, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Viet Nam, Yugoslavia and Zaire. See *Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption*, A/AC.261/2, Buenos Aires, 4-7 December 2001 at <https://www.unodc.org/unodc/en/treaties/CAC/background/adhoc-committee-session1.html> [Date consulted: February 13<sup>th</sup> 2011].

Convention and to set a basis for further discussions and negotiations<sup>48</sup>. Four issues particularly held the Parties attention during this meeting: asset recovery, private sector corruption, treaty implementation, and political corruption. Following these preparatory efforts, negotiations started in the first quarter of 2002 and were conducted over the course of seven negotiating sessions, between January 21<sup>st</sup> 2002 and October 1<sup>st</sup> 2003. The Convention was finally signed in Merida, in December of 2003<sup>49</sup>. Entering into force in December of 2005<sup>50</sup>, the UNCAC already had 140 signatures and 50 ratifications by April of the following year<sup>51</sup>.

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<sup>48</sup> Lisa Landmeier et al., “Anti-Corruption International Legal Developments”, (2002) 36 *The International Lawyer*, 589 at 590 [Landmeier].

<sup>49</sup> Philippa Webb, *supra* note 46 at 205.

<sup>50</sup> In accordance with Article 68(1) of Resolution 58/4 (UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422), the UNCAC entered into force ninety days after the deposit of the thirtieth instrument of ratification.

<sup>51</sup> The following States are Parties to the UNCAC (they have either ratified the Convention or acceded to it): Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, France, Gabon, Georgia, Ghana, Greece, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Indonesia, Iran, Iraq, Israel, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Namibia, Nicaragua, Niger, Nigeria, Norway, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Zambia, and Zimbabwe. The full text of the Convention is available in the Annex of this work. It is also available electronically at the following website: <http://www.unodc.org/unodc/en/treaties/CAC/index.html>.

The Convention attempts to create global anticorruption standards and obligations. With 148 Parties, the Convention's claim to universality, some argue, positions it as the leading international anti-corruption tool<sup>52</sup>. In fact, the list of Parties includes States that have not yet ratified any other international treaty dealing with corruption<sup>53</sup>. Furthermore, because the Convention has been adhered to by a more diverse and a higher number of international players than any other anti-corruption instrument, it is more likely to create an international framework for cooperation in investigations and prosecutions, therefore rendering it more effective in practice. It is also considered the most detailed of any international anti-corruption treaty, containing seventy-one articles: "the UN Convention is by far the broadest in scope, as well as the most detailed, complex, and far-reaching of any of the anticorruption treaties to date"<sup>54</sup>.

An analysis of the Convention and the negotiation process leading up to its adoption are necessary steps in order to study its relevancy and effectiveness. As is often the case, the negotiation rounds demonstrate those areas of the Convention deemed to be controversial, the concessions made, and the differing positions among Member States regarding the inclusion of certain offences. These issues are important in determining its effectiveness and will be highlighted throughout our

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<sup>52</sup> Lucinda A. Low, "The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards", *Conference of the International Bar Association, International Chamber of Commerce, and OECD, "The Awakening Giant of AC Enforcement"* London, England 4-5 May 2006 at 3 [Low, "The United Nations Convention Against Corruption"].

<sup>53</sup> For example, the People's Republic of China ratified the UNCAC on January 13<sup>th</sup> 2006.

<sup>54</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 3.

overview of the Convention. Furthermore, a clear understanding of the UNCAC's many provisions on corruption is also necessary in order to fully assess its contribution to the existing legal anti-corruption framework.

The purpose of the UNCAC is threefold:

- “(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.<sup>55</sup>”

Four main areas can be identified in the Convention, each divided into separate chapters: preventive measures, criminalization, international cooperation, and asset recovery<sup>56</sup>. These issues are the Convention's founding pillars<sup>57</sup>:

“At the core of the negotiating process was the desire of all delegations to find an appropriate balance in the new instrument, in order to make sure that adequate and proportionate attention was devoted to prevention, criminalization, international cooperation and asset recovery.<sup>58</sup>”

This section will not only give a brief overview of the Convention's content, it will also try to give a preliminary assessment as to whether or not it has any “teeth<sup>59</sup>”

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<sup>55</sup> UNCAC, art. 1.

<sup>56</sup> *Ibid.*, Chapters II, III, IV and V.

<sup>57</sup> *UNODC Update*, V.03-89343, December 2003, p.3, available at: [http://www.unodc.org/pdf/newsletter\\_2003-12-01\\_1.pdf](http://www.unodc.org/pdf/newsletter_2003-12-01_1.pdf) [Date consulted: February 2<sup>nd</sup> 2011].

<sup>58</sup> Vlassis, *supra* note 17 at 130.

<sup>59</sup> *General Assembly Approves International Treaty Against Corruption*, UN News Service, 31 October 2003 (quoting Antonio Maria Costa, UNODC's Executive Director). See also Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, London, 1995 at 29 [Chayes & Chayes] (the expression refers to a form of coercive enforcement).

by attempting to interpret the language used. As will be demonstrated, the obligations imposed upon the State Parties by the Convention are drafted using terms that vary from highly discretionary to mandatory.

## Chapter I - Preventive Measures

The multifaceted nature of corruption and the need to eliminate it in a sustainable manner (as opposed to a short term fix) require the pursuit of extensive preventive measures<sup>60</sup>. Where such measures are lacking, reliance is habitually placed on defined offences and sanctions in cases of violation. However, this type of approach does not serve as a strong deterrent in practice<sup>61</sup>, but rather as a band-aid to a bleeding wound. Prevention is therefore necessary in order to deny criminal activity its breeding ground and to cut off corruption before it can take root. The UNCAC's provisions on preventive measures are applicable to both the public and private sectors<sup>62</sup>. In this respect, the Convention goes much further than previous anti-corruption treaties, such as the *AU Corruption Convention* and the IACAC<sup>63</sup>.

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<sup>60</sup> Ben W. Heineman and Fritz Heimann, "The Long War Against Corruption", (2006), Volume 85, Issue 3 *Foreign Affairs*, 75 at 77 [Heineman & Heimann].

<sup>61</sup> Indira Carr, "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?", (2006) 3 *Manchester Journal of International Economic Law*, 3 at 40 [Carr].

<sup>62</sup> Thomas R. Snider and Won Kidane, "Combating Corruption Through International Law in Africa: A Comparative Analysis", (2007) 40 *Cornell International Law Journal*, 691 at 718 [Snider & Kidane].

<sup>63</sup> UNCAC, arts.5-14; Low, "The United Nations Convention Against Corruption", *supra* note 52 at 5.

Among the UNCAC's preventive public sector measures is the requirement that Member States ensure the existence of independent anti-corruption bodies capable of implementing, coordinating and overseeing anti-corruption policies:

- “1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
- (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
  - (b) Increasing and disseminating knowledge about the prevention of corruption.
2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided...<sup>64</sup>”

The importance of such bodies or agencies cannot be stressed enough: they are the intermediary between governments and public opinion, making their political independence that much more important<sup>65</sup>. If they are neither transparent nor held accountable to the public, their impact becomes trivial. The result is similar in situations where anti-corruption agency employees dare not criticize government conduct for fear of being removed or demoted<sup>66</sup>. In light of these concerns, the UNCAC requires that State Parties confer upon these agencies the necessary independence in order to ensure the absence of any undue influence<sup>67</sup>.

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<sup>64</sup> UNCAC, *ibid.*, art.6.

<sup>65</sup> Jeremy Pope and Frank Vogl, “Making Anticorruption Agencies More Effective”, (2000) 37 *Finance and Development*, 6-9 at 6 [Pope & Vogl].

<sup>66</sup> *Ibid.*

<sup>67</sup> UNCAC, art.6(2).

At first glance the article seems to be phrased in legally binding terms. However, the use of the stringent term “shall” is offset by the phrase “in accordance with the fundamental principles of its legal system”. In light of this clause, opinions regarding the mandatory versus permissive quality of the language are divided<sup>68</sup>. In our opinion, it is quite clear that the provision contains a “qualifying clause<sup>69</sup>”, allowing for a potential escape route for Member States. What at first glance may seem as a result oriented obligation may prove to be deceiving; the result in each case will be different and subject to each Member State’s existing legal structure, which may cause uneven implementation among Parties. The following passage explains this unevenness in the field of international penal law:

“[B]eaucoup d’instruments internationaux laissent pour leur mise en œuvre une marge importante. On y trouve souvent des formulations du genre : «chaque partie adoptera les mesures législatives et autres qui s’avèreraient nécessaires pour faire en sorte que... », qui visent à l’équivalence fonctionnelle plutôt qu’à l’uniformité [...] Il n’est donc pas surprenant que les initiatives internationales en matière pénale soient mises en œuvre d’une façon hétérogène qui reflète en général les différentes traditions juridiques et institutionnelles dont relèvent les systèmes nationaux de justice criminelle<sup>70</sup>.”

The most controversial public sector measure created by the UNCAC is related to the oversight of campaign finance<sup>71</sup>. It calls upon Member States to enhance

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<sup>68</sup> Indeed, some authors consider that the provision is written in mandatory terms (see Snider & Kidane, *supra* note 62 at 707), whereas others maintain it is permissive in nature (see Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 5; Philippa Webb, *supra* note 46 at 206).

<sup>69</sup> Philippa Webb, *ibid.* at 206 (the author states that “[t]hese qualifying clauses provide a potential escape clause for reluctant legislators”).

<sup>70</sup> Peter Hägel, “L’incertaine mondialisation du contrôle – La France et l’Allemagne dans la lutte contre la corruption et le blanchiment”, (2005) 29 *Déviante et Société*, 243 at 250 [Hägel].

<sup>71</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 5.

transparency in the funding of political parties and of candidates for elected office<sup>72</sup>. However novel in its nature, the obligation has a discretionary quality, allowing members to “consider” taking measures with respect to political funding:

“2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.<sup>73”</sup>

Other preventive public sector requirements include provisions concerning the establishment of transparent public procurement systems<sup>74</sup>, public financing accountability measures<sup>75</sup>, merit-based systems for the selection of civil servants<sup>76</sup>, and the application of codes of conduct for public officials<sup>77</sup>. The clause “in accordance with the fundamental principles of its legal system” is present in all of these articles, once again affording Member States a certain level of discretion.

Provisions relating to the judiciary as well as prosecution strive to prevent “opportunities for corruption”, using very broad language:

“Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance

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<sup>72</sup> UNCAC, art.7(3).

<sup>73</sup> *Ibid.*, art.7(2), (3).

<sup>74</sup> *Ibid.*, art.9.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, art.7.

<sup>77</sup> *Ibid.*, art.8.

with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.<sup>78</sup>

Other articles call on Member States to enhance transparency in their public administration and to ensure the public's participation in decision-making processes<sup>79</sup>. These obligations are also written in general terms, giving Member States latitude to interpret their obligations as they wish<sup>80</sup>.

Private sector corruption was most definitely a hot topic of discussion during the negotiations among Member States, as previous international treaties had remained silent on this matter<sup>81</sup>. Regional instruments had however already gone in this direction, for example in Europe and Africa<sup>82</sup>. Given the fact that the line between the public and private sectors is becoming increasingly blurred as a result of outsourcing and privatization, the rapid growth of the private sector in some countries<sup>83</sup> and the growing influence of multinational corporations, it would have been negligent to refuse to criminalize corruption in both sectors<sup>84</sup>. The adoption

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<sup>78</sup> *Ibid.*, art.11. Emphasis added.

<sup>79</sup> *Ibid.*, arts.10 and 13.

<sup>80</sup> Carlos Fernandez De Casadevante Y Romani, *Sovereignty and Interpretation of International Norms*, Springer, Madrid, 2007 at 42 [Fernandez De Casadevante Y Romani] (due to the absence of specific obligations, they are described as “good will obligations” and characterized as having a significant margin for discretionary or subjective interpretation. The provisions have a “low value of enforceability” for Member States); Vincke, *supra* note 42 at 364.

<sup>81</sup> Philippa Webb, *supra* note 46 at 213.

<sup>82</sup> See the *European Union Joint Action on Corruption in the Private Sector*, 98/742/JHA (1995) at arts.2-3 [*Joint Action*], as well as the *AU Corruption Convention* at art.4.

<sup>83</sup> This is the case for example in China, see the Asian Development Bank's Annual Report from 2006: [www.adb.org/Documents/Reports/Annual\\_Report/2006/ADB-AR2006-East-Asia.PDF](http://www.adb.org/Documents/Reports/Annual_Report/2006/ADB-AR2006-East-Asia.PDF) [Date consulted: March 23<sup>rd</sup> 2009].

<sup>84</sup> Irwin Arieff, *UN Anti-Corruption Pact Raises Last-Minute Alarms*, Reuters, June 29<sup>th</sup> 2003

of anti-corruption measures in the private sector in the UNCAC, similar to those applicable to the public sector, recognizes the gradual convergence of both sectors<sup>85</sup>.

The preventive measures that are focused on the private sector pertain to auditing and accounting standards as well as to the enforcement of penalties (whether civil, administrative or criminal). Although the terminology used in these provisions is broad, at least an important number of measures are proposed. However, countries are once again called upon to uphold such measures without prejudice to the fundamental principles of their national law<sup>86</sup>. More forceful language is used regarding tax deductions. In effect, Article 12(4) of the Convention requires that Member States prohibit the tax deductibility of expenses that constitute bribes:

“4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.”<sup>87</sup>

Also in the private sector, anti-money laundering measures (hereafter “AML”) take the UNCAC further than prior international instruments<sup>88</sup>. Whereas previous instruments focused on the criminalization of AML, the Convention calls for preventive measures such as the creation of national regulatory regimes for banks

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[Arieff] (comments made by Jeremy Pope of Transparency International).

<sup>85</sup> Philippa Webb, *supra* note 46 at 215.

<sup>86</sup> UNCAC, art.12.

<sup>87</sup> *Ibid.*, para.4.

<sup>88</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 6.

and non-bank financial institutions<sup>89</sup> regarding customer identification, record-keeping and reporting of suspicious activity<sup>90</sup>. The language which imposes these obligations is mandatory: “[each] state party shall: institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions [...]”<sup>91</sup>. Nevertheless, the establishment of a financial intelligence unit equipped to collect and analyze information potentially linked to money laundering is written in more permissive language, the Convention calling on Member States to “consider” the creation of such units<sup>92</sup>. This same wording is used in requiring the implementation of measures to detect cross-border cash and negotiable instrument movements as well as to ensure that financial institutions assess the originators’ or ordering parties’ true identity<sup>93</sup>.

Having created a number of measures aimed at preventing corruption, the Convention then tackles the heart of the issue with a detailed list of specific offences in the following Chapter.

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<sup>89</sup> Non-bank financial institutions include insurance companies, mortgage providers, credit unions and money service businesses. They provide banking services without meeting the legal definition of a bank. They are therefore not regulated by the same framework as banks.

<sup>90</sup> UNCAC, art.14 (1) a).

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, para. b).

<sup>93</sup> *Ibid.*, para. (2), (3).

## **Chapter II - Criminalization and Law Enforcement**

The UNCAC's Chapter entitled “Criminalization and Law Enforcement” constitutes the core of the Convention and defines various offences as well as provisions detailing their application and enforcement<sup>94</sup>. This section will attempt to analyze articles under the Convention which focus on offences such as bribery, embezzlement, money laundering, and bribery-related crimes, as well as the measures set out to enforce them.

### **Section I - Criminalization**

There is a wide array of opinions on what constitutes public corruption, and some are more inclusive or broad than others. There is indeed a lack of uniformity among international instruments regarding the scope of the crime, and the often broad or unspecific language allows for differing interpretations. This complicates harmonization efforts, as Member States will have differing interpretations of the offence, causing them to apply different legal standards and solutions. It has however been widely maintained that public corruption refers almost exclusively to bribery and it is viewed as the “most identified form of corruption<sup>95</sup>”. In fact, past international anti-corruption tools have relied on bribery as the standard

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<sup>94</sup> *Ibid.*, arts.15-42.

<sup>95</sup> Ruth Nicholls, “Corruption in the South Pacific: The Potential Impact of the UN Convention Against Corruption on Pacific Island States”, (2005) 2 *New Zealand Yearbook of International Law*, 207-277 at 225 [Nicholls, “Corruption in the South Pacific”].

offence of public corruption<sup>96</sup>. It can be contended that bribery has over time become almost synonymous with corruption. This unfortunate outcome restricts the scope and reach of anti-corruption tools, ignoring other activities enabling personal enrichment through the misuse of authority and which therefore fall under the breadth of corruption<sup>97</sup>.

The UNCAC innovates by criminalizing corruption in its wider meaning<sup>98</sup>, including bribery but also other bribery-related offences such as embezzlement<sup>99</sup>, trading in influence<sup>100</sup>, abuse of functions<sup>101</sup>, illicit enrichment<sup>102</sup>, money laundering<sup>103</sup>, and obstruction of justice<sup>104</sup>.

### **i. Anti-Bribery Provisions**

According to experts<sup>105</sup>, there are three principal justifications for criminalizing

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<sup>96</sup> Such as the IACAC, the *OECD Anti-Bribery Convention* and the *Council of Europe Criminal Law Convention*.

<sup>97</sup> Peter J. Henning, “Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law”, (2001) 18 *Arizona Journal of International and Comparative Law*, 793 at 796 [Henning].

<sup>98</sup> Ndiva Kofele-Kale, “Change or the Illusion of Change: Against Official Corruption in Africa”, (2006) 38 *George Washington International Law Review*, 697 at 723 [Kofele-Kale, “Change or the Illusion of Change”].

<sup>99</sup> UNCAC, arts.17 and 22.

<sup>100</sup> *Ibid.*, art.18.

<sup>101</sup> *Ibid.*, art.19.

<sup>102</sup> *Ibid.*, art.20.

<sup>103</sup> *Ibid.*, art.23.

<sup>104</sup> *Ibid.*, art.25.

<sup>105</sup> Guy Stessens, “The International Fight Against Corruption”, (2001) 72 *International Review of Penal Law*, 892-937 at 894 [Stessens, “The International Fight Against Corruption”]; Henning, *supra* note 97 at 803.

bribery at the domestic and international levels<sup>106</sup>. The first justification offered is the need to uphold the integrity of public administration as it influences the public's view of society. Indeed, society's trust in governance mechanisms is essential in fostering the democratic society model. This 'need' creates a beneficial cycle in that the public nature of the officials' job plays a role in preventing bribe taking. For instance, the risk of removal from office may in some cases prevent the acceptance of a bribe<sup>107</sup>. A second justification in defense of criminalizing bribery is the need to protect the proper functioning of public administration. Although this principle sounds similar to the first, it refers to efficiency rather than integrity (whereas efficiency refers to the internal functioning of public administration, integrity refers to the appearance of proper functioning)<sup>108</sup>. Finally, safeguarding fair competition and transparency are paramount in ensuring that government funds are not allocated to undeserving bidders<sup>109</sup>.

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<sup>106</sup> The criminalization of bribery may seem obvious at first glance; however it is not a given in some cultures that have a more lenient view of bribery. Some authors suggest that criminalizing all forms of bribery amounts to cultural imperialism and is an "unwarranted intrusion into the culture and affairs of other nations" (Delaney, *supra* note 18 at 20). Precision and nuance are given to this argument in the following passage: "The problem is not that some cultures embrace bribery and corruption – indeed, no culture appears to do so. Rather, the difficulty of blanket global rules and assessments rests in more subtle differences in particularized applications of the generic anti-bribery norm, particularly given countervailing social functions of the same gratuities in one culture that would be considered unacceptable in another. That is, the world very likely could converge on a set of conceptual standards for theoretically defining corruption. It probably cannot agree on the application of the standards in a wide variety of subtly differentiated cases [...]" (Steven R. Salbu, "Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village", (1999) 24 *Yale Journal of International Law*, 233 at 241 [Salbu, "Extraterritorial Restriction of Bribery"]). See also Henning, *supra* note 97 at 794, n. 5.

<sup>107</sup> Stephen R. Salbu, "A Delicate Balance: Legislation, Institutional Change and Transnational Bribery", (2000) 33 *Cornell International Law Journal*, 657 at 676 [Salbu, "A Delicate Balance"].

<sup>108</sup> *Ibid.*

<sup>109</sup> Stessens, "The International Fight Against Corruption", *supra* note 105 at 894.

The most commonly accepted definition of bribery is “the abuse of public office for private gain<sup>110</sup>”. The term ‘abuse’ refers to the supply and demand sides of bribery<sup>111</sup>. The supply side concerns the offering of a bribe, whereas the demand side refers to its acceptance or request<sup>112</sup>. Within the UNCAC, both the bribery of national and foreign public officials is criminalized<sup>113</sup>, and both offences are defined using mandatory terms<sup>114</sup>:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) the promise, offering or giving, (...) directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.<sup>115</sup>”

The specific actions that are criminalized are the offering, giving, promising, acceptance, and solicitation of any “undue advantage”<sup>116</sup>. Unfortunately the Convention does not define the notion of “undue advantage”. It is however agreed that it covers any type of advantage, whether material or immaterial, monetary or

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<sup>110</sup> Beare, *supra* note 3 at 89.

<sup>111</sup> Also commonly referred to as active and passive bribery (see Stessens, “The International Fight Against Corruption”, *supra* note 105 at 901).

<sup>112</sup> UNCAC, art.15 a) and b) (See also Salbu, “A Delicate Balance”, *supra* note 107 at 671).

<sup>113</sup> *Ibid.*, arts.15 and 16.

<sup>114</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 7.

<sup>115</sup> UNCAC, art.15. Emphasis added. This article criminalizes the bribery of *national* public officials, touching domestic law. The offence is defined identically at Article 16 (with the necessary adjustments) for the bribery of foreign public officials and of public international organizations.

<sup>116</sup> UNCAC, *ibid.*, arts.15, 16 and 21.

non-pecuniary<sup>117</sup>. Previous national and multilateral instruments criminalizing bribery distinguished pecuniary benefits from favors and other types of advantages<sup>118</sup>. It can therefore be argued that the Convention encompasses a wider array of advantages, as it “clearly refers to something to which the recipient concerned was not entitled<sup>119</sup>”. The bribe must be carried out in the individual’s official capacity, “in the exercise of his or her official duties”<sup>120</sup>. The illicit advantage need not be destined to the official, but any third party, whether a person or an entity, such as a family member or an organization of which the official is a member<sup>121</sup>.

The provision criminalizing the bribery of national public officials uses strongly binding terms: the Parties to the Convention must adopt legislative measures targeting supply and demand bribery<sup>122</sup>. An important concern with regard to the article’s application is the definition of “public official” as defined in Article 2(a) of the Convention<sup>123</sup>. It is a semi-autonomous definition in that it defines the notion regardless of domestic law, but in addition it allows for the consideration of local definitions:

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<sup>117</sup> Stessens, “The International Fight Against Corruption”, *supra* note 105 at 904; Martin Polaine, “Criminalizing the Bribery of National and Foreign Public Officials”, (2005) Background Paper, *ADB/OECD Anti-Corruption Initiative for Asia and the Pacific*, 3rd Master Training Seminar, Pakistan, 14-17 February 2005 at 14 [Polaine].

<sup>118</sup> Snider & Kidane, *supra* note 62 at 720. For example, the FCPA, the IACAC and the *AU Corruption Convention*.

<sup>119</sup> Polaine, *supra* note 117 at 14.

<sup>120</sup> UNCAC, arts.15 and 16.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, art.15.

<sup>123</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 8.

“[...] (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in Chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party [...]”<sup>124</sup>”

The definition applies to all government branches, namely the legislative, executive, administrative, and judicial branches. The officials need not be permanently employed or remunerated in order to fall under the scope of the definition<sup>125</sup>. Unfortunately the Convention does not define the term “public enterprise”, meaning that its interpretation will be left to the discretion of each Member State.

The bribery of foreign public officials as well as those of public international organizations is covered in Article 16 of the Convention:

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.  
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or

<sup>124</sup> UNCAC, art.2 (a)(iii). Emphasis added.

<sup>125</sup> *Ibid.*, para.(i).

acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.<sup>126</sup>”

The supply and demand sides of bribery have both been criminalized in respect to foreign public officials, but the two offences are not treated equally. The supply side requires criminalization using the terms “shall adopt”, whereas the demand side need only be “considered” as an offence<sup>127</sup>. The choice of terms reflects the influence of jurisdictional issues: the demand side, holding foreign countries accountable, is criminalized using more discretionary terminology.

Many international instruments have focused merely on the supply aspect of bribery<sup>128</sup>. Reasons for the sparse criminalization of passive bribery in the past have had more to do with legal issues such as enforcement, implementation, and jurisdiction, rather than political or social considerations. It is more feasible to control the offering of a bribe through extra-territorial legislation than it is to control the actions of a foreign official:

“Transnational laws that attack the demand side of bribery are feasible, but jurisdictional impediments create additional hurdles that are not applicable to supply-side legislation regulating domestic firms. Outlawing foreign officials’ acceptance of bribes would require multilateral treaties that confer the necessary jurisdictional authority. However, these efforts would prove frustrating. Those nations that would participate in that kind of treaty arrangement

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<sup>126</sup> *Ibid.*, art.16. Emphasis added.

<sup>127</sup> *Ibid.*, paras.1-2.

<sup>128</sup> David A. Gantz, “Globalizing Sanctions Against Foreign Bribery”, (1997-1998) 18 *Northwestern Journal of International Law and Business*, 457 at 480 [Gantz]. There are however multilateral instruments that criminalize both the supply and demand sides of bribery, such as the *AU Corruption Convention* and the *IACAC*.

would probably be committed to fighting corruption, making extraterritorial intervention unnecessary. In contrast, those nations that refuse to participate may lack a commitment to fight transnational corruption.<sup>129</sup>

The ‘jurisdictional impediment’ mentioned in the above citation refers to the lack of enthusiasm on the part of States towards initiatives aimed at criminalizing the actions of another country’s public officials, as this would clearly impede sovereignty<sup>130</sup>.

Before the adoption of the UNCAC, it had been argued that legislators should consider drafting passive bribery provisions to complement the already existing provisions against supply-side bribery<sup>131</sup>. The following explanation may help to understand why the UNCAC's provisions are not more stringent in regards to the solicitation of bribes: “corruption is like adultery: ninety percent of it is a matter of opportunity. If you eliminate the opportunities, you eliminate the crime<sup>132</sup>”.

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<sup>129</sup> Salbu, “A Delicate Balance”, *supra* note 107 at 685.

<sup>130</sup> Sovereignty is defined as the power of a State over its territory, government, and people. It is limited by its physical borders (Philippa Webb, *supra* note 46 at 228). A more complete definition explains the extent and sacredness of this concept: “[...] la souveraineté territoriale, en assurant à chaque État le droit de choisir et de développer librement son système politique, social, économique et culturel, constitue la plus haute expression de la liberté et de l’indépendance politique des peuples et des nations et commande conséquemment non seulement le respect absolu du principe de l’inviolabilité des frontières mais aussi du principe de non-ingérence: aucun État n’a le droit d’intervenir directement ou indirectement, pour quelque motif que ce soit, dans les affaires intérieures ou extérieures d’un État et ce principe exclut non seulement la force armée, mais aussi toute autre forme d’ingérence, comme des mesures coercitives de caractère politique ou économique, qui serait attentatoire à la personnalité de l’État.” (Jean-Maurice Arbour et Geneviève Parent, *Droit International Public*, Éditions Yvon Blais, Montréal, 2006 at 265 [Arbour & Parent]). Some examples of legislative application of this principle can be seen in the *African Union’s Constitutive Act* at Article 4, the *Charter of the Organization of American States* at Article 21 and in the UNCAC at Article 4.

<sup>131</sup> Authors such as Stephen R. Salbu and Guy Stessens shared this opinion. See Salbu, “A Delicate Balance”, *supra* note 107 at 678; Stessens, “The International Fight Against Corruption”, *supra* note 105 at 903.

<sup>132</sup> Gantz, *supra* note 128 at 480.

Although this may be logical in theory, it is our belief that a persistent demand for bribery will encourage its illicit counterpart. Indeed, many acts of bribery are initiated by public officials<sup>133</sup>. The reason for this is simple. The officials are the ones with the upper hand, with the position of power. It is therefore more likely that they would be the ones to broach the subject of bribes<sup>134</sup>.

Similar to previous conventions<sup>135</sup>, the UNCAC's definition of what constitutes a foreign public official is completely autonomous, as it does not call for State Parties to consider domestic law. In comparing the definitions of 'public official' and 'foreign public official', it is clear that the latter is broader because it contains no reference to national law. For instance, a foreign public official could be prosecuted in a situation where, if it were a matter of internal or national conduct, the act would not be punishable<sup>136</sup>. Such an outcome could have serious far-reaching implications for State sovereignty. However, in addition to the fact that the bribery of foreign public officials is phrased in a non-mandatory manner, it is unlikely to apply to the demand aspect of bribery because the definition disregards domestic law<sup>137</sup>. Simply put, it is difficult to conceive that a foreign public official should be punished for passive corruption when the reproached conduct is not

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<sup>133</sup> Salbu, "A Delicate Balance", *supra* note 107 at 686 (the author suggests this as a speculative argument).

<sup>134</sup> Taking this argument further, some argue that highly corrupt officials purposely instigate a feeling of uncertainty in order to increase the offer of bribes (see Nichols, *supra* note 10 at 632).

<sup>135</sup> The *OECD Anti-Bribery Convention* also contains an autonomous definition of foreign public official, ensuring that the offence is prosecuted regardless of local law definitions and providing for a lower burden of proof on the prosecuting party. See Stessens, "The International Fight Against Corruption", *supra* note 105 at 911.

<sup>136</sup> Stessens, *ibid.*

<sup>137</sup> UNCAC, art.16(2).

prohibited in the official's own country<sup>138</sup>.

The meaning of "foreign public official" is stated as:

"[...] any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise; [...]"<sup>139</sup>,

An "official of a public international organization" is held to be: "an international civil servant or any person who is authorized by such an organization to act on behalf of that organization"<sup>140</sup>. This development reflects the fact that public international organizations have a significant economic impact in developing countries, through development projects and humanitarian aid<sup>141</sup>. Other tools such as the *AU Corruption Convention* and the IACAC omitted to include this category of individuals<sup>142</sup>.

The debate on private sector corruption during the UNCAC's negotiation process highlighted strong opposing opinions. More and more public oriented activities are being transferred to the private sector through outsourcing and privatization, blurring the line between sectors. This convergence not only calls for anti-corruption measures, but may potentially create fraud or bribery opportunities in the very act of transferring substantial budgets and regulatory powers from one

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<sup>138</sup> Stessens, "The International Fight Against Corruption", *supra* note 105 at 912.

<sup>139</sup> UNCAC, art.2 b).

<sup>140</sup> *Ibid.*, para.(c).

<sup>141</sup> Snider & Kidane, *supra* note 62 at 733.

<sup>142</sup> *Ibid.*

sector to another<sup>143</sup>. Furthermore, multinational corporations have a significant economic influence that must be included in any international anti-corruption strategy if it is to be effective<sup>144</sup>.

During the UNCAC's negotiation, the European Union held strong in its drive to include a private-to-private provision, backed by the Group of Latin America and Caribbean States who stated that “adopting a limited approach would adversely affect the implementation of the future convention<sup>145</sup>”. These States were of the opinion that targeting only the public sector would have a detrimental effect on the Convention’s success and ability to tackle public corruption: “Tolerance of private corruption inevitably makes it more difficult to prevent and combat public corruption<sup>146</sup>”. On the other hand, the United States’ opinion against the inclusion of a purely private sector provision was forceful, despite their own existing national legislation regarding bribery in the private sector as applying to private-to-public situations<sup>147</sup>. The fear was that “extending the treaty to the private sector could create a private right of action opening the door to lawsuits in foreign courts [...]”<sup>148</sup>. A compromise was reached where private-to-private corruption was

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<sup>143</sup> Philippa Webb, *supra* note 46 at 212; Babu, *supra* note 26 at 19; Vlassis, *supra* note 17 at 156; Stessens, “The International Fight Against Corruption”, *supra* note 105 at 914.

<sup>144</sup> *Ibid.* at 213.

<sup>145</sup> *Report From the Ad Hoc Committee for the Negotiation of a Convention Against Corruption Fourth Session Vienna*, Ad Hoc Committee for the Negotiation of a Convention Against Corruption, A/AC.261/9 (2003) at 3; Philippa Webb, *supra* note 46 at 213.

<sup>146</sup> Antonio Argandona, “The United Nations Convention Against Corruption and its Impact on International Companies”, *Chair of Economics and Ethics*, Research Paper No 656, October 2006 at 9 [Argandona, “The United Nations Convention Against Corruption”].

<sup>147</sup> The *Foreign Corrupt Practices Act* (1977) nationally criminalizes private-to-public bribes paid abroad (see *infra* note 356). See also Philippa Webb, *supra* note 46 at 213.

<sup>148</sup> Arieff, *supra* note 84.

ultimately criminalized, but was not phrased in mandatory terms<sup>149</sup>.

In the past, the phenomenon of private corruption has been commonly dealt with through civil law proceedings, not criminal law<sup>150</sup>. Within the UNCAC, private sector bribery is criminalized in Article 21. The obligation is however framed in non-binding language:

“Each State Party shall consider adopting such legislative and other measures [...]:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.<sup>151”</sup>

Both the supply and demand sides are criminalized, although using non-mandatory wording<sup>152</sup>. Nevertheless, it is believed that many countries might still adopt such measures by following the examples of the Council of Europe and the European Union<sup>153</sup>. Furthermore, many States that have undergone significant privatization have come to realize that bribery in the private sector should be criminalized on the same level as public sector bribery<sup>154</sup>.

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<sup>149</sup> UNCAC, art.21 (this refers to the terms “shall consider adopting”).

<sup>150</sup> Stessens, “The International Fight Against Corruption”, *supra* note 105 at 914.

<sup>151</sup> UNCAC, art.21. Emphasis added.

<sup>152</sup> *Ibid.*, paras (a) and (b).

<sup>153</sup> Art.7 of *The Council of Europe Corruption Convention* requires the criminalization of commercial bribery and the EU has decided that States should do the same. See *Joint Action*, *supra* note 82.

<sup>154</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 10.

## ii. Other Bribery related Provisions

The UNCAC criminalizes bribery related offences in both the public and private sectors, such as trading in influence, the abuse of functions or position, illicit enrichment, embezzlement, and the laundering of proceeds of crime<sup>155</sup>.

### *a) Trading in Influence*

Trading in influence refers to the act of paying public officials in order to influence the decision-making process inherent to their functions. In such cases, the influence is used to obtain an undue advantage for a third party: “the offence involves using ones’ real or supposed influence to obtain undue advantage for a third person from an administrative or public authority of that State<sup>156</sup>”.

In an attempt to deal with what may be described as “background corruption<sup>157</sup>”, Article 18 criminalizes trading in influence using discretionary terms and considers supply and demand in parallel:

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original

<sup>155</sup> UNCAC, arts.18, 19, 20, 22, and 23.

<sup>156</sup> Babu, *supra* note 26 at 12.

<sup>157</sup> Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 342.

instigator of the act or for any other person;  
 (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.<sup>158,</sup>

This provision is considered controversial because of its wide scope; it may apply to lobbying, as it targets transactions carried out with “any other person”<sup>159</sup>. Although the provision's application may be wide, it is framed in non-mandatory terms.

#### *b) Abuse of Functions*

The abuse of functions is described in Article 19 of the Convention as “the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage”<sup>160</sup>. In this scenario, there is no exchange between individuals, contrary to the act of bribery<sup>161</sup>. The provision uses non-mandatory language stating that each Member State “shall consider adopting” these measures, making it a discretionary offence.

It should be stressed that this prohibition applies only to public officials and that it

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<sup>158</sup> Emphasis added.

<sup>159</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 9.

<sup>160</sup> This provision criminalizes one aspect of the demand side of bribery, as it applies exclusively to public officials.

<sup>161</sup> Carr, *supra* note 61 at 23.

therefore does not directly touch companies or their employees<sup>162</sup>. Article 19 of the UNCAC has a larger application than the bribery provisions, as it also condemns acts where a public official intentionally attempts or seeks to gain an undue advantage by using his or her position, even without ever receiving the advantage<sup>163</sup>. The approach is noteworthy in view of the fact that the provision's requirements are independent to those included in the Convention's anti-bribery provisions: "[t]his approach is distinguishable because it requires a violation of law independent of the violation of the same anti-bribery provisions that are the sources of responsibility under the solicitation provision<sup>164</sup>".

### *c) Illicit Enrichment*

Article 20 of the Convention creates an offence in situations where there is a significant increase in the assets of a public official that cannot be justified by his or her income:

"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."<sup>165</sup>

The subject of illicit enrichment has provoked much debate in the context of

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<sup>162</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 10.

<sup>163</sup> Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 342.

<sup>164</sup> Snider & Kidane, *supra* note 62 at 726.

<sup>165</sup> Emphasis added.

previous conventions such as the *AU Corruption Convention* and the IACAC, in that the offence tends to shift the burden of proof to the defendant<sup>166</sup>. This gives investigative authorities an advantage by requiring that they prove only a substantial increase in assets, making it easier for inexperienced law enforcement officers to investigate and prosecute such cases<sup>167</sup>. Preferring the common assets disclosure requirement found in the Asset Recovery Chapter of the Convention, one author criticizes this type of provision<sup>168</sup>:

“It is highly doubtful that compromising the fundamental principle of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course. This is particularly true in Africa where, as the AU Corruption Convention suggests, the crime of corruption is directly linked with the rule of law and good governance. In fact, it directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples’ Rights. The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment.”<sup>169</sup>

However, other experts believe that the restriction imposed on individual rights may be legitimate, as long as the breach is proportionate to the seriousness of the problem<sup>170</sup>. As corruption is a grave social problem, shifting the burden of proof onto the defendant can be deemed an appropriate response. Some countries raised constitutional difficulties with this provision during negotiations, which may

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<sup>166</sup> Carr, *supra* note 61 at 23.

<sup>167</sup> *Ibid.*, at 24. When considering the absence of resources and technical expertise in many developing countries, this advantage is considerable.

<sup>168</sup> Referring to provisions similar to art.52(5) of the UNCAC.

<sup>169</sup> Snider & Kidane, *supra* note 62 at 729.

<sup>170</sup> Ndiva Kofele-Kale, “Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes”, (2006) 40 *The International Lawyer*, 909 at 944 [Kofele-Kale, “Presumed Guilty”].

explain why the text of the provision starts with the phrase “[s]ubject to its constitution and the fundamental principles of its legal system<sup>171</sup>”.

*d) Embezzlement*

The “embezzlement, misappropriation or other diversion of property by a public official” is an offence created by article 17 of the Convention. As with the provisions criminalizing bribery, embezzlement in the public sector is phrased using mandatory wording:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.<sup>172</sup>”

The Convention contains an equivalent offence in respect to embezzlement in the private sector, although it has a non-mandatory quality using the terms “shall consider” as opposed to “shall adopt”<sup>173</sup>. Both provisions regarding embezzlement and diversion of property apply only to domestic actions and do not concern transnational corruption *per se*<sup>174</sup>.

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<sup>171</sup> UNCAC, art.20. Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 23.

<sup>172</sup> UNCAC, *ibid.*, art.17.

<sup>173</sup> *Ibid.*, art. 22.

<sup>174</sup> Snider & Kidane, *supra* note 62 at 726.

*e) Money Laundering*

Money laundering is generally defined as “the recycling of criminally derived funds through normal financial system operations with a view to making the funds available for future legitimate (or illegitimate) use<sup>175</sup>”. In simpler terms, it is “a process which obscures the origin of money and its source<sup>176</sup>”. Although the term is widely used, there are many definitions, perhaps due to differences in State policies, priorities or academic perspectives<sup>177</sup>. It is also defined as “the process of manipulating legally or illegally acquired wealth in a way that obscures its existence, origin or ownership for the purpose of avoiding law enforcement<sup>178</sup>”. Because legislation differs considerably among jurisdictions, money laundering cannot be effectively tackled on a unilateral or bilateral basis<sup>179</sup>. An international instrument enhances the harmonization of tools allowing for the crime to be tackled more effectively<sup>180</sup>.

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<sup>175</sup> Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 242. The Financial Transactions and Reports Analysis Centre of Canada (an independent financial intelligence agency created in 2000) refers to the following definition: “any act or attempted act to disguise the source of money or assets derived from criminal activity”. Furthermore, it illustrates three recognized stages in the laundering process: (1) “placement” which involves placing the proceeds of crime in the financial system, (2) “layering” which involves converting the proceeds of crime into another form and creating complex layers of financial transactions to disguise the audit trail and the source and ownership of funds, and finally (3) “integration” which involves placing the laundered proceeds back into the economy to create the perception of legitimacy. See FINTRAC’s website: <http://www.fintrac-canafe.gc.ca/publications/guide/Guide1/1-eng.asp#221> [Date consulted: July 16<sup>th</sup> 2008].

<sup>176</sup> Barry A. K. Rider, “Recovering the Proceeds of Corruption”, (2007) 10 *Journal of Money Laundering Control*, 5-32 at 15 [Rider].

<sup>177</sup> Heba Shams, “The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control”, (2001) 7 *Law and Business Review of the Americas*, 85 at 108 [Shams].

<sup>178</sup> *Ibid.* at 109.

<sup>179</sup> Dinah Shelton, *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, 2000 at 246 [Shelton].

<sup>180</sup> Okogbule gives an example of a common Nigerian money-laundering scheme whereby public officers incorporate companies and use them as beneficiaries of fake contracts. Many millions of

As an offence, money laundering was criminalized for the first time in 1986 by the United States and the United Kingdom<sup>181</sup>. On an international level, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*<sup>182</sup> first criminalized money laundering in 1988, setting the framework for future global instruments<sup>183</sup>.

The *Vienna Convention of 1988* does not expressly use the terms “money laundering”, but rather refers to each underlying element of the crime<sup>184</sup>. Interestingly, the definition of the elements is similar to that of the UNCAC’s, apart from the fact that it applies only to property derived solely from drug trafficking offences<sup>185</sup>. Because the offence applies only to drug-related crimes, the *Vienna Convention of 1988* is limited in scope. It does however cover many ‘manipulations’ of property “whether to conceal its origin, location, disposition, movement, ownership or any other rights<sup>186</sup>”. Moreover, the criminalization of money laundering has evolved beyond the limited scope of drug-related offences

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naira are transferred from the government treasury to their bank accounts, located in Nigeria and abroad (See also Daniel K. Tarullo, “The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention”, (2003-2004) 44 *Virginia Journal of International Law*, 665 at 53 [Tarullo]).

<sup>181</sup> Shams, *supra* note 177 at 112.

<sup>182</sup> UN Economic and Social Council (ECOSOC), *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 19 December 1988, available at: <http://www.unhcr.org/refworld/docid/49997af90.html> [Date consulted: February 16th 2011] [*Vienna Convention of 1988*]. The Convention has 185 Parties, including the United States, China, Russia, Canada, and India.

<sup>183</sup> Bruce Zagaris, “Trends in International Money Laundering From a US Perspective”, (2001) 35 *The International Lawyer*, 839 at 840 [Zagaris].

<sup>184</sup> *Vienna Convention of 1988*, art.3; Shams, *supra* note 177 at 112.

<sup>185</sup> UNCAC, art.23; Shams, *ibid*.

<sup>186</sup> Shams, *ibid*.

since the 1988 Convention<sup>187</sup>. Indeed, money laundering has been the target of more recent international tools, such as the *OECD Anti-Bribery Convention*, the UNCTOC and the UNCAC. The latter however defines the offence as an aspect of corruption, using a multifaceted approach<sup>188</sup>:

“[...] corruption is very often exercised for the purpose of securing economic or even pecuniary gains. [...] Pursuing the proceeds of corruption and confiscating them, if carried out effectively, can reduce the incentive to act corruptly. This is premised on a belief that the individual’s economic behaviour is rational and based on a balance of interest and risk<sup>189</sup>.”

This multifaceted approach is an important development due to the global change in crime control policy<sup>190</sup>, which more and more affects the profitability of criminal activity such as transnational organized crime.

Within the UNCAC, not only is concealment covered by the provision concerning the laundering of crime proceeds<sup>191</sup>, it is criminalized in its own right, albeit using non-binding language and without prejudicing the Convention’s anti-money laundering provision (Article 23):

“Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the

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<sup>187</sup> *Ibid.* at 113.

<sup>188</sup> Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 241.

<sup>189</sup> Shams, *supra* note 177 at 117.

<sup>190</sup> Referring to the political situation following the September 11<sup>th</sup> attacks: “The political environment has led to a more vigorous and extensive anti-money laundering regime as great urgency is given to requirements to know your customers and exercise due diligence, and to freeze and confiscate terrorist funds” (in Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 243).

<sup>191</sup> UNCAC, art.23 (a)(ii).

commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.<sup>192</sup>,

Article 23, which prohibits money laundering, is divided into two parts. The first, which refers to the transfer of property and its concealment, is strictly binding in its phrasing whereas the second, concerning the use of property and participation, is subject to the basic concepts of the State Party's legal system:

“Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article. [...]<sup>193</sup>”

The second paragraph confers upon States a measure of discretion in interpreting their legal obligations and refers to the ‘use of property’ that is not qualified within the Convention. Any type of proceeds of crime use should therefore be considered

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<sup>192</sup> *Ibid.*, art.24. Emphasis added.

<sup>193</sup> *Ibid.*, art.23. Emphasis added.

an independent offence, subject to the Member States' interpretation<sup>194</sup>. Whether it constitutes an indictable offence is left to the discretion of the Parties to the Convention<sup>195</sup>.

*f) Obstruction of Justice*

Obstruction of justice refers to “the use of physical force, threats or intimidation<sup>196</sup>” in order to obtain false evidence or testimony, or in order to interfere with official duties relating to the commission of offences under the Convention. The terms used are mandatory: “[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences [...]”<sup>197</sup>.

The criminalization of this offence is unusual in a corruption convention, as it is generally criminalized locally. This type of provision has not been widely integrated in previous international or multilateral anti-corruption instruments, such as the *OECD Convention*, the *IACAC* and the *AU Corruption Convention*. Its goal within the *UNCAC* might be to strengthen the investigation and prosecution process of alleged corruption cases<sup>198</sup>.

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<sup>194</sup> Snider & Kidane, *supra* note 62 at 727.

<sup>195</sup> *Ibid.*

<sup>196</sup> *UNCAC*, art.25.

<sup>197</sup> *Ibid.*

<sup>198</sup> Carr, *supra* note 61 at 21.

*g) Participation, Attempt, and Preparation*

The participation in all of the offences criminalized by the Convention is strictly prohibited as follows:

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention [...].<sup>199</sup>”

The Convention also provides for incomplete crimes<sup>200</sup>, namely the attempt and preparation of offences<sup>201</sup>. They are in both cases phrased using discretionary terms. The following paragraphs allow for the adoption of such measures:

“2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.<sup>202</sup>”

The need to distinguish between the attempt and the preparation of bribery offences may stem from the differences between national laws, as not all countries

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<sup>199</sup> UNCAC, art.27(1). Emphasis added.

<sup>200</sup> Don Stuart, *Canadian Criminal Law*, 4<sup>th</sup> Edition, Carswell, Toronto, 2001 at 696 [Stuart]. Incomplete crimes such as attempts and conspiracies exist to enable the police to intervene before the anticipated commission of a crime. They are preventive in nature.

<sup>201</sup> UNCAC, art.27(2) and (3).

<sup>202</sup> *Ibid.* Emphasis added.

criminalize both aspects<sup>203</sup>.

## **Section II - Interpretive and Law Enforcement Measures**

Along with the list of specific offences which we detailed above, Chapter III of the UNCAC also includes interpretive and law enforcement measures. These provisions add important practical measures that should help in promoting harmonization among national anti-corruption laws<sup>204</sup>.

### **i. General Law Enforcement Considerations**

This section groups together certain provisions that are of a more general nature. They refer to basic concepts of criminal law, such as sanctions, intent, liability, and the statute of limitations.

#### *a) Intent*

In the realm of transnational criminal activity, one of the major problems in prosecuting offences is the difficulty of obtaining evidence coupled with the heavy burden of proof imposed upon the prosecution<sup>205</sup>. The presumption of innocence

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<sup>203</sup> Carr, *supra* note 61 at 24; Polaine, *supra* note 117 at 11. For example, in the Republic of Korea, bribing attempts on foreign public officials are not criminalized.

<sup>204</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 12.

<sup>205</sup> Abdullahi Y. Shehu, "Combating Corruption in Nigeria: Bliss or Bluster?", (2005) 12 *Journal of Financial Crime*, 69-87 at 82 [Shehu] (Requirements relating to burden of proof also hinder the

requires that the prosecuting counsel prove that the accused intended his or her actions and their consequences<sup>206</sup>. Within the UNCAC, intent is a required element in the offence of bribery as it is for all of the other offences created<sup>207</sup>.

The interpretation of the fault element or *mens rea* of the crime will vary in different legal systems<sup>208</sup>. For instance, in the common law tradition, corruption requires specific intent. In other words, the intent to commit the act is required (in this case the offering or accepting of a bribe) as well as for the action's consequences (in this case the intent to act upon the given or accepted bribe)<sup>209</sup>. In other jurisdictions, specific intent is not required<sup>210</sup>, lightening the burden of proof for the prosecution. In this respect, the UNCAC is the first anti-corruption convention that clearly stipulates how intent is to be construed, diminishing the debate on whether a subjective or objective test is to be applied<sup>211</sup>. In order to soften the burden of proof resting on the prosecution, the Convention allows for reliance on inferential evidence: “knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances<sup>212</sup>”. Given that the burden is slightly

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possibility of speedy trials. Furthermore, it is contended that anti-corruption efforts in most countries have been affected by evidentiary difficulties: “Among the challenges of proof are issues of how funds were stolen from the public treasury in one country and stashed in another jurisdiction with completely different legal systems”).

<sup>206</sup> Shams, *supra* note 177 at 113.

<sup>207</sup> UNCAC, arts.15 to 27.

<sup>208</sup> Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 227.

<sup>209</sup> Polaine, *supra* note 117 at 17. This is the case in Canada in relation to the bribery of officials. See art.120 of the Criminal Code of Canada.

<sup>210</sup> *Ibid.* at 18. This is the case in Slovenia in relation to the crime of bribery.

<sup>211</sup> Carr, *supra* note 61 at 21.

<sup>212</sup> UNCAC, art.28.

lightened, this provision should considerably help the prosecution of offences under the Convention<sup>213</sup>.

*b) Sanctions*

Although the Convention lists many offences, the sanctions which attach to each offence are far from exhaustive<sup>214</sup>. The UNCAC stipulates in Article 30, “each Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence<sup>215</sup>”. However, it is unclear how the concept of gravity should be construed<sup>216</sup>: does it refer to the gravity of the act itself or to its consequences? The answer will vary with the interpretation given by each Member State. In fact, considering that sentencing policies vary greatly among countries, it is understandable that this area of the law has thus far not been harmonized<sup>217</sup>.

One of the principle provisions dealing with sanctions has proven to be quite controversial and touches the issue of immunities<sup>218</sup>. Article 30 of the UNCAC stipulates:

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<sup>213</sup> Shehu, *supra* note 205 at 83 (The importance of the burden of proof cannot be overstated: “The issue of burden of proof, which has obstructed the successful prosecution of offenders and recovery of proceeds of illicit enrichment, needs to be reversed, so that any accused person will have to prove that his/her assets were not acquired through corrupt means”).

<sup>214</sup> Carr, *supra* note 61 at 34.

<sup>215</sup> UNCAC, art.30.

<sup>216</sup> Carr, *supra* note 61 at 35.

<sup>217</sup> *Ibid.* at 36.

<sup>218</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 13.

“Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.<sup>219</sup>”

From this particular wording, it appears that the Convention grants Member States a very wide discretion regarding immunities and privileges, which, considering their role in hindering the prosecution of officials in the past may prove to be a significant barrier to the removal and punishment of corrupt officials<sup>220</sup>.

### *c) Statute of Limitations*

Even though State Parties may not be required to nationally criminalize all of the offences stated in the UNCAC (as some are phrased in discretionary terms and others in mandatory terms), should they decide to do so, they are required to establish a long statute of limitations period<sup>221</sup>. The language of the relevant provision (Article 29) is somewhat flexible, in that it allows countries to assess when to provide for a longer period, using the terms “where appropriate”:

“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.<sup>222</sup>”

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<sup>219</sup> UNCAC, art.30(2). Emphasis added.

<sup>220</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 13.

<sup>221</sup> UNCAC, art.29.

<sup>222</sup> *Ibid.* Emphasis added.

It is therefore up to each State to decide what is “appropriate”. Furthermore, there is no guidance provided as to what should be considered a long period<sup>223</sup>.

*d) Jurisdiction*

The UNCAC’s provision on jurisdiction is of broad significance as it applies to all criminalization articles under the Convention, and is consistent with similar provisions adopted by previous anti-corruption agreements, such as the *OECD Convention*<sup>224</sup>. In regards to both conventions, parties are asked to merely consult with one another when determining the appropriate jurisdiction for prosecution<sup>225</sup>. Article 42 of the UNCAC confers jurisdiction whether the offence is committed on the State’s territory, whether the offence is committed by or against a national of the State Party or against the State itself<sup>226</sup>. However, since many of the offences under the Convention are capable of being committed in more than one jurisdiction, the provision may not have been adequately drafted and should have anticipated this scenario<sup>227</sup>. In money laundering cases in particular, assessing the location of the crime is complex and can lead to the investigation and prosecution of a crime in two countries.

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<sup>223</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 13.

<sup>224</sup> *Ibid.*, at 15.

<sup>225</sup> *OECD Anti-Bribery Convention*, art.4.

<sup>226</sup> UNCAC, art.42, paras.1-2.

<sup>227</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 15.

In assessing the effectiveness of the UNCAC, the actual wording of the provisions criminalizing specific acts of corruption is of the utmost interest. However, other aspects need to be considered for they will undoubtedly impact the Convention's ability to eradicate corrupt practices.

## **ii. Investigation and Procedural Aspects**

Anti-corruption tools typically suffer from enforcement difficulties in part because of investigation shortcomings and because of the concealed nature of the crimes<sup>228</sup>.

The successful prosecution of cases depends highly on leads provided by informants (sometimes referred to as whistleblowers<sup>229</sup>) who, because of the sensitive nature of the information they possess, are often threatened and intimidated<sup>230</sup>. Unfortunately, the UNCAC must face these difficulties and to that end, it has anticipated measures to protect witnesses, experts, victims, and reporting individuals, thus aiding them in coming forward with information<sup>231</sup>. States are called upon to either “consider incorporating<sup>232</sup>” into their domestic legislation appropriate measures in order to protect reporting persons or to establish measures “in accordance with [their] domestic legal system and within

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<sup>228</sup> Carr, *supra* note 61 at 25.

<sup>229</sup> *Ibid.* at 26, n. 53.

<sup>230</sup> *Ibid.* at 25.

<sup>231</sup> UNCAC, arts.32-33.

<sup>232</sup> *Ibid.*, art.33.

[their] means<sup>233</sup>”. The reason for the discretionary quality of the phrasing is perhaps explained by the costs and resources needed to implement such measures<sup>234</sup>, particularly in those countries facing high levels of corruption and who will therefore need to provide for the protection of more individuals<sup>235</sup>. In addition, these countries are most often some of the poorer developing countries<sup>236</sup>.

Another measure that may prove to be costly for Member States concerns the obligation to establish enforcement bodies. In order to ensure that State Parties can effectively prosecute and investigate offences under the Convention, Member States must establish independent and specialized anti-corruption enforcement bodies, subject to the fundamental principles of their legal systems. Emphasis is put on the importance of independence and the need for cooperation between law enforcement agencies<sup>237</sup>. The degree of autonomy conferred upon such authorities is however left to the discretion of each State, to be determined through relevant national legislation<sup>238</sup>. This provision was placed in the Convention's chapter on

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<sup>233</sup> *Ibid.*, art.32.

<sup>234</sup> Carr, *supra* note 61 at 27.

<sup>235</sup> This assumption is based on the premise that a higher number of corruption cases causes a higher number of informants. This is undoubtedly a simple reasoning because it does not factor in environmental considerations such as social pressure, culture, and poverty.

<sup>236</sup> Transparency International, *Corruption Perception Index Report*, Transparency International Secretariat, Berlin, 2007. In 2007, Transparency International's yearly Corruption Perception Index Report assessed that the countries facing the 10 lowest scores were the following: Somalia, Myanmar, Iraq, Haiti, Uzbekistan, Tonga, Sudan, Chad, Afghanistan, and Laos: [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2007](http://www.transparency.org/policy_research/surveys_indices/cpi/2007) [Date consulted: February 2<sup>nd</sup> 2011].

<sup>237</sup> UNCAC, art.38.

<sup>238</sup> Snider & Kidane, *supra* note 62 at 736.

criminalization and law enforcement despite the fact that it can also be qualified as a preventive provision<sup>239</sup>.

Parties to the Convention must take measures in order to strengthen cooperation between public or government officials and prosecuting authorities, in accordance with State Parties' domestic laws<sup>240</sup>. Such measures include but are not limited to providing enforcement authorities with requested information and to inform them when they have reasonable grounds to believe that an offence has been committed<sup>241</sup>. The same types of measures are called for between national authorities and the private sector, with particular emphasis on financial institutions<sup>242</sup>. These provisions encourage the transmission of relevant information in regard to the commission of offences under the Convention.

### **iii. Consequences of Corruption and Private Rights of Action**

The UNCAC's measures on civil liability and damages are far reaching and will undoubtedly enhance deterrence by creating additional weapons<sup>243</sup>: civil and administrative sanctions. A possible outcome of the implementation of these provisions is a gradual privatization of law enforcement: "[t]hese two articles thus signal a resolve on the part of negotiators of the UN Convention to unleash the

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<sup>239</sup> UNCAC, art.36.

<sup>240</sup> *Ibid.*, art.38.

<sup>241</sup> *Ibid.*, art.38.

<sup>242</sup> *Ibid.*, art.39.

<sup>243</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 15.

power of private civil litigation and collateral legal and administrative sanctions on persons that commit corrupt practices<sup>244</sup>. Moreover, recalling the difficulties associated with the investigation and prosecution of offences, the evidence obtained from civil trials could be used in ongoing investigations or in future criminal trials<sup>245</sup>.

Article 35 explicitly establishes a private right of action, using discretionary terms:

“Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.<sup>246</sup>”

The language used in the provision seems to give considerable latitude to countries in determining the parameters of a private right of action.

The Convention also contains a separate provision allowing States to “consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument [...]”<sup>247</sup>. Discretionary in nature, Article 34 allows States to take measures allowing them to address the consequences of corruption. The following excerpt illustrates a few possible outcomes in relation to these provisions:

“La convention permet aussi l'annulation d'un contrat ou le retrait d'une concession ou de tout autre acte juridique analogue qui pourrait se trouver infecté par une pratique de corruption. Elle

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<sup>244</sup> *Ibid.* at 17.

<sup>245</sup> *Ibid.*.

<sup>246</sup> UNCAC, art.35. Emphasis added.

<sup>247</sup> *Ibid.*, art.34.

édicte, de plus, le droit d'engager une action en justice pour les entités ou personnes qui ont subi un préjudice du fait d'un acte de corruption<sup>248</sup>,

Though discretionary, Article 34 is significant since this type of provision was not previously part of anti-corruption treaties<sup>249</sup>. Furthermore, the provision is not limited to convicted offenders under the Convention, which allows it to apply to a wider array of situations. Close attention should therefore be paid as to how Member States will implement this measure: "[c]ompanies that do business abroad or at home through government contracts, concessions, licenses and permits should be aware that this provision may prompt more widespread revocation of rights than has historically been the case<sup>250</sup>".

### **Chapter III - International Cooperation**

Having analyzed the Convention's preventive measures as well as its main offences one can begin to sense a pattern as to its lack of enforceability. Continuing the overview of the UNCAC's provisions and before moving to an analysis of its main challenges, measures relating to cooperation between Member States must be considered for they will affect the prosecution of alleged offenders.

Due to the transnational nature of corruption it is often very difficult to prosecute,

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<sup>248</sup> Jean-Paul Laborde, "Un pas de plus dans la lutte contre la corruption: la Convention des Nations Unies contre la corruption", (2004) 75 *Revue internationale de droit penal*, 837 at 849 [Laborde].

<sup>249</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 15.

<sup>250</sup> *Ibid.* at 16.

making trans-border cooperation crucial<sup>251</sup>. Within international conventions, it is often contended that the provisions relating to international cooperation are the most valuable in ensuring that both the convention's as well as the domestic criminal justice system's goals are attained<sup>252</sup>:

“The effectiveness of the fight against transnational crime is in part dependant upon the effectiveness of international co-operation in criminal matters. In this sense the attainment of the goals of a domestic criminal justice system is often contingent upon international co-operation.”<sup>253</sup>

The goal of international cooperation in the field of corruption is the same as in the domestic arena: gathering evidence in order to immobilize the suspects. With the prevalence of money laundering and transnational organized crime, another objective comes into play: the confiscation of the proceeds of crime<sup>254</sup>. The critical need for trans-border cooperation is a direct result of State sovereignty<sup>255</sup>: the principle of the sovereign equality of States (codified in the *Charter of the United Nations*<sup>256</sup>) limits the investigatory and enforcement powers locally, to a States' own territory<sup>257</sup>. This is in part why specific agreements need to be concluded to ensure effective cooperation.

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<sup>251</sup> Stessens, “The International Fight Against Corruption”, *supra* note 105 at 928.

<sup>252</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 19.

<sup>253</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model*, Cambridge University Press, Cambridge, 2000 at 252 [Stessens, *Money Laundering*].

<sup>254</sup> *Ibid.* at 251.

<sup>255</sup> There are of course other considerations that challenge international cooperation, such as the lack of financial resources and available expertise.

<sup>256</sup> Art.2 (1), United Nations, *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [Date consulted: February 16<sup>th</sup> 2011].

<sup>257</sup> Stessens, *Money Laundering*, *supra* note 253 at 251.

However daunting the task of facilitating the exchange of information and enforcement actions between nations, one must not forget the overall collective goal: the fundamental interests of the international community warrants that bilateral or multilateral action should at times be prioritized over unilateral decision-making<sup>258</sup>. In this spirit, the international cooperation chapter of the Convention contains a multitude of provisions detailing confiscation cooperation, extradition, and mutual legal assistance<sup>259</sup>. These provisions, lengthy and detailed, create a broad framework for cooperation. They are meant to operate independently from Member States' national systems when domestic laws permit such an outcome and to supplement other existing cooperation treaties<sup>260</sup>.

The obligation to cooperate applies regardless of whether the underlying offence is phrased in mandatory or discretionary terms, as long as it has been implemented at the national level<sup>261</sup>. However, the condition of dual criminality is applied, a notion which commands that the underlying conduct must be criminalized under the laws of both State Parties<sup>262</sup>. The following passage clearly explains the concept:

“Under the dual criminality - or double criminality as it is often called – the act for which a prisoner was convicted and sentenced in a foreign country must also be a crime in the prisoner’s home country. If the home country does not recognize the act as a crime, the prisoner is not eligible for transfer under the terms of a penal transfer treaty.”<sup>263</sup>

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<sup>258</sup> Arbour & Parent, *supra* note 130 at 259.

<sup>259</sup> UNCAC, Chapter IV, arts.43 to 49.

<sup>260</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 18.

<sup>261</sup> *Ibid.*

<sup>262</sup> UNCAC, art.43(2); Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 346.

<sup>263</sup> William V. Dunlap, “Dual Criminality in Penal Transfer Treaties”, (1988-1989) 29 *Virginia*

In this respect, the UNCAC deems that the condition of dual criminality is fulfilled in the following cases:

“[W]henver dual criminality is considered a requirement, it shall be deemed fully irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under laws of both States Parties.<sup>264</sup>”

The nature or extent of the cooperation obligations between States will therefore depend on whether dual criminality is present on a case-by-case basis<sup>265</sup>. Simply put, if dual criminality is not present, the requirements for cooperation will not be mandatory, whereas if present, the same requirements become binding. Applied to extradition, the Convention stipulates that:

“[T]his article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.<sup>266</sup>”

The terms of extradition under the UNCAC are similar to other international instruments in that the goal is to create a ‘treaty within a treaty’<sup>267</sup>, without having to fall back on other treaties or domestic laws. The extradition provision details

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*Journal of International Law*, 813 at 815 [Dunlap].

<sup>264</sup> UNCAC, art.43(2). Emphasis added.

<sup>265</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 18.

<sup>266</sup> UNCAC, art.44(1). Emphasis added. It should be noted that the provision on extradition is lengthy and complex, as is its applicable law. It is not our goal to fully analyze the provision here.

<sup>267</sup> Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 346. See also Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 18.

complex situations that could arise in the domestic implementation process and seeks to resolve them, such as preventive custody requirements pending extradition<sup>268</sup>, evidentiary requirements<sup>269</sup> and prosecution where only one offence among many is extraditable<sup>270</sup>. The provisions practically illustrate actions that can be taken by Member States in different situations:

“Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.<sup>271</sup>”

A wide measure of mutual legal assistance is provided for in Article 46. Among key features is the establishment of a central authority to ensure the rapid execution of mutual legal assistance requests<sup>272</sup> and the requirement that mutual legal assistance requests not be refused on the grounds of bank secrecy<sup>273</sup> or on fiscal grounds<sup>274</sup>. Such requests may pertain to evidence or statements, executing seizures, searches or freezing of assets, examining sites, providing expert evaluations, tracing the proceeds of crime, etc<sup>275</sup>. Other forms of cooperation are also detailed to “enhance the effectiveness of law enforcement action to combat

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<sup>268</sup> UNCAC, art.44(10).

<sup>269</sup> *Ibid.*, para. (9).

<sup>270</sup> Snider & Kidane, *supra* note 62 at 740.

<sup>271</sup> UNCAC, art.44(10).

<sup>272</sup> *Ibid.*, art.46(13).

<sup>273</sup> *Ibid.*, para. (8).

<sup>274</sup> *Ibid.*, para. (22).

<sup>275</sup> *Ibid.*, para. (3). Many examples of requested assistance are listed in the Convention, and are non-exhaustive. In fact, it is stipulated in paragraph (i) of Article 46 that “any other type of assistance that is not contrary to the domestic law of the requested party” can be afforded, when the applicable conditions are met.

the offences covered by this Convention<sup>276</sup>”, for example, mechanisms to exchange information between State Parties’ competent authorities. It can be argued that the UNCAC has the most detailed provisions on mutual legal assistance among similar international anti-corruption tools<sup>277</sup>.

## Chapter IV - Asset Recovery

The UNCAC is seen as revolutionizing the realm of asset recovery in the field of international law:

“La Convention de l’ONU contre la corruption dans le domaine de ces infractions à caractère économique est, donc, venue apporter une mini révolution en instituant le principe de : *celui qui saisit restitue*. C’est là que réside, le revirement de tendance que nous nous plaignons à nommer d’avancée normative significative ou mini révolution conceptuelle.<sup>278</sup>”

The importance of the Convention’s provisions pertaining to asset recovery can only be properly understood when considered against past international initiatives aimed at curtailing corruption and the looting of funds. The International Monetary Fund estimates that the equivalent of approximately two percent of the world’s gross domestic product (up to US \$1.8 trillion) is laundered on a yearly basis and

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<sup>276</sup> UNCAC, art.48(1) paras. a), b), d), and f).

<sup>277</sup> Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 346. Similar anti-corruption measures include the *AU Corruption Convention*, *IACAC*, the *OECD Anti-Bribery Convention*, the *Council of Europe Criminal Law Convention* and the *UNCTOC*.

<sup>278</sup> Saliou Bah, “La restitution des avoirs issus de la corruption dans les conventions anti-corruption internationales: une avancée conceptuelle et normative à la portée pratique limitée”, (2010) 1 *Revue de droit des affaires internationales*, 15 at 16 [Bah].

that a “significant portion of that activity involves funds derived from corruption<sup>279</sup>”.

An interesting example of the severity of the problem is the case of Nigeria, which has been flagged for its high profile corruption cases<sup>280</sup>. Of the estimated \$400 billion that has been looted from the African continent, about a quarter is said to originate from Nigeria, a country in which an important majority of the population lives on less than a dollar a day. Another example is that of Indonesia, where Mohamed Suharto (President for almost thirty years and recently deceased) allegedly stole up to \$35 billion from his own people<sup>281</sup>.

Considering the staggering amount of funds lost, it is surprising that it is only recently that clauses on the recovery of stolen assets have been included in a

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<sup>279</sup> IMF, *Financial System Abuse, Financial Crime and Money Laundering—Background Paper*, February 2001, at 10, available at: <http://www.imf.org/external/np/ml/2001/eng/021201.htm> [Date consulted: February 13<sup>th</sup> 2011], cited in: *Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived From Acts of Corruption*, Ad Hoc Committee for the Negotiation of a Convention Against Corruption, 4<sup>th</sup> Session, Agenda item 3, UN Doc. A/AC 261/12 (2002) at 3. See also Bah, *ibid.* at 16-17 for other staggering amounts.

<sup>280</sup> Guest, *supra* note 1 at 121. See also Guillermo Jorge, “Notes on Asset Recovery in the United Nations Convention Against Corruption”, (2003) available at: [www.abanet.org/intlaw/hubs/programs/Annual0316.03-16.06.pdf](http://www.abanet.org/intlaw/hubs/programs/Annual0316.03-16.06.pdf) at 2 [Jorge] [Date consulted: June 15<sup>th</sup> 2010]; Ige Bola, “Abacha et le banquiers: la lumière sur la conspiration”, (2002) 2 *Forum sur le crime et la société*, 123 at 130 [Bola]. Sani Abacha, Nigeria’s late military and political leader and *de facto* President from 1993 to 1998, was named fourth most corrupt leader (in recent history) by Transparency International in 2004 and is estimated to have stolen up to \$5 billion (see *Introduction to Political Corruption*, TI, 2004 available at: [www.transparency.org/content/download/4459/26786/file/Introduction\\_to\\_political\\_corruption.pdf](http://www.transparency.org/content/download/4459/26786/file/Introduction_to_political_corruption.pdf), at 13 [Date consulted: July 28<sup>th</sup> 2010]. Records have shown that he and his associates stole over \$1 million for each day he was in office. Such cases reveal the disparities between different countries’ legal systems for dealing with asset recovery. To mention but a few, such disparities include the legal value of the evidence obtained abroad, privileges and immunities applicable to public officials, and measures for the immobilization of assets.

<sup>281</sup> *Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived From Acts of Corruption*, *supra* note 279 at 4.

multilateral treaty dealing with corruption. Indeed, while previously adopted regional and multilateral anti-corruption tools provide for the seizing and freezing of assets, they do not extensively cover the issue of asset recovery<sup>282</sup>. The UNCAC therefore enters new territory in this respect, being the first anti-corruption treaty to tackle the issue<sup>283</sup>. Veering away from a penalty approach to criminal law, the Convention targets a more profit-oriented perspective in its attempt to create mechanisms to recover stolen assets<sup>284</sup>.

The draft resolution for the negotiation of the Convention originally proposed that a separate instrument be negotiated on the subject of the repatriation of stolen funds. However, as a result of negotiations, it was decided that both draft resolutions would be combined into one, placing asset recovery at the very center of the Convention<sup>285</sup>. During the first negotiation session, representatives from the Group of 77<sup>286</sup>, the European Union and other Latin American and African States insisted that the Convention should address the issue of asset recovery. They stressed the need to develop measures and mechanisms for the recovery of stolen funds and property. Furthermore, many representatives insisted on the highly complex nature of these issues, referring to the tracing of funds and the

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<sup>282</sup> Carr, *supra* note 61 at 29, referring to the AU and OAS conventions on corruption.

<sup>283</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 19.

<sup>284</sup> Jorge, *supra* note 280 at 4.

<sup>285</sup> Vlassis, *supra* note 17 at 154.

<sup>286</sup> The Group of 77 was established on 15 June 1964 by developing countries signatories of the *Joint Declaration of the Seventy-Seven Countries*. Among its goals is to provide “the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development” (see following website: <http://www.g77.org/doc/> [Date consulted: February 16<sup>th</sup> 2011]).

identification of their rightful owners<sup>287</sup>.

To that effect, an informative seminar on the return of illicit funds was proposed by Peru and supported by Spain to cover practical and legal issues surrounding the implications of cases involving stolen funds and their return<sup>288</sup>. At the second negotiation session held in Vienna in June of 2002, the Chairman of the Ad Hoc Committee for the negotiation of the Convention stated the following: “the question of asset recovery is one of the fundamental aspects of the convention and would also serve as an indicator of the political will to join forces in order to protect the common good<sup>289</sup>”. It was the general opinion that these matters would be quite difficult to negotiate, given the complexities involved in investigating and recovering stolen assets, as well as problems related to the gathering of evidence, international cooperation, issues of cost, and jurisdiction<sup>290</sup>.

The asset recovery chapter received important support from both developing and developed countries:

“This is a particularly important issue for many developing countries where high-level corruption has plundered the national

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<sup>287</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its First Session*, Ad Hoc Committee for the Negotiation of a Convention Against Corruption, Second Session, A/AC.261/4 (2002) at 9.

<sup>288</sup> *Paper Submitted by Spain Concerning the Seminar on Return of Illicit Funds as Proposed by Peru*, Ad Hoc Committee for the Negotiation of a Convention Against Corruption, First Session, A/AC.261/CRP1 (2002) at 2.

<sup>289</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its First Session*, A/AC.261/7 (2002), *supra* note 287 at 3, para.11. See also Philippa Webb, *supra* note 46 at 208.

<sup>290</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its First Session*, *ibid.* at 3.

wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.<sup>291</sup>”

Many countries submitted proposals with specific sections addressing the proceeds of corruption. The United States found the subject so pressing that one of its draft proposals concerned only the redrafting of the asset recovery provisions<sup>292</sup>, whereas Austria and the Netherlands submitted revised texts on virtually every provision of the Convention<sup>293</sup>. Canada however qualified the discussion on asset recovery as unsatisfactory, considering that the concept itself was too broad and its consequences far-reaching, and that it covered a multitude of legal situations, some more complex than others<sup>294</sup>. Indeed, recovering stolen assets in an international setting can be a highly complex task, necessitating the availability of funds, technical cooperation and experts from many countries (to name a few, experts in accounting, criminal law, civil law and money laundering):

“Le démêlage de ces affaires de corruption à cheval entre deux ou plusieurs pays, nécessite un concours de rationalités des plus qualifiés possibles. Pour sortir des dédales d’une grande corruption avec enjeux de restitution d’avoirs depuis l’étranger, une batterie d’experts en comptabilité, en blanchiment d’argent, en droit civil et pénal de plusieurs pays est nécessaire. A minima, une connaissance

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<sup>291</sup> UNODC, *Consensus Reached on UN Convention Against Corruption*, UN Information Service, (October 2003) available at: <http://www.unodc.org/unodc/en/treaties/CAC/background/press-release-consensus.html> [Date consulted: October 12<sup>th</sup> 2009]. After all, developing countries have been and still are victims of large-scale corruption, and are in need of recovering funds stolen from them.

<sup>292</sup> Landmeier, *supra* note 48 at 590; see *Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption*, *supra* note 47.

<sup>293</sup> *Ibid.*, A/AC.261/IPM/4.

<sup>294</sup> Landmeier, *supra* note 48 at 590; *Proposals received from governments, Canada: non-paper*, A/AC.261/IPM/27, 7 December 2001.

pointue en droit comparé et de ses méthodologies est requise<sup>295</sup>”.

Although developed and developing countries had diverging opinions as to the content and scope of the asset recovery provisions, the need for some type of measure to be included was not a matter of debate. Although solidarity can sometimes give way to differing interests<sup>296</sup>, the contrary is also true: when a problem or issue affects many, efforts tend to coalesce.

In its final version, not only is asset recovery explicitly stated as a “fundamental principle” of the Convention, State Parties are required to “afford one another the widest measure of cooperation and assistance in this regard<sup>297</sup>”. A whole chapter is dedicated to the recovery of stolen assets and other measures dealing with money laundering and prevention are also included<sup>298</sup>. As set out in the Convention and in order to be effective, the recovery of assets must be preceded by three stages: investigation, prevention, and confiscation<sup>299</sup>. The prevention provisions are said to be unique to the UNCAC and are written using mainly mandatory language<sup>300</sup>. Prevention refers to the freezing and seizing of assets in order to prevent their transfer into unlawful hands<sup>301</sup>. For instance, Article 52, focusing primarily on the

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<sup>295</sup> Bah, *supra* note 278 at 27.

<sup>296</sup> Arbour & Parent, *supra* note 130 at 89.

<sup>297</sup> UNCAC, art.51. The reallocation of assets toward development is not the only positive outcome of asset recovery: “the process of accountability can have positive spillover effects in terms of generating a climate of rule of law” (Mark V. Vlastic . and Jenae N. Noell, “Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems”, (2010) 5 *Yale Journal of International Affairs*, 106 at 111 [Vlastic & Noell]).

<sup>298</sup> UNCAC, *ibid.*, Chapter V, arts.51 to 62.

<sup>299</sup> Jorge, *supra* note 280 at 5.

<sup>300</sup> Snider & Kidane, *supra* note 62 at 742.

<sup>301</sup> Jorge, *supra* note 280 at 5.

prevention and detection of the transfer of proceeds of crime, requires Member States to take measures to ensure that financial institutions verify their customers' identity and maintain client records in a multitude of situations. The provision's overall goal is to detect suspicious transactions and address large-scale corruption carried out by high-ranking officials<sup>302</sup>. Furthermore, disclosure systems for public officials, although discretionary in nature, are provided for in order to enable information sharing between States during investigations<sup>303</sup>.

As for the specific issue concerning the recovery of assets, the Convention covers direct and indirect recovery<sup>304</sup>. The direct recovery provision requires that States take measures to afford Member States a civil right of action to "establish title or ownership of property<sup>305</sup>" acquired through corrupt behavior and subsequently recovered, in accordance with their domestic law. This not only helps harmonize civil and criminal proceedings, it also offers plaintiffs an important advantage: that of a lower burden of proof (preponderance of probability as opposed to beyond all reasonable doubt)<sup>306</sup>. Indirect measures include the recognition of confiscation orders prepared by other States<sup>307</sup> and measures allowing for the freezing and seizure of property pending investigation<sup>308</sup>. Articles 55 through 57 pertain to

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<sup>302</sup> UNCAC, art.52 paras.(1) and (3). Such measures are commonly referred to as "know your customer" measures within the financial sector (See Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 247).

<sup>303</sup> UNCAC, *ibid.*, art.52(5).

<sup>304</sup> *Ibid.*, art.53 and 54 respectively; Snider & Kidane, *supra* note 62 at 742.

<sup>305</sup> *Ibid.*, para.(a).

<sup>306</sup> Philippa Webb, *supra* note 46 at 211.

<sup>307</sup> UNCAC, art.54(1a).

<sup>308</sup> *Ibid.*, para.(2); Snider & Kidane, *supra* note 62 at 743.

confiscation through international cooperation, seizure and the return and disposal of assets. While these provisions can be considered as an expansion of previous international anti-corruption tools article 57 merits special attention<sup>309</sup>. The disposal of corruptly obtained proceeds was largely discussed, mainly regarding whether it should be the requesting State or the confiscating State that should be lawfully compensated, either based on a surviving property right or on the basis of compensation for malfeasance<sup>310</sup>. The provision provides an answer to this dilemma by setting out:

“[A] series of provisions governing return of confiscated proceeds and other property which generally prefers return to the requesting State Party, but sets stronger rules in cases where the property interest of that State Party is the strongest.<sup>311</sup>”

Article 31 of the Convention, which is included in the “Criminalization and Law Enforcement” chapter, also deals with the confiscation of the proceeds of crime, as well as their freezing and seizure.

While these provisions were always necessary to guarantee the effectiveness of the Convention, their inclusion and acceptance by Member States represent a significant breakthrough and was never a foregone conclusion. Because of the Convention’s universal quality, it may prove to have an important advantage over regional anti-corruption tools in respect to asset recovery, especially when considering that States are not necessarily members of the same regional

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<sup>309</sup> Previous international and multilateral anticorruption tools, such as the IACAC, the *AU Corruption Convention* and the *OECD Anti-Bribery Convention*, did not contain such detailed provisions pertaining to the recovery of assets.

<sup>310</sup> *Anti-corruption Toolkit*, *supra* note 6 at 582.

<sup>311</sup> *Ibid.*

initiatives<sup>312</sup>.

Although previous regional agreements, such as the *AU Corruption Convention*, the IACAC and the Council of Europe's *Criminal Law Convention on Corruption* do address the question of asset recovery, neither offers the legal framework contained in the UNCAC:

“Avec une intensité et une profondeur, certes moindres, les Conventions de l'Organisation de États américains et de l'Union africaine ont également traité de ce sujet. Celle de l'Organisation pour coopération et le développement économique et du Conseil de l'Europe n'en parle que de manière sous entendue. La réalité demeure qu'aucune des conventions régionales anti-corruption n'offre un mécanisme juridique autonome, toute une conception, une architecture juridique dédiée au seul recouvrement des avoirs issus de la corruption pouvant être valablement comparé à l'arsenal élaboré par le texte universel des Nations-Unies<sup>313</sup>”.

As a result of this brief analysis, one may observe the different levels of norms contained in the UNCAC. This mixture of strict and discretionary language is not unusual within international agreements<sup>314</sup> and is not a weakness *per se*. The following chapter will attempt to assess what issues may affect the Convention's effectiveness from a legal standpoint. In the last chapter we will offer an overview of the existing multilateral anti-corruption framework in order to assess the need for further anti-corruption legislation, and therefore the Convention's relevancy.

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<sup>312</sup> Snider & Kidane, *supra* note 62 at 742.

<sup>313</sup> Bah, *supra* note 278 at 24.

<sup>314</sup> Shelton, *supra* note 179 at 70.

## Part II – Barriers to the Effectiveness and Relevancy of the Convention

The title of this chapter refers to effectiveness and relevancy. It is our opinion that effectiveness is measured by results, both on the long and short terms. A high level of compliance will yield positive results, and to ensure compliance, a legal tool must be enforceable: “an agreement is likely to be more effective the greater the degree to which its parties comply with its obligations<sup>315</sup>”.

Compliance may be defined as: “the degree to which a State behaves in a manner that conforms to its legal obligations<sup>316</sup>”. Compliance, even where strict enforcement exists, is however never perfect. Taken on a smaller scale, there are in each society individuals who break the law. There are other factors which will influence compliance, such as a government’s monetary and human resource capacity, the law’s content and language, cooperation between institutions, and so on. However, effectiveness cannot simply be measured by assessing the goals achieved. The bigger picture must also be taken into consideration; simply put, is the overall situation better than it would have been without the Treaty<sup>317</sup>? Moreover, one cannot expect a legal tool to completely eradicate corruption.

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<sup>315</sup> Brett Frischmann, “A Dynamic Institutional Theory of International Law”, (2003) 51 *Buffalo Law Review*, 679 at 693 [Frischmann].

<sup>316</sup> *Ibid.*

<sup>317</sup> Shirley V. Scott, “Political Interpretation of Multilateral Treaties: Reconciling Text With Political Reality”, (2007) 5 *New Zealand Journal of Political International Law*, 103 at 107 [Scott].

Realistically, the desired result should be a change in the behavior of States<sup>318</sup>. The following passage illustrates this more realistic understanding of effectiveness:

“Implementation is the process of putting international commitments into practice, including the promulgation of new regulations and legislation by the national governments. It is one of the most important factors that affect the degree of effectiveness of an international treaty. On the other hand, effectiveness is a different concept that entails a favorable change in behavior in a State Party. [...] effectiveness [...] is measured by the extent it leads to change in behavior that furthers its goal. Effectiveness is not the ability [...] to solve the problem of corruption. Thus the [agreement] will be effective even if it does not eliminate actual corruption, but causes desired behavioral change.<sup>319</sup>”

## **Chapter I – Barrier to the Convention’s Effectiveness: Compliance Challenges**

*“Agreements have value only if the promises exchanged serve to bind the parties. Agreements are, therefore, more valuable if they can bind the parties more effectively.<sup>320</sup>”*

Enforcement is a major hurdle in international law. It is generally very difficult to convince a group of Nations to agree to have their territorial rights diminished, even if the long-term outcome would be beneficial to all parties. Multilateral treaties have always been faced with this difficulty, as they are a product of their negotiators’ will. Once countries do decide to take part in such a process, not even the largest or most influential States manage to have all of their demands met. The

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<sup>318</sup> Giorleny D. Altamirano, “The Impact of the Inter-American Convention Against Corruption”, (2006-2007) 38 *University of Miami Inter-American Law Review*, 487 at 508 [Altamirano].

<sup>319</sup> *Ibid.* at 509.

<sup>320</sup> Andrew T. Guzman, “The Design of International Agreements”, (2005) 16 *European Journal of International Law*, 579 at 580 [Guzman, “The Design of International Agreements”].

process is one of compromise and that is precisely what enables treaties to accommodate diverging interests<sup>321</sup>. Enforcement problems are often the result of this accommodation of broad scopes of interests during the negotiations since they often create obligations that are less strict and more loosely defined<sup>322</sup>.

Many factors and causes of State disobedience have been identified by academics<sup>323</sup>. Although closely linked, each study offers a particular insight and a different approach. In order to better understand the challenges to compliance, three theories will be summarily described in the following paragraphs.

The first theory, illustrated by Haas, endeavors to predict the probability of compliance with international legal tools. Among the developed factors are State capacity (political and technical), national concern, institutional constraints on a domestic level, and the availability of monitoring mechanisms<sup>324</sup>. No mention is made of the treaty's language or of issues relating to jurisdiction. In fact, apart from monitoring mechanisms, the variables are not particularly dependent on a treaty's content and are rather focused on extraneous circumstances, such as the State Parties' economic, political, and social situation.

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<sup>321</sup> Chayes & Chayes, *supra* note 59 at 7.

<sup>322</sup> *Ibid.*

<sup>323</sup> Eyal Benvenisti and Moshe Hirsch, *The Impact of International Law on International Cooperation – Theoretical Perspectives*, Cambridge University Press, Cambridge, 2004 [Benvenisti & Hirsch]. See also Shelton, *supra* note 179 at 72.

<sup>324</sup> Peter M. Haas, "Choosing to comply: theorizing from international relations and comparative politics" in Dinah Shelton, ed., *Commitment and Compliance, Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, 2000, 45 at 72 [Haas].

Two other authors, Chayes and Chayes, identify three variables that can explain why treaty obligations are violated: ambiguities in the language of the treaty, limitations of the Member State's capacity, and the "temporal dimension" of the social and political changes contemplated by international conventions. This last variable refers to the lapse in time many agreements face from the moment they are adopted to their implementation. These elements may be considered causes but are sometimes used as justifications for infringements<sup>325</sup>. Thus, this theory gives significant weight to variables flowing from the treaty itself and unlike the first theory, lists treaty language as a cause for non-compliance. However, these factors also consider external elements to the convention. Interestingly, they do not consider the absence of a monitoring mechanism to be a threat to compliance.

Lastly, Benvenisti's study, in our view, is the most detailed and relevant theory to the UNCAC. Eleven factors affecting compliance are enumerated, some of which are of particular interest<sup>326</sup>. For instance, the number of parties to an agreement: the higher the number, the more difficult the monitoring. This is clearly a problem within the UNCAC: due to the high number of Parties, a monitoring mechanism was negotiated much later in November of 2009<sup>327</sup>. Another element is the participation of a higher number of countries in the agreement: the rationale is that

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<sup>325</sup> Chayes & Chayes, *supra* note 59 at 10.

<sup>326</sup> Benvenisti & Hirsch, *supra* note 323 at 141. Not all factors are discussed here.

<sup>327</sup> This factor is number 1 of the 11 factors (See *ibid.*). The UNCAC's Members met in November of 2009 in Doha, Qatar, to negotiate a review mechanism, during the Conference of the States Parties' Third Session, *infra* note 396.

the more actors participate, the more others will feel compelled to join<sup>328</sup>. There is however a downside: the more members there are to an agreement, the more difficult it is to monitor and to find common ground. The Member States' behavior prior to engaging in negotiations is also a factor<sup>329</sup>. On this point, it is our view that if a State willingly takes part in an international agreement, modifications in behavior, however small they might turn out to be, are not only reasonable, but should be expected. Capacity is another element of importance and is also a variable figuring in Benvenisti's list<sup>330</sup>. This refers to a government's financial capacity and its human resources, which vary from country to country. Furthermore, it is essential that leading countries take part in the negotiation of a convention, as they tend to exert greater influence upon others<sup>331</sup>. These factors relate to the treaty's membership, and not necessarily to the treaty itself. Benvenisti does however include criteria relating to an agreement's monitoring mechanism, stating that "international secretariats to the agreements play important roles in promoting compliance<sup>332</sup>".

These theories seem to share the opinion that a treaty's content does not, in itself, heighten compliance levels among State Parties: the social and political circumstances of the Parties involved also play an important part<sup>333</sup>. With respect

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<sup>328</sup> Benvenisti & Hirsch, *supra* note 323 at 143 (number 8 of 11).

<sup>329</sup> *Ibid.*, (number 2 out of 11).

<sup>330</sup> *Ibid.*, (number 3 out of 11).

<sup>331</sup> *Ibid.* at 144 (numbers 10 and 11).

<sup>332</sup> *Ibid.* at 143 (number 9 of out of 11).

<sup>333</sup> For instance, Guzman suggests that given certain conditions, a State might choose to violate its obligations, and gives the example of a nation under conditions of "great national crisis" (See

for this opinion, important treaty or content-related elements do have a considerable role in ensuring compliance. These elements include, but are not limited to the treaty's language, its monitoring mechanism, as well as its sanctions. These criteria are discussed in the following paragraphs.

## **Section I - Direct Compliance Challenges**

The Convention's language is important in determining its enforceability. Its monitoring mechanism and sanctions (or lack thereof) are also pivotal in this respect. We refer to these factors as "direct compliance challenges", as these challenges are internal to the Convention: they exist as direct consequences of the treaty's wording.

### **i. The Treaty's Language**

Compliance can be defined as "an actor's behavior that conforms to a treaty's explicit rules<sup>334</sup>". It assesses whether the participants' actions conform to the treaty. Some experts argue that with regard to most international agreements, governments negotiate and ratify treaties that they are certain they can comply

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Andrew T. Guzman, "A Compliance-Based Theory of International Law", (2002) 90 *California Law Review*, 1823 at 1862 [Guzman, "A Compliance-Based Theory of International Law"]. Furthermore, a State's technical and financial capacity must be taken into consideration (See Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2000 at 184 [Aust]).

<sup>334</sup> Altamirano, *supra* note 318 at 508.

with without having to alter their current legislation: “[a] situation of high compliance that lacks implementing efforts occurs when the [treaty] merely codifies the current behavior of a State Party. In such a case, compliance can be automatic<sup>335</sup>”. This passage clearly illustrates that the utility of the treaty may be lost. *A contrario*, the impact of a treaty is palpable when it breaks new ground by codifying controversial obligations. There is no question that the UNCAC covers a wide array of requirements that are sure to necessitate active implementation on the part of many signatories. However, problems may arise in regards to its quality as an enforceable treaty, as well as the preciseness of the language used in order to promote effective implementation. These potential obstacles will be assessed in the present section.

The consensus of the negotiators on the content of the treaty is reflected in its text, which “constitutes the authentic written expression of their wills<sup>336</sup>”. The following passage demonstrates the inevitable confrontation between international treaties and interpretation:

“For multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests. The process inevitably produces much wording which is unclear or ambiguous. Despite the care lavished on drafting, and accumulated experience, there is no treaty which cannot raise some question of interpretation.<sup>337</sup>”

This is clearly the case of the UNCAC as it encompasses a large and diverse

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<sup>335</sup> *Ibid.*

<sup>336</sup> Fernandez de Casadevante y Romani, *supra* note 80 at 37.

<sup>337</sup> Aust, *supra* note 333 at 184.

number of States whose interests are divergent. Certainly, when attempting to resolve ambiguities flowing from the text of the UNCAC, the actual words themselves, the context, purpose and goal of the Convention must all be considered<sup>338</sup>. Indeed, Article 31 of the *Vienna Convention on the Law of Treaties* states that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. If the application of this provision leaves the meaning unclear, Article 32 can be applied, giving additional means of interpretation, namely reference to preparatory works of the treaty and the circumstances surrounding its conclusion<sup>339</sup>.

The effectiveness of the UNCAC may face challenges partly because it attempts to prevent and punish corrupt behavior. Interpretation difficulties tend to arise in obligations meant to alter and prevent criminal behavior and most obligations within treaties are meant to affect behavior in some form<sup>340</sup>.

The concept of corruption creates enforcement difficulties due to the lack of consensus as to its legal definition<sup>341</sup>. Indeed, experts qualify the concept as an

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<sup>338</sup> *Ibid.* at 187.

<sup>339</sup> It should be noted that these general rules of interpretation apply only in cases of interpretative dispute, and where a third party intervenes (see Fernandez de Casadevante y Romani, *supra* note 80 at 45). Furthermore, Article 33 provides for the situation whereby the meaning of a treaty differs in different languages. If the use of articles 31 and 32 do not solve the issue, the parties should apply the “meaning which best reconciles the texts, having regard to the object and purpose of the treaty”.

<sup>340</sup> Fernandez de Casadevante y Romani, *ibid.* note 80 at 41, n. 15. The author gives civil liability requirements as an example.

<sup>341</sup> *Ibid.* at 81.

“expanding and malleable concept<sup>342</sup>”, varying over time and societies<sup>343</sup>. Because of this, the UNCAC’s negotiators agreed that the Convention should not explicitly define corruption, but rather identify the specific conducts classified as criminal misconduct<sup>344</sup>. When reading the Convention’s Preamble, one may conclude that the Convention's reach is meant to be vast<sup>345</sup>.

However, ambiguity tends to produce grey zones within which it becomes difficult to assess what behavior is allowed or prohibited<sup>346</sup>. This is for example the case of facilitation payments under the UNCAC<sup>347</sup>: it is unclear whether such transactions are prohibited or not<sup>348</sup>. Considered “bribery loopholes<sup>349</sup>”, Argandona defines facilitation payments as follows: “[u]nlike the worst forms of corruption, facilitating payments do not usually involve an outright injustice on the part of the payer, as she is entitled to what she requests, but they may lead to a certain moral callousness<sup>350</sup>”. Such payments are therefore acceptable, in theory, for tasks that would be accomplished with or without the payment<sup>351</sup>.

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<sup>342</sup> Henning, *supra* note 97 at 805.

<sup>343</sup> Fernandez de Casadevante y Romani, *supra* note 80 at 70.

<sup>344</sup> *Ibid.*

<sup>345</sup> A treaty’s Preamble may be used as an interpretation tool in order to assess its objectives: “the context for the purpose of the interpretation of a treaty shall comprise the whole treaty text, including its preamble and annexes” (Scott, *supra* note 317 at 109-110).

<sup>346</sup> Chayes & Chayes, *supra* note 59 at 10.

<sup>347</sup> These are a form of petty corruption. For a comprehensive overview of facilitation payments, see Argandona, “The United Nations Convention Against Corruption”, *supra* note 146.

<sup>348</sup> Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 228.

<sup>349</sup> Ethics Resource Center, *Facilitation Payments: Whether Considered Custom or Bribery, They Put Companies in a Precarious Position*, (April 2003) Volume 8, Issue 1, Ethics Today Online, available at: [http://resources/article\\_detail.cfm?ID=807](http://resources/article_detail.cfm?ID=807) [Date consulted: July 12<sup>th</sup> 2010].

<sup>350</sup> Argandona, “The United Nations Convention Against Corruption”, *supra* note 146 at 1.

<sup>351</sup> The difference lies in the expediency of the task. They are also known as grease payments.

There are however drawbacks to allowing facilitating payments. For instance, they create a competitive advantage: those not financially able to offer such payments are unfairly penalized. Furthermore, they distort local bureaucracies, confuse government employees as to what behavior is permitted, and create accounting difficulties<sup>352</sup>. In the end, “facilitation payments do not achieve their goals. Instead they increase delays, and become costs and risks in themselves<sup>353</sup>”. One may infer that because the UNCAC includes concerns for good governance, facilitation payments should be considered as “undue advantages”<sup>354</sup>.

The United States however has taken a different stance, interpreting the Convention’s language as allowing facilitation payments, whereas the United Kingdom’s legislation states that such payments constitute an offence under the *Anti-Terrorism Act*<sup>355</sup>. The position of the United States is understandable in light of the fact that the *Foreign Corrupt Practices Act*<sup>356</sup> allows exceptions for such payments:

“There is an exception to the anti-bribery prohibition for payments

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<sup>352</sup> Toby Webb, “Strategy and Management: Facilitation Payments – Stop Paying and they Stop Asking”, (2006), *Ethical Corporation*, available at: <http://www.ethicalcorp.com/content.asp?ContentID=4471> [Toby Webb] [Date consulted: June 29<sup>th</sup> 2010].

<sup>353</sup> *Ibid.* (quoting Alexandra Wrage, President of TRACE).

<sup>354</sup> Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 229.

<sup>355</sup> *Anti-Terrorism Act*, Crime and Security Act, UK, 2001. The Parties position may eventually have significant influence over the treaty’s interpretation. Indeed, art. 31(3) b) of the *Vienna Convention on the Law of Treaties* states that “there shall be taken into account, together with the context [...] any subsequent practice in the application of the treaty [...]”. In other words, whether or not the US decides to continue to allow facilitation payments in the future might impact Member States’ behavior. See Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 230; Scott, *supra* note 317 at 109). See also Gerald McGinley, “Practice as a Guide to Treaty Interpretation”, (1985) 9 *The Fletcher Forum*, 211-230 [McGinley], for an in depth analysis of this provision.

<sup>356</sup> *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. §§ 78dd-1, et seq. (1997) [FCPA].

to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.<sup>357</sup>

The unequal treatment of such transactions between Member States will undoubtedly create unequal standards towards companies conducting business abroad<sup>358</sup>.

The *OECD Anti-Bribery Convention*, although not defending such behavior, explains that these types of payments should be dealt with nationally, because they are "minor domestic offences and not ones of an international nature that, like the larger scale bribing of foreign officials, will distort international trade<sup>359</sup>". This area is still being debated, and the merits of either allowing facilitation payments versus prohibiting them are still unclear.

Two conclusions can be drawn. The first is that by refusing to acknowledge their legality, the UNCAC was inherently meant to leave a measure of discretion to the Member States. The second is that there was no consensus on the matter during

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<sup>357</sup> United States Department of Justice, "Foreign Corrupt Practices Act Antibribery Provisions" (June 2001), available at: <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> [Date consulted: February 14<sup>th</sup> 2011].

<sup>358</sup> Nicholls, "Corruption in the South Pacific", *supra* 95 at 230.

<sup>359</sup> Martjin Wilder and Michael Ahrens, "Australia's Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", (2001) 2 *Melbourne Journal of International Law*, 568 at 582 [Wilder & Ahrens].

negotiations and a broad definition of corruption was necessary in order to ensure that as many States as possible would adhere to the Convention<sup>360</sup>. It is our view that both factors played a part in the Convention's lack of a specific provision criminalizing facilitation payments.

Another example of ambiguity concerns the concept of undue advantage. Because it is not specified within the UNCAC, the notion must be defined locally. This omission is most probably due to the reluctance of the negotiating States to see their sovereignty infringed upon by a requirement which might be contrary to local practices. In other words, States feared “extraterritorial browbeating<sup>361</sup>” and the infringement of their sovereignty. The following passage illustrates these concerns:

“[O]ccasionally, it is necessary to have recourse to vague terms or terms that leave the parties a wide margin for discretion when drafting the text of the norm. This is the tribute paid by the parties in order to achieve a norm which is an instrument for formalising cooperation. This is a consequence of the sovereignty of the state and the principle of the autonomy of the will of the parties which becomes manifest during the process for drafting the norms<sup>362</sup>”.

Critics against harmonizing the notion of “undue advantage” have also argued that bribery remains a domestic concern and the responsibility of the victimized State<sup>363</sup>. However, this varying individual and national treatment of bribery is far

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<sup>360</sup> Snider & Kidane, *supra* note 62 at 731. The Convention by neither expressly allowing them nor prohibiting them refuses to take a stance, highlighting the existing controversy.

<sup>361</sup> Kim & Kim, *supra* note 13 at 558.

<sup>362</sup> Fernandez de Casadevante y Romani, *supra* note 80 at 40.

<sup>363</sup> Kim & Kim, *supra* note 13 at 558; Delaney, *supra* note 18 at 10.

from being an optimal situation, for extradition and international cooperation are subject to the dual criminality principle under the Convention (this is also the case with other international and regional anti-corruption initiatives). As such, if an offence is not criminalized by both the requesting and requested States, the extradition and cooperation provisions cannot be enforced.

Although ambiguity invites interpretation and leads to enforcement difficulties, detail and precision have their own drawbacks. For instance, precision does not always allow for evolution or changes in society. It may also create narrow requirements, omitting unforeseeable elements at the time of the treaty's drafting, and thus restricting its scope<sup>364</sup>. This in turn may create eventual loopholes. Furthermore, the length of the Convention has been criticized: "on peut d'ailleurs se poser la question si les auteurs du traité, en voulant couvrir un si grand nombre de matières, n'ont pas déforcé l'efficacité de son dispositif."<sup>365</sup>

Stating that "far from creating a set of fixed and immutable rights and duties, treaties may over the course of time mutate with surprising and perhaps unwelcome results"<sup>366</sup>, Professor Merills exposes situations depicting the

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<sup>364</sup> Chayes & Chayes, *supra* note 59 at 11. A treaty doted of general language can be just as effective as a more precisely drafted instrument. Although citing an example of an international organization's constitutive treaty, the Chayes' work gives the example of the North Atlantic Treaty that contains very general terminology, but has shown remarkable sustainability.

<sup>365</sup> Vincke, *supra* note 42 at 364.

<sup>366</sup> John Merills, "The Mutability of Treaty Obligations", in Matthew C. R. Craven and M. Fitzmaurice, *Interrogating the Treaty – Essays in the Contemporary Law of Treaties*, Wolf Legal Publishers, The Netherlands, 2005 at 101 [Merills].

mutability of treaty obligations. One of them concerns developments in international law that are external to the international instrument<sup>367</sup>. He gives as an example the World Trade Organization's Appellate Body decision in the *Shrimp/Turtle*<sup>368</sup> case of 1998 in which it was decided that current international concerns must be taken into account when interpreting treaty obligations, as well as taking into consideration objectives stated in the preamble<sup>369</sup>.

In our opinion, the use of broader terms and the absence of specificity within the UNCAC are justified; these characteristics will allow room to consider external factors, such as future legal and political developments that might affect the interpretation of obligations. In the event that such developments should arise, a broader terminology will ensure that the requirements under the treaty can adapt over a long period of time and not become obsolete. Furthermore, disputes between Member States can also be avoided as they are granted larger latitude to comply with the treaty's requirements<sup>370</sup>. The maxim *expressio unius est exclusio alterius* summarizes these arguments and may be translated as "to express one thing is to exclude the other"<sup>371</sup>.

Aside from precision, the compulsory nature of the language used is determinant

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<sup>367</sup> *Ibid.* at 93.

<sup>368</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, NT/DS58/AB/R, 12 October 1998 (in *ibid.* at 95).

<sup>369</sup> Merills, *supra* note 366 at 95.

<sup>370</sup> Dispute settlement is provided for by Article 66 of the UNCAC.

<sup>371</sup> Chayes & Chayes, *supra* note 59 at 10.

in instigating State compliance. In other words, both the vagueness of the terminology and the absence of specific indications as to how obligations should be enforced are decisive<sup>372</sup>. In the following passage, it is argued that although a treaty is legally binding, its value can be diminished if lacking specific indications as to how the Parties' obligations are to be carried out:

“The analysis of state practice reveals that, on many occasions, international treaties have no more value than simple recommendations, due to the way in which their obligations have been drafted. In such cases, the treaty is binding as a norm from the formal point of view, but its content must be limited to simple guidelines unless the Parties have laid down precise and detailed rules which involve specific attitudes.<sup>373</sup>”

There are however drawbacks to including precise and mandatory language in a treaty: it can create legal complexities making implementation more costly and strenuous. For instance, some argue that the obligations derived from the UNCAC's asset recovery chapter are heavy, creating “a further layer of bureaucracy<sup>374</sup>” and might end up having the opposite effect, especially in many developing countries where banks are already overloaded with administrative burdens<sup>375</sup>. It is likely that many developing countries will lack the capacity to fully implement such demands. There will therefore have to be a certain level of flexibility in regard to the application of these types of obligations. Adaptability to social, economic, and political changes is necessary<sup>376</sup>. If one is to follow this

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<sup>372</sup> *Ibid.* at 41.

<sup>373</sup> Fernandez de Casadevante y Romani, *supra* note 80 at 38.

<sup>374</sup> Carr, *supra* note 61 at 31.

<sup>375</sup> *Ibid.*

<sup>376</sup> Chayes & Chayes, *supra* note 59 at 15.

opinion, it can be argued that including detailed and precise enforcement provisions may not be the best solution, as they may not be able to adapt to the changing and evolving needs of anti-corruption legislation and leave little room for unilateral interpretation.

The absence of definitions and the resulting ambiguity in the text allow for a broader interpretation of the Convention. The manner in which a State will interpret a given obligation is closely if not inextricably linked to its cultural practices and domestic legal system, which determines how it will implement the treaty. Monitoring mechanisms may therefore be necessary in order to ensure compliance, whether through recommendations, oversight commissions, and sanctions. These review challenges are examined in the following sections.

## **ii. Monitoring Mechanism and Implementation**

In order to ensure a country's commitment to the UNCAC, a review mechanism is essential for monitoring implementation: “[a]nything less would undermine the credibility of UNCAC [...]”<sup>377</sup>. The goal of monitoring provisions is to encourage countries to ratify conventions and to put them into practice<sup>378</sup>. Most of the UNCAC’s provisions are not self-executing and therefore require national

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<sup>377</sup> TI, *Effectively Monitoring the United Nations Convention Against Corruption*, Policy Position Paper No. 1/2008, available at: [http://www.transparency.org/publications/publications/policy\\_positions/ti\\_pp\\_01\\_08\\_uncac](http://www.transparency.org/publications/publications/policy_positions/ti_pp_01_08_uncac) at 2 [Date consulted: June 12<sup>th</sup> 2010].

<sup>378</sup> Argandona, “The United Nations Convention Against Corruption”, *supra* note 146 at 10.

implementation on the part of its Member States<sup>379</sup>. The mechanisms created to ensure proper domestic implementation are of critical importance in light of the large and diverse array of participating States. This diversity in the Convention's membership also makes it more difficult for Member States to reach a consensus on a monitoring mechanism<sup>380</sup>.

The presence of one disobedient State is enough to create an incentive for other members to disobey the rules. This argument is based on the assumption that compliance is in part a result of the expectation that all States will comply<sup>381</sup>.

Proper implementation is said to take into account the existing social, cultural, and economic ‘incentive systems’:

“Reform works when it gets the incentives right, that is, when its design and implementation take into account existing social, economic, and cultural incentive systems; and works with them adaptively.[...] Reformers must also take into account the incentives of natural resisters – those who profit from things as they are – who are likely to oppose, resist, or manipulate reforms and who somehow often co-opt or neutralise these parties.”<sup>382</sup>

The concept of “natural resisters” is quite pertinent in the case of legal anti-corruption measures in that many individuals already profit from the way things currently stand. The incentive to allow the *status quo* to continue and to refrain

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<sup>379</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 4.

<sup>380</sup> Fritz Heimann, “Follow-up Monitoring Needed for the UN Convention against Corruption”, (2005) Compact Quarterly, available at: [http://www.enebuilder.net/globalcompact/e\\_article000350362.cfm?x=b11,0,w](http://www.enebuilder.net/globalcompact/e_article000350362.cfm?x=b11,0,w) [Heimann] [Date consulted: July 13<sup>th</sup> 2010].

<sup>381</sup> Chayes & Chayes, *supra* note 59 at 142.

<sup>382</sup> Tim Lindsey, *Law Reform in Developing and Transitional States*, Routledge, London and New York, 2007 at 107 [Lindsey].

from implementing international anti-corruption laws will therefore probably prove to be a significant problem in many countries. Without a proper monitoring mechanism, States may decide not to properly implement certain obligations under the Convention.

In addition to the problem that "natural resisters" present for compliance, the "temporal dimension"<sup>383</sup> identified by Chayes' theory as a factor of non-compliance should also be underlined. This temporal problem arises more specifically in regard to instruments dealing with major international problems and necessitating a considerable timeframe for implementation. Such treaties invariably require a transitional period between their adoption and their implementation. The UNCAC without a doubt falls into this category of treaty, as corruption is a major global problem to be remedied.

In its final version, Chapter VII of the Convention consists of two provisions covering mechanisms for implementation<sup>384</sup>. Article 63 establishes a Conference of the States Parties to the Convention (hereafter "COSP" or "Conference") to "improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation"<sup>385</sup>. The Convention also states that the COSP will periodically

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<sup>383</sup> Chayes & Chayes, *supra* note 59 at .9.

<sup>384</sup> UNCAC, arts.63-64. Article 63 establishes the Conference of the States Parties to the Convention, and Article 64 establishes the Secretariat.

<sup>385</sup> *Ibid.*, art.63.

review Member States' implementation<sup>386</sup> and make necessary recommendations for improvement<sup>387</sup>. The Conference can decide to establish a mechanism or body in order to aid in the effective implementation, "if it deems it necessary"<sup>388</sup>.

The vague terminology used unfortunately recalls the expression *lex simulata*, which refers to "a vehicle for sustaining or reinforcing basic civic tenets, but not for influencing pertinent behavior<sup>389</sup>". Defining the notion of *lex simulata* and applying it to the field of international law, Reisman states that:

"Formal lawmaking bodies sometimes (and, some, often) emit communications that have the form of law but that close observers know are not law. A patent contradiction which makes the purported law unenforceable, the absence of necessary implementing legislation, insufficient enforcement machinery, an inadequate budget if a budget at all, or the delegation of implementation to create not law but what I have called elsewhere *lex simulata* or *lex imperfecta*. [...] Thurman Arnold thought the creation of intentionally unenforceable law was an efficient and economic way of mediating between distinct classes and groups which had irreconcilably incompatible demands.<sup>390</sup>"

Applied to the UNCAC, this passage sustains the view that although certain means for enforcing the Convention were provided for in its implementation provisions, they were perhaps not meant to foster immediate action among States.

During the negotiations, many countries held the position that a monitoring system

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<sup>386</sup> *Ibid.*, art.63(4)e).

<sup>387</sup> *Ibid.*, para.f).

<sup>388</sup> *Ibid.*, art.63(7).

<sup>389</sup> W. Michael Reisman, *Folded Lies: Bribery, Crusades and Reforms* (Free Press, New York 1979) at 32 [Reisman, *Folded Lies: Bribery, Crusades and Reforms*]; Philippa Webb, *supra* note 46 at 221. See also Babu, *supra* note 26 at 27.

<sup>390</sup> W. Michael Reisman, "International Law-making: A Process of Communication", (1981) 75 *American Society of International Law Procedure*, 101 at 102 [Reisman, "International Law-making"].

should be established. However, the only proposal retained was that of Austria and the Netherlands suggesting the adoption of a Conference of States Parties (Article 63 of the Convention). States opposing a more stringent monitoring system feared it would violate their sovereignty<sup>391</sup>. Other proposals suggesting a subsidiary monitoring body, a regional evaluation process, and a peer review system including sanctions for non-compliance were all rejected due to that same fear<sup>392</sup>. Because of the lack of consensus, the issue was deferred to the COSP to be held one year after the Convention's entry into force<sup>393</sup>. The COSP's first session took place in December 2006 at which time it deferred any decision as to an implementation review mechanism<sup>394</sup>. A second Conference took place in late January and early February of 2008<sup>395</sup>, which again deferred the matter to its third session, held in Doha in November 2009<sup>396</sup>. The first two sessions, although not bringing about any firm decisions on the review process, still covered many issues relating to technical assistance, asset recovery mechanisms, and certain guidelines or principles to be followed in deciding on a future implementation review

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<sup>391</sup> Argandona, "The United Nations Convention Against Corruption", *supra* note 146 at 10.

<sup>392</sup> Philippa Webb, *supra* note 46 at 221; Babu, *supra* note 26 at 25.

<sup>393</sup> Heimann, *supra* note 380. Article 63 (2) of the UNCAC foresees this delay.

<sup>394</sup> *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session*, First Session, CAC/COSP/2006/12, Amman, 10 to 14 December 2006. The following passage gives reasons for deferring these negotiations to a conference of parties: "on the one hand the negotiators might not be able to agree on the text of a particular provision but do not want to delay the adoption of the text. Therefore, they authorize further negotiations on this point to be held in the future. On the other hand, negotiators did not want to agree on a particular provision, as more details have to be known in order to make it functional and to be most effective" (in Merills, *supra* note 366 at 104). This authorization to delay negotiations is given through "enabling clauses", such as article 63 of the UNCAC.

<sup>395</sup> *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its second session*, Second Session, CAC/COSP/2008/15, Nusa Dua, Indonesia, from 28 January to 1 February 2008.

<sup>396</sup> *Report of the Conference of the States Parties to the United Nations Convention Against Corruption on its Third Session*, CAC/COSP/2009/15, Doha (2009).

mechanism<sup>397</sup>. The third session finally brought about a much awaited review mechanism. This review mechanism will be discussed in the following paragraphs.

The UNCAC's review mechanism is based on an intergovernmental process and is best described as a "peer review mechanism"<sup>398</sup>. Although the term has not been officially defined, it has, throughout the years, been given a specific meaning:

"Peer review can be described as the systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the states involved in the review, as well as their shared confidence in the process"<sup>399</sup>,

Other types of review mechanisms include self-evaluation and expert reviews. Self-evaluation occurs when a government is asked to review itself. It often requires that Member States answer a questionnaire, assessing their own performance. This method is, in our view, the most lenient of review mechanisms, as it is not independent or impartial. Expert reviews, on the other hand, are a more adversarial method, whereby government performance is assessed by a panel of independent experts who are generally well versed in the reviewed State's national law as well as on the applicable agreement. This process ensures a higher level of

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<sup>397</sup> *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session*, supra note 394; *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its second session*, supra note 395.

<sup>398</sup> Fabricio Pagani, "Peer Review as a Tool for Co-operation and Change", (2002) 11 *African Security Review*, 15-24 at 15 [Pagani].

<sup>399</sup> *Ibid.* at 1.

independence and expertise than both the self-evaluation and mutual evaluation processes<sup>400</sup>.

Some of the main objectives of the mechanism under the UNCAC are transparency, impartiality, the absence of ranking among States and the sharing of good practices<sup>401</sup>. More specifically, its characteristics include a self-assessment checklist, a desk review and dialogue between the reviewer and reviewed State. The country review is carried out by two other Member States, one of which must be from the same geographical region as the State under review. The reviewers, made up of government experts, are chosen on a random basis by the drawing of lots. However, the reviewed State may request that different reviewers be drawn and this privilege can be exercised up to two times within the same review period; exceptionally, this process can be repeated more than twice<sup>402</sup>. Within the peer review process, country reviews are deemed as one of the most crucial elements and are said to be part of a process which is formal, systematic and representative of the entire membership of the agreement<sup>403</sup>.

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<sup>400</sup> See the following website: [http://www.transparency.org/global\\_priorities/international\\_conventions/advocacy/monitoring/monitoring\\_mechanisms](http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms) [Date consulted: February 21<sup>st</sup> 2011].

<sup>401</sup> *Report of the Conference of the States Parties to the United Nations Convention Against Corruption on its Third Session, supra* note 396 at 6, para.3.

<sup>402</sup> *Ibid.* at 8, para.18. The mechanism states that: “the State party under review may request, a maximum of two times, that the drawing of lots be repeated. In exceptional circumstances, the drawing of lots may be repeated more than twice”. These ‘exceptional circumstances’ are not defined, but a definition might come to light in the future, following practical applications of the rule.

<sup>403</sup> Cyrille Fijnaut and Leo Huberts, *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague, 2002, at 353 [Fijnaut & Huberts].

The self-assessment checklist consists mainly of a questionnaire that must be filled out by the reviewed State<sup>404</sup>. Each reviewing State appoints experts for the purpose of the review process<sup>405</sup>. A desk review is then conducted, which consists of an analysis of the responses given by the reviewed State in the self-assessment checklist<sup>406</sup>, as well as pertinent information produced by similar mechanisms under other agreements covering anti-corruption measures<sup>407</sup>. An on-site visit can follow but only if the reviewed State agrees to it<sup>408</sup>.

An important aspect of any review process is its follow up procedure. Within the UNCAC, follow up occurs during the review phase and consists of an analysis of the progress made in regard to the observations received by the reviewed State<sup>409</sup>.

Finally, a country review report is then created by the reviewing States and is based on all of the information gathered. It identifies the country's challenges, successes, and good practices and contains "observations" for future implementation<sup>410</sup>. These reports are never published and remain confidential<sup>411</sup>.

The peer review mechanism is said to be an "instrument for formalizing

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<sup>404</sup> *Ibid.* at 8, para.15.

<sup>405</sup> *Ibid.*, para.21.

<sup>406</sup> *Ibid.* at 9, para.23.

<sup>407</sup> *Ibid.*, para.27.

<sup>408</sup> *Ibid.*, para.29.

<sup>409</sup> *Ibid.* at 10, para.40.

<sup>410</sup> *Ibid.*, para.33.

<sup>411</sup> *Ibid.*, para.37.

cooperation<sup>412</sup>", in that it is not considered a strict monitoring mechanism but rather a cooperative one. Its effectiveness is said to depend on four factors: value sharing, commitment, mutual trust, and credibility<sup>413</sup>. Value sharing implies that the participating countries share similar standards upon which to evaluate their respective performance. Commitment, on the other hand, refers to the use of an adequate level of financial and human resources by Member States in the fulfillment of their obligations. While the mutual trust requirement might seem self explanatory, it includes transparency and openness in the sharing of information and data. Finally, credibility implies complete independence on the part of the evaluators.<sup>414</sup>

There is an added element that is considered as pivotal in the proper functioning of the peer review process, that of the participation of civil society, which adds public pressure to the existing peer pressure<sup>415</sup>. The *OECD Anti-Bribery Convention* serves as a good example of the possible benefits of civil society participation, as its monitoring mechanism is qualified as elaborate: reports and recommendations are made public and private sector and civil society play an active role throughout each review phase of the convention's monitoring mechanism<sup>416</sup>.

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<sup>412</sup> Fernandez de Casadevante y Romani, *supra* note 80 at 40.

<sup>413</sup> Pagani, *supra* note 398 at 21.

<sup>414</sup> *Ibid.*

<sup>415</sup> Transparency International's website: [http://www.transparency.org/global\\_priorities/international\\_conventions/advocacy/monitoring/monitoring\\_mechanisms](http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms) [Date consulted: July 14<sup>th</sup> 2010].

<sup>416</sup> Marie Chêne and Gillian Dell, "U4 Expert Answer: Comparative Assessment of Anti-Corruption Conventions' Review Mechanisms", *Transparency International*, (U4 Issue 2008), available at: <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=163> at 2 [Chêne & Dell] [Date consulted: May 11<sup>th</sup> 2010].

In our view, the confidentiality of the country reports goes against the UNCAC's guiding principles of transparency and impartiality, as well as its own article 13 which states that each member should take measures to promote the participation of civil society and non-governmental organizations by allowing the public to contribute to the decision-making process and by ensuring the public's access to information<sup>417</sup>. Indeed, before the UNCAC's mechanism was adopted, Transparency International suggested that its monitoring mechanism be as transparent as possible, by implementing a mechanism that includes the participation of civil society and the private sector<sup>418</sup>. In this respect, it stated that:

“A process limited to governments reviewing governments behind closed doors will have far less public credibility than a more broad-based process and will be less effective in achieving UNCAC's basic objective of overcoming corruption.”<sup>419</sup>

It could however be argued that confidentiality is necessary in order to ensure the active participation of Member States. However, secrecy is said to have resulted in diminished compliance in other regimes, by highlighting difficulties in the disclosure of information throughout the evaluation process<sup>420</sup>: “[a]ccess to data is

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<sup>417</sup> UNCAC., art. 13.

<sup>418</sup> Fritz Heimann and Gillian Dell, “Recommendations for Review Mechanism for UN Convention Against Corruption”, (2007) *Transparency International*, available at: [http://www.transparency.org/publications/publications/conventions/uncac\\_review\\_ti\\_recommendations](http://www.transparency.org/publications/publications/conventions/uncac_review_ti_recommendations) at 10 [Heimann & Dell].

<sup>419</sup> *Ibid.*

<sup>420</sup> It is said that secrecy in the International Atomic Energy Agency and human rights regimes has led to difficulties in evaluating implementation, whereas the International Labor Organization regime is based on the premise of “full disclosure”, using publicity as a tool for encouraging compliance (Elizabeth P. Barratt-Brown, “Building a Monitoring and Compliance Regime Under the Montreal Protocol”, (1991) 16 *Yale Journal of International Law*, 519 at 568 [Barratt-Brown]).

essential if [...] representatives are to evaluate meaningfully the compliance of parties<sup>421</sup>”.

Although transparency is listed as one of the main objectives of the UNCAC’s mechanism, negotiations unfortunately did not give rise to the participation of civil society or the private sector in the review process<sup>422</sup>. Reviewed States must however consult impartial parties in order to answer the self-assessment checklist:

“The State party under review shall endeavour to prepare its responses to the comprehensive self-assessment checklist through broad consultations at the national level with all relevant stakeholders, including the private sector, individuals and groups outside the public sector.<sup>423</sup>”

Another guiding principle within the UNCAC’s monitoring mechanism is impartiality<sup>424</sup>. In this respect, Transparency International recommends that longer term funding come from the regular United Nations budget, as opposed to voluntary contributions, as such contributions might affect State impartiality. Indeed, they allow the donating governments to exert a measure of control over the disbursement of funds<sup>425</sup>. Furthermore, voluntary contributions are not always

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<sup>421</sup> Barratt-Brown, *ibid.*

<sup>422</sup> *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session, supra* note 394 at 6.

<sup>423</sup> *Ibid.* at p.9, para.28.

<sup>424</sup> *Ibid.* at 6.

<sup>425</sup> Heimann & Dell, *supra* note 418 at 3. The United Nations budget has three components: the ‘core’ budget, the peacekeeping budget, and the “extrabudgetary” fund financed by voluntary contributions for development, environment, food aid, refugees, and other social programs. The regular or core budget mainly finances the UN’s administrative costs, covering for instance salaries, headquarter offices, and transport and communications. It is funded by regular Member contributions and the budget is approved every two years by the General Assembly. While the peacekeeping budget may speak for itself, the social and developments programs budget is more relevant to this study. The resources of such programs come almost exclusively from voluntary

consistent and may differ from year to year. The Conference of the States Parties decided to follow this recommendation in part only:

“The requirements of the Mechanism and its secretariat shall be funded from the regular budget of the United Nations. [...] The requirements [...] relating [...] to the requested country visits, the joint meetings at the United Nations Office at Vienna and the training of experts, shall be funded through voluntary contributions [...].<sup>426</sup>”

It seems that two fundamental principles of the Convention, transparency and impartiality, were watered down during the negotiations of the monitoring mechanism in order to please the largest number of Member States.

Other obstacles need to be overcome in order for the mechanism to be at its most effective. Firstly, many developing countries are worried that close monitoring will expose deficiencies which their governments will be unable to adequately remedy. This is where the convention’s technical assistance provisions become essential. Article 60 of the UNCAC states that:

“States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, [...], which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.<sup>427</sup>”

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contributions (Ruben Mendez, “Financing the United Nations and the International Public Sector: Problems and Reform”, (1997) 3 *Global Governance*, 283, at 284-288 [Mendez]). For example, less than 10% of UNODC’s 2010-2011 funding was derived from the UN’s regular budget, while the rest came from donor contributions (see the following website for more information on funding: <http://www.unodc.org/unodc/en/donors/index.html?ref=menutop> [Date consulted: February 11<sup>th</sup> 2011]).

<sup>426</sup> *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session*, *supra* note 394 at 12.

<sup>427</sup> UNCAC, art.60(3).

Secondly, some industrialized members are concerned that the UNCAC's monitoring process will duplicate efforts under other regional anti-corruption conventions<sup>428</sup>. In order to avoid this, proper coordination among the different agreements is necessary and is provided for in the desk review: the reviewed participant must expose its efforts based on other anti-corruption initiatives<sup>429</sup>. As the implementation of the UNCAC goes forward, any overlap with other anti-corruption initiatives can be avoided<sup>430</sup>.

It is still widely debated whether it is more advantageous to have less strict obligations with wider compliance or strict obligations with lower compliance<sup>431</sup>. Only once the review process has been given some time to progress will the UNCAC's long term benefits and flaws become visible.

### **iii. Sanctions Towards Member States**

The UNCAC is devoid of sanctions (military or monetary) and does not penalize its Member States for non-compliance. There is however considerable debate as to the necessity and benefits of sanctions in fostering compliance with international

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<sup>428</sup> Heineman & Heimann, *supra* note 60 at 81.

<sup>429</sup> *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session*, *supra* note 394 at 9, para.27.

<sup>430</sup> Heineman & Heimann, *supra* note 60 at 82.

<sup>431</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 20.

treaties<sup>432</sup>. In fact, it is argued that emphasis should be placed on cooperative instead of punitive tactics. The following passage explains this position:

“[A]n emphasis on compliance may point towards a backwards-looking and essentially legalistic approach focusing on state ‘misbehaviour’, rather than towards a productive enquiry into devising and deploying better normative techniques and arrangements that facilitate more effective international dealings and cooperation<sup>433</sup>”.

If one were to compare national enforcement systems with that at the international level, the latter might disappoint the unsuspecting eye. A closer look however reveals that the two mechanisms do not affect the same players: the reign of sovereignty among countries inevitably means that international rules are almost always created through a consensual rather than adversarial process. According to one author, this fact creates a perpetual conundrum, for the State negotiates between its desire to assure itself enough latitude for its own compliance and its desire for predictability in other States’ behavior<sup>434</sup>. This reality can perhaps serve to explain in part why the UNCAC does not include sanctions.

There are further arguments positing that sanctions (in either an economic<sup>435</sup> or military form) are not necessarily beneficial to a treaty’s implementation or sustained enforcement. This is in part due to financial constraints: repeated sanctions may be costly over time and diminish legitimacy<sup>436</sup>. The following

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<sup>432</sup> Shams, *supra* note 177 at 72.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.* at 67.

<sup>435</sup> Also known as a monetary sanction or fine.

<sup>436</sup> Harold Hongju Koh, “Why Do Nations Obey International Law”, (1996-1997) 106 *Yale Law*

passage illustrates this reality:

“The costs of economic sanctions are also high, not only for the state against which they are directed, where sanctions fall mainly on the weakest and most vulnerable, but also for the sanctioning states. When economic sanctions are used, they tend to be leaky. Results are slow and not particularly conducive to changing behaviour. The most important cost, however, is less obvious. It is the serious political investment required to mobilize and maintain a concerted military or economic effort over time in a system without any recognized or acknowledged hierarchically superior authority<sup>437</sup>”.

Another opinion suggests that cooperative enforcement models do not exclude the application of sanctions, but that they may in fact complement one another<sup>438</sup>. The success of the cooperation-based model would be enhanced by the mere fear or threat of sanctions<sup>439</sup>. It is also argued that military and economic sanctions or fines are rarely invoked due to the high risk of failure: the “membership dilemma<sup>440</sup>” posits that the failure to impose sanctions on the non-abiding member is a sign of acceptance of the prohibited behavior. Expulsion on the other hand cuts off cooperation completely, allowing the member to act freely<sup>441</sup>. These possibilities however represent extreme measures, whereas monetary sanctions can be considered as an intermediary solution. The downside with such a measure is that poorer States might not be able to pay the sanction, whereas richer States might not be deterred. It can therefore be argued that monetary sanctions and member expulsion are not beneficial in fostering State compliance and negatively

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*Journal*, 2599 at 2636 [Koh].

<sup>437</sup> Chayes & Chayes, *supra* note 59 at 2.

<sup>438</sup> Koh, *supra* note 436 at 2639.

<sup>439</sup> *Ibid.*

<sup>440</sup> Chayes & Chayes, *supra* note 59 at 74.

<sup>441</sup> *Ibid.*

impact the more vulnerable States.

Another argument downplaying the importance of economic or military sanctions is related to the concern a State has over its reputation. The following author believes that a country's reputation within a treaty regime affects its behavior:

“Even in situations with considerable incentives to defect and unavailable reciprocal and institutional sanctions, the prospect of exclusion from future agreements and/or having participation in current agreements discounted suffices to ensure compliance<sup>442</sup>”.

Thus, States guilty of non-compliance can face the prospect of a reputation-oriented sanction:

“The parties to an agreement know that reservations, exceptions, escape clauses, and so on capture only some of the possible future situations. They recognize that there is a risk that they will violate a commitment, and that this may generate a loss of reputation.<sup>443</sup>”

One of the benefits of this type of sanction is that it affects States more democratically or equally. Wealthier States are normally more able to answer to economic or military sanctions, whereas no State is sheltered when it comes to its reputation<sup>444</sup>. However, the reputation of poorer Member States might suffer due to their lower compliance rate as a result of their developing economies<sup>445</sup>.

There are different theories concerning a State's reputation. A more traditional theory suggests that a State has a single reputation, making less financially stable

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<sup>442</sup> Benvenisti & Hirsch, *supra* note 323 at 117.

<sup>443</sup> Guzman, “A Compliance-Based Theory of International Law”, *supra* note 333 at 1856.

<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

States more vulnerable to being typecast as non-cooperative. However, another theory posits that any given State has a different reputation for each of its different regimes<sup>446</sup>. This multiple reputation-based theory is less penalizing, as it allows weaker developing States to be perceived as non-compliant in one regime, and compliant in another. Guzman's theory regarding reputation-oriented sanctions suggests that the impact that a violation might have on a State's reputation must be contextualized on a case-by-case basis:

“It seems clear that the reputational impact of a violation of international law varies depending on the nature of the violation. For example, a failure to comply with a minor international obligation that is a result of oversight or human error and that is promptly corrected without damage to other states is unlikely to have a major reputational impact. In contrast, an egregious and intentional violation, such as support of terrorist activities against another state, is likely to have a profound impact on a nation's reputation. [...] A list of factors that influence the reputational impact of a violation, therefore, should include (1) the severity of the violation, (2) the reasons for the violation, (3) the extent to which other states know of the violation, and (4) the clarity of the commitment and the violation.<sup>447</sup>”

It can be argued that one of the main goals of law is to affect behavior, whether in individuals or international actors<sup>448</sup>. This behavioral change is also considered essential in creating effective conventions<sup>449</sup>. Although the UNCAC does not provide for economic or military sanctions, Member States cannot escape their

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<sup>446</sup> Benvenisti & Hirsch, *supra* note 323 at 121.

<sup>447</sup> Guzman, “A Compliance-Based Theory of International Law”, *supra* note 443 at 1861.

<sup>448</sup> *Ibid.* at 51. See also Haas, *supra* note 324 at 67.

<sup>449</sup> Guzman, *ibid.* This author stipulates that behavioral change requires three conditions. First, the agreement must have substantive content governing the behavior in need of changing. Second, members whose behavior is consequential must be part of the agreement, and finally, they must feel obligated to modify their behavior. These three conditions are considered key elements to a different kind of level of compliance: cooperation.

reputation. Therefore there is in fact an important incentive for them to comply with their obligations: the perception of society and their peers.

## **Section II - Indirect Compliance Challenges**

By “indirect compliance challenges”, we refer to external factors to the UNCAC, meaning difficulties which arise not from the Convention’s wording or content, but by elements that exist independently and that cannot easily if at all be modified, such as the absence of good governance in some countries and the inherent nature of the offences covered by the Convention.

### **i. Good Governance**

The greatest challenges in combating corruption are mostly related to good governance<sup>450</sup>. Good governance is a broad notion that has many meanings, one of which defines it as the “proper functioning of governmental machinery<sup>451</sup>”. Another specifies that it can be measured using three main criteria: the nature of a State’s political regime, the process by which economic and social resources are managed, and the ability of the State to prepare and apply economic policy<sup>452</sup>. A

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<sup>450</sup> Shehu, *supra* note 205 at 75. The term “good governance” is however not used in the UNCAC.

<sup>451</sup> Francis N. Botchway, “Good Governance: The Old, The New, The Principle, and The Elements”, (2000-2001) 13 *Florida Journal of International Law*, 159 at 160 [Botchway]; Gerry Stoker, “Cinq propositions pour une théorie de la gouvernance”, (1998) 155 *Revue internationale de sciences sociales*, 19-30 at 23 [Stoker].

<sup>452</sup> Jean-Cartier Bresson, “La Banque mondiale, la corruption et la gouvernance”, (2000) 41 *Tiers monde*, 165 at 167 [Bresson].

more normative description illustrates governance as “the conscious management of regime structures with a view to enhancing the legitimacy of the public realm<sup>453</sup>”.

Strong existing domestic institutions are considered an obvious requirement of good governance<sup>454</sup>. Their importance in fostering compliance is apparent when considering the work of Hathaway:

“[...] strong domestic institutions are essential not only to domestic rule of law, but also to international rule of law. Where international bodies are less active in enforcement of treaty commitments [...] it falls to domestic institutions to fill the gap. In some states, this reliance on domestic institutions is effective. In others it is less so. In democratic nations, where domestic rule of law and hence enforcement tend to be relatively strong (because the judiciary, media, and political parties are free to operate independent of the executive), states are more likely to abide by international law whether it is externally enforced or not. In less democratic nations, where domestic enforcement can be less effective, states are less likely to abide by international law that is not enforced by transnational bodies.<sup>455</sup>”

According to the World Bank, transparency is a core component of good governance<sup>456</sup> and includes many facets, such as the “public disclosure of assets and incomes of candidates running for public office (...), public disclosure of

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<sup>453</sup> *Ibid.*

<sup>454</sup> Karim Dahou, “La bonne gouvernance selon la Banque mondiale: au-delà de l’habillage juridique”, in Marc Totté et. al. eds., *La décentralisation en Afrique de l’ouest*, Paris, Éditions Karthala, 2003, 53 at 58 [Dahou].

<sup>455</sup> Oona A. Hathaway, “Between Power and Principle: An Integrated Theory of International Law”, (2005) 72 *The University of Chicago Law Review*, 469 at 520 [Hathaway].

<sup>456</sup> Ahmed Shafiqul Huque and Habib Zafarullah, *International Development Governance*, Taylor and Francis, New York, 2006 at 270 [Huque & Zafarullah]. See also World Bank, *Governance and Development*, Washington, D.C., 1992, at 7.

political campaign contributions<sup>457</sup>”, “campaign expenditures<sup>458</sup>” and “public disclosure of all parliamentary votes, draft legislation and parliamentary debates<sup>459</sup>”. The following paragraphs attempt to assess this specific aspect of transparency that we consider particularly relevant to the persisting lacuna in multilateral anti-corruption agreements: that of political party financing<sup>460</sup>.

Political parties should arise independently from the State as an answer to the will of societies<sup>461</sup>. It is therefore imperative that they remain free of government influence as the voice of the people. The rationale for limiting political party financing is supported by the opinion that “transparency has a curative effect on the process of raising money, and contribution limits diminish the possibility of corruption<sup>462</sup>”. Other justifications include the fast growth of competition derived from campaign financing<sup>463</sup>, and the frequent instances of diversion of funds for personal use, favoritism, and vote purchasing<sup>464</sup>.

During the UNCAC’s negotiations, political corruption, or more specifically the

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<sup>457</sup> Daniel Kaufmann, “Myths and Realities of Governance and Corruption”, in *Global Competitiveness Report 2005-2006*, World Bank, Washington, D.C., 2005, 81 at 92 [Kaufmann].

<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*

<sup>460</sup> Neither of the following agreements contain provisions on political party financing: the *OECD Anti-Bribery Convention*, *IACAC*, and the *Council of Europe Criminal Law Convention*. Although the *AU corruption Convention* does contain such provisions, they are far from detailed and simply call on States to “incorporate the principle of transparency into funding of political parties” (Article 10).

<sup>461</sup> Antonio Argandona, “Political Party Funding and Business Corruption”, *Chair of Economics and Ethics*, Research Paper No 458, January 2002 at 4 [Argandona, “Political Party Funding and Business Corruption”].

<sup>462</sup> Henning, *supra* note 97 at 843.

<sup>463</sup> Philippa Webb, *supra* note 46 at 215.

<sup>464</sup> Babu, *supra* note 26 at 15.

use of illegally obtained funds to finance political parties caused intense debate. The views of the delegations diverged considerably regarding the inclusion of a provision incorporated in the Draft Convention<sup>465</sup> entitled “Funding of Political Parties”, which tentatively read as follows:

- “1. Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
- (a) To prevent conflicts of interest;
  - (b) To preserve the integrity of democratic political structures and processes;
  - (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
  - (d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.
2. Each State Party shall take measures to avoid as far as possible conflicts of interest owing to simultaneous holding of elective office and responsibilities in the private sector.<sup>466</sup>”

A number of delegations however suggested that the provision be deleted because of the important differences in the Parties' legal systems<sup>467</sup> and the provision was eventually removed during the sixth session of the Ad Hoc Committee<sup>468</sup>. There

<sup>465</sup> Proposed by Austria, the Netherlands, and France in *Proposals and Contributions Received from Governments: Austria, France and The Netherlands*, U.N.Doc. A/AC.261/L.21.

<sup>466</sup> *Revised draft United Nations Convention against Corruption*, Ad Hoc Committee for the Negotiation of a Convention against Corruption, Fifth session, Vienna, 10-21 March 2003, A/AC.261/3/Rev.3, art.10. Emphasis added.

<sup>467</sup> Argandona, “Political Party Funding and Business Corruption”, *supra* note 461 at 9. This was the position of the United States, which called for its deletion as a condition of the Convention’s endorsement. Ironically, the position adopted by the U.S. is diametrically contrary to their position during the negotiations for the *OECD Anti-Bribery Convention* approximately twenty years prior, during which the exclusion of a similar provision elicited major disappointment for U.S. officials. They believed that “excluding political party officials would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials” in Gantz, *supra* note 128 at 486. See TI, *US Weakens UN Convention by Blocking Measures Tackling Political Corruption*, Press Release, (August 2003) available at: [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases/2003/2003\\_08\\_11\\_us\\_blockin\\_g\\_measures](http://www.transparency.org/news_room/latest_news/press_releases/2003/2003_08_11_us_blockin_g_measures). See also *Ad Hoc Committee for the Negotiation of a Convention against Corruption*, Sixth session, Vienna, 21 July-8 August 2003, A/AC.261/3/Rev.4 at 15 [Date consulted: August 14<sup>th</sup> 2010].

<sup>468</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Sixth Session*, Seventh session, Ad Hoc Committee for the Negotiation of a Convention Against Corruption, Vienna, A/AC.261/22 at 10 (held in Vienna, between September 29<sup>th</sup> and October 1<sup>st</sup>

did however remain a shadow of the deleted offence included in article 7 of the Convention which stipulates that:

“Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.<sup>469</sup>”

The final non-mandatory language has been labeled a disappointment and criticized as “toothless”<sup>470</sup>. Indeed, the revised provision is stripped of its content, scope, and enforceability. The removal of the more detailed and stringent provision was however deemed necessary to accommodate the concerns of a substantial number of delegations and to ensure the completion of the Draft Convention before the fast-approaching deadline<sup>471</sup>. It should be noted that no existing multilateral instrument contains detailed provisions on the funding of political parties and that perhaps attempting to arrive at a global consensus on this sensitive issue was an unrealistic goal<sup>472</sup>.

## ii. The Prosecution of Bribery and Bribery Related Offences

Unlike other crimes, “crimes of corruption are carried out in secret<sup>473</sup>”. As bribery

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2003).

<sup>469</sup> UNCAC, art.7(3). Emphasis added.

<sup>470</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 6.

<sup>471</sup> Philippa Webb, *supra* note 46 at 217. Adopted in late August 2003, the deadline being in October of 2003.

<sup>472</sup> Henning, *supra* note 97 at 853.

<sup>473</sup> Benjamin B. Wagner and Leslie G. Jacobs, “Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations”, (2008-2009) 30 *University of Pennsylvania Journal of International Law*, 183 at 215 [Wagner & Jacobs].

is a consensual act, there is no apparent or direct victim. Indirect victims are usually not aware that a specific transaction has occurred<sup>474</sup>. Only incomplete transactions are likely to be reported, unless there is third party knowledge of the corrupt transaction. Logically, if the transaction is completed, then both parties to it are guilty of a crime, and neither of them will denounce the act or want to come forward as a witness. This makes detection of the crime and its enforcement quite problematic. Furthermore, the low reporting rate of such crimes may be explained by the fact that complaints are made only when bribery deals fail to come to fruition<sup>475</sup>. The following passage clearly demonstrates the difficulties in prosecuting such offences:

“Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors. Where there are hints of bribery, investigations backed with some form of compulsory process may be necessary to establish the case that a signatory is obliged to take action. Finally, even if there is information available about a specific, possibly illicit payment, a prosecutor may have good reasons for declining to prosecute the case: insufficient evidence to meet a criminal conviction standard of proof, potential cost of the prosecution relative to other enforcement priorities, etc.”<sup>476</sup>

Another aspect making prosecuting corruption offences difficult lies in the inadequacy of procedural and evidentiary laws in many countries. For instance, many money laundering offences or financial offences are carried out with the use of computers and advanced software. Developing countries do not always have the

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<sup>474</sup> Justine Nolan, “The United Nations’ Compact With Business”, (2005) 24 *University of Queensland Law Journal*, 445 at xiii [Nolan].

<sup>475</sup> Nlerum S. Okogbule, “Official Corruption and the Dynamics of Money Laundering in Nigeria”, (2007) 14 *Journal of Financial Crime*, 49-63 at 51 [Okogbule].

<sup>476</sup> Tarullo, *supra* note 180 at 689.

necessary legislation in place in order to manage the admissibility of such evidence before national courts<sup>477</sup>. This is still the case in Nigeria. Even dating back to 1976, the Nigerian Supreme Court rendered a decision stating that new means of reproducing bank account information needed to be considered, referring to computer generated bank statements:

“The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of computer. In modern times reproductions or inscriptions or ledgers or other documents by mechanical process are common place and S.37 cannot, therefore, only apply to books of account so bound and the pages not easily replaced.<sup>478</sup>”

A further drawback concerns the availability of testimonial evidence. When witnesses live abroad, obtaining statements or ensuring witness cooperation is more difficult. This is not a rare occurrence in money laundering or bribery cases and without key witnesses the possibility of losing the case at trial can be high<sup>479</sup>. Even with the arrival of the UNCAC, this scenario is probable when taking a closer look at its extradition requirements. Article 44 of the Convention creates loopholes by subjecting extradition to Member States domestic laws<sup>480</sup>. Moreover, in cases where extradition is refused, it is said that local trials rarely produce any outcome as a result of the inaccessibility of evidence, such as witnesses located

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<sup>477</sup> Okogbule, *supra* note 475 at 58.

<sup>478</sup> *Festus Yesufu v. ACB Ltd*, (1976) 1 “Nigeria Law Reports”, pt.1 at 328. The need to amend Nigeria’s *Evidence Act* to include computer print outs was also mentioned in a more recent Court of Appeal case: *United Bank for Africa Plc. C. Sani Abacha Foundation for Peace and Unity & 5 Others* (2004) 3 “Nigerian Weekly Law Reports” pt.861, at 516 and 541-542.

<sup>479</sup> Andreas Schloenhardt, “Transnational Organized Crime and the International Criminal Court Developments and Debates”, (2005) 24 *University of Queensland Law Journal*, 93 at 95 [Schloenhardt].

<sup>480</sup> UNCAC, art.44, paras.8, 9, and 10.

overseas<sup>481</sup>.

Furthermore, the investigation and prosecution of transnational crimes can become expensive and time-consuming as they may require specialized forensics in certain areas such as accounting and money laundering. For these types of offences, local forensic offices are necessary. If countries such as Germany, Italy, Japan and the United Kingdom are not equipped with proper forensic offices, the chances that developing countries might possess the necessary means are quite slim<sup>482</sup>.

The prosecution of transnational crimes is wholly dependant upon national prosecution. Even with a comprehensive international treaty, it is up to each Member State to either prosecute locally or to cooperate with its counterparts. The following passage illustrates the difficulty in effectively prosecuting transnational organized crime:

“But it is this reliance on national action that creates the greatest obstacle against effective action against transnational organized crime, and which has created so many safe havens for drug traffickers, migrant smugglers, money launderers and other suspects. [...] The opportunities offered by globalization have enabled sophisticated criminal organizations to take advantage of the discrepancies in different legal systems and the non-cooperative attitude of many nations.<sup>483</sup>”

These are critical arguments justifying the need for the centralized prosecution of bribery and bribery-related crimes through the International Criminal Court

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<sup>481</sup> Schloenhardt, *supra* note 479 at 95.

<sup>482</sup> Heineman & Heimann, *supra* note 60 at 83.

<sup>483</sup> Schloenhardt, *supra* note 479 at 96.

(hereafter “ICC”). It is argued that such a step would make international law enforcement more efficient by providing a further layer or forum in addition to prosecutions at the national level<sup>484</sup>.

Although some might assume that the ICC’s jurisdiction is universal, it is in fact subsidiary and complementary to national tribunals<sup>485</sup>. Furthermore, it is limited by other factors:

“Il y a plusieurs restrictions qui ont été posées à la compétence de la C.P.I. et l’on doit malheureusement constater que cette compétence n’est pas aussi universelle qu’on pourrait le croire. En effet, la compétence de la Cour n’est pas seulement complémentaire ou subsidiaire mais elle est aussi limitée quant aux infractions qu’elle peut juger, quant à l’époque où ces infractions ont été commises, quant au lieu où elles se sont produites et quant aux personnes qui peuvent comparaître devant elle.”<sup>486</sup>

The ICC has jurisdiction over a limited number of offences, namely genocide, crimes against humanity, war crimes and crimes of aggression<sup>487</sup>. Although the ICC’s jurisdiction initially extended itself to other offences such as drug trafficking, opposition to including them grew due to several considerations<sup>488</sup>. Among these was the fear that such an inclusion might substantially burden the court’s resources and that “sovereignty issues of some nations might bar

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<sup>484</sup> *Ibid.*

<sup>485</sup> Although the ICC is not the central focus of this paper, a brief overview of its jurisdiction is necessary. For more on the ICC, see Arbour & Parent, *supra* note 130 at 700-704.

<sup>486</sup> *Ibid.* at 701; Pacifique Manirakiza, “L’Afrique et le système de justice pénale internationale”, (2009) 3 *African Journal of Legal Studies*, 21 at 24 [Manirakiza].

<sup>487</sup> Schloenhardt, *supra* note 479 at 94. These offences are found in Articles 5, 6, 7, and 9 of the *Rome Statute of the International Criminal Court* (last amended January 2002), 17 July 1998, A/CONF. 183/9, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> [Date consulted: February 17<sup>th</sup> 2011].

<sup>488</sup> *Ibid.* at 113.

prosecution of such offences by an international authority<sup>489</sup>”. The following passage illustrates this resistance among certain States to the creation of extraterritorial jurisdiction provisions:

“Historically, efforts to create treaty provisions for extraterritorial jurisdiction met significant resistance. During negotiations of the Rome Statute of the International Criminal Court, the treaty that established the International Criminal Court (ICC), the United States (who ultimately did not ratify the treaty) resisted efforts by some nations to add a provision permitting universal jurisdiction, and as a result of this resistance, no such provision was added. [...] [T]he United States now generally refuses to consent to any treaty that provides the International Court of Justice with jurisdiction over disputes without having the option to waive such a provision. Other states, including Australia and the United Kingdom, consent to ICJ treaties only under the reservation that certain disputes be excluded from the ICJ’s jurisdiction.<sup>490</sup>”

The ICC’s statute would have to be amended in order for it to have jurisdiction over the offences included in the UNCAC. The following passage illustrates the difficult task of amending the ICC’s statute to include other offences: “A review and inclusion is not going to happen soon, and the mere fact that the ICC’s statute will have to be amended to include such offences will be a formidable barrier to the ICC ever taking responsibility for them<sup>491</sup>”.

In order to conclude this chapter, the following paragraphs consider the work of Gerald E. Caiden that advances common flaws that have been observed in most

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<sup>489</sup> *Ibid.*

<sup>490</sup> Evan P. Lestelle, “The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction”, (2008-2009) 83 *Tulane Law Review*, 527 at 554 [Lestelle].

<sup>491</sup> Schloenhardt, *supra* note 479 at 115.

anti-corruption tools<sup>492</sup>. These flaws, when studied against the UNCAC, may serve as a basis for reviewing the Convention's effectiveness<sup>493</sup>.

The first flaw relates to the definition of corruption. Too often corruption is defined using specific and narrow terms, disregarding the fact that in reality it encompasses a very wide spectrum of misconduct<sup>494</sup>. The second flaw, similar to the first, addresses the scope of the treaties; it criticizes the absence of offences relating to private sector corruption, stating that “[c]orruption in the private sector infiltrates the public sector and vice versa, just as the corruption in international business has been assimilated with governments<sup>495</sup>”. This applies to most anti-corruption agreements that criminalize only certain types of bribery<sup>496</sup>. However, the negotiators of the UNCAC clearly took this aspect into consideration by purposely omitting to include a definition of corruption, instead focusing on criminalizing a wide range of public and private bribery offences.

The third flaw concerns the lack of a distinction between political and administrative corruption within many anti-corruption tools. According to Caiden, administrative corruption does not necessarily imply political corruption: one level of administration can participate in corrupt activities leaving other levels unaware

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<sup>492</sup> Caiden, *supra* note 25 at 275.

<sup>493</sup> The first seven flaws can be analyzed with the UNCAC, whereas the last three operate on a more local level and will not be studied.

<sup>494</sup> Caiden, *supra* note 25 at 275.

<sup>495</sup> *Ibid.* at 278.

<sup>496</sup> Such as the UNCTOC and the *OECD Anti-Bribery Convention*.

of any wrongdoing. Adversely, political corruption can rarely function without the participation of the administration<sup>497</sup>. Although the UNCAC differentiates between these two types of corruption in its provision against political party funding, it does not go any further with this distinction<sup>498</sup>. Instead, the UNCAC clearly defines what acts must constitute criminal offences under the Convention, without categorizing the offence as either political or administrative. In our view, this categorization is not necessary for ensuring the proper application of anti-corruption provisions in an international treaty, since the details of implementation are left to the Member States. As long as the act itself is prohibited, its categorization, in our view, is not crucial to the agreement's capacity to eradicate and prevent the unwanted behavior.

Another flaw criticizes the mistake many anti-corruption tools make by failing to differentiate between large and small-scale corruption, implying that both may be tackled together<sup>499</sup>. In our opinion, a distinction must be made between institutionalized corruption and occasional or intermittent acts of corruption. Simply punishing an individual act of corruption does not in itself result in the prevention of future corrupt behavior, particularly in instances where corruption is institutionalized:

“Regrettably, in systemic corruption, the mere elimination of individual wrongdoers will not stem institutionalized corruption

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<sup>497</sup> Caiden, *supra* note 25 at 279.

<sup>498</sup> *Ibid.* at 281. Caiden gives as an example of political corruption, electoral voting fraud versus government inspector bribery, stating that the distinction is paramount in ensuring a proper remedy.

<sup>499</sup> *Ibid.*

since there are always other individuals that can replace the wrongdoers, and the cycle of corruption continues virtually without interruption<sup>500</sup>.

In this respect, the UNCAC's preventive measures seem to have captured this fundamental attribute of corruption by tackling corruption at its root instead of simply attempting to punish the corrupt individuals.

The fifth flaw stresses the importance of setting realistic goals. Corruption will never be fully eradicated. The attempt to eradicate it is therefore inevitably futile. It has taken successful States many generations to restrain corruption<sup>501</sup>. The UNCAC does not attempt to eliminate corruption in its entirety, but rather intends to strengthen measures to prevent and combat corruption, to promote international cooperation and integrity<sup>502</sup>.

The next two flaws relate to the lack of political will among States and 'sabotage'<sup>503</sup>. Although the lack of political will is passive and results in inaction, sabotage necessitates deliberate action<sup>504</sup>. Describing the act of sabotage, Caiden gives the example of a political leader who promises to end corruption in order to attract supporters, only to later adopt the same behavior as his predecessors, thus continuing the cycle of corruption<sup>505</sup>.

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<sup>500</sup> *Ibid.*

<sup>501</sup> *Ibid.* at 283.

<sup>502</sup> UNCAC, art.1.

<sup>503</sup> Caiden, *supra* note 25 at 284.

<sup>504</sup> *Ibid.* at 287.

<sup>505</sup> *Ibid.*

With the adoption of the UNCAC, the political will for an anti-corruption convention was strongly felt. However, the use of discretionary language is prevalent throughout the Convention. It is a reflection of how much Member States were willing to sacrifice in the fight against corruption. The discretionary quality of the language used within the UNCAC is, in our view, one of the Convention's greatest flaws and may prove to diminish its effectiveness by its inability to sustain compliance. Another major flaw is the Convention's monitoring mechanism, which fails to go further than previous anti-corruption agreements by omitting to include civil society in the mutual evaluation process.

Although the Convention does not define its obligations as precisely as hoped, it does put a vast framework into place, thus allowing an important number of Member States to cooperate with each other. Its broad terminology also reflects the need for flexibility and adaptability, as corruption is an evolving phenomenon<sup>506</sup>.

Furthermore, the UNCAC's provisions on asset recovery, technical assistance, cooperation, and the private sector are an important development in the field of anti-corruption as these areas were scarcely prioritized in previous multilateral anti-corruption treaties. Moreover, these provisions play a major role in addressing large-scale corruption and in bringing the fight against corruption to new

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<sup>506</sup> Chayes & Chayes, *supra* note 59 at 11.

territories.

Given the previous analysis, it is clear that the UNCAC's effectiveness is threatened by its direct and indirect compliance challenges. The next chapter will attempt to determine the UNCAC's relevancy by studying competing multilateral anti-corruption agreements.

## **Chapter II – Barriers to the Convention's Relevancy: Existing Anti-Corruption Initiatives**

Relevancy addresses the urgency of the problem tackled by the Convention. It can be assessed in part by studying other similar instruments and laws already in place, as these, we argue, are in competition with one another: “il convient sans doute de tenir compte, dans l'analyse de l'internationalisation des pratiques de corruption internationale, de la concurrence normative [...]”<sup>507</sup>. If the UNCAC is able to tackle more diverse corruption offences and to incorporate a higher number of players than its counterparts, it can in our view be qualified as relevant regardless of the already existing anti-corruption instruments.

The UNCAC is not the first international instrument to tackle corruption. It is

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<sup>507</sup> Juliette Tricot, “Les figures de l'internationalisation en droit penal des affaires: La corruption internationale”, (2005) 4 *Revue de science criminelle et de droit pénal comparé*, 753 at 759 [Tricot].

however argued that it is the most comprehensive anti-corruption tool<sup>508</sup>. The following sections will briefly consider previous anti-corruption related international and regional agreements by starting with an overview of the agreement, followed by a brief summary of its monitoring mechanism.

## **Section I - The *OECD Convention against Bribery of Foreign Public Officials***

### **i. Overview of the Instrument**

The *OECD Convention against Bribery of Foreign Public Officials* entered into force in 1999, after two years of negotiations<sup>509</sup>. The Convention “marked the beginning of an international movement based on the premise that we all have a stake in the integrity of the global marketplace that deserves the protection of law<sup>510</sup>”. The United States exerted considerable pressure on its fellow OECD Member States to bring about their participation in the Convention. The United States, up to that period, was the only country to have made the act of bribing a foreign public official illegal with the adoption of its *Foreign Corrupt Practices Act*<sup>511</sup> in 1977. In fact, the FCPA was used as a model for the *OECD Anti-Bribery*

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<sup>508</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 3.

<sup>509</sup> Tarullo, *supra* note 180 at 668.

<sup>510</sup> Paul D. Carrington, “Enforcing International Corrupt Practices Law”, (2010) 32 *Michigan Journal of International Law* 129 at 140 [Carrington].

<sup>511</sup> Bontrager Unzicker, *supra* note 16 at 655.

*Convention*<sup>512</sup>. All thirty-four members of the OECD are party to the 1999 Convention<sup>513</sup>, and as of December 1999, eighteen members had also enacted their own national anti-bribery laws<sup>514</sup>.

The *OECD Anti-Bribery Convention*'s main requirement is that each Member State adopt national legislation against the bribery of foreign government officials in international business transactions<sup>515</sup>: it therefore deals strictly with transnational bribery, making it its main punishable offence. The *OECD Convention* is a clear example of an agreement dealing with the supply-side of bribery only:

“The Convention, which deals only with transnational bribery, is the exemplary case of an arrangement addressing the “supply-side” of bribery. It obliges signatories to criminalize bribery of foreign officials but does not address the “taking” of bribes by their own officials. Thus, it covers only the impact of bribery by one country’s residents (including corporations) upon the government of another country.<sup>516</sup>”

Its application is therefore limited when considering that the UNCAC covers both the supply and demand sides of bribery. The following passage demonstrates that the main goal of the agreement was to hinder active bribery as opposed to passive

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<sup>512</sup> *Ibid.* at 661.

<sup>513</sup> The OECD members are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. The *OECD Anti-Bribery Convention* was signed by its members as well as by five ‘non-members’: Argentina, Brasil, Bulgaria, Chile, and Slovakia. For more information on the Convention’s negotiation, see: Jacqueline Riffault-Silk, “La lutte contre la corruption nationale et internationale par les moyens du droit pénal”, (2002) 54 *Revue internationale de droit comparé*, 639 at 655 [Riffault-Silk].

<sup>514</sup> *Ibid.* at 666.

<sup>515</sup> Ibrahim Shihata, *International Finance and Development Law*, Kluwer Law International, Boston, 2001 at 237 [Shihata].

<sup>516</sup> Tarullo, *supra* note 180 at 681.

bribery: “The OECD initiative against bribery in international business transactions developed out of the pledge by industrialized nations [...] to combat the supply side of bribery. The approach is aimed at reducing the influx of corrupt payments [...]”<sup>517</sup>.

Although it is still unclear whether the UNCAC’s provisions apply to facilitation payments in practice, it is quite clear that the *OECD Convention* creates an exception allowing such payments when made to lower level public officials: “[s]mall “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” [...] and, accordingly, are also not an offence”<sup>518</sup>.

Similarly to the UNCAC, the *OECD Anti-Bribery Convention* does not provide for any sanctions against offenders, nor does it provide sanctions against Member States for non-compliance. It leaves the use of sanctions towards legal persons to the discretion of the Parties, stating that among the sanctions used there should be effective and dissuasive criminal penalties, including the “deprivation of liberty sufficient to enable effective mutual legal assistance and extradition”<sup>519</sup>. Moreover, the *OECD Convention* contains two provisions that attempt to hinder

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<sup>517</sup> Fijnaut & Huberts, *supra* note 403 at 349.

<sup>518</sup> *OECD Anti-Bribery Convention*, art.1; Alison Von Roseninge, “Global Anti-Corruption Regimes: Why Law Schools May Want to Take a Multi-jurisdictional Approach”, (2009) 10 *German Law Journal*, 785 at 789 [Roseninge].

<sup>519</sup> *OECD Anti-Bribery Convention*, art.3. See also Juliette D’Hollander, “Ethics in Business: The New OECD Convention on Bribery”, (1999) 33 *Revue Juridique Thémis*, 147 at 163 [D’Hollander].

Member States from trying to circumvent the goal of the agreement. Firstly, a State must not be influenced by the potential effect its decisions might have on relations with another member, nor should it be influenced by national economic interests:

“Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.<sup>520</sup>”

Secondly, regarding the issue of a statute of limitations, the Convention states that every Member State's national legislation must “allow an adequate period of time for the investigation and prosecution<sup>521</sup>” of all offences<sup>522</sup>.

When comparing the *OECD Convention* to the UNCAC, a few elements stand out. First is the length of the agreements. The *OECD Convention* has a mere seventeen articles, whereas the UNCAC has over seventy. Second is the number of Parties: the UNCAC has over a hundred parties, whereas the *OECD Convention* has roughly thirty-five<sup>523</sup>. Although this is in part due to the regional quality of the latter agreement, it still merits consideration when assessing the universal

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<sup>520</sup> *OECD Anti-Bribery Convention, ibid.*, art.5.

<sup>521</sup> *Ibid.*, art.6.

<sup>522</sup> Christopher F. Corr and Judd Lawler, “Damned If You Do, Damned If You Don’t? The OECD Convention and the Globalization of Anti-Bribery Measures”, (1999) 32 *Vanderbilt Journal of Transnational Law*, 1249 at 1309 [Corr & Lawler].

<sup>523</sup> Thirty-six States have either ratified or acceded to the *OECD Corruption Convention*: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

characteristic of the conventions. Third, the *OECD Convention* does not address asset recovery, a key issue provided for in length by the UNCAC. However, the *OECD Anti-Bribery Convention's* monitoring mechanism is said to be its distinguishing characteristic<sup>524</sup>.

## ii. Monitoring Mechanism

The *OECD Anti-Bribery Convention's* monitoring mechanism was the first mechanism to be adopted in the field of anti-corruption and is considered one of the most vigorous among its counterparts<sup>525</sup>. The OECD has conducted over 150 investigations from which approximately sixty individuals and companies have been sanctioned<sup>526</sup>. It contains a questionnaire prepared by the reviewing States, a mandatory on site visit and a public country review report. Furthermore, civil society and the private sector play an active part in all phases of the process<sup>527</sup>.

The review process consists of two phases. The first phase focuses on whether the enacted national legislation is consistent with the anti-bribery convention's requirements. The second phase focuses on enforcement and the Member State's capacity to prevent, deter and sanction transnational bribery<sup>528</sup>. In order to create

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<sup>524</sup> Von Rosenvinge, *supra* note 518 at 790.

<sup>525</sup> Lucinda A. Low et al., "Milestones in Mutual Evaluation: The Phase 2 Review of the United States Under the OECD Antibribery Convention", (2003) 5 *International Law FORUM du Droit International*, 106 at 108 [Low, "Milestones in Mutual Evaluation"].

<sup>526</sup> Von Rosenvinge, *supra* note 518 at 790.

<sup>527</sup> Chêne & Dell, *supra* note 416 at 2.

<sup>528</sup> Low, "Milestones in Mutual Evaluation", *supra* note 525 at 108.

incentives to cooperate with the reviewing countries and to properly implement the convention requirements, the review reports include specific recommendations as well as a follow-up mechanism. The review process is set up so as to allow participants enough time to start implementing changes in their national regime according to the recommendations they receive in each phase<sup>529</sup>. By rendering the results of the review process public, significant pressure is brought to bear on members to improve their implementation of the Convention's obligations.

In practice, the country evaluations are carried out by experts from two countries who in the first phase will use questionnaires answered by the reviewed State as well as submitted legal materials. In this phase, the standard of implementation is evaluated and a report is published on the Internet. In the second phase, the examined State's deployed resources and structures are considered by using once again questionnaires followed by on-site visits<sup>530</sup>.

It is safe to conclude that the UNCAC represents a significant step forward in many respects, for instance by the number of its Member States, its geographical pull, the wide array of offences it includes (such as the bribery of a domestic official and bribery in the private sector), its detailed provisions and the inclusion of detailed asset recovery provisions. However, when comparing both agreements' monitoring mechanisms, one must conclude that the *OECD Anti-Bribery*

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<sup>529</sup> Chêne & Dell, *supra* note 416 at 2.

<sup>530</sup> Fijnaut & Huberts, *supra* note 403 at 354.

*Convention's* enforcement mechanism is more effective: contrary to the UNCAC's monitoring process, the results of the country reviews are rendered public, a quality that in our view, enhances the process' transparency as well as any effect public dishonor might have on the reviewed State's behavior.

## **Section II - The *Inter-American Convention Against Corruption***

### **i. Overview of the Instrument**

The *Inter-American Convention against Corruption*, adopted by the Organization of American States<sup>531</sup> in March of 1996, was the first regional agreement to impose anti-corruption obligations<sup>532</sup>. It became effective almost exactly a year later and consists of 28 articles with 33 Parties to date<sup>533</sup>. Its approach is qualified as hemispheric due to the region it covers<sup>534</sup> and it is considered “a compromise between Latin-American interests in mutual legal assistance and extradition and the North-American agenda in criminalizing active transnational commercial

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<sup>531</sup> Hereafter “OAS”. Members of the OAS are: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

<sup>532</sup> Nancy Boswell, “International Law Standards for Domestic Governance”, (2003) 97 *American Society of International Law Proceedings*, 133 at 134 [Boswell].

<sup>533</sup> Altamirano, *supra* note 318 at 499. Parties to the IACAC are: Argentina, Antigua and Barbuda, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

<sup>534</sup> Henning, *supra* note 97 at 807.

bribery<sup>535</sup>”.

The IACAC’s scope is wider than that of the *OECD Anti-Bribery Convention*, also criminalizing transnational bribery in the public and private sector but including both the supply and demand sides of bribery, as well as provisions criminalizing illicit enrichment. Furthermore, the IACAC does not contain any exceptions allowing facilitation payments, but rather criminalizes “any article of monetary value, or other benefit, such as a gift, favor, promise or advantage<sup>536</sup>”. It also reverses the burden of proof pertaining to cases where there exists a sudden increase in an official’s assets<sup>537</sup>. In these respects, it rivals the UNCAC: it does not create any *prima facie* exception for facilitation payments and contains provisions that lighten the burden for the prosecution in certain circumstances<sup>538</sup>. It leaves the criminalization of other corruption related offences to the discretion of its members by encouraging them to consider establishing additional offences<sup>539</sup>. Once adopted, these additional offences become acts of corruption under the IACAC triggering requirements concerning cooperation with States that have not necessarily criminalized the same offences<sup>540</sup>. The OAS Convention has other noteworthy provisions relating to extradition and cooperation:

“[T]he convention constitutes the most important inter-American

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<sup>535</sup> Mark Pieth, “The Harmonization of Law Against Economic Crime”, (1999) 1 *European Journal of Law Reform*, 527 at 538 [Pieth].

<sup>536</sup> IACAC, art.6 (1) a).

<sup>537</sup> *Ibid.*

<sup>538</sup> For example, Article 20 of the UNCAC shifts the burden of proof to the defendant where he or she is accused of illicit enrichment.

<sup>539</sup> IACAC, art.V, para.4.

<sup>540</sup> Philippa Webb, *supra* note 46 at 194.

legal instrument for extraditing those who commit crimes of corruption [and] in co-operation and assistance among the states in obtaining evidence and facilitating necessary procedural acts regarding the investigation or trials of corruption [...]”<sup>541</sup>.

Similarly to the *OECD Anti-Bribery Convention* and the UNCAC, the IACAC is devoid of any penalties<sup>542</sup>, and is therefore criticized as being weak<sup>543</sup>. While the compulsory quality of the language varies within the IACAC, its key provision on acts of corruption is however drafted in mandatory terms:

“Article VI specifies all acts of corruption that fall within the IACAC’s scope. While Article VI does not provide a specific definition of corruption, it does list a number of ‘acts of corruption’ that must be criminalized. Article VI condemns both active and passive bribery, but limits its reach to corrupt practices by public officials within the State Party’s territorial boundary”<sup>544</sup>.

One of its shortcomings is its limited geographical scope, centered on the western hemisphere. Although this is explained by the fact that the IACAC remains a regional initiative, accession is open to any other State, not only to members of the OAS<sup>545</sup>. European Union countries and other important non-western nations have therefore no incentive to adhere to the OAS scheme<sup>546</sup>. Furthermore, contrary to the UNCAC, the IACAC does not contain any actual asset recovery provisions:

“La Convention de l’Organisation des États américains apparait, donc, plus intéressée par la punition des contrevenants à ses prescriptions et au remboursement des frais d’investigation et d’enquêtes que par la restitution proprement dite des avoirs issus de

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<sup>541</sup> Fijnaut & Huberts, *supra* note 403 at 393.

<sup>542</sup> IACAC, art.V, para.4

<sup>543</sup> Nicholls, “Corruption in the South Pacific”, *supra* note 95 at 214.

<sup>544</sup> Altamirano, *supra* note 318 at 501.

<sup>545</sup> IACAC, art.XXIII.

<sup>546</sup> Gantz, *supra* note 128 at 482.

la corruption.<sup>547</sup>”

Finally, no compliance mechanism was initially set up in the Convention<sup>548</sup>. Such a mechanism was only subsequently adopted in June of 2001 during the OAS’ thirty-first General Assembly after participants to the agreement realized that the agreement had a limited chance of success unless a monitoring process was put into place<sup>549</sup>. The State Parties used the *OECD Anti-Bribery Convention* as a model and adopted a similar procedure based on peer review<sup>550</sup>.

## ii. Monitoring Mechanism

The Convention’s monitoring mechanism is composed of two bodies: the Conference of the States Parties to the IACAC and the Committee of Experts. The latter is responsible for the analysis of the implementation of the Convention among its members, whereas the COSP reviews the performance of the Committee<sup>551</sup>. Contrary to the UNCAC’s monitoring mechanism, the State under review can decide to change, and appoint, experts to the Committee<sup>552</sup>. The Committee of Experts reviews the State Party’s performance in multiple rounds,

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<sup>547</sup> Bah, *supra* note 278 at 24.

<sup>548</sup> Gantz, *supra* note 128 at 480.

<sup>549</sup> Roberto De Michele, “The Follow-Up Mechanism of the Inter-American Convention Against Corruption: A Preliminary Assessment”, (2003-2004) 10 *Southwestern Journal of Law and Trade in the Americas*, 295 at 297 [De Michele].

<sup>550</sup> *Ibid.* at 300.

<sup>551</sup> Altamirano, *supra* note 318 at 506.

<sup>552</sup> *Rules of procedure and Other Provisions of the Committee of Experts of the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption*, SG/MESICIC/doc.9/04 rev.3 (Dec. 15, 2006), available at [http://www.oas.org/juridico/english/mesicic\\_rules.pdf](http://www.oas.org/juridico/english/mesicic_rules.pdf).

each round pertaining to an individual provision of the IACAC<sup>553</sup>.

An important aspect of the IACAC's review process is that it is subject to the public's scrutiny: country reports are made public at the end of the review process and civil society can take part in the self-assessment phase<sup>554</sup>. Furthermore, civil society organizations may submit documents to the experts carrying out the review in order to ensure that the information available to them is not biased or purely one-sided<sup>555</sup>. They may also make presentations in Committee meetings, whether formal or informal<sup>556</sup>. Experts can also decide to search or to receive any information pertinent to the review process<sup>557</sup>. The importance of experts using information submitted by third parties is illustrated in the following passage:

“These are some of the reasons why civil society organizations should keep an appropriate distance from the responsibilities of their own governments in responding to the questionnaire. Failing to do so can affect the independence of judgment expected from non-governmental organizations. In fact, one of the debates within the *Conference of the State Parties* focused on how to avoid governments providing unreliable information on the implementation of the Convention. Logically, a third party – civil society – could play a role in providing alternative opinions that could help balance the information and avoid governments acting softly on each other<sup>558</sup>”.

On a more practical front, there have been problems with the timeliness of the review process. The following passage dating back to 2003 criticized the first

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<sup>553</sup> Altamirano, *supra* note 318 at 506.

<sup>554</sup> De Michele, *supra* note 549 at 308.

<sup>555</sup> *Ibid.* at 311.

<sup>556</sup> Altamirano, *supra* note 318 at 506.

<sup>557</sup> De Michele, *supra* note 549 at 312.

<sup>558</sup> *Ibid.* at 317.

stage of the review process and demonstrates a clear lagging in the mechanism:

“This initial phase has demonstrated the need for resources to do a thorough review of all the parties within a reasonable time. The original timetable has already slipped (...). Some countries will not be reviewed until eight years after the Convention entered into force. Moreover, this stage of review only examines certain Convention provisions. As the program is currently organized, others will not be addressed until 2005. It is urgent that the process be accelerated if the Convention is to have an impact on governance in the hemisphere<sup>559</sup>”.

While the IACAC criminalizes more offences than the *OECD Anti-Bribery Convention*, its scope and wider applicability do not compare to that of the UNCAC. When comparing review mechanisms, one can observe that the OECD and the IACAC’s mechanisms have an important aspect in common: they are more transparent than the UNCAC’s review process in that they allow the participation of the private sector and of non-governmental organizations, a crucial facet of transparency. Furthermore, the IACAC’s monitoring mechanism comprises of a COSP and a Committee of Experts. It seems that the IACAC’s Committee of Experts has quasi-investigatory powers that enable it to conduct inquiries. Such powers were not provided for in the negotiation of the UNCAC’s monitoring mechanism. Creating such a committee within the UNCAC’s review process would not only, in our opinion, afford the mechanism greater independence, but would bring it closer to the expert review process (as opposed to the peer review mechanism), rendering the evaluation process more adversarial and effective.

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<sup>559</sup> Boswell, *supra* note 532 at 135.

### **Section III - The *United Nations Convention Against Transnational Organized Crime***

#### **i. Overview of the Instrument**

The *United Nations Convention Against Transnational Organized Crime* was the United Nations' first attempt to create a binding international agreement in the fight against corruption. It was drafted by a committee composed of a 127 States and was adopted in November of 2000 and has 159 Parties<sup>560</sup>. It entered into force three years later with the submission of the fortieth instrument of ratification, and contains little over twenty articles<sup>561</sup>.

Focusing mainly on organized crime, it also recognizes that corruption can be a result of organized criminal activity. It therefore also addresses other various transnational criminal offences, such as money laundering, corruption, and obstruction of justice<sup>562</sup>. The Convention does not address the issue of corruption in the private sector. Regarding bribery related offences, both the supply and demand sides are criminalized<sup>563</sup>, and the criminalization of other forms of

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<sup>560</sup> For a full list of the Parties to the UNCATOC, see the following website: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en) [Date consulted: February 15<sup>th</sup> 2011].

<sup>561</sup> Philippa Webb, *supra* note 46 at 203.

<sup>562</sup> Gerhard Kemp, "The United Nations Convention Against Transnational Organized Crime: A Milestone in International Criminal Law", (2001) *South African Journal of Criminal Justice* 152 at 152 [Kemp].

<sup>563</sup> UNCTOC, art.8.

corruption is left to the discretion of the Member States<sup>564</sup>. Because of the Convention's main concern with organized crime, its cooperation provisions can only apply to corruption cases if they contain a transnational component or if they involve an organized criminal group<sup>565</sup>. Unfortunately, the UNCTOC does not provide for any penalties or sanctions. However, it does call on Member States to adopt measures enabling the confiscation of proceeds of crime, as well as their identification, tracing, freezing and seizure<sup>566</sup>.

It is our opinion that any rivalry between the UNCTOC and the UNCAC is trivial, because the UNCTOC was not meant to vastly cover corruption. In fact, during the negotiations for the UNCTOC, it was understood that the problem of corruption was so important that a separate agreement should be negotiated in order for it to be properly addressed<sup>567</sup>. However, because the UNCTOC's monitoring mechanism has been widely criticized, its overview against that of the UNCAC's is far from trivial.

## **ii. Monitoring Mechanism**

The UNCTOC's monitoring mechanism has been deemed too weak in order to be considered a "fully fledged review mechanism<sup>568</sup>". It is carried out by the

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<sup>564</sup> *Ibid.*

<sup>565</sup> Philippa Webb, *supra* note 46 at 204.

<sup>566</sup> UNCTOC, art.12.

<sup>567</sup> Vlassis, *supra* note 17 at 127.

<sup>568</sup> Chêne & Dell, *supra* note 416 at 6.

Conference of States Parties to the Convention and consists mostly of questionnaires. While the COSP has the ability to recommend improvements to the reviewed State, there is however no process allowing for the verification or publicity of country reports. Furthermore, the mechanism does not provide for any on-site visits.

The UNCTOC's mechanism suffers from some of the same lacunas as the UNCAC's: civil society is not involved and the evaluations are based on similar questionnaires or checklists<sup>569</sup>. This is quite interesting as there had been high hopes that the UNCAC would rectify many of the UNCTOC's gaps. The will of the States to either carry out their reviews zealously or to abstain in doing so will be decisive in the new convention's success. Indeed, part of the problem with the UNCTOC's review process was the lack of participation by its members: the questionnaires based on self-assessments received a very low response rate<sup>570</sup>.

When considering the UNCTOC, it is safe to conclude that the UNCAC is not at risk of becoming obsolete or without purpose. It was after all understood at the time of the adoption of the UNCTOC that a separate and more complete anti-corruption agreement needed to be negotiated in order to remedy the legislative gaps relating to corruption, and in this respect, the UNCAC does not disappoint. Counting over seventy articles, it contains detailed provisions on private sector

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<sup>569</sup> *Ibid.*

<sup>570</sup> *Ibid.*

corruption, detailed asset recovery measures and also covers many other bribery related offences, such as trading in influence, embezzlement, and obstruction of justice<sup>571</sup>. What is disappointing is that the UNCAC, having adopted a similar review mechanism, doesn't seem to have surpassed the UNCTOC in this respect.

## **Section IV - The *African Union Convention on Preventing and Combating Corruption***

### **i. Overview of the Instrument**

The *Convention on Preventing and Combating Corruption* was adopted by the African Union in July of 2003 after five years of negotiations<sup>572</sup>. Its main goals are to "promote and develop mechanisms of prevention, to detect, to punish and to eradicate corruption both in the public as well as the private sector<sup>573</sup>". It therefore criminalizes both public and private sector corruption, the supply and demand sides of corruption, money laundering, concealment, as well as illicit

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<sup>571</sup> Vincke, *supra* note 42 at 364.

<sup>572</sup> Kolawole Olaniyan, "The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal", (2004) 4 *African Human Rights Law Journal*, 74 at 78 [Olaniyan]. The African Union was established in 2000 in replacement of the Organization of African Unity (Philippa Webb, *supra* note 46 at 202). Members of the African Union are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Democratic, Sao Tome and Principe, Senega, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

<sup>573</sup> Mpazi Sinjela, "The African Union Takes a Legal Stand On Corruption", (2003) 11 *African Yearbook of International Law*, 143-159 at 150 [Sinjela].

enrichment<sup>574</sup>. Similarly to the UNCAC and the IACAC, the CPCC criminalizes the solicitation or acceptance of “any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage<sup>575</sup>”, and does not create any exception allowing facilitation payments. It contains a total of 28 articles and one of its main long-term objectives is to strengthen the political and economic development of the African continent<sup>576</sup>. The Convention counts 44 States signatories and 31 Parties to date<sup>577</sup>.

The *AU Corruption Convention* does not address corruption offences implicating foreign public officials or officials of international organizations. Nevertheless, it does concern public officials or "any other person" as stated in the provision on the Convention's scope of application<sup>578</sup>. According to some experts, the meaning of “any other person” is “exceedingly wide-ranging” and creates confusion: if the drafters intended to extend corruption offences to the private sector, this inclusion was unnecessary because Article 11 of the Convention requires that Member States criminalize similar conduct in the private sector<sup>579</sup>. It is therefore our opinion that the term was most likely meant to encompass any person carrying out a public official’s tasks, in order to ensure the provision’s equal application to

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<sup>574</sup> *AU Corruption Convention*, art. 4.

<sup>575</sup> *Ibid.*

<sup>576</sup> *Ibid.*, art.2, para.1.

<sup>577</sup> Parties to the Convention are: Algeria, Benin, Burkina Faso, Burundi, Democratic Republic of the Congo, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.

<sup>578</sup> *AU Corruption Convention*, art.4.

<sup>579</sup> Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 354.

temporary employees.

Similarly to the previously studied anti-corruption agreements, the CPCC does not include any sanctions or penalties<sup>580</sup>. However, all of its substantive provisions are drafted in mandatory terms<sup>581</sup>. Indeed, Member States must “undertake to” adopt legislation in order to establish the Convention’s offences nationally. In this respect, “[t]he African Convention is comprehensive on paper and is largely phrased in mandatory terms. However, some argue that its expansiveness may actually deter countries from ratifying it<sup>582</sup>”.

An important measure in regard to transparency was considered during the Convention's drafting: that of political party funding. Although it was a contentious issue, it was finally inserted and calls on Member States to adopt local measures prohibiting the use of funds acquired illegally or in a corrupt manner and used to finance political parties<sup>583</sup>. Moreover, States are required to establish an independent authority or agency in order to combat corruption and to carry out cooperation among nations when necessary<sup>584</sup>. A similar provision was initially included in the UNCAC, but was ultimately removed during negotiations<sup>585</sup>. The importance of such measures in diminishing corruption cannot be stressed enough:

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<sup>580</sup> Kofele-Kale, “The Right to a Corruption-Free Society”, *supra* note 37 at 719.

<sup>581</sup> Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 352.

<sup>582</sup> *AU Corruption Convention*, art.5 (See Philippa Webb, *supra* note 46 at 203).

<sup>583</sup> *Ibid.*, art.10; Sinjela, *supra* note 573 at 153.

<sup>584</sup> *Ibid.*, art.20.

<sup>585</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption*, Seventh session, *supra* note 468 at 10.

limiting contributions to political parties lessens the possibilities for corruption, as does transparency in political financing<sup>586</sup>.

## **ii. Monitoring Mechanism**

The Convention establishes a monitoring mechanism, also based on a peer review process, by creating an advisory board consisting of eleven experts elected by Member States for a period of two years<sup>587</sup>. These experts are chosen from a list of people who are deemed as having the highest measure of integrity, impartiality, and recognized competence in matters relating to the Convention<sup>588</sup>. As part of its tasks it must “submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this Convention<sup>589</sup>”. Member States must report to the Board on their progress and they must also provide for the participation of civil society during the monitoring process. The Board possesses purely advisory powers, meaning it is devoid of any investigatory authority<sup>590</sup>.

The *AU Corruption Convention*'s success is deemed quite low due to the reluctance of many African governments to criticize each other. The mechanism

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<sup>586</sup> Henning, *supra* note 97 at 843.

<sup>587</sup> *AU Corruption Convention*, art.22.

<sup>588</sup> Sinjela, *supra* note 573 at 157.

<sup>589</sup> *AU Corruption Convention*, art.22, para.(5)h).

<sup>590</sup> Sinjela, *supra* note 573 at 157.

has also faced important financial and technical challenges<sup>591</sup>. Furthermore, the short mandate of the board of experts is criticized: “[i]ts limited mandate means that there is little chance for the Advisory Board to translate the norms of the Convention into reality or provide important clarifications of the obligations imposed by the Convention<sup>592</sup>”. It is also argued that for the Convention to have any positive results, the public needs to be more involved in the monitoring mechanism: "civil society and other pressure groups will have to claim possession of the monitoring process. By joining forces as coalitions, they can help ensure its [Parties] successfully implement this new treaty<sup>593</sup>".

Another main problem concerns the Convention’s regional limitations. As is the case with many regional anti-corruption initiatives, neighboring countries are made to evaluate each other within the review process, which in this case creates a reluctance to participate. The CPCC is however one of the few multilateral agreements to contain asset recovery measures: within the African continent, the scale of illicitly obtained public assets is immense. In the worst cases, the amounts held in individual foreign accounts amount to billions of dollars<sup>594</sup>. Unfortunately, these measures under the CPCC address the confiscation of looted funds only,

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<sup>591</sup> Chêne & Dell, *supra* note 416 at 6.

<sup>592</sup> Olaniyan, *supra* note 572 at 86. The members of the Advisory Board are elected for a period of two years, renewable once.

<sup>593</sup> Akere Muna, "The African Convention Against Corruption", in *Global, Regional and Country Reports*, (2004), Transparency International, 116-121 at 117 [Muna].

<sup>594</sup> Commission for Africa, "Report of the Commission for Africa", (2005) 3 *International Journal Civil Society Law*, 20 at 38.

without providing for specific seizing and freezing measures<sup>595</sup>.

One of the UNCAC's advantages over the CPCC is that it allows for a much larger number and wider diversity of reviewing States. Furthermore, it provides for detailed cooperation and technical assistance among Member States, detailed asset recovery measures, and it contains provisions criminalizing a larger number of offences, such as concealment, trading in influence, embezzlement, abuse of functions and obstruction of justice. Interestingly, it seems that while the UNCAC and the CPCC share similar qualities (they both deal with bribery in the public and private sectors, supply and demand-side bribery, contain bribery related offences, preventive provisions, etc.) they also share a similar difficulty: the lack of political will in creating an enforceable implementation system. A first step to remedying this is to prioritize the participation of civil society organizations in their monitoring process<sup>596</sup>.

## **Section V - The *Council of Europe Criminal Law Convention on Corruption***

### **i. Overview of the Instrument**

The Council of Europe, consisting today of 47 nations, adopted the *Criminal Law*

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<sup>595</sup> Bah, *supra* note 278 at 25.

<sup>596</sup> Sinjela, *supra* note 573 at 158.

*Convention on Corruption* in 1999<sup>597</sup>. Originally, the Council of Europe had planned on drafting a framework convention containing more general requirements pertaining to corruption. After realizing that the incorporated principles were drafted using such vague terminology that it would be practically impossible to implement them in a formal treaty, they became the *Twenty Guiding Principles for the Fight Against Corruption*<sup>598</sup>. These principles enabled the Council of Europe to start working on a corruption convention and are the foundation of the CLCC<sup>599</sup>. At the time of the Convention's adoption in 1999, it was considered the broadest among regional efforts to combat corruption<sup>600</sup>. Cooperation was made easier among its members due to the tradition or history of cooperation as well as the smaller number of participating nations<sup>601</sup>.

The CLCC prohibits both the supply and demand sides of bribery as well as bribery in both the public and private sectors<sup>602</sup>. It also applies to foreign and international public servants, members of legislatures and judges, as well as domestic public officials and members of international organizations<sup>603</sup>. When the

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<sup>597</sup> The members are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

<sup>598</sup> *Resolution (97) 24 adopted by the Committee of Ministers*, 6 November 1997. Hereafter “Guiding Principles”.

<sup>599</sup> Shihata, *supra* note 515 at 240.

<sup>600</sup> Pieth, *supra* note 535 at 537.

<sup>601</sup> The Council of Europe was implemented in 1949, counting 10 signatories: <http://www.coe.int/aboutCoe/index.asp?page=datesCles&l=fr> [Date consulted: July 21<sup>st</sup> 2010].

<sup>602</sup> Henning, *supra* note 97 at 822.

<sup>603</sup> CLCC, arts. 2, 3 and 9; Nicholls, *Corruption and Misuse of Public Office*, *supra* note 2 at 360.

Convention was adopted, it was the first international agreement to deal with private sector corruption<sup>604</sup>. Other than bribery, the Convention incorporates provisions on trading in influence, money laundering and account offences<sup>605</sup>: it is compared to the *OECD Anti-Bribery Convention* in that it treads “a very thin line between corruption and acceptable interaction in public administration<sup>606</sup>”. Although its scope is considered broad, the range of conduct that Member States are required to criminalize is quite narrow, as most offences are limited to active and passive bribery<sup>607</sup>. The agreement does not contain any specific measures pertaining to facilitation payments. However, similarly to the UNCAC, one may infer that such payments are included in the following conduct: “[...] the promising, offering or giving by any person, directly or indirectly, of any undue advantage [...]”<sup>608</sup>.

The CLCC contains provisions ensuring that Member States provide sanctions that include the deprivation of liberty and monetary sanctions to offending individuals<sup>609</sup>. There are however no sanctions or penalties provided for against Parties to the Convention for non-compliance. Furthermore, contrary to the UNCAC, the Convention’s asset recovery measures are succinct and limited in scope. Indeed, the provisions simply call on Parties to adopt legislation in order to

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<sup>604</sup> Shihata, *supra* note 515 at 247.

<sup>605</sup> CLCC, art.14. Account offences pertain to the use of false accounting documents and omitting to hold payment records.

<sup>606</sup> Henning, *supra* note 97 at 824.

<sup>607</sup> Philippa Webb, *supra* note 46 at 199.

<sup>608</sup> CLCC, art.2.

<sup>609</sup> *Ibid.*, art.19.

“trace, freeze, and seize instrumentalities and proceeds of corruption<sup>610</sup>”, without anticipating any specific measures.

## **ii. Monitoring Mechanism**

The monitoring process is implemented by the Group of States Against Corruption<sup>611</sup> (known as GRECO), which uses a peer pressure model combined with mutual evaluation measures. GRECO was established in order to improve its members’ capacity to fight corruption and compliance with corruption related undertakings<sup>612</sup>. It monitors compliance with the CLCC and with the Guiding Principles. The Group has 47 Member States, including the United States: membership is open to all members of the Council of Europe and to non-member States as well.

Ad hoc expert teams are created to evaluate each country with the use of questionnaires, country visits, evaluation reports and plenary sessions. The process is made public by publishing the country reports on the Internet. These reports contain measures that need to be taken by the evaluated Member State in order to ensure future compliance. In the subsequent evaluation round, a follow-up procedure assesses whether the measures have been implemented<sup>613</sup>. In less than

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<sup>610</sup> *Ibid.*, art.23.

<sup>611</sup> Hereafter “GRECO” or “Group”.

<sup>612</sup> Shihata, *supra* note 515 at 260.

<sup>613</sup> Nichols, *supra* note 2 at 367.

five years, GRECO managed to issue 42 country reports<sup>614</sup>.

Although mutual legal assistance treaties already exist within the region, the CLCC also provides for international cooperation measures because its ratification is open to States outside of the Council of Europe<sup>615</sup>. The mandatory quality of language used in the corruption convention, coupled with the existing ties among its members, makes this regional agreement attractive. The UNCAC however still benefits from a much higher number of Member States, criminalizes a higher number of offences, and contains much more detailed provisions on the recovery of stolen assets<sup>616</sup>. However, once again, the UNCAC is faced with a multilateral anti-corruption agreement that chose to arm itself with a public review mechanism.

Having given an overview of existing anti-corruption agreements, the UNCAC's relevancy is quite clear in our view: it criminalizes a much more important number of offences and applies to a much higher number of States than any other multilateral anti-corruption treaty. It also creates a 'normative mechanism' for the recovery of assets, whereas other anti-corruption agreements barely broach the subject<sup>617</sup>. Furthermore, unlike other agreements, the UNCAC contains a chapter devoted entirely to technical assistance and information exchange<sup>618</sup>. Our main

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<sup>614</sup> Philippa Webb, *supra* note 46 at 200.

<sup>615</sup> Shihata, *supra* note 515 at 257.

<sup>616</sup> As previously discussed in Part I, Chapter IV, the UNCAC dedicates a whole chapter to Asset recovery.

<sup>617</sup> Bah, *supra* note 278 at 25.

<sup>618</sup> UNCAC, Chapter VI; Nicholls, "Corruption in the South Pacific", *supra* note 95 at 220.

criticism is directed towards the UNCAC's monitoring mechanism: it seems to fall short compared to multilateral agreements such as the *OECD Anti-Bribery Convention*, the IACAC and the *Council of Europe Criminal Law Convention*. Indeed, the public aspect of the UNCAC's review process is lacking. By making the country reports available to civil society scrutiny, and by giving the COSP the authority to verify reported information, it is our opinion that the monitoring mechanism would gain significant value.

Furthermore, the issue of political party funding is also lacking in the criminalization chapter of the Convention and is an important aspect of anti-corruption measures. For instance, the *AU Corruption Convention* contains such a measure, by calling on Member States to adopt measures that "proscribe the use of funds acquired through illegal and corrupt practices to finance political parties"<sup>619</sup> and that "incorporate the principle of transparency into the funding of political parties"<sup>620</sup>. It is our opinion that by incorporating these small changes, the UNCAC might live to its high expectations.

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<sup>619</sup> CLCC, art.10.

<sup>620</sup> *Ibid.*

## Conclusion

The need for a global in-depth corruption convention is obvious when considering the devastating effects of corruption. To name a few, corruption diminishes development, increases social inequalities and poverty, and discredits the rule of law<sup>621</sup>. It also channels criminal activity, such as terrorism, organized crime, drug and human trafficking, and deters foreign direct investment by acting as an additional expense or tax for investors. Finally, it diverts government funds away from essential sectors, such as health and education sectors<sup>622</sup>, and enhances the public's distrust towards political and government authorities<sup>623</sup>.

The UNCAC attempts to create a universal framework against corruption and is the first of its kind. It is described as the most detailed, complex and broadest international anti-corruption agreement to date<sup>624</sup>:

“The UNCAC has a broader mandate than any previous anti-corruption initiative. Unlike any of its predecessors, the Convention has the potential to create and disseminate a truly global anti-corruption movement that will affect governments and businesses in both developing and industrialized countries. Although it remains to be seen how successful the implementation of the Convention will be, the passage itself is significant because it illustrates the fact that the anti-corruption movement is now worldwide, cross- jurisdictional and here to stay.<sup>625</sup>”

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<sup>621</sup> Delaney, *supra* note 18 at 9.

<sup>622</sup> *Ibid.*, at 10.

<sup>623</sup> *Ibid.*, at 11.

<sup>624</sup> Low, “The United Nations Convention Against Corruption”, *supra* note 52 at 3.

<sup>625</sup> Babu, *supra* note 26 at 32.

Its main purposes are to promote and strengthen preventive anti-corruption measures, to facilitate international cooperation, and to promote accountability and integrity in the management of public affairs<sup>626</sup>. In doing so the Convention focuses on four main issues, each of which makes up a separate chapter: preventive measures, criminalization, international cooperation, and asset recovery.

Preventive measures are necessary in order to ensure sustainability. The UNCAC's preventive measures cover both the public and private sectors, innovating in this respect: previous agreements, such as the IACAC and the *AU Corruption Convention* do not contain such provisions. Among the public sector requirements are provisions concerning the requirement that Parties ensure the existence of independent anti-corruption bodies<sup>627</sup>, the oversight of campaign finance, the establishment of transparent public procurement systems<sup>628</sup>, and public financing accountability measures<sup>629</sup>. On the other hand, preventive private sector measures include provisions pertaining to money laundering, accounting and auditing standards<sup>630</sup>. Unfortunately, the provision pertaining to campaign finance is phrased in discretionary terms. Although the inclusion of the offence was highly debated during the Convention's negotiation, its non-mandatory phrasing remains a disappointment, especially when considering that there is only one other

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<sup>626</sup> UNCAC, art.1.

<sup>627</sup> *Ibid.*, art.6.

<sup>628</sup> *Ibid.*, art.9.

<sup>629</sup> *Ibid.*

<sup>630</sup> *Ibid.*, arts.12 and 14.

multilateral anti-corruption agreement dealing with the issue (the *AU Corruption Convention*)<sup>631</sup>. The UNCAC had a chance to phrase the offence in binding terms, but due to the negotiating States' objections, fell short in doing so.

The UNCAC's criminalization chapter is extensive, and provides for bribery and bribery related offences. Bribery is considered as the most identifiable form of public corruption, and past multilateral agreements have relied on bribery as the main infraction of corruption<sup>632</sup>. Within the Convention, the bribery of national and foreign public officials is criminalized using mandatory terms, and applies to all government branches<sup>633</sup>. Although both the supply and demand sides of bribery are criminalized, they are not treated equally. Indeed, the offence of soliciting or accepting bribes is drafted using discretionary terms, whereas the offering of bribes is phrased using mandatory terms<sup>634</sup>. This may be due to a lack of will in criminalizing behavior committed by another State's public official. However, in our view, both conducts are equally damaging: public officials hold a position of power, a power that they can use in order to influence the actions of others.

The importance of private sector measures becomes apparent with outsourcing and privatization<sup>635</sup>. The UNCAC's private sector measures include both the supply

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<sup>631</sup> Low, "The United Nations Convention Against Corruption", *supra* note 52 at 5.

<sup>632</sup> Nicholls, "Corruption in the South Pacific", *supra* note 95 at 225.

<sup>633</sup> UNCAC, art.15.

<sup>634</sup> *Ibid.*, art.21.

<sup>635</sup> This is the case for example in China, see the Asian Development Bank's Annual Report from 2006: [www.adb.org/Documents/Reports/Annual\\_Report/2006/ADB-AR2006-East-Asia.PDF](http://www.adb.org/Documents/Reports/Annual_Report/2006/ADB-AR2006-East-Asia.PDF) [Date consulted: March 23<sup>rd</sup> 2009].

and demand sides of bribery, but both offences are drafted using non-mandatory terms<sup>636</sup>. It is our view that bribery in the private sector should be criminalized on a similar level as public sector bribery: because both sectors are becoming more and more intertwined, tolerating private sector bribery makes the prevention of public corruption more difficult, and allows it to seep into the public sector<sup>637</sup>. Other bribery related offences are criminalized within the UNCAC, and include trading in influence, abuse of functions, illicit enrichment, embezzlement, money laundering, and obstruction of justice.

The UNCAC revolutionizes asset recovery in the field of international law, dedicating a whole chapter to provisions that create mechanisms to recover stolen funds<sup>638</sup>. In order to be successful, such provisions must be accompanied by investigatory provisions, preventive recovery provisions such as the freezing and seizing of funds, and provisions allowing the confiscation of assets<sup>639</sup>. In addition to considering these aspects, the UNCAC also calls on Member States to incorporate measures in order to detect criminal activity and to afford each other the needed cooperation and assistance in investigations<sup>640</sup>.

The breadth of the UNCAC is unparalleled, due to the global quality of the Convention and the many offences it covers. The goal of this study was to assess

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<sup>636</sup> UNCAC, art.21.

<sup>637</sup> Argandoña, “The United Nations Convention Against”, *supra* note 146 at 9.

<sup>638</sup> UNCAC, Chapter V.

<sup>639</sup> Bah, *supra* note 278 at 27.

<sup>640</sup> UNCAC, art.51.

whether the UNCAC is relevant and effective. In order to assess the Convention's relevancy, similar anti-corruption agreements were considered. Effectiveness, on the other hand, was measured by studying its enforceability.

The UNCAC's enforceability was assessed through its direct and indirect compliance challenges. We considered the treaty's language, its monitoring mechanism, and the absence of sanctions as falling under direct compliance challenges. Prosecution difficulties and the absence of good governance, on the other hand, were considered as indirect challenges.

Although the use of precise language is an important component of effective implementation, strict or narrow definitions are not always beneficial, as they may not be adaptable to political and social change<sup>641</sup>. The Convention, purposely omitting to include a precise definition of corruption, ensures itself a wider and longer applicability. One of the drawbacks to choosing vague terminology is the uncertainty of its applicability to certain behavior<sup>642</sup>. This is the case of facilitation or grease payments. For instance, the United States and the United Kingdom have taken different positions due to the absence of a clear indication as to whether the Convention either allows or prescribes such payments<sup>643</sup>. Furthermore, by giving an overview of the UNCAC's criminalization chapter, we assessed that the provisions are mostly phrased using discretionary terms and lack the use of

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<sup>641</sup> Chayes & Chayes, *supra* note 59 at 11.

<sup>642</sup> *Ibid.*, at 10.

<sup>643</sup> Nicholls, "Corruption in the South Pacific", *supra* note 95 at 230; Scott, *supra* note 317 at 109.

mandatory language. This outcome is unfortunate as it renders the Convention 'toothless'. Aside from re-drafting the provisions, we believe that a more adversarial monitoring mechanism would be sufficient to solve or compensate this issue.

The UNCAC's monitoring mechanism, based on a mutual evaluation or peer review process, is considered more rigorous than the self evaluation method, but more lenient than the expert review process<sup>644</sup>. All in all, peer review can be quite effective, especially when it contains an element of public pressure. This aspect, although lacking within the UNCAC, can be remedied in the future by namely making country reports available to the public, and by including civil society organizations in the review process. Furthermore, by giving the UNCAC's COSP investigatory powers similar to the IACAC's Committee of Experts, the review process would acquire a more adversarial quality.

Although the UNCAC does not provide for any sanctions, whether economic or military, against Member States for non-compliance, there are arguments which downplay the importance of such sanctions within international agreements. For instance, monetary sanctions against richer States might not be sufficient in order to create significant deterrence, whereas poorer States might not be able to cover such costs. Furthermore, expulsion tends to cut off cooperation completely, thus

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<sup>644</sup> See the following website: [http://www.transparency.org/global\\_priorities/international\\_conventions/advocacy/monitoring/monitoring\\_mechanisms](http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms) [Date consulted: February 21<sup>st</sup> 2011].

allowing the State to act freely<sup>645</sup>. The main argument demonstrating how the UNCAC can foster compliance without strict sanctions is the inherent concern a State has over its own reputation<sup>646</sup>. Such reputation-oriented sanctions exist but are stronger when the violation is egregious, as opposed to smaller violations incurred due to inadvertencies<sup>647</sup>. It is our view that strict sanctions are not necessary if the public is made aware of the Member States actions, as this could trigger the reputation-oriented sanction, depending on the importance of the violation. The public aspect of the review mechanism is therefore even more important when considering the absence of traditional sanctions due to State non-compliance.

The UNCAC faces prosecution difficulties that go beyond the control or will of the Member States and are due to the type of offences criminalized by the Convention. The commission of a crime such as bribery necessitates two parties, both of which can be held criminally responsible, and neither of which may want to come forward to the authorities. Detection and enforcement are therefore difficult and often require third party knowledge of the infraction<sup>648</sup>. Another aspect making prosecuting corruption offences difficult has to do with the availability of testimonial evidence. For instance, because witnesses might live abroad, receiving statements or ensuring their presence in court is much more

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<sup>645</sup> Chayes & Chayes, *supra* note 59 at 74.

<sup>646</sup> Guzman, "A Compliance-Based Theory of International Law", *supra* note 443 at 1856.

<sup>647</sup> *Ibid.*, at 1861.

<sup>648</sup> Okogbule, *supra* note 475 at 51.

difficult<sup>649</sup>.

The specific aspect of good governance that we deemed most relevant to this study was that of political party financing. Provisions limiting political financing and ensuring financing transparency are necessary when one considers the fast growth of competition derived from political party financing, the diversion of funds for personal use, and vote purchasing<sup>650</sup>. An earlier draft of the UNCAC contained a provision on the funding of political parties. It was however deleted during the Convention's negotiation because of important differences in the legal systems of Member States<sup>651</sup>. This outcome is disappointing, particularly in light of the *AU Corruption Convention's* political party funding provision<sup>652</sup>. Although the offence is not criminalized in other major anti-corruption agreements, the UNCAC had the possibility to do so, and chose not to. Member States could, in the future, chose to include such a provision by adding precision to the UNCAC's public sector measures.

The Convention's relevancy was measured against existing regional and multilateral anti-corruption initiatives, such as the *OECD Anti-Bribery Convention*, the IACAC, the UNCTOC, the *AU Corruption Convention*, and the Council of Europe's *Criminal Law Convention on Corruption*. Following the

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<sup>649</sup> Schloenhardt, *supra* note 479 at 95.

<sup>650</sup> Philippa Webb, *supra* note 46 at 215.

<sup>651</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its Sixth Session*, *supra* note 468 at 10.

<sup>652</sup> CLCC, art.10.

overview of these competing agreements, one may conclude that the UNCAC is relevant in today's international legal forum and has many qualities, such as criminalizing a large number of bribery and bribery related offences both in the public and private sectors, extensively covering asset recovery and technical assistance measures, not to mention its number of Parties. However, the UNCAC seems to have failed to fulfill expectations in regards to its monitoring mechanism. Although having adopted a peer review monitoring mechanism (which is not the least adversarial form of review method *per se*), the UNCAC failed to include three key features which would have given it a more independent and transparent quality, namely, the participation of civil society, ensuring that country review results are made available to the public, and affording the COSP with (even limited) investigatory powers. These three characteristics are all the more crucial when one considers that an important number of provisions are phrased in non-mandatory terms and that the Convention is devoid of economic or military sanctions. Without these changes, we fear that the UNCAC may not foster compliance in any meaningful way.

Nevertheless, the UNCAC is in our opinion a step forward in the fight against corruption, as it creates a forum allowing continuing discussions between many countries around the world. Due to the Convention's recent entry into force, only time will tell whether it can sustain compliance. There is still a chance for political and business leaders to act upon their rhetoric.

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## Annex I

### Full text of the *United Nations Convention Against Corruption*<sup>653</sup>

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<sup>653</sup> The text of the UNCAC was taken from the following website:  
<http://www.unodc.org/unodc/en/treaties/CAC/index.html> [Date consulted: February 12<sup>th</sup> 2011].

**General Assembly resolution 58/4  
of 31 October 2003**

**United Nations Convention  
against Corruption**

*The General Assembly,*

*Recalling* its resolution 55/61 of 4 December 2000, in which it established an ad hoc committee for the negotiation of an effective international legal instrument against corruption and requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of such an instrument, and its resolution 55/188 of 20 December 2000, in which it invited the intergovernmental open-ended expert group to be convened pursuant to resolution 55/61 to examine the question of illegally transferred funds and the return of such funds to the countries of origin,

*Recalling also* its resolutions 56/186 of 21 December 2001 and 57/244 of 20 December 2002 on preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin,

*Recalling further* its resolution 56/260 of 31 January 2002, in which it requested the Ad Hoc Committee for the Negotiation of a Convention against Corruption to complete its work by the end of 2003,

*Recalling* its resolution 57/169 of 18 December 2002, in which it accepted with appreciation the offer made by the Government of Mexico to host a high-level political conference for the purpose of signing the convention and requested the Secretary-General to schedule the conference for a period of three days before the end of 2003,

*Recalling also* Economic and Social Council resolution 2001/13 of 24 July 2001, entitled "Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds",

*Expressing its appreciation* to the Government of Argentina for hosting the informal preparatory meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption in Buenos Aires from 4 to 7 December 2001,

*Recalling* the Monterrey Consensus, adopted by the International Conference on Financing for Development, held in Monterrey, Mexico, from 18 to 22 March 2002,<sup>1</sup> in which it was underlined that fighting corruption at all levels was a priority,

*Recalling also* the Johannesburg Declaration on Sustainable Development, adopted by the World Summit on Sustainable Development, held in Johannesburg, South Africa, from 26 August to 4 September 2002,<sup>2</sup> in particular paragraph 19 thereof, in which corruption was declared a threat to the sustainable development of people,

*Concerned* about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

1. *Takes note* of the report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption,<sup>3</sup> which carried out its work at the headquarters of the United Nations Office on Drugs and Crime in Vienna, in which the Ad Hoc Committee submitted the final text of the draft United Nations Convention against Corruption to the General Assembly for its consideration and action, and commends the Ad Hoc Committee for its work;

2. *Adopts* the United Nations Convention against Corruption annexed to the present resolution, and opens it for signature at the High-level Political Signing Conference to be held in Merida, Mexico, from 9 to 11 December 2003, in accordance with resolution 57/169;

3. *Urges* all States and competent regional economic integration organizations to sign and ratify the United Nations Convention against Corruption as soon as possible in order to ensure its rapid entry into force;

4. *Decides* that, until the Conference of the States Parties to the Convention established pursuant to the United Nations Convention against Corruption decides otherwise, the account referred to in article 62 of the Convention will be operated within the United Nations Crime Prevention and Criminal Justice Fund, and encourages Member States to begin making adequate voluntary contributions to the above-mentioned account for the provision to developing

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<sup>1</sup>*Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex.

<sup>2</sup>*Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 1, annex.

<sup>3</sup>A/58/422 and Add.1.

countries and countries with economies in transition of the technical assistance that they might require to prepare for ratification and implementation of the Convention;

5. *Also decides* that the Ad Hoc Committee for the Negotiation of a Convention against Corruption will complete its tasks arising from the negotiation of the United Nations Convention against Corruption by holding a meeting well before the convening of the first session of the Conference of the States Parties to the Convention in order to prepare the draft text of the rules of procedure of the Conference of the States Parties and of other rules described in article 63 of the Convention, which will be submitted to the Conference of the States Parties at its first session for consideration;

6. *Requests* the Conference of the States Parties to the Convention to address the criminalization of bribery of officials of public international organizations, including the United Nations, and related issues, taking into account questions of privileges and immunities, as well as of jurisdiction and the role of international organizations, by, inter alia, making recommendations regarding appropriate action in that regard;

7. *Decides* that, in order to raise awareness of corruption and of the role of the Convention in combating and preventing it, 9 December should be designated International Anti-Corruption Day;

8. *Requests* the Secretary-General to designate the United Nations Office on Drugs and Crime to serve as the secretariat for and under the direction of the Conference of the States Parties to the Convention;

9. *Also requests* the Secretary-General to provide the United Nations Office on Drugs and Crime with the resources necessary to enable it to promote in an effective manner the rapid entry into force of the United Nations Convention against Corruption and to discharge the functions of secretariat of the Conference of the States Parties to the Convention, and to support the Ad Hoc Committee in its work pursuant to paragraph 5 above;

10. *Further requests* the Secretary-General to prepare a comprehensive report on the High-level Political Signing Conference to be held in Merida, Mexico, in accordance with resolution 57/169, for submission to the General Assembly at its fifty-ninth session.



## *Annex*

# **United Nations Convention against Corruption**

## **Preamble**

*The States Parties to this Convention,*

*Concerned* about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

*Concerned also* about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

*Concerned further* about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

*Convinced* that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential,

*Convinced also* that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,

*Convinced further* that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively,

*Convinced* that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law,

*Determined* to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery,

*Acknowledging* the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights,

*Bearing in mind* that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective,

*Bearing also in mind* the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption,

*Commending* the work of the Commission on Crime Prevention and Criminal Justice and the United Nations Office on Drugs and Crime in preventing and combating corruption,

*Recalling* the work carried out by other international and regional organizations in this field, including the activities of the African Union, the Council of Europe, the Customs Cooperation Council (also known as the World Customs Organization), the European Union, the League of Arab States, the Organisation for Economic Cooperation and Development and the Organization of American States,

*Taking note with appreciation* of multilateral instruments to prevent and combat corruption, including, inter alia, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996,<sup>1</sup> the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997,<sup>2</sup> the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997,<sup>3</sup> the Criminal Law

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<sup>1</sup>See E/1996/99.

<sup>2</sup>*Official Journal of the European Communities*, C 195, 25 June 1997.

<sup>3</sup>See *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).

Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999,<sup>4</sup> the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999,<sup>5</sup> and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003,

*Welcoming* the entry into force on 29 September 2003 of the United Nations Convention against Transnational Organized Crime,<sup>6</sup>

*Have agreed as follows:*

## **Chapter I** **General provisions**

### *Article 1. Statement of purpose*

The purposes of this Convention are:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.

### *Article 2. Use of terms*

For the purposes of this Convention:

- (a) “Public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public

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<sup>4</sup>Council of Europe, *European Treaty Series*, No. 173.

<sup>5</sup>*Ibid.*, No. 174.

<sup>6</sup>General Assembly resolution 55/25, annex I.

official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

(b) “Foreign public official” shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

(c) “Official of a public international organization” shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization;

(d) “Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

(e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

(h) “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;

(i) “Controlled delivery” shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

### *Article 3. Scope of application*

1. This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.

2. For the purposes of implementing this Convention, it shall not be necessary, except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property.

#### *Article 4. Protection of sovereignty*

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

## **Chapter II Preventive measures**

#### *Article 5. Preventive anti-corruption policies and practices*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

## *Article 6. Preventive anti-corruption body or bodies*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

(b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

## *Article 7. Public sector*

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;

(c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;

(d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the

performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

#### *Article 8. Codes of conduct for public officials*

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures

and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

*Article 9. Public procurement and management  
of public finances*

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

(a) Procedures for the adoption of the national budget;

- (b) Timely reporting on revenue and expenditure;
- (c) A system of accounting and auditing standards and related oversight;
- (d) Effective and efficient systems of risk management and internal control; and
- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

#### *Article 10. Public reporting*

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
- (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

#### *Article 11. Measures relating to the judiciary and prosecution services*

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

### *Article 12. Private sector*

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:

(a) Promoting cooperation between law enforcement agencies and relevant private entities;

(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;

(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;

(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

### *Article 13. Participation of society*

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

- (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
- (b) Ensuring that the public has effective access to information;
- (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
  - (i) For respect of the rights or reputations of others;

- (ii) For the protection of national security or *ordre public* or of public health or morals.

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

#### *Article 14. Measures to prevent money-laundering*

1. Each State Party shall:

(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

- (b) To maintain such information throughout the payment chain; and
- (c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

### **Chapter III** **Criminalization and law enforcement**

#### *Article 15. Bribery of national public officials*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

#### *Article 16. Bribery of foreign public officials and officials of public international organizations*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

*Article 17. Embezzlement, misappropriation or other diversion of property by a public official*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

*Article 18. Trading in influence*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

*Article 19. Abuse of functions*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the

discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

*Article 20. Illicit enrichment*

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

*Article 21. Bribery in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

*Article 22. Embezzlement of property in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

*Article 23. Laundering of proceeds of crime*

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concepts of its legal system:
  - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
  - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

#### *Article 24. Concealment*

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may

be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

#### *Article 25. Obstruction of justice*

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

#### *Article 26. Liability of legal persons*

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

*Article 27. Participation and attempt*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

*Article 28. Knowledge, intent and purpose  
as elements of an offence*

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

*Article 29. Statute of limitations*

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

*Article 30. Prosecution, adjudication and sanctions*

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional

privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

- (a) Holding public office; and
- (b) Holding office in an enterprise owned in whole or in part by the State.

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention

and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

### *Article 31. Freezing, seizure and confiscation*

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

### *Article 32. Protection of witnesses, experts and victims*

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

#### *Article 33. Protection of reporting persons*

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

#### *Article 34. Consequences of acts of corruption*

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

#### *Article 35. Compensation for damage*

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

#### *Article 36. Specialized authorities*

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out

their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

### *Article 37. Cooperation with law enforcement authorities*

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

4. Protection of such persons shall be, *mutatis mutandis*, as provided for in article 32 of this Convention.

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

### *Article 38. Cooperation between national authorities*

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

- (a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or
- (b) Providing, upon request, to the latter authorities all necessary information.

*Article 39. Cooperation between national authorities and the private sector*

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

*Article 40. Bank secrecy*

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

*Article 41. Criminal record*

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

*Article 42. Jurisdiction*

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State Party; or
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
- (c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or
- (d) The offence is committed against the State Party.

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

## **Chapter IV**

### **International cooperation**

#### *Article 43. International cooperation*

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

#### *Article 44. Extradition*

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition,

shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies

solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample

opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

#### *Article 45. Transfer of sentenced persons*

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

#### *Article 46. Mutual legal assistance*

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory

of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or

convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

#### *Article 47. Transfer of criminal proceedings*

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

#### *Article 48. Law enforcement cooperation*

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the

effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

- (i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
- (ii) The movement of proceeds of crime or property derived from the commission of such offences;
- (iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

#### *Article 49. Joint investigations*

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

#### *Article 50. Special investigative techniques*

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

## Chapter V Asset recovery

### *Article 51. General provision*

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

### *Article 52. Prevention and detection of transfers of proceeds of crime*

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate

records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

#### *Article 53. Measures for direct recovery of property*

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

*Article 54. Mechanisms for recovery of property through international cooperation in confiscation*

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

*Article 55. International cooperation for purposes of confiscation*

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 46 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is

based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

#### *Article 56. Special cooperation*

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences

established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

*Article 57. Return and disposal of assets*

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations,

prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

#### *Article 58. Financial intelligence unit*

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

#### *Article 59. Bilateral and multilateral agreements and arrangements*

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

## **Chapter VI**

### **Technical assistance and information exchange**

#### *Article 60. Training and technical assistance*

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:

(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

(b) Building capacity in the development and planning of strategic anti-corruption policy;

(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;

(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;

(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;

(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;

(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;

(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;

(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and

(j) Training in national and international regulations and in languages.

2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements.

4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.

5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.

6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.

7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.

8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

*Article 61. Collection, exchange and analysis of information on corruption*

1. Each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed.

2. States Parties shall consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption.

3. Each State Party shall consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency.

*Article 62. Other measures: implementation of the Convention through economic development and technical assistance*

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:

(a) To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption;

(b) To enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of corruption.

## **Chapter VII**

### **Mechanisms for implementation**

#### *Article 63. Conference of the States Parties to the Convention*

1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.

2. The Secretary-General of the United Nations shall convene the Conference of the States Parties not later than one year following the entry into force of this Convention. Thereafter, regular meetings of the Conference of the States Parties shall be held in accordance with the rules of procedure adopted by the Conference.

3. The Conference of the States Parties shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including rules concerning the admission and participation of observers, and the payment of expenses incurred in carrying out those activities.

4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:

(a) Facilitating activities by States Parties under articles 60 and 62 and chapters II to V of this Convention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it and for the return of proceeds of crime, through, inter alia, the publication of relevant information as mentioned in this article;

(c) Cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations;

(d) Making appropriate use of relevant information produced by other international and regional mechanisms for combating and preventing corruption in order to avoid unnecessary duplication of work;

(e) Reviewing periodically the implementation of this Convention by its States Parties;

(f) Making recommendations to improve this Convention and its implementation;

(g) Taking note of the technical assistance requirements of States Parties with regard to the implementation of this Convention and recommending any action it may deem necessary in that respect.

5. For the purpose of paragraph 4 of this article, the Conference of the States Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the States Parties.

6. Each State Party shall provide the Conference of the States Parties with information on its programmes, plans and practices, as well as on legislative and administrative measures to implement this Convention, as required by the Conference of the States Parties. The Conference of the States Parties shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from States Parties and from competent international organizations. Inputs received from relevant non-governmental organizations duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties may also be considered.

7. Pursuant to paragraphs 4 to 6 of this article, the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

#### *Article 64. Secretariat*

1. The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the States Parties to the Convention.

2. The secretariat shall:

(a) Assist the Conference of the States Parties in carrying out the activities set forth in article 63 of this Convention and make arrangements and provide the necessary services for the sessions of the Conference of the States Parties;

(b) Upon request, assist States Parties in providing information to the Conference of the States Parties as envisaged in article 63, paragraphs 5 and 6, of this Convention; and

(c) Ensure the necessary coordination with the secretariats of relevant international and regional organizations.

### **Chapter VIII** **Final provisions**

#### *Article 65. Implementation of the Convention*

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

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

#### *Article 66. Settlement of disputes*

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

#### *Article 67. Signature, ratification, acceptance, approval and accession*

1. This Convention shall be open to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at United Nations Headquarters in New York until 9 December 2005.

2. This Convention shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with paragraph 1 of this article.

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of

ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

#### *Article 68. Entry into force*

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

#### *Article 69. Amendment*

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

#### *Article 70. Denunciation*

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Convention when all of its member States have denounced it.

#### *Article 71. Depositary and languages*

1. The Secretary-General of the United Nations is designated depositary of this Convention.

2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.