

# **Criminalizing Corruption: The Global Initiatives**

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The past twenty years have seen unprecedented global efforts aimed at combating corrupt practices. With particular reference to criminalizing corruption, this chapter explores some of these efforts in four sections. Section 1 considers the development of the regional and other anti-corruption initiatives which culminated in the United Nations Convention Against Corruption (UNCAC) whilst Section 2 explores the scope of the substantive criminal offences contained in these conventions. Section 3 discusses combating corruption offences involving the private sector and the liability of legal persons whilst Section 4 reviews the monitoring procedures contained in the anti-corruption conventions. The chapter concludes with a short overview.

## **SECTION 1: THE DEVELOPMENT AND SCOPE OF THE ANTI-CORRUPTION INITIATIVES**

### **i) The regional initiatives**

#### *A. The Inter-American Convention Against Corruption (IACAC)*

The IACAC is the first regional anti-corruption instrument and was adopted by the Organization of American States (OAS) on 29 March 1996.<sup>2</sup> In its Preamble, Member States recognize that corruption has international dimensions which require effective coordinated action and highlight their ‘deep concern’ over ‘the steadily increasing links between corruption and the proceeds generated by illicit narcotics trafficking which undermine and threaten legitimate commercial and financial activities, and society, at all levels’.<sup>3</sup>

The Convention adopts a holistic approach to addressing the problem with State Parties being required to i) take measures to prevent corruption; ii) criminalize

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<sup>2</sup> Barbados remains the only one of the 34 OAS member states that has not ratified the Convention

<sup>3</sup> Para 8 of the Preamble

‘acts of corruption’; iii) facilitate international cooperation and iv) facilitate asset recovery. These anti-corruption ‘pillars’ are reflected in other regional anti-corruption instruments as well as the UNCAC.

The IACAC does not define ‘corruption’ but rather requires State Parties to adopt legislative and other measures to establish as criminal offences a series of ‘Acts of Corruption’ including active and passive bribery involving public officials,<sup>4</sup> abuse of office by a public official and the ‘fraudulent use or concealment of property’ derived from such offences.<sup>5</sup> Provision is also made for a State Party to establish the offence of illicit enrichment ‘insofar as its laws permit’.<sup>6</sup>

As regards international cooperation, Article XIV requires States Parties to ‘afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in the Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption’. States Parties also undertake to provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating, and punishing acts of corruption. To facilitate international cooperation, States Parties are required to maintain a Central Authority which is responsible for making and receiving requests for assistance and cooperation.<sup>7</sup>

The Convention itself does not include a monitoring mechanism but in 2001 the Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption (MESICIC) was established by the OAS General Assembly (see below).

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<sup>4</sup> Unlike later conventions, it does not specifically address corruption in the private sector.

<sup>5</sup> Article VI. States also undertake to consider establishing a series of other corruption-related offences: see Article XI

<sup>6</sup> Article IX: see the discussion below

<sup>7</sup> Article XVIII

### *B. European initiatives*

Both the Council of Europe and European Union have taken steps to combat corruption. The Council of Europe Criminal Law Convention on Corruption (the CoE Convention) was adopted by the Committee of Ministers of the Council of Europe on 27 January 1999.<sup>8</sup> In its Preamble, the member states of the Council of Europe and other signatory states recognize the need to pursue a common criminal policy aimed at protecting society against corruption and that an effective fight against corruption requires increased, rapid and well-functioning international cooperation in criminal matters.

Like the IACAC, the CoE Convention does not define 'corruption' but rather requires State Parties to criminalize bribery, trading in influence, money laundering, and what are referred to as 'account offences'.<sup>9</sup> As regards bribery, a feature of the Convention is that active and passive bribery are considered as separate offences with States Parties being required to criminalize, on the basis of a set of common elements, the bribery of domestic, foreign, and international public servants, members of legislatures, and judges, including prosecutors and holders of judicial office.<sup>10</sup> As regards the laundering of the proceeds of corruption, Article 13 requires States Parties to adopt legislative and other measures to establish as criminal offences the money laundering offences referred to in Article 6(1) and (2) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>11</sup> when the predicate offence consists of any of the convention offences.

Convention provisions are mandatory although a State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval, or

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<sup>8</sup> Note also the Council of Europe Civil Law Convention on Corruption, Article 1 of which requires State Parties to provide effective remedies for persons who have suffered damage as a result of acts of corruption. The Convention was adopted on 4 November 1999.

<sup>9</sup> I.e. acts or omissions designed to commit, conceal or disguise the commission of any convention offence: see Article 14.

<sup>10</sup> Articles 2-11

<sup>11</sup> ETS No. 141. This is subject to the extent the State Party has not made a reservation or declaration with respect to those offences.

accession, make a reservation as regards specific Convention provisions. This reflects the intention of its drafters that Parties assume obligations under the Convention only to the extent consistent with their constitution and the fundamental principles of their legal system.<sup>12</sup>

Chapter IV of the Convention addresses international cooperation issues. In particular, Article 25 provides that for the purposes of the investigation and prosecution of Convention offences, States Parties agree to cooperate with one another to the widest extent possible 'in accordance with the provisions of relevant international instruments on international cooperation in criminal matters' or other arrangements. In practice there are a range of Council of Europe instruments already covering this area and therefore in essence the Chapter is a safety net designed to provide a basis for international cooperation in the absence of any other international treaty or agreement.<sup>13</sup> Monitoring the implementation of the Convention is the responsibility of the Group of States Against Corruption (GRECO) (see below).

The European Union (EU) has made the fight against corruption one of its priorities. Thus Article 29 of the Treaty on European Union lists the preventing and combating of corruption and fraud as an objective towards creating a European area of freedom, security, and justice through, amongst other things, the 'approximation' of criminal laws of the Member States in order to fight corruption. In support of this objective, the 1995 Convention on the Protection of the European Union's Financial Interests requires Member States to criminalize fraud affecting the EU's financial interests whilst the First Protocol to the 1995 Convention specifically addresses corruption by or against national and Community officials 'which damages or is likely to damage the European Communities' financial interests'. The 1997 Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union<sup>14</sup> also requires Member States to criminalize corrupt conduct involving officials of both the Community and Member States even if the conduct took place in its own territory or was instigated by one of their own nationals. There is currently no monitoring system in place.

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<sup>12</sup> CoE Explanatory Report to the Criminal Law Convention, para 27

<sup>13</sup> In particular the CoE Convention on Mutual Assistance in Criminal Matters (ETS No 30) and the CoE Convention on Extradition (ETS No 24)

<sup>14</sup> The treaty entered into force on 28 September 1998.

### *C. African initiatives*<sup>15</sup>

The African Union Convention on Preventing and Combating Corruption (the AU Convention) was adopted by the Heads of State and Government of the African Union on 12 July 2003 and came into force on 5 August 2006. As at 1 October 2013, it had been ratified by 31 of the 54 AU member states. Its twenty-eight articles also address the four anti-corruption ‘pillars’ i.e.

- Effective corruption prevention measures
- Strategies to facilitate the investigation and criminalisation of corruption and related offences
- Effective international cooperation in the investigation and prosecution of corruption and related offences
- Strategies for recovering the proceeds and instrumentalities of corruption.

In particular, State Parties undertake to adopt the necessary legislative and other measures provisions to establish as offences a series of ‘acts of corruption and related offences’.<sup>16</sup> These include active and passive bribery in both the public and private sectors, misuse of public office, trading in influence, unlawful diversion of state assets by public officials and the laundering of the proceeds of corruption-related offences. Subject to the provisions of their domestic law, State Parties also undertake to establish the offence of illicit enrichment.

State Parties are required to ‘provide each other with the greatest possible technical cooperation and assistance in dealing immediately with requests’ for mutual legal assistance.<sup>17</sup> To facilitate this process, State Parties are required to establish independent national authorities<sup>18</sup> for the purpose of making and receiving requests for mutual legal assistance.<sup>19</sup>

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<sup>15</sup> For a detailed examination of the African anti-corruption initiatives see John Hatchard *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* 2014, Edward Elgar Publishing, Cheltenham

<sup>16</sup> ‘Corruption’ means ‘the acts and practices including related offences proscribed in this Convention’: see Article 1

<sup>17</sup> Article 18. The inclusion of the word ‘immediately’ is unique to this anti-corruption convention and, given the practical problems often associated with mutual legal assistance requests, is a somewhat unrealistic requirement.

<sup>18</sup> Widely referred to as ‘Central Authorities’.

A follow-up mechanism is provided for through the work of the Advisory Board on Corruption within the African Union which was established in 2009 (see below).

The Southern African Development Community Protocol against Corruption came into force on 6 July 2005 and thus pre-dates the AU Convention.<sup>20</sup> Whilst lacking in detail, its twenty-two articles again cover the four anti-corruption 'pillars'. States Parties are required to adopt the necessary legislative and other measures to establish as criminal offences a series of 'Acts of Corruption' which, in essence, are almost identical to those in the AU Convention.<sup>21</sup> State Parties are required to report every two years to the Committee of State Parties on the progress made in the implementation of the Protocol.

#### *D. Asia-Pacific initiatives*

The Asia-Pacific has no binding regional anti-corruption instrument. However 28 jurisdictions in the region have formally endorsed the Asia Development Bank/Organization for Economic Cooperation and Development (OECD) Anti-Corruption Initiative for Asia-Pacific which was launched in 2000. The current strategic objective of the Initiative is to support its member countries in implementing the international anti-corruption standards as set forth in the UNCAC and the OECD anti-bribery convention (see below). Accordingly in the Preamble to the Initiative, governments 'concur' in taking 'concrete and meaningful priority steps' to deter, prevent, and combat corruption at all levels. Developing regional cooperation and adopting a holistic and international approach are seen as critical strategies in this regard.

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<sup>19</sup> Article 20

<sup>20</sup> The Southern African Development Community (SADC) comprises fifteen states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>21</sup> The Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption of the Economic Community of West African States was signed in December 2001 but still awaits ratification.

## ii) Other key instruments

### A. *The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (The OECD anti-bribery convention)

This Convention entered into force on 15 February 1999 and as of 1 October 2013, had been ratified by forty states worldwide.<sup>22</sup> Article 1 requires each State Party to establish the offence of the bribery of a foreign public official 'in order to obtain or retain business or other improper advantage in the conduct of international business'. On the face of it, the Convention is of limited scope in that it focuses solely on active bribery and related accounting offences. However, as Nicholls et al point out, its importance lies in the fact that the State Parties to the Convention are home to just about all the major multinational/international companies. Thus the steps taken by them to counter the bribery of foreign public officials by companies based in their jurisdiction can have a direct effect on international trade generally and on good governance in specific trading partners in particular. In addition, they note that the OECD Convention has also influenced the wording of the UNCAC.<sup>23</sup>

A key feature of the Convention is its effective and systematic monitoring program undertaken by the Working Group on Bribery (see below).

### B. *UN Convention against Transnational Organized Crime (the Palermo Convention)*

The Palermo Convention is the first global instrument to address corruption. It came into force on 29 September 2003 and as at 1 October 2013 had been ratified by 178 State Parties. It contains several provisions directly relating to corruption. Firstly, Article 8(1) requires State Parties to adopt the necessary legislative and other measures to establish bribery involving public officials as a criminal offence. States Parties are also to consider criminalizing other forms of corruption, including the

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<sup>22</sup> See further <<http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>> accessed 1 October 2013

<sup>23</sup> Colin Nicholls, Tim Daniel, Alan Bacarese and John Hatchard *Corruption and Misuse of Public Office* 2<sup>nd</sup> edition, 2011, Oxford University Press, Oxford, para 13.22 (hereinafter Nicholls et al).

bribery of foreign public officials and of international civil servants.<sup>24</sup> Secondly, in recognition of the fact that organized criminal groups may use corrupt practices to facilitate their activities, Article 9(1) requires each State Party 'to the extent appropriate and consistent with its legal system, [to] adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials'.<sup>25</sup> In addition, each State Party is required to take measures 'to ensure effective action by its authorities in the prevention, detection and punishment of corruption of public officials, including providing authorities with adequate independence to deter the exertion of inappropriate influence on their actions'.<sup>26</sup>

### **iii) The United Nations Convention Against Corruption**

Whilst the Palermo Convention was a significant step forward, the desire for a global, comprehensive international legal instrument through which to combat corruption in both the public and private sectors led to the development of the UNCAC. This entered into force on 14 December 2005 and as at 1 October 2013 had been ratified by 167 State Parties.

The Convention seeks to build upon the earlier multilateral anti-corruption instruments which it notes 'with appreciation'. In the Preamble, State Parties also highlight the 'links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering'. In structure the UNCAC comprises four operative chapters which again reflect the four 'pillars' in the fight against corruption: 1) Prevention (Chapter II); 2) Criminalization and law

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<sup>24</sup> Article 8(3) also requires each State Party to adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with Article 8.

<sup>25</sup> For the purposes of Article 9 and Article 8(1) a 'public official' means 'a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function': Article 8(4).

<sup>26</sup> Article 9(2)



enforcement (Chapter III); 3) International cooperation (Chapter IV); and 4) Asset recovery (Chapter V).<sup>27</sup>

The range of criminal offences contained in the UNCAC essentially mirrors those in the regional anti-corruption instruments and these are considered in the next section.

A notable feature of UNCAC is its extensive and detailed provisions relating to international cooperation in criminal matters. These are particularly significant in that law enforcement is strictly territorial in nature. Thus where a corruption or other criminal investigation or prosecution involves a transnational element, a state (the requesting state) must make a formal mutual legal assistance request to another state (the requested state) for assistance in gathering evidence or information that is held in the requested state.<sup>28</sup> It is then up to the requested state to decide whether it is willing and/or able to provide the assistance requested. The need for effective MLA arrangements is a cornerstone of transnational cooperation in criminal matters and this is reflected in Article 46. This requires State Parties to 'afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings' in relation to convention offences. Article 46 then goes on to set out detailed provisions relating to the MLA arrangements that each State Party is required to have in place. Further, State Parties must also '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 [Convention] offences...'.<sup>29</sup>

Chapter VII sets out 'Mechanisms for Implementation' with Article 63 establishing a review process through the Conference of the State Parties to the Convention (see below).

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<sup>27</sup> Chapter I contains 'General Provisions' whilst Chapter VI addresses technical assistance and information exchange.

<sup>28</sup> Strictly speaking a formal mutual legal assistance request is only required where the requested state is being asked to exercise a coercive powers or obtain a court order: see further Hatchard (2014) pp. 303-317.

<sup>29</sup> Article 48

## SECTION 2: THE CRIMINAL LAW PROVISIONS IN THE ANTI-CORRUPTION CONVENTIONS

This section provides an overview of the substantive criminal offences contained in the anti-corruption instruments with particular reference to the provisions of the UNCAC.

### **i) Bribery offences**

The bribery offences in the anti-corruption conventions cover much the same ground. For example, Article 15 of UNCAC requires each State Party to adopt such legislative and other measures<sup>30</sup> as may be necessary to establish offences relating to the bribery of public officials. Article 15(a) deals with ‘active bribery’, i.e.:

‘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’.

Paragraph (b) deals with ‘passive bribery’, the elements of the offence being a ‘mirror image’ of paragraph (a).

Article 16(1) of the UNCAC also requires State Parties to criminalize the bribery of foreign public officials and officials of public international organisations. The elements of the offence essentially follow those in Article 15(a). As noted earlier, these key provisions largely reflect those in the OECD anti-bribery convention.

### *Public officials*

Reflecting the approach in all the anti-corruption instruments, the term ‘public official’ in the UNCAC is widely defined and refers to any person holding a legislative, executive, administrative or judicial office<sup>31</sup> of a State Party, whether

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<sup>30</sup> The reference to ‘other’ measures is not intended to require or permit criminalisation without legislation. Such measures are additional to, and presuppose the existence of, legislation: UNCAC Legislative Guide, paragraph 15.

<sup>31</sup> Paragraph 3 of the interpretative notes indicate that the term ‘office’ is understood to encompass offices at all levels and subdivisions of government from national to local. In States where sub-national governmental units (for example, provincial, municipal and local) of a self-governing nature exist, including States where such

appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority.<sup>32</sup> It also covers 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. Paragraph 2 of the Interpretative Notes for the official records of the negotiation of the United Nations Convention against Corruption (the interpretative notes)<sup>33</sup> indicate that the word 'executive' is understood to encompass the military branch, where appropriate.

A 'foreign public official' means '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'. The 'foreign country' need not be a State Party to the UNCAC. An 'official of a public international organization' means 'an international civil servant or any person who is authorized by such an organization to act on behalf of that organization'.<sup>34</sup> However, according to paragraph 23 of the Interpretative Notes this:

'... is not intended to affect any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law. The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases'.

### *'Undue advantage'*

The term 'undue advantage' appears in several anti-corruption instruments and both the Legislative Guide to the UNCAC and the CoE Explanatory Report on the criminal law convention provide some assistance as to its meaning. The Legislative Guide indicates that an undue advantage may be something tangible or intangible, whether

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bodies are not deemed to form a part of the State, 'office' may be understood by the States concerned to encompass those levels also.

<sup>32</sup> Paragraph 4 of the Interpretative Notes indicates that each State Party shall determine who is a 'public official' for the purposes of this paragraph and how each of those categories is applied.

<sup>33</sup> Doc A/58/422/Add.1

<sup>34</sup> Article 2

pecuniary or non-pecuniary and that it does not have to be given immediately or directly to a public official of the State. However, the undue advantage or bribe must be linked to the official's duties. The CoE Explanatory Report also indicates that the undue advantage will generally be of an economic nature, the essence of the offence being that a person is, or would be, placed in a better position than that prior to the offence and that the public official was not entitled to the benefit. Such advantages might consist of, for example, holidays, loans, food and drink, or better career prospects.<sup>35</sup> The Explanatory Report also suggests that the word 'undue' should be interpreted as something that the recipient is not lawfully entitled to accept or receive. It adds that '[f]or the drafters of the Convention, the adjective "undue" aims at excluding advantages permitted by the law or administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts'.<sup>36</sup>

### *Intention*

The intention must be not only to promise, offer or give an undue advantage but also with the ulterior intent of influencing the conduct of the public official. In this context, intention may be inferred from objective factual circumstances.<sup>37</sup>

Depending on the factual situation, the promise or offering of a bribe may constitute an attempt to bribe. This is emphasized in Article 27 of the UNCAC where each State Party, in accordance with its domestic law, has an option to establish as a criminal offence any attempt to commit a Convention offence.

### **ii) Embezzlement, misappropriation or other diversion of property by a public official**

The scope of the anti-corruption conventions is reflected in the fact that they require state parties need to criminalize the theft of state property by public officials:<sup>38</sup> conduct that is not necessarily regarded as constituting 'corruption'. For example Article 17 of the UNCAC provides:

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<sup>35</sup> See para 37

<sup>36</sup> See para 38

<sup>37</sup> Article 28

<sup>38</sup> See, for example, the 'grand corruption' cases discussed in Nicholls paras 8.118 et seq

‘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’.

At least as regards common law jurisdictions, ‘embezzlement, misappropriation or other diversion of property’ is often covered by the single offence of theft by a public servant or fraud. However paragraph 30 of the Interpretative Notes explains that ‘the term “diversion” is understood in some countries as separate from “embezzlement” and “misappropriation”, while in others “diversion” is intended to be covered by or is synonymous with those terms’.

### **iii) Trading in influence**

The elements of this offence are essentially the same as Articles 15 and 16 of UNCAC save for the fact that the offence involves the use of real or supposed influence in order to obtain an undue advantage for a third person from an administration or public authority of the State Party. The mens rea for the offence is intention. As paragraph 64 of the CoE Explanatory Report puts it:

‘criminalizing trading in influence seeks to reach the close circle of the official or the political party to which s/he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption’.

Thus, unlike bribery, the influence peddlers are ‘outsiders’ who cannot take decisions themselves but misuse their real or alleged influence on other persons. The scope of the offence remains controversial in that there are concerns that it unduly limits the lobbying of public officials. However, paragraph 65 of the Explanatory Report stresses that ‘the acknowledged forms of lobbying do not fall under the notion of “improper” influence which must contain a corrupt intent by the influence peddler’.

### **iv) Abuse of functions**

Article 19 of the UNCAC provides that:

‘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’.

In many common law countries, such conduct falls within the offence of ‘misconduct in a public office’<sup>39</sup> and, as the Interpretative Notes to UNCAC indicate, the Article 19 offence encompasses a range of conduct.<sup>40</sup> This includes firstly, the abuse of public office in circumstances where this goes beyond the need for disciplinary action: for example where a public official awards a lucrative government contract to a company of which s/he is a secret beneficiary or arranges for the sale of government land to a company owned or controlled by his/her family at a price far below the market value.<sup>41</sup>

Secondly a single charge may reflect a course of conduct or address a situation where no financial reward is involved. For example, in *Sin Kam Wah v HKSAR*<sup>42</sup> the accused, a senior police officer, was in command of a department responsible for investigating vice offences. He was convicted on three charges of misconduct in that on several occasions he had been provided with prostitutes by the owner of several night clubs in return for protection from police investigation. Thirdly it can address the important contemporary problem of the improper disclosure by a public official of classified or privileged information.<sup>43</sup> A charge of conspiracy is also available against those seeking to cause public officials to abuse their powers.

#### **v) Illicit enrichment**

The offence of illicit enrichment applies where there is a ‘significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or

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<sup>39</sup> For a detailed analysis of this offence see John Hatchard ‘Combating corruption: some reflections on the use of the offence and the tort of misconduct/misfeasance in a public office’ (2012) 24 Denning LJ 65-88

<sup>40</sup> A/58/422/Add.1, para. 31

<sup>41</sup> See, for example the facts of *Marin & Coye v Attorney General of Belize* [2011] CCJ 9 (Caribbean Court of Justice).

<sup>42</sup> [2005] 2 HKLRD 375

<sup>43</sup> See, for example *R v W* [2009] EWCA Crim 2219

her income'.<sup>44</sup> Thus once the prosecution has proved that the accused is a public official and has enjoyed a 'significant increase' in his or her assets, that person has the legal burden of providing a reasonable explanation to the court as to how the assets were acquired or face conviction.

In *Attorney General v Hui Kin-hong*<sup>45</sup> the Court of Appeal of Hong Kong recognized the effectiveness of the illicit enrichment offence in the fight against corruption especially in view of the 'notorious evidential difficulty' in proving that a public official had solicited or accepted a bribe and the offence is found in the criminal laws of many states.<sup>46</sup> However due to constitutional issues in some countries relating to the protection of the presumption of innocence this is not a mandatory provision.<sup>47</sup> Even so, evidence of 'illicit enrichment' may form the basis for prosecuting public officials for tax offences or failing to declare their assets (see below).

#### **vi) Accounting and other offences and prosecutorial policy**

Whilst convictions on corruption or bribery charges make excellent headlines, in practice prosecutors often face significant difficulties in proving such allegations particularly when the cases involve powerful political figures and/or corporate entities. Thus determining the appropriate charge in such cases is often the key to a successful prosecution: for example a charge of illicit enrichment against a senior public official will remove the necessity for the prosecution to prove any specific instance of bribe-taking, although as noted above, this may fall foul of constitutional right to fair trial provisions. Yet such payments almost inevitably involve the commission of a range of separate accounting and tax evasion offences as well as

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<sup>44</sup> Article 20 UNCAC

<sup>45</sup> [1995] 1 HKCLR 227

<sup>46</sup> See generally Lindy Muzila et al *On the Take: Criminalising Illicit Enrichment to Fight Corruption* 2012 World Bank, Washington

<sup>47</sup> For example, Canada has an express understanding not to implement such a provision as 'the offence contemplated by Article IX [of IACAC] would be contrary to the presumption of innocence guaranteed by Canada's Constitution...'. See <<http://www.oas.org/juridico/english/Sigs/b-58.html>> accessed 1 October 2013.

the offence of failing to declare assets.<sup>48</sup> This point is reflected in several anti-corruption conventions in which State Parties are required establish a series of accounting offences relating both to the public and private sectors.<sup>49</sup> In addition, the threat of debarment following a conviction for a corruption-related offence may encourage corporations to do 'deals' by agreeing to plead guilty to accountancy and other related offences (see below).

Similarly the effectiveness of the offence of the failure to declare assets is neatly illustrated by the case of Solomon Alamiyeseigha, was Governor of Bayelsa State in Nigeria from 1999 to 2005. During this period he had acquired assets exceeding £10 million largely through the theft of public funds or from bribes yet in 2007 he pleaded guilty to six charges of making false declarations of assets and caused two of his off-shore companies to plead guilty to money laundering.<sup>50</sup>

#### **vii) Money-laundering**

Corruption-related offences and money laundering are often inextricably interlinked. Indeed the importance of preventing those involved in corrupt practices from enjoying their proceeds of crime is reflected in the fact that all the anti-corruption conventions require State Parties to establish a series of money laundering offences.

Of particular significance is the fact that the commission of a money laundering offence often includes a transnational element and thus encourages the prosecution of launderers and their 'allies' in other states. This is particularly relevant in seeking to combat the laundering of the proceeds of 'grand corruption' by public

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<sup>48</sup> A classic case is that of Frederick Chiluba, the former President of Zambia. In a highly-charged trial that attracted international attention he was acquitted on several counts of theft by public servant having given testimony that the money had been given to him by political well-wishers. Whatever the truth, the fact was that he admitted that he had not declared this income for either tax purposes or included them as part of his asset and income declaration and this would have founded criminal liability without more: See *The People v Chiluba* (2009, unreported, copy in the possession of the author, especially page J237).

<sup>49</sup> See, for example, Article 12(3) UNCAC

<sup>50</sup> See *Federal Republic of Nigeria v Santolina Investment Corp and Others* [2007] EWHC 3053



officials (often referred to as 'politically exposed persons (PEPs)) in circumstances where a criminal prosecution in their home state is unlikely.<sup>51</sup> For example, seemingly due to considerable ongoing political support, James Ibori, the former Governor of Delta State in Nigeria, was not prosecuted successfully in Nigeria although there was considerable evidence of corrupt practices on his part. However, in 2012 he was convicted in a London court of conspiracy to defraud and money laundering involving sums totally almost £50 million. The case is interesting in that it demonstrates that given the 'transnational political will' and effective international cooperation arrangements (particularly by way of mutual legal assistance), other states are able to prosecute foreign PEPs successfully and turn their perceived 'safe haven' for the laundering of the proceeds of corruption, into a prison cell. It also highlights that whilst PEPs may enjoy constitutional immunity<sup>52</sup> or political protection in their home state, with the exception of serving heads of state, such persons remain vulnerable to prosecution abroad, as do those who assist them.

### **SECTION 3: OFFENCES CONCERNING THE PRIVATE SECTOR AND THE LIABILITY OF LEGAL PERSONS**

#### **i) The bribery of foreign public officials and the threat of debarment**

Effective national and transnational efforts are needed to combat the bribery of foreign public officials and, as noted above, the OECD anti-bribery convention leads the way in this regard. The challenge of doing so is starkly illustrated by the Siemens case in which the activities of the giant German-based engineering firm were described as being 'unprecedented in scale and geographic reach and which involved more than US\$1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the Americas'.<sup>53</sup> However, the issue is not restricted to the bribery of foreign public officials for as the Transparency International Bribe

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<sup>51</sup> According to Glossary to the Financial Action Task Force Recommendations 2012, PEPs are 'individuals who have been entrusted ... with prominent public functions'.

<sup>52</sup> Such as Nigerian state governors: see Article 308 Constitution of Nigeria 1999

<sup>53</sup> Department of Justice press release, 15 December 2008: available at <<http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>> accessed 1 July 2013

Payers Index 2011 indicates, bribery is just as prevalent between companies across different sectors as it is between firms and public officials.<sup>54</sup>

The impact of the OECD convention is highlighted by the fact that all State Parties have introduced legislation outlawing the bribery of foreign public officials. In this regard the United States has taken the lead through the Foreign Corrupt Practices Act (FCPA) which criminalises foreign bribery as well as containing a series of accounting provisions.<sup>55</sup> As well as this, the FCPA contains wide jurisdictional provisions which enable the two enforcement agencies, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), to impose severe penalties on companies, some of which have only a minimal link with the United States. As a result, it is commonplace for prosecutors to reach an agreement whereby the defendant company pleads guilty to a FCPA accounting offence and agrees to pay a substantial fine so as to avoid a corruption conviction. For example, following its admission of involvement in bribery noted earlier, in 2008 Siemens agreed to plead guilty to a violation of the FCPA's accounting provisions,<sup>56</sup> to pay record fines in the United States and to be monitored to ensure future compliance with anti-bribery laws.<sup>57</sup>

The case also highlights another key weapon in the fight against transnational bribery in the corporate sector for the threat of debarment proceedings following a criminal conviction for a corruption offence may persuade companies, even the most powerful to do a 'deal' with prosecutors. Debarment (also known as 'blacklisting' or 'exclusion') is the mechanism through which a company or individual is prevented from tendering for, or participating in, a project(s) for a specific reason, such as previous involvement in corrupt practices. In some cases, debarment is discretionary

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<sup>54</sup> TI *Bribe Payers Index 2011* page 12: Available at <[http://bpi.transparency.org/bpi2011/in\\_detail/](http://bpi.transparency.org/bpi2011/in_detail/)> accessed 1 July 2013

<sup>55</sup> Indeed the FCPA pre-dates the OECD anti-bribery convention by many years: for a detailed account of the legislation see Nicholls et al, Chapter 16

<sup>56</sup> Under the 'books and records' provisions under section 78m(b)(2)(B), 78m(b)(5), and 78ff(a). It also pleaded guilty to a violation of the FCPA's internal control provisions under section 78m(b)(2)(B), 78m(b)(5), and 78ff(a).

<sup>57</sup> Siemens is listed on the New York Stock Exchange and accordingly it is subject to the FCPA.

(for example, the World Bank) in others, (for example under the European Union Procurement Directives), a purchasing body must exclude from tendering any company that has been convicted of corruption.<sup>58</sup> Debarment systems operate at the national level in several countries, including in the United States under the FCPA.

## ii) The liability of legal persons

All the anti-corruption instruments require State Parties to address the liability of legal persons. However establishing the *criminal* liability of a legal person is potentially difficult. For many common law jurisdictions, corporate criminal liability is restricted to acts of the 'directing' or 'controlling' minds of the corporation who carry out the functions of management and speak and act as the 'company'.<sup>59</sup> For civil law jurisdictions, establishing corporate criminal liability at all has proved problematic and to do so would require a change in the entire basis of their domestic law.<sup>60</sup> As a result, Article 26 of UNCAC, for example, requires State Parties to 'adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons' for convention offences and adds that 'the liability of legal persons may be criminal, civil or administrative'. However, whatever type of 'liability' is imposed, State Parties must ensure that legal persons are subject to 'effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.<sup>61</sup>

The CoE Convention contains similar, albeit more detailed, provisions regarding legal persons. Article 18(1) requires States Parties to adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for active bribery, trading in influence, and money laundering where those offences

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<sup>58</sup> See Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004. See further John Hatchard 'Recent developments in combating the bribery of foreign public officials: A cause for optimism?' (2007) 85 University of Detroit-Mercy Law Review 1

<sup>59</sup> See *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127

<sup>60</sup> Commentary 20 to the OECD anti-bribery convention states that 'in the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility'.

<sup>61</sup> Article 16(4)

were committed for the corporation's benefit by a natural person with a 'leading position' within the legal person based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person

as well as for involvement of such a natural person as perpetrator, accessory, or instigator in the above-mentioned offences. Again, this does not impose any obligation to establish criminal liability for legal persons.

However, Article 18(2) of the CoE convention goes further and addresses liability for a *failure* to put in place corruption preventive measures by legal persons. Thus States Parties are required to take the necessary steps to ensure that a legal person can be held liable 'where the lack of supervision or control by a natural person has made possible the commission of the corruption offences mentioned in [Article 18(1)] for the benefit of that legal person by a natural person under its authority'. This approach is reflected, for example in section 7 of the Bribery Act 2010 (UK) which makes it an offence for a 'relevant commercial organization' to fail to prevent bribery by a person associated with it'.<sup>62</sup>

#### **SECTION 4: MONITORING PROCEDURES**

A notable feature of several anti-corruption conventions is the provision for some form of a 'monitoring' system. Thus one of the key strengths of the OECD anti-bribery convention is its program of systematic monitoring by way of peer review of state compliance which is undertaken by the Working Group on Bribery (WGB). This comprises a country visit by examiners from different OECD countries whose task is to assess state compliance with particular aspects of the convention. Their report is presented to the WGB in plenary and the report and recommendations for action are

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<sup>62</sup> Section 7(1). The offence only applies where the bribery has been committed with intent to obtain or retain business or a business advantage for the organization's benefit. It is an offence of strict liability, but is subject to the defence that the organization had adequate procedures in place to prevent persons associated with it from committing bribery: see further Nicholls para 4.88 et seq

then made public.<sup>63</sup> There is also provision for a follow-up process to assess state compliance with the recommendations. For example, the response of the WGB to UK's decision not to proceed with an investigation into allegations of bribery concerning BAe Systems acquiring of multi-billion dollar arms contracts with Saudi Arabia was to publicly criticize its action and to conduct a detailed supplementary review on the UK's compliance with its convention obligations.<sup>64</sup>

Similarly, under the CoE convention, the Group of States against Corruption (GRECO) was established by the Council of Ministers with the aim of improving 'the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings' in the fight against corruption.<sup>65</sup> Again, a key feature of the process is the systematic verification of the action taken by each of the 49 CoE member States as regards the implementation of the recommendations including being required to submit a Situation Report on the measures taken to implement those recommendations.<sup>66</sup>

A less confrontational approach is adopted in the Follow-up Mechanism of the Inter-American Convention against Corruption (MESICIC) whose objective is to promote the implementation of the IACAC and facilitate harmonization of national anti-corruption legislation throughout the hemisphere. MESICIC also seeks to facilitate technical cooperation activities and the exchange of information, experiences, and best practices. A Committee of Experts comprises members designated by each State Party reviews the implementation of the convention by States Parties through a system of 'rounds' which reviews progress made by state parties focus on particular aspects of the Convention. The reports of the Committee are readily available and are an invaluable source of information about individual

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<sup>63</sup> Reports can be found on the OECD's website: <<http://www.oecd.org/bribery>> accessed 1 October 2013.

<sup>64</sup> See the WGB Phase 2 bis report available at <<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/41515077.pdf>> accessed 1 October 2013. The case is explored in detail in Nicholls et al at paras 7.208 et seq

<sup>65</sup> Article 1, Statute of GRECO

<sup>66</sup> See <<http://www.coe.int/t/dghl/monitoring/greco/evaluations/>> accessed 1 October 2013

state compliance with the convention. Of course, whilst this may usefully indicate the progress being made in convention compliance, the danger is that such a process will be little more than self-serving and contain little critical analysis.

The African Union convention provides for an Advisory Board on Corruption within the African Union<sup>67</sup> whose mandate is limited to promoting and encouraging the adoption of anti-corruption measures and the collection and dissemination of information amongst member states.

As regards the UNCAC, a Conference of the States Parties to the Convention (CoSP) was established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in the Convention and to promote and review its implementation.<sup>68</sup> Through ratifying the Convention, each State Party agrees to take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its domestic law, to ensure the implementation of its obligations under the Convention.<sup>69</sup> Critically the Mechanism is to be non-intrusive, producing no form of ranking with each State Party merely being required to provide information to the Conference on its compliance and implementation of the convention. Provision is made for a review of each State Party by two other State Parties with a report from the reviewers on good practice and challenges in convention implementation being produced. Such reports are to remain confidential although executive summaries are made public.<sup>70</sup>

## **OVERVIEW**

The development of the anti-corruption conventions represents a significant development in the fight against corruption both at the national and transnational

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<sup>67</sup> Article 22(1)

<sup>68</sup> See Article 63(1)

<sup>69</sup> Article 65(1). The review mechanism was adopted by the CoSP in Resolution 3/1

<sup>70</sup> Full details of the work of the CoSP are available on the website of the UN Office for Drugs and Crime: see

<<http://www.unodc.org/unodc/en/corruption/index.html?ref=menu>> accessed 1 October 2013. The executive summaries are available at

<<http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html>> accessed 1 October 2013

level. However the discussion calls for some general comments and has highlighted several challenges:

i) Whilst the regional conventions and the UNCAC require State Parties to take a holistic approach to combating corruption, the majority of their substantive provisions focus on the criminalization and international cooperation pillars.

ii) The scope of 'corruption' goes well beyond the payment or receipt of bribes and the anti-corruption conventions require State Parties either to 'adopt' or to 'consider adopting' a wide range of criminal offences which can be best described as 'acts of corruption and other related offences'.

iii) There remains a considerable challenge in seeking to prove the bribery/corruption offence, especially in that this is often a 'victimless' crime.<sup>71</sup> It is therefore vital that in determining the appropriate charges, prosecutors consider using the whole range of 'corruption and other related offences'. Thus, for example, rather than seeking to prove a bribery offence involving senior public officials, a charge of illicit enrichment may be a viable alternative as this does not require proof of any specific bribe-taking. Where constitutional problems prevent the use of this offence, accounting and tax offences may offer the most realistic prospect of conviction. Thus prosecutorial policy is key to making the criminal law provisions 'work' in practice.

iv) The need for the political will to combat corruption and the fact that those called upon to make the necessary decisions to do so are often the very actors who benefit most from the status quo,<sup>72</sup> means that taking action at the national level is often problematic. It follows that also addressing the issue from a transnational perspective is vital. This means that other State Parties must fulfil their convention obligations and take steps to prosecute those who seek to bribe foreign public officials. Similarly, states must display a willingness to prosecute all those involved in the laundering of the proceeds of corruption, including the financial institutions and 'gatekeepers'<sup>73</sup> who facilitate the process as well as taking active steps to assist

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<sup>71</sup> Of course, the victims are those who suffer direct or indirect harm as a result of the illegal bargain.

<sup>72</sup> Letitia Lawson 'The politics of anti-corruption reform in Africa' (2009) 47(1) *Journal of African Law* 73 at 74

<sup>73</sup> Such as legal practitioners, real estate agents and accountants

victim states recover the proceeds of corruption no matter where in the world they are located.

v) The prospect of a legal person being debarred from involvement in lucrative contracts if convicted of a corruption offence means that the *threat* of a criminal prosecution for such an offence represents a powerful incentive for the doing of 'deals' with prosecutors in which there is an admission of liability for a 'non-corruption' offence in return for the dropping of the corruption charges. Whilst the transparency of such 'deals' is questionable, they ensure that the offending enterprise suffers financial and reputational damage whilst removing the often challenging task of mounting a successful bribery prosecution.

vi) In order to facilitate investigations, prosecutions and the recovery of the proceeds of corruption, the anti-corruption conventions rightly emphasises the need for all states to have in place effective international cooperation mechanisms.

vii) A striking feature of the UNCAC and OECD conventions in particular is the recognition that the private sector plays a key role in combating corruption. Yet the challenge of dealing with the *criminal* liability of legal persons remains. As regards many common law jurisdictions, this calls for a re-examination of the basis of corporate criminal liability itself. In addition, placing legal obligations on corporate entities and their senior management to take active steps to put in place effective corruption preventive measures is a promising development.

viii) The monitoring of state compliance with their convention obligations is a significant feature of the anti-corruption conventions. The question of how 'intrusive' such monitoring can be varies markedly and the remit of the CoSP, in particular, demonstrates the determination on the part of some states to avoid any kind of ranking or assessment of their compliance with those obligations.

ix) Above all, the transnational nature of many corruption-related offences emphasises the need for states worldwide to implement fully their obligations under the anti-corruption conventions.



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