The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?

Indira Carr

Abstract

It is now a year since the UN Convention on Corruption, 2003 came into force. The Convention has received well over sixty ratifications or accessions. Most of these are from countries in the developing world. This article consisting of three parts addresses the following. Are there any special features in the UN Convention that make it unique in advancing the fight against corruption that also contribute to its popularity? Will this convention make a difference in achieving a less corrupt world? Part I uses a table to provide both a bird’s eye view of the other anti-corruption conventions and a reference point for comparison when examining the UN Convention. Part II addresses the issue of the popularity of the UN Convention by exploring critically its scope and innovative provisions against the historical setting of corruption specific regional and international conventions in Part I. Part II is divided into the following sections: offences, investigation and other procedural aspects, asset recovery, sanctions and implementation and concludes with a section entitled “Popularity Assessed” which deals with the main reasons for its wide adoption. Part III places the UN Convention in the broader context of the limits of criminal law and engages critically with the use of preventive measures as envisaged by the UN Convention.

1 Professor of Law, Middlesex University; Honorary Visiting Professor, University of Exeter. I would like to thank Professors Bob Lee and Ken Peattie of BRASS (Cardiff University). They made it possible for me to spend much needed time at BRASS to carry on with my research into corruption in the business environment.
Introduction

The media often carry news items of alleged transnational corruption involving huge corporations and public officials in the host country. In 2002, for instance, Thames Water, Britain's biggest water company, was asked to renegotiate a contract to operate an $891m\(^2\) Turkish water plant due to alleged irregularities in the commissioning of the plant. A number of Turkish government officials were also investigated for misconduct in approving a government guarantee for the project. Wide publicity of such cases however has not seen a reduction in allegations of grand corruption.\(^3\) In 2005 the British Serious Fraud Office started investigating\(^4\) an electricity trading enterprise, EFT, headquartered in London, for alleged corruption in the Balkans as a result of special audits commissioned by the United Nation’s High Representative in Bosnia. The allegation was that kickbacks\(^5\) may have been solicited by officials of a state owned power company to write advantageous electricity-swap contracts with private companies and that US government aid of $11m for providing electricity to war-torn states in the region was diverted to offshore accounts.\(^6\)

\(^2\) All references to $ in this paper are to US Dollars unless otherwise indicated.
\(^4\) This was made possible due to clarification of UK law relating to the bribery of foreign public officials by UK nationals or companies as a result of the Anti-Terrorism, Crime and Security Act 2001 which came into force on 14 February 2002.
\(^5\) Part of an income paid to a person having influence over the size or payment of the income – especially by some illegal arrangement.
Corruption is not a modern phenomenon and multinational corporations and other types of business entities, Western interests and globalisation are not entirely to blame for introducing corrupt practices though there may be some truth in the view that foreign investors may be responsible in part for the rapid spread of grand corruption in developing countries where public sector employees are paid extremely low wages. Corruption in its many guises such as bribes, cronyism and nepotism is as old as humanity and has affected and moulded social relations and power structures across cultures and centuries. In modern times transnational corruption caught the eye of the policymakers in the 1970s when the US Securities and Exchange Commission found that more than 400 US based companies had made illegal payments of well over $300 million to foreign government officials and political parties to ensure the facilitation of trade. This resulted in the US passing the Foreign Corrupt Practices Act in 1977. Nothing happened by way of international legislative initiatives between the 1970s and 1990s. What is unique about the mid-1990s onwards is that governments and international bodies are willing to openly talk about the problem and its effects on the

---

7 Openness to international trade is often seen as a contributor to high levels of corruption especially in countries where there are complex bureaucratic structures. See Hors, ‘Fighting Corruption on Customs Administration: What can we Learn from Recent Experiences’ Technical Paper 175, (Paris: OECD 2001). Also see Krugman ‘Growing World Trade: Causes and Consequences’ Brookings Papers on Economic Activity. (1975).

8 This refers to corruption at the highest levels including the corruption within the government.

9 Petty corruption is a common phenomenon in developing countries, many of them ex-colonies. It takes the form of small bribes or gifts for obtaining necessary documentation such as a motor licence (tax disc) or driving licence and obtaining connection to basic utilities such as electricity and water.


11 According to a recent report from the US Association of Certified Fraud Examiners, the problem of corruption is still a major issue in the United States. They estimate that corruption and fraud claims are more than $700 millions a year in the US.
quality of life for millions of people around the world and think of ways of combating such practices rather than treating corruption as a taboo subject.\footnote{Of course, it is possible to view this unwillingness to do anything substantial pre-1990s cynically as a means of protecting Western economic interests. Equally, the current frenzy towards adopting anti-corruption measures can be viewed as a means of protecting Western economic interests by ensuring that industries from newly emerging economies such as China and India do not obtain a competitive advantage in the global market as a result of engaging in corrupt practices. As it is, low labour cost in manufacturing industries in these countries to some extent is affecting the competitiveness of Western economic interests.} Tackling corruption has now taken the centre stage on the policy making agenda of influential international economic institutions such as the World Bank\footnote{According to the World Bank, the cost of corruption globally stands around $1000 billions. While the World Bank regularly raised concerns regarding corruption with its donees, it was only in 1996 that it announced its commitment to “fighting the cancer of corruption”. At the Ninth International Anti-Corruption Conference, Mr Wolfensohn of the World Bank made their serious concerns known: So far as our institution is concerned there is nothing more important than the issue of corruption ... At the core of the incidence of poverty is the issue of equity, at the core of the issue of equity is the issue of corruption. Corruption has to be dealt with by a combination of forces within the country ... the best we could do was to try and assist in the building of the coalitions and in the forging of that interest in the issue of corruption and inequity, and get it out there. See \texttt{http://www.worldbank.org}. The World Bank describes its approach as a multi-pronged approach. See ‘Helping Countries Combat Corruption: Progress at the World Bank since 1997’, (Washington: World Bank 2000).} and the International Monetary Fund. Coupled with the pioneering work of the civil society organisation, Transparency International,\footnote{Transparency International reports are available at \texttt{www.ti.org}.} this has further quickened the pace of policy makers to combat corruption. Often described as a cancer affecting development and poverty reduction globally, regional and international institutions have worked over the last decade to produce suitable legislative instruments in the form of conventions for adoption by countries.

The use of international conventions as a tool for harmonising law in specific areas is nothing new. Of course, the success rates of conventions in terms of the number of ratifications or accessions coming into force and implementation vary wildly. A convention, be it regional or international, is a product of compromise and consensus driven at times by a number of stakeholders such as politicians, commerce, industry and...
civil society. During this process, legal principles familiar to a legal tradition may be
replaced with unfamiliar principles imported from another legal tradition and this taken
along with the responses of various stakeholders and lobby groups within that nation can
affect a nation’s decision to ratify or not ratify a convention.\(^{15}\) Even were a convention
to be ratified, it may not be implemented by a State for a number of reasons, some
methodological and others associated with sensitive issues related to politics and
sovereignty. For instance, the instrument may be viewed by developing countries simply
as a tool to promote the interests of Western (i.e. developed) economies,\(^ {16}\) and their
decision to ratify may simply be a diplomatic exercise rather than a serious commitment
to the policies embedded in the conventions.

Against this broad context, it is a surprise that the subject of this article, the United
Nations Convention on Corruption (hereinafter “UN Convention”) adopted in December
2003,\(^ {17}\) came into force in December 2005, and currently has well over 60 ratifications\(^ {18}\)
or accessions. It seems that this Convention is well on its way to being a success, since it has met two of the three criteria mentioned above: it is in force and has a great number of ratifications and may be moving rapidly towards the third criterion, notably, implementation. This of itself raises some interesting questions:

- Are there any special features in the UN Convention that make it unique in advancing the fight against corruption?
- What are reasons for its popularity?
- Will this convention make a difference in achieving a less corrupted world?

This article consisting of three parts addresses these questions. Part I uses a table to provide both a bird’s eye view of the other anti-corruption conventions and a reference point for comparison when examining the UN Convention. Part II addresses the issue of the popularity of the UN Convention by exploring critically its scope and innovative provisions against the historical setting of regional and international conventions on corruption mentioned in Part I. Part II is divided into the following sections: offences, investigation and other procedural aspects, asset recovery, sanctions and implementation. Then, it concludes with a section entitled “Popularity Assessed” which deals with the main reasons for its wide adoption. Part III places the UN Convention in the broader context of the limits of criminal law and engages critically with the use of preventive measures as envisaged by the UN Convention.

1. Bird’s Eye View of Anti-Corruption Conventions (Excluding the UN Convention)

Most countries have some form of legislation to combat corruption at the domestic level.
The extent of regulation across countries however is not uniform and this is where international conventions\(^9\) come into their own. They play an important role in unifying to some extent the law across countries, especially where the activity has taken on a global character. The applicability of a State’s domestic law to offences committed outside its jurisdiction, for instance, was an area of ambiguity even in developed countries that had a heightened awareness of the conduct of their businesses abroad. Countries such as the United Kingdom (UK) and Canada, until recently, did not have any clear provisions relating to cross border corruption when their nationals were involved in the corruption of a foreign public official. It was very much a question of speculation as to whether or not their courts had jurisdiction over corrupt acts committed abroad by their nationals.\(^{20}\) In the UK, anti-corruption law was spread across two sources, common law and a number of statutes, notably, the Public Bodies Corrupt Act 1889\(^{21}\), the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. The law covered both active and passive bribery\(^{22},^{23}\), and applied to both private and public sector bribery\(^{24}\). Ratification of the OECD\(^{25}\) Convention on Combating Bribery of Foreign Public Official in International Business Transactions, 1997 (hereinafter “OECD Convention”)\(^{26}\) and its

\(^9\) Full unification remains largely an ideal and perhaps is an impossible goal since policy perspectives and priorities guided by social and cultural needs vary between countries.

\(^{20}\) In Canada, for instance, the case of *R v Libman* [1985] SCR 178 which dealt with the application of conspiracy provisions extraterritorially gave rise to substantial debates as to whether Canadian criminal law was sufficient to cope with corruption of foreign public official by their nationals. See J.M. Klotz, ‘Bribery of Foreign Officials – A Call for Change in the Law of Canada’, 73 Canadian Bar Review (1994), 467.

\(^{21}\) The definition of public body in the 1889 Act was widened by the Prevention of Corruption Act 1916, so that local and public authorities of all descriptions could be included.

\(^{22}\) Active bribery refers to the promise or giving of the bribe, and passive bribery refers to the taking or solicitation of the bribe.

\(^{23}\) The Public Bodies Corrupt Act 1889.

\(^{24}\) The Prevention of Corruption Act 1906.

\(^{25}\) The Organisation for Economic Co-operation and Development.

\(^{26}\) The Convention came into force on 15 February 1999, and has received ratifications or accessions from Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg,
implementation by the UK has now established in clear terms that UK has jurisdiction
over bribery of foreign public officials by their nationals.27  Similarly, in Canada its
Criminal Code dealt with bribery of government officers and judicial officers, but not
with the bribery of foreign public officials.28  That position has changed substantially
now with the implementation of the OECD Convention through the enactment of the
Corruption of Foreign Public Officials Act 1998.29

The above illustration establishes the contribution of conventions to modernizing
domestic law and harmonizing different national laws.  Besides the OECD Convention,
there are a number of other anti-corruption conventions, all of which are regional. These
are:

Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden,
Switzerland, Turkey, United Kingdom and the United States.

27 s.108 of the Anti-Terrorism, Crime and Security Act 2001 introduced the foreign element into the
common law offence of bribery and, amended s.1 of the Prevention of Corruption Act 1906, s.4(2) of the
Prevention of Corruption Act 1916, and s.7 of the Public Bodies Corrupt Act 1889. In March 2003, as a
result of dissatisfaction expressed by the Law Commission with the complex and obscure state of
corruption law, the Home Office published a draft Corruption Bill (hereinafter ‘‘the Bill’’) intended to
provide a comprehensive statute on corruption and repeal the common law offence of bribery, the Public
Bodies Corrupt Act 1889, parts of the Prevention of Corruption Act 1906 and s. 4(2) of the Prevention of
Corruption Act 1916. The Bill includes a definition of ‘‘what acting corruptly actually means’’, and bases
its analysis on a conception of corruption as a lack of loyalty between principal and agent. For instance, cl.3
states that ‘‘a person commits an offence if he performs his functions as an agent corruptly.’’ and the
meaning of agent is provided in cl.11. The Bill creates in its first three clauses three offences—corruptly
conferring an advantage, corruptly obtaining an advantage, and performing functions corruptly. The issue
of what acting corruptly means is to be gathered from cl.5, 6 and 7 which delineate the circumstances in
which it could occur. See Cmd 5777 (2003), text is available at www.hmso.gov.uk. Also see Hansard
Debates (HL) 16 July 2004, col.1554. The Bill was criticized by an All Party Committee of both Houses.
A consultation process was commenced in December 2005. For more on the principal-agent model, see N.
Groenendijk, ‘‘A Principal Agent Model of Corruption’’, 27 Crime, Law and Social Change (1997), 207. In
under the ten minute rule. Transparency International played a substantial role in the drafting of this bill.
For more on this see http://www.transparency.org.uk.

28 See J.G. Castel, Extraterritoriality in International Trade: Canada and United States of America

29 S.C. 1998, c.34.
The Inter-American Convention Against Corruption 1996 (hereinafter “OAS Convention”) of the Organisation of American States

The Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the Fight Against Corruption involving Officials of the European Union Communities or Officials of Member States of the European Union 1999 (hereinafter “EU Convention”)

The Council of Europe Criminal Law Convention on Corruption 1999 (hereinafter “COE Convention”)

The Southern African Development Protocol Against Corruption 2001 (hereinafter “SADC Protocol”)


The Council of Europe Additional Protocol to the Criminal Law Convention on Corruption 2003 (hereinafter “COE Protocol”)

The OAS Convention came into force on 6 March 1997, and the following countries have ratified or acceded to it: Argentina, Antigua & Barbuda, Bahamas (Commonwealth), 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, St Kitts & Nevis, St Lucia, St Vincent & Grenadines, Trinidad & Tobago, United States, Uruguay, and Venezuela.

The EU Convention is still in the process of receiving ratifications. See also Council Framework Decision 2003.568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192 of 31.07.2003). According to Article 249 of the EC Treaty as amended by the Treaty of Amsterdam a decision is binding in its entirety upon those to whom it is addressed.

The COE Convention came into force on 1 July 2002, and has received ratifications from Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, and United Kingdom.

The SADC Protocol is not yet in force. So far the following countries have ratified the Protocol: Botswana, Lesotho, Malawi, Mauritius, South Africa, Tanzania, Zambia, and Zimbabwe.

The AU Convention came into force on 5 August 2006. It has been ratified by Algeria, Burkina Faso, Burundi, Comoros, Congo Libya, Lesotho, Madagascar, Mali, Namibia, Niger, Rwanda, South Africa, Tanzania and Uganda.
The features of the above conventions inevitably vary and some of these including those of the OECD are set out below in a tabular form for ease of comparison. The intention is not to give a detailed account of the conventions but to provide a bird’s eye view of the different approaches to corruption through the creation of criminal offences, sanctions, corporate liability, money laundering, bank secrecy, extradition, mutual legal assistance and international co-operation, seizure, freezing, and confiscation and monitoring of implementation. References will be made to Table I while examining the innovative features of the UN Convention in Part II. In the first column, there are substantive, procedural and other provisions against which the articles dealing with the specific subject-matter from six different conventions are listed in columns 2 – 6. Clarification of terms like ‘public official’ are also included where required. Shaded boxes against the subject matter indicate that that particular matter is not addressed by the convention under consideration.

Table I: Features of the Anti-Corruption Conventions (OAS Convention, OECD Convention, COE Convention & Protocol, SADC Protocol, AU Convention and EU Convention)

© Indira Carr, 2006.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Active bribery of domestic public official</td>
<td>Art VII(1)b</td>
<td>Art 2</td>
<td>Art 3(b)</td>
<td>Art 4(b)</td>
<td>Art 3 'Official'</td>
<td>Art 3 'Official'</td>
</tr>
<tr>
<td>‘Public official’, ‘government official’, ‘public servant’</td>
<td>‘Public official’ widely construed to include those who have been selected,</td>
<td>(Note that offences in COE Convention are couched in mandatory</td>
<td>‘Public official’ widely construed to include those in employment of state, its</td>
<td>‘Public official’ as official or employee of State or</td>
<td>construed as Community or national official including national official of another Member State.</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>----------------</td>
<td>----------------</td>
<td>--------------------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Passive bribery of domestic public official</td>
<td>Art VI(1)(a)</td>
<td></td>
<td>Art 3</td>
<td>Art 3(a)</td>
<td>Art 4(a)</td>
<td>Art 2. (See definition above.)</td>
</tr>
<tr>
<td>Passive bribery of foreign public official</td>
<td></td>
<td>Art 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Active bribery of foreign public official</td>
<td>Art VIII</td>
<td>Art 1 but restricted to international business transactions. No definition of international business transaction but Preamble states that it is to include trade and investment.</td>
<td>Art 5</td>
<td>Art 6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bribery of members of foreign public assemblies;</td>
<td>Debatable. See above on definition of ‘public official’ but ‘Foreign public official’ is construed widely in Arts 6, 9, 10 &amp; 11 (Cover both active and 1.</td>
<td>Arts 6, 9, 10 &amp; 11</td>
<td>See Arts 6 &amp; 1.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Category</td>
<td>Definition</td>
<td>Art 7</td>
<td>Art 3(e)</td>
<td>Art 11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------</td>
<td>-------</td>
<td>----------</td>
<td>--------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Officials of international organisations;</td>
<td>unlikely to include officials of international organisations.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Members of international parliamentary assemblies;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges and official of International Courts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art 1(4) to mean any person holding a legislative, administrative or judicial office of a foreign country, whether elected or appointed; any person exercising a public function, and any official of a public international organisation. ‘Foreign country’ includes all levels of government, from national to local.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Passive bribery in private sector</td>
<td></td>
<td>Art 8</td>
<td>As above</td>
<td>Art 11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Passive bribery in private sector</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substantive, Procedural and Other Provisions</td>
<td>OAS Convention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OECD Convention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>COE Convention &amp; Protocol</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SADC Convention &amp; Protocol</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AU Convention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EU Convention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Active and passive bribery of domestic arbitrators</td>
<td>Debatable. See definition of ‘public official’ above.</td>
<td>Arts 2 &amp; 3 of Protocol</td>
<td>Not mentioned but likely to fall within definition of public official.</td>
<td>Not mentioned but likely to fall within definition of public official.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Active bribery of foreign arbitrators</td>
<td>Debatable.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Art 4 of Protocol</td>
<td>See above.</td>
<td>See above.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bribery of domestic jurors</td>
<td>Debatable. See definition of 'public official' above.</td>
<td>Art 5 of Protocol</td>
<td>See above (Debatable)</td>
<td>See above (Debatable)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bribery of foreign jurors</td>
<td>See definition of 'public official' above.</td>
<td>Art 6 of Protocol</td>
<td>See above (Debatable)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illicit enrichment</td>
<td>Art IX A controversial provision due to reversal of burden of proof.</td>
<td></td>
<td></td>
<td>Art 8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Diversion of monies, securities, property etc for purposes unrelated to those for which they were intended by public official for own/third party benefit.</td>
<td>See Art XI(1)(b)</td>
<td></td>
<td>Art 3(d)</td>
<td>Art 4(d)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Omission/act in discharge of duties by public official for illicitly obtaining benefit for himself/third party</td>
<td>Art VI (1)(c)</td>
<td></td>
<td>Art 3(c)</td>
<td>Art 4(c)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trading in Influence</td>
<td></td>
<td>Art 12</td>
<td>Art 3(f) Covers both public and private sectors.</td>
<td>Art 4(f)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraudulent Use/Concealment of Property Derived through Corruption Offences</td>
<td>Art VI(1)(d)</td>
<td></td>
<td>Art 8(g)</td>
<td>Art 4(b)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transparency in Funding of Political Parties</td>
<td></td>
<td></td>
<td></td>
<td>Art 10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>----------------</td>
<td>----------------</td>
<td>--------------------------</td>
<td>--------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Participatory Acts as principal, co-principal, instigator, accomplice or accessory</td>
<td>Art VI(1)(e)</td>
<td>Art 1(2)</td>
<td>Art 15</td>
<td>Art 3(h)</td>
<td>Art 4(i)</td>
<td></td>
</tr>
<tr>
<td>Accounting Offences</td>
<td></td>
<td>Art 8</td>
<td>Art 14</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporate Liability</td>
<td></td>
<td>Art 2.</td>
<td>Art 18 Legal person can be held liable for active bribery, trading in influence and money laundering.</td>
<td></td>
<td></td>
<td>Art 6 Heads of businesses or persons having power over decision-making may be criminally liable in respect of Art 3 offences.</td>
</tr>
<tr>
<td>Tax Deductibility of Expenses</td>
<td>Art III (6)</td>
<td>See Para IV Revised Recommendation DAFFE/IME/BR (97) 20.</td>
<td></td>
<td>Art 4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Secrecy</td>
<td>Art XVI</td>
<td></td>
<td>Art 23</td>
<td>Art 8</td>
<td>Art 17</td>
<td></td>
</tr>
<tr>
<td>Seizure &amp; Confiscation</td>
<td>Art XV</td>
<td></td>
<td>Art 23</td>
<td>Art 8</td>
<td>Art 16</td>
<td></td>
</tr>
<tr>
<td>Laundering of Proceeds</td>
<td></td>
<td></td>
<td>Art 7</td>
<td>Art 13</td>
<td>Art 6</td>
<td></td>
</tr>
<tr>
<td>Sanctions</td>
<td></td>
<td></td>
<td>Art 3 To be effective, proportionate and dissuasive.</td>
<td>Art 19 To be effective, proportionate and dissuasive.</td>
<td>Art 5 To be effective, proportionate and dissuasive.</td>
<td></td>
</tr>
<tr>
<td>Protection for Informers, Witnesses</td>
<td>Art III (8)</td>
<td></td>
<td>Art 22</td>
<td>Art 4</td>
<td>Art 5</td>
<td></td>
</tr>
<tr>
<td>Sanctions for Malicious Informers</td>
<td></td>
<td></td>
<td></td>
<td>Art 4</td>
<td>Art 5</td>
<td></td>
</tr>
<tr>
<td>Mutual Legal Assistance</td>
<td>Art XIV</td>
<td>Art 9</td>
<td>Arts 21, 23, 26</td>
<td>Art 10</td>
<td>Art 18</td>
<td>Art 9</td>
</tr>
<tr>
<td>------------------------</td>
<td>---------</td>
<td>------</td>
<td>----------------</td>
<td>-------</td>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>International Co-</td>
<td>Art XIV</td>
<td>See Para VII Revised Recommendation DAFFE/IME/BR (97) 20.</td>
<td>Art 25</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>operation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extradition</td>
<td>Art XIII</td>
<td>Art 10</td>
<td>Art 27</td>
<td>Art 9</td>
<td>Art 15</td>
<td>Art 8</td>
</tr>
<tr>
<td>Preventive Measures</td>
<td>Art III Standards of Conduct for public officials; declaration of assets, transparent systems for government procurement, maintenance of books and records, participation of NGOs.</td>
<td>Art 4 Participation of media, civil society, NGOs, public education, transparent systems in government hiring, procurement. Code of conduct for public officials.</td>
<td>Art 12 Participation of civil society, media.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Monitoring and Follow-Up of Implementation</td>
<td>No follow-up mechanism in Convention but system set up after The Declaration of Mar del Plata. There Art 12 Conducted in two phases.</td>
<td>Art 24 Group of States Against Corruption (GRECO) to monitor.</td>
<td>Art 11 Committee consisting of States Parties to carry put process.</td>
<td>Art 22 Advisory Board to encourage adoption on Convention</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As is apparent from Table I above, not all the conventions address corruption in all sectors or aspects that affect the investigation of corruption such as protection of witnesses. Conventions drafted later in chronological terms have tended to move towards a more comprehensive approach. Perhaps the most comprehensive amongst the regional conventions are the COE Convention and the AU Convention, though they too have their omissions, for instance, the AU Convention does not deal with corruption of a foreign public official and the COE Convention with funding of political parties. What is noticeable when it comes to the UN Convention is that it seems to have given an in-depth consideration to corruption in its various forms alongside important issues of investigation, asset recovery and preventive measure thus imparting a sense of a well-rounded convention. This multi-pronged approach is likely to have contributed to its popularity. However whether it has gone far enough is a matter that will be raised as and where appropriate in the next part.

2. The UN Convention

The UN Convention has often been described by organisations such as Transparency International as a comprehensive document. The Convention lends itself easily to this description since

---

35 The UN Convention consists of eight chapters, Chapter I (General Provisions); Chapter II (Preventive Measures); Chapter III (Criminalization and Law Enforcement); Chapter IV (International Co-operation); Chapter V (Asset Recovery); Chapter VI (Technical Assistance and Information Exchange); Chapter VII (Mechanisms for Implementation) and Chapter VIII (Final Provisions). The text of the Convention is available at http://www.un.org.
• it creates an extensive list of corruption and corruption-related offences;
• it addresses the difficult issue of asset recovery by devoting an entire chapter (Chapter V) to it;
• it vigorously promotes international co-operation, technical assistance and information exchange; and
• it includes novel provisions on preventive measures.

2.1 Offences

The UN Convention is not different from the other conventions listed in Table I above in targeting specific acts of corruption and related offences and casts its net widely like the AU Convention. The language of the UN Convention varies from the mandatory to the discretionary, from ‘shall adopt’ to ‘shall consider adopting’, thus indicating that the States Parties (hereinafter “SPs”) in some cases have a degree of flexibility. This linguistic usage is also found in the creation of offences and on the basis of this distinction the offences are set out under what I call for convenience sake “List A” and “List B”: the former covering offences of a mandatory character, the latter offences that include an element of choice.

2.1.1 List A

The most common form of corruption is bribery, involving a mutual exchange between X (the bribe giver) and Y (the bribe taker) where Y does or refrains from doing something in return for something from X. The advantages promised to Y directly or indirectly in this mutual exchange situation need not always be of a monetary kind; neither need it be directed at Y. It can be one of kind, for instance, hospital treatment for an elderly relative.

36 See Table I.
or luxury holidays to be enjoyed by third parties. Article 15 focuses on passive and active bribery of domestic public officials\(^{37}\) and requires SPs to adopt legislative measures to make them criminal offences when committed intentionally. Article 16 extends the bribery offence to active bribery of a foreign public official and officials of public international organisations when committed intentionally. In drafting these offences, it mimics, to some extent, the language found in other anti-corruption conventions.

The next offence to fall within this list is embezzlement, misappropriation or diversion of property by a public official.\(^{38}\) Existing laws on theft in many SPs are likely to cover this type of behaviour but it was felt that this should be specifically included within the list of corruption offences for a number of reasons: first, theft has a broad meaning and second, in some jurisdictions it may refer only to theft of tangibles. The kinds of activities that seem to be contemplated by Article 17 are the use of government funds for improvements to personal real estates, unauthorized withdrawals from government accounts or false expense claims.\(^{39}\)

Laundering of proceeds of crime also seems to fall within List A and SPs are required to establish as criminal offences the conversion, concealment, disposition, conversion, concealment, disposition,

\(^{37}\) ‘Public official’ is widely construed to include any person holding a legislative, executive and administrative or judicial official of a State Party. They can be elected or appointed, permanent or temporary post-holders, paid or unpaid members. It also includes those who perform a public function in a public agency or public enterprise, and also those defined as a ‘public official’ in the domestic law of the State Party. (Article 2(a)).

\(^{38}\) Article 17.

movement or ownership of property when committed intentionally and knowing that such property is proceeds of crime.\footnote{Article 27.}

Obstruction of justice is another offence created by the UN Convention. Under Article 25, SPs have to make the use of physical force, intimidation against members of the public, judicial and enforcement officers, or interference in the giving of testimony an offence when committed intentionally.\footnote{Article 25.} This is an unusual provision in a corruption convention but its inclusion is to strengthen the investigation and prosecution processes when a case of corruption is alleged.

Participatory acts in any capacity such as that of an instigator, accomplice or assistant are also made a criminal offence.\footnote{Article 27} Since companies participate in illegal activities, Article 26 expects SPs to adopt measures to establish the liability of legal persons. The liability of these legal persons may be criminal, civil or administrative. Liability of the legal person does not, however, affect the liability of natural persons.

Intention as is to be expected forms the backbone for the committing of an offence under the UN Convention. It is the first anti-corruption convention to indicate how intentionality is to be construed thus doing away with potential debates on whether the subjective or objective test is to be applied. According to Article 28, “knowledge, intent or purpose required as an element of offence established in accordance with the Convention may be inferred from objective factual circumstances.”

\footnote{Article 27.} \footnote{Article 25.} \footnote{Article 27}
2.1.2. List B.

The UN Convention like the COE Convention\textsuperscript{43} includes bribery in the private sector but under the discretionary list. Its exclusion from List A is a surprise given that (1) multinational corporations now are as powerful in economic terms as some of the small nation states, and (2) many developing countries have privatized the provision of utilities such as electricity and water which were normally provided by the public sector. Europe argued strongly for including the private sector but faced major resistance from the US who did not want to see the private sector included in the UN Convention at all on the basis that “many practices viewed as corrupt in the government aren’t improper in business”.\textsuperscript{44} In the end, by way of compromise, the UN Convention requires SPs to consider the adoption of legislative measures that may be necessary to establish as criminal offences, passive and active bribery and embezzlement of property when committed intentionally in the private sector. This leaves it open to the SPs to act as they see fit.\textsuperscript{45}

A striking inclusion within List B is passive bribery of foreign public officials or an official of a public international organisation in Article 16(b). While it is easy to see how it might be applied to an official working with an international organisation, for instance, an official of UNESCO located within the State that has implemented Article 16(b), it is difficult to see how it could extend to the act of a foreign public official located in another State unless the said act takes place within the implementing State.

\textsuperscript{43} See Table I.
\textsuperscript{44} B. Dabis ‘US Battles Europe to Narrow a Treaty Banning Corruption’, The Wall Street Journal, 17 June 2003. The argument was that in many cultures the giving of expensive gifts to those working within the private sector would not be seen as a ‘bribe’.
\textsuperscript{45} Articles 21 and 22.
Abuse of functions\textsuperscript{46} by a public official is another offence introduced by the UN Convention. It moves away from the idea of mutual exchange present in the offence of bribery and refers to intentionally acting or omitting to act in violation of the law for the purpose of obtaining an undue advantage for himself or a third party. The emphasis of this provision is on the quality of the act of the public official and the consequences that flow from it. So if an official were to use information gained from perusing sensitive and privileged documents and, contrary to confidentiality laws, uses the information to gain some advantage for himself or a third party, then an offence would be committed under this section as long as it is committed intentionally. Though somewhat differently worded, the AU Convention also contains a provision that is intended to have the same result.\textsuperscript{47}

Another offence included within this list is that of illicit enrichment which has proved highly controversial in the context of other conventions, in particular, the OAS Convention and the AU Convention.\textsuperscript{48} For instance, the US in respect of illicit enrichment (Article IX) offence in the OAS Convention said it is contrary to the legal principles of the US legal system, since it reverses the burden of proof. Article 20 of the UN Convention also seems to place the obligation on the public official to give a reasonable explanation for substantial increase of his assets. The UN Convention, however, does go on to state that this provision is subject to the constitution and the fundamental principles of the SPs legal system. This offence does give one major advantage to inexperienced investigation authorities however. In placing the onus on the accused, all that the authorities have to show is a substantial increase in the wealth of the

\textsuperscript{46} Article 19.
\textsuperscript{47} See Article 4 (c).
\textsuperscript{48} See Table 1.
public official under scrutiny. The illicit enrichment offence certainly has been implemented by the South American states that have ratified the OAS Convention, many of whom lack the expertise and availability of personnel required for complex investigations.49

Trading in influence, be it passive or active, is made a criminal offence under Article 20. This offence is also to be found in other conventions.50 It is intended to cover situations where for instance a public official or a person offers his services to influence the decision making process in return for an undue advantage. It does not matter whether the supposed influence leads to the intended result or not for the purposes of this offence. There is a reason to believe that such phenomena are fairly common in corridors of power in many developing countries.

Lastly, attempt to commit an offence and preparation for an offence established under the Convention51 appears in the discretionary list whereas participation appears as a mandatory offence. The reason for this may lie in differences between national laws.

What is also striking about the UN Convention is that it replicates the general approach to be found in the other anti-corruption conventions preceding it, and restricts itself to improper behaviour that affects the decision making processes and involves economic gain in the context of (1) private sector to the public sector as, for instance, when an individual or a company engages in corrupt behaviour with a public official and (2) private sector to private sector as, for instance, when a sales person of one company bribes a procurement manager of another company. However, improper exchanges

---

49 In adopting Art IX of the OAS Convention a State may be in breach of its obligations under a regional or global human rights treaty to which it is a party.
50 See Table I (AU Convention).
51 Article 27 (2) and (3).
where there is an effect on the decision-making process are to be found in other contexts and are likely to be viewed as corrupt though not corrupt under any of the anti-corruption conventions. For example, within the public sector public officials may engage in some form of illicit exchange which does not involve economic or monetary gain for the officials concerned or a third party, but may have long term benefits for the department in which the public official works. For instance, a request from a senior public official from the police department to a senior official of the auditing and statistics department to massage the crime figures with the intention of receiving more resources is likely to be perceived as corruption. It results in public deceit and also deceit of various state actors involved in policy making processes such as resource allocation and so on. Since this type of behaviour lacks personal advantage of an economic nature, it is not caught by the anti-corruption conventions.

2.2. Investigation and other Procedural Aspects

The UN Convention, like the other anti-corruption conventions, will suffer from an enforcement deficit. Part of the reason for this is the covert nature of the crime along with the difficulties associated in the investigation of such crimes. Successful investigation and prosecution are dependent on information provided by affected individuals or others who work alongside corrupt individuals. People are unlikely to come forward as informers or as witnesses if they are likely to face external pressures such as intimidation and threats. Provision is made in Article 33 of the UN Convention which requires SPs to ensure that there are appropriate measures to provide protection against any unjustified treatment for a person who reports in good faith and on reasonable

---

grounds to the competent authorities. Such informants, often termed whistleblowers, are the subject of legal protection in many countries. The purpose of such legislation is to ensure that whistleblowers are protected from reprisals at their workplace and that such protection will enable disclosure of information. The ambit of the legislation varies from country to country. While some restrict protection of whistleblowers to the public sector, others have included both the public and private sector within the scope of such protection. There are also variations amongst national legislations on who is protected (e.g. a public official, an employee), what disclosures qualify for protection (e.g. breach of health and safety regulations, breach of environmental regulations, criminal offences committed or about to be committed), to whom they should be reported (e.g. ombudsman, Auditor General, employer at the first instance), and the level of belief on the whistleblower’s part in respect of the illegal activity (e.g. reasonable grounds of belief or strong reasons for suspicion), and how the whistleblower is to be protected from reprisals (e.g. relief from liability, anonymous reporting). As to how effective such legislation is in encouraging people with information to come forward is highly debatable. There are no available comparative statistics relating to numbers of complaints about malpractices involving whistleblowers within different sectors to assess the success of the legislation.

53 They alert their employers and other authorities regarding illegal activities within an institution such as corruption, fraud, false/irregular accounting practices, environmental violations, health and safety violations. There are a variety of definitions in respect of whistle-blowing: see Jubb ‘Whistleblowing: A Restrictive Definition and Interpretation’, 12(1) Journal of Business Ethics (1999), 77. See also Rothschild and Miethe, ‘Whistleblower Disclosures and Management Retaliation’, 26(1) Work and Occupation (1999)107.
55 For example, Australia – see Protected Disclosures Act 1994 (NSW) as amended 1998.
56 For example, South Africa (Protected Disclosures Acts 2000), UK (Public Interest Disclosure Act 1998), New Zealand (Protected Disclosures Act 2000).
There is, however, plenty of statistical evidence to suggest that whistleblowers are simply victimized by their employers. 57

The whistleblower’s legislation as currently adopted by jurisdictions is devoted to protecting informers from within an entity who expose malpractices within their place of employment. Informers who fall outside of this class also need to be protected, for instance a concerned individual who reports on the corrupt activities of his neighbour. Article 33 also has these types of informers 58 within its sight.

Protection of experts and witnesses is addressed in Article 32 which requires SPs to take appropriate measures for their physical protection including relocation and non-disclosure of their identity. In reality, many of the developing countries will not have the necessary resources to follow through these guarantees as expressed in legislative instruments. And in countries where corruption is endemic at best such provisions are likely to be nothing more than window dressing.


58 Investigation authorities also recruit and use informers (also known as “informants”, “police sources”) but there is limited research on their background and their motivations in imparting information to the police. For available research, see D. Rose, In the Name of the Law, (London: Vantage Press 1996); S. Greer, Supergrassess: A Study in the Anti-Terrorist Law Enforcement in Northern Ireland, (London: Clarendon Press 1995); R. Billingsley, T. Nemitz, and P. Bean, Informers, (Cullompton, Devon: Willan Publishing 2001); D.L. Martin, ‘The Police Role in Wrongful Convictions: An International Comparative Study’ in S. Westervelt and J. Humphreys (eds) Wrongfully Convicted: When Justice Fails, (Piscataway, New Jersey: Rutgers University Press 2001), in this largely “secretive” policing activity, suggests that most of the informers are in some way connected to the criminal fraternity directly or indirectly though there are the few who are not. Their motivations vary. Some are tempted by the police reward whilst others may divulge information in return for immunity or for a reduction in sentence or for the purposes of protecting loved ones from getting involved with the criminal fraternity. Revenge is also cited as a reason for providing police with information. And there are those who are driven by moral principles and act for the greater good. In most cases there is some sort of exchange between the informer and the informed, be it of money, leniency in sentencing or some other favour. It is indeed very difficult to gauge the success of this mechanism in the context of corruption. Regardless of various mechanisms that the police may have in place in accessing information from “good” sources, the reliability of such information is debatable and may result in miscarriages of justice.
Investigation is also made the more difficult when documents, key witnesses, and other materials are spread across jurisdictions. This is particularly so when transnational corruption is involved. Even where there is no transnational element, it is likely that corruptly obtained assets may have been sent abroad. The UN Convention seeks to promote co-operation both at the domestic and international levels, and in Article 38 dealing with co-operation at the domestic level, it is expected that public authorities and public officials co-operate with the enforcement authorities by providing the necessary information that is requested. Article 38(a) also expects public authorities to act as informers where there are reasonable grounds to believe that offences under Articles 15, 21 and 23 have been committed.

Chapter IV headed “International Co-operation” is devoted to co-operation at the international level and includes co-operation between law enforcement agencies on a number of matters, such as establishing the identity, whereabouts and activities of persons suspected of involving in corrupt activities; providing information on the movement of proceeds of crime or property that has been derived from the commission of offences listed in the UN Convention; and providing information requested for investigative purposes, as well as facilitating effective co-ordination between competent authorities. There are also provisions on extradition. As to how far the inclusion of extradition will enable extradition in practice is open to scrutiny since SPs may enter reservations in respect of extradition.

59 Article 15 deals with active and passive bribery of domestic public official; Article 21 deals with bribery in the private sector; and Article 23 deals with laundering of proceeds of crime.
60 Article 44.
Mutual legal assistance is also covered extensively and can be requested in a number of matters such as the taking of statements, effective service of judicial documents, and executing searches and seizures as well as freezing. It also lists the formalities to be followed in requesting mutual legal assistance and circumstances in which it may be refused. The UN Convention expects SPs to establish a special body dedicated to combating corruption. The setting up of a specialized unit in management terms is attractive, since it creates a group of personnel with expert knowledge of the relevant techniques for combating and preventing corruption.

2.3 Asset Recovery

The most radical section in the UN Convention is a body of the provisions on asset recovery. While conventions such as the AU Convention and the OAS Convention provide for seizure and freezing of assets they do not address the controversial and difficult issue of asset recovery. The UN Convention is therefore unique in going beyond seizure and freezing of assets to include repatriation of assets obtained through corrupt activity. The whole of Chapter V (Articles 51-59) is devoted to asset recovery and Article 51 provides that “the return of assets … is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of the cooperation and assistance in this regard”. Chapter V received the enthusiastic support of developing countries, many of whom have been gradually stripped of their national wealth by despotic regimes over time.

---

62 Articles 5 and 36.
63 On freezing, seizure and confiscation see Article 31.
64 However it seems that this phrase does not have legal consequences on the provisions contained in Chapter V. See UN Doc A/58/422/Add.1, 7 October 2003 at 8, available at http://www.unodc.org.
excesses of the leaders and politicians of developing countries\textsuperscript{66} and the ‘illegal export’ of national wealth and their investments abroad in bonds, stocks and real estate. In a few cases states have had some success in recovering at least part of the stolen wealth located in other jurisdictions.\textsuperscript{67}

Asset recovery however is beset with a number of problems. Much of the illicit gains are likely to be located in developed countries, and laws in relation to freezing and confiscation orders are fairly complex and procedurally rigorous in these countries. Many of the developing countries, victims of ‘national asset escape’, lack the financial capacity and legal techniques and expertise required to engage in the investigation and prosecution for recovery of assets. Recovery of ill-gotten assets largely depends on the seriousness and commitment with which international co-operation both at the investigative and legal level are carried out. Developed countries also need to do a great deal in ensuring that they do not provide ‘safe havens’ to individuals engaged in corrupt activities. That there is a political will to do this at least seemed to emerge from the G8\textsuperscript{68} countries’ summit held at St Petersburg in July 2006.\textsuperscript{69} The Leaders of G8 have pledged that they ‘will work with all the international financial centres and our private sectors to deny safe haven to illicitly acquired assets by individuals engaged in high level corruption. … we reiterate our commitment to take concrete steps to ensure that financial markets are protected from criminal abuse, including bribery and corruption, by pressing all financial centres to attain and implement the highest international standards of


\textsuperscript{67} For instance, the return of millions of dollars deposited by the Abacha military regime to Nigeria \textcolor{red}{(http://www.eipd.admin.ch)}; see also the Switzerland-Peruvian case, and the Marcos case \textcolor{red}{(http://www.u4.no)}.

\textsuperscript{68} Group of Eight.

\textsuperscript{69} \textcolor{red}{http://en.g8russia.ru}.
transparency and exchange of information.” While such public expressions impart a level of confidence the important question is whether it will make a real difference on the ground. In the present climate, it may make a difference, since there is a perceived degree of association between corruption and a threat to security. With the current concerns about security, there is reason to believe that movement of funds including corruptly obtained funds across jurisdictions through financial institutions will be under close scrutiny.

The language of Chapter V leans towards the mandatory and Article 52 focuses on the prevention and detection of transfers of proceeds of crime. It requires SPs to take steps in accordance with its domestic law to ensure that financial institutions in their countries identify customers and the beneficial owners of funds deposited into high value accounts. Without doubt, this will introduce a further layer of bureaucracy in some countries. And more so in developing countries where many of the banks are state-owned and are already subject to burdensome bureaucracy and where the decision-making at times is dispersed across different sections of the bank. While measures in relation to identification are important, it may have the opposite unintended effect. After all, is it not excessive bureaucracy that provides the breeding ground for corrupt activities in developing countries? It seems the UN Convention in its attempt to tackle grand corruption unwittingly may be creating an opportunity for petty corruption and harassment of customers by lowly paid bank staff.

---

70 See Donnelly, C ‘Rethinking Security’, 48(3) NATO Review (2000), 32. Web edition is also available at http://www.nato.int. According to Donnelly, “corruption is a security threat in its own right, as well a contributory factor to governmental failings … [It] is the single most serious threat to the viability of several countries ….” (at 32.)

71 It seems national security may be used as a tool to stop corruption related investigations! See ‘National Interests Halts Arms Corruption Inquiry’ The Guardian 15 December 2006.
Article 52 further requires “enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with public functions and their family members and close associates.” The intention here is one of detection but it is questionable whether this will work in practice in countries where corruption is endemic. The UN Convention addresses corruption in specific contexts, namely private to public and private to private. It does not address corruption within the public sector as between departments, for instance, where the Ministry of Finance requests a state-owned bank to relax scrutiny of the bank account of one of their civil servants. While nothing is openly agreed, there may be an expectation that compliance with the request may result in favourable treatment when it comes to allocation of resources to state-owned banks.

Moreover, Article 52 also addresses the issue of introducing financial disclosure schemes for public officials including a declaration of any interest in a financial account in a foreign country. It is expected that SPs will introduce sanctions for non-compliance with these provisions.

Articles 53 - 57 deal with issues relating to confiscation, seizure, international co-operation and mutual assistance for the purposes of confiscation and the return and disposal of such assets. Article 53 is an important provision and requires SPs to take measures that will permit another state to initiate civil action in its courts to establish title to or ownership of property acquired through corrupt activities.

As a preventive and combating measure, Article 58, in a mandatory tone, requires SPs to establish a financial intelligence unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of spurious financial transactions. In theory, it sounds attractive to have a specially-dedicated unit since it has the potential to
increase the chances for detection and subsequent prosecution. However, the question is how it will work in practice. Most of the countries that have ratified the UN Convention fall within the group of developing and least developed countries. Many of them are resource strapped and currently engaged in a variety of local issues ranging from civil unrest, sectarian conflict, high levels of illiteracy, and poverty to high incidence of malaria, TB and AIDS amongst their citizens. In real terms, intelligence units require funds, high levels of staffing and access to modern investigation techniques such as sophisticated information technology that has the potential to compile, hold and access databases, and relate information held in these databases in an effective manner for the purposes of analysis. Lacking funds and skills it is highly debatable whether these countries can cope with the requirements of Article 52. Funds and skills training are essential followed by further financial injection for sustaining such units. International agencies such as the World Bank may be a source of finance but would it be a realistic expectation that they will provide sustained support for such activities? Various agencies, such as the UNODC\textsuperscript{72} and the FATF\textsuperscript{73}, have organized workshops on asset recovery. Without extensive details and statistics, however, it is unclear how far these have resulted in initiation of actions and requests for cross-border co-operation. The UN Conference of the States Parties to the United Nations Convention on Corruption scheduled to take place in Amman during 10-14 December 2006 will consider the issue of asset recovery and the background paper suggests that they will seek to create a centre of expertise, thus forming the backbone of expertise for activities conducted under the

\textsuperscript{72} They have produced a guidance document for implementation of the UN Convention. See Legislative Guide for the Implementation of the United Nations Convention against Corruption available at http://www.unodc.org.

\textsuperscript{73} Financial Action Task Force on Money Laundering which has produced Forty Recommendations to Counter Money Laundering available at http://www.fatf.gafi.org.
five pillars described as: (1) needs assessment; (2) legal advisory services; (3) strategic planning and case-management support; (4) capacity-building and training, and (5) partnership-building and information-sharing. As the background paper correctly observes, “asset recovery may become the litmus test of the effectiveness of the Convention as a practical tool for fighting corruption. Building a comprehensive programme should be one of the top priorities of the Conference of the States Parties. That entails careful thinking about the components of such a programme and a readiness to make the necessary resources available."\textsuperscript{74} But where are these resources going to come from? One possible way to move this forward would be to explore the possibility of a public-private partnership where multinationals and international financial institutions could provide the technology and other resources as part of their corporate social responsibility agenda.\textsuperscript{75}

\textbf{2.4 Sanctions}

One would expect a convention that creates a long list of corruption and corruption-related offences to provide an equally exhaustive list of sanctions. Other than stating that the level of sanctions should take into account the gravity of the offence,\textsuperscript{76} the UN Convention is silent on the type of sanctions, be it fines or loss of liberty to be used. Its

\textsuperscript{74} CAC/COSP/2006/6 - Item 2 of the Provisional Agenda (CAC/COSP/2006/1) Consideration of ways and means to achieve the objectives of the Conference of the States Parties in accordance with Article 63, paragraphs 1 and 4-7, of the United Nations Convention against Corruption, at 8.

\textsuperscript{75} The UN in 2004 added ‘the promotion and adoption of initiatives to counter all forms of corruption, including extortion and bribery’ as Principle 10 in its Global Compact, thus bringing corruption within the fold of corporate social responsibility. The Global Compact is a network to support the participation of the private sector and other social actors to advance responsible corporate citizenship and universal social and environmental standards.

\textsuperscript{76} Article 30(1).
approach is similar to those other conventions that have included provisions on sanctions.77

Gravity is a complex concept in this context and can be construed in a number of ways, for instance, the gravity of the act itself or the gravity of the consequences that flow from the act. The following illustrations will help clarifying the point.

(1) O, a public official, accepts a bribe of $100,000 from a drugs company (C) for planning permission to build a much needed hospital in a remote part of the country. C is well known internationally for using hospital patients for testing new drugs without obtaining consent from them. Indeed, C has recently been prosecuted in a neighbouring country for experimenting on unknowing hospital patients.

(2) O takes a bribe of $150,000 from a well known philanthropist (P) to build a much needed hospital in a remote part of the country.

(3) O accepts a bribe of $10 from an individual (I), for a telephone connection.

In all of the above situations, O has committed the offence as set out in Article 15 and all the acts can be said to be grave since they are criminal offences. Does this mean that O is to be treated in the same manner in all of those cases when it comes to sanctions; or is the value of the bribe relevant? If the value is relevant, then (2), on the gravity scale, comes out as the highest compared with (1) and (3). However, if consequences are important, then (1) is extremely serious due to the concern on drug testing on unknowing patients.

Leaving the interpretation of gravity to SPs will, no doubt, undermine the harmonisation of laws on corruption intended by the Convention. To some extent, the reluctance on part of the Convention to enter the arena of criminal justice is

77 See for example, the OECD Convention, and the COE Convention as set out in Table I.
understandable. Sentencing policies and guidelines vary across jurisdictions. And it would have been foolhardy even to attempt to harmonise laws in this area, since it would have affected the ‘saleability’ of the convention.

Investigation and prosecution of public officials poses special problems since public officials in most jurisdictions enjoy immunities that protect them from investigation and prosecution. Article 30(2) addresses the issue of immunities in discretionary language which suggests the matter is to be left to the SPs even though it states that there should be “an appropriate balance between any immunities or jurisdictional privileges accorded to its public official for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention”. That domestic law is prioritized is again reiterated in Article 30(9) which states that “[n]othing 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”. This means that many of the offences created may not have the intended effect if immunities and privileges are raised as a defence. If the UN Convention is to have a real impact, it is important that SPs consider the possibility of prosecuting an official once he has left office.

2.5 Implementation

As stated earlier, the success of a convention is to be measured not just by the number of ratifications but also its effective implementation. Chapter VIII deals with issues relating
to implementation and their review. According to Article 63, the review of the UN Convention is to be carried out through a Conference of the States Parties to the Convention. Such a Conference is to take place in December 2006. The Background Paper\(^{78}\) on implementation suggests that the implementation review process may start with an initial self-assessment on the part of the SPs to identify the weaknesses, strengths and vulnerabilities in their systems with a view to reviewing these further and providing suitable help and guidance in meeting specific goals as identified.

That follow-up action is important after ratification is recognized by most of the anti-corruption conventions.\(^9\) There are available follow-up models that can provide some useful insights to how this mechanism can be fine tuned. The model adopted for the OECD Convention appears to be working quite well. The OECD’s model\(^{80}\) of systematic monitoring provides a useful framework. The monitoring consists of two phases. Phase I assesses the conformity of a State Party’s anti-bribery laws with the OECD Convention. In Phase II, there is a one-week long on-site meeting with actors from a variety of backgrounds: the government, trade councils, development agencies, businesses, and civil society. A number of Phase II reports have been published.\(^{81}\) These reports are extremely detailed and exhaustive. They exhibit the rigour with which the teams have followed up the issue of implementation of the OECD Convention through amendments to national legislations, correlating the success rate with statistical data gathered by criminal agencies, public awareness, sanctions, jurisdiction and

---

78 CAC/COSP/2006/5 15 November 2006.
9 See Table I.
80 Article 12 of the OECD Convention contains a provision on monitoring and follow-up and according to Article 12 the Parties are required to co-operate in “carrying out a programme of systematic follow-up to monitor and promote the full implementation” [of the OECD Convention] and this is to be done in the “framework of the OECD Working Group on Bribery in International Business Transactions …”.
81 These Reports are available on the OECD website http://www.oecd.org. For instance, the Report on Sweden was adopted on 21 September 2005 and that on Bulgaria on 6 June 2003.
international co-operation. The examination of the legislation and other mechanisms for enforcing the legislation are thorough and recommendations robust as the reports exhibit. Of course, in making recommendations, there is always the danger that SPs fail to act on them. A subsequent meeting with the State actors would be one way to ensure that the recommendations have an impact.

2.6 Popularity Assessed

So far, the author has elaborated the main aspects of the UN Convention and highlighted both the innovative and the problematic provisions of the Convention. As stated in the Introduction, this Convention has proved to be a popular choice, the evidence being the number of ratifications it has received especially from developing countries. This popularity is attributable to the following features of the Convention:

- It is comprehensive, since it includes corruption in private to public sector and public to public sector contexts. Its comprehensiveness reaches beyond the creation of offences to cover aspects of investigation. Of course, it could have done more by dealing with corruption in the political sector, especially funding of political parties as well as corruption in public sector to public sector that does not involve personal advantage. In practical terms, however, this would have made the progress of the Convention extremely arduous, since it would have raised issues that many countries would have found very sensitive.

Despite expectations, for example, that Sweden would have a sophisticated system for preventing and combating corruption, the Report recommends that awareness of the offence of bribery be raised amongst companies, and the Export Credit Guarantees Board, and encourages the Swedish defence industry to develop strong anti-corruption measures. Recommendations are also made in respect of amendments to their Anti-Corruption Regulation of 2001 and effective prosecution and sanctioning of bribery of foreign public officials.
• It is flexible, since the adoption of mandatory and discretionary language in respect of offences means that countries have the option to tailor their legislation according to their legal principles. Its flexibility is attractive to developing countries that normally view legal harmonisation as a manifestation of legal imperialism.

• It is innovative, since it includes a chapter on “Asset Recovery”. The inclusion of this chapter was enthusiastically greeted during negotiations by developing nations that at some time have experienced the negative impact of national asset stripping by their leaders. Many of these countries have been unable to utilise available mechanisms to good effect. The introduction of this controversial topic into an anti-corruption convention with follow-up mechanisms of help and cooperation with investigation and legal assistance may have singularly contributed to its popularity. If the asset recovery mechanisms put in place by the UN Convention turn out to be workable in practice, this will be an applaudable contribution of the UN Convention.

• It has the potential to satisfy donor demands. Many of the donor agencies, such as the World Bank, the African Development Bank, require donee countries to have anti-corruption legislation in place as a condition for receiving loans. Ratification of the UN Convention by a donee country is likely to be seen as satisfying those demands by the donors. Since many developing countries have ratified this Convention, there is a strong reason for saying that this may be the case.

• It is also progressive. As the next Part exhibits, it has given thought to putting in place measures that enhance transparency and integrity.
It sees a greater role for citizen participation not only in the decision making processes within a State but also in adopting a non-tolerant attitude towards corrupt behaviour.

3. Criminal Law, its Limitations and Preventive Measures

The creation of offences along with tough sanctions is normally expected to function as an effective deterrent. While this may be the case to some extent it would be an over-optimistic expectation on part of policy makers that criminal legislation has the intended effect on human behaviour. Experience also shows otherwise. Criminal law, in most countries, creates a wide variety of offences along with tough sanctions. They cover a wide spectrum ranging from offences against the person and property to fraud. Existence of these offences by no means eradicates or reduces violent behaviour or fraudulent activities in society. To curb the criminal activity, it is important to have other mechanisms in place that will work effectively alongside criminal law. In respect of corruption, the UN Convention takes a progressive attitude by requiring SPs to put in place, maintain, and co-ordinate effective anti-corruption policies. The stance it adopts is of a holistic nature and it expects the engagement of the public sector, the private sector, the financial sector, and the judiciary in the prevention of corruption. Transparency, integrity and accountability are the principles it projects in the mandatory requirements imposed on SPs.

Taking public sector first, Article 7(a) advocates adoption of procedures in the hiring, retention, promotion and retirement of civil servants, the obvious aim is to reduce the incidence of cronyism and nepotism prevalent in the appointment and promotion of public officials. A number of studies on the causes of corruption have cited low wages as
a reason for the high incidence of corruption in the public sector. This may be true certainly at the lower levels of public sector employment. With this in sight, a provision requiring SPs to promote adequate remuneration subject to their levels of economic development is also included.\(^{83}\) Whether this will see a significant rise in wages is debatable since many of the developing countries do not have the public funds to meet the wage demands. This shortfall is partly attributable in many cases to evasion of taxes on the part of high income groups and companies. Unless these areas are tightened it may take some time for developing countries to meet this requirement.

The public sector measures are further strengthened by Article 8 through the establishment of codes of conduct for the correct, honourable and proper performance of public functions. Many countries probably have such codes of conduct in place. How seriously these are followed is another matter. Monitoring and introduction of internal disciplinary actions may be one way of ensuring compliance, and in a discretionary tone, Article 8(6) suggests that SPs consider disciplinary and other measures for those who violate the standards or codes of conduct.

Specific provisions on the measures to be taken in respect of activities such as public procurement and management of public finances, which are known to present fertile opportunities for corrupt activities, are also included. Article 9 indicates the steps that SPs need to adopt to ensure transparency and objectivity in public procurement contracts, thus limiting the scope for corrupt activities. SPs are expected to ensure that information about tenders is publicly distributed, and that the conditions of participation and criteria for selection are clear. Where rules of procedure are not followed, the provisions also make room for an effective system of appeal.

\(^{83}\) Article 7(c).
Any anti-corruption drive needs to ensure that the judiciary and prosecution services are not corrupted. Mindful of the problem of corruption in these sectors in many countries\textsuperscript{84} the UN Convention requires SPs to take measures to strengthen the integrity of and to prevent opportunities for corruption among members of these services.\textsuperscript{85} It suggests once again codes of conduct in this context, but these are likely to work only if effective measures for their monitoring are put in place.

Moving on to the private sector, anti-corruption measures are addressed through enhanced accounting and auditing standards along with effective, proportionate and dissuasive civil, administrative and criminal penalties for failure to comply. Codes of conduct are also seen as a means of strengthening the integrity and proper performance of business activities by the actors in the private sector.\textsuperscript{86} Moreover, as in the OECD Convention SPs are required to disallow tax deductibility of expenses that constitute bribes as well as other expenses incurred in furtherance of corrupt conduct.

Since financial institutions play a major role in depositing and transferring illicitly obtained funds across borders Article 14 requires SPs to take adequate measures to prevent money laundering by instituting a comprehensive regulatory and supervisory regime for banks and other financial institutions, including the keeping of meticulous records and the taking of adequate measures to check customer identification and reporting suspicious transactions. Since many money transfers are carried out electronically where the identity of the originator may not always be clear, the UN

\textsuperscript{84} On corruption in the judiciary, see for instance, ‘Tanzania: Corruption in the Police, Judiciary, Revenue and Land Services’ available at \url{http://www.ciet.org}.

\textsuperscript{85} Article 11.

\textsuperscript{86} Article 12.
Convention requires that such information should be clearly included and maintained through the payment chain.

All of the above preventive measures make a constructive and important contribution to combating corruption. However, there is one major weakness. While adoption of codes of conduct is easy, integrity can be assured only if they are followed assiduously. Without effective monitoring, it remains another set of rules to be broken with impunity, especially in developing countries that lack resources. Against this potentially gloomy backdrop, the UN Convention seems to have taken the right approach by requiring SPs to bring in other stakeholders, such as citizens, community-based organisations, non-governmental organisations and activists, within the preventive measures. The UN sees a greater role for the public in the decision-making processes within a State and for the State to put in place measures for greater access to information. It even goes as far as indicating that the detrimental effects of corruption and non-tolerance of corruption should be part of the school and university curricula.87 Once again, it is possible to criticize this as nothing more than an expression of ideals, since many of the countries that have ratified the UN Convention suffer from high rates of illiteracy. And in countries that lack a democratic structure, it is unlikely that they will adopt the trappings of democracy such as access to information and citizen participation in decision-making. A nihilistic picture can be painted of any convention. However, what has to be kept in mind is that it will take time to introduce changes, and the UN Convention is not meant to be a quick-fix solution to the problem that has plagued humanity for centuries.

87 Article 13.
Conclusion

Will the UN Convention make a difference to millions of people around the world who are living below the poverty line? The coming into force of an international convention and the numbers of ratification are a clear sign that the international community of policymakers and lawmakers recognize the impact of corruption on poverty and the need to find a solution. This recognition is important, but a solution through legal regulation of itself is insufficient in achieving the objective of reducing corruption and having an impact on poverty globally. Legal regulation is always prone to enforcement deficit for a number of reasons ranging from lack of investigative expertise and mutual co-operation to political apathy. Without the political will of SPs and the willingness of civil society to take ownership of the problem, the UN Convention will remain just an interesting attempt to promote a global solution to a global problem. There are many elements in the UN Convention that can be used constructively in the fight against corruption, such as the recommendations in respect of public education, and the role of stakeholders such as civil society and non-governmental organisations. However, it is the willingness and enthusiastic participation of the stakeholders that would make a real difference to the quality of life of millions of people round the world. Even so, the UN Convention is an important catalyst in waking up a slumbering world.