VISITING EXPERTS' PAPERS

INTERNATIONAL ANTI-CORRUPTION INITIATIVES

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I. INTRODUCTION

Efforts have been ongoing within various international *fora* to combat corruption through negotiating international instruments, exchanging information, and promoting international co-operation and technical assistance in the field. The necessity of States joining together to combat corruption has also been promoted at the highest political levels. This has been the result of a recognition that corruption weakens democratic institutions and public administration, undermines good governance, fairness and social justice, distorts the economy and competition, hinders economic and social development and damages a society's moral fibre. Of growing concern is that corruption is used as a tool by organised crime to achieve its criminal goals.

Governments and non-governmental organisations have become convinced that the public must become aware of this problem and participate in its prevention, and that governments must exert coordinated action, both domestically and internationally, to fight it effectively. In result, in the last decade the issue of corruption has taken priority in the work programmes of many international organisations, both inter-governmental and non-governmental. This work has included the negotiation of international instruments and other legal measures, implementing various regulatory, preventive and educational measures and providing technical assistance and cooperation.

While acknowledging that the fight against corruption requires multi-disciplinary action, this paper will survey only a number of initiatives undertaken by a number of international and inter-governmental organisations, primarily with respect to legal measures in the criminal law area to fight corruption.

II. ORGANIZATION OF AMERICAN STATES

In 1994, at the Summit of the Americas, Heads of State and of Governments in the Americas endorsed a Plan of Action, which called upon the Organization of American States (OAS) to develop a hemispheric approach to acts of corruption. After several preparatory meetings, the Specialised Conference on the Draft Inter-American Convention against Corruption was held in Caracas, Venezuela on March 27, 28 and 29, 1996. The Convention was concluded on March 29, 1996. Twenty-one Member States (out of thirty-four Member States) signed the Convention on that date, and the Convention entered into force on March 6, 1997.

This was the first international convention to be negotiated that provides for criminalizing the bribery of foreign public officials. The OAS Convention has two purposes:

(1) to promote and strengthen within each State Party mechanisms necessary to prevent, detect, punish and eradicate corruption; and

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The views expressed herein represent those of the author and do not necessarily represent the views of the Department of Justice.

(2) to promote, facilitate and regulate co-operation among States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption.[1]

The Convention describes a number of acts of corruption which States Parties are obliged to criminalize under their domestic law, and further obligates them to consider establishing various preventive measures, consider the establishment of other optional offences and provide international co-operation in the investigation of corruption. The Convention is applicable to, and States Parties shall adopt the necessary legislative or other measures to establish as criminal offences, the following acts of corruption:

- Solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit (such as a gift, favour, promise or advantage for him or herself or for another person or entity), in exchange for any act or omission in the performance of his or her public functions;

- Offering or granting, directly or indirectly, to a government official or a person who performs public functions, any such article of monetary value or other benefit as described above;

- Any act or omission in the discharge of duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for him/herself or for a third person;

- Fraudulent use or concealment of property from any of the acts referred to; and

- Participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any association or conspiracy to commit, any of the acts referred to.[2]

The Convention also contains a number of optional obligations concerning criminalisation, which are conditional and subject to a State's Constitution and the fundamental principles of its legal system. The first of these involves transnational bribery. Each State Party shall prohibit and punish its nationals, persons having their habitual residence in its territory, and businesses domiciled there, for offering or granting, directly or indirectly, to a government official of another State, any article of monetary value, or other benefit (such as a gift, favour, promise or advantage) in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions. The second optional offence involves illicit enrichment. Each State Party shall take the necessary measures to establish under its laws as an offence "*a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions*".[3]

Such offences shall be considered as an act of corruption, for the purposes of the Convention, among those States Parties that have established transnational bribery or illicit enrichment as an offence,

[1] Organization of American States, *Inter-American Convention Against Corruption* (hereinafter "OAS"), Article II.

[2] OAS, Article VI and VII.

[3] OAS, article IX.

respectively. However, even State Parties that have not established transnational bribery or illicit enrichment as an offence shall, insofar as their laws permit, provide assistance and co-operation with respect to those offences, as provided in the convention.[4]

In order to foster the development and harmonization of their domestic legislation and the attainment of the purpose of the Convention, the States Parties are also obliged to consider establishing as offences under their laws the following acts of corruption:

- Improper use by a government official or a person who performs public functions, for his or her own benefit or that of third party, of any classified or confidential information which that official or person has obtained because of, or in the performance of, his of her functions;

- Improper use by such an official or person, for his or her own benefit or that of a third party, of any kind of property belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person has access because of, or in performance of, his or her function;

- Any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he or she illicitly obtains for him or herself or for another person any benefit or gain, whether or not such act or omission harms State property; and

- Diversion by a government official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any moveable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his or her position for the purposes of administration, custody or for other reasons.[5]

Such offences shall be considered as acts of corruption for the purpose of the Convention among those State Parties that have established these offences under domestic law. Any State Party that has not established these offences shall, nevertheless, be obligated, insofar as its laws permit, to provide assistance and co-operation with respect to these offences, as provided in the Convention.[6]

Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences it has established (in accordance with the Convention) when committed in its territory, and may adopt jurisdiction where the offence was committed by one of its nationals or by a person who habitually resides in its territory. It shall also establish jurisdiction over an alleged criminal who is present on its territory and it does not extradite such a person to another country on the grounds of the nationality of the alleged criminal.[7]

With respect to extradition, each of the offences established by the States Parties in accordance with the Convention shall be deemed to be included as an extraditable offence in any extradition treaty between the State Parties, and if no extradition treaty exists between two State Parties,

[4] OAS, Article VIIIand IX.

[5] OAS, Article XI para. 1.

[6] OAS, Article, XI paras. 2 and 3.

[7] OAS, Article V.

they may consider the Convention as the legal basis for extradition. State Parties that do not make extradition conditional on the existence of a treaty shall recognise Convention offences as extraditable offences. If extradition is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offence, the Requested State shall submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the Requesting State.[8]

States Parties shall also afford one another the widest measure of mutual assistance by processing requests either through Central Authorities[9] or from authorities that have the domestic power to investigate or prosecute the acts of corruption described in the Convention.[10] They shall also provide each other with the widest measure of mutual technical co-operation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption. This would include exchanges of experience by way of agreements and meetings, with special attention to methods and procedures of citizen participation in fighting corruption.[11]

State Parties shall also provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of Convention offences. A State Party may, to the extent permitted by its laws, transfer all or part of such property or proceeds to another State Party that assisted in the underlying investigation or proceedings.[12]

Bank secrecy shall not be invoked by the Requested State as a basis for refusal to provide assistance sought by the Requesting State. In reciprocity, the Requesting State is obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorised by the Requested State.[13]

For the purpose of the articles concerning extradition, mutual assistance in general and assistance in respect of measures regarding property and bank secrecy, the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offence or as a common offence related to a political offence.[14]

Subject to the constitutional principles and the domestic laws of each State, and existing treaties between the States Parties, procedural co-operation in criminal matters may be given with respect to an act of corruption that was committed before the entry into force of the Convention. However, the principles of non-retroactivity in criminal law and the application of existing statutes of limitation relating to crimes committed prior to the date of entry into force shall not be affected by the Convention.[15] Likewise, nothing in the Convention prevents the State Parties from providing mutual co-operation within the framework of other bilateral or multilateral agreements or arrangements.[16]

[8] OAS, Article XIII.

[9] OAS, Article XVIII.

[10] OAS, Article XIV, para. 1.

[11] OAS, Article XIV, para. 2.

[12] OAS, Article XV.

[13] OAS, Article XVI.

[14] OAS, Article XVII.

[15] OAS, Article XIX.

[16] OAS, Article XX.

Additionally, the Convention obligates State Parties to consider the applicability of a number of preventive measures within their own institutional systems to create, maintain and strengthen:

- Standards of conduct for the correct, honourable, and proper fulfilment of public functions, in order to prevent conflicts of interest and ensure the proper conservation and use of resources entrusted to government officials in the performance of their functions, including the establishment of measures and systems requiring government officials to report acts of corruption in the performance of public functions;

- Mechanisms to enforce these standards of conduct;

- Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities;

- Systems for disclosing the income, assets and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such disclosures public;

- Systems of government hiring and procurement of goods/services that assure the openness, equity and efficiency of such systems;

- Government revenue collection and control systems that deter corruption;

- Laws that deny favourable tax treatment for expenditures made in violation of anti-corruption laws;

- Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal system;

- Oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts;

- Deterrents to the bribery of domestic foreign government officials, such as mechanisms to ensure that companies and associations maintain accurate and reasonably detailed books and records, which reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to detect corrupt acts;

- Mechanisms to encourage participation by civil society and non-governmental organisations in an effort to prevent corruption; and

- Study further preventive measures that take into account the relationship between equitable compensation and probity in public service.

On June 5, 1997, the OAS General Assembly adopted a Program for Inter-American Cooperation in the Fight against Corruption. Among other things, this program calls for a strategy to secure prompt ratification of the OAS Convention. The Second Summit of the Americas was held from April 18-19, 1998 in Santiago, Chile. Corruption was a featured theme under the Human Rights and Democracy section of the Summit agenda. Among other things, this section of the action plan, approved by leaders in Santiago, calls upon governments to adopt strategies to achieve prompt ratification of the OAS Convention.

A Symposium on Enhancing Probity in the Hemisphere was held in Santiago, Chile, on November 4-6, 1998. Participants included representatives of national institutions and of international agencies involved in the fight against corruption. Participants explained the underlying legal basis, sphere of competence, and functions of those bodies, as well as exiting mechanism of co-ordination with other national institutions. Presentations were also made by representatives of international organisations on how national organisations could improve their fight against corruption and better co-ordinate their activities with non-governmentnal institutions. The Symposium urged all governments to ratify the OAS Convention before the year 2000, and produced a number of conclusions and recommendations.

In 1996, following the negotiations of the Inter-American Convention against Corruption, the OAS General Assembly commissioned the Inter-American Juridical Committee (IAJC) of the Organization of American States to prepare model legislation covering transnational bribery and illicit enrichment (Articles VIII and IX of the Convention, respectively), which could be used by Member States as a guide to implementing those articles of the Convention.[17] The Committee, in the course of its work, concluded that the differences among the legal systems of Members States, in terms of criminal law, even among those with the same language, juridical tradition and similar historical background, were far deeper and more varied than those in other branches of the law. Therefore, the Juridical Committee drafted a minimum number of basic articles (which it acknowledged would probably not be adopted as they stand by any state), together with a commentary, as a guide for legislators. These are contained in its report, dated January 29, 1999, entitled "Model Legislation on Illicit Enrichment and Transnational Bribery". [18] The report was presented to the Permanent Council of the OAS in the spring of 1999.

III. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Corruption of public officials has been viewed as a major problem affecting international trade and investment. Accordingly, the Organisation for Economic Co-operation and Development (OECD), which is a major economic policy forum for the world's most advanced industrialised democracies, has focused attention on this issue. The OECD has 29 members, which include Canada, the United States, most European countries, Japan and South Korea.

In May of 1997, a Ministerial meeting at the OECD called for the negotiation of a binding convention to address the bribery of foreign public officials. Ministers urged that the convention be finalised by the end of 1997, and recommended that Member countries should submit legislative proposals to criminalise such bribery to their national legislatures and seek their enactment by the end of 1998. On June 21, 1997, leaders at the Summit of Seven Industrialised Countries, at their meeting in Denver, Colorado, issued a statement in which the leaders endorsed this approach and timetable. Negotiations commenced with earnest and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was concluded on November 21, 1997. On December 17, 1997, the Convention was signed by Member States

[17] OAS, AG/RES. 1395 (XXVI-0/96).

[18] *Model Legislation on Illicit Enrichment and Transnational Bribery*, OEA/Ser.Q, CJI/doc. 21/99, 29 January 1999.

of the OECD, and by 5 non-Member States, Argentina, Brazil, Bulgaria, Chile and Slovak Republic. On May 17, 1998, in the Final Communique of the G-8 Summit, held in Birmingham, United Kingdom, the Heads of State and Government pledged to make every effort to ratify the OECD Convention by the end of 1998.

Five of the ten OECD countries with the largest share of OECD exports were required to ratify the Convention in 1998 in order to trigger its entry into force. Canada ratified the OECD Convention on December 17, 1998, and by becoming the fifth country to ratify the Convention (out of the ten countries with the largest share of OECD exports, and representing at least sixty percent of the combined total exports of those ten countries, which was a threshold condition for entry into force), the other four countries and Canada were able to trigger the entry into force of the Convention sixty days after the deposit of Canada's instrument of ratification. Thus, the Convention entered into force on February 15, 1999.

The Convention obligates each Party to take such measures as may be necessary to establish as a criminal offence under its law the intentional offering, promising or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for the benefit of that official or a third party, in order that the official act or refrain from acting in relation to the performance of official duties, for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business.[19] Likewise, acts of complicity, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign official, shall also be criminal offences. Attempt and conspiracy shall also be criminalised to the same extent as they are in relation to bribing a public official of that Party.[20]

For the purposes of the Convention, "foreign public official" is defined as meaning "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation. The phrase "act or refrain from acting in relation to the performance of official duties" includes "any use of the public official's position, whether or not within the official's authorised competence".

These criminal offences "shall be punishable by effective, proportionate and dissuasive criminal penalties", which are "comparable to that applicable to the bribery of the Party's own public officials", including deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.[21] The bribe and the proceeds of the bribery of a foreign public official, or property of a corresponding value to such proceeds, are to be subject to seizure and confiscation or to the imposition of monetary sanctions of comparable effect.[22] Where a Party has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation, that Party shall also apply the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.[23]

[19] Organization for Economic Cooperation and Development, *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* (hereinafter "OECD"), Article 1, para. 1.

[20] OECD, Article 1, para. 2.

[21] OECD, Article 3, para. 1.

[22] OECD, Article 3, para. 3.

[23] OECD, Article 7.

Each Party shall also take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.[24] In the event that criminal responsibility is not applicable to legal persons under the legal system of a Party, that Party "shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials."[25]

Regarding jurisdiction, each Party is obligated to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.[26] Additionally, where a Party has jurisdiction to prosecute its nationals for offences committed abroad, it shall take such measure as may be necessary to establish its jurisdiction in respect of the bribery of a foreign public official by one of its nationals, according to the same principles. Each Party shall also "review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps."[27]

The investigation and prosecution offences regarding the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party, but they "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[28] Any statute of limitations applicable to the offence of bribery of a foreign official shall provide an adequate period of time for the investigation and prosecution of this offence.[29]

The Convention also provides obligations regarding accounting practices and auditing standards. Within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, each Party shall take such measures as are necessary "to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery."[30] Effective, proportionate and dissuasive civil, administrative or criminal penalties shall be provided for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.[31]

With respect to international co-operation, each Party shall, "to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person." Importantly, a Party "shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of

[24] OECD, Article 2.

[25] OECD, Article 3, para. 2.

[26] OECD, Article 4, para. 1.

[27] OECD, Article 4, para. 4.

[28] OECD, Article 5.

[29] OECD, Article 6.

[30] OECD, Article 8, para. 1.

[31] OECD, Article 8, para. 2.

bank secrecy."[32] Bribery of a foreign public official shall also be deemed to be included as an extraditable offence under the laws of the parties and any extradition treaties between them; and, if no treaties exist between two Parties, they may consider the Convention as the legal basis for extradition. Each Party shall also assure that it can either extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. If a Party declines a request solely on the ground of nationality, it shall submit the case to its competent authorities for the purpose of prosecution.[33] Where dual criminality is a requirement for mutual legal assistance or for extradition, it shall be deemed to exist if the offence for which the assistance or extradition is sought is within the scope of the Convention.[34]

Of long term significance is the fact that the Convention provides for a mechanism for monitoring and follow-up. Article 12 obligates the Parties to "co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention." Unless otherwise decided by consensus of the Parties, this programme shall be carried out in the framework of the OECD Working Group on Bribery in Intentional Business Transactions. The OECD has already embarked on a programme of evaluation and assessment of Parties' efforts to implement the convention, and each Party is subject to a review and assessment by two other Parties and the results are subject to review by the Working Group.

IV. COUNCIL OF EUROPE

In September 1994, the Committee of Ministers of the Council of Europe, following a proposal of the 19th Meeting of the European Ministers of Justice (Malta, June 1994), established a Multidisciplinary Group on Corruption (GMC) to examine what measures might be suitable to constitute a programme of action against corruption, to make recommendations, and to examine the possibility of drafting model laws or codes, including an international convention, and of organising or promoting research project, training and exchanges of experiences.

In November 1996, a Programme of Action against Corruption, developed by the Multidisciplinary Group on Corruption, was adopted by the Committee of Ministers of the Council of Europe. The Programme of Action, examined the nature and reasons for corruption, and set out a work programme that included examining and making recommendations in a number of areas, including criminal law, administrative law, fiscal aspects, civil law, institutions and categories of persons with special roles and responsibilities as regards corruption, prevention, investigation and sanctioning of corruption, international co-operation and a number of areas related to financing of political parties, role of lobbyist organisations, role of the media, and research, training and exchange of practical experiences.[35] The Committee of Ministers mandated the Multidisciplinary Group on Corruption (GMC) to develop international instruments to give effect to the Programme of Action and to implement the Programme of Action before December 31, 2000.

At the 21st Conference of European Ministers of Justice, held in Prague, Czech Republic, in June 1997, Ministers recommended accelerating the

[32] OECD, Article 9.

[33] OECD, Article 10.

[34] OECD, Article 9, para.2, and Article 10, para. 4.

[35] Multidisciplinary Group on Corruption (GMC), Programme of Action Against Corruption, GMC (96) 95.

implementation of the Programme of Action against Corruption, and intensifying efforts with a view to the early adoption of, among other things, a criminal law convention that would provide for the co-ordinated incrimination of corruption offences among states, enhanced co-operation for the prosecution of such offences and an effective follow-up mechanism open to both Member States and Non-member States.

At the Second Summit of Heads of State and Government of the Member States of the Council of Europe, held in Strasbourg on October 10 to 11, 1997, an Action Plan was adopted which included an instruction to the Committee of Ministers to adopt guiding principles against corruption and to secure the rapid completion of international legal instruments pursuant to the Programme of Action against Corruption.

On November 6, 1997, at its 101st session, the Committee of Ministers of the Council of Europe adopted the 20 Guiding Principles for the Fight against Corruption. These principles set out a number of goals that should be achieved to fight corruption, and addressed a number of areas such as public awareness, co-ordination at the national and international level, adequate resources for and independence of those fighting corruption from undue and improper influences, seizure and deprivation of proceeds of corruption, corporate liability, transparency of public administration and procurement procedures, appropriate auditing procedures, systems of public liability and accountability, codes of conduct and rules for financing of political parties and election campaigns, and effective remedies and sanctions against corruption[36] The Committee of Ministers also instructed the GMC to rapidly complete the elaboration of an instrument to establish a mechanism to monitor the observance of the Guiding Principles and the elaboration of the international legal instruments to be adopted.

On May 5, 1998, the Committee of Ministers adopted Resolution (98) 7 authorising the establishment of the "Group of States against Corruption" (GRECO) in the form of a partial and enlarged agreement which aims at improving the capacity of states to fight corruption by following up compliance with their undertakings in the fight against corruption. GRECO will monitor implementation of the Convention and the application of the 20 Guiding Principles, as well as other conventions and legal instruments developed by the Council of Europe in the area of corruption. The Committee of Ministers invited Member States and Non-member States having participated in the elaboration of the Agreement to join the GRECO. GRECO will come into force when 14 States have indicated their desire to join it, which occurred in early 1999. GRECO started operating in May 1999.

On November 4, 1998, the Committee of Ministers adopted the Criminal Law Convention and decided to open it for signature on January 27, 1999. On January 27, 1999, 21 European states signed the Criminal Law Convention, and as of September 15, 1999, 30 states have now signed. It will come into force when ratified by 14 States. The Convention is open to the accession of Non-member States. The Criminal Law Convention on Corruption seeks to achieve co-ordinated criminalisation of a wide range of corrupt practice by harmonised national legislation and improved international co-operation.

[36] Council of Europe, Committee of Ministers, *Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption*.

It complements existing legal instruments and covers the following forms of corruption and corrupt behaviour:

- Active and passive bribery of domestic and foreign officials;[37]
- Active and passive bribery of national and foreign parliamentarians, which exercise legislative or administrative powers,[38] and members of parliamentary assemblies of international or supranational organisations of which a Party is a member;[39]
- Active and passive bribery in the private sector (i.e, active or passive bribery by "persons who direct or work for, in any capacity, private sector entities") ;[40]
- Active and passive bribery of international civil servants;[41]
- Active and passive bribery of domestic, foreign and international judges and officials of international courts;[42]
- Trading in influence;[43]
- Money-laundering of proceeds from corruption offences;[44]
- Accounting offences (invoices, accounting documents, etc) connected with corruption offences.[45]

"Active bribery" is defined to mean the intentional "promising offering or giving by any person, directly or indirectly, of any undue advantage "to any public official, for the benefit of that official or for anyone else, in order that the public official refrain from acting in the exercise of his or her functions.[46] "Passive bribery" is defined to mean the intentional request or receipt by any public official, directly or indirectly, of any undue advantage, for the benefit of that public official or anyone else, or the acceptance of an offer or a promise of such an advantage, in order that the public official act or refrain from acting in the exercise of his or her functions.[47]

"Trading in influence" means intentionally "promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making" of any public official, member of a public assembly, member of an international organisation, parliamentary assembly or court within the scope of the Convention, in consideration thereof. It is irrelevant whether the undue advantage is for himself or herself or for anyone else. The term "trading in influence" also applies to the intentional "request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."[48]

[37] Council of Europe, *Criminal Law Convention on Corruption*, (hereinafter "COE"), Articles 2, 3 and 5.

[38] COE, Articles 4 and 6.

[39] COE, Article 10.

[40] COE, Articles 7 and 8.

[41] COE, Article9 (i.e., "any official or other contracted employee, with the meaning of the staff regulations, of any public international or supranational organisation or body of which the Party is a member, and any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents").

[42] COE, Article 11.

[43] COE, Article 12.

[44] COE, Article 13.

[45] COE, Article 14.

[46] COE, Article 2.

[47] COE, Article 3.

[48] COE, Article 12.

"Accounting offences" refers to the following acts or omissions, when committed intentionally, in order to commit, conceal, or disguise a corruption offence within the scope of the Convention:

(a) creating or using an invoice or any other accounting document or record containing false or incomplete information; or
(b) unlawfully omitting to make a record of a payment.[49]

Under the Convention, Parties are obligated to establish jurisdiction over the Convention offences where:

(1) the offence is committed on its territory;
(2) the offender is one of its nationals, one of its public officials, or a member of one of its domestic assemblies; or
(3) the offence involves one of its public officials or members of its domestic public assemblies, or any person referred to in any of the articles establishing corruption offences who is one of its nationals.[50]

The third basis of jurisdiction is intended to include the exercise of jurisdiction where the person who is bribed is a national of the Party.

Parties are also obligated to ensure that corporate liability exists in respect of the criminal offences of active bribery, trading in influence and money laundering where the offence is committed for the benefit of the legal person by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person. This leading position can be based on a power of representation of an authority to take decisions on behalf of, or an authority to exercise control within, the legal person. Additionally, a Party shall ensure that a legal person can be held liable where the lack off supervision or control by the natural person, who has a leading position, has made possible the commission of the criminal offence for the benefit of the legal person. Any liability for the legal person does not exclude any criminal liability against the natural person.[51]

Each Party is obligated to provide that the criminal offences established have effective, proportionate and dissuasive sanctions and measures, including, in the case of natural persons, penalties involving deprivation of liberty and in the case of legal persons, non-criminal sanctions and monetary sanctions. Likewise, Parties are obligated to confiscate or otherwise derive the instrumentality's and proceeds of Convention criminal offences or property, the value of which corresponds to such proceeds,[52] and to adopt such legislative or other measures as may be necessary, including those permitting the use of special investigative techniques, to facilitate the gathering of evidence and to identify, trace, freeze and seize instrumentalists and proceeds.[53] These measures include the authority to order that bank, financial or commercial records are made available or seized and that bank secrecy not be an obstacle to any of the measures provided.[54]

The Convention also contains provisions to ensure that persons or entities specialised in the fight against corruption have the necessary independence to carry out their functions free from undue pressure and are adequately trained and

[49] COE, Article 14.
[50] COE, Article 17.
[51] COE, Article 18.
[52] COE, Article 19.
[53] COE, Article 23.
[54] Ibid.

financially resourced,[55] public authorities and public officials co-operate with investigating and prosecuting authorities,[56] and effective and appropriate protection is provided for those who report Convention criminal offences or who are witnesses.[57]

With respect to international co-operation, Parties are obligated to co-operate to the widest extent possible for the purposes of investigation and proceedings concerning Convention offences, and may use the Convention as the basis for co-operation where no bilateral or other international instrument or arrangement exists.[58] Mutual legal assistance may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or public order, but shall not invoke bank secrecy as a ground of refusal.[59] Likewise, the Convention can be used as the basis for extradition with respect to Convention offences, and Parties are obligated to recognise Convention offences as extraditable offences. If extradition is refused solely on the basis of the nationality of the person sought, or because the requested Party considers that it has jurisdiction over the offence, the requested Party shall submit the case to its competent authorities for the purpose of prosecution[60]. The Convention also contains provisions concerning the provision of spontaneous information by a Party to another Party when it considers that disclosure might assist an investigation[61], as well as the use of Central Authorities[62], and direct communications between judicial authorities in the event of urgency.[63]

V. UNITED NATIONS

In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a resolution on *Corruption in Government* [64] which, in addition to inviting and urging Member States to review the adequacy of their laws and procedures to respond to corruption, requested that the United Nations organisation provide technical cooperation and assistance to develop anti-corruption programmes, law reform, training, etc. The organisation was also requested to develop a code of conduct for public officials and to develop a manual on practical measures against corruption.

In 1993, the United Nations published a manual addressing practical measures against corruption.[65] The manual contains a number of chapters addressing issues such as penal laws, administrative and regulatory measures, procedures for the detection, investigation and conviction of corrupt officials, forfeiture of property and proceeds, economic sanctions against enterprises and training, and exchange of international experience.

At the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cairo, Egypt, in 1995, a special session was devoted to the subject of corruption. A *Background paper prepared by the*

[55] COE, Article 20.
[56] COE, Article 21.
[57] COE, Article 22.
[58] COE, Article 25.
[59] COE, Article 26.
[60] COE, Article 27.
[61] COE, Article 28.
[62] COE, Article 29.
[63] COE, Article 30.
[64] United Nations, Economic and Social Council, Resolution 1990/23 of 24 May 1990.
[65] United Nations, "Crime Prevention and Criminal Justice in the Context of Development: Realities and Perspectives of International Cooperation, Practical Measures against Corruption", 41 & 42 International Review of Criminal Policy (1993).

Secretariat on international action against corruption was distributed.[66] The paper presents various characteristics of corruption, as well as its adverse effects on development. Various measures against corruption and recent international initiatives are discussed, as well as the role of international organisations in the fight against corruption.

In the autumn of 1996, the United Nations General Assembly adopted two resolutions concerning corruption. The first, *Action Against Corruption*, to which was annexed an International Code of Conduct for Public Officials.[67] The resolution on the Code of Conduct had been prepared by the UN Commission on Crime Prevention and Criminal Justice. The Code addresses areas such as loyalty to the public interest, effective and efficient administration of public resources, fair and impartial performance of functions, conflict of interest and declaration of possible conflicts, improper use of public property, disclosure of assets, acceptance of gifts or favours, confidentiality of information and political activity. The resolution called upon States to implement the resolution and Code of Conduct.

The second resolution, adopted the *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*.[68] The Declaration called upon States to commit themselves *inter alia* to take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions and, in particular, to criminalise the bribery of foreign public officials in connection with an international commercial transaction, deny the tax deductibility of bribes, develop accounting standards and practices that improve the transparency of international commercial transactions, develop business codes, standards or best practices, examine the criminalisation of illicit enrichment, afford the greatest possible cooperation and assistance to other States in the criminal investigation and prosecution of corruption and bribery, and ensure that bank secrecy does not impede or hinder criminal investigations.

Pursuant to General Assembly resolution 51/59 and ECOSOC resolution 1995/14, a report was prepared in 1997 by the Secretary General that reviews various forms of corruption and several anti-corruption initiatives taken by international bodies and describes possible elements and means to implement the above-mentioned General Assembly resolutions and to promote the International Code of Conduct.[69] While observing that the fight against organised crime and corruption is predominantly presented as a challenge to the law enforcement community, it recognises that crime prevention concepts and techniques can be employed in the fight against corruptions and organised crime, particularly in limiting the opportunities for corruption.

At the sixth session of the UN Commission on Crime Prevention and Criminal Justice (1997), states were called

[66] United Nations, Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/Conf.169/14, 13 April 1995.

[67] United Nations General Assembly, 51st Session, Resolution 51/59.

[68] United Nations General Assembly, 51st Session, Resolution 51/191.

[69] United Nations, Economic and Social Council, "Promotion and Maintenance of the Rule of Law and Good Governance; Action against Corruption, Action against Corruption and Bribery, Report of the Secretary-General, E/CN.15/1997/3, 5 March 1997.

upon to commit themselves to take further action further to General Assembly resolution 51/191. It was also agreed that "combating corruption" would be a theme to be a addressed at a workshop to be held at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held in Vienna, Austria, in April 2000. At the seventh session of the Commission (1998), a resolution was adopted to request the updating of the *UN Manual on Practical Measures on Corruption* and for an experts' group to develop an international strategy against corruption. A meeting of experts was held in Paris in April 1999, and its recommendations were considered and welcomed by the Commission at its eighth session in May 1999.

Recently, the newly structured Centre for International Crime Prevention in Vienna, Austria, has prepared a *Global Programme Against Corruption* which is an outline for action against corruption in terms of research and technical cooperation and assistance. The research component is to undertake a global study on corruption, including identification of types and the effectiveness of anti-corruption measures, particularly in the areas of public administration, business and political-financial corruption. In addition, an international database is to be created which would contain information on best practices, relevant national legislation and regulatory measures of different countries and international instruments against corruption. The technical cooperation component, which is to be multidisciplinary in nature, is designed to strengthen or assist Member States to build and strengthen their institutional capacity in preventing, detecting and fighting corruption. Governments in which technical cooperation activities are to be implemented will be invited to sign a National Anti-Corruption Programme Agreement, which will express their political will to be bound to a technical assistance component to deal with the commercial aspects of corruption and bribery in international commercial transactions.

Currently, members of the United Nations are negotiating a Convention on Transnational Organised Crime. One of the proposals under consideration is to include a provision on corruption that would obligate states to criminalise acts of corruption committed by organised groups. The proposal is similar to that contained in the Council of Europe convention and would criminalise the offering or giving to a public official of an undue advantage to act or refrain from carrying out his or her functions or the receipt of such an advantage by the public official. Of some controversy is the proposal to extend the obligation to criminalise such acts to include also foreign public officials, international civil servants and judges, and officials of international criminal courts. Also being considered by the committee negotiating the Convention is the question whether much broader provisions against corruption, which address aspects other than criminalisation, should be the subject of a future protocol to the Convention or be the subject of a separate international Convention. The Committee is to report to the Commission on Crime Prevention and Criminal Justice on its recommendations.

VI. GLOBAL FORUM ON FIGHTING CORRUPTION

The first *Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials* was held in Washington, DC, from February 24 to 26, 1999, hosted by US Vice President, Al Gore. High-level representatives from 89 governments and others shared

experiences and examined the causes of corruption and the practices that are effective to prevent and fight it, particularly as regards corruption of justice and security officials. The costs of corruption on democracy, economic and social development and the rule of law were noted and participants called on governments to co-operate in appropriate regional and global bodies to rededicate themselves to adopt effective anti-corruption principles and practices and to assist each other through mutual evaluation.

While there were calls for a global convention to be negotiated, there was no consensus whether such a convention should be negotiated immediately or following the negotiation and implementation of regional anti-corruption conventions. Nevertheless, participants were committed to act and a second Global Forum on Fighting Corruption is to be held in the Netherlands in 2000. Immediately before the Global Forum, Ministers from eleven African countries meeting in Washington, DC, drafted a set of 25 principles on anti-corruption, good governance and accountability. There was a sense at the forum that these principles could be adopted by other African countries and serve as the basis for an African Convention Against Corruption, which could be negotiated within the Organization of African Unity.

VII. CONCLUSION

The political priority given to the issue of corruption has resulted in the negotiation of a number of regional and other international Conventions against various forms of corruption. This paper has attempted to survey a number of these initiatives, setting out their major elements. While most of these Conventions have been of a regional nature or of inter-governmental organizations of limited membership, there is a clear recognition that global solutions, including a global convention of some form, is required. It is anticipated that regional and other limited international Conventions will continue to be negotiated in the near future, but with the realisation and goal that a truly global convention is required and that its negotiation is imminent.