

THE INTERNATIONAL LEGAL FRAMEWORK AGAINST CORRUPTION: ACHIEVEMENTS AND CHALLENGES

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The article provides a tour d'horizon of the current international legal framework against corruption, which has made substantial progress over the last two decades. Nevertheless, both the legal framework and its implementation continue to face challenges, some of which must be addressed to ensure tangible improvements in the struggle against corruption. Part II of the article sketches the genealogy of the international legal framework regarding corruption, which was strengthened by the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted after United States pressure that followed the passing of the US Foreign Corrupt Practices Act. Part III outlines the achievements of the main international anti-corruption instruments, complementing the discussion by highlighting their main deficiencies. Special attention is paid to the United Nations and Organisation for Economic Co-Operation and Development instruments, as well as to the Council of Europe's monitoring mechanism, the Group of States against Corruption. Asia remains remarkably absent from the discussion, as the last continent without a regional anti-corruption convention. Anti-corruption initiatives within the international financial institutions and the most important private initiatives are also discussed. Part IV of the article identifies thematic challenges to the current global anti-corruption framework: definitional problems and cultural gift-giving practices; jurisdictional challenges regarding foreign corruption practices; asset recovery; the link between corruption and good governance and that between corruption and human rights; and private sphere corruption.

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‘The adoption of the *United Nations Convention against Corruption* will send a clear message that the international community is determined to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated ... The adoption of the new *Convention* will be a remarkable achievement. But let us be clear: it is only a beginning’.

— Kofi Annan¹

I INTRODUCTION

The present contribution provides an overview of the current international legal framework against corruption. The goal is not to describe each existing

¹ *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) Foreword (‘*UNCAC*’).

instrument in great detail; this exercise has been done elsewhere.² The aim is rather to give a *tour d'horizon* of the genealogy and the main achievements, features and objectives of the existing legal framework and to discuss the challenges it faces. Part II of this article sketches the genesis of the international legal framework regarding corruption. Part III outlines the main international anti-corruption instruments. Special attention will be paid to the United Nations and Organisation for Economic Co-Operation and Development ('OECD') instruments, as these have proven especially influential. Next to these instruments, we will refer to the Group of States against Corruption ('GRECO'), the monitoring mechanism of the Council of Europe ('CoE'); some other regional instruments outside Europe; anti-corruption initiatives within international financial institutions; and a few noteworthy private initiatives. In Part IV, specific challenges to the current global anti-corruption framework will be assessed: definitional problems; jurisdictional challenges regarding foreign corruption practices; asset recovery; the interface between corruption and good governance and that between corruption and human rights; and private sphere corruption. At the end, we provide a number of conclusions and present a number of discussion points.

II A GENEALOGY OF THE GLOBAL ANTI-CORRUPTION FRAMEWORK

On 9 December each year, the world celebrates International Anti-Corruption Day. The fact that such a symbolic day exists (and immediately precedes Human Rights Day on 10 December) reflects the international community's increased recognition of the importance of anti-corruption measures. Various factors have contributed to this, including the heightened awareness of the concrete impact of corruption. Attention has turned, for example, to: the financing of terrorist acts;³ the covering up of narcotics trafficking; and the impediments to the effective use of aid for economic growth and development caused by corrupt practices.

² See, eg, Tiziano Balmelli and Bernard Jaggy (eds), *Les Traités Internationaux contre la corruption: L'ONU, l'OCDE, le Conseil de l'Europe et la Suisse* [International Treaties against Corruption: The UN, the OECD, the Council of Europe and Switzerland] (Editions Interuniversitaires Suisse Lausanne, 2004); Indira Carr, 'Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?' (2007) 15 *European Journal of Crime, Criminal Law and Criminal Justice* 121; Daniel Dormoy, *La Corruption et le droit international* [Corruption and International Law] (Bruylant, 2010); Anna-Catharina Marsch, *Strukturen der internationalen Korruptionsbekämpfung: Wie wirksam sind internationale Abkommen?* [The Structure of International Law Combating Corruption: How Effective are International Agreements?] (Tectum Verlag, 2010); Alejandro Posadas, 'Combating Corruption under International Law' (2000) 10 *Duke Journal of Comparative & International Law* 345.

³ See, eg, *UNCAC* Preamble para 2: 'Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering'.

Corporate corruption scandals unearthed in recent years have provided further impetus to the anti-corruption movement.⁴

The surge in international anti-corruption tools, however, occurred surprisingly recently. During the Cold War, parties on both sides of the Iron Curtain were eager to support potential allies, with very little or no concern for the level of corruption within those states.⁵ In addition, some economists in the 1970s claimed that certain types of corruption could actually be beneficial to society.⁶ This belief was best summarised in Samuel Huntington's conclusion that 'the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy'.⁷ These two factors, among others, impeded a comprehensive, in-depth anti-corruption policy at the international level.

Domestic evolution in the United States was an important impetus for the anti-corruption movement. In the late 1960s and 1970s, the US was afflicted by corruption scandals (notably the Watergate scandal), which thrust the anti-corruption debate onto the political agenda.⁸ In 1977, the US Congress took on a pioneering role and adopted the *Foreign Corrupt Practices Act* ('FCPA'),⁹ the first law prohibiting transnational bribery. The scope of the *FCPA* is limited

⁴ Well-known examples include the corruption allegations against BAE Systems and Siemens: *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 ('BAE Case'); *United States v Siemens Aktiengesellschaft (Plea Agreement)* (DC, No 1:08-CR-00367-RJL, 6 January 2009) ('Siemens Plea Agreement'). The corruption charges against Siemens did not need to be decided at trial because they were resolved via a plea agreement. In the *BAE Case*, the United Kingdom's Serious Fraud Office had launched a criminal investigation into alleged corruption by BAE, who was the main contractor in an arms contract between the governments of the UK and Saudi Arabia. The House of Lords held that it was lawful for the investigation to be discontinued because of national interest considerations, namely the threats to the lives of British citizens if the investigation was to proceed. See also Indira Carr and Miriam Goldby, 'Recovering the Proceeds of Corruption: UNCAC and Anti-Money Laundering Standards' (2011) 2 *Journal of Business Law* 170, 172.

⁵ Michael Kubiciel, 'Core Criminal Law Provisions in the *United Nations Convention against Corruption*' (2009) 9 *International Criminal Law Review* 139, 140; Philippa Webb, 'The *United Nations Convention against Corruption*: Global Achievement or Missed Opportunity?' (2005) 8 *Journal of International Economic Law* 191, 193.

⁶ James Thuo Gathii, 'Defining the Relationship between Human Rights and Corruption' (2009) 31 *University of Pennsylvania Journal of International Law* 125, 127, 134–7.

⁷ Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press, 1968) 69. Huntington argues that an increase in corruption was a positive signal of a society's evolution towards modernisation: at 59–62. He links corruption to modernisation in three ways. First, modernisation implies a distinction between public office and private loyalty and between public welfare and private interest. It requires meritocratic rewards based on universalised standards instead of family or other private sphere ties. Huntington argues that the introduction of achievement-based standards makes reliance on family-based identity and support even more important, thus enhancing the (ab)use of public functions for private (family) gain. Secondly, modernisation creates new sources of power and wealth, where the existing norms have not yet provided for the integration of new groups of economic power into the political process dominated by those who already held power. Corruption, Huntington argues, provides a means for such integration, where relevant norms have not followed the pace of the modernising process. Thirdly, according to Huntington, modernisation goes hand in hand with centralising government and increased government intervention, which in turn creates additional opportunities for corruption.

⁸ Posadas, above n 2, 348. The companies involved in the corruption scandals involved major players such as Exxon, ITT and Lockheed: Gathii, above n 6, 138.

⁹ *Foreign Corrupt Practices Act of 1977*, 15 USC § 78dd-1 (1977) ('FCPA').

to corrupt practices related to business transactions; it does not cover corrupt practices outside of the commercial sphere.

US corporations felt threatened by the stringent *FCPA* provisions and feared losing business,¹⁰ whereupon the US government started lobbying for an international anti-corruption treaty to level the international playing field. Negotiations within the UN Economic and Social Council ('ECOSOC') focused on the *offering* of bribes by transnational corporations from developed countries, rather than on the demand for bribes by public officials in (mainly) developing countries. States from the global South pressed for the anti-corruption negotiations to be tied to the highly polarised discussions on a code of conduct for transnational corporations. This highly sensitive political debate broke down in 1981 due to divisions between the developed and developing worlds.¹¹

The US then refocused on a more promising international forum: the OECD. The US efforts proved fruitful; in 1997, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ('*OECD Convention*') was adopted.¹² Thereafter, the OECD surpassed the UN as the leading international forum for anti-corruption instruments and issued several recommendations, guidelines and anti-corruption tools.

Kenneth Abbott and Duncan Snidal describe the path between the adoption of the *FCPA* and the *OECD Convention* as a process of '[g]radual [I]egalization as a [f]ocal [p]rocess'.¹³ After the adoption of the *FCPA*, the US first attempted to obtain a 'big bang' and pushed prematurely for an international anti-corruption treaty. After the ECOSOC talks broke down, the discussions within the OECD proved equally unfruitful. Abbott and Snidal assert that the US undertook a 'unilateral disarmament' by adopting its domestic *FCPA*, although the stringent anti-corruption requirements imposed on US firms advantaged non-US firms. Other countries had little incentive to level the playing field by agreeing to global anti-corruption rules. As a result, the US shifted its 'big bang' strategy to one of 'gradual legalisation'. Instead of adopting one focal point (criminalising bribery through an international convention), the US adopted a gradual, step-by-step approach. This systematic legalisation began with technical, comparative studies on the legal frameworks of the various OECD member states. These studies helped to inform states of the actual impact of corruption

¹⁰ Margot Cleveland et al, 'Trends in the International Fight against Bribery and Corruption' (2009) 90 *Journal of Business Ethics* 199, 205. Reports varied in their estimates of how much business was lost annually to non-United States corporations because of the *FCPA*, with estimates of up to US\$45 billion. The estimate of a US\$45 billion loss relates to the year 1995.

¹¹ Kenneth W Abbott and Duncan Snidal, 'Filling in the Folk Theorem: The Role of Gradualism and Legalization in International Cooperation to Combat Corruption' (Paper presented at the American Political Science Association Meeting, Boston, 30 August 2002) 24 <http://www.international.ucla.edu/cms/files/Duncan_Snidal.pdf>. As Webb indicates, '[t]he South refused to discuss "demand" side measures like restrictions on solicitation of bribes and the North resisted linking bribery rules to the proposed UN code of conduct for multinational corporations': Webb, above n 5, 192.

¹² *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999) ('*OECD Convention*'). See also Carr, above n 2; Posadas, above n 2, 376.

¹³ Abbott and Snidal, above n 11, 20.

and potential points of convergence and divergence in their legal systems, which reduced the legal uncertainty impeding cooperation. Later on, continued lobbying efforts and the financial support of the US promoted agreement upon soft law instruments. The Clinton Administration reprioritised the anti-corruption crusade from 1993 onwards. Other factors played a role as well, such as the establishment of Transparency International ('TI') by, among others, a former World Bank Director. TI representatives were given the opportunity to address the ad hoc OECD Working Group on Bribery in International Business ('Working Group on Bribery'). Its first recommendation, adopted in 1994, captured the basic principles for an agreement to be reached,¹⁴ which were 'locked-in'. In 1997, a second recommendation elaborated on and added to the basic provisions.¹⁵ Slowly but steadily, through continued negotiations and studies by the low profile Working Group on Bribery, the principal challenges and areas of convergence became clear and the main priorities were outlined. Acting upon the points of agreement for the priority issues slowly allowed harmonisation of the various positions. Certain points proved too divisive and were ultimately excluded, but the *OECD Convention* eventually crystallised earlier than the foreseen deadline.

Moral outrage after corruption scandals initially fuelled the enactment of the US *FCPA*.¹⁶ Nevertheless, in due course, the stringent requirements for US business gave the *FCPA* a more economic dimension; US efforts to achieve a global anti-corruption treaty were predominantly aimed at eliminating the competitive disadvantage of US firms resulting from the *FCPA* prohibitions. The US alleged instances of trade distortion caused by corruption in other World Trade Organization members and requested the WTO to assess and investigate the link between trade distortion and corruption.¹⁷ Asian countries strongly opposed this move¹⁸ and the WTO eventually refused to accept this link.¹⁹

¹⁴ Council, Organisation for Economic Co-Operation and Development, *Recommendation of the Council on Bribery in International Business Transactions*, OECD Doc C(94)75/FINAL (27 May 1994).

¹⁵ Council, Organisation for Economic Co-Operation and Development, *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, OECD Doc C(97)123/FINAL (23 May 1997).

¹⁶ David A Gantz, 'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus' (1998) 18 *Northwestern Journal of International Law & Business* 457, 459.

¹⁷ Gantz notes that former US Trade Representative and Secretary of Commerce, Mickey Kantor, 'has termed foreign bribery an unfair tariff barrier': *ibid* 465. Gantz indicates that '[t]here has been some consideration of the issue as part of negotiations relating to government procurement': at 465.

¹⁸ Kimberly Ann Elliott, 'Corruption as an International Policy Problem: Overview and Recommendations' in Kimberly Ann Elliott (ed), *Corruption and the Global Economy* (Institute for International Economics, 1997) 175, 212.

¹⁹ Gantz, *ibid* n 16, 467. On the issue of corruption and the WTO, see Philip M Nichols, 'Outlawing Transnational Bribery through the World Trade Organization' (1997) 28 *Law and Policy in International Business* 305; Kenneth W Abbott, 'Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption' (2001) 4 *Journal of International Economic Law* 275.

The decade after the end of the Cold War saw renewed anti-corruption efforts worldwide. Nevertheless, post-Cold War conditions facilitated corrupt practices in certain respects. These include, among others:

- the fall of communist regimes without an immediate replacement by fully democratic and accountable institutions;
- the wave of privatisation and deregulation (though excessive government intervention facilitates corruption as well);²⁰ and
- technological evolution facilitating quick communication and money transfers.²¹

The discussions on the renewed anti-corruption efforts after the Cold War mirrored the content of the *FCPA*, which was at that point the only legal instrument against transnational bribery. The commercial lens of the *FCPA* only prohibits bribery conducted in international business transactions, but was a significant influence on early discussions. The negotiations on an international anti-corruption instrument within the OECD were especially influenced by the example of the *FCPA*. Indeed, the US economic rhetoric in this area matched the general OECD focus on economic development: the Preamble to the *OECD Convention* refers to the distorting effect of corruption on international business transactions and the need to assure equivalence of measures between the states parties. Like the *FCPA*, the *OECD Convention* only covers corruption to the extent it is related to business transactions. Moreover, it only covers active corruption, which is the promise, offering or giving of a bribe.²² This seems to mirror early discussions in the UN, where developing countries focused on the corrupting effect of the activities of Western corporations.²³ While the UN discussions were spearheaded by developing countries focusing on active bribery, the more recent discussions that lead to the 2003 *United Nations Convention against Corruption* ('*UNCAC*')²⁴ also approached the passive side of corruption, namely the bribe-takers, who are often public officials from developing nations. At the same time, in these recent discussions, developing nations emphasised that any definition should not impose a Western conception of corruption,²⁵ which could prohibit certain traditional gift practices in developing countries.²⁶

Although limited to corrupt practices in transnational business transactions, the *FCPA* and OECD were a useful first step in sparking the debate. However, the detrimental effects of corruption extend beyond both *transnational* business transactions and *business* transactions in general. Accordingly, later instruments,

²⁰ See, eg. Jean Cartier-Bresson, 'Corruption, libéralisation et démocratisation' [Corruption, Liberalisation and Democratisation] (2000) 41 *Revue tiers monde* 9.

²¹ Roberta Ann Johnson and Shalendra Sharma, 'About Corruption' in Roberta Ann Johnson (ed), *The Struggle against Corruption: A Comparative Study* (Palgrave Macmillan, 2004) 1.

²² *OECD Convention* art 1.1.

²³ Webb, above n 5, 205–6.

²⁴ *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

²⁵ Peter Fleming and Stelios C Zylidopoulos, *Charting Corporate Corruption: Agency, Structure and Escalation* (Edward Elgar, 2009) 4.

²⁶ See below Part IV(A)(3).

such as the *UNCAC*, apply to corrupt practices beyond those occurring in transnational business transactions.

First, the issue of *domestic* corruption may not have received the attention it deserves. Even when strictly adhering to economic reasoning, purely domestic corruption in country A may have indirect but nevertheless substantial ripple effects on the economic interests of country B. The detrimental effects of corruption on development and good governance are no longer called into question. Where corruption thrives in failed states, few economic opportunities surface for businesses of any third country. In addition, corruption of the domestic electoral process may affect the outcome thereof. Corruptly elected heads of state or members of parliament may embezzle development aid or require ever-increasing bribes from foreign companies. Corrupt governments tend to under-invest in areas where bribery is more difficult, such as education or health care.²⁷ These fields are, however, crucial to the economic development of a state and, consequently, also for transnational investment. For example, a Dutch firm might find it harder to reap the rewards of its investment in a country where there are very few skilled labourers. These are all reasons why the criminalisation of purely domestic corrupt acts is useful.²⁸

Secondly, these examples show why not only purely domestic business transactions, but also *private*²⁹ or *public non-business related* corrupt acts, could have been covered by the *FCPA* and the *OECD Convention*.³⁰ Whilst corruption in the transnational business sector certainly covers a substantial part of corrupt practices, these are not the only instances of corruption. There are a variety of examples, including: bribery in football competitions; embezzlement of foreign aid;³¹ bribery for privileged access to an elite education; and bribes requested by the local traffic police. While the concrete impact of such manifestations of corruption may be less substantial in terms of dollar value, such practices may be at least as detrimental as corruption in high value transnational business transactions. People are confronted with this type of corruption far more often in

²⁷ Paolo Mauro, 'The Effects of Corruption on Growth and Public Expenditure' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts & Contexts* (Transaction Publishers, 3rd ed, 2002) 339, 343–4.

²⁸ The *UNCAC* requires states parties to criminalise the bribery of domestic public officials. This covers bribery of domestic officials by both foreigners and the local population. This provision reflects the heightened attention to the bribe-taker (assumed to be mostly public officials in developing countries), away from (exclusively) the bribe-giver (assumed to be mostly transnational companies from developed countries). As such, the main thrust of the provision was presumably not so much to cover entirely domestic corruption but, rather, to oblige developing countries to also criminalise and prosecute their bribe-taking or bribe-requesting public officials. Nevertheless, the wording of art 15 also covers purely domestic acts of corruption (ie, between nationals of one state party).

²⁹ See, eg, Asian Development Bank, 'Anticorruption: Our Framework of Policies and Strategies' (Framework Report, July 1998) 9 <<http://www.adb.org/sites/default/files/pub/1998/anticorruption.pdf>>.

³⁰ See Mark Livschitz, 'Compliance: Präventive Massnahmen zur Korruptionsbekämpfung im privaten Sektor (gemäss Übereinkommen der UNO gegen Korruption)' [Compliance: Preventative Measures for Combating Corruption in the Private Sector (According to the *UN Convention against Corruption*)] (2009) 19 *Schweizerische Zeitschrift für internationales und europäisches Recht* 381.

³¹ Mauro, above n 27, 343.

their daily lives. Failure to tackle it may entrench the general mentality that corruption is simply unavoidable or the ‘way things work’.³²

While the *FCPA* and the *OECD Convention* adopted an economic lens and focused on the market distorting effects of corruption,³³ this limited approach slowly but steadily shifted towards a much broader assessment of the problem of corruption. Thus, the Preamble to the *UNCAC* refers to the detrimental effects of corruption on political stability,³⁴ the rule of law, ethical values and democracy.³⁵ Legal scholarship has further clarified the broad societal impacts of corruption. Antonio Argandoña, for example, refers to the unequal and unjust redistribution of income and wealth; obstruction to the emancipation of less favoured groups; loss of legitimacy of policies and institutions; distortion in decision-making; restriction of citizen rights; the eluding of political and legal controls; and the undermining of the foundations of the rule of law and the democratic system.³⁶

Such a broadened view on the detrimental impact of corruption beyond the traditional economic notions is also reflected in the *Inter-American Convention against Corruption* (‘*OAS Convention*’).³⁷ The history of many Latin American countries — which, at the time, had been recently freed of dictatorial regimes — caused the Organization of American States (‘OAS’) to focus much more on democratic institutions. Corruption was assessed from the perspective that it was a risk to nascent democracy. Instead of introductory language referring to the need to level the playing field, the Preamble to the *OAS Convention* states that ‘corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples’.³⁸

In the World Bank, the focus on anti-corruption efforts was also amplified, culminating in anti-corruption efforts being integrated in the Bank’s ‘conditionality’ for loans. In the early 1990s, the World Bank became aware of the fact that a substantial part of its loans were diverted through corrupt practices.³⁹ Specific scandals, such as corrupt practices in Kenya involving

³² See generally Emmanuelle Lavallée, Mireille Razafindrakoto and François Roubaud, ‘Ce qui engendre la corruption: une analyse microéconomique sur données africaines’ [What Generates Corruption: A Micro-Analysis on African Data] (2010) 24(3) *Revue d'économie du développement* 5.

³³ Gathii, above n 6, 140–2.

³⁴ *UNCAC* Preamble para 3. Note that former Russian President Dmitry Medvedev once called corruption a threat to national security: see Fleming and Zyglidopoulos, above n 25, vii.

³⁵ *UNCAC* Preamble para 1.

³⁶ In addition, Argandoña refers to the moral argument against corruption — an argument that many authors do not seem to find sufficiently tangible and measurable to refer to: Antonio Argandoña, ‘The *United Nations Convention against Corruption* and Its Impact on International Companies’ (2007) 74 *Journal of Business Ethics* 481, 482. Certain international instruments, however, refer to the serious moral concerns about corruption, such as the Preamble to the *OECD Convention*.

³⁷ *Inter-American Convention against Corruption*, opened for signature 29 March 1996, [2000] CTS 21 (entered into force 6 March 1997) (‘*OAS Convention*’).

³⁸ *Ibid* Preamble para 1.

³⁹ Johnson and Sharma, above n 21, 10.

World Bank funds, instigated a change of focus at the Bank.⁴⁰ Previously, the World Bank did not want to adopt anti-corruption language as it deemed this contrary to its charter, which requires it to abstain from political considerations in its lending practices.⁴¹ At the time, one of the World Bank's regional directors, Peter Eigen, even left the Bank as a result of his disappointment with the Bank's refusal to tackle anti-corruption through its lending practices (he later founded TI).⁴² Under the presidency of James Wolfensohn — who labelled corruption a 'cancer'⁴³ — the World Bank's policy was reversed. Corruption was integrated into a larger good governance program,⁴⁴ launched at the World Bank and imposed on borrowing countries through the Bank's now famous conditionality.⁴⁵ The World Bank embedded anti-corruption conditionality into its broader development narrative. Like the World Bank, the International Monetary Fund ('IMF') was at first reluctant to adhere to the good governance program, fearing it to be outside of its strictly economic goals.⁴⁶ In 1996–97, however, the IMF acknowledged the economic impact of corruption and good governance and followed the World Bank by including good governance standards in its practices.⁴⁷ In addition to external anti-corruption policies, the World Bank and the IMF have adopted internal policies to tackle corruption.⁴⁸

Like the multilateral development banks, the UN initially lagged behind in its anti-corruption legal framework. As described above, the UN had been the initial forum for multilateral anti-corruption policies but soon saw its negotiations blocked by divisions between the developed and developing worlds, especially because of the link made between the anti-corruption negotiations and those on the international code of conduct for transnational corporations. After this deadlock, however, the UN took renewed anti-corruption steps in 1996 with the

⁴⁰ See, eg, Richard Calkins et al, 'Dealing with Governance and Corruption Risks in Project Lending: Emerging Good Practices' (Note, World Bank, February 2009) <http://siteresources.worldbank.org/EXTGOVANTICORR/Resources/3035863-1281627136986/EmergingGoodPracticesNote_8.11.09.pdf>.

⁴¹ International Bank for Reconstruction and Development, *IBRD Articles of Agreement* (27 June 2012) World Bank, art IV s 10 <<http://go.worldbank.org/0FICOZQLQ0>>.

⁴² Johnson and Sharma, above n 21, 11.

⁴³ James Wolfensohn, 'People and Development' (Speech delivered at the Annual Meeting of the World Bank and International Monetary Fund, Washington DC, 1 October 1996) <<http://go.worldbank.org/PUC5BB8060>>.

⁴⁴ Gathii, above n 6, 127.

⁴⁵ Johnson and Sharma, above n 21, 11. For an assessment of the effectiveness of the World Bank and the International Monetary Fund's conditionality, see Stefan Koeberle et al (eds), *Conditionality Revisited: Concepts, Experiences and Lessons* (World Bank, 2005).

⁴⁶ International Monetary Fund, *Articles of Agreement of the International Monetary Fund* (3 March 2011) <<http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>>.

⁴⁷ Gathii, above n 6, 145.

⁴⁸ An assessment of the World Bank's internal anti-corruption policies is provided in Parthapratim Chanda, 'The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties' (2004) 32 *Denver Journal of International Law & Policy* 315. See also Ngaire Woods, 'The Challenge of Good Governance for the IMF and the World Bank Themselves' (2000) 28 *World Development* 823; Carolina Pancotto Bohrer Munhoz, 'Corruption in the Eyes of the World Bank: Implications for the Institution's Policies and Developing Countries' (2008) 26 *Penn State International Law Review* 691.

adoption of the *International Code of Conduct for Public Officials* ('*ICCPPO*')⁴⁹ and the *United Nations Declaration against Corruption and Bribery in International Commercial Transactions* ('*UNDAC*').⁵⁰ These instruments provided the basis for the *UNCAC* adopted in 2003. Once the pioneer of transnational anti-corruption efforts, the US opposed several progressive draft provisions — including a provision criminalising private corruption — during the *UNCAC* negotiations.

In line with the *OAS Convention* and World Bank anti-corruption policies, the *UNCAC* not only underlines the economic consequences of corruption but also its developmental and political impacts. It refers to the impact on ethical values and justice, although there is no explicit reference to the impact of corruption on human rights. A human rights perspective has only recently been introduced into the anti-corruption narrative.⁵¹

Nowadays, experts familiar with the anti-corruption subject seem to agree that corruption is detrimental to a society's development and economic growth.⁵² The most quoted number for the annual global cost of corruption is the World Bank's estimate of US\$1 trillion.⁵³ A climate of corruption may particularly disadvantage societal sectors where rent-seeking opportunities are smaller and which, consequently, receive less government support.⁵⁴ Education and public healthcare are prominent examples of such sectors, whereas infrastructure is a sector where rent-seeking is particularly profitable.⁵⁵ Under-financing sectors such as healthcare and education disproportionately harms the poor

⁴⁹ *Action against Corruption*, GA Res 51/59, UN GAOR, 51st sess, 82nd plen mtg, Agenda Item 101, Supp No 49, UN Doc A/RES/51/59 (28 January 1997) annex ('*International Code of Conduct for Public Officials*') ('*ICCPPO*').

⁵⁰ *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, GA Res 51/191, UN GAOR, 51st sess, 86th plen mtg, Agenda Item 12, Supp No 49, UN Doc A/RES/51/191 (21 February 1997) annex ('*United Nations Declaration against Corruption and Bribery in International Commercial Transactions*') ('*UNDAC*').

⁵¹ See, eg, Committee of Ministers, Council of Europe, *Recommendation Rec(2003)4 of the Committee of Ministers to Member States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns* (8 April 2003) Preamble ('*Recommendation Rec(2003)4*'). See also Part IV(E) below.

⁵² Rafael Di Tella and Robert MacCulloch, 'Corruption and the Demand for Regulating Capitalists' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar, 2006) 352, 352–5. The impact of corruption on economic growth has, however, differed from country to country. For example, widespread corruption in China has not prevented the country from achieving impressive economic growth. For further discussion on the specific case of China: see, eg, Jens Andvig, 'Corruption in China and Russia Compared: Different Legacies of Central Planning' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar, 2006) 278, 287–313. Some authors, however, challenge this common assumption: see, eg, Anthony Ogus, 'Corruption and Regulatory Structures' (2004) 26 *Law & Policy* 329, 329 (stating that '[i]n fact, the connection between corruption and the lack of growth is more often assumed than demonstrated'). Ogus suggests that the lack of empirical data may stem from too broad a definition of 'corruption', rendering it more difficult to link corruption to economic performance indicators.

⁵³ World Bank, *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann* (2013) <<http://go.worldbank.org/KQH743GKF1>>.

⁵⁴ See Argandoña, above n 36, 481–2. See also David de la Croix and Clara Delavallade, 'Corruption et allocation optimale de l'investissement public' [Corruption and Optimal Allocation of Public Investment] (2007) 58 *Revue économique* 637.

⁵⁵ Mauro, above n 27, 347.

and — especially with regard to education — seriously hampers development. In the following sections, we will assess the extent to which the existing international legal framework is capable of tackling these multiple challenges to tackling corruption.

III INTERNATIONAL ANTI-CORRUPTION INSTRUMENTS

From the preceding brief summary of the international anti-corruption movement's evolution,⁵⁶ it is clear that the *OECD Convention* was a catalyst for further action. Therefore, an overview of the *current* multilateral anti-corruption framework might logically start with the *OECD Convention*. Nevertheless, it remains a tricky undertaking to classify the anti-corruption instruments based on their impact or importance. It is equally confusing to rank the instruments chronologically. For example, the *OAS Convention* was officially adopted before the *OECD Convention*, but the former undoubtedly sailed on the tide of the latter. The overview below is simply based on the geographical reach of the various interstate instruments, in descending order, starting with the UN; it concludes with a short reference to the anti-corruption framework of the multilateral development banks and the two main private initiatives in the field.

A *The United Nations Convention against Corruption*

The *UNCAC*⁵⁷ is the first truly global anti-corruption treaty, outlining a 'common language'⁵⁸ for the anti-corruption movement. It was adopted by the UN General Assembly ('UNGA') on 31 October 2003 and was opened for signature in Merida, Mexico, on 9–11 December 2003. The *UNCAC* entered into force two years later, on 14 December 2005. The high number of signatories and ratifications reflects the broad international consensus on the *UNCAC*. This consensus was not only shared among states, but also among the international private sector and civil society.⁵⁹

1 *Background*

As indicated above, the UNGA adopted the *ICCPO* in 1996. The text of the *ICCPO* does not explicitly mention corruption — although the term is referred to several times in the text of *Action against Corruption* (the resolution adopting the *ICCPO*), which recommends that member states use the *ICCPO* as a tool to guide their efforts against corruption.⁶⁰ However, the *ICCPO* touches upon very similar and related issues, such as the receipt of gifts that may influence the exercise of a public official's function and conflicts of interest.⁶¹ In the same

⁵⁶ For an overview of anti-corruption instruments under international law: see generally Balmelli and Jaggy, above n 2; Dormoy, above n 2; Marsch, above n 2.

⁵⁷ For commentary: see, eg, Kubiciel, above n 5; Webb, above n 5; Argandoña, above n 36. See also Rainer Hofmann and Christina Pfaff (eds), *Die Konvention der Nationen zur Bekämpfung der Korruption: Betrachtungen aus Wissenschaft und Praxis* [The United Nations Convention against Corruption: Views from Research and Practice] (Nomos, 2006).

⁵⁸ Argandoña, above n 36, 485.

⁵⁹ Ibid.

⁶⁰ *Action against Corruption*, GA Res 51/59, UN GAOR, 51st sess, 82nd plen mtg, Agenda Item 101, Supp No 49, UN Doc A/RES/51/59 (28 January 1997).

⁶¹ *ICCPO*, UN Doc A/RES/51/59, annex arts 5, 9.

year, the *UNDAC* was adopted. The *UNDAC* underlines the need to promote social responsibility and standards of ethics on the part of companies and recognises the link between corruption, fair and competitive business and accountable governance. Member states ‘commit’ to criminalise bribery of foreign public officials. Efforts to do so continued through a 1997 UNGA resolution, which urged member states to ratify the already existing international anti-corruption instruments.⁶² A 1999 UNGA resolution⁶³ requested an Ad Hoc Committee to explore the desirability of an international instrument against corruption, ancillary to or independent of the pre-existing *United Nations Convention against Transnational Organized Crime* (*Palermo Convention*).⁶⁴ The *Palermo Convention* had already recognised the relationship between transnational organised crime and corruption.⁶⁵ After the adoption of the *Palermo Convention*, the UNGA redirected the Ad Hoc Committee to draft a separate convention on corruption,⁶⁶ and requested that it adopt a comprehensive and multidisciplinary approach in order to negotiate a ‘broad and effective convention’.⁶⁷ The Ad Hoc Committee was officially convened for the first time in December 2001. After seven sessions, the Committee adopted the final text of the *Palermo Convention* in October 2003, two months before the scheduled end date of its activities.⁶⁸

2 Ratification Status

As of 1 January 2013, 165 states, including important global players such as the US, China and India, have become parties to the *UNCAC*. This broad participation can be seen as an indication of widespread global support.

⁶² *International Cooperation against Corruption and Bribery in International Commercial Transactions*, GA Res 52/87, UN GAOR, 52nd sess, 3rd plen mtg, Agenda Item 103, Supp No 49, UN Doc A/RES/52/87 (12 December 1997).

⁶³ *Action against Corruption*, GA Res 54/128, UN GAOR, 54th sess, 83rd plen mtg, Agenda Item 107, Supp No 49, UN Doc A/RES/54/128 (28 January 2000).

⁶⁴ *United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) (*Palermo Convention*). See also *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003); *Protocol against the Smuggling of Migrants by Land, Sea and Air*, opened for signature 12 December 2000, 2241 UNTS 507 (entered into force 28 January 2004); *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, GA Res 55/255, UN GAOR, 55th sess, 101st plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/255 (31 May 2001) annex (*Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*). The *Palermo Convention* contains two provisions on corruption. Article 8 requires the criminalisation of active and passive bribery of domestic public officials and asks member states to consider criminalising bribery of foreign public officials. Article 9 requires member states to promote the integrity of domestic officials and to ensure compliance and prosecution of violations of the *Palermo Convention*. Liability of legal persons is required under art 10, though member states can decide whether to impose criminal, civil or administrative sanctions, subject to its legal principles.

⁶⁵ *Palermo Convention* Preamble para 10, art 8.

⁶⁶ Argandoña, above n 36, 485.

⁶⁷ *Terms of Reference for the Negotiation of an International Legal Instrument against Corruption*, GA Res 56/260, UN GAOR, 56th sess, 93rd plen mtg, Agenda Item 110, Supp No 49, UN Doc A/RES/56/260 (9 April 2002) paras 2–3.

⁶⁸ *Ibid* para 6.

However, the lack of ratification by a few states is noteworthy: Germany, Japan and New Zealand have not ratified the *UNCAC*, despite signing it.⁶⁹

The *UNCAC* is open for signature by regional economic integration organisations provided that at least one member state of the organisation has signed it. The European Union signed the *UNCAC* on 15 September 2005 and ratified it on 12 November 2008.⁷⁰ It is currently the sole regional economic integration organisation that has become a party to the *UNCAC*.

3 *Scope: Prevention, Criminalisation and International Cooperation*

The *UNCAC* builds upon the achievements of earlier anti-corruption instruments. For example, where the OECD merely *recommends* that member states prohibit tax deduction of bribes, the *UNCAC requires* states parties to prohibit such a practice.⁷¹ The *UNCAC* is not only innovative in terms of the acts it criminalises, but also because of its strong focus on prevention, as well as the emphasis placed on international assistance and asset recovery.

Chapter II of the *UNCAC*, concerning preventive measures, is predominantly phrased in non-mandatory terms and leaves substantial scope to states parties to choose concrete implementation measures. Nevertheless, the *UNCAC* requires states parties to adopt measures (without imposing a detailed one-size-fits-all implementation) in a wide range of areas: they must set up anti-corruption bodies; establish appropriate procurement systems; strengthen the integrity of the judiciary; take measures to prevent private sector corruption; promote the active participation of civil society; and institute a comprehensive regulatory regime for banks and other financial institutions to prevent money laundering.⁷² These specific provisions are preceded by the chapeau paragraph of art 5, which requires that states parties adopt comprehensive and coordinated anti-corruption policies that promote the participation of society and

⁶⁹ These states did ratify the *OECD Convention*. The report issued by the Organisation for Economic Co-Operation and Development ('OECD') on Japan's implementation of anti-corruption measures indicates that Japan still has a very weak legal framework on anti-corruption: Working Group on Bribery in International Business Transactions, Organisation for Economic Co-Operation and Development, 'Phase 3 Report on Implementing the *OECD Anti-Bribery Convention* in Japan' (Report, Organisation for Economic Co-Operation and Development, 16 December 2011) <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf>>. Issued in December 2011, the report states, that there have only been two convictions since the prohibition of bribery of foreign public officials was inserted in 1999 in art 10(1) of the 不正競争防止法 (平成5年5月19日法律第47号。最終改正平成21年4月30日法律第30号) [Unfair Competition Prevention Law 1993 (Act No 47 of May 19, 1993, as last amended by Act No 30 of April 30, 2009)] (Japan): at 10. For a Group of States against Corruption ('GRECO') report on Germany's anti-corruption efforts, see below n 149. On the role of Germany vis-a-vis transnational standards against corruption, see Peter Hägell, 'L'incertaine mondialisation du contrôle: la France et l'Allemagne dans la lutte contre la corruption et le blanchiment' [The Uncertain Globalisation of Control: France and Germany in the Fight against Corruption and Money Laundering] (2005) 29 *Déviance et société* 243.

⁷⁰ *Council Decision of 25 September 2008 on the Conclusion, on Behalf of the European Community, of the United Nations Convention against Corruption* [2008] OJ L 287/1.

⁷¹ Council, Organisation for Economic Co-Operation and Development, *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, OECD Doc C(96)27/FINAL (11 April 1996); *UNCAC* art 12.4.

⁷² *UNCAC* arts 6–14. While the basic thrust of these provisions is that states parties 'shall' adopt such measures, this requirement is often weakened by adding qualifiers such as 'in accordance with the fundamental principles of its domestic law': see, eg, art 13.1.

reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.⁷³ The basic thrust of this general provision is the requirement of good governance.⁷⁴

International cooperation also received a separate chapter in the *UNCAC*.⁷⁵ Cooperation is mandatory for criminal matters, though for civil and administrative matters states parties need only ‘consider’ cooperation.⁷⁶ Cooperation from private sector entities such as banks is only to be encouraged.⁷⁷ This is a regrettably weak provision, as cooperation from banks and other entities is crucial in the recovery of the proceeds of corrupt acts.⁷⁸ Requiring states parties to cooperate in criminal matters is a necessary but insufficient condition for effective asset recovery, as banks and other entities will often need to trigger prosecutions by identifying potentially corrupt transactions and notifying official authorities of such transactions. The provision on bank secrecy is more stringent: it requires states parties to ensure that bank secrecy hurdles can be overcome when conducting corruption investigations.⁷⁹ This mandatory provision does not leave much room to manoeuvre. The same holds for art 46, which requires states parties to afford each other the widest measure of mutual legal assistance in the investigation and prosecution of offences covered by the *UNCAC*.⁸⁰

Asset recovery was a fundamental issue for developing countries during the negotiations for the *UNCAC*.⁸¹ Its importance is equally reflected in the fact that a full chapter is dedicated to this topic.⁸² Asset recovery is discussed in more detail below.⁸³ It can be noted here that the chapter attempts to balance the insistence by (mostly) developing countries on effective asset recovery with procedural safeguards requested by (mostly) developed countries. The *UNCAC* thus aims to strike a fragile balance: on the one hand, it contains detailed and strong anti-corruption provisions, which developed countries requested; on the other hand, developing countries were willing to accept these provisions in return for strong cooperation and asset recovery provisions. The latter were acceptable to developed countries on the condition that they were subject to sufficient procedural safeguards. Article 46 of *UNCAC*, entitled ‘Mutual Legal Assistance’, almost copies verbatim the wording of the mutual legal assistance provision in the *Palermo Convention*.⁸⁴ The latter, in turn, is based on the concomitant

⁷³ *UNCAC* art 5.

⁷⁴ For a detailed discussion of good governance, see below Part IV(D).

⁷⁵ *UNCAC* ch IV.

⁷⁶ *Ibid* art 43.1.

⁷⁷ *Ibid* art 39.1.

⁷⁸ See below Part IV(C).

⁷⁹ *UNCAC* art 31.77.

⁸⁰ *Ibid* art 46.

⁸¹ Webb, above n 5, 207.

⁸² *UNCAC* ch V.

⁸³ See below Part IV(B).

⁸⁴ *UNCAC* art 46; *Palermo Convention* art 18.

provision in the UN *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.⁸⁵

4 Monitoring

Whilst the *UNCAC* has introduced some innovations, its monitoring mechanism is not groundbreaking.⁸⁶ It merely establishes a Conference of States Parties ('the Conference'), to be convened 'regularly' to monitor implementation.⁸⁷ At its third session, held in Doha in November 2009, the Conference adopted 'Resolution 3/1', entitled 'Review Mechanism'.⁸⁸ In this resolution, the Conference set up an Implementation Review Group. The monitoring mechanism is conceived as a review cycle, focusing on specific parts of the *UNCAC*. States parties must complete a self-assessment checklist beforehand, which forms the basis for a peer review by two other states parties. The whole procedure is a desk review, contrary to the anti-corruption implementation process at the CoE (GRECO),⁸⁹ which includes country visits. So far, only Executive Summaries on France and Togo;⁹⁰ Bulgaria and Indonesia;⁹¹ Jordan and São Tomé and Príncipe;⁹² Fiji and the US;⁹³ Croatia and Morocco;⁹⁴ Australia;⁹⁵ Georgia;⁹⁶ Switzerland;⁹⁷ Bangladesh⁹⁸ and

⁸⁵ *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990) art 7.

⁸⁶ Webb, above n 5, 221.

⁸⁷ *UNCAC* art 63.2.

⁸⁸ Conference of the States Parties to the United Nations Convention against Corruption, 'Resolution 3/1 — Review Mechanism' in *Report of the Conference of the Parties to the United Nations Convention against Corruption on Its Third Session, Held in Doha from 9 to 13 November 2009*, UN Doc CAC/COSP/2009/15 (1 December 2009) 3.

⁸⁹ See below Part III(B)(2).

⁹⁰ Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summaries: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/1/1/Add.3 (9 January 2012).

⁹¹ Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summaries: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/1/1/Add.4 (16 January 2012).

⁹² Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summaries: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/1/1/Add.5 (31 January 2012).

⁹³ Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summaries: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/1/1/Add.6 (23 March 2012).

⁹⁴ Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summaries: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/1/1/Add.7 (2 May 2012).

⁹⁵ Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summary: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/2/1 (15 May 2012).

⁹⁶ Implementation Review Group, Conference of the States Parties, United Nations Convention against Corruption, *Executive Summary: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/I/2/1/Add.1 (30 May 2012).

⁹⁷ Groupe d'examen de l'application, *Résumé analytique: Suisse* [Executive Summary: Switzerland], 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/2012/CRP.4 (18 June 2012).

⁹⁸ Implementation Review Group, *Executive Summary: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/2012/CRP.6 (20 June 2012).

Timor-Leste⁹⁹ have been published. As this country review mechanism has only recently been launched, its effectiveness and impact remain to be seen. However, it does not seem to possess the same levels of rigidity as the OECD or CoE procedures.

5 *Independent Domestic Anti-Corruption Authorities*

Even though the *multilateral* implementation system is still in its infancy, the *UNCAC* requires that states parties set up *domestic* corruption-preventing and corruption-combating bodies.¹⁰⁰ Both the *UNCAC* and the CoE *Criminal Law Convention on Corruption* ('*Criminal Law Convention*')¹⁰¹ lay down certain conditions that anti-corruption authorities should meet if they are to be effective. These conventions refer to the requirements of, *inter alia*, independence, adequate resources, training and specialisation.¹⁰²

The *UNCAC* does not specify what conditions need to be met in order for anti-corruption bodies to be considered independent. Clarification can be found in an OECD study, which states that structural and operational autonomy, along with a clear legal basis and mandate for the anti-corruption body, are all important elements in achieving independence.¹⁰³ In addition, it underlines the importance of transparent procedures for the appointment (and removal) of the director(s).¹⁰⁴ Independence does not equate to unaccountability: as indicated by the OECD study, such bodies should at all times adhere to the principle of the rule of law, meet human rights standards, submit regular performance reports and enable public access to information on their work.¹⁰⁵ One model example of a successful national anti-corruption body is the Independent Commission against Corruption of Hong Kong, which helped the country to achieve 'spectacular success' in combating corruption.¹⁰⁶

⁹⁹ Implementation Review Group, *Executive Summary: Note by the Secretariat*, 3rd sess, Agenda Item 2, UN Doc CAC/COSP/IRG/2012/CRP.8 (22 June 2012).

¹⁰⁰ *UNCAC* art 6.

¹⁰¹ *Criminal Law Convention on Corruption*, opened for signature 27 January 1999, ETS No 173 (entered into force 1 July 2002) ('*Criminal Law Convention*'). See also below Part III(B)(2).

¹⁰² *UNCAC* art 6.2; *Criminal Law Convention* art 20.

¹⁰³ Anti-Corruption Network for Eastern Europe and Central Asia, 'Specialised Anti-Corruption Institutions: Review of Models' (Report, Organisation for Economic Co-Operation and Development, 2008) 10, 24–7.

¹⁰⁴ *Ibid* 10.

¹⁰⁵ *Ibid*.

¹⁰⁶ Stuart S Yeh, 'Ending Corruption in Africa through United Nations Inspections' (2011) 87 *International Affairs* 629, 635.

The OECD study distinguishes four areas of anti-corruption efforts on which such national bodies should focus:

- policy development, research, monitoring and coordination;
- prevention of corruption in power structures (including prevention of conflicts of interest, assets declaration by public officials, anti-money laundering regulations, public procurement standards, etc);
- education and awareness raising; and
- investigation and prosecution (including coordination with auditors, tax authorities, the banking sector, public procurement authorities, foreign law enforcement bodies, etc).¹⁰⁷

Certain states, including the US, have adopted multi-agency models, which focus on strengthening anti-corruption measures in already existing governmental agencies.¹⁰⁸ Other countries (such as Botswana, Hong Kong, Korea and Thailand) opted for the single-agency model, which gives one anti-corruption agency the primary responsibility of implementing an anti-corruption program.¹⁰⁹

B *European Instruments*

1 *European Union*

The EU started off with modest anti-corruption instruments that mainly tackled the misdirection of EU funds in 1995.¹¹⁰ However, the EU broadened its focus over the course of time, with the final step being a comprehensive two-year review process of member states' general anti-corruption achievements.

The results of a 2012 EU Corruption Barometer underlined that even in the EU, the fight against corruption is far from won.¹¹¹ According to the results of the Barometer, 74 per cent of EU citizens thought that corruption remained a major challenge in their country. Around 1 per cent of EU GDP, or around €120 billion, is estimated to be lost annually due to corruption. Around 20 to

¹⁰⁷ Anti-Corruption Network for Eastern Europe and Central Asia, above n 103, 5.

¹⁰⁸ John R Heilbrunn, 'Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?' (Working Paper, International Bank for Reconstruction and Development, 2004) 9 <<http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Anti-Corruption%20Commissions%20by%20John%20Heilbrunn.pdf>>.

¹⁰⁹ Anti-Corruption Network for Eastern Europe and Central Asia, above n 103, 31–2.

¹¹⁰ On the issue of European Union fraud, see Centre d'études pour l'application du droit communautaire en matière pénale et financière [Centre for the Study of the Implementation of Community Law in Criminal and Financial Matters], *Corruption de fonctionnaires et fraude européenne* [Corruption of Public Officials and European Fraud] (Bruylant, Brussels, 1998).

¹¹¹ See European Commission, 'Commission Fights Corruption: A Stronger Commitment for Greater Results' (Press Release, IP/11/678, 6 June 2011) <http://europa.eu/rapid/press-release_IP-11-678_en.htm>; European Commission, 'Commission Steps Up Efforts to Forge a Comprehensive Anti-Corruption Policy at EU Level' (Press Release, MEMO 11/376, 6 June 2011) <http://europa.eu/rapid/press-release_MEMO-11-376_en.htm>; European Commission, 'Frequently Asked Questions: How Corruption is Tackled at the EU Level' (Press Release, MEMO 12/105, 15 February 2012) <http://europa.eu/rapid/press-release_MEMO-12-105_en.htm>.

25 per cent of the value of public contracts is lost to corruption each year. These numbers are astonishingly high.¹¹²

As corruption seriously hinders competition in the internal market, the EU Parliament could have acted on this legal basis. It opted however for the (more straightforward) legal basis of providing an area of freedom, security and justice.¹¹³

In 1995, the European Council drew up the *Convention on the Protection of the European Communities' Financial Interests* ('EU Convention').¹¹⁴ The *EU Convention* covers the misappropriation of EU funds through fraudulent statements or false documents. One year later, in 1996, a *Protocol to the Convention on the Protection of the European Communities' Financial Interests* ('*Financial Interests Protocol*') was drawn up.¹¹⁵ The *Financial Interests Protocol* contains definitions of, and harmonised penalties for, offences of corruption. In 1997, the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union* was drawn up.¹¹⁶ On 22 July 2003, the European Council adopted *Council Framework Decision 2003/568/JHA on Combating Corruption in the Private Sector*,¹¹⁷ covering business activities within profit and non-profit entities (excluding, for example, non-business activities of non-governmental organisations ('NGOs'), sports clubs, etc).

In a decision of October 2008, the European Council set up a network of contact points of the member states, in order to improve cooperation between authorities in combating corruption in Europe.¹¹⁸ Furthermore, the Stockholm Programme provides an EU roadmap for 2010–14 in the area of justice, freedom and security, referencing anti-corruption outcomes as one of its goals.¹¹⁹

However, the EU realised that the various anti-corruption instruments were rather fragmented and that success on this issue would be enhanced by streamlining a coherent anti-corruption policy in all its activities. In addition, reports that corruption worsened in certain newly acceded member states after accession strengthened the view that the EU needs to maintain a vigorous anti-corruption oversight that goes beyond merely imposing anti-corruption

¹¹² For an assessment of corruption in the EU, see Luis Antonio Trejo Fuentes, 'Corrupción y desigualdad en la Unión Europea' [Corruption and Inequality in the European Union] (2010) 37 *Revista de Estudios Sociales* 106.

¹¹³ See, eg, *Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector* [1993] OJ L 192/54, 54 [6].

¹¹⁴ *Council Act of 26 July 1995 Drawing up the Convention on the Protection of the European Communities' Financial Interests* [1995] OJ C 316/48.

¹¹⁵ *Council Act of 27 September 1996 Drawing up a Protocol to the Convention on the Protection of the European Communities' Financial Interests* [1996] OJ C 313/1. The protocol entered into force on 17 October 2002.

¹¹⁶ *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 Communities or Officials of Member States of the European Union* [1997] OJ C 195/2.

¹¹⁷ *Council Framework Decision 2003/568/JHA on Combating Corruption in the Private Sector* [2003] OJ L 192/54.

¹¹⁸ *Council Decision 2008/852/JHA of 24 October 2008 on a Contact-Point Network against Corruption* [2008] OJ L 301/38.

¹¹⁹ *The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C 115/1.

requirements in negotiations for membership.¹²⁰ Moreover, the recent ‘Euro crisis’ made clear that differences in national ethics and governance can endanger the very survival of the EU institutions. These considerations have led the EU to elaborate a comprehensive anti-corruption framework.

In 2011, the European Commission (‘the Commission’) adopted a proposal for harmonised procurement rules, including anti-corruption safeguards.¹²¹ In June 2011, the Commission issued a new communication,¹²² which focuses on the *enforcement* of existing instruments. According to this communication, there is an adequate anti-corruption framework on the international and European level, but the main challenge is the enforcement of the existing provisions.¹²³ The communication established a new EU Anti-Corruption Report mechanism.¹²⁴ As of 2013, the EU will release a report every two years, with dual goals.¹²⁵ First, it will provide a ‘diagnosis’ of corruption challenges in the EU.¹²⁶ Secondly, the report will highlight specific issues in each member state, on the basis of country analyses.¹²⁷ The recommendations made are not legally binding, but will be monitored through follow-up reports. The aim is to work closely together with GRECO — the CoE’s anti-corruption enforcement mechanism — and to avoid overlap in reporting mechanisms.¹²⁸ Meanwhile, the EU is negotiating membership of GRECO.¹²⁹ Other ongoing measures include a legislative proposal for the harmonisation of asset recovery rules across the EU.¹³⁰

¹²⁰ Suzanne Mulcahy, ‘Money, Politics, Power: Corruption Risks in Europe’ (National System Integrity Assessment Report, Transparency International, 6 June 2012) 3. Mulcahy refers in particular to the Czech Republic, Hungary and Slovakia.

¹²¹ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Public Procurement’ (Proposal No COM(2011) 896 final, 20 December 2011) art 55.1(b). See also European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the Access of Third-Country Goods and Services to the Union’s Internal Market in Public Procurement and Procedures Supporting Negotiations on Access of Union Goods and Services to the Public Procurement Markets of Third Countries’ (Proposal No COM(2012) 124 final, 21 March 2012).

¹²² European Commission, ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Fighting Corruption in the EU’ (Communication No COM(2011) 308 final, 6 June 2011).

¹²³ *Ibid* 3–4.

¹²⁴ *Ibid* 6–8.

¹²⁵ *Ibid* 4.

¹²⁶ *Ibid* 6.

¹²⁷ *Ibid* 7.

¹²⁸ European Commission, ‘Commission Steps Up Efforts to Forge a Comprehensive Anti-Corruption Policy at EU Level’, above n 111.

¹²⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Participation of the European Union in the Council of Europe Group of States against Corruption (GRECO)’ (Communication No COM(2012) 604 final, 19 October 2012).

¹³⁰ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of the Proceeds of Crime in the European Union’ (Proposal No COM(2012) 85 final, 12 March 2012).

2 Council of Europe

As is known, the general focus of the CoE is on the development of common and democratic principles in Europe, as well as on the rule of law and human rights.¹³¹

On 6 November 1997, the Committee of Ministers of the CoE adopted the *Twenty Guiding Principles for the Fight against Corruption*.¹³² These guidelines set out a broad spectrum of anti-corruption measures, such as limiting immunity for corruption charges, denying tax deductibility for bribes, ensuring free media and preventing the shielding of legal persons from liability.

The *Criminal Law Convention* was adopted by the CoE in early 1999 and has been ratified by 43 states.¹³³ An *Additional Protocol to the Criminal Law Convention on Corruption* was adopted in May 2003;¹³⁴ it has been ratified by 31 states and signed by an additional 11 states.¹³⁵ The *Criminal Law Convention* aims to harmonise the definition of a certain type of corruption, namely that of public officials. Such harmonisation, as stated by the *Explanatory Report* that accompanied the *Criminal Law Convention*,¹³⁶ would more easily allow for the requirement of dual criminality to be met by the states parties.

The *Civil Law Convention on Corruption* ('*Civil Law Convention*') was adopted on 4 November 1999 and entered into force four years later.¹³⁷ It has

¹³¹ See Council of Europe, *Our Objectives* (2012) <<http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en>>.

¹³² Committee of Ministers, Council of Europe, *Resolution (97)24 on the Twenty Guiding Principles for the Fight against Corruption* (6 November 1997).

¹³³ The *Criminal Law Convention* has been ratified by the following member states of the Council of Europe ('CoE'): Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the UK. Moreover, it has been ratified by one non-member state, namely Belarus. It has been signed, but not yet ratified, by the following member states: Austria, Germany, Italy, Liechtenstein and San Marino. Two non-member states, Mexico and the US, have signed but not yet ratified it.

¹³⁴ *Additional Protocol to the Criminal Law Convention*, opened for signature 15 May 2003, ETS No 191 (entered into force on 1 February 2005) ('*Additional Protocol*').

¹³⁵ The *Additional Protocol* has been ratified by the following member states: Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Greece, Iceland, Ireland, Latvia, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Netherlands, Norway, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the UK. In addition, the *Additional Protocol* has been signed but not ratified by the following member states: Andorra, Georgia, Germany, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Malta, Poland, Portugal, Russia and San Marino.

¹³⁶ Council of Europe, *Criminal Law Convention on Corruption: Explanatory Report*, [21]–[22] <<http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>>.

¹³⁷ *Civil Law Convention on Corruption*, opened for signature 4 November 1999, ETS No 174 (entered into force 1 November 2003) ('*Civil Law Convention*').

been ratified by 34 states and signed by another eight.¹³⁸ It focuses on effective civil remedies for any damage caused by corrupt acts. Both the *Criminal Law Convention* and the *Civil Law Convention* are open for signature by non-European countries.

In addition to these treaties, the CoE has issued several soft law instruments. One of them is the recommendation on codes of conduct for public officials, adopted on 11 May 2000.¹³⁹ On 8 April 2003, the Committee of Ministers adopted a recommendation on common rules against corruption in the funding of political parties and electoral campaigns.¹⁴⁰

The CoE's anti-corruption efforts have received substantial attention mainly because of the anti-corruption implementation mechanism. The CoE established GRECO on 1 May 1999.¹⁴¹ Its function is to monitor compliance with the Council's anti-corruption standards,¹⁴² serving as a platform for both the exchange of best practices and peer pressure.¹⁴³ States that are not members of the CoE can become members of GRECO¹⁴⁴ and states that become parties to the *Criminal Law Convention* or the *Civil Law Convention* automatically become members.¹⁴⁵ Currently, GRECO has 49 members, of which only one (the US) is not a member of the CoE.

Each member of GRECO appoints up to two representatives for GRECO's plenary meeting and provides a list of experts who can take part in GRECO's evaluations. Observer status has been granted to the OECD and the UN Office on Drugs and Crime ('UNODC'). Negotiations on EU participation in GRECO are ongoing.¹⁴⁶

GRECO's monitoring procedure consists of an evaluation round and a compliance procedure. The evaluation rounds, during which all members are evaluated, have specific themes. The evaluation is based on both written replies to questionnaires and information received from public officials and members of civil society during country visits. An evaluation may be followed by either recommendations or observations. Members are required to provide follow-up reporting on recommendations within 18 months after the evaluation report. In

¹³⁸ The *Civil Law Convention* has been ratified by the following member states of the CoE: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Georgia, Greece, Hungary, Latvia, Lithuania, the former Yugoslav Republic of Macedonia, Malta, Moldova, Montenegro, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey and Ukraine. Moreover, it has been ratified by one non-member state, namely Belarus. It has been signed, but not yet ratified, by the following member states: Andorra, Denmark, Germany, Iceland, Ireland, Italy, Luxembourg and the UK.

¹³⁹ Committee of Ministers, Council of Europe, *Recommendation No R 2000(10) of the Committee of Ministers to Member States on Codes of Conduct for Public Officials* (11 May 2000).

¹⁴⁰ *Recommendation Rec(2003)4*, above n 51.

¹⁴¹ Committee of Ministers, Council of Europe, *Resolution 99(5) Establishing the Group of States against Corruption (GRECO)* (1 May 1999) app ('*Statute of the GRECO*').

¹⁴² *Ibid* art 2.

¹⁴³ *Ibid* art 1.

¹⁴⁴ *Ibid* art 4(2).

¹⁴⁵ *Criminal Law Convention* art 24; *Civil Law Convention* art 14.

¹⁴⁶ European Commission, 'Commission Fights Corruption', above n 111.

theory, GRECO's *Rules of Procedure* contain a special procedure for members whose follow-up on recommendations is deemed to be globally unsatisfactory.¹⁴⁷ This procedure has, however, not yet been applied. For observations no such formal requirement of follow-up reporting exists.

Austria, Germany, Italy, Liechtenstein, Mexico, San Marino and the US have ratified neither the *Criminal Law Convention* nor the *Additional Protocol to the Criminal Law Convention on Corruption*.¹⁴⁸ The *Civil Law Convention* has not been ratified by Germany, Italy, Russia, Switzerland, the UK or the US.¹⁴⁹

C Other Regional Anti-Corruption Instruments

1 Organisation for Economic Co-Operation and Development

The OECD anti-corruption efforts are significant for two main reasons. First, as indicated above, the OECD was the driving force behind international anti-corruption tools. When the debate in the UN stalled over disagreement between developed and developing countries, the OECD provided an alternative forum to keep the debate moving. Secondly, several of the largest players in international trade are OECD member states. They are home to some of the largest multinational companies.

The *OECD Convention* was signed on 17 December 1997 and entered into force on 15 February 1999. As of 1 January 2013, 40 states have become parties to the *OECD Convention*.¹⁵⁰ Its aim is to 'assure a functional equivalence' on bribery of foreign public officials 'without requiring uniformity or changes in fundamental principles' of a state's legal system.¹⁵¹ It is open to non-OECD states.¹⁵²

¹⁴⁷ Group of States against Corruption, Council of Europe, *Rules of Procedure* (adopted 4–6 October 1999, last amended 15–19 October 2012) r 32.

¹⁴⁸ The *Additional Protocol* has not been ratified by Andorra, Austria, Belarus, the Czech Republic, Estonia, Georgia, Germany, Hungary, Italy, Malta, Mexico, Monaco, Poland, Portugal, Russia, San Marino, Turkey or the US.

¹⁴⁹ A 2011 GRECO compliance report on Germany indicates that Germany is awaiting amendments to its *Strafgesetzbuch* [Criminal Code] before it can ratify the *Criminal Law Convention* and its *Additional Protocol*: Group of States against Corruption, Council of Europe, 'Third Evaluation Round: Compliance Report on Germany' (Report, 9 December 2011) 2–3, 15 ('*GRECO Compliance Report*'). The report indicates that the German government 'is, in principle, still aiming for such ratification': at 2–3. However, the report continues that no concrete steps on such amendments or steps to ratification have been seen and GRECO 'very much regrets' that Germany, one of its founding members, has not yet ratified the *Criminal Law Convention* or its *Additional Protocol*: at 3, 15.

¹⁵⁰ Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the UK and the US.

¹⁵¹ Working Group on Bribery in International Business Transactions, Organisation for Economic Co-Operation and Development, 'Commentaries on the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*' (21 November 1997) in Organisation for Economic Co-Operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, OECD Doc DAFFE/IME/BR(97)20 (8 April 1998) 12, 12 [2] ('*OECD Convention Commentaries*').

¹⁵² Non-member states may become parties to the *OECD Convention* on the condition that they become full participants in the OECD Working Group on Bribery in International Business Transactions ('Working Group on Bribery'): *OECD Convention* art 13.

The OECD adopted a number of recommendations, such as: the 1996 recommendation of the Development Assistance Committee on *Anti-Corruption Proposals for Bilateral Aid Procurement*;¹⁵³ the 1998 recommendation on improving ethical conduct in the public service;¹⁵⁴ the 2006 *OECD Council Recommendation on Bribery and Officially Supported Export Credits*;¹⁵⁵ the 2009 *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*;¹⁵⁶ and the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*.¹⁵⁷ In 2010, the OECD adopted the 10 *Principles for Transparency and Integrity in Lobbying*.¹⁵⁸ Corruption is also mentioned in s VII of the *OECD Guidelines for Multinational Enterprises*,¹⁵⁹ which were first adopted in 1976 and updated, for the fifth time, in May 2011. In addition, as was the case for the CoE, the OECD has published a number of guidelines and tools related to anti-corruption efforts, such as the ‘OECD Bribery Awareness Handbook for Tax Examiners’¹⁶⁰ and the *Principles for Donor Action in Anti-Corruption*.¹⁶¹

As mentioned above, the *OECD Convention* resulted from strong US lobbying to adopt an international anti-corruption treaty after its domestic *FCPA* and the restrictions on US companies resulting thereafter. After a few non-binding instruments, which slowly but steadily outlined the ‘Agreed

¹⁵³ Development Assistance Committee, Organisation for Economic Co-Operation and Development, *Anti-Corruption Proposals for Bilateral Aid Procurement: Recommendation Endorsed by the Development Assistance Committee at Its High Level Meeting, 6–7 May 1996*, OECD Doc DCD/DAC(96)11/FINAL (7 May 1996).

¹⁵⁴ Council, Organisation for Economic Co-Operation and Development, *Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service*, OECD Doc C(98)70/FINAL (23 April 1998).

¹⁵⁵ Trade Committee, Working Party on Export Credits and Credit Guarantees, Organisation for Economic Co-Operation and Development, *OECD Council Recommendation on Bribery and Officially Supported Export Credits*, OECD Doc TD/ECG(2006)24 (14 December 2006).

¹⁵⁶ Public Governance Committee, Organisation for Economic Co-Operation and Development, *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc C(2009)64 (25 May 2009).

¹⁵⁷ Working Group on Bribery in International Business Transactions, Organisation for Economic Co-Operation and Development, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009).

¹⁵⁸ Public Governance Committee, Organisation for Economic Co-Operation and Development, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, OECD Doc C(2010)16 (18 February 2010) annex (‘*Principles for Transparency and Integrity in Lobbying*’).

¹⁵⁹ Organisation for Economic Co-Operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, first published 1976, 2011 ed). See also Organisation for Economic Co-Operation and Development, *Text of the OECD Declaration on International Investment and Multinational Enterprises* (25 May 2011) <<http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>>.

¹⁶⁰ Organisation for Economic Co-Operation and Development, ‘OECD Bribery Awareness Handbook for Tax Examiners 2009’ (Handbook, December 2009) <<http://www.oecd.org/tax/crime/37131825.pdf>>.

¹⁶¹ Development Assistance Committee, Organisation for Economic Co-Operation and Development, *Principles for Donor Action in Anti-Corruption*, OECD Doc DCD/DAC(2006)40/REV1 (8 December 2006).

Common Elements', the *OECD Convention* was adopted. It strongly resembles the *FCPA*. The scope of the *OECD Convention* is limited to active bribery — hence focusing on the bribe-giver (presumed to be mostly representatives of Western corporations).

The OECD monitoring mechanism is a very rigorous, two-step process. The first phase involves a system of self-evaluation aimed to assess the extent to which a state party has implemented the *OECD Convention's* provisions in its *legislation*. The second phase evaluates the *practical* implementation through a system of mutual evaluation. The monitoring process was implemented in 1991.¹⁶²

One study found that subsidiaries of transnational corporations ('TNCs') in Ghana encountered fewer requests for bribes by Ghanaian officials if their home state had ratified the *OECD Convention* than TNCs whose home state had not ratified it.¹⁶³ This may suggest that a widely disseminated, well-known and rigid anti-corruption instrument such as the *OECD Convention* can indeed exert substantial influence on corrupt behaviour, even beyond the OECD member states.

2 Inter-American Convention against Corruption

The *OAS Convention* was adopted by the OAS on 29 March 1996 and entered into force around one year later. It was the first binding multilateral anti-corruption treaty. Except for Barbados, all OAS members (including the US and Canada) have ratified it. The *OAS Convention* is open for signature by any state, although presently only OAS member states have become parties. Before the adoption of the *UNCAC*, the text of the *OAS Convention* was the most far-reaching of the international anti-corruption instruments.¹⁶⁴

The OAS initiative was led by Venezuela and strongly supported by the US.¹⁶⁵ Reminiscent of the former dictatorial regimes in Latin America, the Preamble to the *OAS Convention* focuses on the stability of democratic institutions, society's moral fibre and justice, rather than (merely) on economic considerations.¹⁶⁶ Not surprisingly, the *OAS Convention* also makes the link between corruption and narcotics trafficking.¹⁶⁷

¹⁶² Cleveland et al, above n 10, 205.

¹⁶³ Jennifer Spencer and Carolina Gomez, 'MNEs and Corruption: The Impact of National Institutions and Subsidiary Strategy' (2011) 32 *Strategic Management Journal* 280, 293. A similar test for Eastern European countries did not provide significant positive results, though the authors suggest this may be due to timing issues: the data for the East European countries were gathered 'in the middle of the primary ratification time frame' for OECD countries and may therefore have been premature: at 293–4.

¹⁶⁴ Joongi Kim and Jong Bum Kim, 'Cultural Differences in the Crusade against International Bribery: Rice-Cake Expenses in Korea and the *Foreign Corrupt Practices Act*' (1997) 6 *Pacific Rim Law & Policy Association* 549, 551, 553.

¹⁶⁵ Webb, above n 5, 193. For further analysis of corruption in Latin America, see Mauricio Morales Quiroga, 'Corrupción y democracia: América Latina en perspectiva comparada' [Corruption and Democracy: Latin America in Comparative Perspective] (2009) 28 *Gestión y Política Pública* 205.

¹⁶⁶ *OAS Convention* Preamble paras 2–3.

¹⁶⁷ *Ibid* Preamble para 8.

In addition, the OAS adopted model laws, such as those on norms of conduct for public officials¹⁶⁸ and access to administrative information.¹⁶⁹

The *OAS Convention* does not include any monitoring mechanism, merely requiring states parties to set up oversight bodies.¹⁷⁰ In 2002, eight years after the adoption of the *OAS Convention*, a monitoring mechanism (the Mechanism for Follow-Up on the Implementation of the *Inter-American Convention against Corruption*) was set up.¹⁷¹ It is based on rounds of mutual evaluation.

3 African Instruments

The African continent has not been spared from the scourge of corruption either. Certain authors trace endemic patterns of corruption in Africa back to the colonial era, which dismantled traditional checks and balances in favour of the colonial centralisation of power.¹⁷² Several anti-corruption initiatives have been introduced on the African continent, but their effectiveness is yet to be proven, according to NGO watchdog TI.¹⁷³

The *African Union Convention on Preventing and Combating Corruption* ('*AU Convention*') was adopted in Maputo, Mozambique on 11 July 2003 and entered into force approximately three years later.¹⁷⁴ As of 1 January 2013, 45 states have signed the *AU Convention* and 31 have ratified it.

The *AU Convention* provides for an Advisory Board, comprised of 11 experts, to monitor implementation.¹⁷⁵ The first Advisory Board was established in 2009. So far, it has focused merely on establishing its own organisational structure. The *2011–2015 Strategic Plan* provided for an additional two-year period for 'building its organizational efficiency'.¹⁷⁶ No country reviews have taken place yet and the *Strategic Plan* describes the role of the Advisory Board as that of a think tank.¹⁷⁷ The monitoring role is only one of the Advisory Board's goals. Reflecting the corruption discussions in the UN in the 1960s and 1970s that were tied to the negotiations of a code of conduct for TNCs,¹⁷⁸ another goal is to 'collect information and analyze the conduct and behavior of multi-national

¹⁶⁸ Departamento de Cooperación Jurídica, Organización de los Estados Americanos [Department of Legal Cooperation, Organization of American States], *Ley Modelo sobre Normas de Conducta para el desempeño de funciones públicas* [Model Law on Standards of Conduct for Public Functions] (2008) <http://www.oas.org/juridico/english/ley_modelo_no_rmas.pdf>.

¹⁶⁹ *Ibid.*

¹⁷⁰ *OAS Convention* art III(9).

¹⁷¹ *Mechanism for Follow-Up of Implementation of the Inter-American Convention against Corruption*, OAS GA Res 1784, 3rd plen sess, OAS Doc AG/RES 1784 (XXXI-O/01) (5 June 2001).

¹⁷² See Yeh, above n 106, 630 n 4.

¹⁷³ For a detailed analysis of the African anti-corruption instruments, see Transparency International, *Anti-Corruption Conventions in Africa: What Civil Society Can Do to Make Them Work* (1 January 2006) <http://www.transparency.org/whatwedo/pub/anti_corruption_conventions_in_africa_what_civil_society_can_do_to_make_the>.

¹⁷⁴ *African Union Convention on Preventing and Combating Corruption*, opened for signature 11 July 2003, 43 ILM 5 (entered into force 5 August 2006) ('*AU Convention*').

¹⁷⁵ *Ibid* art 22.

¹⁷⁶ African Union Advisory Board on Corruption, *2011–2015 Strategic Plan* (June 2011) iii.

¹⁷⁷ *Ibid.*

¹⁷⁸ See generally David Coleman, 'The United Nations and Transnational Corporations: From an Inter-Nation to a "Beyond State" Model of Engagement' (2003) 17 *Global Society* 339.

corporations operating in Africa and disseminate such information to national authorities'.¹⁷⁹ Presumably, the activities of the Advisory Board will not, in the near future, involve the imposition of a rigorous monitoring process similar to the implementation procedures used by GRECO or OECD. One author has called for the establishment of an African Commission against Corruption, which would be supported by UN investigators and exert pressure on African governments to investigate allegations of corruptions.¹⁸⁰

The *Southern African Development Community Protocol against Corruption* ('*SADC Protocol*') was signed on 14 August 2001 and entered into force two years later.¹⁸¹ The *SADC Protocol* aims to align member states' definitions of corruption, in order to facilitate cross-border cooperation.¹⁸² It covers a wide range of corrupt practices (in both the private and public sectors) and provides a broad list of preventive measures, which states parties 'undertake' to adopt.¹⁸³ However, the promising text of the *SADC Protocol* lacks an efficient implementation mechanism. It sets up a committee of states parties, to which individual countries need to report biannually.¹⁸⁴ To date, this monitoring mechanism has not yet taken off.

The *Economic Community of West African States Protocol on the Fight against Corruption* ('*ECOWAS Protocol*') was signed on 21 December 2001 but has not yet entered into force.¹⁸⁵ Like the *SADC Protocol*, the *ECOWAS Protocol* provides for a wide range of preventive measures, including codes of conduct for public officials, transparency in procurement, whistleblower protection, NGO participation and asset disclosure.¹⁸⁶ Remarkably, the *ECOWAS Protocol* also refers to the freedom of press and the right to information¹⁸⁷ — a rare example of an anti-corruption instrument explicitly referring to basic freedoms or human rights.

D *Anti-Corruption Initiatives in International Financial Institutions*

1 *World Bank*

Since 1996, anti-corruption efforts have been integrated into the World Bank's good governance conditionality.¹⁸⁸ Corruption was no longer seen as a purely economic problem of levelling the playing field for transnational business transactions, as the *FCPA* and the *OECD Convention* had done, but as a serious impediment to a society's general development. The World Bank's method for

¹⁷⁹ African Union Advisory Board on Corruption, above n 176, 11.

¹⁸⁰ Yeh, above n 106, 637–48.

¹⁸¹ *Southern African Development Community Protocol against Corruption*, opened for signature 14 August 2001 (entered into force 6 August 2003) ('*SADC Protocol*').

¹⁸² *Ibid* art 2.

¹⁸³ *Ibid* arts 3, 4.

¹⁸⁴ *Ibid* art 11.

¹⁸⁵ *Economic Community of West African States Protocol on the Fight against Corruption*, opened for signature 21 December 2001 (not yet in force) ('*ECOWAS Protocol*').

¹⁸⁶ *ECOWAS Protocol* art 5.

¹⁸⁷ *Ibid*.

¹⁸⁸ For further details on the World Bank, see below Part III(D)(2). For case studies on corruption in World Bank-funded projects, see Courtney Hostetler, 'Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects' (2011) 14(1) *Yale Human Rights & Development Law Journal* 231.

measuring the progress in anti-corruption efforts nevertheless remains largely econometric.¹⁸⁹

According to the World Bank:

Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.¹⁹⁰

The World Bank uses six governance indicators for the measurement of a country's governance score, of which control of corruption is one.¹⁹¹ The World Bank's focus on good governance was supported by literature explaining the causes of corruption mainly in terms of government behaviour. According to these studies, several governmental policies enhance corrupt practices.¹⁹² These policies include: trade restrictions; government subsidies; price controls; low wages in the civil service; and licensing requirements (especially if coupled with a monopoly for certain officials or departments to grant the licences).¹⁹³ As these governmental policies facilitate rent-seeking, World Bank conditionality and deregulation aimed to correct this.¹⁹⁴ Other factors, however, also induce rent-seeking practices, which are not (at least not directly) related to governance policies. These include sociological factors, such as strong family ties and ethnic diversity. Hence an exclusive focus on governance indicators allows these additional contributors to fly under the radar.

The Integrity Vice Presidency ('IVP') investigates allegations of corruption by World Bank employees (internal corruption) and in the execution of Bank-funded projects (external corruption). World Bank employees have access

¹⁸⁹ Gathii, above n 6, 127.

¹⁹⁰ World Bank, *Worldwide Governance Indicators* (2012) <<http://info.worldbank.org/governance/wgi/resources.htm>>.

¹⁹¹ *Ibid.* The other five indicators are:

- (i) voice and accountability;
- (ii) political stability and absence of violence/terrorism;
- (iii) government effectiveness;
- (iv) regulatory quality; and
- (v) rule of law

¹⁹² This paragraph is mainly based on Mauro, above n 27, 341–2.

¹⁹³ See Susan Rose-Ackerman, 'When Is Corruption Harmful?' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts & Contexts* (Transaction Publishers, 3rd ed, 2002) 353, 355, 358. Centralising the authority to provide, for example, driving or export licences to one body can enhance efficiency on the one hand. On the other hand, if officials know that citizens have no other recourse to be provided the licence, they can more easily extract a bribe.

¹⁹⁴ The World Bank's updated strategy on corruption and good governance reiterates that 'anti-corruption strategies without effective broader governance strategies are unlikely to succeed': World Bank, 'Strengthening Governance: Tackling Corruption — The World Bank Group's Updated Strategy and Implementation Plan' (Report, 6 March 2012) 7. This updated strategy softens the idea of imposing one-size-fits-all conditions and blanket deregulation: for example, 'a modest global [governance and anti-corruption] program based on the World Bank's role as convener, connector and generator of knowledge': at 4; '[World] Bank clients demand services and borrow to fund their own priorities and to meet their own aspirations': at 20.

to an internal ethics line, in case they have any corruption-related questions.¹⁹⁵ The World Bank operates a multilingual, anonymous 24-hour alert line, which whistleblowers can call for corruption complaints.¹⁹⁶ Such whistleblower tools are not equally efficient in all countries. Certain authors have argued that in Russia, for example, informing authorities of alleged corrupt acts seems too reminiscent of the very negative reputation of informants during the Soviet era.¹⁹⁷ As a consequence, ‘this legacy stigmatizes whistleblowing’¹⁹⁸ and very few individuals seem willing to blow the whistle for corrupt acts.¹⁹⁹ Other factors may play a role, such as a lack of credibility to the claim that the promised anonymity will be respected.²⁰⁰ Such hurdles are of course not solely related to World Bank whistleblower policies, but one-size-fits-all policies of a multilateral institution such as the Bank may not be equally effective in all of its member states because of such cultural sensitivities.

The IVP assesses:

- whether a corruption complaint received ‘relates to a sanctionable practice in World Bank Group-supported activities’;
- ‘whether the complaint has credibility’; and
- ‘whether the matter is of sufficient gravity to warrant an investigation’.²⁰¹

Priority of a specific corruption allegation is based on the possible reputational risk, the amount of funds involved and the quality of the information or evidence provided. The priority of the first criterion, the reputational risk to the World Bank Group, is especially surprising: one would expect this type of reputational risk management from a listed company, but not necessarily from a state-funded development bank. It is worth noting that the latest OECD follow-up report on corruption in the Netherlands criticised the criterion of reputational risk to Dutch trading and political interests contained in the Dutch prosecution guidelines.²⁰²

¹⁹⁵ The World Bank Group, ‘Living Our Values: Code of Conduct’ (World Bank, 2009) 40 <http://siteresources.worldbank.org/INTETHICS/Resources/World_Bank_Group_Code_of_Conduct_11_06_09.pdf>.

¹⁹⁶ Ibid.

¹⁹⁷ See, eg, Johnson and Sharma, above n 21, 14.

¹⁹⁸ Ibid.

¹⁹⁹ Jasmine Martirosian, ‘Russia and Her Ghosts of the Past’ in Roberta Ann Johnson (ed), *The Struggle against Corruption: A Comparative Study* (Palgrave Macmillan, 2004) 81, 95.

²⁰⁰ The authors would like to thank an anonymous referee for this valuable comment.

²⁰¹ World Bank, *Frequently Asked Questions: About INT* (30 November 2009) <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTD_OII/0,,contentMDK:20520936~menuPK:588945~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html>.

²⁰² Working Group on Bribery in International Business Transactions, Organisation for Economic Co-Operation and Development, ‘The Netherlands: Phase 2 — Report on the Implementation of the Phase 2 Recommendations — Application of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions’ (Report, Directorate for Financial and Enterprise Affairs, Organisation for Economic Co-Operation and Development, 17 December 2008) 4 [6] <<http://www.oecd.org/netherlands/41919004.pdf>> (‘*Netherlands Phase 2 Follow-Up Report*’).

The World Bank publishes a list of debarred individuals and firms on its website. The current list covers individuals and entities from a very wide variety of countries, including Australia, Bulgaria, China, the Democratic Republic of Congo, France, Germany, India, Indonesia, Iraq, Mexico, Morocco, Russia, Uganda, the US, Vietnam and many more.²⁰³ A cross-barring agreement is in place between the various multilateral development banks,²⁰⁴ which greatly facilitates the delisting of fraudulent entities and individuals. It would be useful to consider a similar cross-barring agreement between national anti-corruption bodies. The impact of debarment policies depends on the number of individuals and entities engaged in corrupt practices that are covered by the debarment, as well as their calibre.²⁰⁵

2 Other Multilateral Financial Institutions

With the World Bank taking on the pioneering role, the other multilateral financial institutions followed suit. The policies of each of the individual institutions cannot be described in detail. Suffice it to say that all of these institutions have in some way addressed the problem of corruption, adopting policies for both internal and/or external corrupt practices.²⁰⁶

E Private Initiatives

1 Transparency International

Established by a former World Bank Director in 1993, the NGO TI has been a driving force behind the global anti-corruption movement. Its most influential anti-corruption tool is the Corruption Perception Index ('CPI'). The CPI ranks countries according to the perceived level of corruption, based on polls of

²⁰³ World Bank, *World Bank Listing on Ineligible Firms & Individuals* (2013) <<http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>>.

²⁰⁴ *Agreement for Mutual Enforcement of Debarment Decisions*, signed 9 April 2010 (entered into by the World Bank Group, Asian Development Bank, African Development Bank Group, the European Bank for Reconstruction and Development and the Inter-American Development Bank).

²⁰⁵ The authors would like to thank an anonymous referee for underlining this point.

²⁰⁶ See, eg, European Bank of Reconstruction and Development, 'Anti-Corruption Report — 2010' (Report, 31 December 2010); European Bank of Reconstruction and Development, 'Revised Enforcement Policy and Procedures' (Policy Document, 2 December 2011) <<http://www.ebrd.com/downloads/integrity/epp.pdf>>; Salvatore Schiavo-Campo et al, 'Mid-Term Evaluation of IDB-9 Commitments: Combating Fraud and Corruption' (Background Paper, Inter-American Development Bank Office of Evaluation and Oversight, March 2013) annex A ('*Action Plan to Support Countries in Their Effort to Fight Corruption and Foster Transparency*'); Asian Development Bank, 'Anticorruption — Our Framework Policies and Strategies', above n 29; Anti-Corruption Initiative for Asia and the Pacific, 'Anti-Corruption Policies in Asia and the Pacific: Legal and Institutional Reform in 25 Countries' (Asian Development Bank/Organisation for Economic Co-Operation and Development, 2007); Asian Development Bank/Organisation for Economic Co-Operation and Development Anti-Corruption Initiative for Asia and the Pacific, 'Anti-Corruption Action Plan for Asia and the Pacific' (30 November 2001) <<http://www.oecd.org/site/adboecdanticorruptioninitiative/meetingsandconferences/35021642.pdf>>.

primarily international business people and experts (typically expatriates).²⁰⁷ Household surveys have been excluded as of 2002.²⁰⁸ The perceptions of expatriates correlate with those of the local residents.²⁰⁹

The actual occurrence of corruption is virtually impossible to measure. The *perception* of corruption may therefore provide the best alternative variable. Critics have argued that such a ranking is misleading, as the perceived level of corruption does not necessarily reflect the actual degree of corruption.²¹⁰ Moreover, the data input for the CPI comes from different sources, which may distort the final ranking.²¹¹ Only countries for which sufficient data is available are included in the ranking.²¹² The number of countries may consequently differ from year to year, which makes comparisons between a country's ranking in different years unreliable.²¹³ As the OECD reports concerning, inter alia, the Netherlands and Belgium have indicated,²¹⁴ the mapping of corruption would be significantly enhanced if national authorities would make a greater effort to compile statistics on the phenomenon. Some have criticised TI's rankings for pitting countries against each other, others have critiqued the moralising approach of the anti-corruption campaign in general for its stigmatising effect.²¹⁵

²⁰⁷ Theresa Thompson and Anwar Shah, 'Transparency International's Corruption Perception Index: Whose Perceptions are They Anyway?' (Discussion Draft Working Paper, March 2005) 12 <<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/TransparencyInternationalCorruptionIndex.pdf>>. For an in-depth analysis of anti-corruption indicators, see Francisco-Javier Urra, 'Assessing Corruption: An Analytical Review of Corruption Measurement and Its Problems: Perception, Error and Utility' (Working Paper, Georgetown University, May 2007) <<http://unpan1.un.org/intradoc/groups/public/document/s/apcity/unpan028792.pdf>>; Johann Graf Lambsdorff, 'Measuring Corruption — The Validity and Precision of Subjective Indicators (CPI)' in Charles Sampford et al (eds), *Measuring Corruption* (Ashgate, 2006) 81. See also Guillaume Louis, 'De l'Opacité à la transparence: les limites de l'indice de perceptions de la corruption de Transparency International' [From Opacity to Transparency: The Limits of the Corruption Perceptions Index of Transparency International] (2007) 31 *Déviance et société* 41.

²⁰⁸ Thompson and Shah, above n 207, 3.

²⁰⁹ Lambsdorff, above n 207, 87.

²¹⁰ Thompson and Shah, above n 207, 20.

²¹¹ Lambsdorff, above n 207, 82.

²¹² The methodology is described on TI's website: Transparency International, *Corruption Perceptions Index 2012: Frequently Asked Questions* (2012) <http://www.transparency.org/cpi2012/in_detail>.

²¹³ Lambsdorff, above n 207, 83.

²¹⁴ *Netherlands Phase 2 Follow-Up Report*, above n 202. The OECD phase 2 follow-up report on Belgium indicated that Belgium did not intend to set up a whistleblower system in the private sector, as the previous report had recommended: Working Group on Bribery in International Business Transactions, Organisation for Economic Co-Operation and Development, 'Belgium: Phase 2 — Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Applications of the *Convention* and the 1997 *Revised Recommendation on Combating Bribery of Foreign Public Officials in International Business Relations*' (Report, Directorate for Financial and Enterprise Affairs, Organisation for Economic Co-Operation and Development, 10 January 2008) 3 [4] <<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/39937450.pdf>> ('*Belgium Phase 2 Follow-Up Report*').

²¹⁵ On the stigmatisation critique: see, eg, David Kennedy, 'The International Anti-Corruption Campaign' (1999) 14 *Connecticut Journal of International Law* 455. In Kennedy's view, 'the anti-corruption campaign transforms the politically or ideologically contestable into the technically necessary and the morally imperative': at 462.

Notwithstanding these critiques, the individual country scores are widely quoted in the international press and publications on the issue of corruption.²¹⁶

In addition to the CPI, TI publishes a Bribe Payers Index ('BPI') and a Global Corruption Barometer ('GCB'). The GCB is based on surveys of more than 100 000 people in 100 countries and does not provide a ranking.²¹⁷ This renders the uptake more limited than that of the CPI. The BPI provides a ranking of leading exporting countries according to the perceived likelihood of their firms to bribe abroad. It is based on a survey of business executives focusing on the business practices of foreign firms in their country.²¹⁸ As is the case for the CPI, data for the BPI stem from different survey conductors, using different interview methods (phone, face-to-face, etc).

2 The International Chamber of Commerce

By 1977, the International Chamber of Commerce ('ICC') had already adopted its first set of flagship rules against corruption. The *ICC Rules on Combating Corruption* ('*ICC Rules*')²¹⁹ serve as a set of self-regulatory rules for companies and are described on the ICC's website as providing for 'good commercial practices in fighting corruption'.²²⁰ The *ICC Rules* were significantly amended in 2011 and reflect the spirit of the UN *Guiding Principles on Business and Human Rights*,²²¹ including through the *ICC Rules*' reference to due diligence with regard to the reputation and capacity of its business partners to comply with anti-corruption laws.²²² The *ICC Rules* recommend integrating a number of its own provisions into all contracts with business relations.²²³

²¹⁶ Christiane Arndt and Charles Oman, *Uses and Abuses of Governance Indicators* (OECD Publishing, 2006) 25.

²¹⁷ See Transparency International, *Global Corruption Barometer* (2013) <<http://gcb.transparency.org/gcb201011/>>.

²¹⁸ The 2011 Bribe Payers Index ('BPI') was based on questionnaires filled in by firms in Argentina, Austria, Brazil, Chile, China, the Czech Republic, Egypt, France, Germany, Ghana, Hong Kong, Hungary, India, Indonesia, Japan, Malaysia, Mexico, Morocco, Nigeria, Pakistan, Philippines, Poland, Russia, Senegal, Singapore, South Africa, South Korea, Turkey, the UK and the US: Deborah Hardoon and Finn Heinrich, 'Bribe Payers Index 2011' (Report, Transparency International, 2011) 25.

²¹⁹ ICC Commission on Corporate Responsibility and Anti-Corruption, *ICC Rules on Combating Corruption* (International Chamber of Commerce, first published 1977, 2011 ed) ('*ICC Rules*').

²²⁰ *Ibid.*

²²¹ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights — Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*') ('*UN Guiding Principles*').

²²² *ICC Rules*, above n 219, art 3.F. A link could be made with the *UN Guiding Principles*. If it can indeed be seen as good commercial practice for companies to ensure respect for the human rights that may be impacted on by corrupt acts, then deviation from the *ICC Rules* would arguably constitute a potential breach of a company's due diligence obligation to respect human rights.

²²³ *Ibid* art 3.E.

3 *Other Fora*

Freedom House is a Washington-based NGO which focuses on several issues, including corruption.²²⁴ Its main focus is, however, on freedom of the press. Its research on corruption is less disseminated than that of TI.

Another forum for anti-corruption discussions is the World Economic Forum ('WEF'),²²⁵ a Geneva-based NGO funded by business membership contributions. In 2004, the WEF launched the Partnering against Corruption Initiative ('PACI'), a voluntary code of conduct initiative that member corporations can elect to join.²²⁶ PACI calls for signatory companies to adopt a zero-tolerance policy on bribery.²²⁷ Its dual monitoring system combines self-evaluation with external verification.

IV CHALLENGES

Notwithstanding a surge in awareness and a plethora of international initiatives, many hurdles remain on the road towards a corruption-free world. To start with, there is no agreement as to what exactly constitutes corruption. Different countries and actors apply differing definitions. Even where agreement exists as to a corrupt act, jurisdictional problems may impede prosecution. Moreover, even after a successful legal challenge of corrupt acts, the process of asset recovery needs to overcome several legal and logistical hurdles in order to be successful. In addition, the link between corruption and good governance — and between corruption and human rights — remains the subject of intense debate.

A *Definition*

1 *'Corruption' and 'Bribery'*

As the *Explanatory Report* to the CoE's *Criminal Law Convention* states,

[p]ossible definitions have been discussed for a number of years in different fora but it has not been possible for the international community to agree on a common definition. Instead, international fora have preferred to concentrate on the definition of certain forms of corruption.²²⁸

Bribery is the most well-known form of corruption, although it is only one type. While the concrete wording of the definition differs slightly, it is generally

²²⁴ See generally Freedom House, *About Us* <<http://www.freedomhouse.org/about-us>>.

²²⁵ See generally World Economic Forum, *About Us: History* <<http://www.weforum.org/history>>.

²²⁶ Participating companies include Rio Tinto, Siemens, Deloitte, Merck, Coca-Cola, TNT Express, Tyco, BASF, PricewaterhouseCoopers and Royal Dutch Shell: see World Economic Forum, *Partnering against Corruption Initiative (PACI) Members* (April 2013) <http://www3.weforum.org/docs/IP/2013/PACI/WEF_PACI_Members_2013.pdf>. The current Partnering against Corruption Initiative board includes a representative from TI and from the Working Group on Bribery: see, eg, Christoph Frei and Valerie Weinzierl, 'Case Story: World Economic Forum Partnering against Corruption Initiative' in Birgit Errath (ed), *Business against Corruption: Case Studies and Examples* (United Nations Global Compact Office, 2006) 152, 154.

²²⁷ Cleveland et al, above n 10, 209.

²²⁸ Council of Europe, *Criminal Law Convention on Corruption: Explanatory Report*, above n 136, [2].

defined as the offering, promising or giving, or the request or receipt, by any person, directly or indirectly, of any undue advantage to or by any public official, for themselves or for anyone else, to act or refrain from acting in the exercise of their functions.²²⁹ Most international instruments use the term ‘corruption’ in their titles, though the focus lies (sometimes exclusively) on bribery.

A non-exhaustive list of types of corruption may give an idea of the breadth of the phenomenon:²³⁰

- bribery and graft (extortion and kickbacks);
- kleptocracy (stealing and privatising public funds);
- misappropriation (forgery, embezzlement, misuse of public funds);
- non-performance of duties (cronyism);
- influence peddling (favour brokering and conflict of interest);
- acceptance of improper gifts (‘speed’ money);
- protecting maladministration (cover-ups and perjury);
- abuse of power (intimidation and torture);
- manipulation of regulations (bias and favouritism);
- electoral malpractice (vote-buying and election-rigging);
- rent-seeking (public officials illegally charging for services after creating artificial shortage);
- clientelism and patronage (politicians giving material favours in exchange for citizen support);
- illegal campaign contributions (giving unregulated gifts to influence policies and regulations).

Some authors have raised the concern that corruption is becoming a catch-all term, encompassing very distinct social problems.²³¹ These authors argue that the simplistic definitions, such as the one formulated by the World Bank, are easily copied by donors as they are relatively broad and, possibly, because they give the impression that corruption is a rather straightforward problem that can be easily classified and tackled.²³² An overly broad definition, in these authors’ view, undermines the analytical usefulness of the tool and impedes the development of efficient policies.²³³ Others have warned that as the standard

²²⁹ An almost identical definition is given in the CoE *Criminal Law Convention* art 2. The definition in art VI of the *OAS Convention* is also very similar: the solicitation or acceptance, or the offering or granting, directly or indirectly, by, or to, 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. Article 1.1 of the *OECD Convention* applies a similar definition, though limited in its scope to active bribery of foreign public officials: namely to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

²³⁰ Johnson and Sharma, above n 21, 2.

²³¹ Christine S Cheng and Dominik Zaum, ‘Selling the Peace? Corruption and Post-Conflict Peacebuilding’ in Christine S Cheng and Dominik Zaum (eds), *Corruption and Post-Conflict Peacebuilding: Selling the Peace?* (Routledge, 2012) 1, 4.

²³² Ibid.

²³³ Ibid.

definition of ‘corruption’ focuses on the abuse of public office for private gain, it cannot easily be applied to corporate corruption, where no public office is involved and where there may only be a gain for the company, not for the individual employee.²³⁴

2 *Facilitation Payments*

Even though the international community seems to agree that, at least, bribery should be covered by international corruption instruments, there is no agreement as to whether facilitation payments (also called ‘grease payments’) are a form of bribery. These are payments made to speed up a certain procedure or decision, which would have eventually been completed or made anyway. If bribery covers only payments or other undue advantages made in order to *change* the behaviour of a public official (that is, to make the official act or refrain from acting), then facilitation payments do not fit into that definition. Even if they are seen as corrupt acts, certain international instruments have provided exceptions for such payments.

The *FCPA* excludes facilitation payments from its scope.²³⁵ The (voluntary) *ICC Rules* state by way of principle that facilitation payments should not be made.²³⁶ However, they recognise that companies ‘may be confronted with exigent circumstances, in which the making of a facilitation payment can hardly be avoided, such as duress or when the health, security or safety of the enterprise’s employees are at risk’.²³⁷ In such case, the *ICC Rules* recommend that such payments be accurately reflected in the books.²³⁸ The *OAS Convention* does not exclude grease payments from its scope. The commentaries on the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (‘*OECD Convention Commentaries*’) clarify that facilitation payments are not made ‘to obtain or retain business’, hence are excluded from the *OECD Convention*’s scope.²³⁹ This exclusion reflects the *OECD Convention*’s aim to tackle corruption as a distortion of free competition — grease payments, in this view, do not distort competition.²⁴⁰

The argument that facilitation payments are not made to ‘obtain or retain’ business — and therefore fall outside of the scope of the *OECD Convention* — is too positivistic a view. This technical legal argument ignores the broader consequences of facilitation payments. For example, even though a company would receive a permit in the absence of the payment, the fact that it receives it earlier when a payment is made should be seen as altering (advancing) its business operations, thus helping it to ‘obtain or retain’ business in the broad sense. The *OECD Convention Commentaries* do acknowledge that such facilitation payments should be eradicated, but state that ‘criminalisation by

²³⁴ Fleming and Zyglidopoulos, above n 25, 5–6.

²³⁵ *FCPA* § 78dd-1(b).

²³⁶ *ICC Rules*, above n 219, art 6.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *OECD Convention Commentaries*, OECD Doc DAF/IME/BR(97)20, 12 [4] (on art 1 para 1 of the *OECD Convention*).

²⁴⁰ Kubiciel, above n 5, 153–4.

other countries does not seem a practical or effective complementary action'.²⁴¹ This remark does not make much sense; indeed, the same remark could be made vis-a-vis criminalisation of corruption as such — its breadth is not limited to facilitation payments. If one upholds the need to criminalise corruption, it seems illogical to state that criminalisation is not appropriate for one form of corrupt payments, namely those aimed to speed up a procedure.

The European Bank of Reconstruction and Development is not willing to condone facilitation payments; it further states that '[s]uch payments, which are illegal in most countries, are dealt with in accordance with relevant local laws and international conventions'.²⁴² It does not clarify its stance in case local laws do not prohibit grease payments, though an international convention ratified by the relevant country does so.

The *UNCAC* does not seem to provide an exemption for facilitation payments, which could potentially fall under the prohibition of providing any 'other advantage' related to business transactions.²⁴³ A not-for-profit membership-based organisation, TRACE, conducted a business survey on corruption. In this survey, most of the companies indicated that they started to refuse to make facilitation payments, which had not led to the disruption of their activities and that the number of requests for such grease payments even decreased.²⁴⁴ TRACE holds that all types of grease payments should be prohibited, except in case of a medical or safety issue of an employee.²⁴⁵ If the aim of anti-corruption instruments is to tackle and alter a corrupt mentality within society, excluding facilitation payments would indeed seem to defeat the purpose.

3 The Local Law Exception

In addition to the exclusion of facilitation payments, a 1988 amendment to the *FCPA* under the Reagan Administration provided for two affirmative defences.²⁴⁶ Nevertheless, corrupt practices normally covered by the *FCPA* will not be prosecuted in cases where payment: (i) is allowed under the laws of the host country; or (ii) is a normal payment for travel and accommodation arising out of promotional activities aimed at obtaining or retaining new business.²⁴⁷ The legality defence (acts allowed under the laws of the host country) reflects, to a limited extent, the critique by certain developing countries that the US-led crusade against corruption is a form of modern moral imperialism, which does

²⁴¹ *OECD Convention Commentaries*, OECD Doc DAF/IME/BR(97)20, 13 [9] (on art 1 para 1 of the *OECD Convention*).

²⁴² European Bank for Reconstruction and Development, 'Fraud and Corruption — Definitions and Guidelines for Private Sector Operations' in European Bank for Reconstruction and Development, *Accountability, Integrity and Anti-Corruption* (2012) <<http://www.ebrd.com/pages/about/integrity.shtml>>.

²⁴³ Kubiciel, above n 5, 154.

²⁴⁴ Alexandra Addison Wrage, 'The High Cost of Small Bribes' (Guidebook, TRACE International, 2009) 3, 8, 16 <https://secure.traceinternational.org/data/public/The_High_Cost_of_Small_Bribes_2-65416-1.pdf>.

²⁴⁵ Cleveland et al, above n 10, 222.

²⁴⁶ *FCPA* § 78dd-1(c), as amended by *Omnibus Trade and Competitiveness Act of 1988*, Pub L No 100-418, § 5003(a), 102 Stat 1106, 1415 (1988).

²⁴⁷ *Ibid.*

not respect certain local gift-giving traditions.²⁴⁸ The Philippines, for example, opposed the US démarches at the WTO with a reference to ‘unique cultures and traditions’ requiring due respect.²⁴⁹

Along the lines of the Philippines’ objection, certain authors stress that any definition of ‘corruption’ should allow the accommodation of cultural differences. They argue for a relative definition, along the lines of that given by Arnold Heidenheimer, who, broadly speaking, defines corruption as whatever the public perceives it to be.²⁵⁰ India, for example, has for a long time been organised along caste lines with a high importance attached to interpersonal relations. Some authors have argued that such cultural background gives notions of nepotism and corruption a different meaning in, in this case, India, than it has in industrialised Western countries.²⁵¹ Imposing a one-sided Western definition of ‘corruption’ implies that ‘citizens of less-developed countries are indeed somewhat one-sidedly exposed to the easy moral judgments of citizens of more developed societies’.²⁵² Moreover, it is claimed that corruption during the transition phase of a traditional society towards modernisation can actually empower previously disadvantaged groups. Where they are disproportionately disadvantaged on the economic and political fronts, corruption by these groups may allow them to seize the power from which they had previously been excluded.²⁵³ The *UNCAC*’s flexible reference to an ‘undue advantage’²⁵⁴ reflects this concern of moral imperialism. Different countries proposed different definitions of corruption — hence the decision to not formulate any one definition in the *UNCAC*. Certain provisions of the *UNCAC*, however, provide definitions for specific types of corruption.²⁵⁵ The *Explanatory Report* to the CoE *Criminal Law Convention* equally reflects the moral imperialist objection and excludes socially acceptable gifts from its coverage.²⁵⁶ The

²⁴⁸ Cleveland et al, above n 10, 206–7; Kim and Kim, above n 164, 551.

²⁴⁹ Gantz, above n 16, 467. See also Nichols, above n 19, 365, citing ‘Philippines Rejects US Proposal for WTO Accord on Bribery, Corruption’ (1996) 13 *International Trade Reporter* 880. In addition, certain countries called the efforts to have anti-corruption standards enforced through the WTO a form of protectionism: see Kim and Kim, above n 164.

²⁵⁰ Arnold J Heidenheimer, ‘Perspectives on the Perception of Corruption’ in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts & Contexts* (Transaction Publishers, 3rd ed, 2002) 141, 143, 152. See also Maya Chadda, ‘India: Between Majesty and Modernity’ in Roberta Ann Johnson (ed), *The Struggle against Corruption: A Comparative Study* (Palgrave Macmillan, 2004) 109, 123.

²⁵¹ Arnold J Heidenheimer, ‘Perspectives on the Perception of Corruption’ in Arnold J Heidenheimer, Michael Johnston and Victor T LeVine (eds), *Political Corruption: A Handbook* (Transaction Publishers, 1989) 149, 162; Chadda, above n 250, 123.

²⁵² Kubiciel, above n 5, 145.

²⁵³ Huntington, above n 7, 64.

²⁵⁴ *UNCAC* art 15.

²⁵⁵ For example, bribery of national public officials (art 15), trading in influence (art 18), abuse of functions (art 19) and illicit enrichment (art 20).

²⁵⁶ Council of Europe, *Criminal Law Convention on Corruption: Explanatory Report*, above n 136, [38]. It can be noted that entrenched patterns of gift-giving are not necessarily traditions in the sense of ‘accepted’ social practices. The line should be drawn between entrenched patterns of corrupt practices and gift-giving that reflects longstanding cultural traditions.

OECD Convention Commentaries, on the other hand, clarify that the *OECD Convention* prohibits advantages regardless of perceptions of local customs.²⁵⁷

The tension between a transnational definition and the call for cultural sensitivities is not necessarily insurmountable. The traditional definition of 'corruption' is generally formulated as the offering, promising or giving (or the request or receipt) of an undue advantage to (or by) a public official to act or refrain from acting in the exercise of their functions. An undue advantage implies that the official would have acted differently in the absence of the advantage. The advantage is thus linked to an official's specific behaviour. Cultural gift-giving practices, however, are deemed to be a matter of social courtesy: they do not necessarily constitute corruption as they are not aimed to alter a specific act of a public official. Hence, even the traditional definition of 'corruption' could allow for the exclusion of social courtesy practices. But this thin line between corruption and social courtesy leaves a degree of legal uncertainty. The assessment of an undue advantage is based on a more straightforward criterion: would the public official have behaved differently without the bribe? To assess a social courtesy, courts need to resort to a variety of factors, such as what the socially accepted practice is²⁵⁸ and whether the amount of the payment or level of advantage stays within the limits of that practice.

The local law exception of the *FCPA* brings further legal certainty: there is no corrupt practice if the act is allowed under the written law of the host country. However, this formulation ignores the fact that social courtesy practices are often not explicitly permitted by written laws. Hence, the question of informal social courtesy practices remains unanswered.

The Supreme Court of Korea has, on several occasions, ruled on the question of traditional *ttokkap* ('rice-cake') expenses.²⁵⁹ The Court's approach reflects a healthy dose of pragmatism. On the one hand, it strictly upholds anti-corruption legislation, condemning any payment or other advantage aimed at altering an official's behaviour. On the other hand, it excludes practices of social courtesy from the definition of 'corruption'. The Court's main criterion is whether a payment was 'sufficiently in consideration for action within an official's duties'.²⁶⁰ Social courtesy gifts are not viewed as corruption insofar as they are not made to alter an official's behaviour. In addition, the Korean Supreme Court assessed whether the size of the payment remained within socially acceptable limits.²⁶¹ The various nuanced judgments of the Korean courts on this point suggest that any danger of creating a slippery slope, if socially accepted practice is excluded from the coverage of anti-corruption instruments, may be exaggerated.²⁶²

²⁵⁷ *OECD Convention Commentaries*, OECD Doc DAF/IME/BR(97)20, 13 [7] (on art 1 para 1 of the *OECD Convention*).

²⁵⁸ Socially accepted practice is here understood in the sense of socially supported, not socially condoned.

²⁵⁹ See Kim and Kim, above n 164, 564–71.

²⁶⁰ *Ibid* 565.

²⁶¹ *Ibid*.

²⁶² *Ibid* 566–71.

A 2005 judgment by the Supreme Court of the Netherlands reflects a similar view on where to draw the line between corrupt and non-corrupt acts: it correctly held that gifts made ‘in order to establish and/or maintain a relationship with that public official with the aim being to obtain preferential treatment’ should be seen as corruption.²⁶³

4 *The Scope of Corrupt Acts Covered by the International Anti-Corruption Instruments*

The one type of corruption that all international anti-corruption treaties have in common is the bribery of foreign public officials. It is useful to recall the UN *ICCPO*, which explicitly mentions that

[a] public office, as defined by national law, is a position of trust, implying a duty to act in the public interest. Therefore, the ultimate loyalty of public officials shall be to the public interests of their country, as expressed through the democratic institutions of government.²⁶⁴

This wording may reflect the remnants of the French Revolution: monarchy, privilege, nepotism and hereditary tenure were replaced by representative government. Bureaucrats became public servants and public office became a public trust.²⁶⁵ This idea of public trust is reflected in the fact that most anti-corruption instruments — and even the relevant literature — focus almost exclusively on bribery in the public sphere, that is, with the involvement of a public official. Corruption in the private sphere has received much less attention, even though its impact on a society’s morale can be equally detrimental.²⁶⁶

This focus on the public sector is reflected in the traditional World Bank definition of ‘corruption’ as the use of public office for private gain.²⁶⁷ Most scholars and organisations have adopted a similar definition, though certain experts and entities have broadened the working definition. The Asian Development Bank and TI, for example, include private sector corruption in their definitions (even though TI’s main anti-corruption indicator, the CPI, only reflects public sector corruption).²⁶⁸

²⁶³ Hoge Raad [Supreme Court of the Netherlands], Case No 03034/04 A, LJN AT8318, 27 September 2005, [4.4], quoted in Ildir Peçi and Eelke Sikkema, ‘Corruption and Legal Certainty: The Case of Albania and the Netherlands Implementation of the *Criminal Law Convention on Corruption* in a Transitional and Consolidated Democracy’ (2010) 6(1) *Utrecht Law Review* 101, 114.

²⁶⁴ *ICCPO*, UN Doc A/RES/51/59, art I(1).

²⁶⁵ Johnson and Sharma, above n 21, 15 n 1, citing Gerald E Caiden and Naomi Caiden, ‘Administrative Corruption’ (1977) 37 *Public Administration Review* 301. See also Huntington, above n 7, 60.

²⁶⁶ Alina Mungiu-Pippidi et al, ‘Contextual Choices in Fighting Corruption: Lessons Learned’ (Report 4/2011, Norwegian Agency for Development Cooperation, July 2011) 3–4. For a definition of ‘corruption’ which includes private sector acts: see, eg, Argandoña, above n 36, 481. See also Part IV(F) below.

²⁶⁷ Most authors have formulated similar definitions: see, eg, Rose-Ackerman, ‘When Is Corruption Harmful?’, above n 193, 353.

²⁶⁸ Asian Development Bank, ‘Anticorruption — Our Framework Policies and Strategies’, above n 29, 9–10; Transparency International, *What is the Corruption Perceptions Index?* (2013) <http://www.transparency.org/cpi2011/in_detail>.

The limitation to ‘public office’ is assessed below,²⁶⁹ but the limitation ‘for private gain’ also merits reflection. Certain documents only mentioned the personal gain of the bribe-taker, which is too restrictive. ‘Private gain’ can be interpreted more broadly than ‘personal gain’: a corrupt act takes place not only when it benefits the bribe-taker personally, but also when it advantages, for example, a family member, friend, acquaintance or even the political party or company to which the bribe-taker belongs.²⁷⁰ If corruption is defined as the abuse of public office for private gain, the focus lies on the *abuse* that occurs, rather than on the person who gains.²⁷¹ Nevertheless, the concrete impact of a corrupt act could differ depending on who receives the benefits of the bribe: for example, the advantage can be retained by one individual or shared among all members of the bribe-taker’s tribe. However, due to strong resistance from the US, the *UNCAC* does not cover corruption perpetrated by members of political parties.²⁷² Conversely, certain sound political decisions could also imply a private gain, without amounting to what would commonly be perceived as corruption.²⁷³ There is a thin line between normal political lobbying in favour of one’s own constituency and corrupt practices.²⁷⁴ The same thin line can be found in private promotional or lobbying efforts. For example, if pharmaceutical companies offer doctors free seminars in an exotic place to provide information on new medicine, not everyone would deem this to be outright corruption. A counter-example is tax evasion by a company or individual: as long as no bribe is paid to a public official in the process, such fraudulent acts would not constitute corruption under the international instruments that require the involvement of a public official (such as the *OECD Convention*), even though they may be perceived as corrupt.²⁷⁵ As mentioned above, certain developing countries also insist on distinguishing between corruption and traditional gift-giving. Notwithstanding certain grey areas, however, most people seem to agree on most instances of corrupt practices.

The various international anti-corruption instruments differ in scope. Some, such as the *OECD Convention*, are clearly limited to a specific type of

²⁶⁹ See below Part IV(F).

²⁷⁰ Whilst the *Wetboek van Strafrecht* [Penal Code] (Netherlands) does not explicitly criminalise indirect bribery, case law has interpreted the relevant provisions as criminalising such indirect forms of corruption: see Peçi and Sikkema, above n 263, 113. See also *Rechtbank Rotterdam* [Rotterdam District Court], Case No 10/000019-03, LJN AR7472, 14 December 2004, affd *Gerechtshof’s-Gravenhage* [The Hague Court of Appeal], Case No 22-007801-04, LJN AW2327, 19 April 2006.

²⁷¹ Kubiciel, above n 5, 148.

²⁷² See below Part IV(D).

²⁷³ For example, members of parliament could vote in favour of a law allowing for the establishment of one-person management companies. Many of those parliamentarians could fall under the new law’s scope, which would allow them to exercise their functions under the management company structure — potentially providing them with a substantial tax benefit compared with exercising those functions as a natural person. Depending on the specific circumstances, such voting behaviour would not normally be considered a form of corruption, even though the parliamentarians may obtain a private benefit from the new law.

²⁷⁴ See Ogus, above n 52, 330. One author raises the question as to the status of vote buying in international fora, for example in the International Whaling Commission: Alexander Gillespie, ‘Good Governance, Corruption & Vote Buying in International Forums’ (2004) 1 *New Zealand Yearbook of International Law* 103.

²⁷⁵ Mauro, above n 27, 343. Of course, such acts will probably be covered by the crime of fraud.

corruption. Others cover bribery and some other forms of corruption, which they define in broader or narrower terms. It is therefore difficult to rank international instruments based on the breadth of their scope. Rather, when compared, certain instruments are defined more broadly for one specific issue (for example, illicit enrichment) but more narrowly on others (for example, international cooperation provisions) when compared to other instruments.

As indicated above, the *OAS* and *OECD Conventions* are the earliest multilateral anti-corruption instruments. The scope of the *OECD Convention* is very limited. Subsequent multilateral instruments have broadened this scope, both in terms of the persons covered (*'ratione personae'*) and types of corruption covered (*'ratione materiae'*).

In view of its early adoption (in March 1996, one and a half years before the adoption of the *OECD Convention*) — and in view of Latin America's recent recovery from corrupt dictatorships — the *OAS Convention* is remarkably broad in scope.²⁷⁶ The *OAS Convention* covers both active and passive bribery, of both foreign and domestic officials.²⁷⁷ Unlike the *OECD Convention*, no link with a business transaction is required in order for an act to be classified as an act of corruption under the *OAS Convention*. It suffices that there is bribery related to any act or omission in the performance of an official's public position.²⁷⁸ The corrupt act may involve a bribe, gift, favour or advantage for either the public official or another person or entity.²⁷⁹ Similarly, the *OAS Convention* covers the concealment of the proceeds of corrupt acts,²⁸⁰ as well as illicit enrichment.²⁸¹ The criminalisation of illicit enrichment was intended to facilitate the investigations of the Latin American judicial systems that were still being rebuilt in the wake of dictatorial regimes. Canada and the US, however, held that criminalising illicit enrichment would be contrary to the presumption of innocence. The *OAS Convention* appeased these concerns, by making the requirement to criminalise illicit enrichment subject to a state's constitution and the fundamental principles of its legal system.²⁸² Nevertheless, both Canada and the US made reservations to this article.

Under the *OAS Convention*, the criminalisation of other types of corruption is stated to be merely 'desirable'; member states simply make undertakings to 'consider' prohibiting these other types, namely the improper use of classified or confidential information, the improper use or diversion of state property and trading in influence.²⁸³ However, it is not required that the act of corruption actually harms state property.²⁸⁴ Furthermore, the fact that the corrupt act had a political purpose does not, in itself, suffice to make it a political offence and consequently shield it from regular criminal prosecutions.²⁸⁵ In view of Latin

²⁷⁶ Kim and Kim, above n 164, 551, 553.

²⁷⁷ *OAS Convention* arts III(10), VI(6).

²⁷⁸ *Ibid* art VI(1).

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid*.

²⁸¹ *Ibid* art IX.

²⁸² *Ibid*.

²⁸³ *Ibid* art XI.

²⁸⁴ *Ibid* art XII.

²⁸⁵ *Ibid* art XVII.

America's past of violent dictatorships, it seems especially useful to make such a provision explicit.

As discussed above, the *OECD Convention* strongly mirrors the *FCPA*. Its scope is limited to the active bribery of foreign public officials;²⁸⁶ it does not cover the bribery of domestic public officials²⁸⁷ as the *OAS Convention* does. In addition, under the *OECD Convention*, the bribery must be related to the conduct of international business and the gaining or retaining of an undue advantage. However, other forms of corruption are not covered by the *OECD Convention*.

The *CoE Criminal Law Convention* applies to active and passive bribery in both the public and private sector. Its scope *ratione personae* is very broad: it covers the bribery of domestic and foreign public officials, members of domestic and foreign public assemblies, officials of international organisations, as well as judges and officials of international courts.²⁸⁸ The scope *ratione materiae* is more limited: only certain types of corruption are covered, namely bribery, trading in influence and the laundering of proceeds of crime.²⁸⁹

The *AU Convention* equally covers a broad range of corrupt practices, including active and passive bribery in the private sector and of public officials (without distinguishing between domestic and foreign public officials),²⁹⁰ as well as influence peddling, illicit enrichment and the concealment of proceeds derived from corrupt acts.²⁹¹ States parties 'undertake' to adopt legislation to criminalise these acts,²⁹² but it is unclear what the exact legal implications of this wording are.²⁹³ The *AU Convention* further states that states parties 'shall' adopt measures for the confiscation and seizure of the proceeds of corruption.²⁹⁴ Arguably, if states are required to adopt legislation for the confiscation and seizure of the proceeds of corruption, this implies that they should have criminalised corruption in the first place.

The *SADC Protocol* also covers both active and passive corruption of public officials, as well as corruption in the private sector.²⁹⁵ However, the states parties only 'undertake' to take the necessary measures to, inter alia, criminalise such corrupt acts.²⁹⁶ As far as the corrupt act is related to an economic or commercial transaction, bribery of foreign officials only falls under the scope of the *SADC Protocol* and is subject to the state's domestic law.²⁹⁷ The scope of the *AU Convention* and the *SADC Protocol*, as well as that of the

²⁸⁶ *OECD Convention* art 1.

²⁸⁷ See *ibid* art 1.1.

²⁸⁸ *Criminal Law Convention* arts 2–11.

²⁸⁹ *Ibid* arts 2–13.

²⁹⁰ Article 13(1) of the *AU Convention* stipulates that a state party has jurisdiction over acts of corruption and related offences not only when committed on its territory, but also if committed, inter alia, by one of its nationals or residents abroad. This implies that the scope of the *AU Convention* also covers an act of corruption of a foreign public official, at least when committed by a national or resident of the state party in question.

²⁹¹ *AU Convention* arts 4, 6, 8.

²⁹² *Ibid* art 5.

²⁹³ Webb, above n 5, 202–3.

²⁹⁴ *AU Convention* art 16.

²⁹⁵ *SADC Protocol* arts 2–3.

²⁹⁶ *Ibid* art 4.

²⁹⁷ *Ibid* art 6.

ECOWAS Protocol,²⁹⁸ however, have to be assessed in light of their very weak monitoring mechanism.

The *UNCAC*, as the most recent and universal anti-corruption convention, is also the most elaborate and detailed international anti-corruption instrument. The scope *ratione personae* of the *UNCAC* is rather broad in that it provides a *functional* definition of public official.²⁹⁹ The *UNCAC* covers not only corruption of foreign public officials, but also of domestic public officials and officials of public international organisations.³⁰⁰ In addition, employees working for a public agency or enterprise, or an entity that provides a public service,³⁰¹ are considered public officials for the purposes of the *UNCAC*.³⁰² As there is no official commentary to the *UNCAC*, there is no further official guidance as to the exact scope of these provisions. Guidance can be found in the *OECD Convention*

²⁹⁸ The scope of the *ECOWAS Protocol* is not straightforward, as the definition of corrupt practices is scattered over several articles, which at certain points do not seem to be completely consistent. It requires states parties to criminalise active and passive bribery of (foreign and domestic) public officials (arts 6.1(a), 6.2) and also the act of diverting state or private assets by a public official (arts 6.1(e), 6.2). The *ECOWAS Protocol* does not require states parties to criminalise illicit enrichment. However, it notes that if a state already has the offence of illicit enrichment, this shall cover the situation in which a public official cannot reasonably explain a significant increase in their assets (art 6.3). Creating or using false invoices or other accounting documents or omitting to record payments shall equally be criminal offences (art 4). The same holds for public officials or employees of companies who accept bribes, or persons offering or giving such bribes, thereby acting in violation of their duties (art 5). This seems to exclude facilitation payments from the *ECOWAS Protocol's* scope, as these bribes are made to speed up a service which falls within an official's or employee's normal functions. Influence peddling in both the public and private sector should equally be criminalised, whether or not the influence has actually been exerted. Hence, the *ECOWAS Protocol* only covers two instances of corruption in the private sphere:

- (i) bribery to act in violation of the functions of a private company's employee; and
- (ii) influence peddling.

The latter is not limited to employees of private companies, but covers any such instance in the private sphere (art 6.1(c)). It is not clear why the first instance is not equally broadened up to bribery in the private sector at large (eg, bribery of a private school teacher for better grading, or a private school principal for privileged access to the school). The concealment of the illicit proceeds of corruption are to be criminalised in accordance with the fundamental principles of a state's national law (art 7.2). The latter limitation seems somewhat surprising — if corrupt acts are to be criminalised, it seems logical to also require criminalisation of the concealment of the illicit proceeds of such acts. The *ECOWAS Protocol* clarifies that it is applicable:

- (i) whenever the corrupt act was committed in a member state;
- (ii) whenever such act produces effects in a member state; or
- (iii) when a national institutional system fails to provide the most basic preventive measures enumerated in the *ECOWAS Protocol* (art 3).

The latter provision is noteworthy, especially as the preventive measures listed by the *ECOWAS Protocol* are broad (drafting codes of conduct for public officials, ensuring civil society participation). For further analysis of the influence of civil society and democratisation on corruption, see Mark E Warren, 'La democracia contra la corrupción' [Democracy against Corruption] (2005) 47 *Revista Mexicana de Ciencias Políticas y Sociales* 109 (freedom of press and the right to information, asset disclosure by public officials, etc).

²⁹⁹ A functional definition has also been adopted in Belgian anti-corruption legislation: see *Belgium Phase 2 Follow-Up Report*, above n 214, 24.

³⁰⁰ *UNCAC* arts 15–16.

³⁰¹ As defined in the relevant states party's domestic law: see *UNCAC* art 2(a).

³⁰² *Ibid.*

Commentaries, which clarify that a public function includes any activity in the public interest.³⁰³ An official of a public enterprise is deemed to perform a public function unless the enterprise operates on a normal commercial basis.³⁰⁴

As far as the scope *ratione materiae* of the *UNCAC* is concerned, the mere promise, offer or request of a bribe falls under the its scope.³⁰⁵ The *Explanatory Report* to the CoE *Criminal Law Convention*, however, requires that the beneficiary at least keeps the gift for a certain time, so that the involuntary receipt of a gift that is returned immediately would not constitute bribery. Such an interpretation of corruption focuses more on the acceptance than on the offer, which seems more appropriate.³⁰⁶ Whilst the earlier *UNDAC* was limited (as its title indicates) to corruption in transnational business transactions, the current *UNCAC* is not limited in this way. Active and passive corruption by, or of, domestic public officials falls under the scope of the *UNCAC*, if aimed at making the official act (or refrain from acting) in the exercise of their official duties.³⁰⁷ However, for corrupt acts involving *foreign* public officials or officials of a public international organisation, a distinction is made between active and passive bribery.³⁰⁸ In order to be covered by the *UNCAC*, active bribery (where a bribe is promised, offered or given *to* a foreign public official) should aim to make the official act (or refrain from acting) in the exercise of their official duties in order to obtain or retain business or other undue advantage ‘*in relation to the conduct of international business*’.³⁰⁹ For passive bribery (where a bribe is intentionally solicited or accepted *by* an official), states parties shall ‘consider’ criminalising such solicitation or acceptance, whether or not this is related to business transactions.³¹⁰ The mere ‘consideration’ suggested by the *UNCAC* reflects earlier UN negotiations on the issue of corruption, where developing countries focused mainly on the supply side of bribes — more specifically the offering of bribes by foreign multinationals.³¹¹ Legally speaking, however, the distinction between active and passive bribery seems tenuous: if offering a bribe should be criminalised, so should accepting a bribe. The Netherlands, for example, had already criminalised the passive bribery of public officials in the 1809 *Criminal Code of the Kingdom of Holland*.³¹²

B Extraterritorial Jurisdiction over Foreign Corrupt Practices

An important aspect of the relevant anti-corruption conventions is that they focus on *foreign* corrupt practices, which are practices committed outside the forum state. States normally address these foreign corrupt practices by exercising *extraterritorial jurisdiction* (or at least jurisdiction that is only in part territorial).

³⁰³ *OECD Convention Commentaries*, OECD Doc DAF/IME/BR(97)20, 13 [12].

³⁰⁴ *Ibid.*

³⁰⁵ *UNCAC* arts 15–16.

³⁰⁶ Kubiciel, above n 5, 147.

³⁰⁷ *UNCAC* art 15.

³⁰⁸ *Ibid* art 16.

³⁰⁹ *Ibid* art 16.1 (emphasis added).

³¹⁰ *Ibid* art 16.2.

³¹¹ As discussed in Part II above.

³¹² *Criminal Code of the Kingdom of Holland 1809* (Holland), cited in Peçi and Sikkema, above n 263, 111.

This section gives an overview of the relevant jurisdictional provisions of the *OECD Convention* and the *UNCAC*,³¹³ and of their implementation and enforcement in selected states: the US (which pioneered the exercise of extraterritorial jurisdiction over corruption with the adoption of the *FCPA*),³¹⁴ the United Kingdom (which adopted the *Bribery Act* in 2010,³¹⁵ a statute containing possibly wide-ranging jurisdictional options),³¹⁶ Belgium³¹⁷ and the Netherlands.³¹⁸ It concludes by assessing whether the current jurisdictional and enforcement framework amounts to over- or under-regulation of corruption.

1 *The Jurisdictional Provisions of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against Corruption*

Both the *OECD Convention* and the *UNCAC* feature rather extensive provisions on the exercise of criminal jurisdiction over bribery and corruption in, respectively, arts 4 and 42. These provisions draw on the classical principles of jurisdiction, although, at times, they are given a wide interpretation. At the same time — and this may appear regrettable — these conventions only *require* contracting parties to exercise *territorial* jurisdiction, while leaving the exercise of (active/passive) personality-based, protective or universal jurisdiction optional.

As states can use a variety of principles to establish their jurisdiction over corruption, one may be tempted to assume that normative competence conflicts sometimes arise. In practice, however, given the low level of enforcement regarding foreign corrupt practices, such conflicts are few and far between. Moreover, given the international consensus on the undesirability and even criminality of foreign corrupt practices, states may be unlikely to take issue with other states' exercise of jurisdiction and may, on the contrary, be willing to cooperate in the investigation and prosecution of corrupt practices.³¹⁹ Recently, however, as will be shown below, enforcement efforts have been escalated. As a result, conflict may be more likely to arise, especially if states have different opinions about the punishability of certain corrupt practices (see the definitional problems above).

³¹³ The jurisdictional provisions of the *OECD Convention* and the *UNCAC* are further discussed in Part IV(B)(1).

³¹⁴ The *FCPA* is discussed in detail in Part IV(B)(2).

³¹⁵ *Bribery Act 2010* (UK) c 23 ('*Bribery Act*').

³¹⁶ The jurisdiction over corruption in the UK is discussed further in Part IV(B)(3).

³¹⁷ The jurisdiction over corruption in Belgium is discussed further in Part IV(B)(4).

³¹⁸ The jurisdiction over corruption in the Netherlands is discussed further in Part IV(B)(5).

³¹⁹ Cf Reagan R Demas, 'Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the *Foreign Corrupt Practices Act* and Other Anti-Corruption Initiatives' (2011) 26 *American University International Law Review* 315, 330–1. Demas states that 'the supply-side anti-bribery standards contained in the [US *Foreign Corrupt Practices Act* (which contains wide jurisdictional assertions)], in theory, are broadly accepted across the West and beyond'. Wide jurisdictional assertions in the field of antitrust, however, have met with more opposition, in particular because antitrust standards are not necessarily universally shared (there is indeed no global antitrust treaty) and restrictive business practices of national champions may be tolerated if they cause only limited adverse effects within the champions' territory: see Cedric Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Intersentia, 2008) 15–23.

As far as territorial jurisdiction is concerned, the *OECD Convention* provides in art 4.1 that '[e]ach Party shall take such measures as may be necessary 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'. This is a classic application of the ubiquity theory, pursuant to which territorial jurisdiction is established as soon as one of the constitutive elements of the crime has taken place in the territory of the forum state. Article 42.1(a) of the *UNCAC* provides in general terms that '[e]ach State Party shall ... establish its jurisdiction over ... offences [of corruption] ... when [t]he offence is committed in the territory of that State Party'.³²⁰ One may assume that ubiquity also applies here. The *UNCAC* also clarifies in its rather complicated art 42.2(c) that its jurisdiction extends to extraterritorial participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of the laundering of the proceeds of crimes of corruption (money laundering), provided that these preparatory or inchoate offences are committed with a view to the commission of a territorial offence of money laundering. Such jurisdiction — which is optional for that matter — may also be seen as an application of the territoriality principle, based on the *connexité* of an extraterritorial and territorial offence.³²¹

Whilst pursuant to the cited provisions, the exercise of territorial jurisdiction is obligatory, the exercise of active personality- or nationality-based jurisdiction is, in contrast, normally only *optional*. Article 42.2(b) of the *UNCAC* provides that a state party may establish its jurisdiction if the offence is committed by its national (or a stateless person who has their habitual residence in its territory). Pursuant to art 42.3 of the *UNCAC*, however, such jurisdiction becomes *obligatory* for a state 'when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals'. Article 4.2 of the *OECD Convention* uses more general obligatory language where it provides that

[e]ach Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

But this provision only requires that states parties which already have active personality-based jurisdiction for other offences extend such jurisdiction to corruption.³²² States which do not have such jurisdiction are not required to establish it. However, most penal codes provide for active-personality based jurisdiction, so that in practice, art 4.2 of the *OECD Convention* will be

³²⁰ Article 42.1(b) of the *UNCAC* adds that jurisdiction also extends to offences 'committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed'.

³²¹ See Cedric Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 *International Criminal Law Review* 187, 202–8.

³²² *OECD Convention* art 4.2.

obligatory.³²³ Still, any conditions limiting the exercise of such jurisdiction — such as the requirement of double criminality, the complaint of a victim or the official communication by a foreign state — may arguably continue to apply in respect of the prosecution of corruption.

The exercise of passive personality-based jurisdiction is not foreseen by the *OECD Convention*. This may reflect the traditional view that corruption is a victimless crime.³²⁴ The *UNCAC*, by contrast, provides in art 42.2(a) that a state party may establish its jurisdiction if the offence is committed against a national of that state party. Note, however, that this provision does not require that the national be a victim for jurisdiction to obtain; arguably, pursuant to art 42.2(a), jurisdiction could be obtained over foreign nationals who bribe a nation of a state party.

The exercise of protective jurisdiction was also not foreseen by the *OECD Convention*. Again, the *UNCAC* goes further than the *OECD Convention*, by providing in art 42.2(d) that a state party may establish its jurisdiction if the offence is committed against it. This provision confers protective jurisdiction on a state party in respect of acts of corruption committed against its officials abroad.

Neither the *OECD Convention* nor the *UNCAC* provide for universal jurisdiction. The *UNCAC*, however, contains an *aut dedere aut judicare* [extradite or prosecute] clause in art 42.4:

Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

This clause allows a state party to establish its ‘universal’ jurisdiction over an alleged offender, as it does not require any connection except the territorial presence of the offender. Unlike the *aut dedere aut judicare* clauses in many other conventions, however, the *UNCAC* clause is not couched in obligatory terms.³²⁵ This implies that a state party is still free not to exercise its jurisdiction over offenders, even if it does not extradite them. Only if the offender is a national is the state obliged to exercise its jurisdiction.³²⁶ Clearly, the absence of an *aut dedere aut judicare* requirement does not aid the effective prosecution of corruption.

³²³ See, eg. *Voorafgaande Titel van het Wetboek van Strafvordering* [Preliminary Title of the Code of Criminal Procedure] (Belgium) art 10*quater* [author’s trans] (*‘PT CCP’*); *Code pénal* [Penal Code] (France) art 113-6. For an exploration of active personality, see Paul Arnell, ‘The Case for Nationality Based Jurisdiction’ (2001) 50 *International and Comparative Law Quarterly* 955.

³²⁴ But see Part IV(E) (where it is argued that acts of corruption may adversely affect the enjoyment of human rights).

³²⁵ Cf *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 5.2 (*‘Convention against Torture’*):

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him [or her] pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

³²⁶ *UNCAC* art 42.3.

2 *The United States Foreign Corrupt Practices Act: the Benchmark*

Whether or not the jurisdictional grounds put forward in the *OECD Convention* and the *UNCAC* are obligatory or merely optional, they do incentivise states to prosecute the corruption of foreign officials. Accordingly, much domestic legislation criminalising corruption (of foreign officials) finds its roots in these conventions. However, as discussed above, the conventions themselves have been modelled, at least in part, on US legislation. The *FCPA*, which contains far-reaching jurisdictional provisions,³²⁷ served as the benchmark for later international efforts to tackle corruption of foreign officials.

The *FCPA* has two sets of provisions: the anti-bribery provisions³²⁸ and the accounting provisions.³²⁹ The accounting provisions concern transparency and the reporting of payments made to foreign officials,³³⁰ whereas the anti-bribery provisions provide the basis for prosecutions of individuals and corporations involved in bribing foreign officials.³³¹ The discussion below, on the jurisdictional scope of the *FCPA*, focuses on the anti-bribery provisions.

The *FCPA* provides for a classic, active and personality-based jurisdiction where it subjects all ‘United States person[s]’ to the *FCPA*, even if their acts of bribing (foreign) officials have no nexus with the territory of the US.³³² However, the *FCPA* also applies to persons or entities that are organised under the laws of a US state or have their principal place of business in the US, even if they are not US nationals (the so-called ‘domestic concerns’).³³³ That said, jurisdiction will not be established with regards to these persons if process cannot be served on them (absence of in personam jurisdiction).³³⁴

The nationality principle may be construed rather broadly under the *FCPA*, but it is the construction of the territoriality principle that has rendered the *FCPA*’s application particularly far-reaching. For one thing, the *FCPA* applies to all ‘issuers’, which are companies that register securities and file reports with the US Securities and Exchange Commission.³³⁵ In practice, this includes foreign companies that have issued stock on US securities exchanges, including foreign companies that list American Depositary Receipts on such exchanges and foreign agents of US issuers.³³⁶ An exchange-based jurisdictional system could be considered a variation on the territoriality principle, as it derives jurisdiction from listing stock on an exchange located in a specific territory. Furthermore, in

³²⁷ *FCPA* §§ 78dd-1(g), 78dd-2(i).

³²⁸ *Ibid* §§ 78dd-1, 78dd-2, 78dd-3.

³²⁹ *Ibid* § 78m.

³³⁰ *Ibid*.

³³¹ *Ibid* §§ 78dd-1, 78dd-2, 78dd-3.

³³² *Ibid* §§ 78dd-1(g), 78dd-2(i).

³³³ *Ibid* § 78dd-2(h)(1).

³³⁴ See *United States v Bodmer*, 342 F Supp 2d 176, 192–3 (SDNY, 2004).

³³⁵ *FCPA* § 78dd-1(a), in conjunction with §§ 78l and 78o(d).

³³⁶ See *United States v Panalpina Inc (Plea Agreement)* (SD Tex, No 4:10-CR-00765, 4 November 2010). The case ended in a settlement with the Department of Justice (‘DoJ’) and the US Securities and Exchange Commission (‘SEC’). Panalpina was a Swiss freight forwarding company whose foreign subsidiaries had made illegal payments to various officials in foreign countries, but was considered to be acting as an agent for US issuers. See also Fritz Heimann, Gillian Dell and Kelly McCarthy, ‘Progress Report 2011: Enforcement of the *OECD Anti-Bribery Convention*’ (Report, Transparency International, October 2011) 75.

another variation on territoriality, the *FCPA* applies to ‘any person’ acting within US territory, notably if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the US.³³⁷ This allows the US enforcement agencies (the Department of Justice (‘DoJ’) and the Securities and Exchange Commission (‘SEC’)) to bring corruption proceedings against foreign persons whose bribery acts may have had only a tenuous connection with the US, for example routing payment through US bank accounts or sending an email to a US company.³³⁸ In practice, the relevant provisions may bring foreign subsidiaries of US companies that are involved in the bribery of foreign officials within the reach of the *FCPA* watchdogs, although such subsidiaries could also be considered agents of US persons, issuers or domestic concerns. However, foreign subsidiaries are not subject to the *FCPA*’s accounting provisions (they only apply to issuers), although failure to comply with accounting requirements can engage the parent company’s liability under the *FCPA*.³³⁹ A foreign subsidiary’s failure to comply with the anti-bribery provisions of the *FCPA* can also engage a US parent company’s responsibility under the *FCPA*, even if it had no knowledge or reason to know of the foreign subsidiary’s corrupt practices,³⁴⁰ and even if those practices pre-dated the parent’s acquisition of the subsidiary.³⁴¹

The US jurisdictional claims on the basis of the *FCPA* are particularly far-reaching. This is because they allow US enforcement agencies to bring claims against foreign issuers for the bribery of foreign officials without any nexus with the US (except the listing of stock on a US exchange),³⁴² and also (in respect of foreign bribery) against foreign persons whose stock is not even listed in the US, on the sole basis that some act furthering bribery has a link with the US.³⁴³ It is no exaggeration to state that US jurisdiction over corruption is potentially quasi-universal.

³³⁷ *FCPA* §§ 78dd-1, 78dd-2, 78dd-3.

³³⁸ See, eg, *United States v Technip SA (Plea Agreement)* (SD Tex, No 4:10-CR-00439, 28 June 2010). See also Heimann, Dell and McCarthy, ‘Progress Report 2011’, above n 336, 75. The company had paid bribes to Nigerian officials through UK and Japanese intermediaries and had used US banks to route payments (apart from having American Depository Receipts listed on the New York Stock Exchange). It entered into a settlement with the DoJ and the SEC, agreeing to pay US\$338 million in criminal penalties and disgorgement of profits.

³³⁹ *FCPA* § 78m(b)(5) (criminal law); §§ 78m(b)(2), (6) (civil law). See also HR Conf Rep No 95-831, 14 (1977) (‘the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the [*FCPA*]’).

³⁴⁰ For example, the 2011 settlement between IBM and the SEC, in which IBM agreed to pay US\$10 million in connection with bribes paid by its subsidiaries to government officials in China and South Korea: Securities and Exchange Commission, ‘IBM to Pay \$10 Million in Settled *FCPA* Enforcement Action’ (Litigation Release, 21889, 18 March 2011). See also Heimann, Dell and McCarthy, ‘Progress Report 2011’, above n 336, 76.

³⁴¹ See, eg, the regulatory SEC filing of Kraft Foods in 2011: Kraft Foods Inc, ‘Annual Report to Securities and Exchange Commission’ (Report, Commission File No 1-16483, 28 February 2011) 16 <<http://www.sec.gov/Archives/edgar/data/1103982/000119312511048979/d10k.htm>>. See also Heimann, Dell and McCarthy, ‘Progress Report 2011’, above n 336, 77.

³⁴² *FCPA* § 78dd-1(g).

³⁴³ *Ibid* § 78dd-2(i).

Over the last decade, the DoJ and the SEC have vigorously enforced the *FCPA*, bringing both criminal and civil suits against violators and imposing large fines.³⁴⁴ In 2010, 106 publicly disclosed investigations were being carried out.³⁴⁵

3 Jurisdiction over Corruption in the United Kingdom

While the US has been the historic frontrunner in the criminalisation and prosecution of foreign corruption, the UK was long considered a laggard. The OECD did not shrink from taking the UK to task on this, even as late as 2008.³⁴⁶ Admittedly, in 2001, the UK had criminalised the corruption of foreign officials by UK nationals or companies,³⁴⁷ yet reliance on a strictly circumscribed active personality principle did nothing to combat foreign corruption by UK-based foreign nationals.³⁴⁸ Responding to this criticism, the UK adopted the *Bribery Act* in 2010. The jurisdictional scope of the *Bribery Act* is potentially far-reaching and may arguably even go beyond the *FCPA*'s jurisdictional claims.³⁴⁹ However, so far no 'extraterritorial' prosecution has been brought under the *Bribery Act*.³⁵⁰

The *Bribery Act* features three main jurisdictional provisions: ss 6, 7 and 12.³⁵¹ Section 12 is the most straightforward one, providing for jurisdiction 'if any act or omission which forms part of the offence takes place in ... the United Kingdom' — ie, territorial jurisdiction.³⁵² Sections 12 confers the UK jurisdiction over a person or entity bribing a foreign public official if the person or entity has a close connection with the UK, even if the act or omission at issue does not take place in the UK.³⁵³ A person or entity has a close connection when, for instance, that person or entity, was a British citizen, was an individual ordinarily resident in the UK, or a body incorporated under the law of any part of

³⁴⁴ See generally Lucinda A Low and Owen J Bonheimer, 'Enforcement of the US *Foreign Corrupt Practices Act*: Extraterritorial Reach and the Effects of International Standards' (Paper presented at the International Bar Association Annual Anti-Corruption Conference, Chicago, 19 September 2006).

³⁴⁵ For further details on bribery cases and investigations in the US, see Heimann, Dell and McCarthy, 'Progress Report 2011', above n 336, 74–8.

³⁴⁶ Working Group on Bribery in International Business Transactions, Organisation for Economic Co-Operation and Development, 'United Kingdom: Phase 2bis — Report on the Application of the *OECD Convention on Combating Bribery of Foreign Public Officials on International Business Transactions* and the 1997 *Recommendation on Combating Bribery in International Business Transactions*' (Report, Directorate for Financial and Enterprise Affairs, Organisation for Economic Co-Operation and Development, 16 October 2008) 4 <<http://www.oecd.org/dataoecd/23/20/41515077.pdf>>.

³⁴⁷ *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, s 109 (which came into force on 14 December 2001).

³⁴⁸ F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight against Corruption' (2010) 46 *Texas International Law Journal* 1, 5.

³⁴⁹ *Ibid* 28.

³⁵⁰ For a discussion of the first (domestic) prosecution brought (namely that of Munir Patel) and fine imposed for failings in anti-bribery and corruption systems and controls (on Willis Limited) under the *Bribery Act* (UK), see Steven Pitt and Barney Connell, 'A Year in the Life of the UK *Bribery Act*' in Sidley Austin LLP, *Insurance and Reinsurance Law Report* (2012) 35, 38–41 <http://www.sidley.com/files/upload/2012_IRLR_UK%20BRIBERY_A CT.pdf>.

³⁵¹ *Bribery Act* (UK) c 23, ss 6, 7, 12.

³⁵² *Ibid* s 12.

³⁵³ *Ibid*.

the UK.³⁵⁴ This jurisdictional grant could be considered as an application of an extended version of the active personality principle. The UK goes further in s 7, however, by criminalising the failure of a ‘relevant commercial organisation’ to prevent foreign bribery.³⁵⁵ Section 7 gives the *Bribery Act* a particularly long arm. It not only defines a ‘relevant commercial organisation’ (rather logically) as ‘a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)’³⁵⁶ or as ‘a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)’,³⁵⁷ but also as ‘any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom’³⁵⁸ or as ‘any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom’.³⁵⁹ Accordingly, the UK may entertain jurisdiction over a failure to prevent foreign corruption under the *Bribery Act* (which also extends to corruption of private persons) under an extended active personality principle³⁶⁰ and on the basis of — possibly tenuous — territorial links.³⁶¹ Therefore, any body corporate or partnership which carries on a business, or even only part of a business, in the UK would be covered by the *Bribery Act*. It will fall to the relevant enforcement agency to determine what territorial link is sufficient for UK jurisdiction to be triggered, but a wide interpretation of territoriality, like in the US, is not excluded. The potential jurisdictional scope of the *Bribery Act* becomes even larger if ‘relevant commercial organisation[s]’ (to which the *Act* applies) included foreign subsidiaries of UK companies, or foreign companies in which UK companies have an interest.³⁶² In any event, given the global economic prominence of the UK, a considerable amount of foreign companies have structural, territorial or personal links to the UK and may accordingly become subject to the *Bribery Act*.³⁶³

4 *Jurisdiction over Corruption in Belgium*

It has been submitted, even by the Belgian government itself,³⁶⁴ that Belgian courts can exercise universal jurisdiction over offences of corruption under Belgian law.³⁶⁵ Such jurisdiction would arguably go beyond what the *OECD*

³⁵⁴ For an overview of all instances of ‘close connection’: see s 12(4).

³⁵⁵ *Ibid* s 7.

³⁵⁶ *Ibid* s 7(5)(a).

³⁵⁷ *Ibid* s 7(5)(c).

³⁵⁸ *Ibid* s 7(5)(b).

³⁵⁹ *Ibid* s 7(5)(d).

³⁶⁰ *Ibid* s 6(5), in conjunction with s 7.

³⁶¹ *Ibid* s 12.

³⁶² Warin, Falconer and Diamant, above n 348, 29–30 (submitting in this respect that ‘section 7’s requirements could effectively extend to even the remotest corners of a global organization’).

³⁶³ *Ibid* 37 (speaking of an ‘extraordinary number of multinational corporations’).

³⁶⁴ Explanatory Memorandum, Wetsontwerp tot aanpassing van de wetgeving inzake de bestrijding van omkoping [Bill to Amend the Law on Combating Bribery], Kamer van Volksvertegenwoordigers [Chamber of Representatives] 2677/001, 51st sess (2006) 11.

³⁶⁵ See also David C Weiss, ‘The *Foreign Corrupt Practices Act*, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence’ (2009) 30 *Michigan Journal of International Law* 471, 493.

Convention requires from states parties.³⁶⁶ However, the existence of universal jurisdiction over corruption is only an impression resulting from poor legislative drafting. Article 10*quater*, § 1 of the *Voorafgaande Titel van het Wetboek van Strafvordering* [Preliminary Title of the Code of Criminal Procedure] sets forth as the basic principle regarding the exercise of jurisdiction over corruption that ‘a person can be prosecuted in Belgium when outside the territory of Belgium he [or she] commits [an act of corruption]’.³⁶⁷ However, this provision only applies to acts of corruption committed by Belgian officials abroad; Belgian nationals who are officials of foreign states or international organisations; and officials of international organisations that are headquartered in Belgium.³⁶⁸ Therefore, in reality, this ground of jurisdiction is based on the protective principle. So much was also admitted by the government.³⁶⁹ That being said, Belgian law also criminalises corruption of foreign officials who have no link with Belgium, in accordance with Belgium’s obligations under the relevant conventions, provided however that the presumed offender is a Belgian national or a person who has their main residence in Belgium and that the act is also punishable where it was committed.³⁷⁰ This is a classic application of the active personality principle, although some limiting conditions for the exercise of jurisdiction based on this principle have been abandoned with regards to the prosecution of corruption.³⁷¹ However, the limiting condition of double criminality remains in place. Whilst this has been criticised by the OECD, the Belgian government has pointed out that it interprets the requirement of double criminality as one of the ‘principles’ cited by art 4.2 of the *OECD Convention*.³⁷² This provision indeed does not require that OECD member states introduce unbridled active personality-based jurisdiction over presumed perpetrators of corruption. Instead, art 4.2 of the

³⁶⁶ Explanatory Memorandum, Wetsontwerp tot aanpassing van de wetgeving inzake de bestrijding van omkoping [Bill to Amend the Law on Combating Bribery], Kamer van Volksvertegenwoordigers [Chamber of Representatives] 2677/001, 51st sess (2006) 11.

³⁶⁷ This provision of the *PT CCP* was last amended by Act of 11 May 2007, which entered into force on 8 June 2007. What acts exactly constitute corruption is defined in arts 246–9 of the *Strafwetboek* [Penal Code] (Belgium) (*‘Belgian Penal Code’*).

³⁶⁸ The substantive articles of the *Belgian Penal Code* referenced by *PT CCP* art 10*quater*, § 1 only relate to corruption of Belgian officials, as can be derived *a contrario* from art 250 of the *Belgian Penal Code*, which concerns corruption of officials of foreign states or international organisations, and from *PT CCP* art 10*quater*, § 2. *PT CCP* art 10*quater*, § 1(1) concerns Belgian officials, whereas § 1(2) concerns other officials who nevertheless have a link with Belgium.

³⁶⁹ Explanatory Memorandum, Wetsontwerp tot aanpassing van de wetgeving inzake de bestrijding van omkoping [Bill to Amend the Law on Combating Bribery], Kamer van Volksvertegenwoordigers [Chamber of Representatives] 2677/001, 51st sess (2006) 12.

³⁷⁰ *PT CCP* art 10*quater*, § 2.

³⁷¹ Compare *PT CCP* art 10*quater*, § 2 with art 7, § 2 (ie, the general provision governing the exercise of active personality-based jurisdiction, which requires a complaint of the victim or a communication by the foreign government). As corruption is often regarded as a victimless offence, it is unlikely that victims will come forward. In addition, foreign governments, or at least their officials, may have an interest in the acts of (passive) corruption and may thus be unlikely to communicate these acts to the home state of alleged perpetrators of active corruption. Therefore, abandoning the restrictive conditions enshrined in *PT CCP* art 7, § 2 could be viewed as a precondition for the successful prosecution of acts of corruption.

³⁷² Explanatory Memorandum, Wetsontwerp tot aanpassing van de wetgeving inzake de bestrijding van omkoping [Bill to Amend the Law on Combating Bribery], Kamer van Volksvertegenwoordigers [Chamber of Representatives] 2677/001, 51st sess (2006) 13.

OECD Convention merely requires that states which already have such jurisdiction on their statutory books, extend it (arguably mitigated by pre-existing limiting conditions) to bribery of foreign public officials.³⁷³ As noted above, it is regrettable that the drafters of the *OECD Convention* remained so cautious.

TI has characterised Belgium as a ‘moderate enforcer’ of legislation against foreign corrupt practices. Indeed, TI identified only four Belgian cases and some EU-related cases referred to TI by the European Anti-Fraud Office.³⁷⁴ In addition, TI considered that insufficient resources were earmarked for combating corruption (although the workload of investigating the EU cases may be partly to blame); that ‘the police and the judiciary do not have enough resources and training to deal with these cases’; and that there is ‘no administrative body to handle complaints and lead administrative investigations’.³⁷⁵

5 *Jurisdiction over Corruption in the Netherlands*

Prosecution of corruption in the Netherlands is possible on the basis of a number of jurisdictional grounds. Dutch anti-corruption law is, pursuant to art 5(1)(1) of the *Wetboek van Strafrecht 1881* [Penal Code 1881] (‘*Dutch Penal Code*’),³⁷⁶ applicable to Dutch nationals who commit acts of bribery outside the Netherlands.³⁷⁷ Unlike in Belgium, the prosecution of these persons under the active personality principle is not subject to a double criminality requirement. In addition, Dutch law is applicable, arguably under the protective principle, to acts of bribery committed abroad against Dutch officials (subject to a double criminality requirement)³⁷⁸ and to acts of bribery committed by a Dutch official³⁷⁹ or by an official of an international organisation established in the Netherlands (also subject to a double criminality requirement).³⁸⁰ It is noted that corruption of private persons is punishable in the Netherlands,³⁸¹ but that Dutch courts have no extraterritorial jurisdiction over such acts.³⁸²

³⁷³ *OECD Convention* art 4.2.

³⁷⁴ Heimann, Dell and McCarthy, ‘Progress Report 2011’, above n 336, 19–20 (citing investigations into the Iraq oil-for-food scandal and investigations into the practices of the Belgian utility firm Tractebel, among others). Note that the European Anti-Fraud Office is commonly known as ‘OLAF’, which is an acronym of ‘Office de Lutte Anti-Fraude’, the French name for the Office: see European Commission, *European Anti-Fraud Office* (26 April 2013) <http://ec.europa.eu/anti_fraud/>.

³⁷⁵ *Ibid* 20.

³⁷⁶ *Wetboek van Strafrecht 1881* [Penal Code 1881] (Netherlands) art 5.1.1 (‘*Dutch Penal Code*’).

³⁷⁷ Corruption of officials is criminalised by arts 177 and 177(a) of the *Dutch Penal Code*.

³⁷⁸ *Dutch Penal Code* art 4(10).

³⁷⁹ In case such a person had Dutch nationality, they would also be covered by the *Dutch Penal Code*’s active personality-based jurisdiction: art 5.1.1.

³⁸⁰ *Ibid* art 4(11).

³⁸¹ *Ibid* art 328ter.

³⁸² Cf *ibid* arts 4, 5.

As far as enforcement is concerned, TI identified nine cases and three investigations, and it characterised the Netherlands as a moderate enforcer.³⁸³ Some Dutch companies have also entered into a settlement with US authorities acting under the *FCPA*.³⁸⁴ TI criticised the Netherlands in general for not imposing sufficiently severe pecuniary sanctions on corrupt persons, and the Rijksrecherche [National Police Internal Investigation Department] in particular for not sufficiently focusing on combating foreign bribery (as opposed to passive corruption by Dutch officials).³⁸⁵ It is also observed that Curacao and Sint Maarten have not ratified the *OECD Convention*, which in TI's view may hamper mutual legal assistance.³⁸⁶

6 *Assessing the Exercise of Extraterritorial Jurisdiction over Corruption: Over- or Under-Regulation?*

As set out above, many states do have rather wide-ranging jurisdictional provisions for the prosecution of corruption on their statutory books. Enforcement, however, has been lacking. TI's 2011 Progress Report on the enforcement of the *OECD Convention* noted that enforcement (regarding the bribery of foreign officials) was generally inadequate.³⁸⁷ According to TI, only seven countries (Denmark, Germany, Italy, Norway, Switzerland, the UK and the US) actively enforced the *OECD Convention*.³⁸⁸ This suggests that foreign corruption may be under-regulated. However, the US has recently stepped up its enforcement³⁸⁹ and, with the adoption of the *Bribery Act*, the UK may follow suit. If all states embark on a policy of actively enforcing their anti-corruption legislation, companies may no longer get away with bribing foreign officials. Given the long jurisdictional arm of many law enforcers, companies will have to develop a global anti-corruption strategy that permeates their entire corporate structure and business relationships. While closing the enforcement gap is to be applauded, harmful over-regulation may well loom large. This may occur when the various countries' prosecutorial policies are not transparent³⁹⁰ and when states have overlapping jurisdictional claims (thereby capturing the same conduct

³⁸³ One example is the investigation of *Trafigura Beheer BV*, a Dutch oil trader that had allegedly paid bribes to Jamaican politicians: see 'Dutch to Probe Claims of *Trafigura* Bribes in Jamaica', *Expatica* (online), 1 February 2011 <http://www.expatica.com/nl/news/dutch-news/dutch-to-probe-claims-of-trafigura-bribes-in-jamaica_127033.html>, cited in Heimann, Dell and McCarthy, 'Progress Report 2011', above n 336, 54.

³⁸⁴ Heimann, Dell and McCarthy, 'Progress Report 2011', above n 336, 54–5 (referring to the Dutch company *Snamprogetti* settling with US and Nigerian authorities, in connection with corrupt practices regarding a liquefied gas plant in Nigeria; *Shell* settling with US authorities in connection with bribes paid to Nigerian officials by an agent; and *Philips* going on trial in Poland in connection with payments made to managers of Polish public hospitals).

³⁸⁵ *Ibid* 55.

³⁸⁶ *Ibid*.

³⁸⁷ *Ibid*.

³⁸⁸ *Ibid* 5.

³⁸⁹ For a discussion of US enforcement of its *FCPA*, see above Part IV(A)(2).

³⁹⁰ Joseph P Covington and Iris E Bennett, 'Signs of Life in International Anti-Bribery Enforcement — Recent Enforcement of Anti-Bribery Laws Outside the US and Issues to Consider for a Multi-Jurisdictional Defense Strategy' (Bloomberg Finance LP, 2009) 2 <http://www.jenner.com/system/assets/assets/1118/original/covington_bennett_pdf.pdf?1317312702>.

twice or more) while failing to coordinate.³⁹¹ It is also not unforeseeable that certain countries will bring bogus anti-corruption proceedings with a view to punishing hostile corporations or their home states.³⁹²

The *OECD Convention* and the *UNCAC* do not set great store by jurisdictional restraint to prevent over-regulation. Admittedly, as discussed above, these two conventions only require that states exercise territorial jurisdiction over offences of corruption and do not require that states exercise personality-based jurisdiction, protective jurisdiction or universal jurisdiction in cases where they do not extradite offenders. Nevertheless, a number of provisions in the *OECD Convention* and the *UNCAC* encourage states to provide for a wider jurisdictional ambit than that required or suggested by those conventions. Article 4.4 of the *OECD Convention* requires that each party 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'. Article 42.6 of the *UNCAC* provides that 'without prejudice to norms of general international law, this *Convention* shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law'.³⁹³ Moreover, these conventions do not set out an elaborate framework to solve normative competence conflicts; they satisfy themselves with reminding states of their obligations to consult and coordinate with each other in such cases.³⁹⁴ By way of comparison, in the antitrust field, some states/entities have institutionalised the coordination of their antitrust enforcement action, especially after a specific competence conflict arose between them.³⁹⁵ In the field of anti-corruption, such agreements have so far not materialised, but once international enforcement becomes more vigorous, they may prove useful to limit conflict³⁹⁶ and to avoid deterring legitimate — and necessary — economic

³⁹¹ Warin, Falconer and Diamant, above n 348, 71–2. According to Warin, Falconer and Diamant, not only is it efficient for regulators in multiple jurisdictions to coordinate their efforts against multi-jurisdictional corruption, it is in the interest of justice that multinational companies are not investigated and punished repeatedly in different countries for the same underlying wrongdoing. The case against Siemens proved that cross-jurisdictional cooperation can work.

³⁹² Weiss, above n 365, 505.

³⁹³ *UNCAC* art 42.6. Cf *Convention against Torture* art 5.3.

³⁹⁴ *UNCAC* art 42.5:

If a State Party exercising its jurisdiction ... has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

See also *OECD Convention* art 4(3): 'When more than one Party has jurisdiction over an alleged offence described in this *Convention*, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution'.

³⁹⁵ *Agreement regarding the Application of Competition Laws between the Government of the United States and the Commission of the European Communities*, 30 ILM 1487 (signed and entered into force 23 September 1991).

³⁹⁶ International coordination seems to take place on an ad hoc basis for the time being: see, eg, the successful coordination by national anti-corruption enforcers in the *Siemens Plea Agreement*: Warin, Falconer and Diamant, above n 348, 71–2; Weiss, above n 365, 504–5. Investigations into Siemens' practices were initiated in China, Greece, Hungary, Indonesia, Italy and Norway and the US. Cooperation between Germany and the US was particularly close.

investment in (developing) countries.³⁹⁷ Such agreements may establish a jurisdictional hierarchy (which does not exist under general international law)³⁹⁸ and identify the most appropriate jurisdiction based on a number of variables.³⁹⁹ In addition, they may provide that penalties already paid shall be discounted from penalties newly imposed.

In the short term, it is likely that a few states will more or less vigorously enforce anti-corruption legislation, while a host of other states will have no adequate legislative framework or, if they have one, not enforce it rigorously. Put differently, a situation of partial under-regulation might persist. This situation carries specific dangers. Persons and corporations having a nexus with a small number of highly-regulated states may be subjected to onerous legislation and enforcement when doing business abroad, while similarly situated persons and corporations having a nexus with other states may be unencumbered by such regulatory restraints and their attendant high compliance costs. This imbalance may place the latter businesses at a competitive advantage vis-a-vis the former⁴⁰⁰ and gradually sap the former's support for strict anti-corruption legislation.⁴⁰¹

Therefore, to prevent a backlash in the fight against corruption, the enforcement playing field has to be levelled.⁴⁰² Ideally, a level playing field would involve all states enforcing anti-corruption legislation with equal force. In the short run, this is not likely to occur. However, in the meantime, states that vigorously enforce anti-corruption legislation could also single-handedly level the playing field by extending their jurisdictional assertions. They may, for example, give a broad interpretation to the territoriality or nationality principles, or resort to the universality principle. Extending a state's jurisdictional arm may capture foreign corrupt practices that might otherwise go unpunished (given other states' enforcement failures), dent foreign businesses' competitive advantages and put pressure other (home) states to assume their responsibility in

³⁹⁷ Weiss, above n 365, 505. Weiss states that informal agreements on the issue of international regulatory cooperation do exist, but it is not clear that they can provide the predictability and consistent calculation of penalties that are normatively desirable to avoid over-detering investment in foreign projects. While it would not be undesirable if corruption and bribery disappeared entirely, over-deterrence and the resulting reduction in investment are harmful from an efficiency standpoint.

³⁹⁸ On the system of concurrent jurisdiction in international law, see Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008) 127–9.

³⁹⁹ Cf Weiss, above n 365, 504 (submitting that 'it is one thing for a regulator to inform an interested State that it is investigating a firm, but it is quite another for that regulator to refrain from seeking fines within its grasp merely because of comity toward foreign regulators').

⁴⁰⁰ Demas, above n 319, 337 (arguing that strict *FPCA* enforcement 'tends to place those companies operating in Africa with a US connection at a competitive disadvantage').

⁴⁰¹ Ibid 339, citing Fritz Heimann and Gillian Dell, 'Progress Report 2009: *OECD Anti-Bribery Convention*' (Report, Transparency International, June 2009) 8.

⁴⁰² Ibid 362–3. Note that US efforts to universalise the criminality of corruption have now borne fruit after the adoption of, notably, the *UNCAC* and the *OECD Convention*. While many states have duly implemented the provisions of these conventions, they have often failed to enforce them. Put differently, the legislative playing field may have been levelled, but the enforcement playing field has not. Accordingly, the classic US complaint that US firms are put at a competitive disadvantage is still valid.

fighting foreign corruption.⁴⁰³ Arguably, when it comes to protecting global public interests such as a corruption-free world, broad jurisdictional assertions may need to be tolerated or may even be necessary to improve worldwide compliance with shared international legal standards.

C *Asset Recovery*

Asset recovery provisions aim to ensure that property that was taken from its rightful owner through corrupt practices is returned. Its goal is to tackle the economic incentive for corrupt acts: not only can the persons involved in corruption be held criminally or civilly liable (with a focus on the individual), but the proceeds from their corrupt acts can also be seized (with a focus on the assets). Asset recovery has received increased attention in the international arena. Calls for the recovery of assets taken from developing countries during colonial times⁴⁰⁴ have been reinforced by allegations that European financial institutions had shielded money and assets belonging to dictators recently toppled during the Arab Spring.⁴⁰⁵ Furthermore, the current global financial crisis increases the awareness that more transparency in the international financial system is necessary to prevent fraudulent and corrupt practices.

Asset recovery is included in international anti-corruption instruments.⁴⁰⁶ In addition, it is addressed by international financial regulations that are not (exclusively) focused on anti-corruption, but which will obviously interact with the anti-corruption instruments.⁴⁰⁷ Examples include the Financial Action Task

⁴⁰³ In the fight against climate change, this strategy has recently been adopted by the EU: see *Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 Amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community* [2009] OJ L 8/3 (extending the European emissions allowance trading scheme to flights which arrive at or depart from an aerodrome situated in the territory of a member state, including to flights by aircraft registered in third states and flying over third states' territory), as upheld by the European Court of Justice: *Air Transport Association of America v Secretary of State for Energy and Climate Change* (Court of Justice of the European Communities, C-366/10, 21 December 2011).

⁴⁰⁴ See, eg, Michael J Reppas II, 'Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed' (2007) 36 *Denver Journal of International Law and Policy* 93.

⁴⁰⁵ European Parliament, 'Europe Should Stop Harboring Dictators' Blood Money' (Press Release, 6 February 2012) <<http://www.europarl.europa.eu/news/en/headlines/content/20120203STO37167/html/Europe-should-stop-harboring-dictators%27-blood-money>>. Nevertheless, several financial institutions did freeze the assets of fallen dictators, acts that were strengthened by UN Security Council resolutions imposing asset freezes: see, eg, Financial Action Task Force, 'Laundering the Proceeds of Corruption' (Report, July 2011) 11 [23].

⁴⁰⁶ See, eg, *UNCAC* ch V. See also Saliou Bah, 'La Restitution des avoirs issus de la corruption dans les conventions anti-corruption internationales: une avancée conceptuelle et normative à la portée pratique limitée' [The Return of Assets Derived from Corruption in International Anti-Corruption Conventions: A Conceptual and Normative Advance to a Limited Practical Impact] (2010) 1 *Revue de droit des affaires internationales* 15.

⁴⁰⁷ One example is international accounting standards. Following the example of the *FCPA*, certain multilateral conventions contain separate provisions on accounting standards (for example, *OECD Convention* art 8). Imposing stringent accounting requirements to a certain extent brings the anti-corruption effort under the rigorous oversight of market and stock exchange watchdogs such as the SEC in the US. The post-Watergate investigations in the US caused several companies to report alleged wrongdoings specifically to the SEC: see Cleveland et al, above n 10, 203.

Force recommendations,⁴⁰⁸ the guidance of the Basel Committee on Banking Supervision⁴⁰⁹ and the ‘Wolfsberg Anti-Money Laundering Principles for Private Banking’, revised in May 2012.⁴¹⁰ States’ obligations under these international financial instruments must be read together with their obligations under international anti-corruption instruments.

The provisions on asset recovery form a separate chapter in the *UNCAC*,⁴¹¹ reflecting the importance attached to this issue.⁴¹² Developing countries in particular prioritised asset recovery provisions during the *UNCAC* negotiations⁴¹³ and their efforts were strengthened by US support on this issue.⁴¹⁴ Coupled with asset recovery is the need for international cooperation and assistance.⁴¹⁵ Asset recovery implies costly efforts and complex procedures, for which developing countries often need the assistance of developed countries

⁴⁰⁸ Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’ (February 2012) (*FATF Recommendations*). The Financial Action Task Force (‘FATF’) is an independent intergovernmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing: see generally Financial Action Task Force, *About Us: Who We Are* (2012) <<http://www.fatf-gafi.org/pages/aboutus/>>. See also Financial Action Task Force, ‘Laundering the Proceeds of Corruption’, above n 405.

⁴⁰⁹ For documents issued by the Basel Committee on Banking Supervision (‘BCBS’): see generally Bank for International Settlements, *Basel Committee — Last 3 Years* <<http://www.bis.org/list/bcbs/index.htm>>. The BCBS has released guidance on a number of topics: see, eg, Basel Committee on Banking Supervision, ‘Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering’ (Statement, December 1988) <<http://www.bis.org/publ/bcbsc137.pdf>>; Basel Committee on Banking Supervision, ‘Consolidated KYC Risk Management’ (Guidance Document, Bank for International Settlements, October 2004) <<http://www.bis.org/publ/bcbs110.pdf>>; Basel Committee on Banking Supervision, ‘Due Diligence and Transparency regarding Cover Payment Messages Related to Cross-Border Wire Transfers’ (Guidance Document, Bank for International Settlements, May 2009) <<http://www.bis.org/publ/bcbs154.pdf>>.

⁴¹⁰ Wolfsberg Group, ‘Wolfsberg Anti-Money Laundering Principles for Private Banking (2012)’ (May 2012) <<http://www.wolfsberg-principles.com/pdf/Wolfsberg-Private-Banking-Principles-May-2012.pdf>>. The Wolfsberg Group is an industry-led initiative comprised of 11 global banks. The Group aims to elaborate standards on know-your-customer, money laundering and counterterrorism financing issues: see generally Wolfsberg Group, *Global Banks: Global Standards* (2012) <<http://www.wolfsberg-principles.com/>>.

⁴¹¹ *UNCAC* ch V.

⁴¹² For a detailed assessment, see Carr and Goldby, above n 4, 190.

⁴¹³ Recent studies estimate a capital flight out of poorer countries of more than US\$1.2 trillion in 2008, of which around US\$50 billion would be proceeds of corruption: see Financial Action Task Force, ‘Laundering the Proceeds of Corruption’, above n 405, 9 [15]; Theodore S Greenberg et al, ‘Stolen Asset Recovery: Politically Exposed Persons — A Policy Paper on Strengthening Preventive Measures’ (Policy Paper, Stolen Asset Recovery Initiative/World Bank, 2009) xiii, 3–4 <<http://siteresources.worldbank.org/EXTSARI/Resources/5570284-1257172052492/PEPs-ful.pdf>>; Dev Kar and Karly Curcio, ‘Illicit Financial Flows from Developing Countries: 2000–2009 — Update with a Focus on Asia’ (Report, Global Financial Integrity, January 2011) i <http://www.gfintegrity.org/storage/gfip/documents/reports/IFF2010/gfi_iff_update_report-web.pdf>; Raymond W Baker, *Capitalism’s Achilles Heel: Dirty Money and How to Renew the Free-Market System* (John Wiley & Sons, 2005) 172. The Stolen Asset Recovery Initiative’s (‘StAR’) estimates indicate that around US\$5 billion has been recovered in the period 1995 to 2010: Stolen Asset Recovery Initiative, *Frequently Asked Questions* (2013) <<http://star.worldbank.org/star/about-us/frequently-asked-questions>>.

⁴¹⁴ Webb, above n 5, 207.

⁴¹⁵ On the legal framework and types of legal assistance, see Organisation for Economic Co-Operation and Development, ‘Typology on Mutual Legal Assistance in Foreign Bribery Cases’ (Report, 7 December 2012).

(not in the least because the proceeds of corruption often pass through Western banks, which are therefore best placed to identify suspicious transfers). Unsurprisingly, the *UNCAC* chapter on asset recovery is preceded by a chapter on international cooperation⁴¹⁶ and followed by a chapter on technical assistance and information exchange.⁴¹⁷

Previous UN documents had paved the way for this *UNCAC* requirement of asset recovery. One of those documents was the *Palermo Convention* and its provisions on money laundering⁴¹⁸ and confiscation and seizure.⁴¹⁹ Another example is a 2001 UNGA resolution,⁴²⁰ which called for increased cooperation to repatriate illegally transferred funds to the countries of origin and called upon all countries and entities concerned to cooperate in this respect. The 2001 UNGA resolution further requested an expert group to assess this issue of repatriation of transferred funds, to be reflected in the future *UNCAC*.⁴²¹

Article 23 of the *UNCAC* on the '[l]aundering of [the] proceeds of crime' is formulated broadly, which is laudable. It goes beyond the laundering of money to cover the laundering of any property (which includes, inter alia, company shares and luxury goods).⁴²² The range of persons who can be held criminally liable is also far-reaching: persons knowingly assisting in the covering up of the proceeds of corrupt acts could include banks, lawyers and accountants,⁴²³ real estate agents, casino operators, antique traders and jewellers.⁴²⁴ In other words, as soon as a corrupt act takes place, it taints the whole chain of subsequent transactions. The proceeds of corruption can be recovered through either criminal or civil proceedings. Criminal proceedings require a prior criminal conviction which focuses on the corrupt individual. When a criminal conviction is impossible (for example, where the corrupt individual has passed away or enjoys immunity) or otherwise unachievable, civil proceedings may be a practical alternative. Such civil proceedings focus on the goods tainted by an initial corrupt act, rather than on the corrupt individual. Hence, property can be seized through civil proceedings without the user or owner being convicted for

⁴¹⁶ *UNCAC* ch IV.

⁴¹⁷ *Ibid* ch VI.

⁴¹⁸ *Palermo Convention* arts 6, 7.

⁴¹⁹ *Ibid* art 12.

⁴²⁰ *Preventing and Combating Corrupt Practices and Illegal Transfer of Funds and Repatriation of Such Funds to the Countries of Origin*, GA Res 55/188, UN GAOR, 55th sess, 2nd plen mtg, Agenda Item 93, Supp No 49, UN Doc A/RES/55/188 (25 January 2001).

⁴²¹ *Ibid* para 5.

⁴²² Carr and Goldby, above n 4, 174–5.

⁴²³ Certain authors indicate that the role of lawyers and accountants in operationalising the anti-corruption provisions should not be underestimated. Evidence suggests that lawyers and accountants have strengthened the anti-corruption impetus of the *FCPA* by ensuring compliance by US clients: see Gantz, above n 16, 462. The *ICC Rules* explicitly list potential intermediaries that a company could use as conduits for corrupt acts, such as lawyers, accountants, consultants, resellers or subcontractors: *ICC Rules*, above n 219, art 2.

⁴²⁴ Carr and Goldby, above n 4, 186.

the initial corrupt act.⁴²⁵ Confronted with the question whether such civil proceedings, without the guarantees of a criminal procedure, infringe human rights, a UK court has argued that civil forfeiture is a procedure in rem and is not covered by the UK *Human Rights Act*.⁴²⁶ This allows for the standard of proof to be on the ‘balance of probabilities’, rather than ‘beyond reasonable doubt’, as required in criminal proceedings. This may greatly facilitate the recovery of assets from corrupt acts, though of course this does not result in a criminal conviction of the culprits. One practical impediment to the forfeiture of the proceeds of corrupt acts is the requirement of quantifying those proceeds. Identifying the value of the bribe is one step, but the actual benefit of the bribery for the bribe-giver may be several times the amount of the bribe. A joint OECD/Stolen Asset Recovery Initiative (‘StAR’) report aims to tackle such difficulties by providing very detailed guidance on the calculation of the actual benefit amounting from a bribe.⁴²⁷

The 1996 *OAS Convention* equally stresses the importance of asset recovery, requiring states parties to provide each other with ‘the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds’ of corrupt acts.⁴²⁸ For the *OAS Convention*, cooperation is one of its two explicitly listed purposes,⁴²⁹ which again underlines the importance attached to it. The *OAS Convention* encourages states to assist in the investigation of corrupt acts by stipulating that the forfeited property may be transferred, wholly or in part, to another state party that assisted in the underlying investigation.⁴³⁰ This non-mandatory provision is coupled with the requirement that states parties afford one another ‘the widest measure of mutual assistance’ when requested by a competent authority, as well as the ‘widest measure of mutual technical cooperation’.⁴³¹

Not surprisingly, the *AU Convention* also requires states parties to freeze, seize, confiscate and repatriate the instrumentalities or proceeds of corruption.⁴³² Under the *OECD Convention*, mutual legal assistance ‘to the fullest extent possible’ is obligatory,⁴³³ but no further provisions on asset recovery are included. The *OECD Convention* requires states parties to provide prompt and effective legal assistance for criminal investigations and proceedings concerning offences within the *OECD Convention*’s scope and also for non-criminal

⁴²⁵ An example is the fourth (formerly third) FATF recommendation, entitled ‘Confiscation and Provisional Measures’: *FATF Recommendations*, above n 408, 12. See also Financial Action Task Force, ‘Best Practices: Confiscation (Recommendations 3 and 38)’ (Guidance Document, 19 February 2010) 7 [13]; Theodore S Greenberg et al, ‘Stolen Asset Recovery: A Good Practices Guide for Non-Conviction-Based Asset Forfeiture’ (Guidance Document, Stolen Asset Recovery Initiative, World Bank, 5 January 2009).

⁴²⁶ *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6 (26 January 2005). See also *Human Rights Act 1998* (UK) c 42; Carr and Goldby, above n 4, 182.

⁴²⁷ Jeane-Pierre Brun et al, ‘Identification and Quantification of the Proceeds of Bribery: A Joint OECD-StAR Analysis’ (Report, Organisation for Economic Co-Operation and Development and Stolen Asset Recovery Initiative, World Bank, February 2012) <<http://www.oecd.org/daf/anti-bribery/50057547.pdf>>.

⁴²⁸ *OAS Convention* art XV.

⁴²⁹ *Ibid* art II.

⁴³⁰ *Ibid* art XV(2).

⁴³¹ *Ibid* art XIV.

⁴³² *AU Convention* art 16.

⁴³³ *OECD Convention* art 9.1.

proceedings concerning an *OECD Convention* offence against a legal person.⁴³⁴ If legal assistance is conditional upon the state party's requirement of dual criminality, such dual criminality is deemed to exist for offences under the *OECD Convention's* scope.⁴³⁵ Moreover, states parties cannot invoke bank secrecy against a request for legal assistance.⁴³⁶

In 2007, the World Bank and the UNODC launched StAR. StAR works with developing countries and financial institutions in order to deny safe havens for the proceeds of corruption.⁴³⁷ In addition, StAR has published several best practice documents, a practitioners' handbook and several other tools and guidance documents.⁴³⁸ Another interesting tool is their Grand Corruption Cases Database, which can be used to look for grand corruption cases in specific countries or involving specific companies or individuals.⁴³⁹

The success of asset recovery is to a large extent dependent on the regulation of the financial sector through, for example, rules on know-your-customer ('KYC'), mandatory registration of suspect transactions, record-keeping and bank secrecy. Such financial regulations often complement and strengthen the success of anti-corruption instruments, though there is still the risk that the two regimes may contradict each other on certain points.⁴⁴⁰ Corporate law also impacts the success of asset recovery provisions. For example, a StAR report highlights the use of complex corporate vehicles to launder the proceeds of

⁴³⁴ Ibid.

⁴³⁵ Ibid art 9.2.

⁴³⁶ *Belgium Phase 2 Follow-Up Report*, above n 214, 4 [5].

⁴³⁷ See Stolen Asset Recovery Initiative, *About Us* (2012) <<http://star.worldbank.org/star/about-us/our-vision>>.

⁴³⁸ See, eg, Jean-Pierre Brun et al, 'Asset Recovery Handbook: A Guide for Practitioners' (Handbook, Stolen Asset Recovery Initiative, World Bank, 3 January 2011); Kevin M Stephenson et al, 'Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action' (Study, Stolen Asset Recovery Initiative/World Bank, 21 June 2011); Theodore S Greenberg et al, 'Politically Exposed Persons: Preventive Measures for the Banking Sector' (Policy Paper, Stolen Asset Recovery Initiative/World Bank, 11 May 2012); Greenberg et al, 'Stolen Asset Recovery', above n 425; Stolen Asset Recovery Initiative, 'Management of Returned Assets: Policy Considerations' (Policy Note, World Bank, 2009).

⁴³⁹ Stolen Asset Recovery Initiative, *StAR Corruption Cases Search Centre* (2013) <[http://star.worldbank.org/corruption-cases/assetrecovery/?f\[0\]=bundle%3Apuppet_masters](http://star.worldbank.org/corruption-cases/assetrecovery/?f[0]=bundle%3Apuppet_masters)>.

⁴⁴⁰ For example, Carr and Goldby indicate that the FATF recommendations may conflict with the *UNCAC* provision as to the requirement of double criminality: Carr and Goldby, above n 4, 180. See also Financial Action Task Force, 'FATF 40 Recommendations' (Report, 2010) 5. The FATF recommendations allow states to confiscate the proceeds of corrupt acts if it would have been a criminal offence if it had been committed within its territory, whether or not it was a crime in the country where the corrupt act took place. The FATF recommendations have been amended in 2012. The interpretive note to the amended Recommendation 3 still allows states to confiscate the proceeds of corrupt acts without requiring double criminality. *UNCAC* art 23(2)(c), on the other hand, requires double criminality:

However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there.

Carr and Goldby, above n 4, 180.

corruption.⁴⁴¹ It details how the corporate veil shields the corrupt from investigations.⁴⁴²

Private actors play a crucial role in the successful enforcement of asset recovery provisions. KYC rules, for example, require banks to increase due diligence⁴⁴³ efforts for bank accounts of high-level politicians or large financial transactions.⁴⁴⁴ A limitation of such financial money laundering regulation is that it would probably only detect grand corruption and, accordingly, be of limited use for identifying and remedying petty corruption.⁴⁴⁵ Other types of corruption also continue to fly below the radar of money laundering standards in general, including art 23 of the *UNCAC*. For example, the purchase of real estate or jewellery may be detected, but bribery in the form of offering expensive education, health care benefits or a lucrative position to a bribe-taker or their relatives cannot be detected by money laundering standards.⁴⁴⁶ Nevertheless, such limitations should not render us sceptical but should merely underline the necessity of a comprehensive anti-corruption approach.

D Corruption and Good Governance

As Alexander Gillespie states, “[g]ood [g]overnance” has become the catch-cry of the international community’.⁴⁴⁷ It is not necessary to provide a fully-fledged definition of good governance for the purposes of this contribution.⁴⁴⁸ It is clear, however, that corruption undermines specific values that are encompassed by the concept of good governance, such as transparency,

⁴⁴¹ Emile van der Does de Willebois et al, ‘The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It’ (Report, Stolen Asset Recovery Initiative/World Bank, 24 October 2011) .

⁴⁴² *Ibid* ix, 9, 41, 59, 60, 117, 203.

⁴⁴³ The due diligence obligations reflected in the tenth (formerly fifth) FATF recommendation are reminiscent of the due diligence concept put forward by the Ruggie framework and the *UN Guiding Principles*. Instead of imposing one-size-fits-all substantive rules, the due diligence concept, as a form of meta-regulation, requires banks and other private actors to identify potentially corrupt act(or)s: *FATF Recommendations*, above n 408, 14. See also *UN Guiding Principles*, UN Doc A/HRC/17/31, annex.

⁴⁴⁴ See, eg, Basel Committee on Banking Supervision, ‘Customer Due Diligence for Banks’ (Guidance Document, Bank for International Settlements, October 2001) <<http://www.bis.org/publ/bcbs85.pdf>>.

⁴⁴⁵ Carr and Goldby, above n 4, 188.

⁴⁴⁶ *Ibid* 189.

⁴⁴⁷ Gillespie, above n 274, 103.

⁴⁴⁸ For a fuller discussion, see Jan Wouters and Cedric Ryngaert, ‘Good Governance: Lessons from International Organizations’ in Deirdre M Curtin and Ramses A Wessel (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, 2005) 69.

accountability and the rule of law.⁴⁴⁹ International anti-corruption instruments frequently refer to those good governance values.⁴⁵⁰

The embedding of anti-corruption measures into the broader good governance framework reflects the high degree of consensus on the detrimental societal impacts of corruption. Good governance measures aimed at tackling corruption can take various forms. For example, requiring public officials to disclose their privately held positions is one approach that could be adopted to prevent undesirable acts. The Iraq War unveiled the close connections between a private military firm, Halliburton, and Dick Cheney, former US Vice-President under the Bush Administration, who was Halliburton's Chief Executive Officer for several years.⁴⁵¹ Allegations arose that Halliburton profited from important security contracts for the US government in Iraq and elsewhere, sometimes awarded without public tenders. As a public company, Halliburton is required to make certain disclosures in conformity with securities regulations.⁴⁵² For positions held in non-public companies, other disclosure requirements may be required to promote transparency in potential conflicts of interest, outside of securities regulation. Financial disclosure obligations imposed not only on the companies, but also on politicians, may be one useful approach to help shed light on the close ties between politics and business that might induce corrupt practices.

Legal attempts to prevent potential conflicts of interest can take various forms. Requiring politicians or high-level public employees to disclose simultaneously- or previously-held positions facilitates transparency. This is a 'governance' approach, in which transparency is presumed to lead to a form of self-regulation. Another option is the 'regulatory' approach, where the legislator imposes substantive rules instead of mere transparency-enhancing meta-rules. This could include an outright prohibition to simultaneously hold (certain) public and private positions.

⁴⁴⁹ On the concept of good governance: see, eg, Nicolas Meisel and Jacques Ould Aoudia, 'L'Insaissable Relation entre "bonne gouvernance" et développement' [The Elusive Connection between 'Good Governance' and Development] (2008) 59 *Revue économique* 1159; Brigitte Pereira, 'Ethique, gouvernance et corruption' [Ethics, Governance and Corruption] (2008) 34(186) *Revue française de gestion* 53.

⁴⁵⁰ See, eg, *UNCAC* Preamble: 'the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption'; *OECD Convention*, Preamble: 'Considering that bribery ... raises serious moral and political concerns, undermines good governance'; *AU Convention* Preamble:

Cognizant of the fact that the Constitutive Act of the African Union, inter alia, calls for the need to promote and protect human and peoples' rights, consolidate democratic institutions and foster a culture of democracy and ensure good governance and the rule of law.

See also *AU Convention* arts 2.5, 3.

⁴⁵¹ See, eg, Demetri Sevastopulo, 'Halliburton Scandal Widens after Claims of Pressure to Award Lucrative Contracts', *Financial Times* (online), 11 November 2004 <<http://www.ft.com/cms/s/0/ec9ddf06-3386-11d9-b6c3-00000e2511c8.html#axzz2ahpHP17i>>; Dana Milbank, 'Halliburton, the Second-Term Curse?', *The Washington Post* (online), 9 November 2004 <<http://www.washingtonpost.com/wp-dyn/articles/A35234-2004Nov8.html>>.

⁴⁵² See Securities and Exchange Commission, *Public Companies* <<http://m.investor.gov/introduction-markets/how-markets-work/public-companies#>>.

Thus, the *UNCAC* requests states parties to

endeavour ... to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities [and] employment ... from which a conflict of interest may result with respect to their functions as public officials.⁴⁵³

It might appear to be a lost opportunity that the *UNCAC* negotiators did not make this a mandatory provision. Mandatory disclosure of simultaneously held positions in the public and private sectors would not only greatly enhance corruption prevention in developing countries but also in developed countries. The *OECD Convention* does not contain any similar provision, even though the risk of conflicts of interest in the transnational business transactions it covers is tangible.

Like the *UNCAC*,⁴⁵⁴ the *OAS Convention* requests states to draft standards of conduct for public functions.⁴⁵⁵ Along the same lines, under the *AU Convention*, states parties commit to establishing a body to draft a code of conduct for public officials and monitor compliance.⁴⁵⁶ The CoE went beyond these efforts by publishing a *Model Code of Conduct for Public Officials*,⁴⁵⁷ which stipulates that the code of conduct becomes an integral part of the public official's contract.⁴⁵⁸ It does not require public officials to declare any other position they hold in the private sphere, but to withdraw from any outside position that is 'incompatible with or detracts from the proper performance of his or her duties as a public official'.⁴⁵⁹ In addition, the official should notify or obtain approval from their supervisor if they wish to accept certain (unspecified) positions outside of the public service.⁴⁶⁰

Another related topic is the financing of political parties.⁴⁶¹ This topic provoked the most intense debate during the *UNCAC* negotiations.⁴⁶² A CoE recommendation on corruption in the funding of political parties called those political parties a 'fundamental element of the democratic system of states'.⁴⁶³ The recommendation calls upon states parties to provide support to political parties in a manner that does not interfere with their independence.⁴⁶⁴ States are also asked to make donations public, particularly those above a fixed amount.⁴⁶⁵

⁴⁵³ *UNCAC* art 8.5.

⁴⁵⁴ Article 8 of the *UNCAC* merely requests that states parties 'endeavour to apply' codes of conduct for public officials.

⁴⁵⁵ *OAS Convention* art III.1.

⁴⁵⁶ *AU Convention* art 7.2.

⁴⁵⁷ Committee of Ministers, Council of Europe, *Recommendation No R (2000)10 on Codes of Conduct for Public Officials* (11 May 2000) app ('*Model Code of Conduct for Public Officials*').

⁴⁵⁸ *Ibid* art 2.2.

⁴⁵⁹ *Ibid* art 15.1.

⁴⁶⁰ *Ibid* arts 15.1, 15.2.

⁴⁶¹ On this topic, see Arnold J Heidenheimer, 'Parties, Campaign Finance and Political Corruption: Tracing Long-Term Comparative Dynamics' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts & Contexts* (Transaction Publishers, 3rd ed, 2002) 761.

⁴⁶² Webb, above n 5, 215.

⁴⁶³ *Recommendation Rec (2003)4*, above n 51.

⁴⁶⁴ *Ibid* app art 1.

⁴⁶⁵ *Ibid* app art 3.

As to donations from legal persons, states should require companies to register donations in the books and even to inform shareholders of the donation.⁴⁶⁶

During the *UNCAC* negotiations, Austria, France and the Netherlands proposed a provision that would have *required* states parties to adopt certain measures on the funding of political parties, including the declaration of donations exceeding a certain limit.⁴⁶⁷ However, the US fiercely opposed this proposition.⁴⁶⁸ The US had been strongly in favour of extending the *OECD Convention* to bribery of political party officials, even though this was not retained in the final text of the *OECD Convention*. The US feared that not including political party officials in the definition of public officials in the *OECD Convention* 'would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials'.⁴⁶⁹ The US *FCPA* also covers bribery of a foreign political party, party official or political candidate (on the condition that it is related to obtaining or retaining business).⁴⁷⁰ Nevertheless, the US held a different opinion as to the funding of political parties and did not want to include any stringent mandatory provisions in the *UNCAC*. Its view eventually prevailed and the proposal by Austria, France and the Netherlands was withdrawn. The debate is, to a limited extent, reflected in two non-mandatory paragraphs in which states parties are requested to 'consider':

- (i) prescribing criteria concerning candidature for and election to public office; and
- (ii) enhancing transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.⁴⁷¹

Nevertheless, the *UNCAC* covers the corruption of a (national or foreign) public official for the benefit of, among others, another entity,⁴⁷² which could be a political party.

Good governance approaches to corruption are not limited to legal initiatives in the form of multilateral anti-corruption instruments or broader legislative efforts. There are less formalistic and more flexible options available. In the context of aid, for example, donors can exert additional caution when recipients of aid money intend to buy high-tech products for which there are only a handful of producers, as this more easily allows for corruption. In post-conflict settings where adequate state institutions are not yet installed, donors could prevent the

⁴⁶⁶ *Ibid* app art 5.

⁴⁶⁷ Ad Hoc Committee for the Negotiation of a Convention against Corruption, *Proposals and Contributions Received from Governments — Austria, France and Netherlands: Amendment to Article 10*, UN Doc A/AC.261/L.21 (24 January 2002).

⁴⁶⁸ Webb, above n 5, 217.

⁴⁶⁹ Gantz, above n 16, 486.

⁴⁷⁰ *FCPA* § 78dd.1 (a)(2). See also Cleveland et al, above n 10, 204; Gantz, above n 16, 486.

⁴⁷¹ *UNCAC* art 7, paras 2 and 4.

⁴⁷² *Ibid* art 15.

immediate inflow of substantial aid.⁴⁷³ Furthermore, the structure of aid agencies themselves may impede robust anti-corruption monitoring. Donors focus on providing aid, but much less on monitoring its (ab)use. Staffing of aid agencies is often limited (especially administrative staff), which further limits their capacity to focus on monitoring of aid disbursement. Additionally, donor budgets are often organised on a fiscal-year basis; employees are rewarded for the disbursement of the aid earmarked for that fiscal-year, not for the impact or effectiveness of the money. Internal incentives within aid agencies may thus further diminish the weight attached to ensuring that aid money is not diverted by corrupt practices. Christine Cheng and Dominik Zaum add that there is no evidence that countries that actively implement anti-corruption measures actually receive more aid from international donors.⁴⁷⁴ The fight against corruption should therefore not be exclusively focused on transnational or even domestic legal instruments. A better yardstick to measure countries' commitment to fight corruption on the ground is the way in which they use the tools already at their disposal (such as procurement and aid instruments) to implement their anti-corruption rhetoric.

E Corruption and Human Rights

Recently, the anti-corruption drive has been linked to human rights, arguably as part of a larger tendency to 'humanise' international law by placing the individual centre stage.⁴⁷⁵ The following publications have been instrumental in putting the impact of corruption on human rights on the agenda: Martine Boersma's 2012 monograph;⁴⁷⁶ and the International Council on Human Rights Policy's ('ICHRP') 2009 report⁴⁷⁷ and 2010 book publication.⁴⁷⁸ This may potentially steer the agenda away from anti-corruption crusaders' traditional emphasis on criminal law as an instrument of coaxing corrupting and corrupted

⁴⁷³ Cheng and Zaum, above n 231, 15–16. In such environments, donor countries also often focus on democratisation and the rapid organisation of elections. However, those who profit most during the conflict presumably have the means to buy votes. Often donors have to rely on the few local partners that remain active during the conflict. The limited choice of local partners to implement immediate aid programs further diminishes the possibility of sanctioning corrupt partners.

⁴⁷⁴ Ibid.

⁴⁷⁵ Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff, 2006). This 'humanisation' of international law has, for instance, also occurred in armed conflicts, where international human rights law has been considered to be applicable alongside international humanitarian law (the law that is specifically designed to regulate armed conflicts): see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25]: 'The protection of the *International Covenant of Civil and Political Rights* does not cease in times of war, except by operation of Article 4 of the *Covenant* whereby certain provisions may be derogated from in a time of national emergency'. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law — Volume I: Rules* (Cambridge University Press, 2005) 299–305.

⁴⁷⁶ Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law* (Intersentia, 2012).

⁴⁷⁷ Magdalena Sepúlveda Carmona, 'Corruption and Human Rights: Making the Connection' (Report, International Council on Human Rights Policy/Transparency International, June 2009) ('*Corruption and Human Rights Report*').

⁴⁷⁸ Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary Perspectives* (Intersentia, 2010).

actors into compliance,⁴⁷⁹ or its more recent emphasis on revenue transparency in the extractive industry.⁴⁸⁰

Proponents of making the connection between human rights infringements and corruption are not simply engaging in an academic pastime. They are highlighting various practical advantages of framing corruption as a human rights issue, especially with regards to developing countries and those lacking effective governance mechanisms. First, human rights framing might arguably garner more institutional and popular support for anti-corruption measures as it draws attention to the plight of victims of corruption. Secondly, in the face of inaction of the public prosecutor, a human rights approach may allow individual victims of corruption to avail themselves of specific constitutional rights-based remedies against the government and government officials — particularly in common law countries.⁴⁸¹ Or, alternatively, victims may seek human rights-inspired tort remedies against private actors complicit in official corruption (such as via the US *Alien Tort Statute*).⁴⁸² Thirdly, framing corruption as violating human rights may empower human rights monitoring bodies, including national human rights institutions,⁴⁸³ to look into issues of corruption, thus further strengthening the fight against corruption. And fourthly, as a related

⁴⁷⁹ It is noted that the first paragraph of the Foreword to the *UNCAC* draws a causal link between corruption and human rights:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

However, the operational articles do not return to the issue.

⁴⁸⁰ See especially the multi-stakeholder, ‘hybrid’ Extractive Industries Transparency Initiative (‘EITI’) and the non-governmental organisation initiative Publish What You Pay (‘PWYP’). These initiatives require (multinational) corporations — typically in the extractive industries (oil, gas, mining) — to disclose their payments to the host governments and require the governments to disclose the funds thus received. Neither EITI nor PWYP refer to human rights, although it is clear that transparency may prevent embezzlement and make governments more accountable vis-a-vis their populations in respect of the ways they spend the wealth generated by (foreign) corporations’ resource extraction activities. It is important to note that these initiatives are essentially voluntary; as such, their successful coverage extends to only a handful of countries. See also Extractive Industries Transparency Initiative, *What is the EITI?* <www.eiti.org/eiti>; Publish What You Pay, *The Stories behind Our Campaign* (2011) <www.publishwhatyoupay.org>.

⁴⁸¹ John Hatchard, ‘Adopting a Human Rights Approach towards Combating Corruption’ in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary Perspectives* (Intersentia, 2010) 7, 17–18.

⁴⁸² *Alien’s Action for Tort*, 28 USC § 1350 (2006). For a critical exploration of human rights-inspired tort remedies against private actors complicit in official corruption, see Cecily Rose, ‘The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption’ (2011) 24 *Leiden Journal of International Law* 715.

⁴⁸³ Some national human rights institutions already have a specific competence to investigate corruption: see, eg, *Constitution of the Republic of Ghana 1992* (Ghana) arts 218(a), (e). The Commission on Human Rights and Administrative Justice (the Ghanaian national human rights institution) is empowered to ‘investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his [or her] official duties’: at art 218(a) (emphasis added). The Commission on Human Rights and Administrative Justice is also empowered to ‘investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations’: at art 218(e).

matter, human rights monitoring could usefully supplement corruption monitoring, which is currently perceived by pundits as overly subjective, inaccurate and insufficiently action-oriented. Integrating corruption into human rights monitoring may notably allow for a human rights-based disaggregation of the ‘composite indexes’ typically used by anti-corruption watchdogs such as TI.⁴⁸⁴ In particular, the impact of corruption on the most vulnerable groups could be introduced as a variable.⁴⁸⁵ This could in turn inform policy strategies that specifically target those groups, who arguably suffer most from corrupt practices.

As far as the link between human rights infringements and corruption is concerned, the ICHRP distinguishes between direct human rights violations through corruption, indirect violations and remote violations.⁴⁸⁶ A straightforward example of the first category — direct violation — is where a party to a court dispute bribes a judge with a view to obtaining a favourable judgment, thereby putting the opposing party at a disadvantage. The latter party could reasonably argue that the act of bribing violated their right to a fair trial, as enshrined in art 14 of the *International Covenant on Civil and Political Rights* (‘ICCPR’)⁴⁸⁷ or art 6 of the *European Convention on Human Rights*.⁴⁸⁸ An example of the second category — indirect violation — is the rigging of a construction tender through corruption, in favour of one bidder who might not necessarily comply with adequate health and safety standards, thereby violating residents’ right to safe, healthy and adequate housing as enshrined in art 11(1) of the *International Covenant on Economic, Social and Cultural Rights*.⁴⁸⁹ Another example is the existence of a de facto requirement to pay user fees for services which are supposed to be freely available, such as education — which in the latter instance violates the right to education.⁴⁹⁰ A remote human rights violation through corruption may arise where an election is rigged, leading police to

⁴⁸⁴ See Gauthier De Beco, ‘Monitoring Corruption from a Human Rights Perspective’ (2011) 15 *International Journal of Human Rights* 1107.

⁴⁸⁵ De Beco suggests basing the framework for monitoring corruption from a human rights perspective on the structural-process-outcome indicator framework developed by the Office of the High Commissioner for Human Rights (‘OHCHR’): *ibid* 1120. This framework uses structural indicators (measuring a state’s intention to abide by human rights standards); process indicators (measuring the efforts undertaken by states to implement human rights); and outcome indicators (measuring a state’s actual human rights performance): at 1115–16. See also *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, UN Doc HRI/MC/2006/7 (11 May 2006); *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, UN Doc HRI/MC/2008/3 (6 June 2008).

⁴⁸⁶ *Corruption and Human Rights Report*, above n 477, 27–8.

⁴⁸⁷ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

⁴⁸⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) (‘European Convention on Human Rights’).

⁴⁸⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴⁹⁰ *Ibid* art 13. For a lengthy discussion of violations of the right to education through corruption, see Martine Boersma, ‘Corruption as a Violation of Economic, Social and Cultural Rights: Reflections on the Right to Education’ in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary Perspectives* (Intersentia, 2010) 51.

repress demonstrations, resulting in the violation of protesters' rights to life and physical integrity.⁴⁹¹ Hovering between indirect and remote violations is the adverse impact of embezzlement on the public funds available for realising and, in particular, 'fulfilling' (economic and social) human rights.⁴⁹²

More generally, it is arguable that any act of corruption violates the principle of non-discrimination/right to equality, as enshrined in art 26 of the *ICCPR*, in that the very essence of an act of corruption is that it unjustifiably favours the corrupting person over other similarly situated persons. At the same time, it should be noted that the fight against corruption may come with its own human rights problems, as it may jeopardise the presumption of innocence. This may occur when the law requires that the individual provide a satisfactory explanation of their high standard of living — thus effectively shifting the burden of proving an offence, at least in part, from the law-enforcement agencies to the individual.⁴⁹³

In spite of its proclaimed advantages, it is not clear whether the promises raised by advocates of the connection between human rights infringements and corruption can be fully met. There is no empirical evidence of the proposition that the public does not sufficiently realise that corruption compromises the enjoyment of their human rights; nor is it given that such a realisation would spur the public to bring more pressure to bear on the government to step up its efforts against corruption. In addition, the above categorisations of direct, indirect and remote violations may serve useful didactic purposes, but it is highly doubtful whether the causal link between the act of corruption and the violation of human rights is in all these cases sufficiently strong to attract legal responsibility for the corrupter, the corrupted or the state.⁴⁹⁴ Moreover, it is not clear whether the procedural advantage of empowering human rights monitoring bodies to investigate cases of corruption will fully materialise. So far, these bodies have not, or at least have hardly, considered corruption as falling within their mandate — and it may not even be appropriate for them to do so, as a focus on corruption as a human rights violation might divert scarce resources away from human rights violations where causality and the identity of the perpetrators are not contested. Finally, it is unclear, to say the least, whether victims of private sector corruption can really avail themselves of international human rights-based civil remedies against corporations complicit in government

⁴⁹¹ *ICCPR* arts 6–7.

⁴⁹² Cf Rose, above n 482, 718–19: 'Corrupt acts may inhibit such progressive realization when they involve the state's diversion of resources away from the provision of public services, thereby diminishing any improvement or progress'.

⁴⁹³ See especially *UNCAC* art 20:

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

⁴⁹⁴ Cf David Nelken, 'Corruption and Human Rights: an Afterword' in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary Perspectives* (Intersentia, 2010) 241 (submitting that what proponents 'describe as a "remote link" — and perhaps even some examples of indirect links — may be problematic not because of a lack of scientific causation but because law sets limits to what it is prepared to consider a connection which creates *legal responsibility*': at 246 (emphasis in original)).

corruption, embezzlement or bribery. Apart from the obvious problem of identifying a relevant forum to hear such cases (US federal courts acting under the *Alien Tort Statute* could possibly qualify), it is doubtful whether, in the current state of international law, private actors can be complicit in violations of international human rights law (as opposed to international criminal law),⁴⁹⁵ whether private actors are bearers of duties under international human rights law (arguably, only *states* are); and whether the standard of constructive knowledge ('should have known') suffices for a corporation to be held complicit in governmental corruption affecting human rights.⁴⁹⁶

More fundamentally and also more controversially, some authors have submitted that linking corruption to human rights violations may undermine, rather than further, the cause of human rights. In particular, these authors contend that making such a linkage entrenches a neoliberal world view of development that attributes the absence of economic growth in developing countries to good governance failures within these countries, rather than to fundamentally unequal power relations between the global North and the global South.⁴⁹⁷ They argue that the world's focus on corruption in development studies finds its roots in a Western-backed ideology that distrusts the state and state actors and designs rules that shackle the state.⁴⁹⁸ Institutional development actors, so this argument goes, have imposed this ideology on developing countries and have required good governance, including the taking of anti-corruption measures, by local recipients of aid.⁴⁹⁹ Critics of linking corruption to human rights violations essentially posit that, by tying the good

⁴⁹⁵ It is not disputed that natural persons can be complicit in international crimes: see, eg, *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25 ('*Rome Statute*'). Under the *Rome Statute*, the International Criminal Court does not have jurisdiction over non-natural persons, such as corporations, but this need not mean that under general international criminal law the criminal responsibility of such corporations cannot duly be engaged. Note that Rose, drawing on Clapham, applies *per analogiam* art 16 of the International Law Commission's *Articles on State Responsibility* to corporate complicity in state violations of international human rights law: Rose, above n 482, 726–7, citing Andrew Clapham, *The Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 266. See also International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (3 August 2001) ch IV(E) ('*Draft Articles on Responsibility of States for Internationally Wrongful Acts*').

⁴⁹⁶ On these grounds, Rose logically concludes that 'it seems that international law is not yet capable of capturing private sector complicity in human rights violations such as these': Rose, above n 482, 736. But see *UN Guiding Principles*, UN Doc A/HRC/17/31, annex [11]–[24] (emphasising, as the second pillar of the framework, 'The Corporate Responsibility to Respect Human Rights').

⁴⁹⁷ This argument has been made most pointedly by Morag Goodwin and Kate Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse' in Martine Boersma and Hans Nelen (eds), *Corruption & Human Rights: Interdisciplinary Perspectives* (Intersentia, 2010) 221, 235–6. But see Rose, above n 482, 717: Rose submits that 'the loose invocation of human rights rhetoric in anticorruption literature may actually weaken the normative value of human rights law, particularly economic and social rights'; that 'legal responses to corruption should be confined to the fairly specialized criminal legal regimes on money laundering, bribery, and stolen asset recovery'; and also highlights 'improvements in contract and revenue transparency'.

⁴⁹⁸ Goodwin and Rose-Sender, above n 497, 235–6.

⁴⁹⁹ See the emphasis that the World Bank places on good governance and anti-corruption as a means of alleviating poverty: World Bank Institute, *Collaborative Governance* (2012) <<http://wbi.worldbank.org/wbi/about/topics/governance>>.

governance/anti-corruption model of development to a human rights discourse, the good governance advocates may immunise their ideological model against fair criticism, on the basis that their attacks on anti-corruption efforts can easily be framed as unacceptable attacks on human rights proper.

In our view, whilst those critical of making the connection between corruption and human rights are to be credited for challenging the *pensée unique* regarding the framework linking development, good governance, anti-corruption and human rights, they appear to overstate their claim. For one thing, the risk of human rights forfeiting their emancipatory potential when being made subservient to one particular development model appears to be exaggerated. Throughout history, ideologists have relied on legal tools and legal techniques to further their world view, without law (and more recently, without human rights) necessarily being discredited as an instrument of regulation or emancipation.⁵⁰⁰ Thus, arguably, human rights considerations can still inform alternative development models that highlight a global or Western responsibility for developmental problems.

At the very least, critics of linking corruption to human rights infringements may not so much criticise the adverse effects which corruption may have on human rights (which they may duly recognise, at least in individual cases), so much as question whether the anti-corruption movement truly furthers a collective right to development, or an even more diffuse general concept such as human dignity. These are questions of political economy which lawyers are not particularly well-placed to answer.

In conclusion, the proponents of linking corruption to human rights infringements have rightly drawn attention to the victims of the offence of corruption. Corruption has historically been considered a victimless crime, a perception that may have hampered the vigorous prosecution of this offence. Indeed, enforcement efforts have been somewhat blunted by the elusiveness of determining an exact causal link between instances of corruption and violations of human rights. In particular, the impact of corruption on the enjoyment of economic, social and cultural rights — which may be potentially wide-ranging, but also diffuse and lacking individualisation — has proven hard to measure. In any event, more social science research into the causal link between corruption and human rights appears called for. But at the same time, assuming that such a causal link could be established in certain situations, lawyers may want to ascertain what degree of responsibility is legally relevant to attract liability under human rights law. This, in turn, may greatly facilitate the role that human rights bodies might play in monitoring corruption and, thus, ensure that the discourse linking human rights with corruption has real practical consequences.

⁵⁰⁰ There is, for instance, some evidence that reliance on a ‘thin’ rule of law in apartheid South Africa — a notion which emphasised the human rights of only a minority — has set the stage for the entrenchment of a ‘thicker’ rule of law, which encompasses values such as human rights for all, public participation and accountability of government, in post-apartheid South Africa: see Evelyne Schmid, ‘Thickening the Rule of Law in Transition: The Constitutional Entrenchment of Economic and Social Rights in South Africa’ in Edda Kristjansdottir, André Nollkaemper and Cedric Rynjaert (eds), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (Intersentia, 2012) 59.

F Corruption in the Private Sphere

The focus of international anti-corruption efforts is on acts of corruption involving a public official.⁵⁰¹ The traditional definition of ‘corruption’ — the abuse of public office for private gain — does not easily allow for an application to corrupt acts in the purely private sphere.⁵⁰² First, private corruption by its very definition does not involve an abuse of any public office.⁵⁰³ Secondly, it does not necessarily involve private gain. For example, corporate corruption by an employee may be solely focused on higher profits or another benefit for the company, without any benefit for the employee himself or herself.⁵⁰⁴

Corruption scandals erupting in the private sphere, such as the Enron scandal or the influence of lavish dinners or trips organised by pharmaceutical companies on doctors’ prescription behaviour,⁵⁰⁵ demonstrate that the focus on the abuse of public sector corruption may be too narrow.

Detecting certain types of corruption in the private sphere may be even more difficult than in the public sphere. For example, it may be less difficult to detect that a tender has been corrupted if the offer is granted to a company that charges fees above the average level, or that a public employee has been appointed who does not meet the official requirements, than to detect that a doctor has been influenced in their prescription behaviour or that a company has offered a put option to another company that is recorded in the books far below market value. For those who are forced to offer a bribe to a public official (for instance, for a

⁵⁰¹ R Gomez Monsivais, ‘La Lutte contre la corruption des fonctionnaires’ [The Fight against Corruption of Officials] (2000) 94 *Revue française d’administration publique* 231; Jacques Godeaut, ‘La Corruption dans le secteur public’ [Corruption in the Public Sector] (2000) 314 *La Revue administrative: histoire, droit, société* 215; Alexis Blois, ‘Infraction de corruption d’agent public étranger et procédure pénale nationale’ [Bribery of Foreign Public Officials and National Criminal Proceedings] (2006) 2 *Revue de droit des affaires internationales* 217.

⁵⁰² Fleming and Zyglidopoulos, above n 25, 5–6.

⁵⁰³ The use of the term ‘private corruption’ does not imply that the consequences of the corrupt act remain exclusively private. For example, if doctors prescribe more highly priced medication because of lobbying by a pharmaceutical company, this has repercussions for the budget of official health care institutions that reimburse the patients. Similarly, if a listed company produces false financial statements, this misleads the financial regulatory institutions and may impose a huge cost on the public treasury if the company goes bankrupt, as was the case for Enron, for example. Another example is bribery in order to be admitted to an elite private university. Again, this does not involve the bribery of a public official but has important consequences beyond the purely private realm. Consequently, ‘private’ corruption is used to denominate corrupt acts that do not imply the active involvement of a public official, but does not mean that the consequences of the corrupt act necessarily remain within the purely private sphere.

⁵⁰⁴ Fleming and Zyglidopoulos, above n 25, 5, 7.

⁵⁰⁵ David Blumenthal, ‘Doctors and Drug Companies’ (2004) 351 *New England Journal of Medicine* 1885, 1886, citing Ray Moynihan, ‘Who Pays for the Pizza? Redefining the Relationships between Doctors and Drug Companies. 2: Disentanglement’ (2003) 326 *British Medical Journal* 1193. Even in the absence of special benefits being offered to doctors, the mere promotional activities by pharmaceutical companies (in the sense of information sessions to physicians) have not been proven to increase the quality of prescription behaviour. On the contrary, one study suggests increasing prescribing frequency, increasing costs and lowering prescribing quality: see Geoffrey Spurling et al, ‘Information from Pharmaceutical Companies and the Quality, Quantity, and Cost of Physicians’ Prescribing: A Systematic Review’ (2010) 7(10) *PLoS Medicine* 1. In the US in 2001, the ratio of pharmaceutical sales representative to physicians was 1:4.7: see Blumenthal, above n 505, 1185–6.

driving licence) it may be easier to at least be aware of the bribery and speak out against it, than it is for the doctor's patient or the company's shareholders to find out about corrupt practices. Corrupt acts in the purely commercial sphere may, due to their vast complexity or technicality, be especially hard to unearth — as the example of Enron demonstrates.

A useful understanding of the complex phenomenon of corporate corruption has been provided by Peter Fleming and Stelios Zyglidopoulos.⁵⁰⁶ They explain corporate corruption from a threefold perspective. First, any corrupt act is performed by an individual (agency). Secondly, an individual may be induced to engage in corrupt practices depending on the organisational pressure within the company (structure). Thirdly, once an organisation condones one corrupt act, this quickly leads to a snowball effect (escalation).⁵⁰⁷ This threefold view (agency-structure-escalation) demonstrates the importance of not exclusively prosecuting individuals, or exclusively companies, but to look at the interplay between both. In addition, it underlines the importance of intra-company policies against corruption and regular training. Moreover, it shows the importance of tackling early-stage forms of corruption, such as insider trading before initial public offerings, relatively small financial misrepresentations and even anti-competitive behaviour such as price-fixing.⁵⁰⁸ These acts may be symptoms of an emerging and contagious corrupt corporate culture.

A study on the effects of corruption on cross-border corporate acquisitions revealed that the shareholders of the target company in a country affected by corruption pay a price for the corrupt culture in their country.⁵⁰⁹ The study found no evidence that domestic corruption would constitute a significant barrier for foreign investment, only that the shareholders of the local target pay the price in terms of a lower premium price for their shares, with an average of a 20 per cent premium loss.⁵¹⁰ Local corruption may not only affect the type of investment made (local start-up or takeover, which in turn may alter the extent of the transfer of technology and transaction opportunities for local firms) and the merger premiums paid by foreign investors, but it may also play a role in the overall valuation of TNCs that operate in corrupt countries, as well as the type of their local transactions. As for a TNC's overall valuation, a study on this issue

⁵⁰⁶ Fleming and Zyglidopoulos, above n 25.

⁵⁰⁷ Ibid viii.

⁵⁰⁸ Ibid 2–3, 6.

⁵⁰⁹ Utz Weitzel and Sjors Berns, 'Cross-Border Takeovers, Corruption and Related Aspects of Governance' (2006) 37 *Journal of International Business Studies* 786.

⁵¹⁰ Ibid 802.

found that the overall valuation of TNCs is lower if they operate primarily in countries with a high degree of corruption.⁵¹¹

During the *UNCAC* negotiations, the subject of private sphere corruption was one of the more contentious topics. The EU took the lead in favour of addressing private sphere corruption but the US rejected this.⁵¹² Eventually, it was decided to include non-mandatory provisions on private sector corruption in the *UNCAC*. States parties 'shall consider' criminalising active and passive bribery and embezzlement in the private sector.⁵¹³ The prevention-valve is less freestanding, given that states parties 'shall take measures' to prevent private sector corruption, even though this requirement is softened by adding 'in accordance with the fundamental principles of its domestic law'.⁵¹⁴ The reason for the US resistance to the criminalisation of private sector corruption was that US business feared it would lead to lawsuits in foreign courts over contract and procurement irregularities.⁵¹⁵

At the soft law level, the UNGA resolution adopting the *ICCPO* explicitly

[u]rges Member States carefully to consider the problems posed by the international aspects of corrupt practices, especially as regards international economic activities carried out by corporate entities, and to study appropriate legislative and regulatory measures to ensure the transparency and integrity of financial systems and transactions carried out by such corporate entities ...⁵¹⁶

Along the same lines, the introductory language of the UNGA resolution adopting the *UNDAC* '[e]ncourages private and public corporations, including transnational corporations, and individuals engaged in international commercial transactions to cooperate in the effective implementation of the *Declaration*'.⁵¹⁷

In September 2006, the ICC issued a memorandum to the Working Group on Bribery, in which it recommended amendment of the *OECD Convention* so as to include private sector corruption. The memorandum states that

private-to-private corruption, even though it does not affect directly public trust vested in public officials, undermines the smooth functioning and credibility of free, open and global competition. By adding an artificial and unwarranted

⁵¹¹ This suggests that investors are aware of the risks related to corruption: see Christos Pantzalis, Jung Chul Park and Ninon Sutton, 'Corruption and Valuation of Multinational Corporations' (2008) 15 *Journal of Empirical Finance* 387. This study was limited to US Transnational Corporations ('TNCs') where the perceived risks of corrupt practices may be deemed higher than for non-US TNCs due to the strict provisions of the *FCPA*. If the TNC has a certain level of intangible assets, this conclusion no longer holds. For example, there are fewer opportunities to extract bribes from a firm with technological know-how as its main asset, than from a mining company that undertakes a large number of road transports, which can easily be blocked when no bribe is paid. Because of high transaction costs in countries seriously affected by corruption, it is more advantageous for TNCs with a high level of intangible assets to internalise their operations, rather than entering into (costly) corrupt transactions with external firms in the corrupt country: at 387, 414.

⁵¹² Webb, above n 5, 213.

⁵¹³ *UNCAC* arts 21–2.

⁵¹⁴ *Ibid* art 12.

⁵¹⁵ Webb, above n 5, 214.

⁵¹⁶ *Action against Corruption*, UN Doc A/RES/51/59, para 7.

⁵¹⁷ *UNDAC*, UN Doc A/RES/51/191, annex para 6.

element to the cost of business, it distorts the terms of exchange of international business transactions and penalizes loyal market participants.⁵¹⁸

In short, the almost exclusive focus on public sphere corruption may gloss over a wide range of corrupt acts that occur in reality. There is no reason to exclude, a priori, purely private forms of corruption. Anti-corruption instruments aim to send a strong signal to society and break through the defeatist attitude that corruption is simply the status quo. It would defeat the purpose of such instruments if private forms of corruption remain unchallenged. Pressure is mounting to pay more attention to private corruption, especially to corporate corruption. The recent financial crisis and the resulting rise in popular suspicion of corporate greed may provide a further incentive to extend the scope of anti-corruption instruments to the private sector.

V CONCLUSION

The international anti-corruption legal framework has been substantially strengthened in the past two decades, with impressive progress being made at both global and regional levels. Nevertheless, the work is far from over. For example, the *AU Convention* is currently not supported by any tangible monitoring mechanism. Even more remarkable is the absence of a regional Asian anti-corruption instrument.⁵¹⁹ Notwithstanding the progress made on the international level, 'the battlefield upon which this war is lost or won remains national'.⁵²⁰ In order to bring this struggle to a good end, international monitoring of national implementation and enforcement could use an extra impetus, similar to the OECD and GRECO monitoring mechanisms.

It has been stated that 'incorruptible governments can be constructed only using incorruptible citizens as their bricks and mortar'.⁵²¹ Without a doubt, discouragement and prosecution of corrupt practices is not only obtained through international monitoring bodies or national prosecutions. The moral condemnation of corruption should ideally reach such a critical mass that the sheer reputational risk related to corruption is in itself a powerful disincentive.⁵²² In addition, more lenient sentencing guidelines for companies with a strong internal prevention and detection system may provide additional incentives to

⁵¹⁸ International Chamber of Commerce, *Recommendations by the International Chamber of Commerce on Further Provisions to be Adopted to Prevent and Prohibit Private-to-Private Corruption — Memorandum to the Working Group on Bribery in International Business Transactions* (13 September 2006).

⁵¹⁹ For examples of Asian Development Bank ('ADB') publications, see above n 206. See also the Annual Reports issued by the ADB's Office of Anti-Corruption and Integrity to the ADB's President: see, eg, Department of Policy and Business Practices, Office of Anticorruption and Integrity, Asian Development Bank, 'Report to the President: Office of Anticorruption and Integrity: Annual Report 2012' (Report, March 2013) <<http://www.adb.org/documents/report-president-office-anticorruption-and-integrity-annual-report-2012>>.

⁵²⁰ Mungiu-Pippidi et al, above n 266, 82.

⁵²¹ Gerald E Caiden, O P Dwivedi and Joseph G Jabbara, 'Introduction' in Gerald E Caiden, O P Dwivedi and Joseph G Jabbara (eds), *Where Corruption Lives* (Kumarian Press, 2001) 1.

⁵²² Gantz, above n 16, 464.

establish such internal mechanisms. These will presumably be strongly influenced by international standards and guidance.⁵²³

The battle has not yet been won and it is unrealistic to assume it will ever be won completely. Nevertheless, the developments of the past two decades are evidence that progress can be achieved. As one recent article concluded, '[t]he donor community has spent too much time discussing the dynamics of international crime and corruption, and too little time apprehending the thieves'.⁵²⁴

⁵²³ The US Sentencing Commission issued sentencing guidelines for both individuals and organisational offenders. These guidelines stipulate that the level of the appropriate penalty will be directly influenced by 'the prior diligence of an organization in seeking to prevent and detect criminal conduct': Cleveland et al, above n 10, 217 (citations omitted). See also United States Sentencing Commission, *Guidelines Manual* (2010) <<http://www.uscc.gov/Guidelines/>>.

⁵²⁴ Steve Berkman et al, 'The Fight against Corruption: International Organizations at a Cross-Roads' (2008) 15 *Journal of Financial Crime* 124, quoted in Djordjija Petkoski, Danielle E Warren and William S Laufer, 'Collective Strategies in Fighting Corruption: Some Intuitions and Counter Intuitions' (2009) 88 *Journal of Business Ethics* 815, 815–16.