

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

GLOBAL ACHIEVEMENT OR MISSED OPPORTUNITY?

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ABSTRACT

The United Nations Convention Against Corruption represents the first binding global agreement on corruption. It has elevated anticorruption action to the international stage. This article sets the context for the Convention by considering the first wave of anticorruption initiatives that occurred at the regional level. It then assesses the significance of this new international convention by examining the negotiating process and the strategic positions of different countries. In particular, it analyzes the four areas that generated the most controversy during the negotiations: asset recovery, private sector corruption, political corruption, and monitoring. Although the Convention contains many innovative provisions, the article suggests that it also suffers from some basic weaknesses that may prevent it from having a real impact on corrupt behavior.

INTRODUCTION

Amid great fanfare, the United Nations Convention Against Corruption (UNCAC) was signed by 95 states at a conference in Merida, Mexico in December 2003.¹ As of November 2004, it had 113 signatories and nine parties.² The UNCAC represents the first binding global agreement on corruption.

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¹ United Nations Convention Against Corruption (UNCAC), 9 December 2003, in *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions*, G.A. Res. 58/4, U.N. GAOR, 58th Sess., 50th & 51st plen. mtgs., Annex, Agenda Item 108, U.N. Doc. A/58/422 (2003). See 'UN Anti-corruption Treaty off to Flying Start at Signing Conference', *UN News Center*, 10 December 2003; '95 Countries Sign U.N. Anti-corruption Convention', *Deutsche Presse-Agentur*, 12 December 2003.

² United Nations Office on Drugs and Crime, 'United Nations Convention against Corruption', http://www.unodc.org/unodc/en/crime_signatures_corruption.html (visited 3 November 2004). The nine parties are: Algeria, El Salvador, Kenya, Madagascar, Mexico, Namibia, Sierra Leone, Sri Lanka, and Uganda.

The earliest action against the international dimensions of corruption was when the United States (US) outlawed transnational bribery in 1977.³ At the time, the US urged the United Nations Economic and Social Council to consider an international convention, but due to North–South divisions, the talks were abandoned in 1981.⁴ This article explores what changed in the intervening two decades and whether the UNCAC represents a global achievement in the fight against corruption.

There is an increasing awareness that corruption causes enormous harm and respects no borders. It impoverishes national economies, threatens democratic institutions, undermines the rule of law, and facilitates other threats to human security such as organized crime and terrorism.⁵ The UNCAC arose in the context of this heightened consciousness of corruption as a problem of transnational significance. The existing multilateral anticorruption initiatives not only indicated key areas of concern, but also helped build the necessary consensus to commence negotiations on an international instrument. Moreover, the fact that the Convention was being negotiated under the auspices of the United Nations – the most representative international organization with 191 member states – meant that it was going to be truly global. The question is whether the UNCAC has fulfilled the world’s weighty expectations.

This article takes two approaches to this question. First, it takes a political science approach that looks at the negotiating process, the strategic positions of different countries, and how this impacted on the outcomes. Second, it analyzes specific aspects of the Convention from a legal perspective to assess whether or not the UNCAC really has ‘teeth’.⁶ To put the UNCAC in context, Part I surveys the major multilateral initiatives against corruption. Part II then examines the four areas of the UNCAC that generated that most controversy during the negotiations: asset recovery, private sector corruption, political corruption, and monitoring. Part III evaluates the prospects for compliance with the UNCAC based on three broad theoretical approaches about why states obey international law. Part IV finally assesses whether the Convention is a global achievement or a missed opportunity.

³ Foreign Corrupt Practices Act (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78(m)(b)(3), 78dd-1, 78dd-1, and 78ff (2000)).

⁴ 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, on file with the author) at 24. The 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.

⁵ Secretary-General Kofi Annan, ‘Message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity’, delivered by Dileep Nair (Under-Secretary-General for Internal Oversight Services), 29–31 May 2003.

⁶ See ‘General Assembly Approves International Treaty Against Corruption’, *UN News Service*, 31 October 2003 (quoting Antonio Maria Costa, Executive Director of the UN Office on Drug and Crime, saying the ‘the convention has teeth’).

I. MULTILATERAL INITIATIVES AGAINST CORRUPTION

Since the end of the Cold War, corruption has become an item on the international agenda. This is partly due to the removal of the compelling need to support corrupt regimes for national security reasons, the visible corruption and organized crime in the former Eastern bloc and other parts of the world, and the new corrupt opportunities created by moves towards privatization and deregulation.⁷ The flow of information, money, drugs, and arms across borders has also destroyed the illusion of corruption as a domestic political issue to be left to individual countries. The first wave of anticorruption initiatives occurred at the regional level. They range from binding legal instruments to softer, normative measures and political declarations. These initiatives set the context for the transition from regional to international instruments represented by the UNCAC. This section surveys the major multilateral initiatives, including the type of organization that established them, their main features and their current status.

A. Organization of American States Inter-American Convention Against Corruption

The Organization of American States Inter-American Convention Against Corruption (OAS Convention) was the first binding multilateral agreement on corruption. It was signed by 22 states, including the US, in 1996 and entered into force in 1997.⁸ It currently has 33 ratifications and countries that are not OAS members may also accede to it.⁹ The initiative for the OAS Convention came from a group of Latin American governments led by Venezuela, and was strongly supported by the US.¹⁰ The Convention is distinctive in including developed countries, some in the middle range, and some poor countries.¹¹ The OAS Convention is a manifestation of the spread of democratic government in Latin America which has publicly led to less patience for, and even rejection of, corruption.¹² Consequently, the Convention emphasizes the need to protect democratic institutions because 'representative democracy, an essential condition for stability, peace and development of the

⁷ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge: Cambridge University Press, 1999) 177.

⁸ Inter-American Convention Against Corruption (OAS Convention), done at Caracas, 29 March 1996, 35 I.L.M. 724 (entered into force 6 March 1997), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp>.

⁹ OAS, 'Inter-American Convention Against Corruption', <http://www.oas.org/juridico/english/sigs/b-58.html> (visited 1 November 2004); Article XXIII of OAS Convention.

¹⁰ David A. Gantz, 'Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus', 18 NW. J. Int'l L. & Bus. (1998) 457, at 477.

¹¹ Susan Rose-Ackerman, 'Corruption and the Global Corporation: ethical obligations and workable strategies', in Michael Likosky (ed), *Transnational Legal Processes* (London: Butterworths, 2002) 148-71, at 150.

¹² Gantz, above n 10, at 477. See also, article 2 of the OAS Charter, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp>.

region, requires, by its nature, the combating of every form of corruption in the performance of public functions.¹³

The OAS Convention has a broader scope than the OECD and European instruments. It applies to active bribery (the offence committed by the person who promises or gives the bribe) and passive bribery (the offence committed by the person who receives the bribe).¹⁴ It seeks not only to make bribery of foreign officials a crime, but also encourages governments to deal with domestic corruption. It requires states parties to criminalize: the solicitation, acceptance or offer of illicit payments; acts or omissions of government officials for the purpose of obtaining a bribe; fraudulent use of property derived from such activities; and participation as a principal, accomplice or accessory after the fact.¹⁵ Its provision on transnational bribery is broader than the equivalent provisions of the OECD Convention because it covers not only bribery where the purpose relates to a contract or business transaction, but also any other case where the bribe relates to 'any act or omission in the performance of that official's public function'.¹⁶ States parties are also asked to consider criminalizing a series of further offences on improper use of confidential information or government property by an official, seeking a decision from a public authority for illicit gain, and improper diversion of state property, monies or securities.¹⁷ Interestingly, if adopted, these become 'acts of corruption' under the Convention and trigger cooperation requirements even among states which have not criminalized the offences.

The weakness of the OAS Convention lies in the mechanism for monitoring its implementation. The text of the Convention is silent on this matter and the creation of the follow-up mechanism appears to have been an afterthought. It was not until four years after the Convention came into force that the Conference of States Parties met to establish a follow-up mechanism.¹⁸ OAS uses a peer review system whereby a government-appointed Committee of Experts selects countries for review, obtains information using questionnaires, and prepares a preliminary report. This report is first reviewed by the country and then a final version is submitted to the Conference of States Parties and published.¹⁹ It was not until February 2003 that the first report – on

¹³ Preamble, para 2 of the OAS Convention, available at <http://www.oas.org/main/main.asp?sLang=E&Link=http://www.oas.org/documents/eng/aboutoas.asp>

¹⁴ Peter J. Henning, 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law', 18 *Ariz. J. Int'l & Comp. Law* (2001) 793, at 807.

¹⁵ Articles VI, VII of the OAS Convention.

¹⁶ Article VIII of the OAS Convention. See also Global Programme Against Corruption, *United Nations Manual on Anti-Corruption Policy* (2002) 104.

¹⁷ Article XI of the OAS Convention.

¹⁸ OAS General Assembly Resolution AG/RES.1784 (XXXI-O/01), 5 June 2001, and Summary of the Minutes of the Conference of States Parties, annexed, 2–4 May 2001, Buenos Aires.

¹⁹ Global Programme Against Corruption, above n 16, at 105.

Argentina – was adopted.²⁰ However, the pace has improved recently and the Committee of Experts has now analyzed Colombia, Nicaragua, Paraguay, Uruguay, Ecuador, Chile and Panama. It has also agreed upon a timetable in order to accelerate the process of analysis and produce twelve reports per year.²¹ The Committee can recommend improvements but not sanctions.

B. OECD Convention on Combating Bribery of Foreign Public Officials

The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) is a significant initiative because of the nature of the organization itself. The 30 members of the OECD represent 70 percent of world exports and 90 percent of foreign direct investment;²² they are home to over 75 percent of multinational corporations.²³ The Convention therefore represents an effort to guide the anticorruption activities of governments that influence the flow of most of the world's investment, trade, and goods. Moreover, the OECD probably has an even more global reach than the OAS through its active relationships with 70 other countries and its engagement with civil society.²⁴ The OECD Convention reflects the organization's interest in democratic government and the market economy as well as its specific objective of fighting corruption in international business to help level the playing field for companies.²⁵ The Convention was signed in 1997 and entered into force in 1999.²⁶ It has been ratified by 35 countries.²⁷

The OECD Convention was negotiated under strong pressure from the US. Because the Watergate investigations had revealed that a number of US firms had used foreign connections to funnel illegal contributions to the Nixon campaign, the Carter Administration passed the Foreign Corrupt

²⁰ Technical Secretariat for Legal Cooperation Mechanisms, 'Follow-up Mechanisms for the Implementation of the Inter-American Convention against Corruption', <http://www.oas.org/juridico/english/followup.htm> (visited 2 November 2004).

²¹ Technical Secretariat for Legal Cooperation Mechanisms, 'Schedule for Accelerating the Process of Analysis within the Framework of the First Round', http://www.oas.org/juridico/english/mec_sched_2005.htm (visited 2 November 2004).

²² Gemma Aiolfi and Mark Pieth, 'How to Make a Convention Work: The OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law', in Cyrille Fijnaut and Leo Huberts (eds), *Corruption, Integrity and Law Enforcement* (Dordrecht: Kluwer Law International, 2002) 349.

²³ Gantz, above n 10, at 483.

²⁴ OECD, 'About OECD', http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html (visited 3 November 2004).

²⁵ OECD, 'Fighting Bribery and Corruption', http://www.oecd.org/about/0,2337,en_2649_34855_1_1_1_1_37447,00.html (visited 3 November 2004).

²⁶ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), done at Paris, 17 December 1997 (entered into force 15 February 1999), OECD/DAFFE/IME/BR(97)16/FINAL; 37 I.L.M. 1.

²⁷ OECD, 'Ratification Status as of 10 March 2004', <http://www.oecd.org/dataoecd/59/13/1898632.pdf> (visited 3 November 2004).

Practices Act (FCPA) in 1977.²⁸ The US private sector felt that it was at a trade disadvantage due to this legislation and was pressing the US government to level the playing field.²⁹ Consequently, the US used the forum of the OECD to extend the principles of the FCPA to the international business community.³⁰ This pressure first resulted in some non-binding documents that were used to build up consensus for the Convention. In 1994, the OECD Council issued a series of non-binding Recommendations on Bribery in International Business Transactions which called on member states to 'take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions'.³¹ The Recommendations were revised in 1997 to include specific suggestions for criminal procedure, tax laws, business accounting practices, banking provisions, and making bribery illegal under civil, commercial and administrative laws.³² The OECD also addressed the problem of bribes being written off as tax deductions in its 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.³³

Unlike the non-binding Recommendations, the OECD Convention has a limited scope, which reflects the influence of the FCPA. Its central objective is to use domestic law to combat the bribery of foreign public officials.³⁴ It does not purport to require states parties to criminalize the bribery of their own public officials, unlike the OAS Convention. In this sense, it takes a narrow and unilateral approach, albeit 'collectively unilateral'.³⁵ The Convention applies to both active and passive bribery, but does *not* apply to bribery which is purely domestic or in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not apply when the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining some undue advantage in such business. Moreover, the Convention does not apply to forms of corruption other than bribery. States are, however, required to ensure that incitement, aiding and abetting or authorizing bribery are criminalized and offences are applicable to corporations

²⁸ FCPA, above n 3. See also Christopher F. Corr and Judd Lawler, 'Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures', 32 *Vand. J. Transnat'l L.* (1999) 1249.

²⁹ Aiolfi and Pieth, above n 22, at 350.

³⁰ Rose-Ackerman, *Corruption and Government*, above n 7, at 149.

³¹ OECD Council Recommendation on Bribery in International Business Transactions, 27 May 1994, 33 I.L.M. 1389, 1390, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

³² OECD Council Revised Recommendation on Bribery in International Business Transactions, 23 May 1997, 36 I.L.M. 1018, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

³³ OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996, 35 I.L.M. 1311, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

³⁴ Article 1(1) of the OECD Convention.

³⁵ Aiolfi and Pieth, above n 22, at 350.

and other legal persons.³⁶ Sanctions must be ‘effective, proportionate and dissuasive’ and of sufficient gravity to trigger the application of domestic laws on mutual legal assistance and extradition.³⁷ There are provisions on seizure and forfeiture of proceeds, but not their return.³⁸

Unlike the OAS Convention, the implementation of the OECD Convention is monitored by an apparently rigorous system. The terms of the Convention are vague, simply stating that the OECD Working Group is to be the framework for ‘a programme of systematic follow-up to monitor and promote the full implementation of this Convention.’³⁹ The OECD Working Group has therefore been free to develop a peer review system, drawing on experiences gained through OECD accession procedures, UN human rights audits, and the mutual evaluation procedures of the OECD’s Financial Action Task Force.⁴⁰ A team of experts from two countries monitors implementation of the OECD Convention in essentially two phases. Phase 1 evaluates whether the country has implemented the Convention in its national laws based on answers to questionnaires and the submission of legal materials.⁴¹ The reports of phase 1 are published on the internet after discussion between the experts and the country under review and a hearing by the OECD Working Group.⁴² In ‘phase 1 bis’, the team evaluates the adaptation of laws based on the critique made in phase 1, and the phase 1 reports are accordingly supplemented.⁴³ Phase 2 concentrates on the enforcement of the implementing legislation *in practice* by examining the structures in place for dealing with foreign bribery cases, the level of resources deployed, and personnel training.⁴⁴ The team uses questionnaires and conducts an on-site visit. Civil society groups are permitted to provide information or opinions, but the nature of their involvement is subject to consultation with the country being examined.⁴⁵

The OECD Convention’s two-stage monitoring process has had mixed results. Phase 1 has been successful as 35 countries (all the states parties) have been reviewed.⁴⁶ However, phase 2 reviews of the actual implementation of the Convention have been disappointing. Phase 2 did not commence until

³⁶ Articles 1(2) and 2 of the OECD Convention.

³⁷ Article 3(1) of the OECD Convention.

³⁸ Article 3(3) of the OECD Convention.

³⁹ Article 12 of the OECD Convention.

⁴⁰ Aiolfi and Pieth, above n 22, at 353.

⁴¹ OECD, ‘Bribery Convention: Procedure of Self- and Mutual Evaluation – Phase 1’, http://www.oecd.org/document/21/0,2340,en_2649_37447_2022613_1_1_1_37447,00.html (visited 2 November 2004).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ OECD, ‘Bribery Convention: Procedure of Self- and Mutual Evaluation, Phase 2’, http://www.oecd.org/document/21/0,2340,en_2649_37447_2022613_1_1_1_37447,00.html (visited 2 November 2004).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

late 2002 and to date 10 countries have been reviewed instead of the 14–16 originally planned.⁴⁷ Transparency International (TI) suggests that this slow start is a result of inadequate funding; additional funding has been provided for 2003–2004, but only partial funding is in place for the following years.⁴⁸ In addition, a survey by Control Risks Group of companies in the US and Europe found that only 56 percent of British companies, 38 percent of German companies and 30 percent of Dutch companies were familiar with the OECD Convention.⁴⁹ Moreover, the new domestic laws based on the OECD Convention have not resulted in a single conviction.⁵⁰ In the case of the United Kingdom (UK), although it has introduced legislation in compliance with the OECD Convention and has even updated it under the Anti-Terrorism Act of 2001, there have been no prosecutions for corruption.⁵¹ This is unlikely to be due to an absence of corrupt activity; a TI opinion poll found 52 percent of people thought UK businesses may still be affected by corruption.⁵² The OECD Convention demonstrates the challenges of reducing corruption in practice. Despite its focused scope, widespread ratification, and well-developed monitoring system, it is yet to produce significant changes on the ground.

C. Council of Europe's Criminal Law Convention on Corruption and Civil Law Convention on Corruption

The Council of Europe (COE) has actively developed two significant anti-corruption instruments that are also open to adoption by non-European countries. The COE is Europe's oldest political organization, founded in 1949, and groups together 45 countries, including 21 countries from Central and Eastern Europe. Its original aim was to defend human rights, parliamentary democracy and the rule of law, but since the fall of the Berlin Wall, it has started 'acting as a political anchor and human rights watchdog for Europe's post-communist democracies' by assisting the countries of central and eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform.⁵³ Its anticorruption

⁴⁷ Ibid.

⁴⁸ Transparency International, 'Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials', Report on Paris Meeting of 2–3 October 2003, at 3. Transparency International is an international non-governmental organization devoted to combating corruption. It is made up of a coalition of representatives from civil society, business, and government.

⁴⁹ 'Laws Fail to Halt International Business Bribery', *USAID Democracy and Governance Anti-Corruption News*, 23 August 2003, available at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption/news/403_2.html

⁵⁰ Ibid.

⁵¹ Michael Smith, 'Britain Needs to Get its International Anti-Corruption Act Together', *The Guardian*, 13 October 2003, 25.

⁵² Ibid.

⁵³ COE, 'About the Council of Europe', http://www.coe.int/T/e/Com/about_coe/ (visited 15 October 2004).

conventions reflect this impulse through their active monitoring and evaluation mechanisms.

The Criminal Law Convention on Corruption (COE Criminal Convention) was adopted in 1999 and is open for ratification by non-European countries that participated in its drafting.⁵⁴ It entered into force in 2002 and currently has 30 ratifications.⁵⁵ It has a broad scope because it applies to public and private sectors as well as transnational cases involving bribery of foreign public officials, members of foreign public assemblies, officials of international organizations, and judges and officials of international courts.⁵⁶ However, the range of conduct that states are required to criminalize is fairly narrow; the majority of offences are limited to active and passive bribery.⁵⁷ Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, nepotism and insider trading are not.⁵⁸ The Convention does provide for some support mechanisms such as requiring states parties to protect informants and to have specialized authorities dedicated to the fight against corruption.⁵⁹ The tracing, seizure and freezing of property is provided for, but the text is phrased in terms of ‘facilitating’ such actions and does not deal with the return of assets.⁶⁰ Mutual legal assistance may be refused if it undermines the ‘fundamental interests, national sovereignty, national security or *ordre public*’ of the requested state.⁶¹

The Civil Law Convention on Corruption (COE Civil Convention) was adopted in 1999 and entered into force in 2003.⁶² It currently has 21 ratifications and non-European countries may join.⁶³ It represents the first attempt to define common international rules for civil litigation in corruption cases.⁶⁴ It requires states parties to provide in their internal law for ‘effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of

⁵⁴ Council of Europe Criminal Law Convention on Corruption (COE Criminal Convention), done at Strasbourg, 27 January 1999, (entered into force 1 July 2002), E.T.S. 173, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>. Other states can also join by accession after entry into force subject to the consent of all the contracting states which sit in the COE’s Council of Ministers.

⁵⁵ COE, ‘Treaty Office’, <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (visited 1 October 2004).

⁵⁶ Articles 5, 6, 9 and 11 of the COE Criminal Convention.

⁵⁷ Criminalization requirements are in articles 2–14 of COE Criminal Convention.

⁵⁸ Articles 12 and 13 of COE Criminal Convention.

⁵⁹ Article 22 and 20 of COE Criminal Convention.

⁶⁰ Article 23 of COE Criminal Convention.

⁶¹ Article 26(2) of COE Criminal Convention.

⁶² Council of Europe Civil Law Convention on Corruption (COE Civil Convention), done at Strasbourg, 4 November 1999, (entered into force 1 November 2003), E.T.S. 174, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm>.

⁶³ COE, ‘Treaty Office’, <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (visited 1 October 2004).

⁶⁴ Global Programme Against Corruption, above n 16, at 100.

obtaining compensation for damage'.⁶⁵ It is drafted as a legally binding instrument and applies to public and private sector cases. It is narrower than the COE Criminal Convention because it only applies to bribery and similar acts. Damages can be recovered against anyone who has committed or authorized the act of corruption, or failed to take reasonable steps to prevent such an act, including the State itself, if a causal link between the act and the damages can be shown.⁶⁶ It is also possible for parties to a contract whose consent has been 'undermined by an act of corruption' to have a court declare the contract void.⁶⁷ There are provisions on the protection of employees who report corruption, ensuring the validity of private sector accounting and audits, and international cooperation.⁶⁸ The advantage of the civil law approach is that it makes corruption controls partly 'self-enforcing by empowering victims to take action on their own initiative'.⁶⁹ However, it also reduces the control of government agencies over the overall anticorruption strategy, excludes potential litigants who do not have sufficient resources or access to the courts, and could lead to conflicting civil and criminal proceedings.⁷⁰ Businesses that are concerned about a flood of civil suits may also use methods of settling or avoiding cases that undermine the anticorruption goals of the Convention.

The COE Conventions share a sophisticated monitoring system involving the Group of States against Corruption (GRECO) which was established in 1999 by 17 European states.⁷¹ It now has 38 members, including the US. GRECO uses a combination of mutual evaluation and peer pressure to monitor implementation. Ad hoc teams of experts are appointed, on the basis of a list proposed by GRECO members, to evaluate each member in each evaluation round.⁷² These evaluation teams are the 'cornerstone' of the GRECO procedure; they examine replies to questionnaires, request and examine additional information to be submitted either orally or in writing, visit member countries to seek additional information, and prepare draft evaluation reports for discussion and adoption at the plenary sessions.⁷³ In less than five years, GRECO has issued 42 evaluation reports which are publicly available on the internet.⁷⁴

⁶⁵ Article 1 of the COE Civil Convention.

⁶⁶ Articles 4 and 5 of the COE Civil Convention.

⁶⁷ Article 8 of the COE Civil Convention.

⁶⁸ Articles 9, 10 and 13 of the COE Civil Convention.

⁶⁹ Global Programme Against Corruption, above n 16, at 100.

⁷⁰ *Ibid.*

⁷¹ Article 24 of the COE Criminal Convention and Article 14 of the COE Civil Convention. GRECO was set up under Resolution (99)5, Adopted on 1 May 1999, available at [http://www.greco.coe.int/docs/ResCM\(1999\)5E.htm](http://www.greco.coe.int/docs/ResCM(1999)5E.htm)

⁷² COE, 'Group of States against Corruption', <http://www.greco.coe.int/> (visited 4 November 2004).

⁷³ *Ibid.* See also Articles 10 to 16 of the Statute of the GRECO (Appendix to COE Resolution (99)5) and Title II of GRECO Rules of Procedure, Doc. No. Greco (2003) 6E Final Rev (11 July 2003).

⁷⁴ COE, 'GRECO Evaluations', <http://www.greco.coe.int/evaluations/Default.htm> (visited 1 November 2004).

D. Convention of the European Union on the Fight Against Corruption involving officials of the European Communities or officials of member states

The European Union (EU) has addressed some forms of corruption in legally binding documents, but these are narrowly confined to acts harmful to its own economic interests and only deal with the conduct of its 15 member states. The 1995 Convention on the Protection of the European Communities' Financial Interests and its two Protocols in 1996 and 1997 (EU Protection Convention and Protocols),⁷⁵ aim to combat fraud affecting expenditure and revenue using criminal law.⁷⁶ The Protection Convention covers public and private sectors and deals with acts designated as 'fraud affecting the European Communities' financial interests'.⁷⁷ Each member state must take necessary measures to ensure such conduct is punishable by 'effective, proportionate and dissuasive criminal penalties'.⁷⁸ It also calls for specific individual criminal liability for the heads of businesses in cases where the business commits a fraud. The first Protocol deals with active and passive corruption and the second Protocol addresses the liability of legal persons, confiscation, money laundering and the cooperation between member states and the European Commission. A third Protocol is on the verge of validation and will address 'dirty money laundering', the responsibility of legal persons, and the role of the Commission regarding judicial cooperation.⁷⁹

In 1997, the EU adopted a Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States (EU Corruption Convention).⁸⁰ Despite its strong title, it incorporates essentially the same terms as the Protection Convention, but is even narrower because it only deals with the conduct of officials. It mainly deals with bribery and does not address fraud or money-laundering.⁸¹ However, the attention of the EU was directed towards the private sector in the Joint Action of 1998 (EU Joint Action) which lays down harmonized definitions to combat corruption in the private sector, placing particular emphasis on prevention.⁸² The

⁷⁵ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ 1995 C 316 at 2, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33019.htm>.

⁷⁶ Article 1 of the EU Protection Convention.

⁷⁷ Article 3 of the EU Protection Convention.

⁷⁸ *Ibid.*

⁷⁹ EU, 'Follow-up Work', <http://europa.eu.int/scadplus/leg/en/lvb/l33019.htm> (visited 10 October 2004).

⁸⁰ Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States (EU Corruption Convention), done at Brussels, 26 May 1997, 37 I.L.M. 12; OJ 1997 C 195, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33027.htm>.

⁸¹ Global Programme Against Corruption, above n 16, at 102.

⁸² Joint Action 98/742/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ 1998 L 358, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33074.htm>.

text is drafted in legally binding terms and member states were required to make proposals for implementation by 2000. It is not clear if such proposals have been made, but in July 2002 Denmark presented an initiative aimed at drawing up a common definition of active and passive corruption and the applicable penalties.⁸³

To date, it seems the EU makes bold statements in non-binding instruments, but drafts narrow and specific legal initiatives. For example, in 2003 the European Commission adopted a Communication on a Comprehensive EU Policy against Corruption.⁸⁴ The Communication is admirable in its scope and intent. It appeals to EU leaders to undertake more efforts to detect and punish all acts of corruption, to confiscate illicit proceeds and to reduce opportunities for corrupt practices through transparent and accountable public administrative standards. It asks member states to swiftly enact all relevant supranational and international anticorruption instruments, particularly those of the EU, OECD and COE. It also emphasizes the crucial role of monitoring and peer review evaluation between countries participating in these initiatives. Yet, in the final analysis, the terminology is 'should' not 'shall'; it is an exercise in communication rather than legislation.

E. African Union Convention on Preventing and Combating Corruption

The most recent regional initiative is the African Union Convention on Preventing and Combating Corruption (African Union Convention) which was adopted in Mozambique in 2003.⁸⁵ The African Union was established in 2000 as the successor to the Organization of African Unity (OAU). It represents the change in priorities for Africa: whereas the OAU focused on removing the vestiges of colonization and apartheid, the African Union aims to expedite the process of economic and political integration in the continent.⁸⁶

The Convention's objectives reflect the African Union's focus on economic and political development. It aims to promote mechanisms to fight corruption in the public and private sectors, to facilitate cooperation among states parties, and to coordinate the policies and legislation relevant to corruption.⁸⁷ The Convention's scope is broad and covers active and passive bribery, influence peddling, illicit enrichment, concealment of proceeds derived from corrupt acts.⁸⁸ Its requirements are extensive and appear to be binding. States parties

⁸³ EU, 'Follow-up Work', <http://europa.eu.int/scadplus/leg/en/lvb/l33074.htm> (visited 2 November 2004).

⁸⁴ Communication on a Comprehensive EU Policy against Corruption, COM(2003) 317, Adopted 28 May 2003, available at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0317en01.pdf.

⁸⁵ African Union Convention on Preventing and Combating Corruption (African Union Convention), done at Maputo, 11 July 2003, 43 I.L.M. 1, available at <http://www.africa-union.org/home/Welcome.htm>.

⁸⁶ African Union, 'About AU', <http://www.africa-union.org/home/Welcome.htm> (visited 2 November 2004).

⁸⁷ Article 2 of the African Union Convention.

⁸⁸ Article 4 of the African Union Convention.

'undertake to' adopt legislative and other measures to establish the Convention's offences, strengthen national control measures to ensure the setting up and operations of foreign companies in their territory are subject to the national legislation, establish independent national anticorruption authorities, pass laws to protect informants and witnesses, and punish those who make false and malicious corruption reports.⁸⁹ States parties must adopt legislation to give effect to the right of access to any information that is required to assist in the fight against corruption.⁹⁰ The African Union Convention will be monitored by an Advisory Board on Corruption made up of 11 members elected by the Executive Council.⁹¹ States Parties have to report on their implementation progression to the Board on an annual basis and the Board will then report to the Executive Council. The Board will adopt its own rules of procedure, but as of yet it is not obliged to verify the country reports in any way.

As of November 2004, only 4 of the 53 states had ratified the Convention; it requires 15 ratifications to come into force.⁹² The African Union Convention is comprehensive on paper and is largely phrased in mandatory terms. However, its expansiveness may actually deter countries from ratifying it and the lack of a follow-up mechanism enables countries to delay or avoid implementation.

F. United Nations Convention Against Transnational Organized Crime

The United Nations Convention Against Transnational Organized Crime (UNCTOC) is the organization's first foray into creating a legally binding instrument that addresses corruption.⁹³ It also signals the transition from regional to global initiatives in this field. A committee of 127 member states drafted the Convention in 18 months from 1999 to 2000. It entered into force on 19 September 2003 with the deposit of the fortieth instrument of ratification. To date, 147 nations have signed and 93 have ratified it.⁹⁴

The UNCTOC arose in response to international calls to address global organized crime by closing major loopholes that hinder international enforcement efforts and allow organized crime to flourish.⁹⁵ It focuses on the activities of 'organized criminal groups', but recognizes that corruption is often an instrument

⁸⁹ Article 5 of the African Union Convention.

⁹⁰ Article 9 of the African Union Convention.

⁹¹ Article 22 of the African Union Convention.

⁹² African Union, 'List of Countries which have Signed, Ratified/Acceded', <http://www.africa-union.org/home/Welcome.htm> (visited 4 November 2004).

⁹³ United Nations Convention Against Transnational Organized Crime (UNCTOC), done at Palermo, 12–15 December 2000, (entered into force 19 September 2003) 40 I.L.M. 353; G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex, Agenda Item 105, U.N. Doc A/RES/55/25 (2000), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf

⁹⁴ United Nations Office on Drugs and Crime, 'Signatories to the UN Convention against Transnational Crime and its Protocols', http://www.unodc.org/unodc/en/crime_cicp_signatures.html (visited 4 November 2004).

⁹⁵ Luz Estella Nagle, 'The Challenges of Fighting Global Organized Crime in Latin America', 26 *Fordham Int'l L.J.* (2003) 1649, at 1665.

or effect of organized crime and includes several provisions to address this.⁹⁶ The main one is the requirement that each party adopt laws and other necessary measures to criminalize active and passive bribery in connection with the exercise of the duties of government officials.⁹⁷ It also provides that each party 'shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions'.⁹⁸ This provision is important because it focuses on successful law *enforcement*, not just simple law enactment.⁹⁹ However, the provision also provides an escape hatch by stating that each party shall take measures that are 'appropriate and consistent with its legal system'.¹⁰⁰ This means that states can avoid enforcement on constitutional grounds, claim a domestic conflict, or rely on a lack of devices for implementation.¹⁰¹ Other sections of the UNCTOC on money-laundering and the tracing, seizure and forfeiture of the proceeds of crime may be useful in specific corruption cases.¹⁰² The application of the provisions on international law enforcement cooperation will only apply to corruption cases if they involve an 'organized criminal group' and are 'transnational in nature'.¹⁰³

Monitoring of the UNCTOC is through a Conference of States Parties, which also has the power to recommend improvements.¹⁰⁴ However, no specific time frame is set: reviews need only be made 'periodically' and there is no process for verifying country reports.¹⁰⁵ Despite these weaknesses, the UNCTOC did introduce the idea of mandatory criminalization requirements at the global level and established a wide range of cooperation and technical assistance provisions. Moreover, its relatively rapid negotiation and entry into force indicated that there was a sufficient level of consensus for an international agreement on corruption.

G. United Nations Convention Against Corruption

In December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the UNCTOC, was desirable.¹⁰⁶ It decided to establish an Ad Hoc Committee for the negotiation of such an instrument in Vienna at the headquarters of the Centre

⁹⁶ Global Programme Against Corruption, above n 16, 91–92.

⁹⁷ Article 8 of the UNCTOC.

⁹⁸ Article 9(2) of the UNCTOC.

⁹⁹ Nagle, above n 95, at 1667–68.

¹⁰⁰ Article 9(1) of UNCTOC.

¹⁰¹ Nagle, above n 95, at 1668.

¹⁰² Articles 7 and 12 of UNCTOC.

¹⁰³ Article 27 of UNCTOC.

¹⁰⁴ Article 32 of UNCTOC.

¹⁰⁵ *Ibid.*

¹⁰⁶ G.A. Res. 55/61, U.N. GAOR, 55th Sess., Agenda Item 105, at 1, U.N. Doc. A/RES/55/61 (2001).

for International Crime Prevention, UN Office on Drug and Crime (UNODC).¹⁰⁷ As a first step, an Intergovernmental Open-Ended Expert Group was asked to prepare draft terms of reference for the negotiation of the Convention. These terms of reference were set out in a further General Assembly resolution which requested the Ad Hoc Committee to ‘adopt a comprehensive and multidisciplinary approach’ and to consider the specific elements.¹⁰⁸

The text of the United Nations Convention against Corruption (UNCAC) was negotiated during seven sessions of the Ad Hoc Committee held between 21 January 2002 and 1 October 2003. The draft Convention was adopted by the General Assembly in October 2003.¹⁰⁹ At the High-Level Political Signing Conference at Merida, Mexico from 9–11 December 2003, high expectations and intense optimism surrounded this latest addition to the multilateral initiatives against corruption.¹¹⁰ The UN Secretary-General asserted that the Convention ‘can make a real difference to the quality of life of millions of people around the world’.¹¹¹ However, the experiences of regional organizations suggest that creating meaningful anticorruption instruments is a difficult task.

II. ANALYSIS OF THE CONVENTION AND ITS NEGOTIATING HISTORY

The Ad Hoc Committee certainly met the request of a ‘comprehensive and multidisciplinary approach’ by drafting a Convention that runs to 71 articles.¹¹² The UNCAC is the most wide-ranging instrument to date, covering three major aspects of fighting corruption:¹¹³

- *Prevention*: An entire chapter of the UNCAC is devoted to preventive measures addressed to both the public and private sectors.¹¹⁴ Provisions relate to the prevention of corruption in the judiciary and public

¹⁰⁷ Ibid.

¹⁰⁸ These were: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation: G.A. Res. 56/260, U.N. GAOR, 56th Sess., Agenda Item 110, at 2, U.N. Doc. A/RES/56/260 (2002).

¹⁰⁹ G.A. Res. 58/4, U.N. GAOR, 58th Sess., Agenda Item 108, U.N. Doc. A/RES/58/4 (2003).

¹¹⁰ See ‘UN Anti-corruption Treaty off to Flying Start at Signing Conference’, *UN News Center*, 10 December 2003; Adriana Barrera, ‘New UN Pact Aims to Stop Leaders Looting Coffers’, *Reuters*, 10 December 2003.

¹¹¹ ‘Secretary-General Congratulates Ad Hoc Committee on Successful Conclusion of Negotiations on UN Convention against Corruption’, *M2 Presswire*, 2 October 2003.

¹¹² See the UNCAC.

¹¹³ See generally, ‘Highlights of the United Nations Convention Against Corruption’, *UNODC Update*, December 2003, available at http://www.unodc.org/unodc/newsletter_2003-12-01_1_page003.html.

¹¹⁴ Ch II of the UNCAC.

procurement as well as the establishment of anticorruption bodies.¹¹⁵ The Convention calls on states parties to actively promote the involvement of nongovernmental organizations (NGOs) and other elements of civil society in the fight against corruption.¹¹⁶ However, the language of this chapter is non-mandatory.

- *Criminalization*: States parties are required to adopt legislative and other measures to criminalize not only basic forms of corruption, such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption.¹¹⁷ Most provisions are mandatory, but there are references to adopting legislative measures ‘in accordance with fundamental principles of its domestic law’ or taking measures ‘to the greatest extent possible within its domestic legal system’.¹¹⁸ These qualifying clauses provide a potential escape clause for reluctant legislators.
- *International cooperation*: States parties agree to cooperate in prevention and investigation activities and the prosecution of offenders.¹¹⁹ The Convention binds parties to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders. Countries must also take measures to support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

Due to the large number of issues covered by the UNCAC, this section focuses on the four areas that generated the most controversy during the negotiations: asset recovery, private sector corruption, political corruption, and implementation. It outlines the problems that the negotiators sought to address, examines their strategic positions, and evaluates the outcome. The way these controversies were resolved provides a good indication of the strengths and weaknesses of the Convention, and its potential to have a meaningful impact on corruption around the world.

A. Asset recovery

Asset recovery is a vital issue for developing countries where cases of grand corruption have exported national wealth to international banking centers and financial havens, and where resources are badly needed for the reconstruction of societies under new governments. The Nyanga Declaration on the Recovery and Repatriation of Africa’s Wealth states: ‘An estimated US\$20–40 billion has over the decades been illegally and corruptly appropriated from some of the world’s poorest countries, most of them in Africa, by

¹¹⁵ Articles 11, 9 and 6, respectively of the UNCAC.

¹¹⁶ Article 13 of the UNCAC.

¹¹⁷ Chapter III of the UNCAC.

¹¹⁸ See, e.g., Articles 23 and 31 of the UNCAC.

¹¹⁹ Chapter IV of the UNCAC.

politicians, soldiers, businesspersons and other leaders, and kept abroad in the form of cash, stocks and bonds, real estate and other assets'.¹²⁰

Although the full extent of the transfers of illicit funds is hard to measure, it is certain that this form of corruption has 'a cancerous effect on economies and politics around the globe'.¹²¹ The International Monetary Fund estimated that the total amount of money laundered on an annual basis is equivalent to 3 to 5 percent of the world's gross domestic product (between \$600 billion and \$1.8 trillion) and it can probably be assumed that a 'significant portion of that activity involves funds derived from corruption'.¹²²

There are severe consequences of exporting funds derived from corruption for the country of origin. It 'undermines foreign aid, drains currency reserves, reduces the tax base, harms competition, undermines free trade, and increases poverty levels'.¹²³ There is no shortage of examples of corrupt leaders sacrificing their country's future for personal enrichment. Between 1995 and 2001, Haiti, Iran, Nigeria, Pakistan, the Philippines, Peru, and the Ukraine claimed losses ranging from \$500 million to \$35 billion due to the corruption of former leaders or senior officials.¹²⁴ President Mobutu Sese Seko looted Zaire's treasury of \$5 billion, an amount equal to the country's external debt at the time.¹²⁵ The late Nigerian dictator, Sani Abacha, and his inner circle looted around \$2.2 billion in a country where 70 percent of the population lives on less than \$1 a day.¹²⁶ The 'steal and run' strategy has been used by at least 4,000 Chinese officials who are suspected of embezzling about \$600 million and then fleeing overseas.¹²⁷

Given the staggering amount of money being siphoned out of developing countries, the issue of asset recovery was a high priority from the very beginning of the negotiations. It importantly had the support of the US. When 58 nations gathered in Buenos Aires for the preparatory meeting in which countries were asked to submit proposals that would be used as the

¹²⁰ The Nyanga Declaration was made by representatives of TI in 11 African countries on 4 March 2001, available at http://www.transparency.org/pressreleases_archive/2001/nyanga_declaration.html.

¹²¹ 'Global Study on the transfer of funds of illicit origin, especially funds derived from acts of corruption', Ad Hoc Committee for the Negotiation of a Convention Against Corruption, 4th Sess., Agenda Item 3, at 3, U.N. Doc. A/AC.261/12 (2002).

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid. See also, 'Crooked Officials Said to Cost Asia a Fortune', *AFX Asia*, 4 December 2003 (saying one-third of public investment in many Asia-Pacific countries is squandered on corruption, with governments paying between 20 to 100 percent over the top for goods and services due to corrupt procurement practices).

¹²⁵ See Andrea D. Bontrager, 'From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery', 7 *Indian Journal of Global Legal Studies* (2000) 655.

¹²⁶ Global Study on the transfer of funds of illicit origin, above n 121, at 3.

¹²⁷ Renmin Wang, 'International Conventions will Help "Extradition" of "Corrupt Officials"', *World News Connection*, 28 September 2003.

basis for negotiations, the US submitted text regarding asset recovery only.¹²⁸

The organs of the UN were also engaged with this issue. Even before the terms of reference were drafted, the General Assembly had passed a resolution in 2000 specifically requesting the Intergovernmental Open-Ended Expert Group examine the question of illegally transferred funds and the repatriation of such funds.¹²⁹ This request was reiterated in the 2002 resolution on the elements to be examined by the Ad Hoc Committee.¹³⁰ The Economic and Social Council passed its own resolution requesting the Secretary-General to prepare a global study on the transfer of funds of illicit origin to assist the deliberations of the Ad Hoc Committee.¹³¹ Due to a proposal by Peru, this study was supplemented by a one-day technical workshop on asset recovery during the second session.¹³² No other aspect of the UNCAC was treated with the same depth.

Within the Ad Hoc Committee, a tremendous amount of political will coalesced around the issue of asset recovery. At the first session, the representatives of the Group of 77 and China, EU, Africa, and Latin America and the Caribbean stated that it was essential that the Convention address this issue effectively.¹³³ At the second session, the Chairman made the significant statement that: 'the question of asset recovery [is] one of the fundamental aspects of the Convention and would also serve as an indicator of the political will to join forces in order to protect the common good'.¹³⁴

Asset recovery therefore became a sort of 'litmus test' for the success of the negotiating process as a whole. Although there were intense debates on how to reconcile the needs of the countries seeking the return of the assets with the legal and procedural safeguards of the countries whose assistance is needed, the representatives always emphasized its importance throughout the negotiations.¹³⁵ The high priority of the issue was bolstered by the Security Council resolution deciding that all UN member states should take steps to freeze funds removed from Iraq by Saddam Hussein or his senior officials and immediately transfer them to the Development Fund for Iraq, and take steps

¹²⁸ In contrast, the proposal of Austria and The Netherlands covered almost all matters in the Terms of Reference and ran to 30 pages: Lisa M. Landmeier *et al.*, 'Anti-Corruption International Legal Developments', 36 *Int'l L.* (2002) 589, at 590.

¹²⁹ G.A. Res. 55/188, U.N. GAOR, 55th Sess., Agenda Item 93, U.N. Doc. A/RES/55/188 (2000).

¹³⁰ G.A. Res. 56/260, U.N. GAOR, 56th Sess., Agenda Item 110, U.N. Doc. A/RES/56/260 (2002).

¹³¹ ECOSOC Res. 2001/30, U.N. ECOSOR, at 10, U.N. Doc. E/2001/30-E/CN.15/2001/13 (2001).

¹³² *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its second session, held in Vienna from 17 to 28 June 2002*, Annex 1, U.N. Doc. A/AC.261/7 (2002).

¹³³ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its first session, held in Vienna from 21 January to 1 February 2001*, at 6–8, U.N. Doc. A/AC.261/4 (2002).

¹³⁴ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its second session, held in Vienna from 17 to 28 June 2002*, at 3, U.N. Doc. A/AC.261/7 (2002).

¹³⁵ 'Consensus Reached on UN Convention Against Corruption', *UN Information Service*, 3 October 2003.

to facilitate the safe return to Iraqi institutions of Iraqi cultural property that had been illegally removed.¹³⁶ The African representative, in particular, believed that the words and spirit of this resolution should be incorporated into the UNCAC.¹³⁷

In the end, provisions on asset recovery formed an entire chapter of the UNCAC.¹³⁸ The provisions have been hailed as ‘ground-breaking’,¹³⁹ but this overstates their true impact. The Convention says the return of assets pursuant to this chapter is a new ‘fundamental principle’ of international law.¹⁴⁰ However, the *travaux préparatoires* indicate that the expression ‘fundamental principle’ has no legal consequences on the other provisions of the chapter.¹⁴¹ The article on prevention and detection of transfers of the proceeds of crime sets out useful provisions on ‘know-your-customer’ requirements for financial institutions and the prevention of ‘phantom banks’ that have no physical presence and are not affiliated with a regulated financial group.¹⁴² However, states parties need only ‘consider’ establishing effective financial disclosure systems for public officials.¹⁴³ There are mandatory provisions on establishing measures to allow states parties to recover property through civil actions or via international cooperation in confiscation.¹⁴⁴ Although the seizure and freezing of property is compulsory for states parties, they need only ‘consider’ preserving property for confiscation.¹⁴⁵ The Convention recognizes the complexity of many asset recovery cases by drawing distinctions between how assets will be returned in response to different crimes. In the case of embezzlement or laundering of public funds, the confiscated property is returned to the requesting state party.¹⁴⁶ In the case of proceeds from any other offence under the Convention, the property is returned as long as there is proof of ownership or recognition of the damage caused to the requesting state party.¹⁴⁷ In all other cases, priority consideration is given to returning the property to the requesting state party, returning property to

¹³⁶ S.C. Res. 1483 (2003), U.N. SCOR, 4761 mtg., at paras 23 and 7, U.N. Doc. S/RES/1483 (2003).

¹³⁷ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its sixth session, held in Vienna from 21 July to 8 August 2003*, at 5, U.N. Doc. A/AC.261/22 (2003).

¹³⁸ Ch V of the UNCAC.

¹³⁹ Mark Turner, ‘Step Forward for Fight Against Global Corruption’, *Financial Times*, 1 October 2003.

¹⁴⁰ Article 51 of the UNCAC.

¹⁴¹ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption*, at 8, U.N. Doc. A/58/422/Add.1, (2003).

¹⁴² Article 52(1) and (2) of the UNCAC.

¹⁴³ Article 52(5) and (6) of the UNCAC.

¹⁴⁴ Articles 53 and 54 of the UNCAC.

¹⁴⁵ Article 54(2)(c) of the UNCAC.

¹⁴⁶ Article 57(3)(a) of the UNCAC.

¹⁴⁷ Article 57(3)(b) of the UNCAC.

its prior legitimate owners, or compensating the victims of the crime.¹⁴⁸ States parties are also to consider setting up a financial intelligence unit to keep track of suspicious financial transactions.¹⁴⁹

The effectiveness of the asset recovery provisions depends to a large extent on the measures for mutual legal assistance.¹⁵⁰ During the negotiations, many developed countries insisted on ‘dual criminality’ before such assistance would be made available – that is, that both the requesting and requested states parties must have comparable offences in their criminal law.¹⁵¹ TI, which was observing the negotiations, reported that many developed countries appeared to prefer to continue to use their extensive bilateral and multi-lateral agreements on extradition and mutual legal assistance rather than rely on the Convention.¹⁵² In the end, a compromise was reached so that dual criminality is only required when the legal assistance requires coercive action.¹⁵³

Overall, even though the chapter on asset recovery is not as revolutionary as some people say, it is a significant step forward in dealing with a complex problem in international affairs. Most importantly, the Convention ties the asset recovery provisions to a wide range of corrupt acts, not just bribery.¹⁵⁴ The Conventions of the OAS, OECD and COE have promoted the understanding of corruption as synonymous with bribery. This view has ‘inherent limitations’, especially in cases where officials become enriched from illicit payments, such as skimming and kickbacks, that do not fit within the definition of active or passive bribery.¹⁵⁵ The Convention addresses the complexity of corruption by recognizing its many forms and providing for appropriate recovery actions in each case.

To date, the recovery of assets derived from grand corruption has been hampered by at least four major obstacles. First, these cases are usually enormously complex and require a sustained effort by experts in forensic accounting, money laundering, and the civil and criminal laws of different countries.¹⁵⁶ The provision on the financial intelligence unit and the Convention’s chapter on technical assistance and information exchange¹⁵⁷ may help in this regard. Second, pursuing assets overseas is highly expensive due to the

¹⁴⁸ Article 57(3)(c) of the UNCAC.

¹⁴⁹ Article 58 of the UNCAC.

¹⁵⁰ Article 46 of the UNCAC.

¹⁵¹ Transparency International Press Release, ‘US weakens UN Convention by blocking measures tackling political corruption’, 11 August 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.08.11.us_blocking_measures.html.

¹⁵² The US, for example, has 110 such agreements: *ibid.*

¹⁵³ Article 46(9)(b) of the UNCAC.

¹⁵⁴ Article 57 of the UNCAC.

¹⁵⁵ Global Study on the transfer of funds of illicit origin, above n 121, at 7.

¹⁵⁶ Global Programme Against Corruption, above n 16, at 120.

¹⁵⁷ Chapter VI of the UNCAC.

need to retain experts, transport evidence and witnesses, translate testimony, and carry out investigations and prosecutions in a number of countries.¹⁵⁸ The Convention's mutual technical and legal assistance provisions may mitigate some of these costs. Third, a common legal complication in recovery actions is straddling the boundary between civil and criminal proceedings because each type involves different procedural safeguards, burdens of proof and remedies.¹⁵⁹ In this regard, the mechanisms for recovery directly, or through international cooperation, help harmonize procedures.¹⁶⁰ If the Convention is implemented by enough state parties, the civil/criminal dilemma will be alleviated. Fourth, asset recovery actions raise complicated political considerations. The requesting state party may face internal political obstacles from supporters of the former leader or senior officials who allegedly transferred the assets. On the other hand, the requested state party may have concerns about the political legitimacy of the requesting state's government, the motivations behind the recovery efforts, or the fate of the returned assets if corruption is still ongoing.¹⁶¹ The Convention does not directly address these concerns, but the very process of negotiating the asset recovery provisions helped generate a high level of political will about the importance of this issue. This consensus may encourage states parties to better address the political obstacles to asset recovery.

The asset recovery chapter has been greeted with delight by many countries that have been cheated by their leaders. For example, the Philippines, which has been trying to recover billions of dollars transferred overseas by former President Ferdinand Marcos for 17 years, has warmly welcomed the asset recovery provisions.¹⁶² Rose-Ackerman argues that national criminal prosecutions of former officials of the previous regime are likely to absorb resources that could be put to better use elsewhere, but she makes an exception for allegations of corruption: 'Such prosecutions can be part of an effort to locate and repatriate corrupt proceeds deposited abroad... [and] can bring a net financial gain to the state as it seizes the former official's assets.'¹⁶³ The UNCAC could make this type of asset recovery more feasible. But, Rose-Ackerman warns that caution must be exercised: 'Too often, former rulers are accused of corruption at the same time as the new rulers are creating corrupt structures of their own that will repeat the pattern. The effort to

¹⁵⁸ Global Programme Against Corruption, above n 16, at 120. See also, Global Study on the transfer of funds of illicit origin, above n 121, at 10.

¹⁵⁹ Global Study on the transfer of funds of illicit origin, *ibid.*, at 9.

¹⁶⁰ Articles 53, 54 and 55 of the UNCAC.

¹⁶¹ Global Study on the transfer of funds of illicit origin, above n 121, at 10.

¹⁶² See Roel Landingin, 'Philippine Commission's Hopes High in Hunt to Recoup the Marcos Billions', *Financial Times*, 2 October 2003; 'Gov't to Push for OK of Pact vs Corruption', *Manila Bulletin*, 30 October 2004 (noting that the ratification of the UNCAC is specifically cited in the Government's Medium-Term Philippine Development Plan for 2004 to 2010).

¹⁶³ Susan Rose-Ackerman, 'Establishing the Rule of Law', in Robert Rotberg (ed), *When States Fail: Causes and Consequences* (Princeton: Princeton University Press, 2004) 182–221, at 185.

retrieve looted funds should be combined with affirmative programs of reform.¹⁶⁴ The impact of the asset recovery provisions should therefore not be exaggerated; they focus attention on a certain aspect of corruption that afflicts developing countries, but do not supply a panacea to their problems.

B. Private sector

The recognition that private sector corruption is a problem has been intensifying in developing and developed countries for three reasons. First, the private sector is larger than the public sector in many countries.¹⁶⁵ In the UK, 82 percent of all workforce jobs were in the private sector in 2000.¹⁶⁶ The private sector has even been experiencing exponential growth in China where its share of industrial employment reached more than 18 percent of the national total by 1995; the private sector accounted for 34.3 percent of national industrial output by 1997, compared to 2 percent in 1985.¹⁶⁷ A second and related reason is that the line between the public and private sectors is being blurred by privatization and outsourcing.¹⁶⁸ In the US, 86 percent of state agencies said they either increased or maintained the level of privatization activity from 1993–98.¹⁶⁹ The World Bank found that privatization surged in developing regions in 1997, but there was a decline everywhere except for Latin America and the Caribbean due to the East Asian crisis in 1997 and the Russian crisis in 1998.¹⁷⁰ Activity has since picked up and more aggressive privatization programs will be launched, or are in progress, in the Middle East and North Africa (countries that will enter the Free Trade Agreement with the EU), Eastern and Central Europe (countries acceding to the EU), and South Asia.¹⁷¹ Privatization not only increases the number of public-oriented activities

¹⁶⁴ Ibid.

¹⁶⁵ Transparency International Press Release, 'TI calls for the UN Anti-Corruption Convention to Deter Bribery of Corporate Officials and Criminalize Private Sector Corruption', 11 March 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html.

¹⁶⁶ Duncan MacGregor, 'Jobs in the Public and Private Sectors: Presenting data (updated to June 2000) on jobs in the public and private sectors' (Economic Trends, Working Paper No. 571, 2001) at 1, <http://www.statistics.gov.uk/cci/article.asp?id=88> (visited 1 November 2004).

¹⁶⁷ Yang Yao, 'The Size of China's Private Sector', *China Update* 1 (1999), at 2, available at <http://old.ccer.edu.cn/faculty/yao/Size%20of%20PS.pdf>.

¹⁶⁸ Transparency International Press Release, 'TI calls for the UN Anti-Corruption Convention to Deter Bribery of Corporate Officials and Criminalize Private Sector Corruption', 11 March 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html.

¹⁶⁹ Keon S. Chi and Cindy Jasper, 'Private Practices: A Review of Privatization in State Governments', (Council of State Governments Report, 1998) 7, available at <http://stars.csg.org/reports/1998/private/98private-all.pdf>.

¹⁷⁰ World Bank, *Global Development Finance 2000*, Appendix 4: Progress in Privatization, 135 (2000), available at <http://www.worldbank.org/prospects/gdf2000/app4.pdf>. See also, World Bank, *Global Development Finance 2003*, Figure 4 &fig4; .3, 86 (2003), available at http://www.worldbank.org/prospects/gdf2003/gdf_ch04_web.pdf.

¹⁷¹ Ibid.

being conducted in the private sector, but also creates opportunities for corruption through the very process of transferring assets of large state enterprises. There could be insider dealing, assurances of lenient regulatory oversight, and retention of monopoly rents.¹⁷²

Third, the huge economic influence of multinational corporations (MNCs) and the consequent leverage they have in relation to states, means that they are an actor that cannot be excluded from an international anticorruption strategy. If the size of countries and MNCs are measured by value added, the world's largest MNC, ExxonMobil, with an estimated \$63 billion value added in 2000, ranked 45th in a combined list of countries and non-financial companies; this is equivalent to the size of the economy of Chile or Pakistan.¹⁷³ In the top 100 combined country-company list for 2000, there were 29 MNCs. These powerful non-state actors can make deals with developing country governments that represent a sizable share of a state's national income or resource endowments; they often negotiate with top public officials and, if it is a corrupt environment, the MNC must decide whether to participate actively, quietly refuse to deal, or report the corruption.¹⁷⁴

Extending the Convention to cover the private sector was one of the most contentious issues during the negotiations. The EU spearheaded the drive to criminalize bribery in the private sector.¹⁷⁵ It was supported by the Latin American and Caribbean States whose representative argued that in view of the linkage between the two sectors, adopting a 'limited' approach that only targeted the public sector 'would adversely affect the implementation of the future convention'.¹⁷⁶ However, the US resisted intrusions on 'purely private sector conduct'; a US official explained, 'Private sector bribery is not a crime in the United States. We get at it in other ways'.¹⁷⁷ The US position is somewhat surprising because it has led the way with the FCPA legislation outlawing bribes paid to obtain business, preceding the OECD Convention by two decades. Admittedly the FCPA applies to bribes paid abroad in private-to-public contexts rather than

¹⁷² Rose-Ackerman, *Corruption and Government*, above n 7, at 36–37.

¹⁷³ UNCTAD, *World Investment Report 2002* (2002) 90, available at <http://r0.unctad.org/wir/pdfs/fullWIR02/pp85-114.pdf>. The value added measure is used because a comparison of the sales of MNCs with the GDP of countries is 'conceptually flawed' (according to UNCTAD) since GDP is a value added measure and sales are not. A comparable yardstick requires that sales be recalculated as value added. For MNCs, value added is estimated as the sum of salaries and benefits, depreciation and amortization, and pre-tax income.

¹⁷⁴ Rose-Ackerman, *Corruption and Government*, above n 7, at 187–88.

¹⁷⁵ 'UN Anti-corruption Pact Raises Last-Minute Alarms', *Reuters*, 29 June 2003.

¹⁷⁶ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its third session, held in Vienna from 30 September to 11 October 2002*, at 3, U.N. Doc. A/AC.261/9 (2002).

¹⁷⁷ Quoted in 'UN Anti-corruption Pact Raises Last-Minute Alarms', *Reuters*, 29 June 2003.

private-to-private transactions, but the legislation gave US firms a head start in developing corporate codes of conduct¹⁷⁸ and many such codes cover purely private sector bribery.¹⁷⁹

The US views prevailed in the final version of the Convention which only has a non-mandatory framework for criminalizing bribery and embezzlement in the private sector.¹⁸⁰ The Convention takes a slightly stronger stance on prevention by requiring each state party, ‘in accordance with the fundamental principles of its domestic law’, to take measures to prevent corruption in the private sector, enhance accounting and auditing standards, and ‘where appropriate’ provide effective civil, administrative or criminal penalties for failure to comply with such measures.¹⁸¹ It provides a non-exhaustive list of measures such as promoting the development of codes of conduct, preventing the misuse of procedures for subsidies and licenses, and preventing conflicts of interest.¹⁸² It requires states parties to prohibit off-the-books accounting.¹⁸³ In terms of private-to-public corruption, the UNCAC strengthens the standards set by the OECD Convention. First, it criminalizes the bribery of not just foreign public officials, but also national public officials and officials of public international organizations.¹⁸⁴ Second, it requires each state party to disallow the tax deductibility of expenses that constitute bribes¹⁸⁵ – an issue on which the OECD has only made a non-binding recommendation.¹⁸⁶

US businesses were concerned that extending the Convention to the private sector could create a private right of action that would open the door to lawsuits in foreign courts over contract and procurement irregularities.¹⁸⁷ Partly due to the lobbying efforts of TI in the US business community, a provision was included in the Convention requiring each state party to ensure that entities or persons that have suffered damage from corruption ‘have a right to initiate legal proceedings against those responsible for that damage in order to obtain compensation’.¹⁸⁸ To guard against the unintended effect of increasing US exposure to lawsuits from overseas, the *travaux préparatoires*

¹⁷⁸ Rose-Ackerman, *Corruption and Government*, above n 7, at 187–88.

¹⁷⁹ While not limited to US firms, an OECD survey of corporate codes of conduct found that of 56 codes that dealt with bribery, 64 percent addressed bribery of private actors: Kathryn Gordon and Maiko Miyake, ‘Business Approaches to Combating Bribery: A Study of Codes of Conduct’ (OECD Working Papers on International Investment, No. 2000/1, 2000) at 6, available at <http://www.oecd.org/dataoecd/45/32/1922830.pdf>.

¹⁸⁰ Articles 21 and 22 of the UNCAC.

¹⁸¹ Article 12(1) of the UNCAC.

¹⁸² Article 12(2) of the UNCAC.

¹⁸³ Article 12(3) of the UNCAC.

¹⁸⁴ Articles 15 and 16 of the UNCAC.

¹⁸⁵ Article 12(4) of the UNCAC.

¹⁸⁶ OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996, 35 I.L.M. 1311, available at http://www.oecd.org/document/46/0,2340,en_2649_37447_2048174_1_1_1_37447,00.html.

¹⁸⁷ ‘UN Anti-corruption Pact Raises Last-Minute Alarms’, *Reuters*, 29 June 2003.

¹⁸⁸ Article 35 of the UNCAC.

indicate that this provision does not restrict the right of each state to determine the circumstances under which it will make its courts available, and gives the example of legal action ‘where the acts have a *legitimate relationship* to the state party where the proceedings are to be brought’.¹⁸⁹

In sum, the UNCAC does not significantly alter the (absence of) rules regarding private-to-private corruption. The Chairman of the Ad Hoc Committee noted that there were concerns about placing ‘unwarranted, undue and unwanted restraints on trade and the ability of private sector entities to pursue their activities for the benefit of national economies and international development’.¹⁹⁰ However, requiring the private sector to comply with similar anticorruption laws to the public sector surely benefits ‘national economies and international development’ by eliminating loopholes and recognizing the increasing convergence between the sectors in many areas of economic life. In failing to criminalize bribery and embezzlement in the private sector, the Convention falls short of the standard set by the EU Joint Action.¹⁹¹ Nonetheless, the Convention does go further than the OECD Convention with respect to private-to-public corruption and its provision on the private right of action, even if it is restricted to certain circumstances, follows the COE Civil Convention by empowering victims of corruption to take action on their own initiative.

C. Financing of political parties

The most intense debate during the negotiation of the Convention was reserved for the provision on the financing of political parties. There are two dynamics underlying this controversy. The first, more general, dynamic is that corruption in elections is of universal concern. TI’s Global Corruption Barometer surveyed 40,000 people in 47 countries and found that in three out of four countries, corruption in the political process is the most important issue.¹⁹² The message is that a lack of trust in political parties undermines their legitimacy and can ‘encourage a culture of corruption throughout public administration and the public sector’.¹⁹³

The second, more specific, dynamic is the issue of campaign finance. As Offe observes, the party competition that is an integral part of democratic

¹⁸⁹ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption*, at 6, U.N. Doc. A/58/422/Add.1 (2003) (emphasis added).

¹⁹⁰ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its fourth session, held in Vienna from 13 to 24 January 2003*, at 3, U.N. Doc. A/AC.261/13 (2003).

¹⁹¹ Joint Action 98/742/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ 1998 L 358, available at <http://europa.eu.int/scadplus/leg/en/lvb/l33074.htm>.

¹⁹² James Auger, ‘International Survey Sheds Light on Corruption Blackspots’, *World Markets Analysis*, 7 July 2003.

¹⁹³ *Ibid.*

government 'generates an insatiable appetite for campaign funds'.¹⁹⁴ Moreover, the costs of this competition are increasing in a 'media democracy' where opportunities for communicating must be purchased.¹⁹⁵ Yet, this flow of campaign finance generates two problems. First, when large amounts of money reach a politician, there is a temptation to divert the funds for personal use.¹⁹⁶ Second, even if the donations are not diverted, they can be used, in effect, to 'purchase' an elected official's support or vote on legislation.¹⁹⁷ Democracies have sought to reduce corruption in campaign finance in a variety of ways, but each has proved unsatisfactory. The US requires disclosure of donors and imposes limitations on the total amount that individuals can directly contribute to a candidate.¹⁹⁸ However, third-party organizations can legally collect unlimited contributions.¹⁹⁹ Germany has very stringent laws,²⁰⁰ but in the 1980s, contributions requiring *quid pro quos* were disguised as charitable contributions.²⁰¹ There have also been allegations that former Chancellor Kohl maintained a secret campaign contribution fund.²⁰²

The negotiations in the Ad Hoc Committee centered around Article 10 on the funding of political parties proposed by Austria, France and the Netherlands.²⁰³ At the fourth session of the negotiations, the article read:

1. Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
 - (a) To prevent conflicts of interest;
 - (b) To preserve the integrity of democratic political structures and processes;
 - (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

¹⁹⁴ Claus Offe, 'Political Corruption: Conceptual and Practical Issues', in Janos Kornai and Susan Rose-Ackerman (eds), *Problems of Post Socialist Transition: Building a Trustworthy State*, vol 1, (New York: Palgrave Macmillan, 2004) 290 at 308.

¹⁹⁵ *Ibid* at 309.

¹⁹⁶ Henning, above n 14, at 842–43.

¹⁹⁷ *Ibid*.

¹⁹⁸ 2 United States Code (USC) § 434(b) (2000).

¹⁹⁹ The US Supreme Court affirmed the ban on the 'soft money' that national political parties collected from corporations, labor unions and wealthy patrons. However, some believe major donors will now direct that money to third-party organizations: Glen Justice, 'Court Ruling Affirms New Landscape of Campaign Finance', *N.Y. Times*, 11 December 2003.

²⁰⁰ It requires detailed information on donors of more than DM20,000 (US\$10,000), anonymous donations must not exceed DM1,000, and any political party caught accepting improper donations must pay twice that amount to charity: see German Embassy, 'Party and Campaign Finance in Germany', <http://www.germany-info.org/relaunch/info/archives/background/partyfinance.html> (visited on 12 October 2004).

²⁰¹ Rose-Ackerman, *Corruption and Government*, above n 7, at 134.

²⁰² See Charles P. Wallace, 'Greasing the Wheels', *Time (Europe)*, 7 February 2000; 'Comparative Corruption', *Economist (US)*, 17 May 2003.

²⁰³ *Proposals and Contributions Received from Governments: Austria, France and The Netherlands*, U.N. Doc. A/AC.261/L.21 (2002).

- (d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.
2. Each State Party shall take measures to avoid as far as possible conflicts of interest owing to simultaneous holding of elective office and responsibilities in the private sector.²⁰⁴

The article's legally binding language and broad scope elicited a negative reaction from several delegations. The US refused to endorse the Convention if it included that article and called for its deletion.²⁰⁵ It is ironic that the US was such a strong opponent of this aspect of the UNCAC. Two decades ago, during the negotiations for the OECD Convention, the US was very concerned about corruption in political parties. In fact, it was a 'major disappointment' to the US that the definition of 'foreign public official' in the OECD Convention excluded political party officials.²⁰⁶ The US delegates believed that excluding political party officials 'would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials'.²⁰⁷

The US ultimately triumphed in the negotiations and Article 10 was deleted during the penultimate session of the Ad Hoc Committee, as the deadline for completion quickly approached. Following the decision, the representatives of Benin, Burkina Faso, Cameroon and Senegal expressed their wish that the report of the Ad Hoc Committee 'reflect their preference for a separate binding article on the financing of political parties; however, because of their willingness to accommodate the concerns of other delegations and to ensure the successful finalization of the draft convention, they felt compelled to join the consensus on the deletion of article 10 and the incorporation of a new paragraph in article 6'.²⁰⁸

Article 6 represented a substantial compromise. The strong language of Article 10 was watered down to two non-mandatory clauses asking states to 'consider' adopting measures to 'prescribe candidature for and election to public office' and to 'enhance transparency in the funding of candidatures... and, where applicable, the funding of political parties'.²⁰⁹

²⁰⁴ *Revised Draft United Nations Convention Against Corruption*, at 18, U.N. Doc. A/AC.261/3/Rev. 2 (2002).

²⁰⁵ 'Transparency International Zambia President Dr. Chanda Criticizes US' Unilateralism', *Africa News*, 15 August 2003. See also, Transparency International Press Release, 'US Weakens UN Convention by Blocking Measures Tackling Political Corruption', 11 August 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.08.11.us_blocking_measures.html.

²⁰⁶ Gantz, above n 10, at 486.

²⁰⁷ *Ibid.*

²⁰⁸ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its sixth session, held in Vienna from 21 July to 8 August 2003*, U.N. Doc. A/AC.261/22, Aug 22, 2003, 10.

²⁰⁹ Article 6(2) and (3) of the UNCAC.

Although the US already has strong domestic laws on transparency in political funding, it was only willing to support a discretionary paragraph on this issue.²¹⁰

The outcome of the negotiations acknowledged that the relationship between money and politics is complex and hard to constrain without creating incentives for illegality. The Ad Hoc Committee ultimately had to recognize that campaign contributions are a crucial part of the election systems in many countries and it had to tread carefully in order to avoid the Convention coming into conflict with a core aspect of democratic politics. Despite the intense public concern about corruption in the political process, no multilateral initiative deals expressly with the financing of political parties because this is an area fraught with uncertainty.²¹¹ Indeed, several delegations to the Ad Hoc Committee questioned whether the negotiation of such a provision was practical given the ‘enormous variations in political systems’.²¹²

Campaign finance appears not to be well-suited to regulation through international conventions. The mixed results of domestic laws suggest that that ‘reformers need to look beyond the details of the campaign finance law to seek ways to limit the discretion of politicians to favor gift givers’.²¹³ Offe also makes the interesting argument that in addition to formal controls, there should be standards of political virtue observed by elites and non-elites.²¹⁴ Reducing political corruption requires reliance on ‘endogenous sources of discipline’.²¹⁵ While this is a rather abstract idea, the failure to reach consensus on Article 10 and the way domestic campaign finance laws have been continually circumvented supports Offe’s point that formal controls are insufficient to counter the appetite of competing political parties.

D. Implementation, enforcement, and monitoring

The signing conference of the UNCAC in Mexico signals the beginning, not the end, of the work needed to make the Convention become a reality. The Convention can be seen as a blueprint for policy reform on a global level, and as with any reform proposal, there is a need to consider not just the formal provisions, but how they will impact on societies. ‘Law’, in the sense of a set of formal written documents, will be largely irrelevant if the rules are not embedded in an institutional and organizational structure that favors

²¹⁰ Article 6(3) of the UNCAC. See 2 United States Code (USC) § 434(b) (2000).

²¹¹ Henning, above n 14, at 853.

²¹² *Revised Draft United Nations Convention Against Corruption*, 18 (commentary in footnote 76), U.N. Doc. A/AC.261/3/Rev. 2 (2002).

²¹³ Rose-Ackerman, *Corruption and Government*, above n 7, at 139.

²¹⁴ Offe, above n 194, at 320.

²¹⁵ *Ibid*, at 321.

compliance.²¹⁶ The work by Thomas and Grindle puts forward an ‘interactive’ model of reform²¹⁷ that requires states parties to follow through on their decision to sign and ratify the Convention; the UNCAC must be translated into visible, meaningful, and sustainable changes on the ground.

The survey of multilateral initiatives in Part I demonstrated how implementation, monitoring and enforcement are the areas where most conventions fall down. In the case of the OAS Convention, the monitoring mechanism did not produce any results until 2003. The mechanism’s questionnaire methodology is also open to criticism because it will:

have little bearing or weight or force on whether the States Parties actually benefit from or adhere to the intent of the [OAS Convention] . . . The [Convention] and any other anticorruption instrument can only be successful if the officials responsible for implementation are themselves held accountable for their own conduct. It is one thing to tell the world that one’s Nation is participating in an international convention, and another matter altogether to actually live up to the convention itself.²¹⁸

The OECD Convention has a more robust monitoring mechanism with on-site visits and a focus on practical changes in institutional structures. However, significant problems still exist. Phase 1 reviews have found that domestic laws are being implemented in compliance with the Convention, but the content of these laws may not be conducive to practical change. Australia’s Criminal Code Amendment (Bribery of Foreign Officials) Act 1999 (Cth) has many provisions that are either undefined or ‘so broad that companies engaging in borderline acceptable conduct may be more likely to be within the realms of the offence than not’.²¹⁹ Moreover, surveys by TI and Control Risks Group indicate that such laws are not enforced in practice.²²⁰ Phase 2, which is meant to address enforcement, has been disappointingly slow in exposing the reasons for the lack of prosecutions and in compelling states parties to remedy the situation. TI has made useful recommendations for strengthening the OECD monitoring process including recognizing that the effort must be long-term, introducing a ‘Phase 3’ with further on-site

²¹⁶ Rose-Ackerman, ‘Establishing the Rule of Law’, above n 163, at 83.

²¹⁷ See John W. Thomas, ‘After the Decision: Implementing Policy Reforms in Developing Countries’, 18 *World Development* (1990) 1163.

²¹⁸ Nagle, above n 95, at 1678.

²¹⁹ Martijn Wilder and Michael Ahrens, ‘Australia’s Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’, 2 *Melb. J. Int’l L.* (2001) 568, at 586.

²²⁰ Transparency International, ‘Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials’, Report on Paris Meeting of 2–3 October 2003, 1; ‘Laws Fail to Halt International Business Bribery’, *USAID Democracy and Governance Anti-Corruption News*, 23 August 2003, available at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption/news/403_2.html.

reviews, including more experienced prosecutors on country review teams, and encouraging civil society participation.²²¹

The COE Civil and Criminal Conventions have a similar peer review and mutual evaluation system to the OECD Convention. The COE mechanism also supplements questionnaires with on-site visits. It has proceeded at a good pace and completed first round evaluations of all states parties in 2002.²²² It is now engaged in second round evaluations arranged around three themes: proceeds of corruption, public administration and corruption, and legal persons and corruption.²²³ The COE system appears to be faring slightly better than the OECD mechanism because it includes training for evaluators, appears to have a consistent level of funding, and is flexible enough to make adjustments to its rules and procedures as it goes.²²⁴ Most importantly, the formation of GRECO – a group of member states, non-member states, and organizations – puts the COE Conventions in a broader context. Nonetheless, there does not appear to have been any empirical work on whether the COE Conventions are actually being enforced so it is quite possible that they suffer similar problems to the OECD Convention.

Perhaps conscious of the failings of previous instruments, the negotiations over the UNCAC's monitoring mechanism started off strongly. At the second session, Austria and The Netherlands submitted a proposal for a monitoring mechanism.²²⁵ They suggested the establishment of a Conference of States Parties with the objectives of facilitating training and technical assistance, exchanging information, cooperating with regional organizations and NGOs, reviewing implementation 'periodically', and making recommendations to improve the Convention.²²⁶ They also called for a Subsidiary Body of ten experts elected by the states parties which would assess reports submitted by states parties on their implementation of the Convention.²²⁷ The weakness of this proposal was that reports need only be submitted every five years and even though the Subsidiary Body could request further information, there was no mention of on-site visits or other means of verifying the accuracy of the country reports.²²⁸ Norway then submitted an amendment to this aspect of the Convention that was much more rigorous. It proposed a regional evaluation process whereby states parties in Africa, America, Asia, Europe and

²²¹ Transparency International, *ibid.*, at 3–4.

²²² Third General Activity Report of GRECO (2002) 2, available at [http://www.greco.coe.int/docs/2002/GRECO\(2002\)34E.pdf](http://www.greco.coe.int/docs/2002/GRECO(2002)34E.pdf)

²²³ *Ibid.*, at 4.

²²⁴ See *ibid.*

²²⁵ *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2003).

²²⁶ Article 66 in *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2002).

²²⁷ Articles 67 and 68 in *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2002).

²²⁸ Article 68 in *Proposals and Contributions Received from Governments: Austria and The Netherlands: Amendments to Articles 66 to 70*, U.N. Doc A/AC.261/L.69 (2002).

Oceania appoint a Bureau to assist the Subsidiary Body.²²⁹ It also set out a two-phase evaluation process, based on the OECD Convention: Phase 1 would focus on whether the domestic laws of each state party fulfil the requirements of the Convention; Phase 2 would study the structures put in place to enforce the laws, with provision for on-site visits.²³⁰ Norway's proposal also set out innovative methods for addressing non-compliance with the Convention, including positive (targeted technical assistance) and negative (suspension of the state party from the Convention) measures. This goes a step further than any previous multilateral initiative against corruption.

However, neither of these proposals secured enough support. The Austrian and Dutch proposal for establishing a Conference of States Parties to facilitate activities and information exchange was retained.²³¹ However, the proposals on the Subsidiary Body and the regional evaluation process did not make it into the final Convention. Instead, each state party is to provide information on its implementation measures 'as required by the Conference of States Parties'.²³² The role of civil society is weak: the UNCAC may consider inputs from NGOs 'duly accredited' in accordance with procedures that are yet to be decided, with no time limit specified for such a decision.²³³ The Conference of States Parties may establish a mechanism to 'assist in the effective implementation of the Convention', but only if 'it deems it necessary'.²³⁴ The *travaux préparatoires* indicate that nothing in this section is intended to limit the discretion of the Conference of States Parties in making this decision.²³⁵ However, the absence of timelines and concrete commitments means that the UNCAC might be what Reisman calls a *lex simulata*: 'a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied'.²³⁶

This is an area where UNCAC has not shown any innovation. It follows the formula of the weakest regional conventions by giving state parties a large degree of leeway to decide if and how far to incorporate the Convention into national law. Deferring consideration of a monitoring mechanism until the Conference of States Parties is convened one year *after* the Convention acquires 30 ratifications and enters into force²³⁷ will probably result in a delay

²²⁹ *Proposals and Contributions Received from Governments: Norway: Amendments to Article 68 as Submitted in the proposal by Austria and The Netherlands*, U.N. Doc A/AC.261/L.78 (2002).

²³⁰ *Ibid.*

²³¹ Article 63 of the UNCAC.

²³² Article 63(6) of the UNCAC.

²³³ *Ibid.*

²³⁴ Article 63(7) of the UNCAC.

²³⁵ *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption*, at 12, U.N. Doc. A/58/422/Add.1 (2003).

²³⁶ W. Michael Reisman, *Folded Lies: Bribery, Crusades and Reforms* (New York: Free Press, 1979) 31.

²³⁷ Articles 63(2) and 68 of the UNCAC.

of several years. In the meantime, governments have little incentive to pass implementing laws. As imperfect as they are, the monitoring mechanisms of the OECD and COE demonstrate that peer review and mutual evaluation can produce some results such as raising public awareness and encouraging the passage of implementing laws. Moreover, the UNCAC could have taken this opportunity to propose the creation of a new international institution for review and adjudication. Rose-Ackerman suggests that tribunals in the fields of human rights, international labor standards and nuclear energy might be models.²³⁸ She says another option may be to use the leverage of the World Trade Organization to give victims of corruption a means of lodging a complaint.²³⁹

III. PROSPECTS FOR THE CONVENTION: THEORIES OF COMPLIANCE

When a treaty comes into force, ratifying states are legally obliged to comply with it according to the principle of *pacta sunt servanda*.²⁴⁰ However, the international legal environment is very different to domestic legal systems. The International Court of Justice (ICJ) is not equivalent to a domestic court because it cannot enforce its judgments.²⁴¹ The General Assembly is not equivalent of a domestic legislature because its resolutions are not binding. The Secretary-General is not an analog to a president. As former Secretary-General Boutros Boutros-Ghali once said, 'I can do nothing. I have no army. I have no money. I have no experts. I am borrowing everything. If the member states don't want [to do something], what can I do?'.²⁴² In sum, international law is largely voluntary in nature and lacks any central enforcement power. This section considers the prospects for the UNCAC in a legal environment where compliance is complex and elusive in practice. It examines three broad theoretical approaches that seek to explain the conditions under which international law exercises influence on state behavior.²⁴³

A. Compliance as function of normativity

The first school of theory is composed of international law scholars who argue that governments comply with treaties not only because they expect a reward

²³⁸ Rose-Ackerman, *Corruption and Government*, above n 7, at 195.

²³⁹ *Ibid.*, at 196. The European Union has said that it wants to expand the agenda of the World Trade Organization to include anti-corruption measures: Hugh Williamson and Guy de Jonquières, 'EU Wants WTO to Tackle Corruption', *Financial Times*, 9 January 2004.

²⁴⁰ Article 36 of the Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969 (entered into force 27 January 1980), 1155 U.N.T.S. 331.

²⁴¹ The ICJ can ask the Security Council to enforce its judgments under Article 94 of the United Nations Charter, but this has only happened once in 50 years (in the Lockerbie Case) and it was with the prior agreement of Libya.

²⁴² Quoted in PBS, 'Kofi Annan: Center of the Storm', http://www.pbs.org/wnet/un/print/job_print.html (visited 21 October 2004).

²⁴³ See Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Mich. J. Int'l L.* 345, for an overview of competing concepts of law and the problematic notion of compliance.

for doing so, but also because of their commitment to the ideas embodied in the treaties.²⁴⁴ This normative approach to analyzing state behavior has given rise to a number of different, yet related, views. For Brierly, state consent is the critical factor: nations obey international law because they have consented to it.²⁴⁵ Franck, on the other hand, places emphasis on process, arguing that states comply with international law because it comes into existence through a legitimate (i.e. transparent, fair, inclusive) process.²⁴⁶ The Chayes also examine the treaty-making process, but stress the interplay between actors, rather than the overall legitimacy of the procedure. They argue that compliance is fostered by a 'managerial model' whereby nations comply with treaties because of an 'iterative process of discourse among the parties, the treaty organization and the wider public'.²⁴⁷ Koh offers a related vision in his explanation of the 'transnational legal process' – 'the interaction, interpretation and internalization of international norms into domestic legal systems'.²⁴⁸ For Koh, this process of norm internalization is pivotal to understanding why nations obey international law.²⁴⁹ Finally, Hathaway offers a political theory of international law that describes three levels of incentives that shape a state's decision to commit to and comply with international treaties: domestic legal incentives arising from expected enforcement of the law by national actors; transnational legal incentives arising from enforcement by international bodies or other states parties; and non-legal incentives created by the anticipated reactions of domestic and transnational actors.²⁵⁰

Several features of the UNCAC bode well for compliance, according to this theoretical approach. First, the Convention was negotiated under favorable conditions with high participation, with an average of over 100 states attending each session.²⁵¹ Second, the final draft of the Convention commanded broad support from all the regional groups.²⁵² Third, the UN and the public were involved in the process through the presentation of the Convention to the Third Committee and the General Assembly, and the publication of all documentation on the internet.²⁵³ Fourth, the UNCAC explicitly involves the

²⁴⁴ Oona A. Hathaway, 'Between Power and Principle: A Political Theory of International Law', 71 U. Chi. L. Rev. (forthcoming May 2005), at 6.

²⁴⁵ James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, New York: Oxford University Press, 1963).

²⁴⁶ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

²⁴⁷ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 3, 25.

²⁴⁸ Harold Hongju Koh, 'Why Do Nations Obey International Law?', 106 Yale L.J. (1997) 2599, at 2603.

²⁴⁹ *Ibid.*

²⁵⁰ Hathaway, above n 244.

²⁵¹ Participation ranged from 97 states at the first session to 114 states at the seventh session; attendance never fell below 97: *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of its First to Seventh Sessions*, at 3–14, U.N. Doc. A/58/422 (2003).

²⁵² *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of its First to Seventh Sessions*, at 16, U.N. Doc. A/58/422 (2003).

²⁵³ See United Nations Office on Drugs and Crime, 'Documentation', http://www.unodc.org/unodc/crime_cicp_documentation.html (visited 11 October 2004).

transnational legal process through the requirement that states parties translate many of its provisions into domestic law. However, the lack of a robust monitoring mechanism for the UNCAC means that the domestic and transnational legal incentives for enforcement are low.

B. Compliance as a cooperation problem: competition or coordination?

The second theoretical approach views compliance in international law as either a prisoner's dilemma or a coordination problem. In both situations, the actors are better off if they all cooperate. Under a prisoner's dilemma, the cooperative solution is unstable since each individual has an incentive to cheat when everyone else is cooperating.²⁵⁴ In contrast, in a pure coordination game, the cooperative solution is stable. Once everyone behaves morally, there is no incentive for anyone to defect. 'The only problem is inducing firms [and states] to move to such a strategy, because being the only honest firm [or state] in a sea of corruption is costly'.²⁵⁵ If the UNCAC is an exercise in coordination, the prospects are good. If it is a prisoner's dilemma, then it will have little impact.

Two questions are raised by this theory. First, what does a coordination game look like? Second, how does one trigger a switch from a prisoner's dilemma to a coordination game? In terms of the first question, Ginsburg and McAdams describe coordination games as 'situations where parties have fully or partially common interests that can be achieved only if they coordinate their strategies among multiple possible equilibria'.²⁵⁶ 'Pure' coordination games where interests are perfectly aligned are a very rare situation in international affairs given the diversity of politics, laws, and cultures. However, that does not mean that coordination is not significant in 'mixed motive' games where even though states have divergent interests, they also retain some interest in coordinating their conduct.²⁵⁷ When states encounter coordination situations repeatedly, this iteration can produce conventions – 'a form of spontaneous order that emerges even in a state of anarchy'.²⁵⁸ Here, Ginsburg and McAdams are not talking about international agreements, but a particular pure strategy equilibrium that emerges in an iterated game when more than one is possible.²⁵⁹ However, the UNCAC arguably represents this type of strategic 'convention' as well. The coordinated expectations underlying it allow states parties to avoid conflict.

²⁵⁴ Rose-Ackerman, 'Corruption and the Global Corporation', above n 11, at 163.

²⁵⁵ *Ibid.*

²⁵⁶ Tom Ginsburg and Richard H. McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 *Wm. & Mary L. Rev.* (2004) 1229, at 1235.

²⁵⁷ *Ibid.*, at 1245.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*, at 1247.

As for the second question, some claim that a prisoner's dilemma can be converted into a coordination game through dialogue and public relations.²⁶⁰ There has indeed been a greater willingness to discuss corruption over the past ten years. In addition to the regional initiatives discussed in Part I, discourse about corruption has appeared in the context of other international issues. The preamble to the General Assembly resolution on the UNCAC states that the importance of fighting corruption has been recognized by the UN's two largest international conferences on financing for development and sustainable development.²⁶¹ This discourse has 'generated shared understandings of the negative impacts of corruption'.²⁶² The role of TI, as the first international NGO devoted to combating corruption, cannot be underestimated. Its awareness-raising campaigns, monitoring efforts, and lobbying work in over 100 countries has kept corruption on the global agenda.²⁶³

Another way in which a coordination game can come about is through gradualism and legalization. Abbott and Snidal analyze the emergence of the OECD Convention and how the OECD offered a setting where states could 'learn about the problem of corruption, reduce their uncertainty, change their positions, craft a series of steps towards a cooperative agreement and resolve their assurance problems'.²⁶⁴ They examine why the US was unable to gain international agreement on foreign bribery rules between 1977 and 1990, but then was successful in achieving cooperation between 1990 and 1997.²⁶⁵ The transition from the 'soft law' of the 1994 and 1997 Recommendations to the binding 1997 OECD Convention was a process of 'ratcheting up' cooperation.²⁶⁶

Under this game theoretical approach, the prospects for compliance with the UNCAC are good if it serves a coordinating function. There are strong indications that we are dealing with a coordination game rather than a prisoner's dilemma. First, there has been extensive dialogue and public relations around the issue of corruption on national, regional and international levels.

²⁶⁰ Rose-Ackerman, 'Corruption and the Global Corporation', above n 11, at 163.

²⁶¹ A/58/422, p. 19. The Monterrey Consensus adopted by the International Conference on Financing for Development in March 2002, underlined that fighting corruption at all levels was a priority. The Johannesburg Declaration on Sustainable Development adopted by the World Summit on Sustainable Development in September 2002, declared corruption a threat to the sustainable development of people. See also *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18–22 March 2002*, (United Nations publication, Sales No. E.02.II.A.7), chap. 1, resolution 1, annex and *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 1, annex, para 19.

²⁶² Alhaji B.M. Marong, 'Toward a Normative Consensus Against Corruption: Legal Effects of the Principles to Combat Corruption in Africa', 30 *Denv. J. Int'l L. & Pol'y* (2002) 99, at 101.

²⁶³ Hugh Williamson, 'Keeping Corruption on the Global Agenda', *Financial Times (London)*, 16 October 2003, 13.

²⁶⁴ Abbott and Snidal, above n 4, at 3.

²⁶⁵ *Ibid.*, at 20–21.

²⁶⁶ The Recommendations each exerted influence on their own, facilitated additional progress forward and limited backsliding: *ibid.*, at 30.

Second, the UNCAC can also be seen as the culmination of a ‘ratcheting up’ that began with the US unilateral action with the FCPA and progressed to soft law and then finally binding agreements by regional organizations. Even if the states parties to the UNCAC have mixed motives, it is likely that they still have some interest in coordinating their actions in the ‘anarchic’²⁶⁷ environment of international relations. However, the question is how far will this coordination go? If it only extends to lawmaking and not law enforcement, the UNCAC will not change much.

C. Moral imperialism, norms and behavior

The third theoretical approach focuses on anticorruption conventions so its critiques are more specific. Salbu has put forward a moral imperialism critique. In terms of the extraterritorial legislation like the FCPA, he contends that the so-called ‘global village’ has yet to develop into a single viable community that can be subjected to ‘a single set of extrinsically imposed rules’.²⁶⁸ The moral peril consists of the ‘dangers of intrusiveness, paternalism, imperialism, and disrespect that arise whenever one state imposes its discretionary values upon another state’.²⁶⁹ Salbu extends his critique to multilateral efforts, such as the OECD Convention, saying that such treaties ‘cannot avoid cultural imperialism simply by virtue of their multilateralism’.²⁷⁰ He says that ‘even if all the countries of the world were to sign the Convention’, their ability to evaluate activities outside their own borders would be subject to ethnocentrism and moral imperialism.²⁷¹ Salbu admits that one day such a critique will become obsolete due to the forces of globalization, but writing in 2000, he argues that the level of globalization has not yet been reached.²⁷² According to this view, the UNCAC will be unsuccessful because its provisions enshrine values that are not yet shared and any attempts to monitor or enforce them would be ethnocentric.

Salbu’s concerns are answered in two ways. First, the growing consensus about the negative effects of corruption suggests that its proscription may be considered a ‘hypernorm’ that transcends national boundaries.²⁷³ Conventions like the UNCAC are not acts of moral imperialism but are instead attempts to ‘give voice to or contribute to the creation of the values of a larger community’.²⁷⁴ Second, Windsor and Getz draw a useful distinction between

²⁶⁷ Ginsburg and McAdams, above n 256, at 1233.

²⁶⁸ Steven R. Salbu, ‘Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village’, 24 *Yale J. Intl L.* (1999) 223, at 226.

²⁶⁹ *Ibid.*, at 227.

²⁷⁰ *Ibid.*, at 252–53.

²⁷¹ *Ibid.*

²⁷² Steven R. Salbu, ‘A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery’, 33 *Cornell Intl L.J.* (2000) 657, at 682.

²⁷³ Philip M. Nichols, ‘Regulating Transnational Bribery in Times of Globalization and Fragmentation’, 24 *Yale J. Intl L.* (1999) 257, at 302–03.

²⁷⁴ Duane Windsor and Kathleen A. Getz, ‘Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values’, 33 *Cornell Intl L.J.* (2000) 731, at 762.

moral, or value-oriented, and normative, or behavior-oriented, regimes. A multilateral ‘moral regime’ is a matter of intrinsic commitment to global hypernorms and assumes either widespread value concurrence or value enforcement by a dominant actor.²⁷⁵ This is the type of regime Salbu is concerned about. In contrast, a ‘normative regime’ merely requires voluntary consent concerning specific forms of behavior, without respect to motives or attitudes.²⁷⁶ Moral values need not be at stake other than rhetorically; a normative regime may address whether corruption is morally acceptable, but it really turns on a practical question, ‘namely, whether bribery and extortion are economically and politically tolerable’.²⁷⁷

According to Windsor and Getz, the OAS, OECD and EU Conventions represent the beginnings of a multilateral normative regime because each constitute formal consent by states parties to the basic principle of suppressing business bribery of foreign public officials.²⁷⁸ Applying this theory, the UNCAC represents a significant step in the development of a multilateral normative regime because it not only broadens the principle to include forms of corruption other than bribery, but also has the potential – by transcending regional arrangements – to secure the consent of a larger range of states parties. Windsor and Getz predict that a normative regime could develop with time and experience into a moral regime.²⁷⁹ However, they rightly point out that, ultimately, this evolution is not the crux of the issue: instead, for the sake of all the victims of corruption, what is important is that corrupt behaviors decline and then cease.²⁸⁰

According to this theory, the UNCAC will be complied with not necessarily because it reflects a moral consensus, but because it taps into practical concerns about corrupt behaviors. There are positive indicators that the UNCAC engaged with such practical issues such as the strong support for its innovative asset recovery provisions. However, the precedents set by other multilateral initiatives suggest there is still an ‘implementation gap’ between formal compliance in terms of laws on the books and practical compliance that changes behaviors.

CONCLUSION

The former head of the Hong Kong Independent Commission Against Corruption, Tony Kwok Man-wai, said the UNCAC was his ‘dream come true’.²⁸¹ It is true that the Convention symbolizes a defining moment in the

²⁷⁵ Ibid.

²⁷⁶ Ibid, at 763.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid, at 771.

²⁸⁰ Ibid.

²⁸¹ Quoted in Peter Michael, ‘UN Deal Will Help Curtail Global Graft, Says ICAC’, *South China Morning Post*, 7 October 2003, 2.

normative consensus that has been building up around corruption. It has helped elevate anticorruption action to the international stage. However, finalizing the text is only the beginning of the long journey to having an impact on corrupt behavior. The Convention must now be ratified by at least 30 states, domestic legislation must be reworked, and, most importantly, its provisions must be enforced.

As with every international legal agreement, the UNCAC struggles with the tension between domestic sovereignty and international obligations. During the third session of the negotiations, the Chairman of the Ad Hoc Committee expressed his concern about the repeated references in the text of the Convention to its conformity with domestic law:

Such references should be the exception rather than the norm, because international law was not meant to be a mere reflection of national laws. [These] [n]egotiations... [offer] an opportunity to codify innovative approaches to common problems, to which national laws [can] aspire. Such an opportunity should not be missed.²⁸²

Was an opportunity missed? In some ways, it was. Purely private sector corruption is only subject to a non-mandatory framework which fails to recognize the large size of this sector in many countries and its increasing linkages with the public sector. However, the most disappointing aspect of the UNCAC was its failure to incorporate a robust monitoring mechanism even though the proposals of Austria, The Netherlands and Norway were on the table. The experience of the OAS Convention suggests that a vague provision for monitoring will result in a long delay before even the most rudimentary action is taken to hold states parties accountable. It is undeniably challenging to design a monitoring mechanism that does not encroach too far on state sovereignty, especially on a subject as contentious as corruption. Yet, the OECD and COE models prove that monitoring mechanisms can achieve some results, especially in the area of domestic implementation of laws. Instead of improving on such models, the UNCAC retreated back to the safety of noncommittal legal language and deferral of the hard decisions to another day.

However, there *are* some aspects of the UNCAC that are innovative or build on the strengths of previous initiatives. Its provisions on asset recovery go a long way to addressing the major obstacles to retrieving assets derived from grand corruption. If ratified widely, the asset recovery provisions provide a solid foundation for international cooperation in this area. Moreover, the Convention's provisions on private-to-public bribery strengthen the standards set by the OECD Convention, and its creation of a private right of action internationalizes the impact of the COE Civil Convention. In the case

²⁸² *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its third session, held in Vienna from 30 September to 11 October 2002*, at 7, U.N. Doc. A/AC.261/9 (2002).

of the financing of political parties, the UNCAC did as best it could given that this is a difficult problem that probably requires creative solutions outside of formal legal controls.

It is too early to accurately predict the tangible contribution that the UNCAC will make to the fight against corruption. Writing about international bribery 25 years ago, Reisman observed, 'To date, the international efforts that have been mounted seem more on the order of a crusade than reform. Their major contribution appears to be a feeling that something laudable is being done.'²⁸³ It would be a great shame if the Convention became another example of *lex simulata*. Ultimately, the UNCAC will only become a global achievement – and succeed where other conventions have failed – if the rhetoric becomes a reality. That is a challenge that now rests with political and business leaders, civil society, the media, and the individuals that make up the international community for whom this Convention was drafted.

²⁸³ Reisman, above n 236, at 157.

