

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION OVERVIEW OF ITS CONTENTS AND FUTURE ACTION

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I. INTRODUCTION

The new United Nations Convention against Corruption has enormous significance. It proves that a destructive practice as old as history can no longer be tolerated. It manifests the realization that the world of the 21st century needs new rules to become a better place for all peoples. It demonstrates that core values, such as respect for the rule of law, probity, accountability, integrity and transparency must be safeguarded and promoted as the bedrock of development for all.

People around the world, in developing and developed countries alike, have become increasingly frustrated at witnessing and suffering from the injustice and the deprivation that corruption brings. On a daily basis, people have faced head-on the effects of corruption on areas such as the administration of justice and the provision of adequate medical care. They have watched with awe and anger the revelations about the luxurious lifestyle and immense fortunes amassed by corrupt leaders, while their people toiled to scrape a living and were denied the most basic of services.

And that anger becomes resignation and cynicism when people discover that the vast fortunes stolen by corrupt leaders cannot be recovered because they have been transferred abroad. To these people, diatribes about good governance, sustainable development, the benefits of a free market and the liberalization of trade ring hollow.

It is there that lies one of the gravest dangers, one of the most serious threats posed by corruption. The loss of confidence in institutions and the de-legitimization of government have destructive consequences that can span generations. The best and brightest will eschew local political and economic life or even flee abroad.

The new Convention offers good reason to look at the future with optimism. It is itself an act of faith. Only a few years ago, speaking of the possibility of such an instrument, and saying it would be negotiated in such a short time, would have brought ironic smiles to the faces of most people. Yet, it is a reality and a remarkable achievement.

It became a reality because of the vision, determination and commitment that all Governments displayed throughout the negotiation process. And it is a remarkable achievement because it is innovative, balanced, strong and pragmatic. These qualities, together with its universality and functionality, make the new Convention a unique platform for effective action and an essential framework for genuine international cooperation.

The Convention offers all countries a comprehensive set of standards, measures and rules that they can apply to strengthen their legal and regulatory regimes to prevent and control corruption.

Negotiating the Convention was not an easy undertaking. There were many complex issues and concerns from different quarters that the negotiators had to tackle. It was a formidable challenge to maintain the quality of the new Convention while making sure that all of these concerns were properly reflected in the final text. Very often compromise was not easy and all countries made concessions. But the result is a source of pride. This result was made possible by the flexibility, sensitivity, understanding, and above all strong political will that all countries displayed.

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II. BACKGROUND

The new Convention can be seen as the most recent of a series of developments in which experts have recognised the far-reaching impact of corruption and the need to develop effective measures against it at both the domestic and international levels. It is now widely accepted that measures to address corruption go beyond criminal justice systems and are essential to establishing and maintaining the most fundamental good governance structures, including domestic and regional security, the rule of law and social and economic structures which are effective and responsive in dealing with problems, and which use available resources as efficiently and with as little waste as possible.

The gradual understanding of both the scope and seriousness of the problem of corruption can be seen in the evolution of international action against it, which has progressed from general consideration and declarative statements,¹ to the formulation of practical advice,² and then to the development of binding legal obligations and the emergence of numerous cases in which countries have sought the assistance of one another in the investigation and prosecution of corruption cases and the pursuit of proceeds. It has also progressed from regional instruments developed by groups of relatively like-minded countries such as the Organisation of American States,³ the African Union (formerly Organisation of African Unity),⁴ the OECD,⁵ and the Council of Europe⁶ to the global United Nations Convention.⁷ A series of actions on specific issues within specific regions has become more general and global in order to deal most effectively with the problem.

III. OVERVIEW OF THE CONVENTION

A. General Provisions (Chapter I, Art. 1-4).

The first article of the Convention states that its purposes are the promotion and strengthening of measures to prevent and combat corruption more efficiently and effectively; the promotion, facilitation and support of international cooperation and technical assistance, including in asset recovery; and the promotion of integrity, accountability and public management of public affairs and public property.

The Convention then includes an article on the use of terms. In addition to such definitions as "property", "proceeds of crime" and "confiscation", the most significant innovation of the new Convention are the definitions of "public official", "foreign public official" and "official of a public international organization".

The Convention contains a broad and comprehensive definition of "public official" that includes any person holding a legislative, executive, administrative or judicial office and any person performing a public function, including for a public agency or public enterprise, or providing a public service. The definition retains the necessary link with national law, as it would be in the context of national law that the determination of who belongs in the categories contained in the definition would be made.

During the negotiation process significant debate revolved around whether there was a need for a definition of "corruption" and, should the answer to that question be affirmative, what the content of such a definition would be. In the end, negotiators decided that attempting to define in legal terms, i.e., in terms that would stand scrutiny in a wide array of legal systems around the world and would add value to the rest

¹ See, for example GA/RES/51/59 and 51/191, annexes, and the discussion held at the 9th U.N. Congress on the Prevention of Crime and Treatment of Offenders, held in Cairo from 29 April - 8 May 1995 (A/CONF.169/16/Rev.1, paragraphs 245-261.

² See, for example, the United Nations Manual Practical Measures against Corruption, ECOSOC Res.1990/23, annex, recommendation #8 and International Review of Criminal Policy, Special Issue, Nos. 41 and 42, New York 1993.

³ Inter-American Convention against Corruption, OAS General Assembly resolution AG/res.1398 (XXVI-0/96) of 29 March 1996, annex.

⁴ African Union Convention on Preventing and Combating Corruption, Maputo Mozambique, 11 July 2000, available from the AU on-line at: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Treaties_Conventions_&_Protocols.htm.

⁵ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD document DAF/IME/BR(97)20.

⁶ European Criminal Law Convention on Corruption, 1998, European Treaty Series #173.

⁷ For a summary of other international legal instruments dealing with corruption, see United Nations Manual on Anti-Corruption Policy, Chapter V, available on-line at: <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

of the text of the Convention was neither feasible nor desirable. Corruption could easily be allowed to stand as a word describing conduct that was broadly understood in a progressively more consistent manner throughout the world. While the term might still be understood in a broader or narrower fashion depending on national exigencies or traditions, attempting to crystallize in a short legal text requiring high precision the core of the collective perception of the concept entailed a number of unnecessary risks. There was the risk of limiting the Convention to the current understanding, thus depriving the instrument from the dynamism necessary for it to remain relevant to national efforts and international cooperation in the future. There was also the risk of capturing in the definition only some aspects of the phenomenon, thus inhibiting broader action against corruption that countries might have already taken or might be contemplating. In deciding not to include a definition of “corruption” in the final text the negotiators were inspired to a large extent by the similar approach taken by the United Nations Convention against Transnational Organized Crime, which does not define “transnational organized crime” but, instead, contains a definition of “organized criminal group”.

The Chapter contains an article on the scope of application, which states that for the purposes of implementing the Convention, it will not be necessary, except as otherwise provided in the Convention, for the offences set forth in it to result in damage or harm to state property. This provision has particular importance for international cooperation and asset recovery.

Finally, the chapter contains an article on protection of sovereignty, an issue which figures prominently in the concerns of Member States, especially in view of the jurisdictional provisions that are later found in the Convention. The article was inspired and follows the formulation of a similar article in the United Nations Convention against Transnational Organized Crime.

B. Preventive Measures (Chapter II, Art. 5-14)

The Convention contains a compendium of preventive measures which goes far beyond those of previous instruments in both scope and detail, reflecting the importance of prevention and the wide range of specific measures which have been identified by experts in recent years. More specifically, the Convention contains provisions on policies and practices, preventive anti-corruption bodies; specific measures for the public sector, including measures to enhance transparency in the funding of candidatures for elected public office and the funding of political parties; comprehensive measures to ensure the existence of appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making; measures related to the judiciary and prosecution services; measures to prevent corruption involving the private sector; participation of society; and measures to prevent money laundering. The chapter on prevention has been structured in a way that would establish the principle of what needs to be put in place, but allows for the flexibility necessary for implementation, in recognition of the different approaches that countries can take or their individual capacities.

The provisions on preventive measures are regarded as forming an integral part of the mechanisms that the Convention is asking States to put in place. It is the one side of the coin, the other being the criminalization of a variety of manifestations of corruption. It is important to note that the prevention chapter covers all those measures that the international community collectively considers necessary for the establishment of a comprehensive and efficient response to corruption at all levels.

C. Criminalization and Law Enforcement (Chapter III, Art. 15-44)

While the development of the Convention reflects the recognition that efforts to control corruption must go beyond the criminal law, criminal justice measures are still clearly a major element of the package. The Convention would oblige States Parties to establish as criminal offences bribery of national public officials; active bribery of foreign public officials; embezzlement, misappropriation or other diversion of property by a public official; money laundering; and obstruction of justice. Further, States Parties would establish the civil, administrative or criminal liability of legal persons.

In recognition of the fact that there may be other criminal offences which some countries may have already established in their domestic law, or may find their establishment useful in fighting corruption, the Convention includes a number of provisions asking States Parties to consider establishing as criminal offences such forms of conduct as trading in influence, concealment, abuse of functions, illicit enrichment, or bribery in the private sector.

The final formulation of the criminalization chapter, with the inclusion of both “mandatory” and “discretionary” offences, created a quandary for negotiators as to how to deal with international cooperation, more significantly certain principles such as dual criminality, which normally govern such forms of international cooperation as mutual legal assistance. The solution found, which is explained below under “international cooperation”, is another innovative feature of the Convention, adding significantly to its value for the international community.

Other measures found in Chapter III are similar to those of the Convention against Transnational Organized Crime. These include the establishment of jurisdiction to prosecute (Art. 42), the seizing, freezing and confiscation of proceeds or other property (Art. 31), protection of witnesses, experts and victims and cooperating persons (Art. 32-33) and other matters relating to investigations and prosecutions (Art. 36-41).

Elements of the provisions dealing with money-laundering and the subject of the sharing or return of corruption proceeds are significantly expanded from earlier treaties (see Chapter V), reflecting the greater importance attached to the return of corruption proceeds, particularly in so-called “grand corruption” cases, in which very large amounts of money have been systematically looted by government insiders from State treasuries or assets and are pursued by subsequent governments.

D. International Cooperation (Chapter IV, Art. 43-49)

Chapter IV contains a series of measures which deal with international cooperation in general, but it should be noted that a number of additional and more specific cooperation provisions can also be found in chapters dealing with other subject-matters, such as asset recovery (particularly Art. 54-56) and technical assistance (Art. 60-62). The core material in Chapter IV deals with the same basic areas of cooperation as previous instruments, including the extradition of offenders, mutual legal assistance and less-formal forms of cooperation in the course of investigations and other law-enforcement activities.

A key issue in developing the international cooperation requirements arose with respect to the scope or range of offences to which they would apply. The broad range of corruption problems faced by many countries resulted in proposals to criminalise a wide range of conduct. This in turn confronted many countries with conduct they could not criminalise (as with the illicit enrichment offence discussed in the previous segment) and which were made optional as a result. Many delegations were willing to accept that others could not criminalise specific acts of corruption for constitutional or other fundamental reasons, but still wanted to ensure that countries which did not criminalise such conduct would be obliged to cooperate with other States which had done so. The result of this process was a compromise, in which dual criminality requirements were narrowed as much as possible within the fundamental legal requirements of the States which cannot criminalise some of the offences established by the Convention.

This is reflected in several different principles. Offenders may be extradited without dual criminality where this is permitted by the law of the requested State Party.⁸ Mutual legal assistance may be refused in the absence of dual criminality, but only if the assistance requested involves some form of coercive action, such as arrest, search or seizure, and States Parties are encouraged to allow a wider scope of assistance without dual criminality where possible.⁹ The underlying rule, applicable to all forms of cooperation, is that where dual-criminality is required, it must be based on the fact that the relevant States Parties have criminalised the conduct underlying an offence, and not whether the actual offence provisions coincide.¹⁰ Various provisions dealing with civil recovery¹¹ are formulated so as to allow one State Party to seek civil recovery in another irrespective of criminalization, and States Parties are encouraged to assist one another in civil matters in the same way as is the case for criminal matters.¹²

E. Asset Recovery (Chapter V, Art. 51-59)

As noted above, the development of a legal basis for cooperation in the return of assets derived from or

⁸ Art. 44, para. 2.

⁹ Art. 46, para. 9.

¹⁰ Art. 43, para. 2.

¹¹ See, for example, Art. 34, 35 and 53.

¹² Article 43, paragraph 1 makes cooperation in criminal matters mandatory and calls upon States Parties to consider cooperation in civil and administrative matters.

associated in some way with corruption was a major concern and a key component of the mandate of the Ad Hoc Committee. To assist delegations, a technical workshop featuring expert presentations on asset recovery was held in conjunction with the second session of the Ad Hoc Committee,¹³ and the subject-matter was discussed extensively during the proceedings of the Committee.

Generally, countries seeking assets sought to establish presumptions which would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the incorporation of language which might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure, forfeiture and return of such assets. From a practical standpoint, there were also efforts to make the process of asset recovery as straightforward as possible, provided that basic safeguards were not compromised, as well as some concerns about the potential for overlap or inconsistencies with anti-money-laundering and related provisions elsewhere in the Convention and in other instruments.

The provisions of the Convention dealing with asset recovery begin with the statement that the return of assets is a “fundamental principle” of the Convention, with annotation in the travaux préparatoires to the effect that this does not have legal consequences for the more specific provisions dealing with recovery.¹⁴ The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. A further issue was the question of whether assets should be returned to requesting State Parties or directly to individual victims if these could be identified or were pursuing claims. The result was a series of provisions which favour return to the requesting State Party, depending on how closely the assets were linked to it in the first place. Thus, funds embezzled from the State are returned to it, even if subsequently laundered,¹⁵ and proceeds of other offences covered by the Convention are to be returned to the requesting State Party if it establishes ownership or damages recognised by the requested State Party as a basis for return.¹⁶ In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.¹⁷ The chapter also provides mechanisms for direct recovery in civil or other proceedings (Art. 53) and a comprehensive framework for international cooperation (Art. 54-55) which incorporates the more general mutual legal assistance requirements, *mutatis mutandis*. Recognizing that recovering assets once transferred and concealed is an exceedingly costly, complex, and all-too-often unsuccessful process, the chapter also incorporates elements intended to prevent illicit transfers and generate records which can be used should illicit transfers eventually have to be traced, frozen, seized and confiscated (Art. 52). The identification of experts who can assist developing countries in this process is also included as a form of technical assistance (Art. 60, para. 5).

F. Technical Assistance and Information Exchange (Chapter VI, Art. 60-62)

The provisions for research, analysis, training, technical assistance and economic development and technical assistance are similar to those contained in the United Nations Convention against Transnational Organized Crime, modified to take account of the broader and more extensive nature of corruption and to exclude some areas of research or analysis seen as specific to organized crime. Generally, the forms of technical assistance under the Convention against Corruption will include established criminal justice elements such as investigations, punishments and the use of mutual legal assistance, but also institution-building and the development of strategic anti-corruption policies.¹⁸ Also called for is work through international and regional organizations (many of who already have established anti-corruption programmes), research efforts, and the contribution of financial resources both directly to developing countries and countries with economies in transition and to the United Nations Office on Drugs and Crime,¹⁹ which is expected to support pre-ratification assistance and to provide secretariat services to the Ad Hoc Committee and Conference of States Parties as the Convention proceeds through the ratification process

¹³ See A/AC.261/6/Add.1 and A/AC.261/7, Annex I.

¹⁴ Art. 51 and A/58/422/Add.1, para. 48

¹⁵ Art. 57, subpara. 3(a).

¹⁶ Art. 57, subpara. 3(b).

¹⁷ Art. 57, subpara. 3(c).

¹⁸ Art. 60, para. 1.

¹⁹ Art. 60, paras. 3-8.

and enters into force.²⁰

G. Mechanisms for Implementation (Chapter VII, Art. 63-64)

The Convention contains a robust mechanism for its implementation, in the form of a Conference of the States Parties, with comprehensive terms of reference already specified in the Convention and with a secretariat that would be charged to assist it in the performance of its functions. These provisions are inspired by the United Nations Convention against Transnational Organized Crime, but go considerably beyond that instrument, both in terms of scope and detail. The Secretary General is called upon to convene the first meeting of the Conference within one year of the entry of the Convention into force,²¹ and the Ad Hoc Committee which produced the Convention is preserved and called upon to meet one final time to prepare draft rules of procedure for adoption by the Conference, "well before" its first meeting.²² The bribery of officials of public international organizations is dealt with in the Convention only on a limited basis (Art. 16), and the General Assembly has also called upon the Conference of States Parties to further address criminalization and related issues once it is convened.²³

H. Final Provisions (Chapter VIII, Art. 65 - 71)

The final provisions are based on templates provided by the United Nations Office of Legal Affairs and are similar to those found in other United Nations treaties. Key provisions include those which ensure that the Convention requirements are to be interpreted as minimum standards, which States Parties are free to exceed with measures which are "more strict or severe" than those set out in the specific provisions,²⁴ and the two articles governing signature and ratification and coming into force. The Convention is open for signature from 9 December 2003 to 9 December 2005, and to accession by States which have not signed any time after that. It will come into force on the 90th day following the deposit of the 30th instrument of ratification or accession with the Office of Legal Affairs Treaty Section at U.N. Headquarters in New York.²⁵

IV. THE ROAD AHEAD

The Signing Conference that the United Nations Office on Drugs and Crime organized in Mérida last December was yet another manifestation of the political will that made the Convention possible and enabled the Ad Hoc Committee to negotiate it in record time, fully respecting the deadline set for it by the General Assembly. Ninety-five countries signed the Convention and, in an unprecedented and highly significant move, one country also deposited the first ratification of the new instrument.

While we should all rejoice with the adoption of the new Convention, we must guard against complacency. The new instrument must be only the beginning of our redoubled efforts to prevent and control corruption. We must all make sure that the momentum that made its negotiation possible is not allowed to dissipate. The collective political will that permitted the innovative and groundbreaking solutions of the new Convention must continue unabated.

Before highlighting our vision for what lies ahead, let me use this opportunity to clarify what we consider a matter of crucial importance. Quite often, and with some consternation, we come across a fundamental misperception about the new Convention, namely that it does not foresee monitoring of its implementation. Nothing can be further from the truth. The Convention contains provisions for a vigorous and effective mechanism to ensure and follow up on its implementation. The relevant provisions were carefully negotiated and, while inspired by similar provisions in the United Nations Convention against Transnational Organized Crime, go considerably beyond that Convention both in terms of details and potential impact. We must dispel this misperception and, instead of engaging in theoretical discourses about our own individual image of how

²⁰ GA/RES/58/4, paras. 8 and 9 and Convention Art. 64. UNODC is already designated as the secretariat for the Ad Hoc Committee pursuant to GA/RES/55/61, paras. 2 and 8 and GA/RES/56/261, paras. 6 and 13. By convention, the General Assembly calls on the Secretary General to provide the necessary resources and services, leaving to his discretion the designation of particular U.N. entities and staff to do so.

²¹ Art. 63, para. 2.

²² GA/RES/58/4, para. 5.

²³ GA/RES/58/4, para. 6.

²⁴ Art. 65, para. 2.

²⁵ Art. 67 (signature, ratification, acceptance, approval and accession) and 68 (Entry into force). For further information see the segment on procedural history and footnotes 10 and 11 (sources of assistance), above.

the Convention should read, concentrate on the task at hand, which is formidable.

We must organize our efforts around some key elements that we must always keep in mind.

The first step must necessarily be to secure the necessary ratifications for the entry into force of the Convention within the shortest time possible. Implementation would be a word devoid of meaning if the Convention languishes on the shelves for long. The best way to achieve implementation is to bring into existence the Conference of the States Parties and make sure it functions effectively. To secure the necessary ratifications, we should exercise all the influence we possess to bring ratification to the top of the domestic political agenda in as many countries as possible, in all regions of the world. We have been informed that a number of Governments, which were also very active during the negotiation process, are thinking about forming an informal group of “friends of the Convention” to seek ways to keep the momentum alive. We should support them and encourage them in pursuing that direction.

The Office on Drugs and Crime intends to pursue the following actions in achieving the objective of effectively promoting the new Convention and securing the necessary ratifications for its entry into force.

- Organization of high-level seminars to increase awareness of the Convention on the part of Member States, as well as intergovernmental and non-governmental organizations.
- Assistance to requesting States in the development of legislation and regulations to facilitate the ratification of the Convention. The Office intends to develop a Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and further explore the development of appropriate implementation tools.
- Provision of expertise or technical cooperation to requesting States with a view to strengthening domestic criminal justice systems capabilities in dealing with corruption.
- Assistance in the establishment or intensification of bilateral and multilateral cooperation in the areas covered by the Convention.
- Facilitating the sharing of information, experience and expertise between States.

Implementation rests firmly in the hands of States. And for good reason. First, effective action against corruption is the responsibility of Governments. Only through their commitment and determination can we see tangible results. Second, the Convention is the first truly global instrument of its kind. This is a prominent feature that distinguishes it from the very commendable initiatives and instruments that preceded it at the regional level. This global nature is also the source of special attributes that we must not ignore. Mechanisms for implementation that were developed for, and are functioning in the context of regional legal instruments cannot be readily emulated at the global level. We can learn from the experience gained by those mechanisms, and we fully intend to continue and strengthen our close working relationships with the international organizations that are supporting those mechanisms. But, we must also take into serious consideration legitimate concerns of our constituency and, most importantly, the gaps in capacity that exist in many developing and least developed countries. On that basis, and remaining faithful to the letter and spirit of the Convention, we must nurture its implementation mechanism and support the widest possible participation in the development and functioning of that mechanism, including through well-targeted technical assistance to developing countries.

While guided by these considerations, we must not underestimate the role that civil society and the private sector can and must play. Governments must be prompted, encouraged, supported and held accountable. And both civil society and the private sector can help in all of these efforts. To complement and support the initiative of Governments forming a support group for the Convention, we are exploring the possibility of putting together two other informal groups, one that would serve as a forum for civil society and one that would offer the opportunity to the private sector to become engaged and bring to bear its own great potential and influence. In putting together these groups, we would seek the cooperation and guidance of the Global Compact and would welcome ideas and support from all concerned.

In the United Nations, we believe that it is a matter of consistency, credibility and efficiency to lead by example. Our interaction with Governments and all other members of our constituency stand to gain enormously from the realization and the firm belief that we “practice what we preach”. And the Organizational Integrity Initiative, spearheaded by the Office of Internal Oversight Services is a case in point.

The same principle applies to the private sector. I believe that the issue must be approached in a two-pronged fashion. The private sector must realize and accept that its position and operations in a globalized economy bring with them great potential, but also great responsibility. Integrating and projecting transparency, and using influence to help fight corruption is a sound business practice, it makes eminent business sense. Investments require a stable and secure environment to produce returns. They require a "level playing field". Corruption produces invariably a host of distortions in markets, it removes the most basic elements from the environment that is conducive to productive investment and thrives on the confusion that ensues. Just like businesses invest seriously in their own infrastructure, they must look very carefully at investing in the infrastructure of the environment in which they wish to operate. And it is a sound investment, an investment in the future carrying very little risk, to support the efforts of countries to strengthen their systems in order to fight, domestically and together with others, corruption. Its returns may not be easily and immediately quantifiable in a way that they would be reflected in a balance sheet. But the results and returns are bound to show in the medium to longer term. This is why the Office on Drugs and Crime is an avid supporter of the Global Compact and stands ready to contribute to its efforts in any way it can, especially in view of the imminent introduction of transparency and action against corruption as its tenth principle.