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ACTION AGAINST NATIONAL AND TRANSNATIONAL ECONOMIC AND ORGANIZED CRIME, AND THE ROLE OF CRIMINAL LAW IN THE PROTECTION OF THE ENVIRONMENT: NATIONAL EXPERIENCES AND INTERNATIONAL COOPERATION

Background paper prepared by the Secretariat on international action against corruption

Summary

The present report presents the various characteristics of corruption, as well as its adverse effects on development. Various measures against corruption, at different levels, are discussed. The report also highlights recent international initiatives to tackle corruption. The results of some of these initiatives are annexed to this report. The role of international organizations in the fight against corruption and the importance of their support to institution-building processes are also examined.

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INTRODUCTION

1. The United Nations has been concerned with the problem of corruption for some years. The matter has been discussed by the quinquennial congresses, particularly with reference to new forms of criminal activity and crime prevention planning in the context of development. In this connection, the Secretariat has elaborated a "Manual on practical measures against corruption" and a draft International Code of Conduct for Public Officials (see annex I). In 1989, the Crime Prevention and Criminal Justice Branch of the Secretariat, in cooperation with the Department of Technical Cooperation for Development of the Secretariat, organized an Interregional Seminar on Corruption in Government, hosted by the Government of the Netherlands at The Hague.[1] The Seminar was attended by high-level officials from 18 developing countries from all regions and by observers from eight developed countries, non-governmental organizations, academic institutions, independent anti-corruption bodies and ombudsman's offices. The Branch has also made substantive contributions to the Fourth and Fifth International Anti-Corruption Conferences, held in 1989 and 1992 in Australia and the Netherlands, respectively.

2. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted resolution 7 on corruption in government.[2] The Eighth Congress recommended that Member States should devise a variety of administrative and regulatory mechanisms for the prevention of corrupt practices and invited them to review the adequacy of their criminal laws, including procedural legislation, to respond to all forms of corruption and to actions designed to assist or facilitate corrupt activities. The Eighth Congress requested the Secretariat to provide technical cooperation assistance to requesting Member States in the fields of strategic planning of anti-corruption programmes, law reform, public administration and management, training of public officials and criminal justice personnel, and in tendering international aid projects. The Secretariat was also requested to organize regional and interregional seminars, expert group meetings, workshops and other appropriate activities. These were intended to encourage the exchange of information on anti-corruption techniques, laws and research, and the examination and promotion of improvements in institutional arrangements and processes. In addition, these activities were also directed towards the improvement of the management of the justice process, through the use of databases, to improve decision-making. The Branch was requested by the Eighth Congress to develop a draft international code of conduct for public officials and submit it to the Ninth Congress.

3. The Eighth Congress had before it the "Manual on practical measures against corruption", which had been prepared by the Secretariat with the valuable assistance of the United States Department of Justice. After that Congress, the manual was circulated to experts around the world and the comments received were incorporated to produce a revised version, which was recently published in the *International Review of Criminal Policy*.[3]

4. The issue of corruption received further attention by the General Assembly, which adopted resolution 45/107 of 14 December 1990 on international cooperation for crime prevention and criminal justice in the context of development. The Assembly reiterated the recommendations of the Eighth Congress regarding the measures that should be adopted by Member States and recommended that the Branch coordinate the elaboration of materials to assist countries in their efforts against corruption and to provide specialized training to judges and prosecutors to qualify them to deal with the technical aspects of corruption.

5. The General Assembly, in the statement of principles and programme of action annexed to its resolution 46/152 of 18 December 1991, decided that the United Nations crime prevention and criminal justice programme should be designed to assist the international community in meeting its pressing needs in the field of crime prevention and criminal justice and to provide countries with timely and practical assistance in dealing with problems of both national and international crime. Among the goals of the programme would be the integration and consolidation of the efforts of Member States in preventing and combating transnational crime and the promotion of the highest standards of fairness, justice and professional conduct.

6. At its second session, the Commission on Crime Prevention and Criminal Justice had before it a number of suggestions regarding possible subjects of workshops to be organized at the Ninth Congress (E/CN.15/1993/7 and Corr.1). Corruption was one of those subjects. On the recommendation of the Commission, the Economic and Social Council decided, by its resolution 1993/32 of 27 July 1993, to devote one day of plenary deliberations at the Ninth Congress to the issue.

7. In pursuance of resolution 7 of the Eighth Congress, the Secretariat elaborated a draft international code of conduct for public officials (see Discussion Guide (A/CONF.169/PM.1/Add.1)), which was discussed by the five regional preparatory meetings of the Ninth Congress and by the Commission at its third session. The Economic and Social Council, in its resolution 1994/19, section VI, of 25 July 1994, recommended that the Ninth Congress should consider the desirability of a code of conduct for public officials, and that the Secretary-General should seek comments from Member States and relevant entities, in order to assist the Commission on Crime Prevention and Criminal Justice in its consideration of the matter at its fourth session.

I. RECENT INTERNATIONAL INITIATIVES

8. In recent years, the subject of corruption has moved rapidly up the international agenda. A number of events of particular importance took place in 1994. In May, the Council of the Organization for Economic Cooperation and Development (OECD) made a formal Recommendation to member countries entitled "Bribery in international business transactions" (annex II); and in December the heads of State and governments of the region, meeting at the Summit of the Americas, included a statement on corruption in their Declaration of Principles and several proposals in their Plan of Action (annex III).

9. In November, the United Nations International Drug Control Programme organized, in cooperation with the Crime Prevention and Criminal Justice Branch of the Secretariat, a Ministerial Forum against Corruption, held at Pretoria, South Africa. The Final Communique of that Forum is contained in annex IV.

10. Another call for action was made at the "East and Central African Seminar on Corruption, Human Rights and Democracy", held at Entebbe, Uganda, from 12 to 14 December 1994. The Seminar concluded that a major element in corruption at the higher levels is massive corruption in international transactions. This distorts decision-making, creates infeasible projects and drives up the costs of necessary projects, so adding to the impoverishment of people. It contributes in a major way to the African external debt crisis. In that context, the Seminar expressed strong disapproval of the fact that the bribes paid by most foreign businesses from developed countries were tax deductible at home, and that most of those countries refused to recognize the bribery of foreign officials as being a criminal offence. It therefore called on all African leaders to make the voice of Africa heard loudly in all international forums. In that respect, the Seminar gave full support to the current recommendation by OECD member States to make transnational bribery illegal, and it proposed that African Governments should actively associate themselves with the initiative. It also called on African leaders to follow the example set by the leaders of the Americas at their summit at Miami, Florida (USA) by being prepared honestly and openly to face up to the problem of corruption. Only in an environment of honesty and frankness could effective instruments be developed and enforced.

11. In February 1995, the Council of Europe convened a Multidisciplinary Group on Corruption, which brought together experts from a number of countries to discuss legal and administrative measures against corruption. It should be noted that the issue is receiving attention by the Organization of American States (OAS), which has established a working group that is reviewing, *inter alia*, the proposal of the Government of Venezuela for an inter-American convention against corruption. The European Union (EU) as well has taken action against corruption and has adopted a Code of Conduct applying to public affairs practitioners dealing with EU institutions. Increased transparency is also being promoted in the relations

between the European Commission (EC) and special interest groups, and minimum requirements for a code of conduct between the Commission and special interest groups has been drafted.[4]

12. While these initiatives will only be effective to the extent that they are followed by action, they demonstrate recognition, at the highest level, of a major problem that in the past had scarcely been debated outside specialist circles.

II. BACKGROUND AND CONCEPT

13. Over the years, considerable debate has been carried out in both academic and international forums on the definition of corruption. Presently, the question seems to be more one of scope than of concept, i.e. whether the phenomenon needs to be defined broadly or narrowly. While arguments abound in support of either approach, practical needs and the urgency of action may point in the direction of a workable description, which would be conducive to concrete national and international measures. One of the early attempts, in 1931, on which it may be difficult to improve, is J. J. Senturia's concise definition: "Corruption is the misuse of public power for private profit".[5] While the word "corruption" is often used as a synonym for "bribery", to include for example any improper inducements given and received within the private sector, it is more usual to restrict its use to bribery affecting public administration. On the basis of the report of the Italian Minister of Justice at the 19th Conference of European Ministers of Justice (organized by the Council of Europe at Valetta, Malta, from 14 to 15 June 1994), the Multidisciplinary Group on Corruption (GMC, the French acronym) of the Council of Europe established the following provisional working definition of corruption: "Corruption as dealt with by the Council of Europe's GMC is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others." The meaning of resolution 7 of the Eighth Congress appears to be along the same lines. In this context, corruption could be said to constitute the combined effect of monopoly of power plus discretion in decision-making in the absence of accountability. This means that officials will have the opportunity to collect corrupt benefits as a function of their degree of monopoly over a service or activity, their discretion in deciding who should get how much, and the degree to which their activities are accountable.[6] Accountability then becomes one of the key issues of international discourse, as well as the ultimate goal of international cooperation.

14. It may be useful to distinguish between the corruption of heads of State, ministers and top officials on the one hand and the petty corruption of, for example, junior officials, customs clerks and traffic police on the other. As with other offences, national laws make various differentiations on the basis of severity and other criteria. Corruption poses a long-term institutional danger. There is no hard line to be drawn between large-scale and petty corruption, nor should it be inferred that petty corruption is insignificant. On the contrary, where it is prevalent it can be highly damaging to the fabric of society, as it normally victimizes the poorest and most vulnerable segments. However, petty corruption is essentially a matter for the government of the country concerned, which can have little hope of dealing with it effectively in a situation where large-scale corruption is rife. It is suggested herein that the attention of the international community should first be focused on large-scale corruption, because of its consequences and effects at all levels.

15. Both large-scale and petty corruption can be either systemic or ad hoc. Systemic corruption generates economic costs by distorting incentives, political costs by undermining institutions and social costs by redistributing wealth and power towards the rich and privileged. When corruption undermines property rights, the rule of law and incentives to invest, economic and political development are crippled and democracy becomes ineffectual.[6] Corruption is a crime usually associated with the abuse of power. Under the opportunity theory of crime, substantial power is held to provide substantial opportunities to engage in profitable crimes validating the maxim that "power corrupts". In identifying the causes of crimes involving

an abuse of power, it can be noted that, while these might in some cases involve personal greed or personality defects, in most they are rooted in intimately interlocked social, economic and political conditions which facilitate such criminality. These conditions may need to be altered.*

16. Corruption (at least large-scale) may be transnational or local. Generally it is easier and safer for public officials to make large sums of money on international rather than local transactions. Even when a large-scale fraud is perpetrated entirely within one country, the necessity to transfer funds overseas introduces an international element. The present paper, therefore, concentrates on the transnational aspects of corruption, while not ignoring that in some circumstances very large sums can be misappropriated at the national level.

17. The dangers posed by corruption are magnified and exacerbated by its reciprocal relationship with organized transnational crime. In a world that is constantly changing and becoming more interdependent, the long-term consequences of that relationship merit attention and action. International cooperation is especially important at present, particularly considering the sophistication and flexibility of organized transnational criminal groups. It is recognized that a major objective of any strategy to counteract the influence of organized crime must be to control corruption and to sever the ties of organized crime to political and criminal justice authorities. Bribery of civil servants, influential politicians and staff of private enterprises is a typical instrument employed by organized crime to ensure protection and escape detection, as well as to avoid disruption of its international activities. Also looking at the definition of money laundering, i.e. the concealment of the illicit origin of the proceeds from a crime, another link between corruption and organized crime emerges quite clearly. Laundering may encompass acts which can be defined as corruption on the side of the person receiving the money.[7] In major frauds upon the public treasury the offending officials are often eager to conceal their ill-gotten gains from discovery or from a change in political climate that might increase the vulnerability of such funds to seizure.

III. CORRUPTION IN PERSPECTIVE

A. The scale of the problem

18. It may be worthwhile to examine the circumstances in which large transnational bribes are most likely to arise. Three criteria are fundamentally important, as follows:**

Size

(a) The arithmetic is simple although the amounts will vary from country to country and the actual figures are of no special significance:

5 per cent of US$ 100,000 may be interesting to a senior official below the top rank;
5 per cent of US$ 1 million is in the permanent secretaries' (director-generals') area;
5 per cent of US$ 10 million is real money for a minister and his key staff;
5 per cent of US$ 100 million may attract the serious attention of the Head of State.

In many countries, however, 5 per cent would now be considered to be a laughably low rate of commission;

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*See "Crime and the abuse of power: offences and offenders beyond the reach of the law", working paper prepared by the Secretariat for the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (A/CONF.87/6).

**Based on information from a non-governmental organization, Transparency International.

(b) It is obvious, therefore, that the real pressure in the large-scale corruption stakes comes when the project is a big one, the corollary being that there is little prospect in many developing countries of making a large equipment sale or undertaking a major project without large-scale corruption being involved. This does not mean, however, that at the bottom end of the scale a fairly modest official may not be determined to secure a payout which would be beneath the notice of his masters;

Immediacy

(c) Politicians and even officials in developing countries are conscious that their term of office may be brief, a factor which naturally contributes to their eagerness to soliciting bribes. It follows that the most attractive projects are those in which the full purchase price, or at least a very substantial deposit, is payable at an early stage, so that a large proportion of the total agreed commission is due before there is any risk of the intended recipient leaving office;

(d) A convention appears to be quite widely recognized that the proportion of commission payable from the deposit or down payment belongs to those in office when the contract is signed, whereas the balance of the commission goes to those in office when it falls due. It would be a very rash supplier who would be prepared to disburse the total commission in one payment, as subsequent office-holders might then prove to be very uncooperative;

Mystification

(e) The more high technology which is involved, or seemingly involved, in a supply contract, the more attractive it will be to the potential beneficiaries, because it reduces the risk of them being criticized for paying too much. Anyone can find out the fair price for a cargo of sugar or cement bought on a certain day, whereas it is much more difficult to determine whether a particular fighter aircraft should have cost US$ 21 million rather than US$ 22.5 million.

19. Applying the above criteria, it could be determined which areas or activities would be preferable or more attractive. The higher the type of contract, the more attractive it becomes for corrupt public officials. The typology is exemplified as follows:

(a) Aircraft, ships and military supplies (including telecommunications) are of primary importance. Not only are the sums of money enormous but the high technology content and a requirement, sometimes genuine, for secrecy makes it extremely difficult for anyone to question the validity of the purchasing decision. Lead-times may be long but down payments made with orders can be sufficiently large to facilitate the immediate payment of a large proportion of the total commission. For example, a 10 per cent down payment, to be followed by regular progress payments, may be the minimum requirement of the supplier; but if the government agrees to a 20 per cent down payment, the beneficiaries may be able to bargain for, say, 7 per cent of their total 10 per cent immediately. This would suit both the suppliers and the beneficiaries but would add appreciably to the total effective cost;

(b) The capital goods element of major industrial and agro-industrial projects are also extremely important. The sums involved tend to be smaller but an element of technological mystery remains and large down payments for purpose-built equipment can be readily justified;

(c) Major civil engineering contracts, such as dams, bridges, roads, airports and hospitals can involve massive expenditure and they also necessitate the use of consultants (for design and monitoring) and quantity surveyors. Large mobilization payments may be needed but it is difficult to justify them being paid many months before men and material arrive on site. No contractor can risk the collapse of a dam or a bridge but most travellers in developing countries are familiar with new trunk roads breaking up almost before they are

completed, usually the result of the failure of a public works department to supervise a contractor who is trying to recoup the commission which he has had to pay;

(d) Substantial sums may also be involved in the ongoing purchase of bulk supplies (e.g. oil, fertilizers, cement) where distribution is through a parastatal company, or where there is a need for standardization (e.g. pharmaceutical products and school textbooks). There is little scope for fortunes to be made overnight, as individual shipments do not compare in value with the capital goods mentioned above, but there can be a steady income for those responsible for placing repeat orders, if they remain in office;

(e) Consultancy fees, where the potential pickings are generally smaller than in any of the other categories, may appear to be a misguided target for the commission seekers. Their popularity with officials probably rests on the subjective method of selection of consultants, which is sometimes virtually the responsibility of one person. Also, since the price is often not considered to be the overriding factor in selecting consultants, it is often possible to include a higher share, say 20-30 per cent, as a bribe in the proposal. If someone other than the preselected consultant submits a better proposal, it can always be rejected on spurious grounds. The commission received by the official concerned may be relatively modest but he may not have to share it with his masters.

20. In view of the leading position of the military sector in the categories mentioned above, the sums which are likely to be involved can easily be extrapolated.* For example, between 1988 and 1992 the top 10 arms exporters sold goods of an average value of US$ 30 billion per annum, of which two thirds went to 10 developing countries. Assuming that not less than 15 per cent of this value was effectively paid to decision makers - politicians and military chiefs - in the countries concerned as bribes, US$ 4.5 billion per annum has been diverted into the bank accounts of these individuals.

21. The necessity of much of this military hardware has been the subject of debate in many countries and regions. There has been speculation in some quarters that it is only being bought because there may be easier access to commissions for decision makers, and that fact demonstrates the extent to which the developing world is being deprived of much-needed finance. It was reported, for example, that in 1994, one African country had the intention of purchasing radar equipment with a value of US$ 150 million, equivalent to nearly 40 per cent of its annual export earnings. It was considered improbable that this was the result of an objective review of priorities.[8]

22. There is an obvious danger in attributing every bad purchasing decision to corruption. Genuine errors of judgement can be made and factors such as national prestige and regional bias can lead to projects being undertaken which appear unjustifiable to an objective observer. However, since corruption is now far more openly discussed than it was five years ago, it is less likely that manifestly ridiculous decisions, whether or not they have been corruptly influenced, will be allowed to slip through unquestioned.

23. Developed countries, in general, have suffered less from corruption than developing countries, probably because of their stronger democratic institutions and their free press, but there is hardly room for complacency. Recently the governments of two developed countries fell following corruption scandals and a third one has come close to doing so. In another developed country, a new book describing in detail how many of its President's closest friends have enriched themselves from public funds through false invoices and secret commissions has not resulted in any libel action. During 1994, in one developed country the police were involved in a major purchasing scandal and in another one the Ministry of Defence has been described on national television as "the Ministry of Bribes". It is difficult to say whether this apparent deterioration is because standards in public life are declining or because the media and the public are now more sensitive

*Based on information from a non-governmental organization, Transparency International.

to the problem of corruption. In any event, the result is that there is presently serious motivation among countries to contribute to the fight against corruption.

B. Measures to prevent and fight corruption

24. Recent developments have drawn international attention to the effects of malfeasance by public officials. Various incidents that have captured public interest, mainly through the exposure accorded to them in the printed and electronic media around the world, offer proof of the problem's dimensions and the urgency of action to solve it. These incidents have served as a reminder of the vulnerability of all societies to corruption, whatever their degree of development. Often, the exposure of large-scale corruption has set in motion a chain of constructive political developments that would otherwise not be feasible, or require considerably more time.

25. A wide range of measures against corruption are available. It should be borne in mind that, because of the very nature and complexity of corruption, especially at the transnational level, a combination of various measures, both legal and administrative, is required to prevent and control it. The degree to which such measures would be complementary and proportionately interrelated depends on each country's particular administrative structures, as well as on the specific problems that need to be addressed. For example, in the case of some developing countries and most countries in transition, privatization efforts should be supported exercising some caution. It is necessary to strike a balance between necessary measures to avoid corruption, since it tends to defeat the privatization process, and the risk of overregulation which, in turn, may stifle economic activity. Some existing measures are discussed below.

1. Criminal law

26. In any consideration of the weapons which are, or might be, available to fight corruption, criminal law would occupy a prominent position. In every OECD country, and probably in most others, it is a crime for anyone, whether or not a national of that country, to bribe or attempt to bribe the holder of a public office, usually defined to include elected as well as appointed officials and local or regional as well as national office holders. However, in many countries, even in Europe, these provisions have recently come under criticism as outdated and ineffective. This deficiency is more dramatic in developing countries and countries in transition and particularly in their international transactions.

27. President Museveni of Uganda, in a recent speech given at the opening of an African Leadership Forum conference on corruption, democracy and human rights in east and central Africa, held at Entebbe in December 1994, described the shortcomings of the local legislation:

> "The real problem is that the guards in Africa have themselves got to be guarded and this is clearly a vicious circle. Without moral authority in our top leadership it is very difficult to eliminate corruption and unfortunately it is at the top that the really big thieves are to be found. In dealing with corruption at this level, moral suasion is not enough. We need legal sanctions and we need the enforcement of the laws that govern corruption. Where sanctions against corruption do not exist they must be put in place. The problem sometimes is that the corrupt leaders, who are also the lawmakers, do not make laws to curb corruption because they would, by so doing, be creating problems for themselves."

28. In most developed countries, it is not a crime to bribe an official of another country, unless the act of bribery takes place within the briber's own country. This situation was illustrated by a recent case in one European country in which two officials of one of its largest companies were charged with bribing a government official in another country in order to obtain an order. The question was raised in court as to how it was possible for such a large bribe to be offered without the knowledge of a more senior officer of

the company, such as the chief executive. The explanation was that the money had been taken from funds allocated to the payment of overseas "commissions" for which no detailed explanations were necessary. In other words, off-shore bribes were permissible but domestic bribes were not.

29. The first country which has criminalized off-shore bribery is the United States of America, where the Foreign Corrupt Practices Act (FCPA) was introduced by the Carter administration in 1977. FCPA was a consequence of the disclosure, at Congressional hearings, that major United States corporations had paid bribes to secure foreign orders.

30. FCPA prohibits payments to a foreign official, a foreign political party or a candidate for foreign political office and covers both civil servants and elected officials. It applies to payments intended to influence official actions and decisions in order to obtain or retain business. It does not, however, cover bribery unrelated to obtaining or retaining business, such as might be involved in court proceedings, taxation or environmental regulations and neither does it apply to "grease payments" made to secure routine governmental action, such as customs clearances, passports and visas, or telephone, power and water service.

31. Corporations violating FCPA are liable to fines of up to US$ 2 million per violation and individuals up to US$ 100,000 and imprisonment for up to five years. In addition to direct payments to "officials", the FCPA applies to payments to third parties with the knowledge that such third parties will pay officials. Knowledge is defined to cover deliberate ignorance or conscious disregard.

32. A most important provision is that the issuers of securities on United States stock exchanges must maintain books and records which accurately reflect transactions and dispositions of assets. The purpose is to eliminate the use of secret corporate slush funds and to make it difficult to disguise payments to foreign officials. A senior American corporate lawyer* with first-hand experience of FCPA is convinced that it has made a significant impact for the following reasons:

(a) Making foreign bribes a crime under United States law creates a deterrent which corporate management must take seriously. Violating United States criminal law is far more risky for an American company than violating the law of a foreign country. This extension of United States domestic law has been criticized as a breach of the principle of extraterritoriality, which assumes that crimes committed by nationals outside their domestic frontiers should be a matter for the courts in the country concerned. However, there is an increasing number of international conventions which effectively provide international definitions of crime;**

(b) Subjecting individuals to criminal penalties is a strong deterrent;

(c) The accounting requirements place demands both on the company's own accountants and on the external auditors who must insist on compliance;

(d) The stock exchange requirements of disclosure makes a board of directors liable to shareholder suits for mismanagement;

(e) The risk of prosecution in the United States increases the risk of prosecution in the country whose officials were bribed, and vice versa.

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*Based on information from a non-governmental organization, Transparency International.

**See, for example, the Universal Declaration on Human Rights (General Assembly resolution 217 A(III)) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (E/CONF.82/15 and Corr.2).

33. The Swedish penal code envisages the possibility of "a person who has committed a crime outside the realm being tried according to Swedish law and in a Swedish court ... providing that the act is punishable under the law at the place where it was committed". In the cases of Canada and the United Kingdom of Great Britain and Northern Ireland, existing legislation could in principle be used to equate a conspiracy to pay a bribe in another country with a conspiracy to pay a domestic bribe, provided that the conspiracy occurred within Canada or the United Kingdom respectively, even if it took place on the telephone. Proof, however, may be very difficult to establish under these statutes.

34. Criminalization of corruption would be among the first steps to be taken by both developed and developing countries. The transnational nature of present-day corruption requires a more concerted approach on the part of Governments in elaborating or amending their criminal legislation. International criminal law provides for the extension of a country's criminal law jurisdiction beyond its own territory based upon one or more of the following factors: (a) citizenship of the perpetrator; (b) citizenship of the victim; and (c) the act threatens a specific national interest (such as a country's currency). In addition, any country will normally assume criminal law jurisdiction over an act which is recognized to be against the law of nations no matter where committed (such as crimes against humanity or piracy).

35. Further, another basis for jurisdiction may be founded on the principle of assimilation. This principle enables a country's legal system to assimilate an offence committed abroad into its own penal system. This can occur only where the legal systems of the two countries treat each aspect of the crime comparably and where they formally agree that this approach is appropriate. Thus in certain circumstances a crime committed by a British citizen in a foreign country could be referred to the British courts, providing that the foreign authorities requested it and the two sets of national legislation were compatible in relation to this offence.

36. The United States FCPA is, for all practical purposes, unique; the adoption of similar legislation by other developed countries would strike a major blow at transnational corruption. Put in its simplest terms, the chief executives of major corporations are entitled at present to turn a blind eye to a practice which may be unethical but is not actually illegal. The use of middlemen even makes it possible for them to choose not to know the ultimate destination of large "commissions". Conversely, very few of these men would be prepared to perjure themselves or, still less, to risk prison sentences and heavy fines if the terms of FCPA applied to their companies.

37. The issue of criminalization of corruption in such a way as to extend criminal jurisdiction to cover activities carried out outside the borders of a country is a process that will require some time. It is also one of the most illustrative examples of the need for concerted action against corruption at the international level. As already noted, the Council of OECD has adopted a specific Recommendation to promote national legislation against corruption and is currently following up by promoting its implementation. However, individual action in the direction of criminalization of off-shore corruption by OECD member Governments appears to be largely dependent upon the assurance of collective and simultaneous action, preferably also by some potential competitors who are currently outside OECD. However genuinely the Governments of developed countries may deplore large-scale corruption, they feel that they cannot risk creating a competitive disadvantage for their exporters and business community, particularly at the present time and in the prevailing economic circumstances.

38. At the Symposium on Corruption and Good Governance, organized by OECD and held in Paris on 13 and 14 March 1995, it was suggested that one possibility of expediting the process would be for all international organizations, including funding agencies and the newly established World Trade Organization (WTO), to join efforts in encouraging their Member States to move in the direction of criminalizing corruption. While OECD is primarily composed of industrialized nations, the constituency of other international organizations, such as the United Nations and WTO, includes developing countries, whose contribution to the joint effort is extremely important and should be facilitated and elicited. Developing

countries might be quicker to accept the advantages of initiatives designed to ensure that their institutions have the capacity to promote and enforce appropriate standards in their trading relationships. The Agreement on Procurement, which is at present being negotiated under the auspices of General Agreement on Tariffs and Trade (GATT), might be an additional vehicle for promoting transparency in State purchasing.

2. Independent entities for the prevention and control of corruption

39. Important and encouraging examples of developing jurisdictions which have succeeded in halting and reversing the trend towards increasing corruption by the establishment of independent bodies are Hong Kong and Singapore.

40. Prior to the setting up of the Corruption and Prevention Department and the Independent Commission Against Corruption (ICAC), in 1973, Hong Kong was regarded as a highly corrupt society. The success of ICAC is based upon tough legislation,[9] supported by a three-pronged approach to combating corruption, which emphasizes public support, prevention and enforcement. ICAC places winning public support above all else in its fight against corruption. The great majority of reports of corruption that ICAC receives come directly from the public. Administrative and managerial failures in an organization may give rise to loopholes which may be exploited by employees with a corrupt intent. The basic concept of corruption prevention is to close these loopholes by introducing administrative and managerial improvements. ICAC has powers to investigate suspected offenders and in particular to probe the sources of the assets of public servants. However, the real breakthrough in establishing the credibility of ICAC came with the prosecution of the previous Hong Kong senior police officer who was extradited from the United Kingdom after his retirement.

41. In Singapore, Prime Minister Lee Kuan Yew introduced a strong Prevention of Corruption Act, supported by a Corrupt Practices Investigation Bureau (CPIB). The success of these measures was undoubtedly assisted by a marked improvement in the remuneration and status of public servants and by the personal commitment of the Prime Minister.

42. It is true that the citizens, including public servants, of Hong Kong and Singapore enjoy a considerably higher standard of living than those of most developing countries, but it appears that the most important factors in the success of their anti-corruption campaigns have been appropriate laws and institutions, proper education of their populations and, above all, the genuine determination of their leadership to combat corruption effectively and to allow the bodies created for that purpose to operate independently.

3. Auditing regulations, tax laws and administrative or commercial law measures

43. As discussed earlier, criminal law is a powerful deterrent and, therefore, an extremely useful tool in the fight against corruption. However, corruption is a multifaceted phenomenon, becoming increasingly sophisticated and complex, particularly in its transnational dimension and in the context of its links with other forms of economic crime and with organized transnational crime. In order to maximize its effectiveness, action against corruption would need to be based on a balanced combination of measures. In this connection, there would be a significant role for civil, commercial and administrative laws, regulations and measures to ensure that the capacity for prevention, detection and control of corrupt practices can be raised to adequate levels. Experience in the countries which have already adopted and are successfully pursuing this course of action has shown that complementarity between criminal law and other measures is very important.

44. For example, in the United States, the Securities Exchange Commission (SEC) shares responsibility with the Justice Department for the civil enforcement of FCPA. The Commission insists on the disclosure of any improper payment by a listed company because it considers corporate ethics to be relevant to investment decisions and to the election of directors. If, therefore, a company is shown to have failed to make proper disclosure, its directors and top managers are liable to be sued.

45. In exploring the most appropriate composition of a package of measures against corruption, it has been suggested that legislative measures could be adopted to the effect that where it can be shown that a contract has been obtained as the result of a bribe, the contract should be voidable. Under such legislation, damages might be claimable by a third party which has suffered loss as a result of the original contract award, making such a measure a considerable deterrent.

46. Another theory which has been recently advanced is that competition law, as outlined in the Uruguay GATT Agreement, could be extended to cover a situation in which corruption had distorted free and fair competition.

47. Auditing regulations and practices can play a significant role in strengthening the response to corrupt practices. The specialized knowledge of auditors, coupled with the experience gained by being responsible for sifting through many intricate relationships and activities in the course of performing their functions, can prove invaluable in detecting corrupt practices and securing the evidence required for the application of criminal law. One of the most desirable results of criminalization of corruption would be that, in many countries, it would bring off-shore bribes within the sphere of attention of both the company's auditors and the national tax authorities.

48. At present, even if it becomes obvious to an auditor in the course of his or her duties that a company has disbursed a large sum of money for rather nebulous overseas services, which even a trainee accountant might suspect of being a bribe, their only concern is to ensure that the disbursement was in accordance with a contract properly entered into by the company. In practice, in a large company a senior manager or director of a subsidiary may be authorized to commit the company to very large payments and, provided that this authority has not been exceeded, the auditor will have no cause to comment. If he does so, he may be told to mind his own business, or at least to remember the limits of his authority. An audit partner in one of Britain's largest accountancy practices has confirmed that this is a fairly common occurrence. However, if off-shore bribery is criminalized, any substantial sum of money which appears likely to have been used for such a purpose may become a cause for detailed scrutiny by an auditor.

49. There are many occasions when the payment of a large fee to a third party is entirely legitimate, but such cases should not be difficult to prove by producing a contract detailing the services to be provided. If the sums payable under the contract do not appear to bear a reasonable relationship with the services to be provided, the auditor would be obliged to inquire further. The additional audit work involved would lead to increased fees, but the sums involved would be trivial compared to those which are now siphoned off by large-scale corruption.

50. It would be impractical to attempt to ban every gift or payment which could, in extreme circumstances, be deemed to be corrupt if it was associated with the winning of a contract. There is no good reason to try to prevent normal entertainment. It is also sensible to recognize that the sort of gift which would constitute a major inducement on a small contract would not distort a decision on a large one. There is a strong case for recognizing that small gifts are irrelevant and even, perhaps, for defining "small gifts" in monetary or percentage terms.

51. Some companies have recently started to claim, in their annual reports for example, that they operate in accordance with strict ethical standards. It has been suggested that any such statement should be subject to audit, just as environmental audits have become common, to satisfy "green" shareholders that their company is being operated in an ecologically responsible manner.

52. Currently, because they are not illegal, off-shore bribes are tax-deductible as legitimate business expenses. The consequence is whatever rate of tax is charged on the profits of the company (and this is not infrequently as high as 50 per cent) the Government, or in effect the other tax payers, are subsidizing bribes

to the same extent - not surely a situation which many tax payers would willingly accept if they were aware of it.

53. While it may take some time to arrive at criminalization, it would be a relatively simple matter to disallow bribes for tax purposes. This would be a potentially strong weapon, because in most tax systems the onus is on the taxpayer to prove that he or she is not liable for tax. Here is another case in which any questionable payment would have to come to the attention of the company's chief executive.

54. It should be noted that reviews of both business accounting requirements and practices on the one hand and tax legislation, regulations and practices on the other are presently taking place in many countries, quite separately from the review of criminal law.

4. Voluntary codes

55. With few exceptions, most attempts at preventing and controlling transnational large-scale corruption have so far been based on voluntary codes of conduct. The International Chamber of Commerce (ICC) produced such a code for companies, the Rules of Conduct to Combat Extortion and Bribery, adopted in 1977, but it appears to have become a dead letter at an early stage and ICC has never made any attempt to press it on its members. Transparency International, a recently established non-governmental organization, has also developed Standards of Conduct, applicable to all parties in international business transactions, which owe a considerable amount to the ICC code.

56. As a method of indicating to companies what sort of standards they should be observing, such codes have an obvious value. As a means of helping honest leaders in developing countries to know what standards to demand from companies from developed countries, they are perhaps even more useful. However it is unrealistic to believe that a voluntary code can compel any person or company to conform unless they genuinely wish to do so.

57. Some companies have their own internal codes. A recent survey in the United Kingdom indicated that more than half of the companies belonging to the Institute of Management (generally the larger companies) have codes of ethics in place, but some of these do not even refer to transnational corruption.

58. A company code may be limited to an unequivocal statement of the standards which it expects its employees to observe and contain phrases such as:

(a) Employees must neither give nor accept any gift of such significance that such giving or acceptance could give the appearance of the company granting or receiving a favour;

(b) Employees will not offer a gift or gratuity to government employees;

(c) Employees will not make a contribution of company funds or other things of value to government officials, political parties or candidates for office.

59. . A more positive code, used by a large multinational company, requires every chief executive within the group to sign a letter at the time of the preparation of the annual accounts confirming that, for the previous year "to the best of my knowledge and belief in respect of all transactions within my jurisdiction":

(a) "Neither the company nor its authorized representatives has been party to the offering, paying or receiving of bribes;

(b) "No payments have been made which knowingly violate the laws of the countries in which the company has operated;

(c) "No receipts or payments of, or derived from, company moneys or other assets have been either unrecorded or falsified when described in the relevant books and records and no other improper accounting practice has been adopted in the period under review."

60. Clearly it would be impossible for an honest chief executive to sign such a letter if his or her company had directly or indirectly been a party to large-scale corruption. Since he or she is "put upon inquiry", the option of "preferring not to know" is closed.

61. Yet another British-based multinational whose shares, like those of many foreign companies, are listed by the United States SEC, takes the line in its internal code that all transactions conducted by the company should comply with FCPA (although it appears that for the time being it is exempted from compliance by a regulation of SEC). It also states that all fees paid to agents should be commensurate with the services performed and should normally be covered by a contractual agreement.

62. It is worth noting that some companies which have their own codes specifically exclude their application to their foreign operations, which they presumably consider to be no more than a recognition of the present state of the law.

63. A self-regulating code can undoubtedly play an important part in helping a company to establish its corporate ethos. But it can only be as effective as the person at the top wishes it to be. If he or she instructs his or her subordinates that the code is for the benefit of the shareholders and the non-executive directors and can be ignored by the staff, it becomes a useless piece of paper. It is doubtful whether the chief executive of a struggling company, with the jobs of employees and perhaps his or her personal fortune at stake, will allow himself or herself to be bound by a moral commitment, unsupported by the force of law.

IV. FUTURE DIRECTIONS

64. The prevention and control of corruption in all its forms and dimensions appears to be rapidly rising in the list of priorities of both developing and developed countries. Awareness of its effects and potential threat to fundamental institutions is increasing, particularly under present global circumstances. Most countries in the world today are taking or contemplating measures to increase the effectiveness and efficiency of government, reduce expenditures and make better use of limited resources. Democratic and economic reforms are proceeding at a fast pace in various parts of the world, creating an environment of less tolerance for corrupt practices, but also a need for strengthened institutions that can effectively eradicate deeply entrenched attitudes that favour corruption. In many countries, there is increased awareness that effective control of corruption is close to becoming an issue of survival for democratic institutions and a *sine qua non* for continuing social and economic development.

65. Conversely, corrupt practices are becoming increasingly resistant to traditional measures and gaining in sophistication and complexity. Recent cases that have been extensively covered by the international media are demonstrating a disturbing trend. Lines of distinction between corrupt practices - white-collar crime, economic crime or the activities of organized criminal groups operating across national boundaries - that existed in the past, are becoming increasingly obscured. An activity that is manifested in one country as bribery may have the elements of a sophisticated large-scale fraud in another and may resurface as a combination of other economic crimes in yet other countries. The issue goes beyond links between corruption and other forms of crime, or the use of corruption by organized crime as a course of action in furthering its objectives, which have been described briefly above. It points in the direction of a growing

threat and accentuates the difficulties faced by national authorities in preventing, detecting and controlling the phenomenon. Action against corruption thus becomes a matter of urgency, while international cooperation and assistance for those countries which need to upgrade their response are essential.

66. As discussed earlier, effective prevention and control of corruption, particularly in its new forms and transnational dimensions, require a combination of measures, including criminal law. States, both developing and developed, need to seriously consider and be encouraged to take steps towards criminalizing corruption. Such a course of action could be initiated by making it a serious offence to seek, offer, accept or pay a bribe by a citizen or legal person registered in that country. Deterrence would be stronger if such acts no matter where they had been committed were covered under this offence.

67. Criminal law legislation would gain in effectiveness if combined with other measures, including the adoption or appropriate amendment of civil and administrative legislation. The adoption or revision of regulatory measures would also serve the purpose of a concerted approach that would increase the capacity of States to respond to the phenomenon. In this connection, it may prove beneficial to consider the establishment of independent agencies with a primary focus on the fight against corruption, taking into consideration the successful experiences to date of such bodies as ICAC in Hong Kong. Together with the establishment of such agencies, the adoption of strong legislation along the lines of the United States FCPA and the Prevention of Bribery and the Corrupt and Illegal Practices Ordinances of Hong Kong would increase effectiveness.

68. As with most contemporary problems, international cooperation is essential to reinforce and consolidate national efforts against corruption. Some of the qualities of anti-corruption measures that appear to be increasingly important are their flexibility and compatibility with those of other countries, thus easing cross-border cooperation at all levels. It, therefore, appears to be crucial that national measures should be designed in such a way as to promote comprehensive action at the international level and increase the possibilities for cooperation at the bilateral and multilateral levels.

69. Among the fundamental objectives of international cooperation for good governance, and at the same time the ultimate goal of measures to fight corruption, should be the promotion of accountability and the respect for the rule of law.[10] The rule of law, as an essential factor for the functioning of society and the economy, should cover governors and governed, lawmakers and law-abiding people. An expression of the rule of law is the independence of the judiciary. An objective, reliable and independent judiciary is an essential factor for democratization and good governance. In a vicious circle, in some countries corruption tends to target the judicial power, thriving on the faults of the system and the inadequacy of the incentives for the judges in order to divert further the administration of justice from its principles and fundamental objectives.

70. International organizations, through a truly concerted approach based upon their fields of competence, can play a key role in the fight against corruption and in promoting international cooperation for that purpose. It is important to maximize cooperation and coordination among interventions at the regional and international levels, thus avoiding duplication of work. Supporting national democratic reforms, more competitive economies and improved governance, international organizations could offer a true service to their constituencies.

71. The United Nations could play a significant role in furthering cooperation of international organizations, in view of its global constituency and its mandates related to preventing crime, promoting the improvement of criminal justice and furthering good governance. Together with other relevant international intergovernmental and non-governmental organizations, and in concert with the private sector, the United Nations could work towards increasing awareness and promoting concerted international action. A mechanism to coordinate initiatives and efforts among all the parties mentioned above may be considered.

72. At the operational level, the United Nations, in cooperation with other intergovernmental and non-governmental organizations and financial institutions, could gather and disseminate examples of best practices, as well as frameworks for policy analysis, a combination which has been called "tool kits".[6] Such tool kits, covering various aspects of the international approach, may include manuals, organization of workshops, assistance, case-studies of best practices and successes in reducing corruption, policy implementation, its evaluation and monitoring. The "Manual on practical measures against corruption", elaborated by the Secretariat, and the draft code of conduct of public officials contained in annex I in its revised form and considered by the Commission at its fourth session, could serve as the basis for the development of more comprehensive tools in the delivery of technical services to requesting States.

73. Financial institutions have a very important role to play in international efforts against corruption, particularly in view of their mandates. They have an obligation to safeguard resources devoted to development aid and to channel them into productive investments, leading States to create a framework for maximum efficiency in the use of such resources. In many developing countries, institutions may lack the capacity to counter corruption, particularly when it is systemic. Therefore, countries willing to undertake reforms to address systemic corruption should be encouraged and assisted in their efforts.

74. At present, the type of international aid available from Governments, funding agencies and financial institutions ranges from government guarantees given by the supplier's own Government which enable the supplier to borrow from banks on extremely favourable terms through bilateral loans, to loans and grants from multilateral agencies such as the World Bank and its affiliates, the European Investment Bank and the regional development banks. There are not more than 15 bilateral agencies involved and a rather smaller number of significant multilateral agencies, of which the World Bank and its affiliates are overwhelmingly the most important.

75. The limits of international aid are clear: countries cannot be reformed through assistance, they can only reform themselves. Thus, political commitment becomes one of the fundamental prerequisites to any international intervention, together with the need for long-term strategies towards the development of enduring forms of democracy, taking into account elements such as consistency, financial and human resources, public involvement and support, as well as media assistance.

76. Assistance could be primarily geared to combat corruption by backing the institutional strengthening of anti-corruption mechanisms. Aid for structural adjustment programmes, and other assistance fostering better economic performance, may indirectly help against corruption through a more appropriate policy framework. In any case, promotion of the institutions which support democracy and transparency in Government is extremely important,[11] to turn corruption from a low-risk, high-profit activity into a high-risk, low-profit one.

77. In discussing these and similar issues, the Congress will comply with the recommendations of the Economic and Social Council, in its resolution 1994/19, section VI to consider, during the plenary discussion on corruption, effective ways of coordinating, at the international level, all efforts to tackle corruption and any other form of malfeasance by public officials, taking into account successful experiences with detection, prevention and control in this respect.

Notes

[1]Department of Technical Cooperation for Development and Centre for Social Development and Humanitarian Affairs, *Corruption in Government: Report of an Interregional Seminar, The Hague, Netherlands, 11-15 December 1989* (New York, 1990) (TCD/SEM.90/2 - INT-89-R56).

[2]*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.7.

[3]*International Review of Criminal Policy*, Nos. 41 and 42, 1993 (United Nations publication, Sales No. E.93.IV.4).

[4]"An open and structured dialogue between the Commission and special interest groups", *Official Journal of the European Communities*, No. 93/C63/02, 5 March 1993.

[5]J. J. Senturia, *Encyclopedia of the Social Sciences*, vol. IV (1993).

[6]Robert Klitgaard, "National and international strategies for reducing corruption", paper presented at the OECD Symposium on Corruption and Good Governance, Paris, 13-14 March 1995.

[7]Giorgio Sacerdoti, *The International Aspects of Corruption* (Council of Europe, Multidisciplinary Group on Corruption, 1995) (GMC(95)7), p. 3.

[8]*Africa Analysis*, No. 216, 24 February 1995 and *The East African*, 27 February-5 March 1995.

[9]"Prevention of bribery ordinance", *Laws of Hong Kong*, Chap. 201 and "Illegal practices ordinance", *Laws Of Hong Kong*, Chap. 288.

[10]See the working paper prepared by the Secretariat on international cooperation and practical technical assistance for strengthening the rule of law: promoting the United Nations crime prevention and criminal justice programme (A/CONF.169/4).

[11]Jon Wilmshurst, "Political, economic and administrative reforms to promote good governance", paper presented at the Symposium on Corruption and Good Governance, Paris, OECD, 13-14 March 1995.

Annex I

DRAFT INTERNATIONAL CODE OF CONDUCT FOR PUBLIC OFFICIALS*

I. General principles

1. A public office is a ***position of trust, implying a duty to act in the public interest. Therefore***, the primary loyalty of public officials shall be to their country ***as expressed*** through the democratic institutions of government, and not to persons, political parties or specific government departments or agencies.

[***Former paragraph 2 deleted***]

2. Public officials shall ensure that they perform their functions in an efficient and effective manner. They shall at all times seek to ensure that public resources ***for which they are responsible*** are administered in the most effective and efficient manner.

3. Public officials shall be attentive, fair and impartial in the performance of their functions and, in particular, in their relations with the public. They shall at no time afford ***any undue*** preferential treatment to any group or individual, discriminate against any group or individual or otherwise abuse the power and authority vested in them. ***This provision should not be interpreted as excluding any officially approved affirmative action policies to assist disadvantaged groups.***

II. Conflicts of interest *and* disqualification

4. Public officials shall never in any way use their official authority for the ***improper*** advancement of their own or their family's personal or financial interest. They shall not engage in any transaction, ***acquire any position or function*** or have any financial, ***commercial or other comparable*** interest that is incompatible with their office, functions and duties or the discharge thereof.

5. All public officials shall, unless exempted, declare relevant business, commercial and financial interest ***or activities undertaken for financial gain*** upon entering the service. This information shall be updated regularly. In situations of possible or perceived conflict of interest ***between public officials' public duties and private interests, they*** shall disqualify themselves from ***any*** decision-making process ***relating to such conflict of interest.***

6. Public officials shall at no time use public property, ***services*** or information acquired in the performance of, or ***as a result*** of, their official duties for activities not related to their official work.

7. Within a stated period after separation from public service, public officials holding managerial positions shall obtain governmental permission prior to accepting employment or consultancy assignments from

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*This draft code was prepared by the Secretariat pursuant to resolution 7 of the Eighth Congress and included in annex II of the Discussion Guide on Demonstration and Research Workshops (A/CONF.169/PM.1/Add.1). The Commission on Crime Prevention and Criminal Justice reviewed the draft and commented on it at its third session. Pursuant to Economic and Social Council resolution 1994/19, adopted on the recommendation of the Commission, the Director-General of the United Nations Office at Vienna sent the draft code to Member States seeking their comments. To date, only one country has responded providing comments and suggestions for amendments. The draft in its present form was prepared by the Secretariat in the light of these comments and suggestions, the observations made during the Commission's discussions at its third session and the input of the five regional preparatory meetings for the Ninth Congress. Revisions in the text are given in bold italics for ease of reference.

business or private concerns that are in financial relationship with the governmental department or agency in which such officials were employed. During the same period after separation, such permission shall also be required prior to engaging in any private or business activity related to, or dependent on, their previous position in public service.

III. Disclosure of assets

8. Public officials holding managerial or policy-making positions shall, upon request ***from their supervisor or other person having an official audit function who has reasonable cause to consider that this is necessary or desirable***, disclose to their employers all personal property, assets and liabilities, as well as those of their spouses and/or other dependants. Such officials shall also provide detailed information on the source of any property or asset acquired after their appointment to a senior post. All information provided shall be treated as confidential and may only be disclosed within the framework of special procedures.

IV. Acceptance of gifts or other favours

9. Public officials shall not place themselves in a position of being under the moral obligation to accord preferential treatment or special consideration to any person or entity, for instance by accepting directly or indirectly any gift, gratuity, favour, entertainment, loan or anything of monetary value, ***above a certain limit to be defined by their employer***.

V. Confidential information

10. ***Matters of a confidential nature in the possession of public officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise***.* Such restrictions shall apply also after separation from service.

VI. Political activity

11. The political activity of public officials shall not be such as to impair public confidence in the ***impartial*** performance of their functions and duties.

[***Former para. 13 deleted***]

VII. Reporting, disciplinary action *and* implementation

12. Public officials ***should*** report violations of ***this*** Code [***deleted***] to the appropriate authorities.

13. Public officials who knowingly and deliberately, ***or recklessly*** disregard the provisions of this Code shall be subject to the appropriate disciplinary and administrative measures.

14. Serious violations of the provisions of this Code ***may*** also be punishable by criminal sanctions, including forfeiture and confiscation of illicit proceeds with compensation to any injured party.

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*See Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169, annex, article 4.

Annex II

Recommendation of the Council of the OECD on Bribery in International Business Transactions*

The Council,

- **Having regard to** Article 5b) of the Convention on the Organization for Economic Cooperation and Development of 14 December 1960;

- **Having regard to** the OECD Guidelines for Multinational Enterprises which exhort enterprises to refrain from bribery of public servants and holders of public office in their operations;

- **Considering that bribery** is a widespread phenomenon in international business transaction, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

- **Considering** further that all countries share a responsibility to combat bribery in international business transaction, however their nationals might be involved:

- **Recognizing that** all OECD member countries have legislation that makes the bribing of their public officials and the taking of bribes by these officials a criminal offence while only a few Member countries have specific laws making the bribing of foreign officials a punishable offence;

- **Convinced** that further action is needed on both the national and international level to dissuade both enterprises and public officials from resorting to bribery when negotiating international business transactions and that an OECD initiative in this area could act as a catalyst for global action;

- **Considering** that such action should take fully into account the differences that exist in the jurisdictional and other legal principles and practices in this area;

- **Considering** that a review mechanism would assist Member countries in implementing this Recommendation and in evaluating the steps taken and the results achieved;

On the proposal of the Committee in International Investment and Multinational Enterprises;

General

I. Recommends that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II. Considers that, for the purposes of this Recommendation, bribery can involve the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public official, in violation of the official's legal duties, in order to obtain or retain business.**

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**The notion of bribery in some countries also includes advantages to or for members of a law-making body, candidates for a law-making body or public office and officials of political parties.

Domestic Action

III. Recommends that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. These steps may include:

i) criminal laws, or their application, in respect of the bribery of foreign public officials;

ii) civil, commercial, administrative laws and regulations so that bribery would be illegal;

iii) tax legislation, regulations and practices, insofar as they may indirectly favour bribery;

iv) company and business accounting requirements and practices in order to secure adequate recording of relevant payments;

v) banking, financial and other relevant provisions so that adequate record would be kept and made available for inspection or investigation; and

vi) laws and regulations relating to public subsidies, licenses, government procurement contacts, or other public advantages so that advantages could be denied as a sanction for bribery in appropriate cases.

International Co-operation

IV. Recommends that Member countries in order to combat bribery in international business transaction, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneous or "upon request"), provision of evidence, and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this co-operation.

Relations with Non-Members and International Organizations

V. Appeals to non-Member countries to join with OECD Members in combating bribery in international business transactions and to take full account of the terms of this Recommendation.

VI. Requests the Secretariat to consult with international organizations and international financial institutions on effective means to combat bribery as an aid to promote the policy of good governance.

VII. Invites Member countries to promote anti-corruption policies within and beyond the OECD area and, in their dealings with non-Member countries, to encourage them to join in the effort to combat such bribery in accordance with this Recommendation.

Follow-up Procedures

VIII.Instructs the Committee in International Investment and Multinational Enterprises to monitor implementation and follow-up of this Recommendation. For this purpose, the Committee is invited to establish a Working Group on Bribery in International Business Transaction and in particular:

i) to carry out regular reviews of steps taken by Member countries to implement this Recommendation, and to make proposals as appropriate to assist Member countries in its implementation;

ii) to examine specific issues relating to bribery in international business transactions;

iii) to provide a forum for consultations;

iv) to explore the possibility of associating non-Members with this work; and

(v) in close co-operation with the Committee on Fiscal Affairs, to examine the fiscal treatment of bribery, including the issue of tax deductibility of bribes.

IX. Instructs the Committee to report to the Council after the first regular review and as appropriate thereafter, and to review this Recommendation within three years after its adoption.

Paris, 27 May 1994

Annex III

Plan of Action of the Summit of the Americas on Combating Corruption*

The problem of corruption is now an issue of serious interest not only in this Hemisphere, but in all regions of the world. Corruption in both the public and private sectors weakens democracy and undermines the legitimacy of governments and institutions. The modernization of the state, including deregulation, privatization and the simplification of government procedures, reduces the opportunities for corruption. All aspects of public administration in a democracy must be transparent and open to public scrutiny.

Governments will

- promote open discussion of the most significant problems facing government and develop priorities for reforms needed to make government operations transparent and accountable;

- ensure proper oversight of government functions by strengthening internal mechanisms, including investigative and enforcement capacity with respect to acts of corruption, and facilitating public access to information necessary for meaningful outside review;

- etablish conflict of interest standards for public employees and effective measures against illicit enrichment, including stiff penalties for those who utilize their public position to benefit private interests;

- call on the governments of the world to adopt and enforce measures against bribery in all financial or commercial transactions with the Hemisphere; toward this end, invite the OAS to establish liaison with the OECD Working Group on Bribery in International Business Transactions;

- develop mechanisms of cooperation in the judicial and banking areas to make possible rapid and effective response in the international investigation of corruption cases;

- give priority to strengthening government regulations and procurement tax collection, the administration of justice and the electoral and legislative processes, utilizing the support of the IDB and other international financial institutions where appropriate; and

- develop within the OAS, with due regard to applicable treaties and national legislation, a hemispheric approach to acts of corruption in both the public and private sectors that would include extradition and prosecution of individuals so charged, through negotiation of a new hemispheric agreement or new arrangements within existing frameworks for international cooperation.

Miami, 9 December 1994

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Annex IV

FINAL COMMUNIQUE*

SOUTHERN AFRICA
MINISTERIAL FORUM AGAINST CORRUPTION

PRETORIA, 14 November 1994

We the representatives of countries of Southern and Eastern Africa participating in the Ministerial Forum Against Corruption held at Pretoria on 14 November, 1994 under the auspices of the United Nations International Drug Control Programme in cooperation with the Ministry of Justice of the Republic of South Africa and the United Nations Crime Prevention and Criminal Justice Branch

RECOGNIZING the connection between drug trafficking, external debt, corruption, and organized crime and that the corrupt activities of public officers, often instigated by the private sector, can destroy the potential effectiveness of all types of government programmes, hinder development, and victimize and impoverish individuals and groups

AND AWARE that corruption as a global phenomenon has become systemic in various types of major international transactions, resulting in distortions of decision-making to the detriment of development and the destruction of the environment, and undermining democratic structures; as such it calls for concerted international efforts to combat it

HEREBY AGREE AND DECLARE THAT:

1. Leadership at the national level has a paramount duty to demonstrate in all practical ways its commitment to a just and honest society and to give full support to the endeavours of those charged with responsibilities for the protection of society's integrity. In this way too the public can be encouraged to abhor and expose corruption. At the same time it is desirable to enlist the support of civil society and to foster within the private sector the highest ethical practices in order to assist in building public attitudes firmly opposed to corruption.

2. We recognize the over-riding importance of institutions, practices and procedures that through accountability and transparency reduce to an achievable minimum the levels of corruption in our societies. To this end, we identify the need for appropriate disclosures of interests to be made by political leaders and decision-makers within the public service and for these to be monitored fairly and effectively

3. We identify international public procurement as an area which can be particularly vulnerable to corrupt practices and so requires continual monitoring to ensure through techniques of transparency and accountability that abuse is kept to a minimum

4. We also identify as most important:

- local and international accounting and legal practices;

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- disclosures of conflicts of interest by decision-makers;

- appropriate disclosures of assets by politicians and civil servants;

- the independence, powers and establishment of the judiciary, the Auditor-General, the Law Officers, and investigative and prosecutorial authorities;

- the appropriateness in this context of the provisions of any Official Secrets or Freedom of Information legislation;

- requirements for reporting of donations to political parties;

- the use made of international inspection and verification arrangements;

- the inappropriateness in this context of bank secrecy;

- protection of those who provide authorities with information about corruption;

- parliamentary and other procedures for taking information into the public domain (including appropriate protection of the privately-owned media where the public interest is at stake);

- mutual legal assistance arrangements for the investigation and prosecution of offenses with an international element;

- regulations governing the conduct of agents in international transactions involving the public sector; and

- relevant codes of conduct and internal practices adopted by companies competing for public sector contracts.

5. We will as a matter of urgency, to the extent that we have not already done so:

a. Review, devise and develop administrative and regulatory mechanisms for the prevention of corrupt practices or the abuse of power;

b. Review the adequacy of our criminal laws, including procedural legislation, in order to respond to all forms of corruption and related-conduct which assists or facilitates corrupt activities, and to provide sanctions sufficient to ensure adequate deterrence

c. Adopt procedures for the detection, investigation, prosecution and conviction of corrupt public officials and those involved with them and consider the scope for presumptions where persons are clearly living beyond their means

d. Provide for the forfeiture of funds and property from corrupt practices and property derived therefrom.

e. Consider establishing in those of our countries which have not yet done so independent and adequately resourced anti corruption agencies

6. We shall complete, as soon as possible, our implementation of the 21 recommendations of the 1991 Livingstone Workshop attached to this communique. To this end, we will enact all necessary national legislation to deal with drug trafficking and further will enact the necessary national legislation to enable our

accession to all international drug control conventions in particular the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

7. Our legal and law enforcement agencies will communicate more frequently with their counterparts within the sub-region and will take steps to eliminate logistical constraints which have hindered this in the past.

8. We will afford one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to criminal offenses and specifically information sharing and acting upon intelligence, including controlled deliveries of illicit drugs.

9. Those of us that do not already have them will establish national multi-sectoral drug-control co-ordination mechanisms in each of our jurisdictions. Those that do will review their operation to ensure their maximum effectiveness.

10. We will in all our countries designate focal contact points for rapid information exchange to combat, in particular, cross-border drug trafficking.

11. We call upon the industrialized countries to work in partnership with us in countering international corruption, in particular by criminalizing the bribery of our citizens and ending the tax-deductibility of bribes and further by assisting us to recover corruptly-obtained funds placed in havens in their countries.

12. We look forward to the success of the World Ministerial Conference against Organized Transnational Crime to be held from November 21-23, 1994 in Naples, Italy and encourage that Conference to positively consider the formulation and adoption of an international convention to combat organized crime and specifically corruption.

13. We endorse the formation of an informal Ministerial Group to follow developments in the countries participating in the Group, to monitor the implementation of our decisions and to encourage the development of training programmes for the region. We invite the Minister of Justice of South Africa to serve as the initial chairperson of the Group and ask him to liaise with other Ministers from the region to ascertain whether they wish to participate in such a Group.