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## United Nations Manual on Anti-Corruption Policy





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<sup>\*-/</sup> Prepared by the Global Programme against Corruption, Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna.



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**PART 1:  
TYPES, CAUSES AND EFFECTS  
OF CORRUPTION**

# **I. INTRODUCTION**

## **A. Background**

The Centre for International Crime Prevention (CICP) has prepared this United Nations Manual on Anti-Corruption Policy, in accordance with Economic and Social Council Resolutions 1995/14, 1996/8 and 1998/16, and General Assembly Resolutions 51/59 and 54/128. It serves as a policy guide for governments in their anti-corruption efforts. The Manual is supplemented by and should be read in conjunction with the United Nations Anti-Corruption Tool Kit, its operational counterpart. Despite divergencies across legal system, international cooperation is crucial and will be enhanced by the elaboration of a new United Nations Anti-Corruption Convention.

Since the Manual on Practical Measures against Corruption was first published in 1992<sup>1</sup> by the CICP, in cooperation with the US Department of Justice, the world has witnessed an unprecedented increase in awareness raising by governments and international agencies regarding the extent and the negative effects of corruption. In recent years international organizations, governments, and the private sector have come to view corruption as a serious obstacle to democratic government, quality growth, and national and international stability. There is now an increased interest in, and need for, anti-corruption policies and measures that have proven effective.

## **B. Lessons Learned**

During the past 10 years, policymakers and scholars have devoted increasing attention to the causes and impact of corruption on public and private socio-economic affairs. As a way of summarizing the issue, the most relevant applied policy studies show that corrupt practices are encouraged by the following factors: <sup>2</sup>

- High levels of politicization in public institutions coupled with the existence of state agencies that operate within an informal clientelistic framework on a standard basis;
- The lack of free access by citizens to government-related public information;
- The lack of systems to assure relative transparency, monitoring and accountability in the planning and execution of public sector budgets coupled with the lack of social and internal control mechanisms in the hands of civil society and autonomous state auditing agencies respectively;
- The lack of public sector mechanisms able to channel the social preferences and specific complaints of the population to the agencies involved in those complaints;

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<sup>1</sup> International Review of Criminal Policy, Special Issue, Nos. 41 and 42, New York 1993, ST/ESA/SER.M/41-42; United Nations Sales Publication, Sales No. E.93.IV.4.

<sup>2</sup> For a review of these factors refer to Refer to (i) Petter Langseth, 2000. Integrated vs Quantitative Methods, Lessons Learned; 2000 (presented at NORAD Conference, Oslo, 21 October 2000). (ii) Alberto Chong y César Calderón. 1998. "Institutional Efficiency and Income Inequality: Cross Country Empirical Evidence" Mimeograph, World Bank, Washington, D.C.; (iii) Edgardo Buscaglia. 1998. "Law and Economics of Development" in Encyclopedia of Law and Economics. London and Boston: Edward Elgar Press. (iv) Alberto Ades y Rafael di Tella. 1996. "The Causes and Consequences of Corruption: A Review of Recent Empirical Contributions", IDS Bulletin 27.

- The lack of social and internal mechanisms applied to the quality control of service delivery;
- Excessive red tape and procedural complexities at all levels of government;
- The abuse of discretion and uncertainty in the application and interpretation of regulations and laws within the administrative public sector domain;
- The lack of internal systems to assure relative transparency, monitoring and accountability in the design and execution of public policies.
- The lack of social control mechanisms aimed at preventing grand corruption schemes usually seen when the state's policies are "captured" by vested interests;
- Poor motivation in public sector personnel due to the lack of a merit-based system used to hire, promote, and remove employees at the local and central levels of government;
- Lack of employees' participation and knowledge of the public institutions' decision-making criteria;
- The absence of results-based management in public service delivery;
- An ineffective judicial sector, including here the police, the prosecutor's offices and the judicial branch.

At the same time, some of the most important policy lessons learned in the course of the last decade include:

- Economic growth is not enough to reduce poverty.<sup>3</sup> Poverty alleviation will not occur without a broader, integrated strategy that focuses on qualitative (integrated) rather than quantitative development strategies including anti corruption policies and measures both in "North and the South".
- The misuse of power for private gain seems to be endemic and ubiquitous.<sup>4</sup> It not only involves public officials abusing their positions, but includes other private individuals and organizations connected to the public sector such as procurement-related firms, power brokers, and influence peddlers" who take advantage of any opportunity to make easy money.
- Curbing systemic corruption is a challenge that will require strong measures, greater resources and more time than most politicians and "corruption fighters" will admit or can afford. Very few anti-corruption policies, measures and/or tools launched today are given the same powerful mandate and/or financial support as the often-quoted ICAC in Hong Kong<sup>5</sup>.

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<sup>3</sup> "Why quality matters," The Economist, 7 October 2000.

<sup>4</sup> Jeremy Pope, (2000) Transparency International, The TI Sourcebook, Berlin, October 2000.

<sup>5</sup> Petter Langseth (2001), The Value Added by Partnerships in the Fight Against Corruption, OECD's third Annual Meeting of the Anti Corruption Network for Transition Economics in Europe, Istanbul, March 20-22, 2001

- If left unchecked, corruption will only increase and make the poorest even poorer. Corrupt transactions are entered into consciously. Profit and opportunity are weighed against the risks of being detected and the likelihood and extent of any punishment. Where risks and punishment are minimal and rewards are greater, corruption is likely to increase. Corruption can be initiated from either side. Those offering bribes may do so either because they want something to which they are not entitled and therefore need the official to “bend the rules,” or because they believe the official will not give them their entitlements without some form of inducement. Officials may solicit bribes in order to supplement their salaries or to raise their standards of living. Therefore, both the bribe “giver” and the bribe “taker” must be addressed in the “North”<sup>6</sup> as well as in the “South”.
- Raising awareness without adequate enforcement may lead to cynicism among the general population and actually increase the incidents of corruption. Citizens who are well informed through the media about types, levels and the location of corruption but who have few examples of reported cases where perpetrators are sent to jail, might be tempted to engage in corrupt acts where “high profit and no risk” appears to be the norm. It is therefore essential for any anti-corruption strategy to balance awareness raising with enforcement. The message to the public must be that the misuse of public power for private gain is: (i) depriving the citizens of timely access to government services; (ii) increasing the cost of services; (iii) imposing a “regressive tax” on the poorest segments of the population; (iv) curbing economic and democratic development; and (v) a high risk low/profit activity (e.g. corrupt persons are punishable by jail sentences and fines). The challenge is how to best communicate this message to the population at large.
- Development agencies, NGOs and the private sector from countries in the “North” can either be part of the problem or part of the solution. Recent corruption cases involving the World Bank<sup>7</sup>, the United Nations<sup>8</sup> and other multilateral and bilateral organizations provide evidence that misuse of public power for private gain can occur in any society or organization where there are insufficient checks and balances. Credible reporting of these cases, both in the North and the South, should help to “level the playing field” by facilitating the investigation and prosecution of corruption whenever it is found.
- A country’s national institutions do not work in isolation. Those that do will fail.<sup>9</sup> A transparent system must possess checks and balances that are designed to

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<sup>6</sup> One key objective of the OECD Convention is to criminalize bribing of public officials in the South by private companies in the North.

<sup>7</sup> Stephen Fidler, “Corruption leads to freeze on trust funds World Bank five european governments act after organisation's staff were found to have received kickbacks”, Financial Times; Feb 7, 2001

Mark Riley and Andrew Clennell (2001), UN staff accused over refugee bribes, <http://www.smh.com.au/news/oio222/pageone>

Jeremy Pope, (2000) The TI Sourcebook, October 2000

<sup>8</sup> Richard C. LaMagna, (1999) “Changing a Culture of Corruption, and Independent Commission Against Corruption”, Operations Department Review, 1998-1999

<sup>9</sup> Richard C. LaMagna, (1999) “Changing a Culture of Corruption, and Independent Commission against Corruption”, Operations Department Review, 1998 –1999

achieve a balance between independence and accountability among the various arms and agencies of government. Additionally—conflicts of interest must be eradicated in the public sector. Checks and balances disperses power and limit opportunities for conflicts of interest. This concept, which describes a modern system of government, has been referred to as “horizontal accountability.” The dispersal of power, enhanced institutional independence of each branch of government and increased degrees of accountability make it more difficult for a well-placed politician to distort the system.

- Social control mechanisms are needed in the fight against corruption.<sup>10</sup> These mechanisms must not only include strategic anti-corruption steering committees but also operational watchdogs working within government institutions composed of civil society and government officials working together. These operational mixed watchdog bodies must cover monitoring and evaluation of local and central government affairs such as budget-related policies, personnel-related matters, public investment planning, complaint matters, and public information channels.
- Public trust in anti-corruption agencies and in their policies are essential if the public is to take an active role in monitoring the performance of their government. In a survey conducted by the ICAC, in 1998, 84% (66% in 1997) of the interviewees stated that they would be willing to submit their name when filing a complaint or blowing the whistle on a corrupt official or colleague. It is even more impressive that this trust relationship that has been built up systematically over 25 years has not changed much since Hong Kong joined China in 1996. If anything, when surveyed about what they fear most by joining China, the public in Hong Kong considered increased corruption to be one of the major threats. Without public confidence in the anti-corruption policies and measures, complaints systems will fail, investigative media reports will remain unsuccessful and anti-corruption trails will be futile in the absence of witness testimony.

The linkages among public sector governance, institutional propensity towards corruption, and institutional performance are also relevant for policy making. The hypothesis is that governance related factors such as transparency (e.g. quality of the flow of information); degree of public officials’ participation in decision making; administrative discretionality (i.e. lack of decision-making criteria); procedural complexity in budget, personnel, and service delivery; systematic consultation with users; accountability systems prevailing in each agency; and the level of resources all have an impact on the institutional performance of each public institution at the central, regional and local levels. In some cases, the impact on institutional performance operates through the impact of governance on corruption.

What emerges from past experiences shows that corruption is dynamic and has various cross cutting dimensions, therefore, the most appropriate approach to curb it must also be dynamic, integrated and holistic. Therefore, this Manual adopts a modular approach that draws from a broad set of anti-corruption policies and strategies covering in a comprehensive manner the areas of prevention, enforcement, institution building, the repatriation of illicitly transferred funds, awareness raising and monitoring types, levels and causes of corruption as well as the successes and failures in the fight against corruption. These anti-corruption strategies are highly

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<sup>10</sup> Edgardo Buscaglia (2001), Access to Justice and Poverty: Paper Presented at the World Bank Conference on Justice, St. Petersburg. Russia. July, 2001

flexible and may be utilized at different stages and levels, and in a variety of combinations according to the needs and context of each country/sub-region.

The Manual is complimented by an Anti- Corruption Tool Kit which, following a more hands-on approach, offers detailed guidance for the implementation of the single strategies. However, in order to improve both the overall policy framework and strategy as well as the single anti-corruption tools, CICP is adopting a systematic action learning process to identify best practices. Through this process the most successful policies and tools will be identified and refined.

Each of these responses has its particular strengths, weaknesses and limitations. None can succeed in isolation. However, synergies can be created among the various functions, and mutual support can be provided when the responses are sufficiently synchronized and follow an adequate sequence.

All the proposed measures should eventually accumulate in a National Integrity System providing quality services, sustainable development and the rule of law for the benefit of all citizens.

## II. TYPES OF CORRUPTION

### A. Introduction

Before one can successfully identify viable anti-corruption strategies, the environment in which they will be applied needs to be assessed. Identification of what is corruption and what should be considered corruption is key for any successful integrity program. A debate concerning definitions of corruption has been conducted extensively. Part of the difficulty in finding universal definitions is that such labeling will vary from country to country and from culture to culture. Sometimes, substantial variations exist within the same country. In this regard, a 1997 opinion survey conducted by the New South Wales Independent Commission Against Corruption found sharp disagreements even among public sector employees within that part of Australia<sup>11</sup>.

For this reason, many turn to the law for a definition. Academicians consider popular or sociological definitions as being imprecise or arbitrary. Only the legal realm, they argue, could offer a solid definition. Yet, because legal traditions also change over time and are highly interrelated with the socio-political and cultural context, they tend to differ quite significantly too. Rather than attempt to resolve this problem, an alternative approach is to ignore (at least for a moment) legal references. While we may lose a degree of precision by straying from legal references, we may gain a more common understanding of the problem and succeed in bridging communication gaps across national borders.

The alternative pursued here is to seek to clarify the essence of corruption by looking straight at reality without any particular local or traditional legal lenses. By adopting this “empirical approach”, we shall try to move towards a wider consensus as to which acts are intrinsically harmful to society and should therefore be prevented and punished. Not everyone will agree that all types of questionable relationships and misconduct described here constitute corruption or should be illegal. The point is to take into account as many voices and perspectives as possible. This approach will help nations to reassess what it is that they define as corrupt acts that should be prevented and sanctioned.

In general terms, we can all agree that *corruption is an abuse of (public)<sup>12</sup> power for private gain that hampers the public interest.*<sup>13</sup> This gain may be direct or indirect. Most of the time, corruption entails a confusion of the private with the public sphere or an illicit exchange between the two spheres. In essence, corrupt practices involve public officials acting in the best interest of private concerns (their own or those of others) regardless of, or against, the public interest. In this context, when public policy making, its design and implementation are compromised by corrupt practices then we classify this phenomena as *grand corruption*. Examples of grand corruption abound in privatizations, government procurement, and labor policies. In this case, the use of public office for private benefit can involve the compromise of government procedures or the capture of a government institution’s rulings.

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<sup>11</sup> Jeremy Pope, (1997), TI Sourcebook, Berlin, 1997

<sup>12</sup> Using the term public power limits corruption to the public sector. Since much corruption is initiated by the private sector many scholars see the utility of defining corruption in a broader fashion thereby including the private sector.

<sup>13</sup> UN’s Anti Corruption Tool Kit,(2001),

Alternatively, the use of public office for private benefit in the actual course of public service delivery usually falls under the denomination of *petty corruption* (e.g. grease money or speed payments and bribing or custom border officials)

The different expressions of corrupt practices explained below appear under both, grand and petty corruption. Corruption is a phenomena which preserves the status quo and inequalities of power in a socio-political sense. In this context, a system of favouritism remains in place and victimizes current and future generations. People able to perform the same tasks and get the same jobs are left unemployed because of their lack of ability or willingness to bribe officials. Corruption also contradicts the very notion of democracy by distorting the translation of social preferences into public policies.<sup>14</sup>

Abuses of public office to secure unjust advantage may include any planned, attempted, requested or successful transfer of a benefit as a result of unjust exploitation of an official position. A corrupt official may seek sexual familiarity, money, gifts, economic influence, hospitality or lucrative business opportunities in exchange for official action or forbearance. Little benefit is gained by undue focus on whether the initiative for the prohibited transfer or gratuity originates with the person seeking official action (bribery) or with the official (extortion). Indeed, the more widespread and institutionalized corruption becomes, the more impossible and irrelevant it is to determine which party took the first step in the customary exchange of favours to encourage or discourage the performance of a public duty.

It is essential, in this context, to determine the extent of the harmful effects of various behaviours and to decide whether such behaviour and all of its attendant consequences should be prevented, controlled and sanctioned. This process includes a thorough analysis of the damaging effect of the single forms of corruption, since some of them are more important and harmful than others. Public policy ought to take such differences into account when allocating resources and planning an anti-corruption strategy.

In the Developing Countries, corruption has hampered national, social, economic and political progress. Public resources are allocated inefficiently, competent and honest citizens feel frustrated, and the general population's level of distrust rises. As a consequence, foreign aid disappears, projects are left incomplete, productivity is lower, administrative efficiency is reduced and the legitimacy of political order is undermined. As it involves the transfer of large sums of money funds from the South to the North<sup>15</sup>; corruption impairs economic development. This, in turn, leads to political instability as well as poor infrastructure, education, health and other services.

Similar effects can be found in industrialized countries. Individuals who wish to conduct their affairs honestly are demoralized and loose faith in the rule of law. Corruption breeds distrust of public institutions, undermines ethical principles by rewarding those willing and able to pay bribes and perpetuates inequality. Economic competition is distorted and public funds squandered. Wherever economic success of private enterprises relies extensively on the payment of bribes, the quality of products and services provided as well as the skills of employees tends to deteriorate.

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<sup>14</sup> Edgardo Buscaglia and William Ratliff (1997), "Judicial Reform in Developing Countries: The Neglected Priority" *Annals of the American Academy of Political and Social Sciences*, March.

<sup>15</sup> *International Herald Tribune* of Feb 7<sup>th</sup> 2001 quoted a US Congressional report to estimate the amount of "Dirty Money" to more than US\$ 1 trillion per year

Domestic corruption also undercuts rules and regulations designed to enhance social responsibility of corporations and other businesses. Many countries have witnessed inhuman labour exploitation and serious environmental pollution. National budgets have been depleted partly due to the concession of excessive tax advantages and incentives to corporations or industries and partly due to the purchase of unnecessary equipment or services. Nowhere is such victimisation more pronounced than in instances of transnational corruption.

In order to maximise profits, legitimate and illegitimate enterprises resort to bribery and other forms of corruption to cover up crimes against the environment. Unless effective controls are in place, the environment is damaged sometimes irreparably.

Because of the very substantial amounts<sup>16</sup> that are involved in corrupt practices every year; the international financial systems are also affected. According to a United State Senate Investigation<sup>17</sup>, more than US\$ 1 Trillion<sup>18</sup> flows through the international financial system annual One consequence is “competitive deregulation” whereby jurisdictions seek to attract these illegal proceeds by a total deregulation of their financial system and the enhancing of bank and corporate secrecy. Money laundering becomes an even more lucrative business with a potential corruptive effect and with increased dependency on assets deriving from all forms of criminal acts.

The global risks are higher when links between corruption and “organized crime” become stronger. Nearly all profitable illegal markets rely on the support of public officials and controllers. Corruption is a necessary tool for organized criminal groups to operate.

Corruption materializes in different forms. It normally includes several of the elements described below.<sup>19</sup>

## **B. Bribery<sup>20</sup>**

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<sup>16</sup> According to the Financial Times of July 1999, more than US\$ 100 billion had been looted from Nigeria since mid 1980s

<sup>17</sup> International Herald Tribune Feb 7. 2001,

<sup>18</sup> The same report estimated that 50% of this money was going through US Banks. The report did not specify whether the source of the money was from corruption, organized crime, drugs or tax evasion

<sup>19</sup> Petter Langseth, (2000) Integrated vs Quantitative Methods, Lessons Learned; 2000 (presented at NORAD Conference, Oslo, 21 October 2000).

<sup>20</sup> In particular, Article 8 of the U. N. *Convention Against Transnational Organized Crime*, and Article VI of the *Inter-American Convention*, require Parties to criminalize offering of or acceptance by a public official of an undue advantage in exchange for any act or omission in the performance of the official's public functions. Article 1 of the OECD Convention and Article VIII of the OAS Convention require Parties to criminalize the offering of bribes by nationals of one state to a government official of another in conjunction with a business transaction. The European Union and Council of Europe have also elaborated binding instruments requiring Parties to criminalize both public and private sector corruption. Articles 2 and 3 of the E.U.'s *Convention on the Fight Against Corruption Involving Officials of the European Communities or officials of Member States of the European Union* (1997) requires Parties to criminalize the request or receipt by a public official of any advantage or benefit in exchange for the official's action or omission in the exercise of his functions (denominated as “passive bribery”), as well as the promise or giving of any such advantage or benefit to a public official (denominated as “active bribery”). The Council of Europe's *Criminal Law Convention on Corruption* (1998), goes further by criminalizing “active” and “passive” bribery of, *inter alia*, domestic public officials, foreign public officials, domestic and foreign public assemblies, as well as private sector bribery, trading in influence and account offences. *See also*, U.N. *Declaration Against Corruption and Bribery in International Commercial Transactions* (1996) (calling for the criminalization of corruption in international commercial transactions and the bribery of foreign public officials); and Principle 4 of the Global Forum on Fighting Corruption's *Guiding Principles for Fighting*

Bribery involves the promise, offer or giving of any benefit that improperly affects the actions or decisions of a public official. It can also include those who may not be public officials per se, but may also include members of the public who serve on government committees. A bribe may consist of money, company shares, inside information sexual or other favours, gifts, entertainment, a job, promises etc. The advantages gained by corrupt officials can be direct or indirect. We can speak of indirect gains when the benefits flow to an official's friend, family, associate, favorite charity, private business or interests, campaign funds or political parties. Bribe-receivers in the public sector are politicians, regulators, law enforcers, judges, or any other class of civil servant.

Some examples of bribery include the following:

- Officials who work for or supervise revenue-collecting agencies, such as tax authorities, customs, public utilities may solicit bribes. In such agencies, it is possible for officials to bill for lower amounts and share the difference with the citizens. Alternatively, they may not bill at all or 'disappear' invoices - and share the benefits, again with the citizen. Civil servants may accept cash payments in order to alter tax files (income declarations) of individuals or organisations. Tax officials may extort money in order not to impose additional taxes on particular taxpayers (ibid.). Officials may also illegally transfer funds and park them in accounts earning interest for themselves. Also, public officials are in a position to manipulate for their benefit foreign exchange rates. This type of corruption can involve large amounts of money and is rarely picked up by auditors. Customs officials may receive bribes in order to ignore legal or illegal imports or exports that have taken place. In this way, the payment of duties and levies is avoided at the expense of the national treasury. In addition, dangerous or prohibited goods cross national borders.
- Payroll abuses can yield substantial amounts to unscrupulous officials. A typical scenario is that personnel lists are inflated with the names of ghost workers. The salaries would go officials' friends, relatives or fictitious names. During a civil service reform implemented in an African country, more than 30% of the people allegedly employed by the government turned out to be ghost workers.<sup>21</sup>
- In some countries, local governments and enterprises bribe their way into state-funded projects. Many contractors believe that the only way to win these state-funded projects is with bribes. This not only intensifies the abnormal competition but also proves repeatedly the effectiveness of "official bribery", resulting in an increased expenditure by the State, deteriorating quality of goods & services, decreasing competition on the market and a general lack of quality of enterprises and their employees skills.
- It also happens that harsh competition among state enterprises for scarce bank loans has resulted into bribery and consequently increased the number of bad loans in the banking system. State enterprises and collective enterprises offer effectively public-funded bribes to officials in order to secure bank loans.
- Bribes are often offered in order to extract privileged information about competitors. According to information developed by FBI investigations, for

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<sup>21</sup> Petter, Langseth (1996), Post-Conflict Uganda, Towards and Effective, Civil Service,, Fountain Publishing House, Kampala, 1996

example, “defense contractors had illegally bought secret Department of Defense information about plans, budgets, and contract bids of other corporations from government employees. The contractors bribed Department of Defense employees using cash gifts or promises of future employment. The deals were largely made through ‘defense consultants’ who acted as conduits for gathering proprietary information from the military services and then passed it on to the defense contractors. Their work resembled that of ‘agents’ who do the dirty work in the bribery of foreign officials by US corporations.

### C. Embezzlement, Theft and Fraud<sup>22</sup>

These offences involve theft of resources by persons entrusted with authority and control over government property. These can include public officials and private individuals. *For example*, government workers in charge of distributing food to the local village steal a portion of the food and sell it to other parties. Medical supplies being transported from the airport to a local hospital are stolen and sold to a local pharmacy instead. A government official submits false invoices for official travel. Embezzlement also includes conversion of government property and personnel for private use. In considering legal prohibitions against this type of corruption, the challenge will be to define the prohibition broadly enough to include every dishonest method of diverting public resources that criminal ingenuity can devise. Not merely physical theft should be punished, but also unauthorized use of the time and labour of public employees and of government facilities and equipment.

Officials sometimes use publicly owned cars and heavy equipment for personal purposes. World Bank-funded vehicles have been used for taking officials’ children to school. This activity consumed 25% of the working day for the use of the car for official business and duties. Equipment is diverted for use on private land or that of friends and relatives. As a result, the machinery is unavailable for its intended purpose while the maintenance, wear and tear costs are borne by the public. In other cases, officials use public facilities for the repair of private cars. In most countries, certain public institutions (such as, ministries of work, transportation, water boards, power utilities, etc.) maintain workshop and repair facilities. Worker time, spare parts, supplies, space and equipment is abused. In addition, parts are taken from official vehicles or equipment, thus rendering them useless. The diversion of supplies and materials is also a frequent problem. This ranges from a few sheets of corrugated roofing to spare parts, tires, batteries and whole tanker truck loads of fuel. In one case, the monthly loss of a public utility to employee theft was 250,000 liters. Another way

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<sup>22</sup> A number of recent international legal instruments have sought to ensure that Parties have offences addressing this type of conduct with varying degrees of specificity. These include the Organization of American States’ *Inter-American Convention Against Corruption* (1996) and the European Union’s *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests* (1995). Article XI(1)(b) and (d) of the *Inter-American Convention* call upon Parties to consider criminalizing a government official’s improper use or diversion of government property, including money and securities, regardless of the person or entity to whom the property is diverted, while Article XI(1)(a) calls upon Parties to consider criminalizing the improper use of classified information by a government official. Article IX requires, subject to a Party’s Constitution and the fundamental principles of its legal system, criminalization of “illicit enrichment,” meaning “a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.” Addressing the narrow area of protection of the financial interests of the European Community from fraud and corruption, Article 1 of the European Union’s *Convention* requires Parties to criminalize the use or presentation of false or incorrect representations or non-disclosure of information the effect of which is the misappropriation or wrongful retention of funds from the budget of the European Communities. For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption).”

in which public assets can be diverted by officials is the illicit use of government owned housing. For instance, officials may not vacate the government property after they leave office. A variation of such misuse involves the renting out of public housing. All of these methods drain public institutions of scarce resources and prevent them from carrying out their mandates and efficiently serving the public.

#### **D. Extortion**

The act of extortion involves coercing a person to pay money or to provide other valuables or personal favours in exchange for acting or failing to act. This coercion can be under the threat of physical harm, violence or restraint. *For example*, a sick woman needs to see a doctor and at the hospital, the nurse tells her husband that he must pay something extra just to get into the doctors office. His wife dies while he is searching for the money. In many countries, the police are known to extort money by threatening arrest on false grounds. Minor incidents, such as traffic infractions, are used as the basis for threatening arrest.

So called “speed money” is paid when government agencies are slow to deliver services and process applications. This mild form of extortion is not regarded by the “victims” as being offensive. Since payers of speed money simply ask an official to do his or her job, they do not regard this practice as unethical or inappropriate. They argue that all they want in exchange for their money is the system to work exactly as it is supposed to. They are not asking for unlawful favours. Understandable as it may appear, this logic is against the spirit of democracy and cannot be seriously defended. Not everyone is willing or able to pay speed money.<sup>23</sup> This means that some citizens or organisations will be treated preferentially. Delays and unresponsiveness will continue to plague that society as officials have little incentive to improve its general efficiency. The crucial point is that officials receive salaries in order to do their job well. They should not be expected to perform their duties only when they are bribed.

#### **E. Exploiting a Conflict of Interest/Influence Peddling, Insider Trading<sup>24</sup>**

Engaging in transactions, “selling” influence, or acquiring a position or commercial interest that is incompatible with one’s official role and duties for the purpose of illegal enrichment. *For example*, with the intent to profit from secret information, a public official buys land in the area where a large development is planned to be built. This official votes in favour of granting permission to the real estate developer to build its project. Regardless of whether or not this project is in the best interest of the public, this official has exploited a conflict of interest for personal enrichment. Privatisation of government property, functions and businesses provides abundant opportunities for corrupt exploitation.

Conflicts between official duty and private self-interest should be properly dealt with, although defining what conflicts should be made criminal is very culture-bound.

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<sup>23</sup> Edgardo Buscaglia (1997) :“Comments on Corruption” Proceedings of the Annual Bank Conference on Development Economics (ABCDE Conference). Washington DC: The World Bank

<sup>24</sup> Recent international legal instruments have encouraged disclosure requirements as a means of further minimizing conflicts of interest. *See e.g.*, Art. 13-14, Council of Europe, *Model Code of Conduct for Public Officials* (2000); Principle 5 of the Global Forum on Fighting Corruption’s *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999); Art. 5, United Nations, *International Code of Conduct for Public Officials* (1996); Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 5). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption).”

Every society would expect a legislator to advance the interests of his or her particular constituency. It is only at the point where the self-interest of an official is so strong or expressed in a way so indicative of a wrongful purpose, in a manner to be presumed to threaten the public good, that criminalization should be considered.

Conflicts that threaten the public good are also common for officials who find themselves in a necessarily cooperative, even symbiotic relationship with the private sector. It is only natural for an authority setting the rates for public utilities, approving the sale of pharmaceuticals, or negotiating contracts between a State agency and private entrepreneurs to strive for an arms-length but not hostile relationship with the persons with whom business must be done. There is a greater risk that a conflict of interest arises when the regulated industry being dealt with has a natural monopoly of employment or business opportunities in the professional specialty of the government official. These are unavoidable occasions for temptation, creating conflicts of interest between the obligations of the often underpaid public servant and the attraction of highly lucrative private business opportunities, which become available only if the government regulator finds favour with the industry. When the well being of the citizenry is subordinated to such favour seeking, penal sanctions would seem to be appropriate.

The criteria for criminalization of conflicts of interest is not whether the public interest is served by a particular decision, or whether there is a loss of public financial advantage. There are almost always multiple financial and non-financial public interests affected by a single decision, and only a few of them are objectively and immediately measurable. Such criteria is better defined as the purity and transparency of the decision-making process. A public official should not be allowed to act in any matter affecting his or her financial or personal interest

#### **F. Offering or receiving of an unlawful gratuity, favour or illegal commission.**

This offence is aimed at public officials who receives anything of value as extra compensation for the performance of official duties. *For example*, after the issuing of a passport or other document the recipient pays offers a “tip” or “gratuity money” for the good service received. In many countries this will not necessarily be considered an act of corruption. Particularly where public servants are underpaid, the culture of tipping is widely spread and generally accepted. However, this practice undermines the integrity of the public service and can lead to incidents of extortion where the citizen may not be willing or capable to provide a ‘tip’.

#### **G. Favouritism, nepotism and clientelism:**

This is the assignment of appointments, services or resources according to family ties, party affiliation, tribe, religion, sect and other preferential groupings. *For example*, a public servant provides extraordinary services, commissions, jobs and favours to political allies, family and friends while members of the general public would not receive this special treatment. This type of corruption tends to reinforce existing power balances, as it confers most favours to those well connected. It also may introduce a market place for corruption as new players may afford or be willing to pay for the same favours.

Clientelism is at the heart of how corruption propagates throughout the state. The way in which central authorities, for example, usually consolidate their regional power is by appointing and removing public servants at the local level without any

kind of merit based standards. These mechanisms are based on clientelistic practices. In many cases, the degree of turnover in personnel is such that the institutional memory of public institutions is lost every electoral period. This use of public office for private benefit clearly damages the public interest.

## **H. Illegal Political Contributions**

This occurs when political parties or the government in power receives money in exchange for non-interference and good-will towards the entity or group making the contribution. It is closely related to bribery. Powerful interest groups, particularly corporations make generous contributions in order to achieve less regulation of their industry or for specific favours. Politicians may extend courtesies and protection towards to legitimate or even illegitimate enterprises in exchange for contributions to a political campaign.

The expenditure of huge sums of money to influence elections by very calculating enterprises, including transnational corporations and special interest groups, cannot all be motivated by ideology or the charisma of a candidate. It is a reality of life that significant financial or personal advantages are expected by major political contributors. Most legal systems leave space to accommodate this reality in personnel appointments at policy-making levels and in other discretionary areas consistent with the traditions of the society. All, however, have limits beyond which the distribution of government benefits and advantages should be legally required to be impartial or governed by objective standards designed to secure a decision on the merits of the case. When political favouritism becomes so pervasive as to threaten professionalism in the operation of government programmes, mechanisms must be found to limit its influence. Laws covering non-partisan bases for government action as a means of encouraging integrity and professionalism in government are discussed in chapter II of the present Manual. Disclosure laws governing political financing can be useful for compelling candidates or political parties to disclose any contributions they have received, thereby permitting the voting public and the news media to react to those contributions not only when they are made before an election, but also afterwards, when the contributors receive unwarranted consideration.

## **I. Money Laundering**

Any comprehensive strategy against corruption must include measures aimed at preventing and controlling the laundering of corruption proceeds. The connection between corruption and the laundering of its proceeds is not new and has been highlighted on several occasions in the past. The link between money laundering and corruption is not only related to the laundering of corruption proceeds, but goes much further. Money laundering as such produces a corruptive effect on national and international financial systems. Due to the close link between corruption and money laundering, various international fora have noted that a comprehensive anti-corruption strategy must also include actions to prevent and control the laundering of corruption proceeds. The corruptive effect of money laundering is not only affecting private enterprise and its employees but also entire States. In various occasions it seems to be deliberately accepted that deregulation of the financial sector combined with enhanced bank and corporate secrecy is leading to an increasing flow of illegal assets into a countries financial system<sup>25</sup>

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<sup>25</sup> Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1

# **PART 2: POLICIES AND MEASURES**

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April, 1999), I.A.2 (b).



### III. AN INTEGRATED APPROACH

#### A. Introduction

An “integrated approach”, designed and currently being pilot tested by UN’s Global Programme against Corruption, promotes a co-ordinated effort based on six pillars: (1) democratic reform; (2) a strong civil society with access to information and a mandate to oversee the state; (3) the presence of rule of law (i.e. predictability, stability, and coherence in the interpretation and enforcement of the law); (4) increased checks and balances through enhancing the presence and balance between institutional accountability and independence coupled with an increased public confidence in anti-corruption agencies; (5) new strategic national and international partnerships to advocate and support implementation of national and international anti-corruption policies and measures and (6) new strategic national and international partnerships to develop joint strategies for implementation of international and national anti- corruption policies and measures.

Lessons learned from pilot countries reveal that the key to reduced poverty is an approach to development addressing quality growth, environment, education, health and *governance*. Such an approach must be *evidence based, non partisan, and transparent as well as inclusive, integrated, comprehensive and impact oriented*.<sup>26</sup>

#### B. The Integrated Approach

Each of the key aspects of the integrated approach are explained in more detail below:

##### 1. Evidence based

Country assessments identify the types and levels of corruption as reported via the use of surveys gathering subjective and objective indicators and case studies on a global and agency-specific basis. This evidence gives service *providers* the information necessary to implement reform and service *users* information to help promote reform and curb corruption. Indeed, the value of country assessment in giving consumers a “voice” and allowing them to exert pressure on anti-corruption agencies to curb corruption and can not be underestimated. The role of a country assessment in providing concrete data about perceptions in a relatively unambiguous way is also significant, as is its role in promoting greater participation among service users in the service delivery process.

One of the main attributes of the evidence-based approach using a country assessment is that it provides useful management tools. Ultimately, the tools could be used internally by managers at all levels of the government and externally by governmental oversight agencies, politicians, the public, and international donors. Country assessments establish a baseline for service delivery and policy evaluation purposes. This baseline could be used to improve the design of an anti-corruption program. The indicators could be measured periodically to ascertain the reform’s progress. A service delivery survey would also build capacity within the country to design and implement surveys, as well as to implement results-oriented management.

The process of design and implementation of the country assessment could also build participatory channels into the reform process. Investigating public perceptions

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<sup>26</sup> Petter Langseth, 2001, Helping Member States Build Integrity to Fight Corruption, Vienna, 2001

implies that there is a value to the customers' opinions. Although some efforts have been made in the past to touch upon the issue of service delivery through the citizens' eyes as well as at the ministerial level, service delivery surveys (SDS) can be more comprehensive in scope as they include 'perception' as an integral part of its focus. This means that such a study is innovative in attempting to measure the reforms from both a "top-down" as well as "bottom-up" perspective. The study also has implications for other reforms as well. For example, regional indicators could yield information relevant to decentralization reforms.

The product of the early phases of a country assessment will be a set of indicators that the government can use to develop a baseline of corruption levels and services and to measure the progress of reforms. Ideally, these indicators should also be objective in nature (i.e. based on the examination of institutional outputs such as abusive procedural violations) and not just perceptual. Perceptions should also be analyzed in ways that show different subjects interviewed with compatible perceptions (e.g. lawyers, court litigants, and judges all perceiving abuse of power within the courts). In addition, the process of designing the country assessment methodology, including the survey, will involve representatives of the government. Thus, survey design capacity will be built in the country.

The chain of argument is simple. First, the country assessment method offers a bridge between evidence from communities, interpretation of that evidence, and the expert opinion of the service workers. Second, as local ownership increases along with results orientation, fewer resources are lost due to system leakage. Indeed, the use of these techniques to audit the equity, effectiveness and efficiency of public services might begin with a concern for system leakage (corruption). Third, as planners become accustomed to using an evidence-based approach consisting of reliable data, a climate of accountability and responsiveness is created. This sort of transparent environment is crucial for reducing corruption. By providing information in a system which naturally suffers from information imperfections, and in conjunction with other efforts, the evidence-based approach offers a powerful tool that removes information barriers and closes the fracture between the served (public) and the server (government).

## *2. Non-Partisan*

Because the fight against corruption will be a long-term effort and may span various administrations, it is critical that the objectives of ant-corruption efforts remain politically neutral. Regardless of which political party or group is in power, reducing corruption and improving service delivery to the public should always be a priority.

## *3. Transparent*

Transparency in government is widely viewed as a necessary precursor to good governance and corruption reduction. The public has a right to know about the activities of its government. Public access to the decision-making process is key in providing accountability of government operations.

## *4. Inclusive*

The integrated approach advocated here argues that both national and international anti-corruption efforts need to be as broad-based and as inclusive as possible. Very few initiatives involve the poorest and least educated people suffering from the effects

of corruption. It is therefore critical to do more of what ICAC in Hong Kong has done over the past 25 years. The ICAC interfaces directly (face to face in awareness raising workshops) with almost 1 % of the population every year.

Broad-based participation and inclusion in reform initiatives is encouraged in order to raise the expectations of all those involved in the process and to increase the likelihood of successful reform. Expanding the number and diversity of more marginalized participants in the process simultaneously empowers those participants by providing them with a voice and reinforcing the value of their opinions. Successful reform is more likely to occur in an empowering environment where participants perceive that their input and efforts will have an impact.

Establishment of strategic partnerships, as a pro-active measure designed to include as many stakeholders as possible, has proven to be valuable. Early experiences from the fight against corruption shows that new strategic partnerships between NGOs and international aid institutions, such as the partnership between the World Bank and Transparency International, have resulted in excellent national and international anti-corruption awareness raising.

The integrated approach promotes a co-ordinated effort based on new strategic national and international partnerships to develop joint strategies for implementation of international and national anti-corruption policies and measures. Stronger partnerships, based on trust, are needed between<sup>27</sup>:

- The public, the media, private sector, youth, religious organisations and the three branches of government at the national and municipal *level to strengthen checks and balance, to build integrity and to curb corruption.*
- Multilateral and bilateral agencies, recipient governments, local media and national and international NGOs to educate citizens and *to raise public awareness and actively involve the victims of corruption in the fight against corruption.*
- Governments in the North and the South, international institutions and private sector regulatory agencies to develop international legal instruments that will facilitate the *recovery of money looted by corrupt individuals and regimes from developing nations.*
- International media, governments from North and South and international institutions to raise international awareness and political support for the implementation of international legal instruments that will *allow the curbing of money laundering and the recovery and return of funds looted by corrupt leaders and banked abroad*

## 5. *Integrated*

The “integrated approach” facilitates and assists governments in their pursuit of good governance. In fostering collaborative efforts among all stakeholders in a given society -- government, public and private sectors -- the integrated approach helps to draw out shared goals and objectives. Such goals are identified through a variety of instruments that include diagnostic surveys such as service delivery and integrity surveys, national integrity systems workshops and action plans and anti-corruption

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<sup>27</sup> Petter, Langseth, (2001) Value Added of Partnership in the Fight against Corruption, OECD’s 2001 Third Annual Meeting of the Anti-Corruption Network of Transition Economies in Europe, Istanbul, March 20-23, 2001

strategies. Each of these instruments is predicated upon broad-based participation both to maximize the local ownership and to increase the objectivity and relevance of the reform.

#### *6. Comprehensive*

The phenomenon of corruption entails many factors. Opportunities for corrupt individuals present themselves when, for example, rule of law has broken down to the point where lawlessness is rampant due to little or no enforcement of the law, where civil servant salaries are shamelessly low, where the public has lost its sense of civic pride due to cynical views about its government, where rules and regulations overburden the public to the point where frustration leads desperation and bribes just to get a minimum amount of service, and when the media ignores its responsibility to report facts of interest to society without regard for being ‘politically correct’ or honest.

There is no single factor causing corruption. Any effort at corruption reduction must be comprehensive in scope and must take into consideration that the variety of factors that enable or propagate the corrupt environment all need to be addressed. Using the UN’s Country Assessment, for example, a nation may discover that meager civil servant salaries contribute to a corruption problem and that there is also a civil society weakness that makes it acceptable to offer bribes. These two factors must be addressed together in order to succeed in reducing corruption. While this is a very simplistic example, the point is that many forces combine to produce a corrupt environment. They can include weak national or local laws, a distrustful public attitude towards government, police and the judiciary, a lack of honesty and integrity within the media, and a host of other factors.

#### *7. Impact oriented*

Typically, the ability of a national anti-corruption program to meet its goals is difficult to ascertain. This can be attributed to a lack of baseline data describing the pre-reform state of services. When designing a reform program, baseline data can help countries to set realistic goals for the key outcome of reform — curbing corruption and improvement in service delivery to the public. The same indicators that determined the baseline could be monitored and periodically reported in order to measure the reform program’s progress. In a quickly democratizing environment, such information would be useful to all stakeholders. The indicators could also facilitate the task of "result-oriented management," upon which governments and donors increasingly focus, and could contribute in the medium-term to the introduction of a performance appraisal system.

An effort to determine appropriate and useful indicators of corruption and service delivery promises to improve the design and implementation of reform programs. A well designed survey combined with other relevant information could provide information about types, levels, cost of corruption and the availability, quality, cost and timeliness of services by country, region, sector, and/or stakeholder. It could also be used to compare the effects of the program, or different programs, across time, sector, region or country. It could have focused impact through an easy-to-read format presenting the most important information policymakers need. Policymakers could, for example, be presented with the chosen indicators for the baseline and for subsequent periods. They could also receive a list of programs and the major events/activities that occurred in that year. In this way they could assess the outcomes

of these programs, determine which reforms yield the highest net marginal benefits, and analyze the relation between inputs and outcomes.

### C. Action Research or Learning by Doing

A great deal of literature exists on the concept of “Action Research” or “learning by doing” as referred to in this manual. Common among most is the concept of creating dialogue between different groups to promote change through a cycle of evaluation, action and further evaluation, an iterative process illustrated in Figure 1 below. In particular, Action Research has been described as embracing “principles of participation and reflection, and empowerment and emancipation of groups seeking to improve their social situation.”<sup>28</sup>

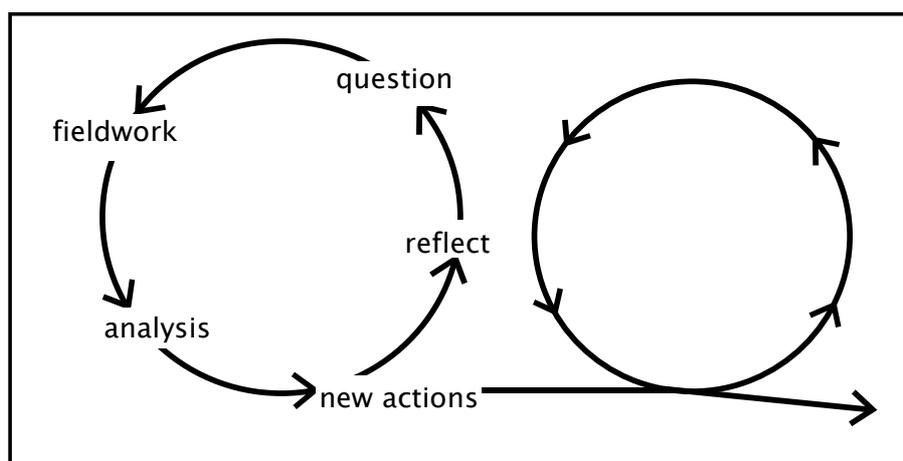


Figure 1: Cyclical Research Process<sup>29</sup>

UN’s Global Programme against Corruption applies the methodology described above both in the piloting of its new approaches to help governments build integrity to curb corruption and its dissemination of lessons learned from such pilots and experiences elsewhere.

### D. UN’s Global Programme against Corruption

Considerable progress<sup>30</sup> has been made in refining, implementing and raising awareness about the Global Programme against Corruption, launched in March 1999. The Global Programme consists of an integrated package of assessment, technical co-operation, evaluation and contributions to the formulation of international strategies and instruments to combat corruption. It entails a systematic process of "action

<sup>28</sup> Kaye Seymour-Rolls and Ian Hughes, “Participatory Action Research: Getting the Job Done,” Action Research Electronic Reader, University of Sydney, 1995.

<sup>29</sup> Yoland Wadsworth, “What is Participatory Action Research?” Action Research International, Paper 2, 1998. Available on-line: <http://www.scu.edu.au/schools/sawd/ari/ari-wadsworth.html>.

<sup>30</sup> The following facts are indicative of the progress made: (a) the Programme has received firm endorsement by States, including through the Vienna Declaration, several General Assembly resolutions and the decision to initiate the elaboration of an international legal instrument against corruption; (b) the number of countries who have formally or informally indicated the request to join the Programme has increased from five (1999) to twenty (2001); (c) the number of active pilot countries has increased from three to seven in the same period, with several more being finalised; and (c) increased substantive expertise dissemination of information and visibility for the programme has been achieved, especially through the organization of two international and one national anti-corruption workshop, the launching of a new web page ([www.ODCCP.org/corruption.html](http://www.ODCCP.org/corruption.html)) featuring an anti-corruption tool-kit, participation at international conferences and presentation of professional papers.

learning", which will identify best practices and lessons learned through pilot country projects, programme execution and monitoring through periodic country assessments and the global corruption trends study. Attention is given equally to institution building, prevention, awareness raising and education, enforcement, anti-corruption legislation, judicial integrity, repatriation of illegal assets as well as monitoring and evaluation.

A global corruption trends study is being initiated to analyse and forecast trends, types, levels, cost and causes of corruption around the globe, identify anti-corruption policies and best practices and assess public awareness. It will be carried out in close partnership with concerned institutions and will link up closely with other crime and justice issues and related work, especially organised crime, trafficking in human beings, illicit global markets and money-laundering.

An anti-corruption tool-kit has been developed, which outlines some 30 anti-corruption tools. Each tool will be supplemented through case studies from country experiences. The tool-kit will be disseminated both in print and through GPAC's web page. ([www.ODCCP.org/corruption.html](http://www.ODCCP.org/corruption.html)).

A web page detailing the Programme has been launched and is being continuously updated, as a component element of the Centre's web site ([www.ODCCP.org.html](http://www.ODCCP.org.html)). The web page will be used to disseminate detailed information on the Programme, especially lessons learned, updates on findings of the global corruption trends study, results of perception surveys from country assessments, etc.

It is envisaged that during its initial stage, the Programme will undertake projects in selected pilot countries from all regions of the world. Seven countries, all of which have requested the Centre's assistance to design and implement an integrated anti-corruption programme, have been selected for pilot projects: Benin, Colombia, Hungary, Lebanon, Nigeria, Romania and South Africa. Projects in these countries are currently at different stages of formulation and implementation. Decisions on additional pilot countries are being reached on the basis of project concepts and feasibility assessments, in close consultations with the authorities of the concerned countries. These currently include Indonesia, Iran and Uganda.

An expert group meeting on the "Global Programme against Corruption - Implementation Tools" was held in Vienna, on 13 and 14 April 2000. The experts provided feedback on the proposed strategies and contents of the Programme and presented anti-corruption tools, to be compiled in the Anti-Corruption Tool-Kit.

A workshop on "Integrity in Judiciary" was also organised in Vienna, on 15 and 16 April 2000, which was attended by eight chief justices from Africa and Asia. A follow-up to this *Leadership group on Integrity in Judiciary* took place in Karnataka in India in March 2001, and the GPAC is expected to, in partnership with other national and international stakeholders, pilot test integrity tools such as codes of conduct and assessments of corruption in the judiciary in selected pilot countries.

In March 2001, GPAC, in collaboration with UN's Global Programme against Money Laundering, convened an Expert Group meeting to: (i) define what role UN should play in the area of Recovery of Assets and (ii) how ODCCP should respond to the request from Nigeria to facilitate the recovery of money looted by former dictators. The recommendations from the Expert Group will be presented at the Crime Convention in May 2001.

## E. GPAC's Country Assessment.

The country assessment is conducted with the cooperation of different national and international partners (e.g. In Hungary: UNICRI, Gallup). It is primarily a locally requested tool that will, among other things, be used by the civil society to hold government accountable. Important elements of the assessment include a *desk review* aimed at compiling all relevant anti-corruption information on relevant public sector institutions as well as from civil society and the private sector. This includes the following:

- (a) The *public opinion surveys*, sufficiently representative to indicate corruption levels, types and coverage across sub-national units and key institutions.<sup>31</sup>
- (b) One important variable to survey regularly is the public confidence across all institutions and stakeholder groups involved in the fight against corruption including.
- (c) The *focus groups* to promote in-depth discussion with opinion makers or targeted interest groups in government and society. Using this technique detailed information can be gathered about perceptions of corruption, what they see as the causes and what the government needs to do in order to fight it.
- (d) The *case study*, as elaborated by local experts, to describe typical corruption cases in great detail as a means of facilitating a better understanding of how corruption actually occurs. Well-documented practical case studies are expected to help anti-corruption agencies fine-tune their measurement as well as to make the public and potential whistleblowers more aware.
- (e) *The Legal Assessment* to assess existing laws and regulations, e.g. what constitutes a corrupt act and what sanctions should be applied; analysis of legal insufficiencies and inconsistencies<sup>32</sup>; examination of how these laws and regulations are implemented and enforced, whether they are viewed seriously, and whether sufficient resources have been invested in their execution. Additionally, the assessment will be addressing the inefficiencies in formal legal structures that are found to be closely related to the activities of organized criminal firms, such as both inefficient substantive laws and state-induced shortage of legal professionals and other rights-enforcement agent. For example, the state's lack of capacity to enforce property and contractual rights tend to foster the presence of organized crime in areas such as debt collection, lending operations, and labor disputes.
- (f) *General assessment of official oversight bodies* to hold governmental officials and agencies accountable for their actions. Examples could be the Inspector-General of Government, Ombudsman and/or Auditor General.
- (g) *The institutional assessments* to inventory what judicial, executive and legislative bodies are doing to fight and prevent corruption. It is important to go into greater depth with some of these anti-corruption agencies to identify

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<sup>31</sup> As an example in Uganda each of the 46 districts would have survey data comparing their district with the national average. This type of survey was requested by the Government Inspector-General, who argued that the only way he can fight corruption is to have information about corruption levels across sub-national units.

<sup>32</sup> Certainly anti corruption provisions can appear in many different laws: criminal and penal codes, civil service laws, standing orders, public procurement regulations and many others. These should be consistent.

where there are specific problems. To accomplish this, the Global Programme will use different techniques including “process mapping” to analyze the functions, procedures, reporting relationships, access to information and incentives in anti-corruption agencies across all three branches of government. The mapping specifies how an organization does its business, identifies what is efficient and effective and reveals where there are conflicts of interest and excessive opportunities for extortion, bribe taking, and bribe giving.

- (h) *The assessment of civil society and of informal institutions* to determine the capacity to hold the government accountable and the extent of government failures respectively. This can be evidenced by their access to information and the freedom and independence of press. Different techniques can be used to assess the quality and the vigilance of the media reporting on corruption cases. This can range from: (i) systematic content analysis, (ii) the impact of different media types; (iii) a review of ownership and control of the media.

#### **F. UN’s Anti-Corruption Tool Kit**

The technical co-operation activities facilitated by UN Centre for International Crime Prevention (CICP) under the framework of GPAC are supported by a modular approach that draws from a broad set of anti-corruption policies and measures, or “tools.” These anti-corruption tools may be utilised at different stages and levels in a variety of combinations according to the needs and context of each country/sub-region, thereby maximising the flexibility of the adoption of such measures.

The Anti-Corruption Tool-Kit covers areas relating to prevention, enforcement, institution building, awareness raising, recovery of illicit assets and assessment of corruption levels and impact monitoring of anti-corruption policies and measures. This extensive, though by no means exhaustive, collection of approaches and their associated practical applications has been developed from anti-corruption research and technical assistance activities, including the GPAC comprehensive Country Assessment, undertaken by CICP in a number of pilot countries.

Currently the Anti-Corruption Tool Kit ([www.ODCCP.org/corruption.html](http://www.ODCCP.org/corruption.html)) contains the following 30 Tools:

## TABLE OF CONTENT

Institution Building	Prevention	Awareness Raising	Enforcement	Anti-Corruption Legislation	Recovery of Assets	Monitoring and Evaluation
Anti Corruption Agency (ICAC)	Disclosure of Assets	Access to Information	Guidelines for Investigations into Corruption	Amnesty	Standards to curb the Laundering of Corruption Proceeds	United Nations Country Assessment
Ombudsman	International Monitoring Mechanism	Mobilizing Civil Society	Financial Investigation and Monitoring of Assets	Easing the Burden of Proof	<i>Model Legislation on International Legal Assistance</i>	<i>Performance Monitoring of Anti-Corruption Agencies</i>
<i>United Nations Ombudsman</i>	Integrity Pacts	Anti- Corruption Action Plans	Integrity Testing	Whistle Blower Protection	<i>Facilitating the Recovery of Assets through Partnerships</i>	<i>Public Hearings</i>
Strengthening Judicial Integrity	Private Sector Anti-Corruption Cooperation	Media Training	<i>Electronic Surveillance Operations</i>	<i>Freedom of Information Act</i>	<i>Cooperation between the Financial Sector and Governments</i>	<i>Civil Society-Government Watchdog Boards</i>
Codes of Conduct	Reduction of Procedural Complexities and Discretion	<i>Special Awareness Program for the Youth</i>	<i>Civil Society/Government Complaint Boards</i>	<i>Model Anti-Corruption Legislation</i>	<i>Measuring the Impact Money Laundering Policies and Initiatives</i>	<i>Monitoring the Implementation of International Legal Instruments</i>
National Integrity Steering Committee	Result based Management	<i>Disseminate Anti-Corruption Tools</i>	<i>Guarding the Guards</i>			<i>Monitoring and Evaluation Workshops</i>
Action Planning Meeting	Prevent Links between Organized Crime and Corruption					
National Integrity Unit	<i>Civil Service Reform</i>					
Strengthening Local Government Level						
Local Anti-Corruption Planning and Implementation Mechanisms						
Parliament's Role in Fighting Corruption						
<i>Empower the Victims of Corruption through Social Control Boards</i>						

Tools *italic red* are under preparation



## **IV. PREVENTION OF CORRUPTION – Administrative and regulatory mechanisms for the prevention of corrupt practices**

### **A. Elimination of Abuse of Discretion**

The application of clear, stable, and coherent criteria in the interpretation and enforcement of laws and regulations is key to avoid an institutional environment within which the propensity towards corrupt practices is avoided. Recent studies centered on the judiciaries worldwide demonstrate that this factor is related to procedural corruption and state capture by vested interests.<sup>33</sup> Moreover, these studies show that the degree to which public officials lack criteria, or do not apply existing criteria, or do not understand decision making rules will all be related to abuse of discretion. These conditions apply to customs, municipal governments, and tax authorities alike.

The sampling and review of case files can then generate objective indicators of practices enhancing the likelihood of a corrupt environment. Usual mechanisms to counteract these practices include the issuing of procedural manuals coupled with the strengthening of an unbiased and independent institutional review of the decisions made by public officials.

### **B. Procedural Complexity**

Best anti-corruption practices show the need to decrease procedural complexity and discretionality through procedural reengineering in service delivery areas. The rationalization of procedures would be based on the introduction of quality control standards based on objective indicators applied to specifying for each service the optimal/recommended number of procedural steps, required decrease in procedural times, and on the justified number of departments involved in a single procedure. The critical services to be addressed must be defined during workshops with government and civil society members exchanging information related to problems affecting citizens in their interaction with the state. The determination of benchmarks should also be delineated during these workshops bringing together representatives of civil society and government agencies involved in the reforms.

Once these “under-performing” services are identified, it is necessary to measure the procedural complexity and its variability for each “critical” procedure. Indicators of procedural complexity have already been developed in past reform experiences in developing countries. For example, an indicator based on the weighted average of combining the effects of procedural times, number of procedural steps, and number of departments/divisions involved in a decision has been associated to corrupt practices in several institutional contexts worldwide.<sup>34</sup> Addressing the procedural complexity and reducing its variability can be achieved by eliminating steps and departments with no value added and by applying quality control techniques to service delivery in order to reduce the range within which procedural times, service delivery outputs, and procedural steps can all vary. The experiences in the judicial sector of Costa Rica

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<sup>33</sup> Edgardo Buscaglia. 2001. “An Economic and Jurimetric Analysis of Corrupt Practices in Developing Countries: A Governance-Based Approach” *International Review of Law and Economics*, June

<sup>34</sup> Edgardo Buscaglia and Jose Luis Gerrero (1995), “A Quality Control Approach to Judicial Reform” *Quality Control Journal*. Vol 21, pp. 34-67V

and the municipal governments of Venezuela shows that anti-corruption programs applying these type of technical components combined with social control mechanisms have been able to render unprecedented results in fighting corruption.

### **C. Lack of Transparency in the Allocation of Public Resources**

The introduction of more effective integrated budgeting and auditing systems that are constantly accessible online on an agency-specific basis by internal/external auditors is key to the enhancement of transparency and consequent accountability. These integrated systems should cover all departmental and municipal budgetary and extra budgetary financial transactions at the operational and non-operational levels; In this context, public policies must aim at minimizing the differences between a Parliamentary-approved and executed budgets and rewards/penalty systems should be implemented for deviations above a pre specified rate. Extra-budgetary spending and budget deviations must be further monitored through quarterly financial statements and justified only by Executive and Emergency Decrees. At the municipal and regional levels, the discretionary use of co-participation funds and allocation of these funds by the National government mostly to local governments without clear criteria is usually associated with the existence of clientelistic practices, therefore, fostering corruption at the municipal level.

Additionally, the lack of standard procedures in the municipal budgetary management, makes it usually possible for mayors to approve budgets and bypass social controls in order to deal with politically-allied base organizations. The unjustified discretionary and abusive practices caused by the lack of procedural guidelines in budget determination and allocations at the municipal level (e.g. lack of municipal government obligation to share information with the public, lack of enforceable deadlines, and lack of penalties to be applied to those governments failing to incorporate accountability mechanisms to their budget-allocation process) the high levels of budget diversions.

At the national and local levels, governments must also strengthen the enforcement of internal agency-specific administrative rulings in order to reduce the range of decision making options allowed under a given system of budgetary rules. In this context, it is necessary to specify a uniform criteria for discretionary decision-making in the allocation of budget resources (extrabudgetary allocations and/or budget diversions) between national and municipal levels and for personnel management decisions (e.g. political quotas) from the national to the local levels.

Finally, program budgeting must aim at the establishment of program structures in public institutions with clearer statements of agency and program objectives (strategic and outcome-oriented) and the determination of performance indicators that would serve as inputs in the PBCs periodic decision making on personnel management. In this way, agency's accountability is enhanced through the disclosure of budget-related performance objectives before-the-fact in spending estimates (the basis of Congress' appropriations) along with the after-the-fact disclosure of results in departmental annual reports.

#### D. Employee motivation<sup>35</sup>

A necessary step towards the prevention of corrupt practices is motivation of the employees. This measure gains particular importance where salaries of public employees are low and corruption has become an accepted way of making a living. In such an environment, however, the first and at the same time most unpopular step must be the increase of salaries to enable the public official to an appropriate lifestyle. Adequate resources should be expended to employ a competent workforce and managerial staff at a living wage. Where government is not able to ensure appropriate salaries it may not only force the public official to top his income through corrupt practices but it provides a moral justification for corruption. When a clerk in a public office does not earn a subsistence salary, he is likely to be frequently absent, cheat on his hours of work, steal, extort or take bribes. When an agency head making governmental decisions comparable to those of a corporate executive receives a salary comparable to that of a corporate clerk or Manual laborer, the occasion for corruption is there, simply awaiting the right temptation. When a Government fails to pay salaries roughly commensurate with responsibility, it suggests that governmental functions are not worthy of respect or professionalism and can be performed by anyone, no matter how poorly paid. If that attitude is communicated, the elements of altruism and idealism that bring some employees into government service are rejected, and the moral tone of the workforce is thereby lowered, while at the same time a certain moral reward is eliminated that could otherwise partly compensate for any disparity in pay.

However, in particular in countries where corruption is rampant the simple increase of the salaries of public officials will not resolve the problem of corruption. It is unlikely that the government will be able to meet the income made by the corrupt public officials. Consequently the economical incentive to use corrupt practices remains high and unless it is not replaced by a moral/ ethical incentive, the likelihood that a significant part of the public service continues to consider corrupt practices as an acceptable alternative. Therefore, government employers need to be educated in ethics. Employees must be instructed, with periodic retraining, on what the ethical obligations of government service require. In this area, precision and subtlety may have to be sacrificed to clarity and enforceability. It may be better to allow an employee to accept any type of hospitality in the form of food or drink, or to flatly prohibit acceptance of any hospitality at all, rather than to promulgate tortuous rules based upon the value, intent and nature of the acquaintance, which allow very compromising relationships so long as they are carried out artfully. Employees should

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<sup>35</sup> <sup>35</sup> The need for such mechanisms to combat public corruption was recently recognized by the Global Coalition for Africa in its *Principles to Combat Corruption in African Countries* (1999), Article 15 of which encourages states to adopt legislative mechanisms and procedures for public submission of corruption complaints; as well as in the Organization of American States's *Inter-American Convention Against Corruption* (1996), Article III (preventative measures); Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 15); –and Principle 2 of the Global Forum's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption).”

receive the same message from government deeds as they do from ethical exhortations by their superiors<sup>36</sup>.

Institutional effectiveness in service delivery is also very much related to the perception of dysfunctional personnel-related managerial capacity. In this context, best-practices applied in Costa Rica and Colombia indicate that it is necessary to adopt human resource policies implementing merit-based performance evaluations for all hiring, promotion, and firing practices at the middle management and lower rank levels based on internal and external periodical citizen-survey-based reviews. The handling of these issues could be conducted by social control bodies (also called Public Service Commissions) for each area of service delivery (health, education, tax collection, etc.). This would allow governments to avoid conflicts of interest by separating personnel adjudicational tasks (i.e. firings, promotions, hirings) from operational and management tasks for each service area., thereby reducing the chances of clientelistic practices.

In this context, salary scales must be based on group-related individual performance evaluated through internal and external channels. A human resources policy system must also address the corruption-enhancing short term horizon mind-frame found in a significant proportion of the public officials interviewed who stress the lack of perceived stability associated to their job environment<sup>37</sup>; The career system must then address different approaches to the three levels of decision-making: top level political appointees, middle management, and the lower ranks of administrative employees. At the lower rank and file level, emphasis must be placed on small group-based performance evaluation based on pre-established measures of productivity coupled with external citizens-users' surveys and social control boards. The combination of productivity-based and users' perceptual results must be ranked in accordance to well-known and transparent criteria (e.g. number of permits processed for each category combined with users' perception of service effectiveness) that would later serve to justify the change in employees' salary levels. In order to enhance uniformity in the enforcement of such criteria it may be necessary to create a specialized agency with assigned responsibility for convening appeal and reviews related to promotions, discipline, redeployment and related management decisions affecting employees; for investigating grievances and, where appropriate, recommending corrective measures.

#### **E. Result based management**

Another effective preventive measure is the strengthening of accountability of government employees. Accountability within the public sector may be greatly enhance through a management style based on results, i.e. on outcomes and impacts. As stated in the previous section, emphasis must be placed on small group-based performance evaluation based on pre-established measures of productivity coupled with external citizens-users' surveys and social control boards. Results-based management (RBM), also known as performance management, has been adopted by many governments and organizations to provide a coherent framework of

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<sup>36</sup> . In this regard, Spain has statutes, which are very precise and detailed as to those activities that are incompatible with public office, with administrative sanctions whose severity depends upon the seriousness of the activity.

<sup>37</sup> Edgardo Buscaglia and Jose Luis Gerrero (1995), "A Quality Control Approach to Judicial Reform" Quality Control Journal. Vol 21, pp. 34-67V

accountability in a decentralized environment. Even though fractionalized operations have the potential to be more effective and efficient than centralized administrations, they may more easily fall prey to corruption because of the lack of effective monitoring. The usefulness of an RBM style of management in deterring corrupt activities and monitoring the effectiveness of goal attainment can be thus stated quite simply. RBM functions as both a management system and a performance reporting system. It can support an on-going transition in operational methods from a Management by Objectives style to a strategy-driven results-oriented management style. RBM emphasizes development effectiveness and accountability, in line with the demands of a new external environment. It supports a culture focusing on results on the ground, greater transparency and participation. The results chain includes inputs, processes, outputs, outcomes, and ultimate impacts. Such a system gives room to effective monitoring and consequently to the detection of insufficient results as well as corrupt practices which may not only be caused by the monitored agency's shortcomings but also of instances where such shortcomings may be caused by corruption.

#### **F. Internal reporting procedures**

Institutions with effective integrity programmes generally have well-developed procedures to deal with potential dishonesty and the complicating factors of supervisory and personal relationships. Only where there are clear obligations and procedures for the reporting of breaches of the Code of Conduct, it is likely to be respected. Such rules have the effect, when observed and enforced by management, of protecting employees from allegations of disloyalty, breach of friendship, self-promotion or bad judgement. Each organization can develop rules suitable to its own culture and counterpart organizations. Employees may be required to report to a supervisor at a certain level unless that supervisor is alleged to be involved in wrongdoing. An ethics officer for the entire organization may be designated, as the primary point of referral or as an alternate contact when the allegation touches the supervisor who would normally be the primary recipient. The rules should require the creation of a permanent record by the maker or recipient of the allegation to permit subsequent accountability and monitoring of the action taken. The channel of transmittal to the appropriate investigating authority should be clear, with time-limits and explicit standards governing which allegations must be referred for review by a criminal justice authority. The primary goal is either for allegations to be brought promptly and accurately to the notice of someone at a responsible level of management, who then has the responsibility of following specific standards to decide whether to involve a criminal investigating authority, or for them to be submitted directly to such an authority by the employee.

#### **G. Disqualification**

As an administrative precaution in sensitive situations, as a preventive measure against corruption and as a means of protecting the reputation of employees and of government operations in general, public officials involved in the decision-making process should disclose their interests. Their continued involvement in the matter should be decided by an impartial body. As a general rule in the evaluation of a conflict of interest: when in doubt, disqualify. If vigorously applied by policy makers, who set an example for subordinates, one of the principal causes of public distrust of government might be reduced. In a governmental culture where disqualification for personal or financial interest has become the norm, can help to reaffirm the public

trust in government decision making processes. Moreover, disqualification regulations provide a useful defence mechanism for the honest official, who can discourage those who attempt to influence his or her decision.

## H. Codes of Conduct<sup>38</sup>

Additional obligations for public officials, judicial officers and other government and private sector employees can derive from codes of conduct. They should be implemented to establish standards of behavior consistent with organizational and ethical principles of justice, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, responsible use of the organization's resources and, where appropriate, standards of conduct towards the public. It should also enumerate the sanctions for non-compliance by affected members or employees.

The code of conduct should not only contain rules governing behaviour. Also, the code of conduct should establish a system that ensures implementation of the code. The code must therefore translate the underlying guiding ethical and organizational principles into concrete behavioral rules, promote and provide for monitoring compliance with those rules; and provide clear sanctions for violation of those rules.

As a first logical step in developing a Code of Conduct, the responsible body must identify the ethical principles that are most relevant for a particular organization. Some of those principles which apply to most contexts are: justice, impartiality and independence, integrity, loyalty towards the organization and towards the public interest, diligence, propriety of personal conduct, transparency, accountability and the responsible use of the respective organization's resources.

Specific categories of public officials as well as professional categories might require specific rules of behaviour. Therefore the development of separate codes for civil servants, police, members of parliament and cabinet, judicial officers, journalists and other employees in the private sector should be considered.

It is not be enough to disseminate the code and have the organization's members or employees read and sign it. An integrated implementation strategy must be planned that balances "soft" and "hard" measures to ensure that the organization's members will act in accordance with the code. The code should therefore contain rules that encourage and monitor compliance by all employees, members and/or public officials with clear sanctioning penalties enumerated in cases of breaching the code. Exemplary behavior and conduct should be rewarded and managers should provide moral leadership at all times. Employees should receive regular training on issues of integrity and on what each employee can do to ensure compliance by their colleagues in the work place. Peer pressure and peer reviews should also be encouraged. Disciplinary sanctions should be envisaged as well as a system ensuring that criminal action is initiated when appropriate. Any members of the organization who become aware of allegations of unethical, improper, criminal or unprofessional conduct by officials should be obliged to immediately take adequate steps to report this to the

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<sup>38</sup> Two international ethical codes have been promulgated in recent years: the Council of Europe's *Model Code of Conduct for Public Officials* (2000); the UN *International Code of Conduct for Public Officials* (1996). Moreover, the Global Forum's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). Principles 2, 3 and 7 address various ethical codes States may wish to consider promulgating. See also, Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 17). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption)

appropriate body. The practice of whistle blowing should be institutionalized and destigmatized, and adequate protection for whistleblowers should be guaranteed.

### **I. Disclosure of Assets**

Excessive assets, income, gifts, and liabilities are all indicators of irregularities when they are out of proportion to one's earned salary. Therefore, the disclosure of assets is another effective measure to enhance accountability and integrity of public servants. Transparency of the accumulation of assets/liabilities and of gifts to government officials serves as a deterrent to illicit enrichment from corrupt practices. Disclosure of assets can also assist in the investigation of corruption allegations and may provide evidence for subsequent prosecution. It is essential for the disclosure to be made upon entry into the public service. It should thereafter be updated on a regular basis. The monitoring of these asset declarations and their accuracy should be performed by an independent agency such as an ombudsman, inspector general or an anti-corruption agency.

It is unrealistic to expect that laws requiring disclosure of illegal financial gains by public officials will result in voluntary confessions. Nevertheless, laws or regulations requiring comprehensive disclosure of financial assets will provide a basis upon which to monitor unearned income and can also provide a basis for prosecution. As such, financial disclosures should include all financial obligations and relationships, a summary of significant financial events, such as extraordinary income, business activities, receipts besides income, sales, purchases, exchanges or gifts of any asset exceeding a certain value as well as details of all major spending.

To be effective, penalties for non-disclosure or false reporting must be severe enough to act as a significant deterrent. The standard for determining such penalties could be consistent with penalties for the offence of illicit enrichment or a similar law. In addition to the obligation to submit the disclosure declaration, public officials should be obliged to answer any follow-up clarification needed to verify the accuracy of their declaration.

A further refinement of disclosure status relates to the support of political activities. Disclosure laws governing political financing can be useful for compelling candidates or political parties to reveal contributions they have received. This would permit the voting public and the news media to react to those contributions as soon as they are made public



## **V. ENFORCEMENT-**

### **Procedures for the detection, investigation and conviction of corrupt officials**

#### **A. Covert and consensual nature of corruption**

Unlike other crimes such as theft or murder, where a complainant with some interest in uncovering the crime comes forward, crimes of corruption and bribery are committed in the shadows with both parties benefiting from the crime. This unique relationship, since neither party believes they are victims of any crime, prevents authorities from knowing that a crime has taken place. Neither party is going to report the crime. The inherently covert and consensual nature of corrupt activities makes it difficult to obtain information on instances of corruption.

Challenges exist in developing a flow of information to overcome the inherent secrecy of corruption offences. Encouraging the public, particularly its most frightened and victimized members, to report instances of corruption is key.

Similarly, it is necessary to elaborate mechanisms that would assure reporting by agency workforces among whom there is likely to be considerable awareness or informed suspicion of any wrongdoing within their sphere of experience and observation. The significance of encouraging and processing citizen complaints is to restore or confirm public confidence in government. A complaints system should be established enabling service users to complain, either through a “hot-line” or by other means, to a credible and independent complaints office. The incoming complaints should be entered into a computerized management system that allows for the analysis and monitoring of the complaints, tracks the allegations reported, action taken, outcome of any investigation and resulting disciplinary and court proceedings. The agency responsible for receiving the complaint should also perform a clearing house function, so that those complaints that alleging inefficiency rather than corruption are forwarded to the appropriate authorities.

Persons who know about instances of corruption but are reluctant to submit a complaint that would reveal their identity should nevertheless be encouraged to come forward. Because of its susceptibility to abuse, the anonymous complaint should initially be considered as investigative intelligence. The subject of an anonymous complaint should by all means be treated with utmost confidentiality. This is necessary to protect the reputation of allegedly corrupt individuals.

#### **B. Other sources of Information**

Efforts should be made to encourage “insiders” to provide information. For this purpose whistleblower protection is essential. People are often aware of corrupt activities by co-workers but are frightened to report them. Therefore, a clear and simple framework must be established that encourages “whistle-blowing” and protects such “whistleblowers” from victimization or retaliation. The main purpose of whistleblower laws is to provide protection for those who, in good faith, report cases of maladministration, corruption and other illicit behavior inside their organization. Some whistleblower laws are only applicable to public officials, while others provide a wider field of protection including private sector organizations and companies.

Experience shows that the existence of a whistleblower laws alone are not sufficient to instill trust in potential whistleblowers. Laws alone will not encourage people to

come forward. In a survey carried out among public officials in New South Wales, Australia, regarding the effectiveness of the protection of the Whistleblower Act 1992, 85% of the interviewees were unsure about either the willingness or the desire of their employers to protect them. 50% stated that they would refuse to make a disclosure for fear of reprisal<sup>39</sup>.

Disclosures by whistleblowers must be treated objectively and even if they prove to be inaccurate or false, the law must apply as long as the whistleblower acted in “good faith”. It must also apply irrespective of whether or not the information disclosed was confidential and the whistleblower therefore might have breached the law by blowing the whistle.

Since whistle blowing is a double-edged sword, it is necessary to protect the rights and reputations of persons against frivolous or malicious allegations. Whistleblower legislation should therefore include clear rules to restore damage caused by false allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes should contain provisions sanctioning those who knowingly come forward with false allegations. It should be made clear to whistleblowers that these rules apply also to them if their allegations are not made in good faith.

The whistleblower law should also contain rules providing for compensation or reinstatement in case whistleblowers suffer victimization or retaliation for disclosing the information. In the case of dismissal, it might not always be acceptable for whistleblowers to be reinstated in their position. The law should therefore provide for alternative solutions by obliging employers either to provide for a job in another branch or organization of the same institution, or to pay financial compensation.

### **C. Prosecution and Investigations**

The deterrent effects of investigation and prosecution and the direct incapacitation of wrongdoers by their removal from office and incarceration can reduce corruption in government. Yet virtually all practitioners involved in anti-corruption efforts would concede that, no matter how draconian or rigorously enforced the penal measures might be, no society could realistically punish more than a small proportion of the officials who abuse their positions. If the level of integrity in government is to be improved, it will be by managerial, administrative, regulatory and reporting mechanisms<sup>40</sup>. This has been recognized by one of the best organized anti-corruption entities, the Hong Kong’s Independent Commission against Corruption (ICAC).<sup>41</sup>

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<sup>39</sup> John Feneley, Witness Protection: Pitfalls and Best Practices, paper presented at the 8th International Anti-Corruption Conference, [http:// www.transparency.de/iacc/8th\\_iacc/papers/feneley.html](http://www.transparency.de/iacc/8th_iacc/papers/feneley.html)

<sup>40</sup> The need for such mechanisms to combat public corruption was recently recognized by the Global Coalition for Africa in its *Principles to Combat Corruption in African Countries* (1999), Article 15 of which encourages states to adopt legislative mechanisms and procedures for public submission of corruption complaints; as well as in the Organization of American States’s *Inter-American Convention Against Corruption* (1996), Article III (preventative measures); Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 15); -and Principle 2 of the Global Forum’s *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption).”

<sup>41</sup> The ICAC has three departments with separate functions. The Operations Department performs criminal investigative work, the Corruption Prevention Department attempts to eliminate vulnerability to corruption in systems or procedures and the Community Relations Department educates the public about the evils of corruption. Similarly, Trinidad and Tobago has reinforced its existing anti-corruption

#### **D. Auditing authorities**

Auditing functions may have various configurations. However, there should always be one government-wide office to monitor the effectiveness and efficiency of governmental programmes. It may have an executive, legislative or even a judicial function. It could theoretically have direct operational responsibility for management audit and integrity inspections of every government activity. Perhaps more frequently, an office of government-wide competence will function primarily in a policy-making and supervisory role, as does the *Secretaria de la Controloria General de la Federación* in Mexico. Separate audit or inspection staffs may exist in each government agency (as do the “controlorías internal” in the Government of Mexico). Sometimes the power to make legislative or public reports is vested in government auditors and occasionally they have statutory guarantees of operational authority, budgetary independence or other incentives to objectivity.

In addition to serving as a logical contact and screening point for both anonymous and attributed citizen complaints, an internal auditor can perform other valuable functions by stimulating and making use of the flow of information that is essential to identifying and combating dishonesty in government. An audit staff works throughout an agency and should enjoy a reputation for objectivity, because its organizational loyalty is normally owed only to the chief executive. With mobility and prestige, an audit staff is an obvious point of contact for the reporting of wrongdoing by government employes. To preserve employee confidence, a tradition of discretion may need to be established, but that should always be the standard in corruption inquiries. Audit staffs are also more likely to be technically knowledgeable than are members of a general law-enforcement authority. This means that auditors can perform necessary functions not only by screening complaints, but also by interpreting them for less technically sophisticated criminal justice authorities, both at the time of initial referral and as a continuous resource throughout an inquiry requiring specialized knowledge.

The identification of areas of excessive cost and of inferior management controls also serves to detect and deter corruption in ways in which a criminal justice anti-corruption authority cannot. Penal jurisdiction is normally triggered only by a complaint or observation of conduct, which if proved true would constitute a crime. A criminal justice agency, even if it legally had discretion to do so, could ill afford to devote its resources to examining bid approval procedures for which no specific allegation of criminality had been received. A vigilant audit staff would perform just such an examination, recommend preventive and corrective measures, and also refer any evidence of wrongdoing to the penal authorities. A separate authority, which has not only criminal justice but also anti-corruption audit responsibilities can provide a public image of independence, and can identify, expose and lead to the correction of situations where the vulnerability to corruption is unacceptably high.

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mechanisms, such as its Ombudsman, with an Integrity Commission, for the purpose of receiving and monitoring financial declarations from public officials. In the Philippines, the Office of the Ombudsman has laid the ground for a comprehensive and long-range corruption prevention programme. In its prevention efforts, the Office of the Ombudsman has sought to enlist the support of the public at large through the creation of Community-based Corruption Prevention Units and Citizen Committees on Good Government. The corruption prevention programme is geared towards building values and trust in public service, inter alia, through research and special studies

## **E. Disclosure statutes**

An invaluable measure to obtain indicia of corrupt practices are disclosure statutes. Even though it is not realistic to expect that any law requiring the reporting of illegal acts by public officials will result in voluntary confessions, laws or regulations requiring comprehensive disclosure of a person's financial assets as well as a periodic review can be extremely helpful for the detection of corruption. Their value is twofold. They function as an early-warning device, an indicator that a person whose financial picture and lifestyle are inconsistent with the salary of a public official should be required to explain the situation, or should be watched carefully. A second useful function is as a separate vehicle of prosecution, when the underlying corruption that generated the illegal income or assets may not be provable. Each country could impose disclosure requirements appropriate to the practices of beneficial ownership and societal group interests that are of particular concern in the context of its legal and social traditions.

To be effective, sanctions against non-disclosure or false reporting must be approximately as severe as those against the underlying corruption<sup>42</sup>. Purely civil sanctions, or those that treat reporting violations as infractions or minor offences, are frequently ineffectual because they can be exploited as the lesser of two evils. An official who has enriched himself unjustly will be motivated to conceal the criminal proceeds in any reporting document because the consequences of non-disclosure would be significantly less painful than those of disclosure, involving discovery of the illegal payment and the resulting greater criminal sanction for that offence. Lesser penalties for failure to report allow a similar option. A failure to report, however, will be noticed fairly promptly if the disclosure is required to be periodic, instead of being triggered by an event that can be known only to the corrupt individuals.

## **F. Means of countering intimidation<sup>43</sup>**

Sometimes physical threats may be made, the severity of which depends upon the personalities involved, how accustomed they are to the use of violence, the scope and profitability of the suspected corruption, and the probability of sanctions. When the threat of violence is severe, both witnesses and criminal justice system personnel may need protection.

A programme may be necessary that would allow witnesses to be protected. The investigating authorities and their families may need to be housed in secure locations. A pool of prosecutors and investigating magistrates may be developed, as in the "Palermo anti-Mafia pool", to diffuse responsibility and to prevent one person from becoming the sole institutional memory and solitary target. Court members should be

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<sup>42</sup> With respect to relevant recent international principles addressing this issue, *see e.g.*, Principle 5, point 2 of the Global Forum on Fighting Corruption's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). For a more detailed analysis of this instrument, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption)."

<sup>43</sup> For recent international provisions relevant on this issue, *see* United Nations *Convention Against Transnational Organized Crime* (2000), Articles 23 (requiring Parties to provide criminal penalties for obstruction of justice) and 24 (requiring Parties to take measures to protect witnesses); the Council of Europe *Criminal Law Convention on Corruption* (1998), Article 22 (Protection of collaborators of justice and witnesses); the Organization of American States's *Inter-American Convention Against Corruption* (1996), Article III (preventative measures); Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 15); and Principles 2, 5 of the Global Forum's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption)."

chosen for their invulnerability to intimidation and corruption. Diplomatic or academic assignments abroad may and are being used as a combination of reward and cooling-off period after a particularly sensitive and dangerous investigation.

Other threats may be more subtle. For example, suggestions of a diminution of career opportunities or of unfortunate budget cuts for the investigating unit may be implied. Methods must be found to prevent these subtler forms of intimidation. In particular the independence of the authorities responsible for the prosecution of corruption cases is essential. Where anti-corruption inquiries are carried out by an investigating magistrate, judicial independence can help to insulate the magistrate from unwanted contacts and undesirable pressures<sup>44</sup>. Where the anti-corruption authority is a police or prosecuting body, ways must be found to ensure independence from improper influences within the executive branch of government<sup>45</sup>. In special cases, the legislature may create an independent anti-corruption body.

### **G. Defining tasks**

When an investigating authority has to deal with a case of suspected corruption, certain fundamental management questions need to be resolved. For this purpose clear and comprehensive terms of reference (TOR) should be developed. They should contain a comprehensive list of all the resources needed (human, financial, equipment) to conduct the investigations, a clear definition of the scope and a timetable. Particular consideration should be given to the possible need of additional resources to maintain the secrecy of the investigation.

In addition the TOR should contain a clear description of the facts giving rise to the investigation, all decisions rendered during the investigation with their justifications and reasons for the involvement / non-involvement of senior management of the institution for which the suspect works.

The selection of an effective team will be crucial to the success of an investigation. Its members should possess the specific investigative skills needed, should have proven integrity and high ethical standards and be willing to undertake the work. Their backgrounds should be thoroughly checked, including their social and family ties and lifestyle.

Rather than following only one investigative path, it may be advisable to pursue reasonable leads that might prove useful. It is not unusual that seemingly insignificant information becomes vital in proving criminal activity. This also applies to statements and documents. They should be carefully analyzed and cross-referenced using the names, places and all other information that can help to provide information and may serve to confirm the validity of evidence gathered.

One of the most successful ways to produce evidence against corrupt public officials is to conduct financial investigations to prove that they spend or possess assets beyond the means of their income. This will help to produce a preponderance of evidence of corruption, and can identify those illegal assets that might later be

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<sup>44</sup> See the Basic Principles on the Independence of the Judiciary in Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2.

<sup>45</sup> See the Code of Conduct for Law Enforcement Officials contained in the annex to General Assembly resolution 34/169 of 17 December 1979. See also the guidelines on the role of prosecutors contained in the annex to resolution 26 of the Eighth Congress (Eighth United Nations Congress..., pp. 188-194).

confiscated. However, suspects are unlikely to place the bounty from a bribe into their daily bank accounts and instead may transform the proceeds into other forms of property. Therefore, financial investigations should also concentrate on the lifestyles, expenditures and property of the suspected persons. In this respect, it might be helpful to look not only at what has actually been spent, but also to compare the amounts of money deposited into the bank accounts of suspects with deposits from previous years. Efforts should also be focused on identifying whether the suspected corrupt person maintains foreign accounts. The existence of such an account can be suspicious alone and indicate that funds are being hidden. In order to be effective, financial investigations should be extended to the suspected persons' family members and those living in the same household: experience shows that they are often used as conduits for corruption proceeds.

During the period of investigation, a decision might be made to suspend suspects from their official duties. In particular, if they are involved in making important decisions and a subsequent conviction may negatively influence the validity of their decisions, actual or perceived, it may become necessary to remove them from any approval processes. When the suspect is employed by an institution of the criminal justice system, measures should be taken to prevent him from "networking" after any suspension. Colleagues of the suspected persons should be given strong warnings about relating information to the suspended colleague who should be authorized to contact only one specific supervisor within their organization.

A comprehensive witness interviewing strategy should be designed. It should include measures to overcome obstructive lawyers, witness protection, ensuring the credibility of the witness and to avoid suspected illegal managing of witnesses. Witnesses often have a criminal background themselves and therefore might not be very credible. It is essential that witnesses admit their involvement in prior criminal acts, particularly if they are involved in the acts of corruption for which the suspects are being investigated. Nothing is more damaging to a prosecutor's case than for an important witness to be unexpectedly exposed to the jury as a criminal. The personal background of the criminal witness must be offered to the jury as soon as possible in the proceedings. Also, witnesses must be protected against threats. The most cost-effective means to do this is to protect the identity of witnesses for as long as possible. The best way to avoid allegations of illegal managing of witness by the investigating team is to electronically record all interviews.

During investigations and court proceedings, a clear media strategy should be elaborated that assigns one person to interface with and report to the media. All other personnel and investigators involved should be made aware of the potential damage that may be caused to the successful outcome of the investigation and prosecution if they make comments to the media. This also applies to the witnesses. In the case where a public official is accused, the senior managers of the institution in which the accused works should be informed of the risks of commenting to the media.

Cases of grand corruption often include international aspects. For example, the bribe giver may be a foreign investor, the slush fund might be located in a country other than that where the bribe is paid, or the bribe might be transferred directly into a recipient's foreign bank account. Investigators and prosecutors should therefore be trained on mutual legal assistance and exchange of information procedures at the international level.

There should be no obligation to inform the suspect about the investigation during its early stage. When a suspect has knowledge of an investigation prior to the time the police can secure sufficient evidence, the suspect might destroy evidence and warn other targeted persons to do the same.

Strong investigative powers are fundamental for successful investigation. In particular, the ability to order searches and seizures without court authorization, ability to remove banking secrecy during investigations and the ability to request preventive detention and telephone interception have proved extremely helpful.

The possibility of making recourse to plea bargaining and summary proceedings has been extremely helpful in increasing efficiency during what are normally long and complex proceedings. Plea bargaining has also been successfully used to help identify other criminal activity as reported by suspects wishing to reduce the severity of a potential conviction.

#### **H. Case selection strategies**

Some type of case selection criteria will be necessary to effectively allocate resources. Where resources are limited, prioritizing cannot be avoided. It must be noted that case selection criteria must be uniform and consistent. Any less rigorous method can raise suspicions of improper motives, if not corruption itself. Ignoring seemingly minor allegations will deter future complainants from reporting perhaps even more significant matters. Moreover, what may appear as minor quite often develops into a serious matter when investigated. Guidelines should be developed giving the investigative agency clear indications on how to manage the workload.

Before devoting efforts in any investigation, it is important to evaluate the most cost-effective means of deploying staff and focusing investigative energies. Probably the least defensible approach is a response to stimulus without any governing standards or master plan. Such responses allow investigative resources to be applied in an uncontrolled fashion to what seems like the most vulnerable or newsworthy target of the moment. This approach, risks the absorption of substantial resources in cases that are simple to solve or interesting to investigate, but have little programmatic impact.

A more defensible and efficient strategy based upon reaction to externally presented referrals and complaints would involve some form of priority-setting according to conscious criteria laid down in advance and consistently applied. For obvious reasons, inquiries and complaints from the legislative branch or arising out of sensational mass media exposés may be accorded immediate attention rather than inquiries not yet in the public domain. Some inquiries can be declined immediately or with minimal action if the offender cannot be identified without disproportionate expenditure of resources. Others may demand immediate action while the offence is still being committed or before crucial evidence is lost.

Also wrongdoing that is on the borderline between administrative and criminal misconduct can be subject to guidelines. If national law permits providing for exclusively administrative handling or summary referral by a criminal justice authority to administrative authorities, if the offence is minor and the sanction is adequate the speedy passing on of the case to the respective authorities should be possible. Establishing and enforcing such guidelines can at least permit the allocation of resources in a consistent and accountable pattern, which can then be adjusted by a process of programme evaluation to meet changing goals or priorities.

Both the above targeting approaches are reactions to external stimuli. Such reactive strategies have the advantage of being non-controversial. The investigating authority is less likely to be accused of partisanship and to be the target of institutional hostility from an entity under investigation, when it is apparent that the inquiry was dictated by a complaint or outside pressure and was not the product of the authority's improperly motivated desire to impair organizational or personal reputations. Nevertheless, purely reactive strategies are subject to criticism because of the inherently covert and consensual nature of most corruption. Exposure and prosecution of only the most blatant and unsophisticated offences may simply perpetuate the status quo, placating public opinion without really exposing or threatening large-scale corruption. Reactive strategies provide no mechanism for exposing the far more costly effects of sophisticated corruption, inviting the cynical conclusion that the system protects the corrupt but powerful official by sacrificing the clumsy petty thief. These anti-egalitarian consequences of reactive strategies and their obvious inability to reach corrupt practices that are well hidden or difficult to comprehend provide the impetus for developing alternative strategies for target selection.

As an alternative, the selection strategy may be based at least partially on intelligence. A relatively small percentage of investigative resources should be used to collect, analyze and generate criminal intelligence to identify possible targets for investigation. Most of the resources are then applied to the development of cases targeted as a result of this intelligence-gathering and evaluation process. The law-enforcement authorities may gather intelligence on the connections of public officials to known criminal elements or may ask that travel and immigration records be provided so that they can select for investigation frequent travelers to particular destinations. Of course, any targeting of individuals can be controversial because of the danger of damage to individual reputations and the possibility of abuse. An approach that somewhat reduces those dangers is the risk assessment of a unit or programme rather than of individuals.

Also ongoing investigations should be used to collect and analyze intelligence. During the course of investigation, fragments of information, or intelligence, is collected. This intelligence must be analyzed in order for the investigator to piece together fragments of information to have a clear picture of the relationships and events that taken together can constitute proof of criminal activity. Intelligence gathering and analysis is therefore critical in uncovering corruption. In addition, a constant analysis of the results will help to redirect and adjust efforts and will serve to help allocate resources efficiently.

One method which has proven to be highly effective in the context of intelligence gathering is financial monitoring. Pro-active monitoring aimed at defining indicators of corruption, such as living beyond ones means, may help in identifying targets for investigations. Another method to define the target for financial monitoring is to examine the outcome of past corruption cases. If the results of a corruption investigation suggest that corruption and bribery in a certain public service is widespread, it is advisable to concentrate on the systematic checking of the assets of all possible bribe takers. However, this exercise may not yield enough information to warrant further investigation.

## I. Integrity-testing

A far more controversial targeting strategy is one that employs decoys and integrity-testing tactics<sup>46</sup> The criticisms of these devices are substantial. They arguably express an intolerably cynical view of how law enforcement should operate. A decoy may be seen as manufacturing simulated crime when no real crime is otherwise provable. And it could also be argued that the weakness of human nature may permit law enforcement to target, trap and destroy almost any opponent, political, personal or ideological, that it chooses.

As a response to these criticisms, the analytical observation may be made that hidden corruption can continue indefinitely until exposed, and that no other technique has the capability to penetrate the secrecy of bribery and other abuses of office. The pragmatic argument that accompanies the theoretical analysis is that integrity testing, has proved effective and has on occasion revealed depths, and heights, of corruption never previously exposed. It is one of the most effective tools for cleaning up vital government services in an extremely short time. In particular, in conditions of rampant corruption and low trust levels, it is one of the few tools that promise immediate results and are able to restore trust in public administration. Most of the legal systems that provide for “agent provocateur” scenarios, ensure that they are not be designed to instigate criminal conduct and make criminals out of people who might otherwise have been honest citizens. It is therefore important to ensure that the degree of temptation is not extreme, etc. If the scenarios are not reasonably handled, they can make honest people appear to be criminals, and many criminal law systems exclude evidence of an agent provocateur when the provocation is considered to be excessive.

Although this activity might initially require considerable preparation and resources, it can produce rapid results that serve as an excellent deterrent. Close monitoring and strict guidelines are essential to avoid the danger of entrapping a target. Any decision to use integrity testing must have a sound and defensible basis. The test itself must be fair to the target so that can be defended in court as reasonable. Integrity testing should be electronically recorded in the interest of fairness to the target and for accurate evaluation of criminal responsibility by judge and jury. Conviction’s resulting from integrity testing must be based clearly on the necessary criminal intent, on the part of the accused. The government must not engage in convincing anyone to commit a crime they are not predisposed to commit. More than in any other area of policing, the public must be protected from false accusations or behavior tending to entrap an individual into committing an offence he or she would not have otherwise committed but for the encouragement of the police.

Integrity testing is an instrument that enhances both the prevention and prosecution of corruption. Integrity testing can help to determine whether or not a public civil servant would engage in corrupt practices. It can be used in order to ‘clean up’ the public service from (possibly) corrupt civil servants, can increase the actual and perceived risk for corrupt officials of being detected and can increase the number of reports of “real” corruption cases.

Integrity Testing can also be used as a “targeted test” to confirm an existing suspicion which is usually based on one or more allegations from members of the public,

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<sup>46</sup> Examples may include members of a police integrity unit dressed in civilian clothes, driving rented cars in an apparently drunken manner to ascertain if police officers will stop them and solicit a bribe in lieu of an intoxication test, or the willingness of an investigator posing as a foreign investor to pay bribes to legislators to secure favourable treatment for a proposed investment

criminals or even other officers. It can also be used as a “random test” to determine more generally the likelihood of a public official to engage in corrupt practices.

In order to be fair, the public servants must normally know that they might be subjected to an integrity test. This gives them a fair chance to refuse the bribe and report the incident. It also avoids any disadvantage for those who undergo the test at an early stage (i.e. when the “news” about integrity testing has not yet spread), compared to those who might be tested later on, and who are already aware of it through the experiences of their colleagues. However, this does not mean that the public officials have to be informed about the number, types or general targets of the test. Public servants are only more likely to refuse and report cases when they cannot exclude that the bribe offered might be a “set-up”.

Experiences in various police forces where integrity tests have been carried out, such as the London Metropolitan Police, the Police of Queensland, Australia and the New York Police Department, have shown that it is not enough to ‘clean up’ an area of corruption when problems appear. Instead, systems must be developed that ensure that there will be little chance of corruption returning. It is therefore essential to repeat random and targeted tests on a regular basis.

Positive integrity tests can produce various results that differ significantly according to whether random or intelligence led testing is conducted. It might be a good idea to provide incentives for those who successfully pass integrity tests. In the case of positive intelligence led tests, harsh disciplinary consequences and even criminal prosecution should be taken into consideration, while for random tests the responses should perhaps be milder and should focus mainly on educating the subject.

#### **J. Publicity and the news media**

All investigations of corruption should be conducted in a discreet and professionally responsible manner, although what constitutes a discreet and responsible inquiry will vary. It will never include those occasions in which detailed or sensational descriptions appear in the news media of allegations being investigated, based upon anonymous sources that are obviously knowledgeable. Such leaks are sometimes defended as a means of bringing forward additional witnesses and evidence or of exposing and deterring wrongdoing when the corrupt officials may escape criminal prosecution because of the inability to assemble prosecutable evidence. The goal of securing additional evidence may be legitimate, but must be pursued in conformity with the laws of investigative and judicial secrecy. The goal of exposing wrongdoing is only rarely permitted by laws that allow investigative findings not constituting a chargeable offence to be publicly reported, almost always under judicial or legislative supervision. In the absence of such laws and without rigorous compliance with their procedures, the disclosure of information capable of damaging reputations through unofficial channels seems tantamount to an abuse of authority, to an infliction of summary punishment by the investigating authority where no guilt has been proved.

The media play a potentially useful role in enlisting public and ultimately political support for necessary Anti-corruption resources and legislation. They also have a legitimate role, as surrogates for the public, in guaranteeing transparency and accountability in government and particularly in the criminal justice system. Yet they are not an element of law enforcement, and their interests are not congruent with those of responsible investigators, prosecutors and judges. When the laws and procedures of a culture dictate disclosure of investigative action, and the resulting

publicity inhibits criminal conduct or increases the available fund of intelligence and evidence, justice is being served. When an investigation or a suspect is still protected by judicial secrecy, but is disclosed because someone within the investigating authority is impatient with the delays and restrictions imposed by secrecy laws and implements a personal judgment that exposure is warranted, justice is not served. Such situations provoke the understandable suspicion that personal or institutional favour is being sought with the media. Since they may result in illegal damage to reputation, they should be avoided and discouraged by effective administrative or penal sanctions.

During investigations and court proceedings, a clear media strategy should be elaborated that assigns one person to interface with and report to the media. All other personnel and investigators involved should be made aware of the potential damage that may be caused to the successful outcome of the investigation and prosecution if they make comments to the media. This also applies to the witnesses. In the case where a public official is accused, the senior managers of the institution in which the accused works should be informed of the risks of commenting to the media.

#### **K. Dealing with the subject of investigation**

From the investigative point of view, a dominant consideration is that disclosure of law-enforcement interest should be avoided while there is any possibility of productive covert action. The investigating authority should control the extent and timing of any disclosure. Even when investigative action becomes overt, secrecy is advantageous because it minimizes the likelihood of destruction of evidence and intimidation of witnesses. Given the risks involved, it may be difficult to understand why an investigatory authority should notify those responsible for a suspect organization or activity of the existence of an inquiry.

Given the advantages of secrecy, it is, however, a great temptation for an anti-corruption authority to adopt a garrison mentality, assuming that integrity exists only within its ranks and that anyone affiliated with a unit or activity under inquiry must be viewed as under suspicion. Consequently there might be great reluctance to inform the supervisors of the person being investigated, even if they are not under suspicion. Such notification may, however, be useful. The supervisor may be in a position to provide further information. Also, timely notification will avoid that the supervisors themselves will feel unjustly suspected and therefore be reluctant to assist law enforcement when it should become necessary at a later stage. The suspects may be removed from positions where they can obstruct the investigation and assigned to temporary duty elsewhere. The programme agency can be relied upon to assemble and screen documents or other evidence, even though the criminal investigators make the final examination. Moreover, honest persons with pertinent knowledge or evidence may be found in almost any organization, no matter how corrupt, and it is poor practice to denigrate the institution and provoke a hostile and defensive reaction by even its honest employees, who may already be facing substantial disincentives to candid cooperation.

Additional reasons for notification may derive from bureaucratic self-defence, even during the covert stage of the investigation. If a covert operation has a substantial risk of being disclosed in an embarrassing manner, if the motives of the investigating authority can be made to appear suspect, or simply if the investigation will be controversial, the investigating authority must consider notifying the person

responsible for the target agency. Indeed, an anti-corruption authority that acts without regard for such considerations may ultimately find itself at odds with political authorities that see it as an unrestrained and irresponsible destroyer of organizational or personal reputations. Moreover, consultation can help to preclude later criticism that the investigation was ill-founded, incompetently planned, or would have been successful if only more consultation and cooperation had been sought. Finally, there is a legitimate public interest in ensuring that corruption is not permitted to continue any longer or anymore extensively than is necessary to permit the development of a sound prosecution. Indeed in some situations, (for example, corrupt tolerance of the disposal of hazardous wastes, of transport safety violations, of drug importation and distribution), immediate termination of the practice, whether accomplished administratively or by criminal justice measures, may be as important as any ultimate conviction.

Clearly, personal acquaintance, a good reputation for discretion or comparable guarantees of reliability are necessary before such a confidence can be imposed. Once overt investigation commences, the notification becomes less a matter of reposing a confidence than an essential bureaucratic courtesy. It is a self-serving means for the inquiring authority to discharge its function and simplify its task. The notification should detail how non-disclosure of investigative direction and findings is compelled by judicial secrecy and the need to protect members of the recipient organization from any suspicion regarding the transmission of investigative information to the subjects of the investigation. It may convey little real factual data, other than what cooperation the investigating authority requires to assist it in its functions. It has the advantage, however, of aligning the programme agency leadership with the anti-corruption authority and permitting it to preserve its authority and self-respect vis-à-vis the public and within the agency.

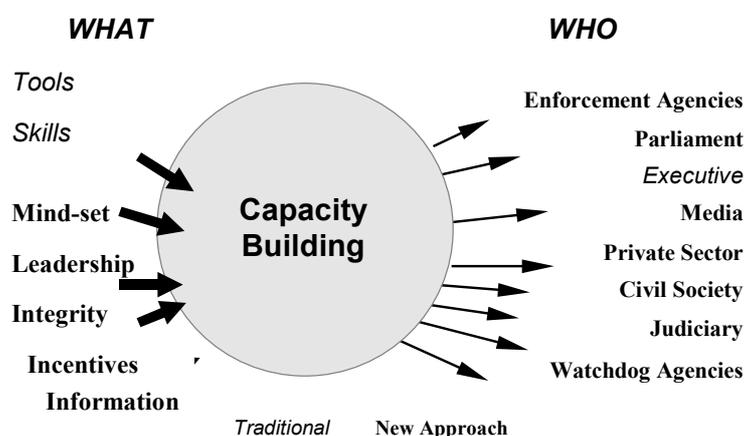
#### **L. Witnesses**

In many case those allegedly corrupt may possess significant power. Those who could provide evidence of their corrupt practices, may be reluctant to do so because of fear of being victimized. Often the fear of reprisal is likely to be a serious deterrent. It is therefore necessary to consider ways and means to protect witnesses from any form of harm or reprisal. Witness protection programmes may in some cases be extended to the witnesses of corruption cases, if there is the realistic fear that the witness will become the target of acts of intimidation or revenge. In particular the identity of the witness should be protected as long as possible. Also informing the administrative entity concerned by the allegation should be considered with care. Even though there may be a natural interest of safeguarding the integrity of the administrative entity concerned and to afford it the opportunity to take action and eliminate wrongdoing and to screen complaints, thus reducing the workload and cost of investigative and enforcement agencies, in some cases giving out this information may lead to the identification of the witness and consequently to reprisals.

## VI. INSTITUTION BUILDING – Strengthening the institutional anti-corruption framework

### A. Introduction

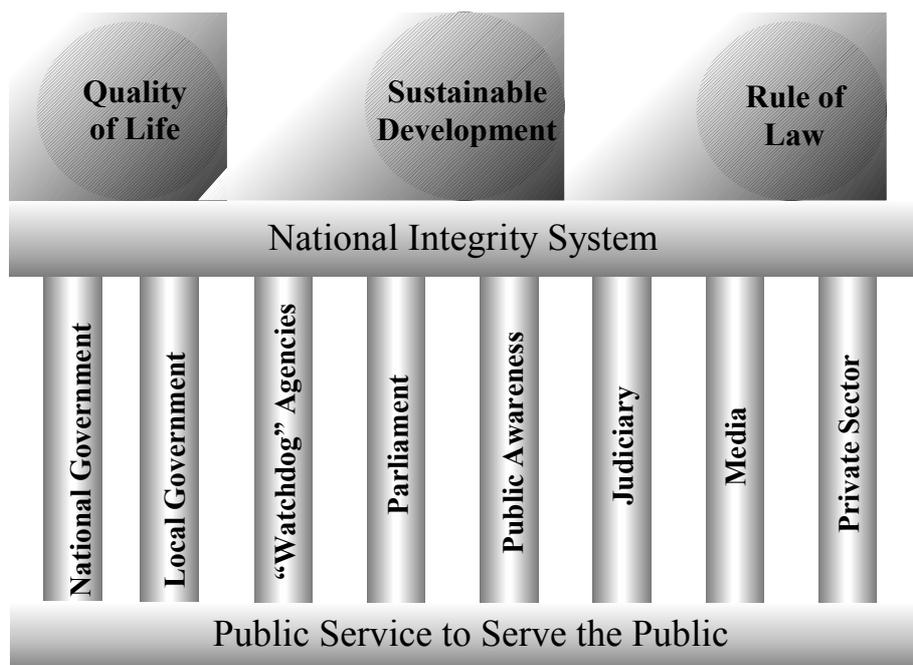
Institution building has traditionally focused on expanding government facilities and skills. Typically, such projects financed infrastructure, equipment and technical skills training. These activities are important, but without a leadership confident in introducing accountability, transparency and a focus on objectives and results, the sustainable effect of these initiatives is questionable. The new approach emphasizes the importance of leadership and of an “integrity mind-set”. Mind set refers to the outlook that civil servants bring to their jobs. Donors work as facilitators with clients to establish standards and ground rules for leaders in the public service through the introduction of leadership codes, codes of conduct, and declarations and monitoring of assets. Integrity is critical when appointments of key executive or civil service positions are made and is equally important among politicians.



**Figure 1:** Institution Building — A New Definition

The second change is that the audience for the institution building is broadened to include all parts of society interested in creating and maintaining national integrity. Traditionally, the focus of donor attention has been on the Executive Branch of government, particularly the programs and activities relating to government ministries. However, capacity building focused almost entirely on strengthening the capacity of ministries to deliver public services is insufficient. A more systemic approach to building integrity and sustainable development requires institutional strengthening of other “pillars” that is, domestic stakeholders both inside and outside government. Donors have in some of the more advanced countries been invited in to help initiate awareness raising and skill building efforts with parliaments, law enforcement agencies, judiciaries, public account committees, NGOs and private-sector organisations.

The pillars are the “who” in Figure 2 and are a central part of a new definition of capacity building.



**Figure 3: Pillars of Integrity**<sup>47</sup>

To ensure that there is an enabling environment that is supportive of private and public sector contributions to sustainable development, a National Integrity System needs to be built with mutually supportive pillars<sup>48</sup>. The “pillars of integrity” in a society include actors outside the executive and outside government itself. The collection of stakeholder groups is referred to as “pillars of integrity” because it is incumbent on them to support and uphold practices that promote public integrity. A National Integrity System is based on eight pillars of integrity: (1) executive, (2) parliament, (3) judiciary, (4) watchdog agencies, (5) media, (6) private sector (Chambers of Commerce, etc.), (7) civil society and (8) law enforcement agencies.

The pillars are interdependent, a weakening of one pillar results in an increased load being shifted on the others. Where several pillars weaken, the system can no longer support sustainable development and effectively collapses. Figure 3 illustrates the interaction of the different stakeholders in combating corruption. Examining a National Integrity System requires identifying gaps and opportunities for corruption within each of the pillars and then co-ordinating the work of the government, civil society, and donors into a coherent framework of institutional strengthening.

The reasons for building an integrity system may differ from country to country. In Figure 3, three broad, almost generic, objectives are identified: rule of law, sustainable development, and quality of life. In the fifteen countries that have embraced the reform effort, inadequate rule of law could turn out to be the critical bottleneck for progress. This is particularly the case in much of Latin America and Africa where it is estimated that many countries need ten to fifteen years of intensive work before effective rule of law can be established.

<sup>47</sup> The integrity pillars were first presented by TI’s Ibriahim Seushi in Tanzania and later adapted by Jeremy Pope and Petter Langseth in building the framework for a National Integrity System in Tanzania.

<sup>48</sup> Petter, Langseth, Rick Stapenhurst, and Jeremy Pope. (1997). *The Role of a National Integrity System in Fighting Corruption*. Washington, D.C.: EDI Working Papers Series, World Bank.

## B. Organizational structures<sup>49</sup>

Legislation may be required to organize the structures that put anti-corruption measures into effect. In reply to the question whether a specialized anti-corruption unit is necessary or whether the function can be handled within existing organizations, it may be said that for police, prosecutors and investigating magistrates alike, there are both advantages and disadvantages to separate units. Among the disadvantages are rivalries and barriers to communication between a new authority and existing organizations, greater administrative costs, and the possible or perceived diminution in the prestige and morale of the existing law enforcement, investigative and judicial structures. It is also necessary to follow some workable principle with respect to the creation of new entities and to ask, for example, whether an investigative unit is necessary not only for corruption offences, but also for drugs, theft of cultural patrimony, environmental crimes or whatever other phenomenon may receive political and public attention at any particular moment. Among the advantages of a separate unit are specialization, greater security and accountability. The latter may well be the greatest virtue, as it allows the political authority to measure what success is being achieved with given resources, and assigns anti-corruption responsibility to identifiable persons or entities. This ability to measure results is important because of the nature of corruption as a covert activity, which may never be detected, and effectively dealt with, without aggressive law enforcement and investigative efforts.

Sometimes, radical structural changes may be legislatively imposed as a result of scandals that have created a perception of corrupt activity and concealment by the very same authorities charged with exposure and suppression of such wrongdoing. Once public opinion becomes outraged, the only means of satisfying it may be the creation of entities considered to be impervious to the corrupting influences that gave rise to the scandal, and independent of the traditional authorities believed to have been corrupted. A police scandal in Hong Kong in the 1970s led to erosion of public confidence, as a result of which a new entity was created the Independent Commission against Corruption. This Commission is an example of a single-purpose anti-corruption entity independent of any other authority save judicial review and necessary budgetary support. An independent counsel mechanism has existed in the United States of America since shortly after the Watergate political scandal of 1972-1974, in which high-ranking public officials were implicated. In any case involving certain legislatively enumerated positions of the executive branch and of the presidential election campaign, it is required that the Attorney General notify a special court, which then appoints a special prosecutor to investigate the matter and to prosecute if necessary. This independent counsel must be chosen from outside the Government, and operates without supervision by the Attorney General, but may call upon an unlimited budget and any desired resources of the Government, including the investigative agencies normally under the control of the Attorney General.

These entities are rather rare creatures, anti-corruption elements created to be independent of the existing power structure and enjoying operational autonomy, even

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<sup>49</sup> With respect to recent relevant international initiatives addressing this issue, *see e.g.*, the United Nations *Convention Against Transnational Organized Crime* (2000), Article 9 (requiring Parties to provide anti-corruption authorities with adequate independence to deter inappropriate influence on their actions); the Council of Europe *Criminal Law Convention on Corruption* (1998), Article 20 (establishing specialised anti-corruption authorities); the Organization of American States's *Inter-American Convention Against Corruption* (1996), Article III (preventative measures); the Global Forum on Fighting Corruption's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999)

to the extent of determining their own budget. They do entail substantial costs, both financially and in loss of prestige by existing law enforcement units, and can be controversial. Such extreme measures may be necessary to preserve public confidence that even the highest levels of government can be held accountable. Whether or not a society needs an independent authority capable of action against its leading political authorities outside regular channels seems to be a question answerable only within the context of the Government's level of, and vulnerability to, corruption, the degree of law-enforcement professionalism, the independence and impartiality of the judiciary and responsiveness to public opinion.

### **C. Exclusivity of anti-corruption jurisdiction**

Regardless of whether anti-corruption responsibility is assigned to an independent agency or remains with a branch or division of an existing structure, exclusivity of jurisdiction needs to be considered. When certain resources are dedicated exclusively to corruption matters, it is tempting as a matter of managerial clarity, to give the entity that operates those assets a monopoly over all corruption investigations. In addition, endemic delays in the administration of justice due to overloaded dockets of courts argue in favour of exclusive anti-corruption jurisdiction, even at the judicial level. The demonstrated susceptibility of human nature to the corrupting influence of power and to the temptations and wrongful opportunities that come with authority argues, however, against the orderly logic of exclusive competence. The Latin maxim *of quis custodiet custodes ipsos?* is a reminder that one must question who will guard the guards themselves. A little redundancy and even competition can be a healthy antidote to corruption, because no single person or entity has the power to license illegal activities. An obligation of other entities to report all corruption investigations to the primary anti-corruption authority seems appropriate, the only real question being the timing of such an obligation. The legislative and managerial challenge in this area is to allow just enough redundancy, and even rivalry, to expose corruption if the primary anti-corruption authority fails to do so, but not to permit so much duplication that the flow of intelligence, or of investigative and prosecutive opportunities, available to the primary authority is disproportionately reduced.

### **D. Anti-Corruption Agencies<sup>50</sup>**

The Anti-Corruption Agency (ACA) is an independent institution with the mandate to detect, investigate, monitor, prosecute and prevent corruption, and to educate the public about the negative effects of corruption and its role in fighting it. It is normally established where: (1) corruption is systemic and the traditionally responsible governmental institutions are corrupt, or perceived as being so, and do not enjoy the necessary trust of the public to engage in a credible effort to fight corruption; and (2) a comprehensive, integrated approach including prevention, enforcement, monitoring and education is needed.

ACAs are usually created when corruption is so pervasive and the law enforcement agencies so corrupt that offences of bribery are no longer investigated or prosecuted. If the traditional criminal justice system is able to handle the problem of corruption, the creation of such an ACA is not advisable. Doing so may induce a perception of mistrust in existing institutions and therefore produce a demoralizing effect that may cause far more damage to the government's overall anti-corruption strategy than the

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<sup>50</sup> UN's Global Programme against Corruption (2001), Anti Corruption Tool-Kit, web page [http](http://www.unodc.org)

good done by the ACA. In order to avoid unnecessarily discrediting the other governmental bodies, in particular the police and the office of the public prosecutor, the appropriateness of an ACA should be evaluated carefully. If that is not the case, resources might be better employed by enhancing the creation of specialized units within the existing law enforcement agencies. To this purpose it is helpful to conduct an assessment of the levels, causes, locations and remedies of corruption. This will not only give an answer to the question of whether traditional law enforcement is too corrupt to enforce the anti-corruption laws, but will also help to define and prioritize the work program of the new agency.

The agency should be created by law. The law must provide both for its independence and the methods by which it is to be accountable to the community. It is important that the agency is politically and financially independent. It should not depend on the executive for either strategic decisions or for human and financial resource related issues. The law should include: (1) *An investigative and prosecuting function*. Especially when the country is emerging from a situation of systemic corruption, the ACA will be the only body willing to start to investigate and prosecute high-level government officials. Successful criminal action against them will obviously not solve the problem of corruption. However, if no action is taken against the main culprits, the entire government anti-corruption campaign will suffer from the general cynicism created by inaction, (2) *An educational and awareness raising function*. The public needs to be educated about the negative effects of corruption and what they can do against it. Any ACA that does not enjoy the support of the public is unlikely to succeed. It is therefore critical for any ACA to regularly monitor the trust level between the public and the their agency, (3) *A preventive function*. A close nexus must be found between investigation and institutional reform. Wherever systemic corruption is detected, the organizational causes must be analyzed and the necessary improvements made and (4) *A legislative function*. The ACA must also be empowered to submit legislative proposals to the parliament.

Effective performance must be measured in terms of impact and cost. Thus “cases prosecuted” may be a success indicator of the workload of the prosecution department, but where it results in an inconsequential number of convictions, the indicator takes on a very different significance. Case backlog and continuing case management are essential pre-conditions for such an evaluation. For the awareness raising, it is essential to measure the interface with the public and to conduct regular surveys on issues such as the extent of public knowledge of, and trust in, the ACA: how many people know its mandate, how many people view it as being successful, how many people would give their name as a complainant or informant, etc.

In order for the ACA to be effective, certain obstacles must be overcome. Some of the important ones include weak political will, political interference and skepticism regarding the benefits of anti-corruption initiatives. Even if the determination to tackle corruption is initially strong (usually upon the accession of a new government to power), it often diminishes as the realities of office, the vested interests in the status quo and the pressure of more immediate tasks bear on the actions of government. It is therefore highly advisable from the outset to create an institution that is as politically independent as possible. Interference in the administration of the ACA should be minimal, while the necessary accountability should be ensured. Inadequate laws also present a significant obstacle. Often the laws against corruption are ineffective because they: (i) are either too complicated and unintelligible, (ii) fail to contain some basic offences, (iii) do not fit in well with existing laws either because they contain

duplications or because they are incomplete, or (iv) require evidence which is not sufficient taking into account that corruption is a secretive act and therefore evidence is particularly hard to gather. Another potential impediment may result from the past. This is especially problematic in countries that have suffered widespread, systemic corruption for many years. If the government announces a new initiative to launch an ACA to address the problem, public expectation is raised. Without clear provisions concerning past corruption, the new agency may be swamped by information from the public, much of it going back years, that it is unable to handle properly. Due to lack of qualified staff, time and resources, current corruption may be dealt with inadequately.

## **E. Judicial Sector**

Corruption within the judicial sector ranks can create a pernicious multiplier corruption effect on the rest of the public sector. One could consider judicial corruption as a “corruption of corruptions” in which those who’re responsible to interpret and enforce the rules to counteract corrupt practices are themselves corrupt.

The ability of the police, prosecutors’ office, and judicial branch to enhance integrity within its own ranks depends on best practice reforms that have already rendered positive results in other contexts. These reforms include:

### *1. Championing Multi-party Politics:*

The latest findings show that the best safeguard of judicial independence is party competition. Where there are real risks for a politician of losing office, with at the same time an expectation of running again and winning in future periods, legislators will try to ensure that there are impartial fora for resolving differences with those in power and for deciding election petitions. It is therefore rational for single-party dominated political systems to accord courts less independence because of the governing party expectation it will continue to win elections, whereas competitive party systems favor greater judicial independence in order to preserve a party’s legislative gains while in office once it is out of power.

There are four traditional ways of assessing judicial independence. One, called the “legalist” approach assesses the judiciary’s degree of insulation from partisan political pressures is afforded by the legal (sometimes constitutional) provisions of appointment, security of tenure, and remuneration. A second approach known as “behavioralist” analyzes judicial decision making per se. That is, whether courts interpret and apply the laws in ways hostile to or in disregard of the wishes of those with political power and influence; a third approach is a “culturalist approach” whereby judges themselves estimate their own perception of independence; and a final method focuses on the career path patterns dealing with the determinants of appointments and promotions in judicial careers. Yet, accountability mechanisms need to be in balance with judicial independence if countries are to avoid abuses of power within their judicial ranks. In this area, the judicial councils and civil society control mechanisms (explained below) play a key role. In this context, high degrees of judicial independence shows a remarkable association to the low occurrence and low perception of corrupt practices.<sup>51</sup>

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<sup>51</sup> Edgardo Buscaglia (1999), “Judicial Corruption in Developing Countries: Its Causes and Economic Consequences” Essays in Public Policy. Hoover Institution. Stanford University.

Of course, the judiciary has a very limited role in ensuring political competition to begin with. Yet, an institutional environment within which the judicial sector achieves a balance between accountability and independence have proven to render the best results in fighting corrupt practices elsewhere in the public sector.<sup>52</sup>

## *2. Organizational and Administrative Control Issues:*

Clear rules applied to personnel management and budget related issues can make a difference in promoting integrity systems within the judicial ranks. Weak governance in these areas can reduce the level of effectiveness among jurisdictional and administrative personnel, and also create a consequent lack of commitment with the institution as seen in many international surveys.<sup>53</sup> More specifically, decisions on promotions, recruitments, appointment of personnel, and budgeting maybe sometimes arbitrary and not based on institutional service delivery needs. In fact, the perception of a lack of rule-based and merit-based personnel and budget managements can be quite damaging within the courts and prosecutors' offices. Clientelistic practices are also usually rampant in the appointment of police personnel.

The lack of an effective judicial and administrative career coupled with no practice in applying quality control standards in the definition of enforceable performance indicators act as incentives to enhance personal and political relationships above everything and makes lower level judges too dependant on superior and supreme court judges who are usually more politically motivated and subject to clientelistic - related capture.

The enactment of civil service reforms in the police, prosecutors' and judicial areas would address these problems by generating career incentives based on rewards and penalties (predictable promotions and value-enhancing rotations) needed to address the sometimes prevailing opportunistic behavior among court personnel. This requires the introduction of performance indicators in order to determine individual promotions, compensation benefits and salary increases all related to budget planning. This would also serve to avoid high turnovers of judicial personnel coupled with the lack of predictable rotation and performance standards in those remaining, all of which creates an environment that usually fosters the emergence of organized networks where lawyers and court personnel interact to advance corrupt practices in the handling of files (e.g. evidence disappearing in a systematic fashion, delays in notifications and citations, ex-parte communication, disappearance of files, or even the "buying" of rulings.) It is also true that the lack of a case-flow management also add to an environment where these corrupt practices prevail.

Lack of a clear and predictable career path makes many prosecutors and judges think that they will inevitably remain where they are, in low wage positions and often in remote communities. In these cases, they have little incentives to cultivate good reputations.

Administrative discretionality and lack of uniformity in the handling of administrative procedures can sometimes be explained by the high concentration of administrative

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<sup>52</sup> Mark J. Ramseyer (1994), "The Puzzling (In) Dependence of Courts: A Comparative Approach." *Journal of Legal Studies*, 23: 721-747

<sup>53</sup> Edgardo Buscaglia (2001). "An Economic and Jurimetric Analysis of Official Corruption in the Courts: an Objective Governance-Based Approach" *International review of Law and Economics*, Elsevier Science. June

and managerial responsibilities in one or two members of each court or prosecutor's office who are not subject to formal procedural or performance monitoring systems. The lack of administrative transparency is also explained by the absence of uniform accounting and auditing standards within and among the court system.

Courts and prosecutors sometimes also lack best practice organizational and administrative procedural manuals and therefore, ad hoc discretionary procedures prevail among all staff. Moreover, the courts and prosecutors alike sometimes lack adequate organizational structure and an internal control system to monitor group and individual performance based on pre-specified and transparent average standards such as the ones used by the Judicial Councils in Costa Rica and in Singapore. The combination of an absence of performance standards, the absence of enforceable procedural manuals, and the lack of a predictable organizational structure all add to the dilution and segregation of responsibilities, therefore, creating an environment where the lack of user-oriented service and abuse of public office is more likely.

### *3. Substantive law-related aspects of institutional performance*

The study of judicial sector corruption worldwide also shows that the lack of due justification and consistency in the judges' and prosecutors' decision making criteria is considered to be a key element in the propensity to engage in corrupt practices (e.g. case fixing). This is very much related to the lack of systems supplying information on new statutes, doctrines, and jurisprudence. In this context, inconsistencies and contradictions involving legal and constitutional frameworks are common. If judges' and prosecutors make decisions based on laws that have been rescinded or contradicted, this would foster an institutional environment within which there's a propensity towards corrupt practices.

### *4. Procedural Law-related aspects of institutional performance:*

We need to differentiate substantive law related corruption (e.g. case fixing at the prosecutor or at the court) from procedural judicial corruption, that represents the most widespread form of corruption everywhere<sup>54</sup> (e.g. paying court employees to delay or accelerate a case where employees are simply compensated for performing normal services such as delivering a notification, or for taking a deposition within the stage when evidence is gathered). Procedural delays are sometimes used as a strategic tool by lawyers and courts to extract payments from one of the litigants. This usually is more likely to happen in the midst of a lack of effective case control and case-tracking mechanisms that would allow supervision by the prosecutor and judicial management of the procedures for each case type.

The use of quality control methods to monitor and correct deviations from expected procedural times and caseloads have been used in several pilots in Argentina and Ecuador. These techniques also help to identify and address procedural defects.<sup>55</sup>

### *5. Political Interference and Judicial Effectiveness*

The state capture of the court or of the prosecutor's office is common in most countries with high levels of corruption linked to organized crime or to irregular

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<sup>54</sup> Edgardo Buscaglia (1995), "Stark Picture of Justice in Latin America" The Financial Times, London: March 13, p. A5.

<sup>55</sup> Edgardo Buscaglia and Maria Dakolias (1995) "Judicial Reform in Latin America: The Cases of Argentina and Ecuador" Technical Paper Series # 353, The World Bank

partisan practices. Sometimes, this is partly rooted in the power of Congress to select and fire prosecutors' and judges through non-transparent and unpredictable procedures. Political criteria based on regional and party quotas maybe used in the appointment and impeachment of judges and prosecutors. This appointment and impeachment criteria based on mainly political clientelism and patronage networks joined by the lack of an effective judicial career system and unjustified discretionality in the allocations of budget and personnel all combines into a recipe where there's no "wall of fire" between a dependant court system and the political system once a judge is appointed.

The interaction between the prosecutor's office and the judiciary in the fight against corrupt political influences is an area that has been relatively unexplored. The contrast of case studies (e.g. Italy vs. Germany) show that there is an association between low effectiveness in fighting political-administrative corruption and systems where the prosecutors have a monopoly in deciding the course of a criminal action. This low effectiveness in fighting political-administrative corruption can also be linked to a lack of uniform written guidelines or criteria established and strictly enforced by the chief prosecutor in conjunction with the Justice Ministry. In these systems, it is common to find the combination of a lack of regulation in prosecutorial discretion with a lack of written guidelines (establishing criteria, guidleines, standards) monitored by civil society. This is compounded sometimes in cases where there is a lack of coordination with regional district attorneys where each prosecutor can pursue his own agenda. This environment in which prosecutorial action is personalized and uncoordinated is ripe for political capture. There is a another relevant association between low effectiveness in fighting political-administrative corruption and systems where there is no systematic rotation in prosecutors assignments and where politicians are the ones who determine the geographic jurisdiction where they will work.

#### *6. Social Control Mechanisms*

Countries that have improved the institutional effectiveness of their judicila sector (e.g. Costa Rica and Singapore) have also found mechanisms to inject social control of prosecutors and courts. Complaint boards and review boards have made a difference in instilling civil society's concerns in everyday operations when dealing with abuses of judicial or prosecutorial discretion. In general, specialized non-governmental organizations with a track record in monitoring judicial trends have been the ideal candidates to perform these functions from the civil society side. Review boards, dealing with the allocation of personnel and budget resources to service delivery have performed an advisory role.

#### **F. Strengthening Local Governments**

Local governments in developing countries are increasingly governed by elected officials. Greater decentralisation has also opened up opportunities for citizen participation in decision making at the local level. As a result, this "first generation" of democratic leadership is being required to carry out key government functions such as construction and maintenance of basic infrastructure, delivery of basic services, and social services. In this context, access to additional resources for local governments that are compatible with an increased level of responsibility do require institutional safeguards to assure integrity . As this occurs, it is important that best

governance practices are deepened and strengthened through transparent decision-making mechanisms that are open to citizen participation.

Corruption is one of the gravest problems affecting local governments and populations within their jurisdictions. The economic, social, and political costs caused by corruption have a negative impact on service delivery and therefore, on poverty and economic growth. Additionally, corruption negatively affects the government's legitimacy and hampers its capacity to enhance the public interest.

Effective programs aiming at reducing corrupt practices must place emphasis on identifying the most common institutional/governance failures explaining irregularities. Moreover, the necessary elements to reduce corrupt practices at the municipal levels include the design of public information channels to be used by citizens in their daily interaction with government, political leadership, and collective action.

### **G. Social Controls and Anti-Corruption Measures**

The application of participatory channels designed to make social control an everyday operational mechanism is key to the sustainable success of any anticorruption program. Specialized committees composed of well-trained civil society members and government officials must then be formed. The following is a list of examples where committees, composed of civil society and government officials, are designed to cover the policy design, monitoring, and evaluation of:

- Annual Public Audience on Budgetary Affairs
- Public Audience on Public Projects
- Public Audience on Public Projects Directly Run by Civil Society
- Tripartite Commission (composed of reps of Civil Society-Legislative Council-and Mayor aimed at Monitoring Government Affairs from within)
- Long Term Social Investment Boards (composed of reps of Civil and Mayor)
- Complaint Boards<sup>56</sup>
- Public Information Office
- Community Service Delivery Monitoring Committee

The idea is to incorporate best practices (that have given positive results already in many contexts) into municipal public anti-corruption policies through these civil society operational committees acting as watchdog bodies from within the government itself. One can expect lower levels of corruption and improved service delivery sustained through best practice technical solutions combined with the accountability generated by effective social controls. This would demonstrate the advantages of combining political will, technical capacity to execute reforms, and a partnership with civil society. All combined produces enhanced efficiency, equity, and transparency.

As stated above, the Local Integrity Steering Committee is the watchdog and mechanism to launch, implement and monitor a country's municipal integrity strategy. Its mandate typically consists of:

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<sup>56</sup> Refer to Edgardo Buscaglia "Access to Justice and Poverty: An Empirical Design and Evaluation of Performance Indicators for Policy Reform" Paper Presented at the World Bank Conference on Judicial Reform. St. Petersburg, Russia. July 2001

- the broad-based development of an integrated municipal integrity strategy;
- monitoring of its implementation;
- translating the anti-corruption policies of the municipal and national integrity strategy and action plans into legislation;
- ensuring broad-based support of the national and municipal integrity strategies by the general public; and
- guaranteeing momentum for the implementation of the municipal integrity strategy and the anti-corruption action plan.

The key challenge to staffing the Committee or Anti-Corruption Agency is to appoint local citizens/opinion makers known and respected for their integrity. The Committee consists of representatives from the mayor's office, from the municipal council, municipal civil servants in key departments, such as budget, revenue collection, and public services departments. From outside government, leaders from municipal districts, business groups, agricultural credit unions, farmers' associations, unions, religious groups, media, and special interest groups all must be included.

The task of this strategic steering local committee is to prepare the municipal integrity and action planning meetings. It must also identify priority areas, plan the implementation strategy for the municipal integrity strategy and the municipal integrity action plan by balancing short, medium, and long-term reform goals, and design mechanisms for raising public awareness and encouraging broad-based local citizen participation. Of course, the Municipal Integrity Steering Committee (and the Commission Boards explained below) must be also formalized by law or municipal decree. This law must clearly establish the composition, functions, and jurisdiction.

In addition to the strategic steering committees, operational boards must also be formed with the purpose of undertaking the every day operational watchdog roles mandated by the Strategic Committee. These boards must cover several areas involving:

- i- a commission in charge of gathering and determining the public preferences for the next period's spending coupled with the monitoring of the execution of budget-related affairs;
- ii- a civil society commission social investment projects implemented by the local government,
- iii- a civil society commission in charge of channelling of the public funds directly managed by the community in the process of constructing public infrastructure,
- iv- a tripartite commission (composed of representatives of the mayor, the council, and civil society) all in charge of the daily monitoring of administrative affairs within the "black box" of local government. At the same time, this Commission must be in charge of designing a an internet data base available to the public to monitor the procurement practices, contracts, and public finances.
- v- A local management civil commission in charge of receiving the public's requests reflecting the priorities for spending in the medium to long term;

- vi- public “accountability” audiences where the mayor is held accountable for her management and execution of the budget on an annual basis. This audience would be based on a results oriented criteria;
- vii- Complaint civil boards in charge of channelling the requests made by citizens to the local government;
- viii- A civil commission in charge of advising the local government on how to simplify procedures faced by citizens

## VII. AWARENESS RAISING AND PUBLIC PARTICIPATION

### A. Introduction

The purpose of this measure is to increase the checks and balances by empowering the civil society to oversee the state including the executive, legislative and the judiciary. The desired impact of an awareness raising programme includes broad public dissemination of the negative impacts of corruption and the expected behaviour on the part of government collectively and its officials individually. Such awareness and public involvement on government matters should lead to greater accountability of public service providers (officials) in the delivery of government services.

Among the few existing success stories, Hong Kong has taught us that it takes time and considerable effort to curb corruption in a systemic corrupt environment. Having fought corruption for the past 25 years, Hong Kong's Independent Anti-Corruption Commission (ICAC) continues to allocate substantial financial and human resources in its efforts build integrity to prevent corruption, spending US\$ 90 million (1998) per year and employing 1,300 staff who in 1998 conducted 2,780 training sessions to strengthen partnership between anti- corruption agencies and private and public sector and in doing so interfacing, on an annual basis, directly with close to 1% of the population.<sup>57</sup>

Educating and involving the public in building integrity is essential to prevent corruption in the medium and long term. It is a key element of the broad based, comprehensive, integrated, evidence based and impact oriented strategy. Public education and awareness raising can be implemented through any of the following activities:

- Government and/or private sector sponsored public education and awareness raising campaigns (radio, news papers, TV);
- annual broad based national/municipal integrity workshops where all stakeholders are invited to discuss problems and suggest changes;
- government and/or private sector sponsored public hearings
- improved information to citizens about their rights (Citizens' Charter); and empower the citizens to monitor the government through periodic service delivery surveys;
- production and dissemination of a national integrity strategy and an annual corruption survey at national, municipal and sub-county level;
- production and broad dissemination of integrity survey results at the municipal or sub-national level;
- investigative journalism and more active role the media in describing the negative effects of corruption and exposing corrupt officials; and
- dissemination of international instruments such as the (i) *UNOV Manual*; (ii) *The TI Source book*; and (iii) the UN's Anti-Corruption Tool Kit both presenting experiences of other countries in combating corruption.

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<sup>57</sup> Petter, Langseth, (1999) "Prevention: An Effective Tool to Reduce Corruption," ISPAC 1999 Conference on "Responding to the Challenge of Corruption," Milan, 19-20 November 1999.

Organisations in the public and private sector at the local and national level must adopt various public education measures *in order* to achieve success in the fight against corruption. Economic development, democratic reform, a strong civil society with access to information appear to be crucial for the effective prevention of corruption. The following is a list of measures or initiatives that should be developed and implemented at various levels within the public and private sectors<sup>58</sup>. The measures *must* address policy, systemic and behavioural issues and aspects of change. In order to address both aspects in a comprehensive and integrated manner, public education and awareness raising measures have been organised as follows: (i) Public Sector or executive measures; (ii) Legislative measures; (iv) Private sector measures; (v) Civil society measures; and (vi) International measures<sup>59</sup>.

## **B. Public Sector (executive) Measures**

Public sector measures may include:

- Opening up government to the public by: (i) inviting civil society to oversee aid and other government programs; (ii) establishing and disseminating service standards, (iii) establishing a credible complaints mechanism; (iv) regularly assess public confidence in anti-corruption institutions, judiciary and law enforcement and design programs to improve trust levels.
- Enforcing access to information;
- Focusing on prevention projects which educate society to the evils of corruption and instill a moral commitment to integrity in dealings with business and government officials;
- Create independent anti-corruption commissions and or National Integrity Steering Committees which focuses on, among others research, education, training and advice.

## **C. Legislative Measures**

Legislative measures should include<sup>60</sup>:

- freedom of information,
- freedom of the media and
- freedom of expression

## **D. Private Sector Measures**

Private sector measures should aim at:

- Educating, aiding and empowering businesses to avoid involvement in corrupt practices;
- Promoting ethical standards in business through the development of codes of conduct, and

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<sup>58</sup> Petter, Langseth, (1999) presentation at the 9<sup>th</sup> IPAC conference in Milan, November 1999.

<sup>59</sup> This list of recommended action has been developed in collaboration with Jeremy Pope from Transparency International in the UK

<sup>60</sup> Petter, Langseth, (1999) presentation at the 9<sup>th</sup> IPAC conference in Milan, November 1999.

- Education and integrity training.

## **E. Civil Society Measures**

Civil society measures should include:

- Increasing education, awareness and involvement of the civil society to mobilise civil society organisations (media, NGOs, professional associations, research or university institutes) to research and monitor good governance;
- Creation and strengthening of NGO-networks to share information on local, regional and national initiatives;
- Strengthening civil society to demand integrity and fairness in government and business transactions;
- Developing databases and networks for ensuring analysis and monitoring of corruption trends and cases as well as information exchange among different agencies dealing with corruption.

## **F. Media Training**

In the context of awareness raising, building and maintaining of an independent, professional and free media with a nation building role is crucial. A free, competent and independent media with professional investigative capabilities can be a “nation builder.” Measures aimed at strengthening the media in this role may include: (i) capacity building; (ii) enforcing integrity through introduction and monitoring of codes of conduct; (iii) encouraging owners/editors to allow balanced reporting and (iv) encouraging the media to police itself.

By drawing attention to corruption, journalists can help to turn corruption from a seemingly low risk/high profit activity to a high risk and low profit venture. Recognizing the critical role of the media, Uganda began training of its investigative journalists with donors help in 1995<sup>61</sup>. A preliminary assessment, which will be validated by content analysis, shows that training and awareness raising among the journalists has had a positive effect on the frequency and quality of reporting on corruption. The lessons learned from the investigative journalism workshops in Uganda have been transferred to Tanzania, Mauritius, Benin, Malawi, Ethiopia, Ukraine, and Nicaragua through regional workshops, study tours, and exchanges.

## **G. Integrity Steering Committees and Operational Boards**

The Integrity Steering Committees are the watchdog body and mechanism to launch, implement and monitor a country’s integrity strategy. Its mandate typically consists of:

- a broad-based development and delineation of an integrity strategy;

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<sup>61</sup> Uganda has, with the help of donors, trained over 200 journalists in investigative journalism, most of who work in print media. However, Uganda’s eight FM radio stations and the two Radio Uganda stations reach 80 percent of Uganda’s population, according to the 1993 Research International Report. The two leading English daily newspapers reach 10 percent with their combined daily circulation of about 42,000–45,000 papers.

- monitoring of the implementation of an integrity strategy;
- translating the anti-corruption policies of the municipal and national integrity strategy and action plans into legislation;
- ensuring broad-based support of the national and municipal integrity strategies by the general public; and
- guaranteeing momentum for the implementation of the municipal integrity strategy and the anti-corruption action plan.

The key challenge to staffing the Committee or Anti-Corruption Agency is to appoint organizations or citizens/opinion makers known and respected for their integrity. Examples include prominent members of business groups, agricultural credit unions, farmers' associations, unions, religious groups, media, and special interest groups.

The task of the Committee is to prepare the integrity and action planning meetings. It must also identify priority areas, plan the implementation strategy for the integrity strategy and the integrity action plan by balancing short, medium, and long-term reform goals, and design mechanisms for raising public awareness and encouraging broad-based citizen participation.

In the case of long-term initiatives, such as service delivery and legal reforms that tend to be technical in nature, the Committee may create specialized joint sub-committees and assign them specific fields of action. The Integrity Steering Committee must be also legalized through a public participation law. This law must clearly establish the composition, functions, and jurisdiction of these bodies.

Additionally, operational boards must be formed with the purpose of undertaking the every day watchdog role mandated by the aforementioned steering committee in each key government institution suffering from critical levels of corruption. These boards must cover several activities involving for example the monitoring the execution of budget-related affairs; monitoring social investment projects implemented by the government; and dealing with monitoring government procurement practices.

## VIII. INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS

### A. Introduction

Several international instruments, both soft and hard law, have been developed during the last decade. However, a comprehensive international binding legal instrument is still lacking. Existing instruments are limited in scope, substance and geographical coverage. The following summary describes existing anti-corruption legal instruments<sup>62</sup>

### B. Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000 and open for signature from 12 to 15 December 2000 in Palermo (Italy), though mainly aimed at the fight against organized crime, includes several provisions related to the phenomenon of corruption.

The Convention envisages criminalization of corrupt acts by public officials; adoption of such measures as may be necessary to establish as a criminal offence participation as an accomplice in corruption-related offences; liability (criminal, civil or administrative) of persons who corrupt public officials; measures to prevent, detect and punish the corruption of public officials; promotion of the concept of "integrity" of public officials as well as the provision for adequate independence of authorities engaged in the prevention, detection and punishment of those who corrupt public officials. The Convention strengthens its provisions by stating that the offence of corruption shall be established, *inter alia*, independent of any transnational nature or involvement of an organized criminal group.

The Convention also provides that each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, *i*) the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself, or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties and, *ii*) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself, or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. In addition, each State Party shall consider criminalizing the conduct described above where it involves a foreign public official or an international civil servant. Other forms of corruption are also identified for criminalization.

The UN Convention introduces and promotes the concept of "integrity" of public officials and foresees that each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of corruption by public officials. Independence of the anti-corruption authorities is also provided for (article 9).

With respect to confiscation and seizure, the UN Convention provides that States Parties shall adopt, to the greatest extent possible within their domestic legal systems,

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<sup>62</sup> See United Nations Declaration against Corruption and Bribery in Commercial Transactions (General Assembly Resolution 51/191, Annex) and International Code of Conduct for Public Officials (General Assembly Resolution 51/59, Annex) See Report of the Secretary-General on international instruments, Commission on Crime Prevention and Criminal Justice, 10<sup>th</sup> Session, E-CN.15/2001/#.

such measures as may be necessary to enable confiscation of: *i*) proceeds of crime derived from offences covered by this Convention, or property, the value of which equals that of the criminal proceeds; and *ii*) property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention. For this purpose, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act on the grounds of bank secrecy.

The provisions of the UN Convention dealing with extradition and mutual legal assistance are similar to traditional provisions already in place in many regional and bilateral agreements. The major significance of these provisions is that a large number of countries are expected to ratify the Convention thus making legal assistance and extradition available more widely than is presently the case. However, these provisions are intended to set minimum standards only. Countries can go further in bilateral or regional arrangements, and are in fact encouraged to do so.

According to Article 16, extradition from another State Party may be sought for the four specific offences established by the Convention. This remedy will be available regardless of whether or not there was involvement in the offence by an organized criminal group. However, the offence itself must be punishable by the domestic laws of both States. Where extradition is refused solely on grounds that the concerned person is one of the requested State Party's nationals, the requested State Party shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution (article 16, par.10). Also, States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters (article 16, par. 15).

Article 18 provides that the broadest measure of mutual legal assistance can be requested from another State Party for any investigation, prosecution or judicial proceedings in relation to offences covered by the Convention. The provisions of this article can be used to obtain statements or other evidence, conduct searches or seizures, serve judicial documents, examine objects or sites, obtain original documents or certified copies, identify or trace proceeds of crime or other property, obtain bank, corporate or other records, facilitate the appearance of persons in the requesting state party, or any other form of assistance permitted by the laws of the states involved (article 18, par.3). Since the variety of available assistance is generally consistent with many existing mutual legal assistance agreements, the major significance of the Convention provisions are that these extend mutual legal assistance to a much greater number of countries than is presently the case. According to article 18, par. 8, States Parties to the UN Convention shall not decline to render mutual legal assistance on grounds of bank secrecy.

In addition, the UN Convention also provides the general basis for conducting joint investigations (article19), co-operation in special investigative procedures, such as electronic surveillance, and general law-enforcement co-operation (articles 20 and 27). The development of domestic training programmes and the provision of technical assistance to other States in training matters are also encouraged (articles 29 and 30).

### **C. Criminal Law Convention on Corruption COUNCIL OF EUROPE**

In November 1998, the Committee of Ministers of the Council of Europe adopted the text of the Criminal Law Convention on Corruption and decided to open it for

signature by the Member States of the Council of Europe and the non-Member States that had participated in its elaboration. Currently Croatia, Cyprus, Czech Republic; Denmark; Hungary, Latvia, Slovakia, Slovenia and the Former Yugoslav Republic of Macedonia have ratified the Convention.

The Criminal Law Convention on Corruption is an instrument aimed at the coordinated criminalization of a large number of corrupt practices. For example, it seeks to criminalize: *i*) active and passive bribery of domestic and foreign public officials; *ii*) active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies; *iii*) active and passive bribery in the private sector; *iv*) active and passive bribery of officials of international organizations; *v*) active and passive bribery of domestic, foreign and international judges and officials of international courts; *vi*) active and passive trading in influence; *vii*) money-laundering of proceeds from corruption offences; and *viii*) accounting offences (invoices, accounting documents, etc.) connected with corruption offences. In addition, it is foreseen that each Party shall adopt such legislative and other measures as may be necessary to establish criminal laws against aiding or abetting the commission of any of the criminal offences established in accordance with the Convention.

States are required to provide for effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty that can lead to extradition. Legal persons will also be liable for the criminal offences of active bribery, trading in influence and money-laundering, as established in accordance with the Convention and committed for their benefit, and will be subject to effective criminal or non-criminal sanctions, including monetary sanctions. Furthermore, the Convention contains provisions concerning the development of specialized anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities and gathering of evidence and confiscation of proceeds.

The Convention also provides for enhanced international co-operation (mutual assistance, extradition and the provision of information) in the investigation and prosecution of corruption offences. In connection with mutual assistance, it provides that Parties must create special designated central authorities to handle requests in a prompt manner. While mutual assistance may be refused if the request undermines the fundamental interests, national sovereignty, national security or *ordre public* of the requested Party, refusal may not be made on the grounds of bank secrecy.

#### **D. Civil Law Convention on Corruption**

The Civil Law Convention on Corruption of the Council of Europe is the first attempt to define common international rules in the field of civil law and corruption. It aims at requiring each Party to provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage. However, only Albania, Bulgaria and Estonia have ratified this Convention.

The Convention requires each Party to provide, in its internal law, for the right to commence a civil action in corruption cases. It should be noted that, under the Convention, damages may not be limited to any standard payment but must be determined according to the actual loss sustained. This excludes punitive damages. However, parties whose domestic laws provide for punitive damages are not

precluded from seeking such damages. The extent of compensation is determined by the Court which is empowered to award such compensation for material damages, loss of profits and for non-pecuniary losses. In order to obtain compensation, the plaintiff must prove the actual damage, must show whether the defendant acted with intent or negligence, and must indicate the causal link between the corrupt behavior and the damage. With regard to the unlawful behavior on the part of the defendants, it should be noted that, as a matter of policy, those who directly and knowingly participate in corruption should be liable for damage that results. This includes liability on the part of the giver and the recipient of the bribe, as well as those who incited or aided the corruption or failed to take the appropriate steps to prevent corruption.

The Convention also deals with the issue of state responsibility for acts of corruption by public officials. However, the Convention does not indicate the conditions for the liability of a State Party but leaves each Party free to determine in its internal law the conditions under which the Party would be liable.

The validity of contracts is also addressed. According to the respective provision “each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void”. Furthermore, each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding any right to claim for damages.

The Convention also aims at protecting the interests of whistleblowers by obliging State Parties to take the necessary measures to protect employees who report, in good faith, their suspicions on corrupt practices.

Finally, the Convention addresses international co-operation. Under the Convention, Parties shall cooperate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgements and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are Party, as well as with their internal law.

#### **E. Group of States against Corruption (GRECO)**

In May 1999, the representatives of the Committee of Ministers of Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden, by adopting resolution 99 (5), established the Group of States against Corruption (GRECO).<sup>63</sup> The aim of the GRECO is to improve its members' capacity to fight corruption by monitoring their undertakings in this field, including the ratification, implementation and compliance of State Parties with the Twenty Guiding Principles for the Fight against Corruption and implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption<sup>64</sup>.

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<sup>63</sup> The following countries have then become Member States of GRECO: Bosnia and Herzegovina; Denmark; the former Yugoslav Republic of Macedonia, Georgia; Hungary; Latvia; Poland; United Kingdom of Great Britain and Northern Ireland and United States of America.

<sup>64</sup> The Programme of Action against Corruption, drafted by the Multidisciplinary Group on Corruption, has been approved by the Committee of Ministers in November 1996.

*Ad hoc* teams of experts are appointed to evaluate each member in each evaluation round. Evaluation teams examine replies to questionnaires, request and examine additional information to be submitted either orally or in writing, visit member countries for the purpose of seeking additional information relevant to the evaluation, and prepare draft evaluation reports for discussion and adoption at the plenary sessions.

#### **F. The twenty guiding principles for the fight against corruption**

In resolution (97) 24 of November 1997, the Committee of Ministers of the Council of Europe agreed to adopt the twenty guiding principles for the fight against corruption, elaborated by the Multidisciplinary Group on Corruption (GMC).<sup>65</sup> The principles represent the fundamental directives that Member States are called to implement in their efforts against corruption both at national and international levels.

The principles, which have been elaborated on the basis of the recognition that the fight against corruption must be multidisciplinary, include different elements such as *i*) raising public awareness and promoting ethical behaviour; *ii*) ensuring a co-ordinated criminalization of national and international corruption; *iii*) guaranteeing the appropriate independence and autonomy of those in charge of the prevention, investigation, prosecution and adjudication of corruption offences; *iv*) taking appropriate measures for the seizure and deprivation of the proceeds of corruption offences as well as for preventing legal persons being used to shield corruption offences; and *v*) limiting immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society. In addition, the Committee of Ministers agreed on other measures such as *i*) promoting the specialisation of persons or bodies in charge of fighting corruption and providing them with appropriate means and training to perform their task; *ii*) denying tax deductibility for bribes and other expenses linked to corruption offences; *iii*) adopting codes of conduct both for public officials and elected representatives; *iv*) promoting transparency within the public administration, particularly through the adoption of appropriate auditing procedures, activities of the public administration sector as well as public procurement processes; *v*) guaranteeing that the media have freedom to receive and impart information on corruption matters; *vi*) ensuring that civil law takes into account the need to fight corruption and provides effective remedies for those whose rights and interests are affected by corruption; and *vii*) ensuring that in every aspect of the fight against corruption, the possible connections with organized crime and money laundering are taken into account.

#### **G. Model Code of Conduct for Public Officials**

The Committee of Ministers of the Council of Europe adopted, on 11 May 2000, a recommendation on codes of conduct for public officials which includes a Model Code of Conduct for Public Officials. The Model Code of Conduct offers suggestions on how to deal with real situations frequently confronting public officials, such as gifts, use of public resources, dealing with former public officials, etc. The Code stresses the importance of the integrity of public officials and the accountability of hierarchical superiors. It comprises three objectives: 1) to specify the standards of integrity and conduct to be observed by public officials 2) methods to help them meet

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<sup>65</sup> The Multidisciplinary Group on Corruption has been set up as a result of the 1994 Malta Conference of the European Ministers of Justice.

those standards and 3) to inform the public of the conduct it is entitled to expect of public officials. Furthermore, it contains a series of general principles addressing, for example, conflicts of interest, incompatible outside activities, appropriate reactions when confronted with problems such as offers of undue advantages, especially gifts, susceptibility to the influence of others, misuse of official position, use of official information and public resources for private purposes and the rules to follow when leaving the public service, especially in relations with former public officials.

#### **H. Convention of the European Union on the protection of its financial interests**

The Convention constitutes the first agreement under “Provisions on police and judicial cooperation in criminal matters” of the Treaty of the European Union. It has been ratified by Austria, Finland, France, Germany, Greece, Spain, Sweden and United Kingdom.

The Convention aims at protecting the European Communities’ financial interests by calling for the criminal prosecution of fraudulent conduct injuring those interests. Fraudulent acts are defined as all acts affecting the European Communities’ financial interests, including any intentional act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which results in the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, (ii) non-disclosure of information in violation of a specific obligation, with the same effect, (iii) the misapplication of such funds for purposes other than those for which they were originally granted. Revenue related incidents such as: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, (ii) non-disclosure of information in violation of a specific obligation, with the same effect, (iii) misapplication of a legally obtained benefit, with the same effect, are also included.

Member States are obliged to establish jurisdiction over these offences when: (i) fraud, participation in fraud or attempted fraud affecting the European Communities’ financial interests is committed in whole or in part within its territory, including fraud for which the benefit was obtained in that territory, (ii) a person within its territory knowingly assists or induces the commission of such fraud within the territory of any other State, (iii) the offender is a national of the Member State concerned, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred. Furthermore the Convention establishes the criminal liability of heads of businesses and covers the issues of extradition and prosecution as well as cooperation.

#### **I. Protocol on the Convention on protection of the European Communities’ financial interests**

The Protocol was elaborated as an additional instrument to complement the Convention and to reinforce the protection of the Communities’ financial interests. The Protocol is primarily aimed at acts of corruption that damage, or are likely to damage, the European Communities’ financial interests. In order to ensure a broad and homogenous application of its substantive provisions, the Protocol is applicable to community officials, national officials and officials of another Member State.

With regard to jurisdiction, the Protocol establishes a series of criteria conferring jurisdiction of a Member State to prosecute and try cases involving the offences covered by the Protocol if (a) the offence is committed in whole or in part within its territory; (b) the offender is one of its nationals or one of its officials; (c) the offence is committed against a national of the Member State, an official as defined by the Protocol, or member of a Community institution; (d) the offender is a Community official working for a Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State concerned.

#### **J. Second Protocol on the Convention on the protection of the European Communities' financial interests**

The Second Protocol is directed at the liability of legal persons, the laundering and confiscation of proceeds of corruption, and cooperation between the Member States and the Commission for the purpose of protecting the European Communities' financial interests and protecting personal data related thereto.

According to the Second Protocol legal persons shall be made liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on (i) a power of representation of the legal person, or (ii) an authority to make decisions on behalf of the legal person, or (iii) an authority to exercise control within the legal person, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud. In addition, Member States shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to has contributed to enabling the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority. The sanctions for violations under national law shall include criminal or non-criminal fines and other sanctions such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placement under judicial supervision and (d) a judicial winding-up order.”

Member States shall also take the necessary measures to enable the seizure and, without prejudice to the rights of bona fide third parties, confiscation or removal of the instruments and proceeds of fraud, active and passive corruption and money laundering, or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be allocated or distributed by the Member State in accordance with its national law.”

#### **K. Convention of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States**

The Convention has been elaborated in order to help ensure that corrupt conduct involving Community officials or Member States' officials is criminalised. Prior to the Convention, criminal law in most Member States did not apply to officials of other Member States, even where covered offences took place in their own territory or at the instigation of one of their own nationals. As this situation became increasingly intolerable, the Council decided to develop a free-standing international legal instrument addressing corrupt conduct involving Community officials or Member States' officials. The Convention draws extensively from the agreements reached in

the above Protocol. It sanctions active and passive corruption by “Community officials” and “national officials” as well as the participation and instigation of such acts.

In order to broaden and strengthen the scope of the anti-corruption measures introduced by the Convention, it requires that each Member State’s criminal law be adjusted to accommodate certain offences committed by individuals occupying specific posts in the Community institutions. As with the first Protocol, a principle of assimilation is introduced whereby Member States will be bound to apply to members of the Community institutions the same descriptions of corruption offences as apply to individuals occupying similar posts within their own institutions.

#### **L. Joint Action of 22 December 1998 on corruption in the private sector by the Council of the European Union**

The Joint Action of 22 December 1998 is directed at combating corruption in the private sector on an international level. The Joint Action applies a broad definition of the concept of ‘breach of duties’ covering, as a minimum, any disloyal behavior constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions which apply within the course of conducting business. Passive corruption in the private sector is defined as the deliberate action of a person who, in the course of his business activities, directly or through an intermediary, *requests or receives* an undue advantage of any kind whatsoever, or accepts the promise of such an advantage, for himself or for a third party, in order to perform or refrain from performing an act in breach of his duties. Active corruption in the private sector is described as the deliberate action of whosoever *promises, offers or gives*, directly or through an intermediary, an undue advantage of any kind whatsoever to a person, for himself or for a third party, in the course of the business activities of that person, in order that the person should perform or refrain from performing an act in breach of his duties.

The Joint Action also addresses forms of participation and instigation of active and passive corruption, the liability of and sanctions for legal persons and establishment of jurisdiction.

#### **M. Inter-American Convention against Corruption**

The Inter-American Convention against Corruption addresses measures to prevent and control corruption. Towards this end, it obliges Member States to take necessary action (1) to promote and strengthen the development of mechanisms needed to prevent, detect, punish and eradicate corruption, and (2) to promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance. Since its effective date of 6 March 1997, it has been ratified by Argentina, Bahamas (Commonwealth), Bolivia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

The Convention defines as acts of corruption the following behaviors: (a) the solicitation or acceptance, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, in exchange for any act or omission in the performance of his public functions, (b) the offering or granting, to a

government official or a person who performs public functions, of any article of monetary value, or other benefit, in exchange for any act or omission in the performance of his public functions, (c) any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party, (d) the fraudulent use or concealment of property derived from any of the acts referred to in this article, (e) participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article<sup>66</sup>. The Convention also covers transnational bribery and illicit enrichment, even though it does not establish an obligation for criminalisation. However, any State Party that decides not to follow the recommendation of the Convention shall, as far as its own laws permit, provide assistance and cooperation with respect to these offences. Transnational bribery is defined as “the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official’s public functions.” Illicit enrichment is described as the “significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.”

With respect to prevention, States Parties agreed to consider the applicability of measures within their own institutional systems to create, maintain and strengthen: (1) standards of conduct for the correct, honorable, and proper fulfillment of public functions, (2) mechanisms to enforce these standards of conduct, (3) instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities, (4) systems for registering the income, assets and liabilities of persons who perform public functions in certain posts as specified by law, (5) systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems, (6) government revenue collection and control systems that deter corruption, (7) laws that deny favorable tax treatment for any individual or corporation for expenditures made in violation of the anti-corruption laws of the States Parties, (8) systems for protecting public servants and private citizens who, in good faith, report acts of corruption, (9) oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts, (10) deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts, (11) mechanisms to encourage participation by civil society and non-governmental organizations in efforts to prevent

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<sup>66</sup> For the purpose of its application the Convention defines the terms of “public function”, as any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy. “Public official” is defined as any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy. “Property” means assets of any kind, whether movable or immovable, tangible or intangible, and any document or legal instrument demonstrating, purporting to demonstrate, or relating to ownership or other rights pertaining to such assets.

corruption, (12) the study of further preventive measures that take into account the relationship between equitable compensation and probity in public service.

Furthermore, the Convention addresses the issues of jurisdiction over the offences it has established in accordance with the Convention and issues of extradition and mutual legal assistance. The Convention obliges State Parties to provide the broadest assistance possible with regard to measures of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offences established in accordance with this Convention. Finally, the Convention provides that State Parties, when requested to provide assistance, shall not invoke bank secrecy as a basis for refusal. At the same time, the requesting State shall be obligated not to use any information received that is otherwise protected by bank secrecy for any purpose other than the proceeding for which that information was requested.

#### **N. OECD-Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed on 17 December 1997 and became effective on 5 February 1999. At the beginning of 2001, Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Republic of Korea, Mexico, Netherlands, Norway, Poland, Slovak Republic, Spain, Sweden, Switzerland, United Kingdom and United States have ratified the Convention. Brazil, Portugal, Turkey, Ireland, Luxembourg, New Zealand and Chile are in the process of ratification.

The main purpose of this Convention is to provide a framework to criminalise corruption in international business transactions. Countries party to the Convention pledge to punish those accused of bribing officials of foreign countries, including officials in countries that are not part of the Convention, for the purpose of obtaining or retaining international business. The Convention seeks to ensure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials without requiring uniformity or changes in fundamental principles of a Party's legal system. International bribery is defined as the intentional offer, promise, or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international businesses.

Also, the Convention addresses the issue of the criminal liability of legal persons, the effectiveness of the criminal and civil sanctions, the jurisdiction for the offences established under the Convention, the confiscation of the proceeds of corruption and bribery and the provision of mutual legal assistance. With regard to the "enforcement" of the offences established, the Convention recognizes the fundamental nature of national regimes of prosecutorial discretion. However, it specifies that investigation and prosecution of the bribery shall not be influenced by "...considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." Although the primary scope of the Convention is the criminalization of the bribery of foreign public officials, it also contains provisions related to money-laundering and falsified accounts. In this regard,

the Convention requires State Parties to make the bribery of foreign public officials a predicate offence to money laundering, given that bribery as such is a predicate to money laundering. In connection with falsified accounts, the Convention obliges State Parties to take the necessary measures to prohibit the establishment of off-the-books accounts and similar practices used to bribe foreign public official's or to hide such bribery.

Within the framework of the OECD Working Group on Bribery in International Business Transactions and pursuant to the OECD Convention, a rigorous procedure for self- and mutual evaluation was adopted to ensure compliance with the Convention. Since 1999 twenty-one countries out of the thirty-four signatories that had deposited their instruments of ratification have been subject to close peer monitoring. For each country, the Working Group on Bribery adopted a report, including an evaluation, which was made available to the public subsequent to the OECD meeting. As highlighted in a report on the implementation of the Convention, presented in June 2000, the Working Group noted that there is overall compliance with the Convention's obligations in the majority of countries.

#### **O. Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions**

A first Recommendation on Bribery in International Business Transactions was adopted in 1994. In 1997, the OECD Working Group on Bribery reviewed this Recommendation and issued a revised version which was adopted by the OECD Council on 23 May 1997. This document pulls together analytic work on anti-corruption measures and commitments undertaken over the previous three years to combat bribery in international business transactions. This revised version, as an expression of the common political position, is an important vehicle to encourage action by Member countries. Its implementation is enabled as it includes provisions concerning monitoring and other follow-up procedures designed to promote their implementation.

The Revised Recommendation invites member countries to "take effective measures to deter, prevent and combat" international bribery in a number of areas. Specifically, it elaborates commitments in the fields of: criminalisation of bribery of foreign public officials, accounting, banking, financial and other provisions designed to ensure that adequate records are kept and made available for inspection and investigation. It also covers public subsidies, licenses, government-procurement contracts and other public advantage that could be denied as sanctions for bribery in appropriate cases. It also urges prompt implementation of the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials and incorporates the proposals contained in the 1996 Recommendation by the Development Assistance Committee on Anti-Corruption Proposals for Aid-Funded Procurement.

#### **P. Future Convention against Corruption**

In recent years, the international community has demonstrated an unprecedented awareness of the gravity of corruption. Responding to the call of addressing corruption in a coordinated manner, the international community became engaged in the negotiation and the elaboration of several international legal instruments within different organizations, such as the Council of Europe, the European Union, the Organization of American States and the Organization for Economic Cooperation and Development.

With the exception of the OECD, all the other intergovernmental organizations under which the existing international legal instruments have been developed are regional. One remark that can be made in this connection is that these instruments have been developed by countries facing similar problems and sharing, at least to a certain degree, similar legal practices. These characteristics are reflected in the approaches taken and the choices made in these instruments. However, while the OECD Convention is the only instrument having comprehensive geographical coverage, the scope of the instrument remains rather limited. The instrument tackles solely a specific part of the global problem of corruption; i.e. the so-called "supply" side of the bribery of foreign public officials. Similar considerations must be made with regard to the United Nations Convention against Transnational Organized Crime. While comprehensive in its geographical scope, this instrument remains limited with regard to substantive scope.

The General Assembly, via resolution 55/61, recognized the desirability of an effective international legal instrument against corruption and has begun the elaboration of such an instrument in Vienna at the headquarters of the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention.

The mandates by the General Assembly, in resolutions 55/61 and 55/188, represent a unique opportunity to develop a global and comprehensive legal instrument against corruption which can fully address the concerns of the international community as a whole and which can include provisions and mechanisms applicable at a global level. The international community is in the advantageous position of being able to take stock of what has proved more or less workable and feasible. It is also in a position to explore, with the benefit of the broadest possible participation, whether common thinking has evolved over the last few years and whether the experience of existing joint efforts has enabled innovative solutions to emerge.

The General Assembly requested the Secretary-General to prepare a report analysing all relevant international instruments and other documents and recommendations addressing corruption and asked the Commission on Crime Prevention and Criminal Justice, at its tenth session, to review and assess the report and, on that basis, to provide recommendations and guidance as to future work on the development of a legal instrument against corruption. In addition, the Assembly requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare, on the basis of the above report and of the recommendations of the Commission at its tenth session, draft terms of reference for the negotiation of the future legal instrument against corruption.

In accordance with General Assembly resolution 55/188 on "preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin", the above intergovernmental open-ended expert group will also examine the question of illegally transferred funds and the repatriation of such funds to their countries of origin. The intergovernmental open-ended expert group is expected to meet in Vienna from 30 July to 3 August 2001.

## IX. NATIONAL LEGAL INSTRUMENTS

### A. Criminal Law

#### 1. *Sanctioning of corruption and related acts*

Corruption has been defined as the abuse of (public) power for private gain. This would include acts such as bribery, embezzlement and theft of public resources by public officials, fraud damaging the state and extortion, as well as the laundering of the proceeds from such activities. Certain other behaviors such as favoritism and nepotism, conflicts of interest and contributions to political parties may, under specific conditions, be considered worth sanctioning by means of administrative or criminal law. The difficulty of defining these types of acts as corruption lies in the fact that only from time to time do they actually cause damage either to the state, the individual, or to the public at large. Often the harm they cause consists mainly of a negative perception that ultimately results in a decrease in trust of the public towards the State.

Another measure worth considering is the criminalisation of the creation of slush funds, that is the accumulation of assets “off the books” with the purpose to use such funds to pay bribes. In many national legal systems, the creation of slush funds is not necessarily illegal.<sup>67</sup>

There is an increasing tendency, both at the international and national levels, to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation for this. Several national legislators have introduced such provisions and, at the international level, the offence of “illicit enrichment” or “unexplained wealth” has become an accepted instrument in the fight against corruption.<sup>68</sup> An alternative to criminalization of unexplained wealth could be to provide, instead, for administrative sanctions that do not require the unconditional presumption of innocence and that do not carry the stigma of conviction or make a person liable to imprisonment. Examples would be loss of office, loss of licenses and procurement contracts, and exclusion from certain professions, etc.<sup>69</sup>

Since business and high level corruption are often committed by legal persons, in particular corporate entities, normative solutions must be developed regarding their criminal liability. This desire has been recognized by many jurisdictions and is provided for in some international legal instruments. Companies that do not have any risk of being dissolved and losing their assets if they engage in, or tolerate, criminal activities of their staff, are unlikely to strengthen compliance with the law. This is

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<sup>67</sup> Art. 8 of the OECD Convention and Art. V. of the OECD Recommendation (Note 3). See also the Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.E.14 (k).

<sup>68</sup> For example, Hong Kong Prevention of Bribery Ordinance Section 10; Botswana Corruption and Economic Crime Act, Art. 34; Organization of American States, Inter-American Convention against Corruption, Art. IX; National Law of the Republic of Indonesia on combating the criminal act of corruption No. 31/1999, Art. 37

<sup>69</sup> For example, Italian Law No. 575/1965.

especially true if there are incentives to not comply with the law, as is often the case in the context of corruption. Both, the UN Convention against Transnational Organized Crime and the Criminal Law Convention of the Council of Europe foresee establishing (criminal) liability of legal persons for the participation in the offences of active and passive corruption and money laundering.

## *2. Confiscation of the proceeds of corruption*

Confiscation of the proceeds of corruption should be obligatory and where proceeds per se cannot be confiscated, confiscation should be ordered for the equivalent value of the proceeds. In this regard, consideration for easing the evidentiary requirements needed in order to establish the illicit origin of the proceeds of corruption should be allowed. Various national legislators have introduced such provisions. They are all based on the concept that a public officials' property should be confiscated if they maintain standards of living, or if they control or possess pecuniary resources or property, that are disproportionate to their present or past known sources of income, and if they fail to give a satisfactory explanation in this regard<sup>70</sup>. The official is in the best position to explain how he or she came into these excessive possessions. Jurisprudence in most legal systems agree that courts can require defendants to establish (at least on the balance of probabilities) the existence of facts "peculiarly within their own knowledge". Such is the case with personal possessions. This does not reverse the burden of proof but simply establishes rules for the gathering and evaluation of evidence that allows the court to base its decision on a realistic foundation. Unexplained wealth that is totally out of proportion with past and present sources of income points to some sort of hidden income. Although such wealth may be totally legal (such as inheritance, gifts from wealthy relatives, or a win on the lottery) it is likely to be illegal if the owner cannot – or is unwilling to - provide a satisfactory explanation for it.

Both the Convention against Transnational Organized Crime and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provide a useful model with respect to easing the onus of proof and provides a procedural mechanism that can be of immense significance in anti-corruption efforts. The approach has both tactical and strategic appeal. As a tactical weapon, it offers a means of forfeiture that requires relatively few resources and involves little risk of unfairness or error. Placing the burden of identification and explanation of assets on the possessing official is tantamount to conducting psychological and tactical warfare against corruption. The constant fear of being required to account for ill-gotten possessions should give rise to a state of anxiety which would have a deterrent effect.

In easing this burden of proof and shifting the onus of proving ownership of excessive wealth onto the beneficiary, careful consideration must be given to the principles of due process, which in many jurisdictions are an integral part of the constitutional protection of human rights. To ensure consistency with constitutional principles, no change would be made in the presumption of innocence or the obligation of the prosecuting authority to prove guilt. What may be established is a procedural or evidentiary rule of a rebuttable presumption. Some countries, such as Italy<sup>71</sup> and the

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<sup>70</sup> German Criminal Code Art. 73d, Singapore, Corruption Confiscation of Benefits Act, Art. 5; Art. 34a Norwegian General Civil Penal Code

<sup>71</sup> Other states like Italy also enriched their legal framework with special administrative procedures that allow for forfeiture and confiscation of assets independently of criminal conviction. Art. 2 ter of the

United States,<sup>72</sup> in order to overcome constitutional concerns, provide for the possibility of civil or administrative confiscation. Unlike confiscation in criminal matters, this type of legislation does not require proof of illicit origin “beyond reasonable doubt”. Instead, it considers a high probability of illicit origin and the inability of the owner to prove to the contrary as sufficient to meet this requirement. However, the more these sanctions resemble criminal penalties, the more they lead to criticisms based on human rights. It is interesting to note that Germany, in order to overcome concerns raised with regard to the presumption of innocence, has re-introduced the property penalty recalling medieval penal proceedings. This provision, as the name indicates, does not enable the confiscation of property of illegal or apparently illegal origin, but establish a real penalty which applies independent of the actual origin of the concerned assets. By introducing this provision, the legislature has tried to avoid any limitation of the presumption of innocence.

## **B. Laws to facilitate the detection of corruption**

Although corruption is not a victimless crime per se, unlike most crimes, the victim is often not easily identifiable. Usually, those involved are beneficiaries in some way and have an interest in preserving secrecy. Clear evidence of the actual payment of a bribe can be exceptionally hard to obtain and corrupt practices frequently remain unpunished. The traditional methods of evidence gathering will often not lead to satisfactory results. Additional laws are needed providing for more innovative evidence gathering procedures, such as integrity testing, amnesty regulations for those involved in the corrupt transaction, whistleblower protection, abolition and/ or limiting of enhanced bank, corporate and professional secrecy, money laundering statutes, and access to information.

### *1. Collaboration of offenders*

Parties to offences can be encouraged to come forward and offer evidence. This inevitably gives rise to the question of immunity from prosecution and amnesties. In Central and Eastern Europe there exist provisions that when the giver of a bribe reports it within 24 hours, he can be immune from prosecution (others might see this really as a matter of reporting the fact that one has been the victim of extortion). However, it seems that these provisions have not operated effectively, if at all. In the US, the first person involved in the violation of a Securities and Exchange Commission offence who “blows the whistle” is usually granted automatic immunity. This introduces an element of risk into the corruption equation.

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Law 31 May 1965/ No. 575 foresees the seizure of property that is owned directly or indirectly by any person suspected of participating in Mafia-type associations when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said goods are the proceeds of unlawful activities or the use thereof. The seized property consequently becomes subject to confiscation if its lawful origin cannot be proved.

<sup>72</sup> The United States Anti-Drug Abuse Act 31 U.S.C. § 5316 foresees a so-called "civil confiscation". Differently from criminal confiscation, this type of measure does not require proof beyond reasonable doubt of the illicit origin of the property to be confiscated, but considers a probable cause to be sufficient. The rules of evidence of criminal procedure are not applicable. If the illegal origin is probable, the burden of proof shifts to the owner who has to prove the legal origin of the property. However, civil confiscation has been strongly criticized for violating the rights of defence and of private property.

Any provision granting the offender immunity or limitation of criminal responsibility for contributing to the detection of crimes in which he has been involved should require an admission in sufficient detail to allow authorities to prosecute other criminals. Further, redistribution of all ill-gotten proceeds should be effected.

## *2. Money laundering statutes*

Money laundering statutes can contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. Identification and recording obligations as well as the reporting of suspicious transaction, as it is also required by the UN-Convention against Transnational Organized Crime, will not only facilitate detection of the crime of money laundering but will also help identify the criminal acts from which the illicit proceeds originated. It is therefore essential to establish corruption as a predicate offence to money laundering.

Identification by financial institutions of the true beneficiaries of a transaction can often be difficult. Criminals engaged in money laundering typically use false identities. Financial institutions must refrain from entering into business relations where true identification is questionable and in particular when identification is impossible because of the use of company schemes that are mainly designed to guarantee anonymity. Furthermore, all relevant information regarding the client and the transaction need to be registered. In order to make this a manageable task, the obligation should exist, at a minimum, where the transaction exceeds a certain value or where the client wants to enter into a permanent business relationship with the institute, for example when opening an account. Regardless of the value of the single transaction, financial operators should be obliged to report such transactions that give rise to reasonable suspicions that the assets involved in the transaction derive from one of the predicate offences of money laundering. The reporting obligation should be established independent of the institute actually executing the transaction.

In order to support financial institutions in implementing this obligation, “Red Flag Catalogues” indicating instances in which they should pay special attention to transactions having no apparent economic or obvious lawful purpose, should be provided to them. Criteria relating to corruption/money-laundering will be different from those “red flags” pointing towards drug-money laundering. It is possible to make distinctions between high-risk areas, industries and persons, and risky transactions. It might therefore be advisable to include in the traditional lists of “red flags” those situations that point to possible corruption proceeds.

The above obligations should not necessarily be limited to institutions entitled to execute financial operations. Instead, it should also be considered to extend the obligations to other businesses which are typically conducting transactions of considerable value, such as broker/dealers in gold, company shares and other precious commodities.

The statute should also provide for sufficient penalties for violation of the obligations. In some jurisdictions it might be considered to provide for procedures that ensure the adequate protection of the bank personnel.

## *3. Limitation of bank and professional secrecy as well as the introduction of adequate corporate laws*

Banking secrecy laws are a serious obstacle to successful corruption investigations. The Convention against Transnational Organized Crime and the Drug Convention

address the issue of bank secrecy in the context of confiscation. Efforts at reducing secrecy of account ownership has resulted in some traditional tax havens adjusting procedures to allow more access to accounts and greater possibility of confiscation, while other jurisdictions have used the opportunity to capture a greater share of the international market by offering enhanced bank secrecy.

However, bank secrecy is not the only obstacle to investigations. Accounts opened in the name of a company often provide for the true beneficiaries to remain anonymous. Banking laws and regulations that prevent information on the true identity of beneficiaries from being obtained have been identified as a source of concern at various international fora, such as the Paris Expert Group on Corruption and its Financial Channels and the OECD Working Group on Corruption.<sup>73</sup>

#### *4. Access to information legislation*

If information is power, to increase public access to information serves to empower the civil society to oversee the state. If done correctly, increased access to information could raise the likelihood of detecting instances of corruption. In an environment of transparency, citizens, NGO's, and the media can easily obtain necessary information to detect irregularities in public administration which are often indicators for inappropriate management of resources, if not outright corruption. Many Member States, both in the North and the South, have recognized this and have enacted appropriate legislation<sup>74</sup>. The basic principle is the "right to know". Access to Information Legislation provides for the practical tools to implement this right.

Access to Information Laws usually adopt four methods to achieve its objective. It usually provides that (1) every government agency is required to publish an annual statement of its operations, (2) a legally enforceable right of access to documented information held by the government be recognized, subject only to such exceptions as are reasonably necessary to protect public interests or personal privacy. (3) a person's right to apply to amend any record containing information relating to them which, in their opinion, is incomplete, incorrect, out of date or misleading be recognized and (4) independent bodies provide a two-tier system to appeal against any refusal to provide access.

#### **C. Administrative Law**

Judicially-supervised administrative procedures, involving the citizens' right to a hearing, notice requirements and a right to a statement of reasons for a public official's decision, are all effective mechanisms for preventing and controlling corrupt practices because they give civil society a tool to challenge abuse of authority. This is also an effective mechanisms for citizens to challenge non-transparent policy making.

By creating judicially-enforceable procedural administrative rights, politicians decentralize the monitoring function to their constituents, who can bring suits to place public pressure in cases of politicians of bureaucratic abuse of power. In these cases,

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<sup>73</sup> Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C.6 (f), and I.D.11.

<sup>74</sup> Australia, New South Wales, Freedom of Information Act 1989; Ireland, Access to Information Act, 1997; Sweden, The Freedom of the Press Act; Uganda, Right of Access to Information, Article 41 of the Constitution of Uganda, 1995; United States of America, Freedom of Information Act, Part 552 of Title 5 (U.S. Code)

one could state that administrative substantive laws and procedures are means of ensuring accountability and act as instruments of political control of the state. They serve the purpose of monitoring and disciplining public officials.

There are also some drawbacks that need to be taken into account when introducing administrative law as an anti-corruption tool. First, extensive administrative procedures may entail a slower, less flexible administration. At the same time, these procedural rights that extend to politicians' opponents may be used for political purposes in order to gain electoral advantages.

## **X. CURBING ILLEGAL TRANSFER OF FUNDS AND THE REPATRIATION OF ASSETS**

### **A. Introduction**

The large-scale illegal transfer of funds by corrupt political leaders, their relatives and their close associates has long been a serious problem. The former Shah of Iran was alleged to have misappropriated some \$35 billion during the 25 years of his reign, largely disguised by foundations and charities. Papa Doc Duvalier and his son, Jean Claude Duvalier, as Presidents of Haiti from 1957 to 1986, were alleged to have extracted between \$500 million and \$2 billion from the state, an estimated 87% of government expenditure being paid directly or indirectly to Duvalier and his associates between 1960 and 1967. The case against family members of former President of the Philippines, Ferdinand Marcos, is still ongoing almost 15 years after he left office amid allegations that he misappropriated at least \$5 billion of state assets.<sup>75</sup>

More recently, a Pakistani court convicted the husband of former Pakistani Prime Minister Benazir Bhutto, Asif Ali Zardari, of accepting \$9 million in kickbacks, and he is known to have channeled \$40 million of unexplainable origin through Citibank private bank accounts. In Nigeria, the late Sani Abacha and his associates are estimated to have removed funds from Nigeria of up to \$5.5 billion, mainly deriving from the systematic looting of the Central Bank, as well as bribes received by foreign investors. In Peru, a congressional investigation has estimated that Vladimiro Montesinos, Peru's former head of intelligence, might have acquired as much as \$800 million from activities including kickbacks from military procurement. Former Ukrainian Prime Minister Pavlo Lazarenko is believed to have embezzled around \$1 billion from the state. Now under arrest in the United States on charges of laundering some \$114 million, Lazarenko has admitted to having laundered \$5 million through Switzerland, which has repatriated almost \$6 million to Ukraine.

Broadly speaking, the assets mainly derive from bribes, kickbacks, extortion and protection money, the systematic looting of the state treasury, the illegal selling of national resources, the diversion of loans granted by regional and international lending institutions and of project funding contributed by bi- and multilateral donor agencies.

In view of these occurrences, repatriation of assets diverted by top-level public officials and politicians through corrupt practices has become a pressing issue to many Member States. However, the successes have been scarce so far. Most cases take years to conclude and all are extremely expensive. It is rare that more than a small proportion of the illegal funds is repatriated to the country from which they were stolen. In the Marcos case, after 15 years, only \$600 million (much of that interest on the original sum) of more than \$5 billion lies in escrow in the Philippines National Bank and the case shows no signs of being concluded.

The problems hindering repatriation may vary depending on the countries involved. Nevertheless, current and past cases seem to share some similarities. For example, the following factors hinder or render successful recovery of assets impossible: (1) the absence or weakness of the political will within the victim country as well as within

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<sup>75</sup> A 1989 RICO claim brought in California estimated that the assets amounted to \$5 billion.

those countries where the assets have been diverted, (2) the lack of an adequate legal framework allowing for necessary actions in an efficient and effective manner, (3) insufficient technical expertise within the victim country to prepare the groundwork at the national level, such as by filing charges against the offenders and at the international level to prepare the mutual legal assistance request, (4) the specialized technical expertise is extremely limited and mainly provided by private lawyers whose services are very expensive and who normally do not have any interest in building the necessary capacities at the national level, (5) the reluctance of victim States to improve their national institutional and legal anti-corruption framework, a deficiency which may not only lead to the further looting of the country, but also seriously damaging to the credibility of the country when requesting mutual legal assistance.

### **B. Lack of political will**

A strong and committed political will in both the requesting as well as the requested state is essential for the successful outcome of the recovery effort. Direct involvement in the diversion of state funds by high-level government officials, and all too often the countries' leaders themselves, can impede any action that could be taken. Once a new government comes into power, its credibility depends largely on the question to what extent it will prove willing and capable to deal with the "grand corruption" that took place under its predecessor. Successful recovery of what has been looted from a country can be more important to the public than sanctioning and imprisonment of the offenders. The repatriation of stolen funds can not only confirm to the public a return of the rule of law, but can also provide the government with the necessary resources to implement the reforms promised during the crucial initial phase of coming into power.

However, even where a Government decides to embark on a recovery effort, their internal political conditions may not to allow an unrestricted effort. This condition not only affects the credibility of the recovery initiative, but also of the new government in general. For example, restricting recovery efforts to certain person or circle of people might lead to difficulties in the process of gathering evidence since such evidence might lead to the uncovering of assets that have been diverted by other people than those targeted. In some instances, the lack of unconditional political will to recover all funds that have been diverted may hinder the recovery effort and can lead to criticism both at the national and international level. This could eventually lead to the reluctance of some parties involved to provide their full support and collaboration.

Another common feature of many cases is that the victim states often concentrate exclusively on the extraterritorial investigations while they neglect the basic preparatory work at the national level. In most jurisdictions, there is little hope to recover assets unless a conviction is obtained for the crimes committed in the course of the looting and the connection between those crimes and the assets abroad has been established<sup>76</sup>.

A lack of political will on the part of the requested country is also a common barrier to successful recovery of stolen assets. Authorities may be reluctant to move against powerful interest groups, such as banks. This seems particularly obvious where the banks are not only holding the assets but were also involved in facilitating their transfer in the first place<sup>77</sup>. Wherever the political will is weak, there is little chance that the complex legal and factual problems typically occurring in cases of asset recovery will be overcome.

### C. Legal framework

Recent examples of recovery efforts show that there is no legal framework providing sufficiently practicable basis for the recovery of assets diverted through corrupt practices. Multi- and bilateral mutual legal assistance treaties are too limited in their substantial and geographical scope and are therefore often not applicable except in the context of the specific case from which they originated. As a consequence, no standard procedure is applied. Recovery strategies vary from civil recovery to criminal recovery to a mix of both. Each method has its advantages and disadvantages and the final choice seems to depend exclusively on what is expected to work best in the jurisdiction where the assets are located. Selection of the appropriate strategy, therefore, requires specialized legal expertise that is typically very costly, if available

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<sup>76</sup> In Nigeria, it was only after more than one year after the first mutual legal assistance requests had been submitted, that charges were filed against M. Abacha at the Abuja High Court. In Mexico, Raúl Salinas has been convicted of murder, but not of drug trafficking or money laundering. Peru has issued warrants for the arrest of Vladimiro Montesinos, but he has disappeared. Former Ukrainian Prime Minister Pavlo Lazarenko has been convicted in a U.S. court of money laundering but not yet in Ukraine itself, where he is suspected of having stolen or generated up to \$1 billion in illegal funds

<sup>77</sup> A number of further significant developments in controlling the proceeds of corruption offences that implement principles first enunciated in the 1988 UN *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. Initially, the United Nations *Convention Against Transnational Organized Crime* (2000) contains a number of strong measures to control the proceeds of bribery and other serious crimes committed by an organized group. Such measures are found in Articles 6 (criminalisation of laundering the proceeds of crime), 7 (regulatory regime against money laundering), 12-14 (asset confiscation), 16(15) (non-refusal of extradition for fiscal offences), 18(8), (22) (non-refusal of mutual assistance on bank secrecy or fiscal offence grounds). The Council of Europe *Criminal Law Convention on Corruption* (1998) also contains strong obligations pertaining to control of the proceeds of corruption, including in Articles 13 (corruption offences to be considered money laundering predicates), 19(3) (confiscation of proceeds of corruption offences), 26(3) (non-refusal of mutual assistance on bank secrecy grounds). Provisions of this sort also appear in the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997) (Articles 3(3) (confiscation), 7 (money laundering), 9(3) (non-refusal of mutual assistance on bank secrecy grounds); and the Organization of American States's *Inter-American Convention Against Corruption* (1996), Articles XV (asset forfeiture) and XVI (non-refusal of assistance on bank secrecy grounds). See, also *Recommendations of UN Expert Group Meeting on Corruption and its Financial Channels* (1999) (recommending, *inter alia*, measures to regulate money laundering, removal of tax benefits and bank secrecy impediments); Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 4, 21); Global Forum's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999), Principles 8, 10; Council of Europe, *Twenty Guiding Principles For The Fight Against Corruption* (1997) (Prin. 4, 19); G8 *Senior Experts Group Recommendations to Combat Transnational Organized Crime* (1996), Recommendations 29-34 (treating money laundering, confiscation of proceeds of crime, regulation of corruption); G8 *Forty Recommendations of the Financial Action Task Force on Money Laundering* (1996). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption)."

at all. The United Nations Convention against Transnational Organized Crime provides a response to some of these problems. However, mainly because of its limited scope, it will be only applicable in some specific cases.

### *1. Legal Problems encountered*

During the initial phase of a recovery effort, the main challenge lies in the tracing of the assets, the identification of the various players involved in the process of the looting of the assets and the determination of their potential criminal or civil liabilities. Often, the exchange of information between various jurisdictions as well as the public and the private sphere is extremely cumbersome, if possible at all. In such an environment, most efforts fail in this initial phase or are not even undertaken because of the difficulties envisaged. The central legal problems are related to jurisdiction and territoriality. Where legal systems are incompatible, particularly when cases involve cooperation between Continental and Common Law systems, cooperation is difficult. Mutual legal assistance treaties (MLATs) have proven cumbersome and ineffective when the object is to trace and freeze assets as quickly as possible. Overcoming jurisdictional problems slows down investigations, often fatally. By the time investigators get access to documents in another jurisdiction, the funds have moved elsewhere.

The legal problems encountered differ significantly depending on the jurisdiction in which the recovery effort is pursued (common / continental law) and the approach chosen (civil/ criminal recovery). Each approach and jurisdiction has its advantages and disadvantages. Civil law, allowing for confiscation and recovery based on the balance of probabilities, has the clear advantage since the evidentiary threshold is typically lower than with criminal actions. Conversely, access to information as well as investigative powers in the civil process is limited and, apart from some common law countries, the freezing of the assets can be difficult. Civil recovery, however, also opens alternative approaches as far as the civil action against third parties is concerned. For example, in some common law countries where compensation goes beyond simple economic damage and where moral and punitive damage compensation is possible, actions against the facilitators of the looting may be considered. Another advantage of civil recovery consists in the free choice of the jurisdiction in which the recovery of the proceeds of corruption is pursued. In the case of criminal recovery, prosecution must follow pre-set jurisdictional conditions while civil recovery can be pursued almost anywhere in the world, and, perhaps even more importantly, be pursued in several jurisdictions in parallel. This can be particularly important where there is the risk that the offender might transfer his or her loot to a “non-freezing-friendly” jurisdiction.

The criminal law approach generally provides the investigators with privileged access to information, both at the national and international level. The investigative powers of a prosecutors office make it easier to overcome bank secrecy and to obtain freezing orders. At the same time, however, the actual confiscation and refunding to the victim may prove more complex since most legal systems still require that the illicit origin of the proceeds be established beyond any reasonable doubt. In the civil proceeding, the link between the assets and the criminal acts at their origin must only be established on the grounds of balanced probabilities, also known as a preponderance of the evidence.

Another clear advantage of criminal recovery is the cost factor. Criminal recovery requires less financial resources on the part of the requesting State since most of the investigative work which has to be conducted is undertaken by law enforcement agencies of the requested country. However, a clear disadvantage of criminal recovery arises from the dependency on the sometimes strict requirements that need to be met under the requested countries national law in order to obtain the collaboration of its authorities. Courts in requested countries often set preconditions to file charges or to bring forfeiture proceedings against individuals prior to agreeing to freeze assets or to keep them frozen. Repatriation in most cases can be only granted after a final decision is made on criminal prosecution or forfeiture to permit repatriation. Those proceedings must comply with the requested state's own procedural requirements of due process. The courts might also want to establish that the proceedings in the requesting countries satisfy human rights principles. Many requesting countries have found some or all of these requirements difficult to fulfill.

Other aspects are linked to the legal tradition of the jurisdictions involved. For example, a clear advantage within many continental law jurisdictions is the possibility for the victim to participate in the criminal proceeding as a *partie civile*. Such status enables the victim to have access to all the data available to the prosecution and reliance on the criminal court to decide on the (civil) compensation to the victim.

In common law systems, the wide discretionary powers of the prosecution to engage in plea-bargaining has proven to be an effective tool in asset recovery cases. In particular, where the main objective consist not in obtaining conviction for all the single criminal acts involved but to recover the largest amounts of assets possible, offenders may be offered immunity from prosecution in exchange for their fullest collaboration in the location of the diverted assets. However, the impediments mentioned above only touch upon a few of the most evident problems involved. A complete inventory of all the possible scenarios is beyond the scope of this manual.

## *2. Solutions and Limitations of the TOC Convention in the context of the recovery of assets*

Because the TOC-Convention currently under consideration for ratification, the issue of asset recovery as a legal problem will receive some important attention. The Convention, even though targeted at combating offences transnational in nature and involving organized criminal groups, will provide for some solutions in this context. Once ratified, the Convention will also be applicable to other crimes, such as the embezzlement of state resources, fraud, thievery, extortion and other forms of the abuse of public power for private gain, as most of them will be considered as serious crimes under the national law of the State Parties.

The transnational nature of illegal transfers of stolen property will always be present in repatriation cases. However, proving involvement of an organized criminal group in the activity might be problematic. In view of the wide definition of the organized criminal group as a “structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain directly or indirectly a financial or material benefit”, the Convention may nevertheless be applicable. In many cases of the more recent past, the main offenders relied on a network of close associates participating in and benefiting from the various criminal acts involved in the looting. E.g. Mohammed Abacha, son of the late dictator Sani

Abacha, and his associates have already been charged for participating in an organized criminal group under Swiss law.

The Convention obliges the State Party that has been requested to provide mutual legal assistance in investigation, prosecution, and judicial proceeding in relation to the offences covered under this Convention. However, the requesting Party must have reasonable grounds to suspect that such offences are transnational in nature and involves an organized crime group. In particular, the mutual legal assistance to be afforded may include measures such as the identification, tracing, freezing or seizing and confiscating of the proceeds of crime. However, the request shall be executed in accordance of the domestic law of the requested State. This provision gives the requested State wide grounds to refuse responding to the request.

The Convention also obliges State Parties to submit the request for mutual legal assistance in relation to the confiscation of proceeds from offences covered under this Convention to its competent authorities for the purpose of obtaining an order of confiscation, and if granted, to give effect to it. In addition, the requesting State party is also entitled to submit an order of confiscation issued by a court of its own territory to the requested State for execution.

This new legal framework would mean that Member States handling cases of large scale corruption will have a functioning and practical legal framework. In particular they would be able to obtain the cooperation of other State Parties to identify, trace, freeze or seize assets deriving from a large variety of corrupt practices. Recovery of the assets, however, can remain problematic. According to Article 14, State parties shall give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party. This provision is not mandatory and it is only applicable if the requesting State Party intends to compensate the victims or to return the proceeds to their legitimate owners. While it relatively easy to obtain repatriation where assets have been directly diverted from State resources, the situation is less clear with regard to the proceeds of corruption. In these cases, the interests at stake for the victim state are less clear unless it suffers damage directly linked to the payment of the bribe. Where the requesting state can not show that the funds are actually owned by the state, the requested state may still confiscate the funds as criminal proceeds and keep it for themselves.

#### **D. Technical Capacities**

One of the most important obstacles to seeking out illegal funds and securing their repatriation is lack of capacity in the requesting and in the requested country. The recovery of assets that have been diverted through corrupt practices is extremely complex and consequently requires top-level technical capacities. Tasks necessary to successfully mount a repatriation effort include the conduct of financial investigations, forensic accounting, requests for mutual legal assistance and a solid understanding of the legal requirements of the States where the assets have been located. There are few practitioners in either public or private practice with experience in this type of work, and in many jurisdictions, there are none at all.

In states where corruption is rampant, these capacities are often not available and it is probable that a lack of state capacity helped create the conditions that facilitated the corruption in the first place. Shortcomings in judicial, administrative and/or investigative capacity, however, seriously impede the degree to which a country can undertake such a case successfully. Necessary technical expertise is available at very

high costs. Countries that have been looted by their former leaders are typically finding themselves in substantial budgetary crisis. Spending money on private lawyers based on the uncertain hope of actually being able to recover these costs may often not be an option. Also, the private sector generally has no interest in educating the national authorities so that they will be able to conduct future recovery efforts without the help from outsiders. Consequently the lack of expertise remains unchanged.

#### **E. Resources**

The recovery of assets can be costly. Much of what can be done in relation to the repatriation of assets depends on the resources available to fund the case. Cases will almost certainly last for several years, and parties to the action are likely to be determined by their ability to fund litigation. In the case of criminal recovery, this might less be an obstacle. Also, offenders that have been looting their respective countries over a long period of time do not face the same resource problems as the victims trying to recover the assets. They can employ armies of lawyers ready to jeopardize and delay the successful recovery with all legal means available. The issue of justice being done becomes a question of how long offenders and victims are able to sustain the battle.

#### **F. Prevention of future victimization**

States that have been victimized often do too little to prevent future diversion of assets. This leads not only to repeated victimization, but it also affects negatively the repatriation of such funds that have already been diverted. It is understandable when some countries may be hesitant to collaborate in the repatriation of assets when they must fear that the assets returned most likely will become prey to corrupt practices again. Therefore, countries embarking on a recovery effort should consider committing a certain percentage of the assets recovered in form of a “Governance Premium” to the strengthening of the national institutional and legal anti-corruption framework.



## **XI. MONITORING AND EVALUATION**

### **A. Introduction<sup>78</sup>**

Although not as newsworthy as grand corruption, petty corruption and system leakage make a favorable environment for grand corruption. From the perspective of public service users, inefficiencies and inequities of public services are a misuse of public power. They “leak” resources from the system that should serve the public.

Petty corruption and system leakage passes along the costs of services to the public, increasing costs without increasing — and often decreasing — efficacy. Stakeholders lose time waiting in queues, going through a proliferating number of gatekeepers who live off of providing these services, paying additional user fees and receiving inferior and ineffective services. In the same way, reducing system leakage makes good sense because more resources are available for service provision, the quality of services usually improves, and an ethos of accountability and service to the public is strengthened. At the same time, a more efficient system of service provision can help to build an unfriendly environment for grand corruption.

Service Delivery Surveys (SDS) combine systematic modern measurement sciences with opinion polls and anthropology. Focus groups and systematic discussions with community leaders are used to enrich hard data with cultural and experiential insights. Rigorous epidemiological analysis identifies the risk and resilience factors that point toward corrective action, and helps to predict the dividends likely to be gained from potential corrective action.

Service Delivery Surveys basically help to reduce the system leakage caused by corruption and a lack of results orientation by correcting for information asymmetries and by bringing service providers and users closer together.

### **B. Why Bother to Measure?**

Corruption represents a “leakage” of resources from institutions that are supposed to be using them for social objectives. It is not only the large-scale larceny of contract rigging, kickbacks, and misuse or simply misappropriation of public funds that represent leakage. This leakage can be in the form of unofficial user fees, kickbacks, grease payments or even free time from services not performed. Under-the-table user charges, absenteeism, the sale of drugs or fertilizers that should be dispensed free of charge, or sale of examination papers — all of these examples represent the misuse of public funds for private profit.

The results of this leakage creates an environment propitious for grand corruption, diverting already scarce public service resources, and it “double taxes” the public. Validation of the fact that corruption reduces service effectiveness is shown by corruption surveys done in Uganda and Tanzania. In Uganda, peasants subjected to corrupt agricultural extension agents had to pay more for fertilizers and pesticides than those in areas outside the reach of the project. They also had lower levels of production. In Tanzania, households who had to pay bribes for police assistance and for land transfers often found their problems were not resolved by the payment. And to make matters worse, sometimes these police and land officials also accepted bribes

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<sup>78</sup> Neil Andersson

from the other side of the conflict, thus often leaving the issue effectively unresolved (or resolved in favor of whoever paid the most). Surveys can uncover these facts.

Another reason to measure is because resources may not be used to the maximum due to information asymmetries and constraints. The first reasons for this asymmetry is the introspective nature of institutional information systems. Public service providers in virtually all countries have recourse to data generated by routine information systems. However, even in the best of cases, these data tend to be introspective, concerned with the perspective of the institution (the school, the clinic or the police station) rather than the users of the services (the public). Many "users" are not even in contact with the services and thus their opinions can not be registered in a service-based information system. Further, conventional planning of public services, since it begins with the institutions rather than with the public, often does not contemplate key concerns like coverage or impact of services — much less the question of system leakage.

The second asymmetry concerns the lack of information from which to form expectations. Very often public service users have little idea of what services their money should be buying and are thus subjected to local market dynamics. As they have no way to know whether a particular shortfall in services is due to the service worker, under-investment on public services, or any of a dozens of causes of system leakage, the formation of expectations becomes rather difficult.

Reform might further aggravate the information constraints that they try to correct. It is true that managers often have an accurate "big picture" of the reforms which are necessary to improve equity, effectiveness, efficiency and deal with system leakage. Streamlining, downsizing, and refocusing service objectives are some examples of these reforms. Yet, the promise of increased responsiveness and improvement in quality often does not materialize because this streamlining often reduces the institutional ability to measure coverage and impact of services (as well as system leakage).

In public service provision, there are a number of questions that managers of public services need the answers to if they are to overcome information constraints. The first set of questions address the issue of what needs reform. What can be changed? What should be changed first? How much is gained from each of the actions taken? How does one measure progress? What is the confidence level of the answers obtained? A second set of questions deals with the focus of the actions. Some of these questions include the following. Should we focus on particular service providers? Are there any special groups of service users (ethnic, generational and gender divisions are typical stratifications) especially harmed by system leakage? Are there any multiplier effects or combinations of actions that produce more than the sum of their individual effects? A third set of questions deals with the financial and political costs of reducing system leakage. How much will this stakeholder information system cost to implement? How long do we have to wait for the returns? What evidence is there of a community or constituency acceptance or a public mandate for change? What is the level of institutional acceptance from the service delivery agencies?

The solution to these information asymmetries and constraints requires a measurement interface between services and users — a process whereby the community voice can be built into planning. Service Delivery Surveys have been designed and implemented in a number of countries with the goal of providing this measurement interface.

### C. Service Delivery Surveys (SDS)

Service delivery surveys originate from a community-based action-research process developed in Latin America in the mid-1980s, known as Sentinel Community Surveillance (SCS). Since then, these stakeholder information systems have been implemented with World Bank support in Nicaragua, Mali, Tanzania, Uganda and Bosnia. With the help of UNICEF and UNDP, they have been established in Pakistan, Nepal, Burkina Faso, Costa Rica and Bolivia.

The scheme was originally conceived to build capacities while producing accurate, detailed and “actionable” data rapidly and at low cost. Ordinarily, SDS’s focus on the generation and communication of evidence for planning purposes. This may be at the level of a municipality, a city, a state, a number of provinces or an entire country. In each of these settings, a representative sample of communities is selected to represent the full spread of conditions in the country (or district). The approach permits community-based fact-finding through a reiterative process, addressing one set of issues at a time.

The SDS process starts with a baseline of service coverage, impact and costs in a representative panel of communities across the country (or district). This involves a household survey, where local interviewers are trained to knock on doors and ask a limited number of well-focused questions about use of services, levels of satisfaction, bribes paid and suggestions for change. These data, and the institutional review from the same communities, are discussed in each community with the service workers and community leaders. The quantitative aspects are used for bench-marking progress with subsequent reiterations of the survey. Logistics of the SCS focus on repeated measurement in the same sites, reducing sampling error and making impact estimation straightforward. The qualitative dimensions reveal what should be done about the problem.

Central to SCS is interaction with the research partners — the communities. The product is therefore the aggregation of data from the epidemiological analysis distilled through interaction with communities.<sup>79</sup> By feeding information back to the communities, dialogue for action is stimulated within households, in communities, and between communities and local authorities. The resulting mobilization to resolve specific problems also serves as a basis for empowerment. This involves initiation of cycles that follow a fairly constant rhythm, independent of the subject. Experience over more than a decade of implementation in 40 countries has shown that ownership and commitment on the part of the client is vital to successful development projects. The greater the intensity of participation (in terms of information sharing, consultation, decision-making and initiating action), the greater the sustainability.

The method has been used to measure impact, coverage and cost of land mines, economic sanctions, environmental interventions, urban transport, agricultural extension, health services, judiciary and institutional restructuring. It has proved useful in generating community-designed strategies to combat corruption in the public services in several countries. Actionable results are provided in a short time and at low cost. Typically, the duration of a whole cycle, from the design stage to the report writing, is six to eight weeks.

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<sup>79</sup> Webster’s New Collegiate Dictionary defines “epidemiology” as: i) a branch of medical science that deals with the incidence, distribution, and control of disease in a population, ii) the sum of factors controlling the presence or absence of a disease or pathogen.

#### **D. Some results of the SDS**

Corruption (almost by definition) represents a separation between leaders and their constituencies and separation between public servants and the public. The first contribution of a SDS in overcoming this separation is that all segments of the public are reflected in the collected data. This data gives a voice to the urban and rural, male and female, rich and poor, young and old — even those who do not have access to certain public services for either physical or social reasons. Stratified focus groups are assembled to identify potential solutions so that each group is enabled to voice their opinions and solutions.

But simply to be included in the sample as people who give opinions on the services is a fragile representation of the community voice. The second way SDS's reduce this separation is that it involves stakeholders actively in the social audit process. Feedback of the data to the communities (such as in Uganda and Tanzania) and systematic use of data to build solutions adds another dimension to the community voice in planning. In these examples, the participants of the focus groups were invited to meetings with the local community leaders to discuss the feasibility and implications of the solutions.

The third way SDS's close this gap is by providing feedback in a positive way using results to reveal options for the achievement of goals rather than underscoring deficiencies. Communities or districts with the poorest indicators are shown how certain reforms can improve their situation. Further, having a voice in the interpretation and analysis of the resulting data helps to build confidence among the stakeholders and provides a favorable climate for community mobilization.

The fourth way SDS's can help to bring the governed and governing together is by using results to manage a change process. This process starts with a necessary commitment to communicate results from the government. The results of each cycle are then communicated to public service providers through a series of "change management" workshops. In Tanzania, the results were discussed in a Cabinet retreat, where a national policy against corruption was formulated. In Uganda, the results were presented at a parliamentarian's retreat. Media workshops in both countries familiarized journalists with the data and the correct management of positive examples. In this way, these change management workshops help build a sense of accountability, transparency and open government.

SDS's also provide data necessary for results-oriented development planning. It is a fact that most local governments in developing countries are characterized by poor fiscal outcomes. A results-oriented approach can help improve these outcomes. However, results-oriented management needs detailed "actionable" quantitative data. For a government or municipal authority to act on behalf of a vulnerable subgroup, hard data are required to identify the subgroup concerned and to act as a benchmark to measure progress. Complementary qualitative data are also needed to indicate the cultural and gender constraints and opportunities as well as to confirm the analysis given to the quantitative data.

#### **E. Different Types of Monitoring at the international level**

At least three types of monitoring mechanisms are currently in use as part of anti-corruption programmes: (i) those based on international instruments, (ii) those based

on national instruments and (iii) those of a more general nature<sup>80</sup>. The advantage of instruments-based mechanisms is that the legal framework is clear: the monitoring focuses on the *implementation and impact* of the various provisions of these instruments. Examples of this type of monitoring are the mechanisms relating to the OECD-Convention on combating bribery of officials in international business transactions, the GRECO-Programme of the Council of Europe and the various monitoring exercises within the European Union (it is expected that the future UN-instrument against Corruption will also contain a provision on monitoring).

However, even without this sort of formal framework, monitoring effectiveness of national strategies has been accomplished via the use of surveys. An example of this is the recently established monitoring mechanism used in Romania, Lithuania and Poland. Instead of being based on a legal instrument, monitoring takes place on the basis of questionnaires, listing relevant questions on national policies and legislation. Two other examples include the perception indices developed by Transparency International as well as the annual independent survey conducted by ICAC in Hong Kong which measures, among other things, the trust level between ICAC and the public, prosecution rate, as well as levels, types, location and causes of corruption. The UN is currently testing a method in two pilot countries using a so-called country assessment based on both facts and perceptions using hard facts, surveys, focus groups and case studies.

#### **F. Challenges measuring the impact of anti-corruption strategies**

There are certainly many challenges to accurately measuring the impact of anti-corruption strategies, policies and measures.

*First*, collected data must be analysed by a competent and independent institution capable of extracting the true essence of the data collected which can then be analysed highlighting differences and identifying so-called "best practices". To do this in a credible manner, availability of resources will always be an issue. This holds true even for monitoring mechanisms based on international instruments, since it is not always evident that the Secretariats of the organisations concerned have the necessary resources to ensure effective support and analysis of these mechanisms.

*Second*, current international monitoring mechanisms are unevenly distributed throughout the world. In some regions, countries tend to participate in more than one monitoring exercise, while in other parts of the world there are no operational monitoring mechanisms at all, as, for example, in most parts of Asia. Of course, the other extreme involves instances where there are multiple mechanisms applicable to the same region, and the challenge arises as to how to avoid duplication of effort.

*Third*, monitoring can never be an end in itself. Rather, it should be an effective tool to bring about changes in international and national policies and improve the quality of decision making. If the monitoring exercise is linked to an international instrument, the primary objective should be to first ensure proper implementation of the technical aspects of the instrument and then the practical impact of its implementation. Monitoring can thus serve two immediate purposes. It helps to reveal any differences in interpretation of the instruments concerned and it can stimulate swift and effective translation of the provisions of these instruments into national policies and legislation. If it is determined that incomplete or ineffective implementation has occurred,

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<sup>80</sup> Petter, Langseth; (2001) Helping Member Countries Build Integrity to Prevent Corruption;

sanctions can be imposed to motivate stronger efforts at success. Therefore, accurate monitoring is critical with respect to launching any successful anti-corruption initiative.

In the case of the OECD-Convention, for example, a built-in sanction requires that reports of the discussions on implementation be made available to the public. Such publicity can be an important mechanism in helping promote more effective measures. Reference can be made in this regard to the publicity surrounding the perception indices of Transparency International. Even though these indices simply register the perceived level of corruption as seen by primarily the international private sector, they gain wide publicity. However, inasmuch as the TI indexes are somewhat useful, a distinct disadvantage is that they: (i) do not always reflect the real situation, (ii) do not involve the victims of corruption in the countries surveyed; (iii) offer little or no guidance of what could be done to address the problem, and (iii) can discourage countries from taking serious measures when their anti-corruption programme efforts are not seen as being successful by an improved score against the TI-Index.

*Fourth*, monitoring exercises cannot be separated from the issue of technical assistance and it is critical that monitoring not only addresses levels of corruption, but also its location, cost, cause and the potential impact of different remedies. Furthermore, since the trust level between the public and anti-corruption agencies is critical for the success of anti-corruption efforts, public trust levels should also be monitored.

It may be the case that participating countries agree on the need for implementing the measures identified as "best practices", but lack financial, human or technical resources to implement them. Under those circumstances, monitoring exercises would be much more effective if they were accompanied by targeted assistance programmes. It should be added, however, that not all measures require major resources, especially in the context of preventative measures where much can be done at relatively low cost.

Most of the data collection done by the traditional development institutions is based on an approach that can be described as "data collection by outsiders for outside use". Generally conducted by external experts, international surveys tend to be done for external research purposes. International surveys help spark debate about those countries which fare badly. Such surveys help to place issues on the national agenda and keep it at the forefront of public debate. However, international surveys are comparative and fraught with statistical difficulties.

One value, however, has been that they have highlighted the need for national surveys, and these are now being undertaken with increasing thoroughness. With public awareness of levels, types, causes and remedies of corruption dramatically improved over the last 5 years, the utility of collecting data about corruption is to increase the accountability of the state towards its public by establishing measurable performance indicators that are transparently and independently monitored over time

## **G. Integrated Country Assessments**

The approach pilot tested under the framework of the UN Global Programme against Corruption (GPAC) by the UN Centre for International Crime Prevention (CICP) in collaboration with the United Nations Inter-regional Crime and Justice Research

Institute (UNICRI)<sup>81</sup> is an integrated approach where national or sub-national surveys are ideally conducted by locals (in some cases helped by outsiders) for local objectives. An important outcome of this process is that citizens have a voice in their own government and ultimately demand that government become more accountable and transparent.

With GPAC's integrated approach, data collection should be an important but small proportion of entire initiative. The majority of effort should be to use the data for evidence-based planning and decision-making, as well as for transparent impact monitoring. .

Often a larger sample size is required in the integrated approach than that which is necessary according to surveys done by external institutions for external use. This is partly because the data is used to compare corruption sub-nationally across districts or provinces within a recipient country. In addition, the data collection itself is not merely for gathering data, but also to raise awareness and empower citizens by asking pertinent questions that might impact directly on their lives. With a sample size of 18,412 households in Uganda<sup>82</sup>, more than 100,000 citizens were directly involved in the data collection and the related 350 focus groups involved another 5,000 citizens in the process. The data collection process itself could almost be seen as an empowerment process or as pilot run of a functioning democracy.<sup>83</sup>

The country assessment is conducted with the co-operation of different national and international partners (e.g. In Hungary: UNICRI, Gallup). It is primarily a locally requested tool that will among other things, be used by the civil society to hold government accountable. Important elements of the assessment are:

- (i) *A desk review* aimed at compiling all relevant anti-corruption information.
- (j) The *public opinion surveys* based on the SDS methodology described above, sufficiently representative to indicate corruption levels, types and coverage across sub-national units and key institutions.<sup>84</sup> One important variable to survey regularly is the public confidence across all institutions and stakeholder groups involved in the fight against corruption including.
- (k) The *focus groups*, also based on the SDS methodology, to promote in-depth discussion with opinion makers or targeted interest groups in government and society. Using this technique detailed information can be gathered about perceptions of corruption, what they see as the causes and what the government needs to do in order to fight it.
- (l) The *case study*, as elaborated by local experts, to describe typical corruption cases in great detail as a means of facilitating a better understanding of how corruption actually occurs. Well-documented practical case studies are expected to help anti-

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<sup>81</sup> UNICRI is the organization that conducts the International Crime Victimization Survey (ICVS), one of the studies used by Transparency International in their annual Corruption Perceptions Index.

<sup>82</sup> CIETinternational, 1997

<sup>83</sup> Petter Langseth, (1999). Update on Uganda; Staying the Course, World Bank PREM NEWS, June 1999.

<sup>84</sup> .As an example in Uganda each of the 46 districts would have survey data comparing their district with the national average. This type of survey was requested by the Government Inspector-General, who argued that the only way he can fight corruption is to have information about corruption levels across sub-national units.

corruption agencies fine-tune their measurement as well as to make the public and potential whistleblowers more aware.

- (m) *The Legal Assessment* to assess existing laws and regulations, e.g. what constitutes a corrupt action and what are the sanctions; to analyze in detail where legal gaps are and inconsistencies exist<sup>85</sup>; to examine how these laws and regulations are implemented and enforced, whether they are taken seriously, and whether sufficient resources have been invested in their execution.
- (n) *General assessment of official oversight bodies* to hold governmental officials and agencies accountable for their actions. Examples could be Inspector-General of Government, Ombudsman and/or Auditor General.
- (o) *The institutional assessment* to inventory what judiciary, executive and legislative bodies are already doing to fight and prevent corruption as well as public confidence. It is important to go into greater depth with some of these anti-corruption agencies to identify where there are specific problems. To accomplish this, the Global Programme will use different techniques including “process mapping” to analyze the functions, procedures, reporting relationships, access to information and incentives in anti-corruption agencies across all three branches of government. The mapping specifies how an organization does its business; what it does efficiently and inefficiently, identifies where there are conflicts of interest and where there are excessive opportunities for extortion (bribe taking) and bribe giving.
- (p) *The assessment of civil society and the media* and their capacities to hold the government accountable as evidenced by their access to information and the freedom and independence of press. Different techniques can be used to assess the quality and the vigilance of the media reporting on corruption cases. This would range from: (i) systematic content analysis, (ii) the impact of different media types; (iii) the review of who owns and controls the media. Regarding the access to information the country assessment is not only going to assess laws on the books but also to what extent a journalist or a citizen actually can access certain information in a timely and free fashion.

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<sup>85</sup> .Certainly anti corruption provisions can appear in many different laws- criminal and penal codes, civil service laws, standing orders, public procurement regulations and many others. These should be consistent

**PART 3:  
CONCLUSION AND  
RECOMMENDATIONS**



## XII. CONCLUSIONS

### A. Introduction

Contextualising the problem of corruption and recognizing that corruption exists must not be the end of the analysis. Demoralization, cynicism and fatalism are not the solution. No one claims that corruption or crime can be eliminated. They can and must, however, be reduced. Their most serious consequences must be countered. The causes of the gravest forms of corruption ought to be addressed. Many are tempted to think that the omnipresence of this problem means that it is unsolvable or that nothing much can be done about. Nothing is more removed from the truth. The cases of Singapore, Botswana and Hong Kong can highlight how determined administrations, continuous commitment and wide alliances between government agencies, the public, the press and the private sector can make a huge difference. These administrations not only had leaders who were whole-heartedly committed to fight corruption, but also understood well the root causes of the problem.

A complete theory and understanding of the causes of corruption must include accounts of opportunities to engage in corrupt activities; motives or incentives to take advantage of available opportunities; and control weaknesses to allow corrupt practices to go on undetected or unsanctioned. Therefore, attempts to fight corruption that do not address all three areas are unlikely to succeed. Anti-corruption efforts must be continuous, whole-hearted, transparent, evidence based, integrated, broad based and full-scale.

Perhaps the two most significant achievement in the “governance area” over the last 10 years have been the:

- (a) shattering of a taboo that shrouded corruption from discussion, particularly in diplomatic circles and intergovernmental institutions. The topic is now out in the open and a potentially powerful coalition has emerged from this debate. Interest groups that never collaborated previously in preventing corruption now recognise that governments alone cannot hope to contain corruption<sup>86</sup>,
- (b) increased public awareness of the scope of money laundering as a problem much larger than the aid industry, its link to political corruption and the emerging willingness of international organisations and governments to address the issue of repatriation of funds looted by former dictators.

The support and participation of an active but independent civil society must be attained. Governments must allow new *checks and balances* to be established including:

- Timely, broader and easier access to information;
- an independent judiciary with integrity<sup>87</sup>;
- a legislative that represents the public and provides the correct role model;

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<sup>86</sup> Jeremy. Pope, Transparency International Source Book, 3 edition, Berlin 2000

<sup>87</sup> Petter, Langseth, & Oliver, Stolpe, (2001), Strengthen the Judiciary against Corruption. International Yearbook for Judges, Australia, 2001

- a result-oriented and clean executive; and a strong civil society empowered by a free, clean and independent media

## **B. History has revealed the following valuable facts**

1. Economic growth is not enough to reduce poverty. Poverty alleviation will not occur without a broader, integrated and comprehensive strategy for change
2. The misuse of power for private gain seems to be endemic
3. Curbing systemic corruption requires stronger measures, more resources and a longer time horizon than most politicians and corruption fighters will admit or can afford.
4. Left unchecked, corruption will increase and make the poorest and least educated poorer. Where personal risk and punishment are minimal, the risk of corruption naturally increases.
5. Raising awareness without adequate and visible enforcement will lead to cynicism among citizenry and possibly increase the incidence of corruption.
6. Recent corruption cases exposed at the World Bank, the UN and other multilateral and bilateral organisations have shown that the misuse of public power for private gain can occur in any society or organization, even where there are well-laid checks and balances.
7. A country's national institutions do not work in isolation. Where they do, they will fail in their totality. A transparent and integrated system of checks and balances, designed to achieve accountability among the various arms and agencies of government, disperses power and limits opportunities for conflicts of interest
8. Public trust in government, anti-corruption agencies and anti-corruption policies and measures is key when a country invites the public to take an active role in monitoring the performance of its government. For example, in Hong Kong, according to a 1999 community opinion survey, 99% of the population said they supported its Independent Commission Against Corruption, 66 % of the population said they were willing to file a complaint or blow the whistle on a corrupt official or colleague, and 75% of those people said they were willing to also identify themselves when reporting suspected corruption Without public confidence in anti-corruption policies and measures, complaint systems will fail, investigative media reports will remain officially unfounded and anti-corruption trials will be viewed as mere political show-casing.
9. *It takes Integrity to Fight Corruption.* Any successful anti-corruption effort must be based on integrity and credibility. Where there is no integrity in the very system designed to combat corruption, the risk of detection and punishment to a corrupt regime will not be meaningfully increased. Complainants will likely not come forward if they perceive that reporting corrupt activity will have no effect.
10. *Building integrity and credibility takes time and consistency.* The belief that corruption can be eradicated quickly and permanently inevitably leads to false expectations that result in disappointment and distrust. It must be understood that curbing corruption requires political will, public confidence, adequate time, resources, dedication and integrity. Moreover, efforts can not stop once corruption has been identified and controlled. Localities will have to continue to build integrity and to

maintain vigilance. Thus, fighting corruption will become a permanent item of public expenditure.

11. The close link between money laundering and corruption makes it essential to launch national and international efforts in at least in three areas:

- a. curb opportunities for corrupt leaders to loot national integrity strategies and anti- corruption action plans have to reduce the opportunities for corrupt leaders to send large amounts of money abroad. According to Financial Times, more than US\$ 250 Billion (10 annual budgets of the World Bank) have over the last 15 years been looted and transferred abroad by Nigeria and Russia alone,
- b. curb opportunities for corrupt leaders to deposit their illicit assets abroad
- c. increase the chances to repatriate the illicit funds already looted by former and current officials. Parts of the recovered funds should be invested building national integrity, public awareness, rule of law and strong checks and balances to prevent future looting by corrupt leaders.

### **C. Overriding Lessons**

Perhaps the overriding lesson is that we still have much to learn. Success stories are few, and it is not enough to point to Singapore, Botswana and/or Hong Kong. These are small areas with governance practices and values that would not necessarily work or be accepted in other environments. We have learned much about failure, and these lessons are valuable because they can help reformers and the civil society to avoid repeating discredited approaches.

The belief that corruption can be eradicated quickly and permanently inevitably leads to false expectations that result in disappointment and distrust. It must be understood that curbing corruption requires adequate time, resources, dedication and integrity. Moreover, efforts can not stop once corruption has been identified and controlled. Localities will have to continue to build integrity and to maintain vigilance. Thus, fighting corruption will become a permanent item of public expenditure.

Corruption has debilitating effects upon society. It undermines the efficient allocation of financial resources for economic development and alters the composition of public expenditure. In addition to the detrimental effects on economic growth, corruption jeopardises free trade, distorts competitiveness and undermines the stability upon which the free market system is based. Corruption further jeopardises the credibility of governments and their institutions and provides a breeding ground for organised crime to flourish. Moreover, it is a phenomenon that transcends national boundaries, affecting the public and private sector, and businesses and public officials can be either the perpetrators or the victims of corrupt practices.

Strategies to fight corruption do not reside solely with criminal justice but rather should also be co-ordinated with economic and social policies and the development of civic political culture. Because it is a process and a relationship, the state, its public administration and the citizens all share a responsibility in preventing and controlling it.

A number of mechanisms exist to fight corruption at various levels (local, national, transnational) within both the public and private sectors. International instruments, in the form of declarations, conventions and codes promote transnational co-operation and delineate prohibited and punishable offences. These instruments, however, are

limited and legal loopholes must be filled with national legislation. In spite of limited success stories, widespread implementation of anti-corruption measures and monitoring mechanisms has been scarce. This fact supports the need for a comprehensive UN convention addressing corruption.

#### **D. Recommendations**

##### *1. It is important to involve the victims of corruption.*

Very few initiatives involve the people suffering from the effects of corruption. It is therefore critical to do more of what ICAC in Hong Kong has done over the past 25 years. The ICAC interfaces directly (face to face in awareness raising workshops) with almost 1 % of the population every year. In an environment where the public can trust the anti-corruption agency, they can be a major source of intelligence whose “eyes and ears” can aid tremendously in identifying and thereby curbing corruption. To play this role the public must be protected. Also, they need to be given tools to assist in identifying factors precipitating corruption, should be solicited to suggest remedies and should be encouraged to monitor the impact of anti-corruption strategies and action plans. A well-informed and protected public can hold the government and its civil servants accountable and thereby increases the risk and uncertainty for civil servants abusing its public powers for private gains.

##### *2. Sequencing of Reform*

Working out precisely where to start the reform process is important as it will dictate much of the path ahead. It is in this context that the “national integrity system workshop” can be most effective, providing an opportunity for all stakeholders to participate in a process. Probably as important is the combination and sequencing of different anti-corruption tools. Some tools are not going to be effective unless they are used in combination with other tools. For example a hotline is not going to result in curbing corruption unless the hot-line is broadly presented to as many citizens as possible as a credible and trust worthy tool that will be followed up by a strong anti-corruption agency.

##### *3. Strength and Credibility of Anti-Corruption Watchdog Agencies*

The strength and credibility of enforcement and watchdog agencies is crucial to the building of public trust and confidence. Credible agencies will attract public cooperation, both as complainants and as witnesses. An institution lacking in trust will not. And at the heart of credible institutions lies their manifest and popularly accepted integrity. Their leaders must role model conduct of the highest kind.

##### *4. Strategic Partnerships*

Strategic partnerships and increased information sharing at the international, national and sub national level is essential. A particular challenge for bi- and multilateral donor agencies that assist Member States in their fight against corruption as outsiders is to identify the right partners. This dictates a special role for civil society in a country from the very outset so as to ensure that the reform process is fostered with the right “champions”.

### *5. Partnerships to Facilitate Recovery of Illicit Assets*

In order to succeed to prevent illegal transfers of corruption proceeds and to repatriate such proceeds, the criminal justice systems in the North and the South, international donor agencies and regulatory bodies need to establish stronger partnerships to develop an adequate legal and institutional framework.

### *6. Partnership to Strengthen Checks and Balances*

A large percentage of national corruption is taking place within the public sector. In order to curb public sector corruption, whether at political, administrative or street levels, there is a need to establish stronger checks and balances. Stronger checks and balances require new and stronger partnerships including and empowering all key stakeholder such as the victims of corruption, media, private sector, religious organisations, youth, legislative, judiciary and the executive at the national and municipal level. In order for such broad coalitions to work it is critical that the partnership is based on trust. Based on experiences from Hong Kong as reported by the ICAC, public confidence in the state must be earned and thereafter requires consistent awareness raising, information sharing and hard work.

### *7. Partnerships to implement existing International Legal Instruments*

Corruption and the laundering of corruption proceeds are addressed by a variety of international and regional legal instruments. Successful implementation of these instruments requires strong collaboration between the Member States. If there are no working partnerships and little or no political will, such legal instruments are not going to help countries to prevent and control corruption as well as prevent the illegal transfer of corruption proceeds and the repatriation of such proceeds.

### *8. Partnerships to develop a legal instrument against corruption*

Partnerships are also crucial in the process of developing legal instruments against corruption both at the national and international level. The process should involve a broad group of stakeholders including, government authorities, the private sector – in particular the banks -, the victims, NGO's and the media.

### *9. Identifying and recovering stolen assets is not enough.*

According to the New York Times, as much as \$1trillion in criminal proceeds is laundered through financial system world-wide each year with about half flowing through US banks. In developing countries such as Nigeria, this can be translated into US\$ 100 Billion stolen by corrupt regimes over the last 15 years. Even if Nigeria receives the necessary help to recover its stolen assets, reasonable people would be hard-pressed to advocate its return back into a systemically corrupt environment without trying to first increase the risk, cost and uncertainty to corrupt politicians who would most likely again abuse their power to loot the national treasury.

### *10. Increased enforcement of Money Laundering Legislation and Regulations*

Governments must improve and enforce money-laundering statutes to reduce the opportunities for corruption. Money laundering and corruption seem to be treated as different problems. The media frequently links money laundering' to illicit drug sales, tax evasion, gambling and other criminal activity. When politicians accept the idea that lack of opportunity and deterrence are major factors helping to reduce corruption,

it follows that when ill-gotten gains are difficult to hide, the level of deterrence is raised and the risk of corruption is reduced.

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