The Effective Implementation of International Anti-Corruption Conventions

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I. Introduction

For over 10 years, organisations such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe (CoE) have been helping developing countries adopt legal measures to fight corruption. These efforts, however, have sometimes had less than the desired impact. The UN, OECD, and CoE conventions against corruption have been relatively ineffective because these conventions, while ratified by national parliaments, are not being implemented in the government agencies most prone to corruption – particularly the traffic police, security services, customs, and tax inspection. Figure 1 provides an overview of the three conventions discussed in this article and the ways in which they are supposed to be implemented. As shown in the figure, two of the conventions rely on the national judicial system – particularly on government prosecutors – to implement their provisions (the CoE Civil Law Convention, in contrast, does not). However, national authorities can engage in a number of practical steps that can bolster the effectiveness of these international conventions. As it is not possible to address all such practical steps in detail, this article will focus on a few aspects of an effective implementation of the aforementioned international anti-corruption instruments.[1]

Part II of this article covers the basic points that should (or should not) be included in executive regulations governing law enforcement agencies. Part III discusses methods of discouraging civil servants from taking bribes. The fourth part examines ways in which countries can finance additional law enforcement obligations imposed by the international conventions against corruption. In Part V, a concrete example is given of how some of the issues raised in the previous parts can be applied within the international legal framework. The issues are illustrated on the basis of the international corruption scandal involving the French oil company Elf-Aquitaine. Finally, Part VI provides concluding observations and suggestions.

Figure 1: Overview of the three international conventions against corruption, source: author

Convention	Brief Description	Method of Implementation	Weaknesses
UN Convention against Corruption (2003)[2]	Makes corruption a criminal offence in over 100 countries; provides provisions for asset restitution.	Relies on member state police and judicial systems to investigate and prosecute corruption.	Offers general guidance, includes no methods for financing the additional activities imposed on signatory states, repeats much of the work of previous regional treaties.
OECD Anti-Bribery Convention (1997)[3]	Makes the bribing of foreign officials by legal and natural persons from OECD countries a criminal offence.	Relies on OECD member state prosecutors and courts to discover and convict corruption cases committed in foreign countries.	Provides little incentive for governments to harm their own companies in international competition by enforcing the Convention; provides no methods for financing the additional activities imposed on signatory states.
Council of Europe Civil Law Convention Against Corruption (1999)[4]	Encourages legal and natural persons to sue for the harms imposed by corruption.	Relies on harmed parties to sue in civil courts for the value of the harm engendered by corruption.	Relies on self-interested individuals to "fight the system" as well as on an often corrupt judiciary.

II. Executive Regulations for Law Enforcement Agencies

Three points should be dealt with regarding executive regulations that tackle corruption: the distinction between bribes and gifts, the problem of unnecessary regulation, and the need for clear regulatory drafting to help compensate for the vagueness of the conventions themselves. The effective implementation of the conventions listed in Figure 1 requires, first, a reasonable *delineation of offenses* covered by the legal definition of corruption. In developing countries, bribes are often confused with gifts. Such confusion has led most international conventions against corruption, including the UN Convention against Corruption, to prohibit (or at least regulate) gift-giving to civil servants.[5] However, surveys about the public's perception of corruption often point to differing views about the giving of whiskey, chocolate, or small cash gifts. According to most of these surveys, many respondents consider the giving of such gifts to be ethical and permissible behaviour even though international guidelines for developing countries discourage this kind of activity. A *two-part test* can help civil servants and prosecutors to understand the difference between indictable bribes and gifts about which there should be no complaint: A "payment" (a bottle of cognac, for example, or a box of chocolates) is not "corrupt consideration" if (1) the gift does not coincide with the delivery of a service to which the public service user has a right and if (2) the civil servant could not anticipate *ex-ante* (i.e., before delivering the service) that the gift would be given. If both of these requirements are met, there is no linkage between the "payment" and the service delivery. Naturally, a fixed rule against accepting any gifts might be easier to implement, and cases in which one part of the test fails would require special attention.

Furthermore, executive regulations should reflect the fact that the effective implementation of international conventions against corruption often depends on the removal of *unnecessary regulation/legislation* in general. Often, the state engages in unnecessary anti-corruption programmes or provides problematic regulations that may even enhance corruption. In many cases, corruption results when regulations prevent economic actors from engaging in activity in which they would prefer to engage.[6] For example, regulations that impede the cross-border import and export of products encourage traders to find black market methods of trading these products. The World Bank estimates that the effect of these "regulatory distortions" can be to increase the cost of goods from 5% to 100% in some countries![7] While such regulations obviously contribute to the creation of black markets, many other regulations are similarly counterproductive. For example, regulations specifically aimed at reducing corruption – such as rules about the rotation of staff, the declaration of civil servants' assets, or the signing of forms by multiple civil servants – can also encourage the development of black markets. An increasing number of documented cases shows that anti-corruption regulations and rules aimed at reducing corruption actually lead to an increase in corruption![8] Another negative aspect is that the enforcement of such regulations requires resources (and thus tax revenue). Increasing the number of regulations on civil servants is an almost visceral response to corruption; such an approach can – and often does – cost more than it benefits the civil service.

Although avoiding superfluous and vague agency-level anti-corruption programmes and/or regulations may seem to be a relatively minor problem, studies show that the conventions themselves are very *vague*. As a result, the development of specific and concrete supporting regulations is necessary. For example, a study of all 71 articles of the UN Convention against Corruption assessed the extent to which the articles in the Convention provide clear instructions as opposed to expressing general statements of principles.[9] On a 5-point scale related to the "clarity" of each article of the Convention (where 1 signified that the article outlined a broad principle and 5 represented a concrete, specific, and well-defined obligation), the average clarity of the Convention was 2.5. In light of this situation, the lawyers and other specialists working in agencies such as customs or the police should write detailed department-level instructions to help implement these international conventions.

III. Increasing the Risk of Engaging in Corruption

Another important issue for the effective implementation of international anti-corruption requirements is to find ways of increasing the risk of engaging in corruption. A standard recommendation for legal reform in corruption-prone countries is to increase the risk to bribe-taking civil servants and bribe-giving private individuals of engaging in corruption.[10] In numerous countries around the world, engaging in corruption is low-risk behaviour. In Germany, for example (until 2000), companies could claim tax deductions for bribes paid to foreign government officials. Currently, in the Ukraine, a civil servant convicted of engaging in corruption can be fined a maximum of only $40,000. According to a large-scale survey, 27 % of the Bolivian population claims to have had experience with corrupt government officials, even though less than 10 officials are convicted of corruption offenses every year.[11] These examples show the low risk that bribe-takers and bribe-givers face when engaging in corruption. There are many possible ways to respond to this problem; three responses are recommended here: first, increase the liability of civil servant's superiors; second, adopt alternative procedures with a lower burden of proof for certain types of corruption offences; and third, conduct so-called "integrity probes."

One way to increase the risk of engaging in corruption is to adopt regulations that would make a bribe-taking government official's boss liable (or legally responsible) for the corruption of his or her subordinates. The concept used in this context, *respondeat superiour,* refers to the legal liability that an employee's bosses and managers incur for the improper actions of their subordinate. Such legal liability is often already imposed, albeit haphazardly. For example, in October 2007, a Hungarian Member of Parliament was questioned by police for suspected corruption involving his staff.[12] Making the Member of Parliament legally responsible for the corruption offences of his staff should increase his interest in monitoring their activities and hence make corruption all the more risky for them.

The *criminal* prosecution of corruption cases is difficult because of the high *burden of proof* required in order to obtain a conviction. The burden of proof requirement in criminal cases[13] requires the prosecutor to show "beyond a reasonable doubt" (to use a famous phrase from the American and English legal systems) that the accused participated in corruption. In other words, if even a 1% chance exists in the mind of the judge (or jury in the case of a jury trial) that the accused did not participate in the corrupt act, then the judge/jury has the duty to acquit the accused person. The high burden of proof called for by the international anti-corruption conventions reduces the ability of law enforcement agencies to stop individuals from engaging in corruption.

Law enforcement agencies would have more success implementing these international conventions – and thus stopping corruption – if they were to choose prosecutorial strategies that involve a less stringent burden of proof than that required in criminal proceedings. Accordingly, a prosecutor could choose to pursue certain offences as disciplinary or administrative infractions to which a less stringent burden of proof applies; this less stringent burden of proof would require the prosecutor to show only "on the balance of probabilities" (to again borrow a phrase from the legal community in the USA and UK) that the accused participated in corruption. In other words, if convinced that the accused is more likely guilty than not, the judge or jury – based on the evidence that investigators were able to collect – would be able to convict. In simple terms, if the judge or jury believes that there is a 51% chance that the accused took a bribe (or engaged in any other form of corruption), then the judge/jury is obliged to render a guilty verdict. However, because this level of proof is much lower than the burden of proof required in criminal cases, the sanctions imposed following conviction in such a proceeding would have to be less severe than those imposed on persons convicted of criminal activity. Such sanctions could involve small fines, a bad review in the convicted officer's personnel file, or dismissal from work. Despite these lighter sanctions, the increased probability of a successful conviction would increase the risk of engaging in corruption.

Finally, so-called "*integrity probes*" could dramatically increase the risk to law enforcement officers and other government officials who engage in corruption. The British Customs Service has conducted such probes for years. In these probes, a plain-clothes individual working with the Customs Service tries to smuggle contraband. The individual notes whether the customs officials on duty find the contraband and waits for them to make suggestions or to solicit bribes. Many countries are concerned about using such integrity probes for fear that these probes are illegal or unconstitutional because they encourage government officials to commit crimes. Entrapment of this nature can be avoided if the officers consent to these probes at the start of their employment (to the extent they are statutorily permissible) and if the person who has the contraband is not the one to suggest that the situation can be handled through the payment of a bribe.

IV. Financing Anti-Corruption Measures

One of the most important issues in practice is the financing of state anti-corruption activities. On the one hand, the international conventions against corruption require effective implementation; on the other hand, these conventions do not answer the question of how extra money can be provided to help realize the obligations they impose on governments. The UN Convention requires investigators to turn over evidence to foreign prosecutors in international corruption cases[14] and to protect witnesses who observe corrupt transactions.[15] The OECD Convention requires signatory states to impose "dissuasive" penalties for corruption – which are very expensive to implement as the cost of an investigation can run into several tens of thousands of dollars.[16] Indeed, public budgets in developing countries are often too small to fund large-scale anti-corruption work. Even the OECD countries – which include the richest countries in the world – are failing to implement the OECD Convention because certain measures cannot be financed.[17] As a result, it is crucial to generate funds. Funding could come from a number of sources, including proceeds of corruption that have been recovered by means of so-called "*qui tam* actions" (as will be explained below), civil damages imposed on corrupt parties, and fines imposed on negligent companies or organisations.

The international conventions against corruption would be more effective if they encouraged anti-corruption work to be *self-financing*. Allowing law enforcement agencies to keep (or claim from the budget) a portion of the value of the corruption that they successfully detect and prosecute would provide an incentive to fight corruption and would tie anti-corruption efforts to the amount of corruption affecting a particular agency. Such payments would also allocate resources to the investigator or even the private whistle-blower as well as to the agency that can best fight corruption. A good example can be given from Turkey: Turkish law enforcement agencies were at one time allowed to resell or keep a portion of the value of the contraband goods they found. While some countries have had good experiences using schemes such as this one, the policy of paying law enforcement officers based on the amount of crime and corruption they find can lead to "shake-downs" and more inspections than economically, socially, or legally desirable. However, rewards to departments and civil servants (in the form of promotion prospects or perquisites such as social housing or subsidies on public services) can be used to create incentives for law enforcement officials without encouraging excessive shake-downs of public service users.

The international anti-corruption conventions do not provide mechanisms for rewarding the investigation and prosecution of corruption. Few cases of corruption are successfully prosecuted because rewards are not provided to witnesses, plaintiffs, investigators, or prosecutors for participating in legal actions against corrupt officials. However, *qui tam* rewards can encourage individuals to report cases of suspected corruption. The term *qui tam* derives from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hoc parte sequitur*", meaning "he who sues for the king as well as for himself". Qui tam provisions allow individuals to sue those who harm the State and to claim a share of the damages paid by the offender. The damages that a whistle-blower can be awarded in a qui tam action concerning corruption may include the value of the bribes

paid as well as the value of revenue the State loses due to corruption. In the United States, such qui tam rewards have allowed the government to reclaim over $12 billion since 1986.[18]

Fines levied *on companies* potentially engaged in corruption represent another manner in which cash-strapped prosecutors' departments can raise the funds needed to continue investigating and prosecuting the corruption targeted by the international anti-corruption conventions. At present, companies engaging in corruption do not pay for the damage their corrupt activities cause. For example, the global engineering company Siemens paid over € 400 million in bribes to win telecommunications contracts.[19] The harm to the purchasing governments' agencies and, ultimately, to the consumers who received Siemens products (which were presumably of inferior quality to those of the company that would have won the contract had Siemens not paid the bribe) was certainly much larger than the € 400 million Siemens paid in bribes. Nevertheless, Siemens is not required to pay damages to these aggrieved parties (in the form of money to the individuals and agencies harmed by corruption).

Because proving corruption remains difficult – mainly due to the high burden of proof in criminal cases and the difficulty in punishing legal persons – the imposition of fines on companies for failing to take sufficient precautions against corruption must be considered. Such "negligence fines" would punish companies for failing to engage in activities that help prevent corruption in the course of their operations. Clearly, if a company is accused of engaging in bribery or corruption – as in the above-mentioned Siemens case – prosecutors have a difficult time proving that individual natural persons physically handed out brown paper bags filled with cash bribes. However, prosecutors have an easier time showing that legal persons failed to monitor their staff and the way the staff spent company money.

V. Handling International Corruption Cases

Some of the issues mentioned above become much more difficult when cases are examined that play not only at the national level but at the international level as well. These cases show the possibilities provided by the international legal framework to find a suitable solution to the problem of international corruption. The following case will serve as an illustration of the application of the UN Convention against Corruption: In 2003, almost forty senior officials went on trial in Paris for corruption associated with the activities of the former French oil giant Elf-Aquitaine.[20] The case involved the payment of kickbacks amounting to almost € 200 million to public officials in Gabon, Cameroon, Congo-Brazzaville, Russia, Spain, Germany, and other countries. According to investigators, senior company officials transferred over €150 million into their own personal (foreign) bank accounts. The accused (and later convicted) senior oil executives testified that the French president and several foreign heads of state directly participated in (or at least had active knowledge of) the illegal activities.

The prosecutorial strategies presented in the previous part illustrate the remedies that prosecutors would have if the illegal activities had taken place in 2008 rather than 1993. Today, the UN Convention against Corruption, which entered into force in December 2005, would allow for the restitution (return) of the funds collected by the foreign officials who received bribes and kickbacks from the French oil company. In the Elf-Aquitaine case, these assets included € 6 million in jewellery, five antique statues worth about € 40,000, and a € 23m pied-à-terre in Corsica.[21] However, the UN Convention does not indicate who should receive these recovered funds. The claims of four possible beneficiaries should be considered: First, a case could be made that the funds should be turned over to the French investigators and prosecutors who investigated the case. Rewarding successful anti-corruption work clearly directs resources to their most efficient use and provides further encouragement to investigate corruption (although the agency rather than the individuals would most likely receive the cheque). Second, the direct victims of Elf-Aquitaine's corruption could be compensated. Bribes and kickbacks to foreign officials presumably came from the company's shareholders and customers.

As such, any funds recovered should be divided among these victims. Third, the individuals harmed by such corruption could be compensated – the consumers who paid higher prices at the gas pump and the company's competition who lost contracts to the French oil giant are obvious injured parties. Fourth, the funds should be spent on the poverty-stricken Africans who most need these funds (as a general principle, public funds go to those who need them most). As government agencies begin filing petitions with foreign governments in order to recover assets located in foreign countries and purchased with the benefits of corruption, they will need to decide which of the four beneficiaries mentioned above should be the preferred recipient of restituted funds.

Another issue to consider in the hypothetical application of the UN Convention against Corruption to the Elf-Aquitaine case is that of jurisdiction. What if Russian investigators – and not French investigators – had discovered the corruption committed in the Elf-Aquitaine case? How should the French authorities treat claims from Russian courts for Russian assets located in Paris? The UN Convention does not clearly define how countries should co-operate on asset recovery.[22] In general, however, requests for the restitution of assets can be handled in four ways. First, the country receiving the request (France in the Elf-Aquitaine example) could translate the request into a property seizure order and arrange for the transfer of the property (or the proceeds after sale) directly based on the request. Second, the French authorities could request to review the evidence used by the Russian court before they process the request to seize the Russian-financed assets held in Paris. Third, the French authorities could decide to render assistance only if their law enforcement officials participated in the trial in Russia. Fourth, the French authorities could refuse all requests. These four possibilities can be referred to, in order, as: foreign jurisdiction, translated judgment, joint judgment, and no foreign (local) jurisdiction.

The Elf- Aquitaine example illustrates how the UN Convention against Corruption could be used today to correct injustices which used to be unresolvable in the past. The UN Convention provides for increased international co-operation and assistance (allowing for easier sharing of evidence and facilitating extradition). However, the Convention does not clearly define how such arrangements are to be made (necessitating either more detailed national implementing legislation or agency-level regulation where such rule-making has been delegated to the law enforcement agency). The UN Convention is a useful tool for fighting corruption and for recovering the proceeds of corruption (which can then be used to fund additional law enforcement activity).

VI. Concluding Remarks

How can the signatory states to the international conventions against corruption help ensure their effective implementation? While an answer has many dimensions, this article looked at specific areas where practical steps could be incorporated into agency-level regulation. This article argued for a clearer legal delineation between bribes and gifts, the removal of unnecessary regulation, and the introduction of clear regulatory drafting to help compensate for the vagueness of the conventions themselves. Other suggested measures include increasing the liability of a civil servant's superiors, charging suspects with non-criminal corruption offences so as to employ a burden of proof lower than that required in criminal cases, and implementing "integrity probes." The increased burden (in terms of the cost of enforcement) imposed by the international anti-corruption convention on executive agencies – particularly law enforcement agencies – could be paid for from recovered proceeds of corruption, *qui tam* rewards, civil damages imposed on corrupt parties, and fines imposed on negligent companies or organisations. In order to illustrate how these remedies might be applied in corruption cases of an international dimension, the Elf-Aquitaine case, which took place prior to the entry into force of the UN Convention, was used as a hypothetical – showing how the new legal framework would provide for better outcomes (in terms of convicting guilty parties and recovering funds) than were possible in the past.

As a recommendation, officials working in executive agencies (such as customs, police, or tax) need to draft regulations implementing the international anti-corruption standards. Each article of these regulations should address a separate issue contained in the national anti-corruption law (which enacts the three international conventions examined in this article). Experience in Eastern Europe indicates that such an implementing regulation usually runs no longer than about 20 pages. The agency should circulate the draft regulation (or rule as these regulations are sometimes known) among interested public service users and should then publish the draft rule in the country's version of the Federal Register (to use the US example) or as a green paper (as it is practised in the UK and by the EU Commission). For example, the country's customs service would consult major importers and exports and any business associations that have a direct interest in trade and customs issues. The important parts of the regulation should be widely advertised. For example, part of the regulation in the border guard service could call – on the basis of the OECD Anit-Bribery Convention – for signs to be placed at border crossing points informing border crossers (in the English language as the *lingua franca* of the 21st century) that a bribe paid at the border makes the crosser a criminal in his or her home country if the person comes from a North American, European, or East Asian country such as Japan or South Korea.

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1. This article distils some ideas from a much longer academic and technical text written for legal scholars. The text is available at: http://www.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps150.pdf↩
2. United Nations Convention against Corruption, published at http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf. The UN Convention was adopted by the United Nations General Assembly on 31 October 2003 (Resolution 58/4). It entered into force on 14 December 2005.↩
3. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html#Text_of_the_Convention. The OECD Anit-Bribery Convention was adopted by the Negotiating Conference on 21 November 1997 and entered into force on 15 February 1999.↩
4. Civil Law Convention on Corruption, CETS No.: 174. Published at http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=8&DF=3/11/2008&CL=ENG. The CoE Convention was opened for signature on 4 November 1999 and entered into force on 1 November 2003.↩
5. Art. 8 para. 5 of the United Nations Convention against Corruption,.↩
6. *Susan Rose-Ackerman*, Corruption and Government: Causes, Consequences, and Reform, Cambridge University Press (1999).↩
7. *Bineswaree Bolaky and Caroline Freund*, Trade, Regulations, and Growth. World Bank Policy Research Working Paper Series No. 3255.↩
8. *Frank Anechiarico and James Jacobs*, The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective, University of Chicago Press (1996).↩
9. *Bryane Michael*, What Does the UN Convention on Corruption Teach Us About International Regulatory Harmonisation? Paper presented at the Japanese Economic Association Conference in Nagoya (2003).↩
10. *Cheryl Williamson Gray, Joel Hellman, and Randi Ryterman*, Anticorruption in Transition 2: Corruption in Enterprise-State Interactions in Europe and Central Asia, World Bank (2004).↩
11. *Mitchell A. Seligson*, *The* Measurement and Impact of Corruption Victimization: Survey Evidence from Latin America, 34 World Development 381 (2006).↩
12. *Sandor Peto*, Hungarian PM Pledges Laws to Clean Up Politics, Reuters, 1 October 2007, at http://ca.today.reuters.com/news/newsArticle.aspx?type=topNews&storyID=2007-10-01T181243Z_01_L01743732_RTRIDST_0_NEWS-HUNGARY-POLITICS-COL.XML&archived=False↩
13. Most corruption offenses are now categorised as crimes under the UN, OECD and CoE, conventions against corruption.↩
14. Art. 37-38 of the United Nations Convention against Corruption.↩
15. Art. 32-33 of the United Nations Convention against Corruption.↩
16. Art. 3 of the OECD Anti-Bribery Convention. The cost of an investigation of alleged corruption is based on the authors' own experience and interviews as no formal figures are released.↩
17. Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Transparency International (2007).↩
18. ,"Justice Dept. Civil Fraud Recoveries Total $2.1 Billion for FY 2003 – False Claims Act Recoveries Exceed $12 Billion Since 1986". US Department of Justice Press Release. At http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm↩
19. "Siemens names new board member to fight corruption". AFP. At http://afp.google.com/article/ALeqM5isms888At2Y2tOf3e4rGRtZ2Md1Q↩
20. "Elf Corruption Trial Reaches French Courts". Deutsche Welle. At http://www.dw-world.de/dw/article/0,,811008,00.html↩
21. The proceeds from the Elf case were used to buy expensive jewelry, real estate, and other luxury goods. See *Jon Henley*, Gigantic sleaze scandal winds up as former Elf oil chiefs are jailed. Guardian Unlimited. At http://www.guardian.co.uk/france/story/0,11882,1083784,00.html↩
22. A promising direction in anti-corruption work involves the UN Stolen Asset Recovery Initiative. *See* Stolen Asset Recovery Initiative, World Bank (2007) at http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf↩

* Authors statement

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