THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A CRITICAL REVIEW

Dissertation Submitted to Jawaharlal Nehru University
in partial fulfilment of the requirements
for the award of the degree of

MASTER OF PHILOSOPHY

SURABHI MAHAJAN

CENTRE FOR INTERNATIONAL LEGAL STUDIES
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI 110067
INDIA
2017

CENTRE FOR INTERNATIONAL LEGAL STUDIES
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI 110067 INDIA

Tel.:+ 91-11-2670 4388

Date: 21/07/2017

DECLARATION

I declare that the dissertation entitled **"THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A CRITICAL REVIEW"** submitted by me in partial fulfillment of the requirements for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other university.

Surabhi Mahajan

CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

Prof. Bharat H. Desai
(Chairperson, CILS)

Chairperson
Centre for International Legal Studies
School of International Studies
Jawaharlal Nehru University
New Delhi - 110067

B.S. Chimni
Prof. B.S. Chimni
(Supervisor)

Table of Contents

ACKNOWLEDGMENT

I would like to thank my supervisor Prof. Chimni for his guidance and insight on this dissertation. The door to Prof. Chimni's office was always open whenever I had trouble shaping my thoughts or had doubts and questions about my research and writing. He consistently allowed this dissertation to be my work, but steered me in the right direction whenever he thought I needed it. I feel extremely fortunate to have a guide and mentor like him.

I would like to thank Prof. Desai and Prof. Fazil for their thoughts and inputs, which helped me immensely.

I take this opportunity to thank the non-teaching staff of Centre for International Legal Studies, Madam Bisht and Hariom Patel for their help in administrative matters during the course of my work.

Finally, I must express my profound gratitude to my parents, my parents-in-law, my husband and my daughter for providing me with unfailing support and continuous encouragement throughout the process of researching and writing this dissertation. Special thanks to Kheinkor, without her this journey would have been harder. Thank you.

New Delhi

___July, 2017 Surabhi Mahajan

ABBREVIATIONS

AML	Anti-Money Laundering
ADB	Asian Development Bank
ASEAN	Association of South East Asian Nations
AU	African Union
CLCC	Criminal Law Convention against Corruption
CPCC	Convention on Preventing and Combating Corruption
ECOSOC	Economic and Social Council
EU	European Union
FCPA	Foreign Corrupt Practices Act
G-77	Group of 77
IACAC	Inter-American Convention against Corruption
IBRD	International Bank for Reconstruction and Development
IMF	International Monetary Fund
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
NGOs	Non Government Organisations
StAR	Stolen Asset Recovery
TNCs	Transnational Corporations
UNGA	United Nations General Assembly
UNCAC	United Nations Convention against Corruption
UNCTAD	United Nations Commission on Trade and Development
UNCTOC	United Nations Convention on Transnational Organized Crime
UNODC	United Nations Office on Drugs and Crime
WBG	World Bank Group

CHAPTER 1

INTRODUCTION

INTRODUCTION

Corruption is a ubiquitous phenomenon and can be found in all forms of government, from dictatorships to democracies. It is present in developed and developing countries and in capitalist and centrally planned economies. Though the manifestation of corruption may vary in different countries, it is undeniably pandemic.[1]

The word corruption comes from *corrumpere (l)*, which means to contaminate or impair the purity of. It is a moral category of wrong that signifies repugnance and is indicative of the moral health of societies as a whole.[2] The phenomenon of corruption is not recent, and has been the leitmotif of scholarship in various civilisations. In its classic conception, corruption stems from the morality of different societies as opposed to individual acts.[3] Machiavelli had defined corruption as the decay of the capacity of citizens and officials of a state to subordinate the pursuit of private interests to the demand of the common good or public interest.[4] He believed the *virtú* of the citizen is undermined and destroyed by corruption; and when that happens, it was up to a heroic leader to rebuild the political order and infuse his *virtú* into the citizenry.[5]

Montesquieu thought of corruption as the dysfunctional process by which a monarchy transforms into despotism. Rousseau was concerned with moral corruption, and thought of political corruption as its manifestation. According to him, political corruption was a consequence of the struggle for power. He also believed equality was a natural state of being, and good laws are aimed towards maintaining such equality and provide protection from the corrupt influence of power mongers.[6] The modern sense of corruption is closer to Rousseau's understanding of the phenomenon. Constitutionalism is concerned with preventing abuse of power by applying the rule

[1] Heindenheimer, Arnold J., Johnston, Michael (2007), "Introduction to Part I" in Heindenheimer, Arnold J., Johnston, Michael (eds.) *Political Corruption: Concepts and Contexts,* New Jersey: Transaction Publishers.
[2] See Michael Johnston "The Definition Debate: Old Conflicts in New Guises" in Arvind K. Jain (eds). *The Political Economy of Corruption*, London and New York: Routledge.
[3] *id*
[4] Machiavelli, Niccolò, *The Prince*, written c. 1505
[5] Friedrich Carl J. (1972), *The Pathology of Politics: Violence, Betrayal Corruption Secrecy and Propaganda,* New York: Harper and Row pp 127-141.
[6] Rousseau, Jean Jacques (1985) *A Discourse on Inequality* New York: Viking Press

of law to public officers. Today, corruption is understood as a polymorphous phenomenon that has various attributes like immorality, abuse of power, derogation from cultural norms etc.[7]

With the transformation in forms of governments over centuries, the idea of corruption has evolved as well; from "the king can do no wrong" in the medieval era to political accountability and transparency today, the discourse on corruption has come a long way.[8] In the pre-modern era, "state was not a legal entity but an embodiment of inheritance which reached into the dim and distant past."[9] State was considered as private property in terms of claim over the territory and the right to govern it. In other words, an autocrat could not have been corrupt as per the modern concept of corruption since there was no delineation of public and private rights.[10] Lord Acton objected to Archbishop Creighton's canon that the Pope and King are different from other men, and a favourable presumption must be made that they did no wrong; holding a contrary view he said that presumption must be made against those in power and aphoristically said "power corrupts and absolute power corrupts absolutely".[11]

---

[7] See generally Banfield EC (1958) *The Moral Basis of a Backward Society*, New York: Free Press; Wraith, R. and Simkins, E., (1963) *Corruption in Developing Countries*, London: Allen and Unwin; Van Klaveren, J., (1989) P*olitical Corruption: A Handbook,* New Brunswick, NJ: Transaction. Rogow, A. and Lasswell, HD., (1963) *Power, Corruption and Rectitude* Englewood Cliffs, NJ: Prentice Hall; and Senturia, JA,. (1935) *Corruption: Political Encyclopedia of the Social Sciences*, Vol.4. New York: Crowell-Collier-Macmillan, Berg et al (1976) *Corruption in the American Political System* Morrison, NJ: General Learning; Peters JG and Welch S,. (1978) "Political Corruption in America: A Search for Definitions and A Theory", *American Political Science Review* 72: 974-984

[8] Forms of government can broadly be classified into monarchy and republic. Monarchy can be hereditary or elective in terms of succession and can be classified as absolute monarchy, constitutional (limited) monarchy, and parliamentary monarchy. The concept of constitutionalism brought an end to monarchic absolutism and developed other limited forms of monarchy. A republic allows for the election of heads of states either by citizens or by their elected representatives. For more details *see* Ungureanu Adelin (2015) "Forms of Government Theoretical and Practical Expose" *Juridical Current Vol 8 Issue 4*, pp 133-142; also see Holman Frank E. (1946), "Forms of Government" *American Bar Association Journal*, Vol 32, No.4, pp 190-194 available at http://www.jstor.org/stable/25715533 last accessed on 10-01-2017.

[9] Theobald, R., (1990) *Corruption, Development and Underdevelopment*, Durham, NC: Duke University Press

[10] *id*

[11] Lord Acton (John Emerich Edward Dalberg) in a letter to Archbishop Mandell Creighton objected to the assertion of unnecessary criticism of authority figures. Available at URL https://history.hanover.edu/courses/excerpts/165acton.html last visited on 10-02-2017

The modern idea of checks and balances was not in existence as there was no countervailing or intermediary group, which could confront those who ruled.[12] The limits to power and demand for accountability possibly came from settlement of claims and grievances as opposed to the idea of good governance.[13] Wars and acquisition of territory necessitated elaborate administrative structures and functions. As the scope of government expanded, it became imperative to remunerate those carrying out administrative tasks including the collection of regular taxes to fund the government, sowing the seeds of bureaucracy. The demand for accountability, if not from the king, then from his ministers was premised on the idea of public service. Pertinently, the language of corruption was used to undermine the legitimacy of the government and challenge the system of royal prerogative.[14] These conflicts gave rise to what is understood as a system of public role with limited power and as a corollary to limited power, there is accountability for the manner in which these powers are exercised. Even today, the perception of a corrupt government can undermine its legitimacy in public opinion.

1.1 Causes and Impact of Corruption

A great deal of study and enquiry has been focused on corruption, traversing fields, from politics to sociology and from economics to law. The intersection of all these fields brings forth the complex and sometimes conflicting understanding of the causes and consequences of corruption. In more comprehensive terms, corruption involves the inappropriate use of political powers while reflecting a failure of the political institutions within a society.[15] If there is an underlying imbalance between the acquisition of power and the institutional discipline over such power, corruption is the inevitable result.[16] Therefore, even though the manifestation of corruption is economic, its foundation is institutional.

---

[12] van Klaveren Jacob (1989) "Corruption as a Historical Phenomenon" in Arnold Heindenheimer and Michael Johnston (ed.) *supra* 1 at p 83-84.
[13] Heindenheimer, Arnold J., Johnston, Michael (2007), "Introduction to Part II" in Heindenheimer, Arnold J., Johnston, Michael (eds.) *Political Corruption: Concepts and Contexts,* New Jersey: Transaction Publishers.
[14] Peck Linda Levy (1990) *Court Patronage and Corruption in Early Stuart England*, Boston: Unwin Hyman
[15] Jain, Arvind K (2002), "Power, Politics, and Corruption" in Arvind K. Jain (ed). *The Political Economy of Corruption*, London and New York: Routledge
[16] ibid Jain, Arvind K

It is difficult to determine the causes of corruption with a degree of certainty because of the interplay of various factors. Furthermore, its illicit nature makes empirical studies nearly impossible. However, useful devices have been developed to generate quantitative estimates.[17] The causes of corruption are sometimes also the consequences of corruption and create a feedback loop that makes the determination of underlying causes indecipherable.[18]

Early work on the subject of corruption was more tolerant towards the phenomenon.[19] While states were aware of "rent-seeking"[20] and other corrupt activities, they were considered to be second order illicit activities; even in light of misappropriation to the tune of hundreds of millions of dollars by heads of state like Zaire's Mobutu Sese Seko and Philippines's Ferdinand Marcos, corruption was not addressed with the gravitas necessary. For a period of time corruption found an unlikely defender in a section of economists who romanticised the idea of corruption to the extent that it could be beneficial for growth in states stifled with bad and inefficient governments or "grease the wheels".[21] While others contended bribes incentivise better performance of bureaucrats, not paid well by the state.[22] Facilitation payments are often justified as necessities to ensure smooth functioning of businesses and firms in various countries. The idea is not unprecedented; historically, colonists would bribe local heads to ensure colonisation perpetuated by global trade would be relatively

---

[17] Rose-Ackerman Susan (2006) "Introduction and Overview" in Susan Rose-Ackerman (ed.) *International Handbook on the Economics of Corruption*, Cheltenham, Northampton: Edward Elgar

[18] Lambsdorff Johann "Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries" in Susan Rose-Ackerman (ed) *id* at p 4

[19] *id*

[20] Krueger Anne O. (1974), "The Political Economy of Rent-Seeking Society" *The American Economic Review* Vol. 64 No.3 pp 291-303.

[21] Some Economists argued that corruption was effective in circumventing government imposed rigidities that would otherwise hamper growth; See Leff, Nathaniel, (1964), "Economic Development Through Bureaucratic Corruption", *American Behavioral Scientist*, pp 8-14; Huntington, Samuel P., (1968), *Political Order in Changing Societies*, New Haven: Yale University Press; Kaushik Basu, the Chief Economic Advisor during UPA II had written a paper suggesting that the act of giving a bribe should be considered legal. Talking about coercive bribes, Basu was of the opinion that the act of giving coercive bribes should be considered legal since the interests of the bribe giver and taker diverge. See Basu Kaushik, "Why, For a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal" available at URL http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf last accessed on 24-06-2017.

[22] See Tullock, Gordon, 1996, "Corruption Theory and Practice", *Contemporary Economic Policy*, Vol XIV (July), pp 6-13; Becker Gary S., Stigler George J., 1974, "Law Enforcement, Malfeasance and Compensation for Employees", *Journal of Legal Studies* (January), pp 1-18.

trouble free.[23] In order to defend such actions, a concept of dual morality was applied wherein the morality of the colonies was different from 'civilised' western nations.[24] The alleged dichotomy in the value system served as the premise for encouraging such practices and deeming them as domestic problems. Over the years these arguments have been criticised and countered by many other economists to reach the conclusion, which is, corruption is unequivocally damaging.[25]

1.1.1 Corruption in Developing Countries

In developing countries corruption is inimical to institution building and has an adverse effect on public investment and growth. Corruption can cause diversion of public investment and deterioration of infrastructure facilities. Societies that show grave income inequality and serious poverty are also vulnerable to social instability and ethnic violence.[26]

Corruption in developing countries can also cause artificial inflation of consumer goods and places additional burden on its impoverished consumers.[27] For developing countries that seek foreign investment, it threatens the ease of doing business and can make investor wary of investing in states that have a reputation of being corrupt. Moreover, corrupt officials can lead to unnecessary excessive spending and incur mounting long-term debt of a developing country and jeopardising its future. In addition to exacerbating inequality, corruption also causes frustration in the working

---

[23] Padideh Ala'i, "The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption", *33 Vanderbilt Journal of Transnational Law* 877, pp 884-885.

[24] During the impeachment of Governor-General of Bengal, Warren Hastings, racial stereotypes were used to defend his actions. Hasting would recruit local "black tyrants" to run his operations in Bengal and he perceived them to be easier to control than white expatriated. See *Ibid*. 29.

[25] Bardhan Pranab, 1997, "Corruption and Development: A Review of Issues", *Journal of Economic Literature*, Vol XXXV (September), pp 1320-1346. Bardhan argued that while there can be some beneficial consequences of corruption the overall economic effects are undesirable; Rose-Ackerman Susan "Corruption and Development" *Annual World Bank Conference on Development Economics*, available at URL http://documents.worldbank.org/curated/en/719821468740214930/pdf/multi0page.pdf#page=39 last accessed on 1-02-2017

[26] Many African countries like Somalia, Democratic Republic of Congo and Sierra Leone have seen violence for years because of a complete breakdown of rule of law. The instability in these states has been attributed to a corrupt and unjust government and a complete breakdown of state machinery.

[27] Murphy Mark (1995) "International Bribery: an Example of Unfair Trade Practices" *Brook Journal of International Law*, Vol 21, pp 385-391

class by causing unemployment or under-employment. These situations can cause unrest in a society and opens the way for organised crime and other nefarious activities. In many countries bureaucratic red tape can has protracted the way of life. These regulatory complexities can be cause of confusion and create opportunities for corrupt officials to take advantage of the situation.

In developing countries, corruption is attributed to reasons such as the economic and political instability during and after decolonisation along with initial nescience in matters of law and policy making that would appropriately address their distinctive problems. Due to a lower standard of living, bureaucrats of developing countries are not paid well and bribery seen as an accepted practice across the board. A nexus between corrupt bureaucrats, politicians and criminals creates a network that can frustrate any attempts to combat corruption and crime.[28] Moreover, law enforcement agencies are either complicit or ill equipped to take appropriate action against the corrupt.

So far empirical and theoretical studies on corruption are concerned with low growth rates in countries, assessing that low growth and corruption have a circuitous relationship.[29] Corruption causes distortion in the allocation of financial and human resources, usually at the cost of the poor and marginalised; it adversely affects the policy decision-making and is mostly inconsistent with the social, political and economic objectives and needs of a state. Some studies have determined that a political environment that provides greater access to economic elites is more likely to be corrupt.[30] Furthermore, the private sector has a tendency to influence public

[28] The N.N. Vohra Committee studied the criminalisation of politics in India. The Committee Report made damning observations and highlighted the nexus of politicians, bureaucrats and criminals and the pervasive reach of criminal gangs in Indian politics. Many parts of the Report are yet to be made public. In *Vineet Narain v Union of India,* the Supreme Court of India had referred to the Vohra Committee Report saying the report "confirmed our worst suspicions focusing on the need of improving the procedure for constitution and monitoring the functioning of intelligence agencies." See 1 SCC 226. While the Vohra Committee Report had suggested the establishment of a Nodal Agency to investigate the nexus between politicians, criminals and bureaucrats, the report is yet to be implemented.

[29] *ibid* Rose-Ackerman Susan (2006)

[30] Jain Arvind K *supra* 15 pp 3-10.

officials, sometimes with the purpose of avoiding prosecution, which can result in reduced transparency.[31]

It is true that corruption slows growth. However, there are countries with corruption that have shown growth.[32] Therefore, it is rather simplistic to say growth is the main remedy for corruption, since corruption and growth are not mutually exclusive. It is pertinent to emphasise that growth does not necessarily ameliorate poverty or increase equality. Even if a state is able to register growth it does not mean it will reach every citizen is a proportional manner, on the contrary there is evidence that a corrupt system leads to disproportional growth for certain segments of society at the cost of the poor and marginalised.[33] Studies have examined the relationship between corruption, and inequality and poverty; indicating that high rates of growth can coexist with rising inequality, with those at the bottom of income distribution receiving few benefits.[34] Corruption can also slow down economic development by lowered tax revenues.[35] As a consequence of lower tax revenues, social services are adversely impacted and reduce investment in human capital and the state invests less in key sectors like health care and education.[36] The illicit nature of corruption also leads to distortion in economic activities; therefore, undermines fairness of a system and leads to waste and misdirected public spending.[37]

---

[31] Denoeux G (2007) "Corruption in Morocco: Old Forces, New Dynamics and a Way Forward", *Middle East Policy* XIV(4): 134-151.

[32] http://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf p 14

[33] Mauro, Paolo (2007) "The Effects of Corruption on Growth and Public Expenditure" in *Political Corruption: Concepts and Contexts* (eds.) Arnold Heindenheimer and Michael Johnston New Brunswick, London: Transaction; *Also see* Rose-Ackerman, Susan (1999) *Corruption and Government: Causes, Consequences and Reforms*, Cambridge and New York: Cambridge University Press.

[34] Rose Ackerman (1999) *id*.

[35] See Tanzi Vito and Davoodi Hamid "Corruption, Public Investment, and Growth" IMF Working Paper WP/97/139 available at URL https://www.imf.org/external/pubs/ft/wp/wp97139.pdf last visited on 02-02-2017; ul Haque Nadeem and Sahay Ratna (1996) "Do Governemtn Wage Cuts Close Budget Deficits? The Costs of Corruption" *IMF Staff Papers* 43. No.4 (December) pp 754-778

[36] Gupta Sanjeev et al "Corruption and the Provision of Health Care and Educational Services" in Arvind Gupta (ed.) *supra 15*; Mauro Paulo "Corruption and the Composition of Government Expenditure" *Journal of Public Economics* 69 (1998) pp 263-279;

[37] Shleifer, A and Vishny, R., "Corruption", *The Quarterly Journal of Economics*, Vol 108:3, p 616.

1.1.2 Corruption and Neoliberalism

In the post-colonial world, the foremost concerns of the international community were distributive justice, neocolonialism and dependency theory.[38] However, by the 1980s the idea was replaced by the discourse on free markets, individualism and self-help.[39] At the time, claims were made about the anti-corruption benefits of liberalisation, since most opportunities for corruption arose from state intervention and the consequent market distortion.[40] The suggestion was that rent-seeking behaviour was rampant where state intervention could distort markets and created an opportunity for bureaucrats to indulge in rent seeking due to their position.[41]

The 1990s ushered in the era of the Washington Consensus and policies of deregulation, privatisation of state assets and the idea markets self-regulation and state interference should be minimal. International Financial Institutions like World Bank started to focus on corruption with emphasis on good governance and democratisation; it linked economic liberalisation with political systems and state sector reform.[42] Consequently the discourse on poverty, inequality and unemployment was shifted from structural failures and constraints, onto individuals. Furthermore, the answer to every discontent was more liberalisation of the economy, privatising government agencies deemed to be inefficient, abolishing capital control and a free rein to foreign capital to enter all markets.

The idea of economic growth is the ideological foundation of globalisation and it was contended that the only way forward was to give primacy to economic growth. With a consistent and vociferous promotion of free trade and consumerism, country after country opened its markets and reduced government regulation of business. It is key

[38] Passas, Nikos. "Global Anomie, Dysnomie, and Economic crime: Hidden Consequences of Neoliberalism and Globalization in Russia and Around the World." *Social Justice 27.2 80* (2000): 16-44.
[39] Woods Ngaire, (1999) "Order, Globalization and Inequality in World Politics" *Inequality, Globalization and World Politics* Oxford: Oxford University Press p 8-35
[40] Bauer P (1984) *Reality and Rhetoric: Studies in the Economic of Development*, London: Weidenfeld and Nicolson. p 35.
[41] Colclough C (1991) Structuralism versus Neo-liberalism: An Introduction in C Colclough and J Manors (eds.) *States or Markets? Neo-liberalism and the Development Policy Debate* p 1-25; also see Moore M (1991) Rent Seeking and Market Surrogates: The Case of Irrigation Policy in C Colclough and J Manors (eds.) *States or Markets? Neo-liberalism and the Development Policy Debate* p 279-305.
[42] Szeftel M (1998) Misunderstanding African Politics: Corruption and the Governance Agenda, *Review of African Political Economy* p 221-240.

to remember the said economic model did not have regard for local variables, or even the disparity in industrialisation of various countries.[43] The result of this model has been remarkable across boundaries. The idea of welfare states has given way to "pay as you go" social service system. The system of subsidies was diminished and even public utilities have been privatised. Labour protection and industrial interventionism have been replaced by *laissez faire*; and the idea of taxation, which was to correct inequalities, has become a system to promote incentives.[44]

In developing countries, the influence of the North has been remarkable with the implementation of neoliberal policies.[45] The shift towards neoliberalism was voluntary sometimes, and coerced at other times. International institutions like the International Monetary Fund, World Bank, the OECD and European Union consistently tried to impose the neoliberal agenda in various countries.[46] Countries were already buckling under external debt sought out to pay older loans by taking new ones, usually from developed countries. These loans were granted on the condition of introducing Structural Adjustment Programs (SAPs) with the same elements i.e. liberalisation of trade, easing policy for foreign investment, encouraging an export oriented economy, privatisation of state enterprise to name a few.[47] Even with the promise of unfettered growth, the reality is that neoliberalism has exacerbated the political and economic asymmetries without fulfilling its theoretical expectation. In order to "harmonise" the world, there is greater volatility in economic growth, marked with "booms" and "busts".[48] With greater access and permeability caused by economic integration the effects of corruption have a spill over effect all over the world.

On the issue of economic liberalisation and corruption, the literature is divided. One approach holds that liberalisation has the potential to alleviate corruption through the

---

[43] Mander J., (1996) "Facing the Rising Tide" in J Mander and E Gold smith (eds.) *The Case Against the Global Economy*, San Francisco: Sierra Club Books p 3-19

[44] Steward F and Berry A (1999) "Globalization, Liberalization and Inequality: Expectations and Experience" in Ngaire Woods and A Hurrell (eds.) *Inequality, Globalization and World Politics* Oxford: Oxford University Press, p 150-186.

[45] Burbach et al 1997 *Globalization and Its Discontents*, London: Pluto Press

[46] See Chimni, Bhupinder S. "International Institutions Today: An Imperial Global State in the Making." *European Journal of International Law* 15.1 (2004): 1-37.

[47] Bello W (1996) "Structural Adjustment Programs: Success for Whom?" in *supra* 43.

[48] Huber, Evelyne, and Frederick Solt. "Successes and Failures of Neoliberalism." *Latin American Research Review* 39, no. 3 (2004): 150-164.

market mechanism. The contrary view believes that liberalisation can increase the scope for corruption. International financial institutions like the IMF and World Bank are pushing the neoliberal agenda but there is a dearth of evidence to show that these policies have decreased the amount of corruption in states.

Beyond the immediate and near-immediate economic consequences, corruption has far reaching ramifications. Corruption can hasten environmental degradation, ensconce organised crime, subverts market competition and worsen inequality.

1.2 Definition and Manifestation of Corruption

Broadly speaking, corruption can be divided into three categories:

1) *Physical: destruction, decomposition or disintegration;*
2) *Moral: moral deterioration or depravity;*
3) *Perversion of the original state, which is considered pure*.[49]

The current usage of corruption, especially in political contexts is influenced by the idea of moral corruption.[50] Corruption is any behaviour that deviates from a norm, which is prevalent or believed to be prevalent, in a certain context. The deviance is associated with motivation, usually understood as private gains at the expense of the public.[51] Therefore, corruption is often defined as abuse of public office for private gains.[52] This definition is widely used by many public institutions including the World Bank, the International Monetary Fund (IMF) and the Transparency International (TI). Some of the common elements found in public office centered definitions are corrupt intent, benefit of value must accrue to the public official, a relationship between the thing of value and the act of the official, and the elements of

[49] For a detailed discussion on the definition of corruption *see* Heindenheimer, Arnold J., Johnston, Michael supra 1
[50] *id*
[51] Friedrich, Carl J., (2007) "Corruption Concepts in Historical Perspective" in Heindenheimer, Arnold J., Johnston, Michael, *Political Corruption: Concepts and Contexts,* New Jersey: Transaction Publishers
[52] However, the standard to identify 'abuse' may vary. Joseph S. Nye gave one of the oft-cited definitions: "[corruption is] behaviour which deviates from the formal duties of a public role because of private regarding (close family, personal, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence." *See* Nye, Joseph N. (1967), "Corruption and Political Development: A Cost-Benefit Analysis" *The American Political Science Review*, Vol. 61 (2), pp 417-427.

intent to influence or to be influenced in carrying out the official act.[53] One of the key criticisms against the abovementioned definition is that it does not consider public interest.[54] Moreover, corruption is contextual and the policies, bureaucratic traditions, social history and political development are also relevant understanding the causes of corruption in a state.

Corrupt activities can also be classified on its degree rather than on type; for example a distinction between grand and petty corruption;[55] or incidental corruption, where corruption is attributed to the individual acts of politicians or public officials and systemic corruption, where corruption is entrenched into the fibre of a society. Another pertinent distinction is made between economic and political corruption. Economic corruption deals with the abuses committed to further private gain, usually monetary, whereas, political corruption pertains to the manipulation of a political system towards an ideological goal or the pursuit of certain political goals.[56]

Corruption laws vary from state to state, and the municipal laws of a country decide to penalise certain acts deemed to be corrupt in nature; thus there is disparity in what can qualify as corruption; it may vary from bribery to conflict of interest and political funding and contributions. It is usually an act, which is done with the intent of getting an inconsistent advantage. Corruption happens to be contextual and often there are differences in how corruption is defined under law in different states as opposed to public opinion of corruption. Furthermore, there are pertinent differences in how various countries understand and define the problem. [57]

---

[53] Lowenstein, Daniel H (1989), "Legal Efforts to Define Political Bribery", *Political Corruption: A Handbook*, New Brunswick: Transaction Publishers

[54] Alternatively, public interest centred definitions have also been used to understand corruption such as by Carl Friedrich: "the patent of corruption can be used to exist wherever a power holder who is charged with doing certain things, i.e. who is responsible functionary or office holder, is by monetary or other rewards not legally provided for, induced to take actions which favor whoever provides the rewards and thereby does damage to the public and its interests." *See* Friedrich Carl J (1972), *The Pathology of Politics: Violence, Betrayal Corruption, Secrecy and Propaganda*, New York: Harper & Row, pp 127-141.

[55] Doig Alan, Riley Stephen "Corruption and Anticorruption Strategies: Issues and Case Studies from Developing Countries" *Corruption and Integrity Improvement Initiatives in Developing Countries* 45 (1998) 62.

[56] Brown Ed, Cloke Jonathan (2004) "Neoliberal Reforms, Governance and Corruption in the South: Assessing the International Anticorruption Crusade" *Antipode 36(2)*, pp 272-294.

[57] Gardiner, John (1993) "Defining Corruption" in Maurice Punch, Emile Kolthoff, Kees van der Vijver, and Bram van Vliet, (eds) *Coping with Corruption in a Borderless World: Proceedings of the*

1.3 Approaches to Corruption

The academic literature on the subject of corruption is extensive and inexhaustible; however it can broadly be divided under three approaches:

1.3.1 State Centric Approach

According to this approach the main cause of corruption is deterioration, backwardness and imperfection of state institutions. State centric approach is premised on the belief that corruption is a symptom of fundamental governance failure and that anticorruption strategies should focus on the underlying features of the governance environment.[58] Furthermore, anticorruption policies and measures have to be commensurate with the level of corruption in a state. There is no singular way by which corruption can be eradicated in states. Therefore, anticorruption campaigns should be directed at improving the legal system of a state, strengthening discipline, and to strengthen enforcement at all levels.[59]

1.3.2 Market Centric Approach

The Market Centric Approach believes corruption is mainly caused by excessive state intervention in markets, or what is also called rent seeking behaviour. Market centered definitions of corruption have been developed by scholars dealing with earlier Western and contemporary non-Western societies.[60] The market-based definitions of corruption present themselves as morally neutral and use economic methods and models for the analysis of politics.[61] According to its theorists a corrupt civil servant will see his public office as a business and seek to maximize income

---

Fifth International Anti-Corruption Conference, Deventer and Boston: Kluwer Law and Taxation Publishers.

[58] Shah, Anwar, and Mark Schacter (2004). "Combating Corruption: Look Before You Leap." *Finance & Development* 41(4) pp 40-43.

[59] Doig Alan and Riley Stephen (1998), "Corruption and Anti-corruption Strategies: Issues and Case Studies from Developing Countries, in UNDP (ed.), *Corruption and Integrity Improvement Initiatives in Developing Countries*, New York: United Nations Development Program, pp 45-62. Also see Huther Jeff, Shah Anwar (2000) "Anticorruption Policies and Programs: A Framework for Evaluation", *Policy Research Working Paper 2501*, Washington: World Bank.

[60] Heidenheimer and Johnston *supra 49*

[61] Philp Mark, "Conceptualizing Political Corruption" in Heindenheimer and Johnston (ed.) *supra 49.*

from it.[62] This approach states "corruption is an extralegal institution used by individuals or groups to gain influence over the actions of bureaucracy. As such the existence of corruption *per se* indicates only that these groups participate in the decision making process to a greater extent than would otherwise be the case."[63] It is pertinent to note that even though market centric definitions are supposed to be morally neutral, they are still predicated on the conception of public office and the norms that bind it. When corruption is called extralegal, it belies its amoral character by acknowledging that public office is bound by certain principles of conduct and that these acts deviate from the standard of expected behaviour.[64]

The market centric approach believes anticorruption efforts should look to recalibrate the state-market relation in order to reduce unnecessary government regulation and encourage full market competition. Furthermore, these efforts should aim at opening legitimate channels to improve profit standardising and reducing administrative discretion and increase administrative transparency.[65]

1.3.3 Good Governance Approach

As per the good governance approach, anticorruption efforts need cooperation of state and society. According to this approach, the fight against corruption is not limited to the state but rather employ a multi-stakeholder approach that would involve the non-profit sector, markets, individuals and international organisations in the fight against corruption. Good governance is seen as a participatory, accountable, transparent, responsive, consensus oriented, equitable and inclusive as well as following the rule of law.[66]

---

[62] See Jacob van Klaveren (1957), "Corruption as a Historical Phenomenon" in Heindenheimer and Johnston *supra* 1.
[63] Nathaniel Leff "Economic Development Through Bureaucratic Corruption" *supra 21*.
[64] Philp Mark *supra* 61
[65] See Jain A.K (2001), "Corruption: A Review" *Journal of Economic Survey 15(1)*, p 71-121; Bardhan, Pranab (1997). "Corruption and Development: A Review of Issues." *Journal of Economic Literature* 35(3) pp 1320-1346.
[66] UNDP (1997) "Governance for Sustainable Human Development: A UNDP Policy Document" available at URL http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Discussion-Paper--Governance-for-Sustainable-Development.pdf last visited on 16-04-2017

There is no universally accepted definition of governance, in common parlance it comprehends how a country's political systems are functioning.[67] The World Bank defined governance in 1989 in context of exercise of political power with respect to management of a country's affairs. The World Bank Report on Africa in 1989 argued that underlying the cause of Africa's developmental problems was a crisis of governance. The concept of 'failed states' was used to exemplify the problem of governance using the example of states like Somalia, Liberia, and erstwhile Democratic Republic of Congo.[68] In engaging with governance, the Bank was now looking at the quality of governance in a state as a key determinant of the viability of sustainable economic and social development. However, the shift from governance to good governance introduced a normative dimension.[69]

All the abovementioned approaches are set within a western institutional framework grounded in liberal democratic political systems, market based economy and the idea of private ownership and polycentric political structures. The outlook towards corruption varies significantly between developing and developed countries. Whereas developed countries are striving to perfect anticorruption systems within the domestic systems, developing countries have an urgent need to curb and deter corruption that use effective and sustainable mechanisms.

1.4 Corruption as a Global Concern

Corruption has evolved from being a domestic issue to a global concern. Corruption scandals are not new, from the Lockheed scandals that led to the development of the American Foreign Corrupt Practices Act in 1970s to present day scandals as seen in India. The literature on corruption suggests that some of the factors that contributed to corruption being at the centre of international agenda include:

[67] Mbao Melvin, Komboni GG (2008), "Promotion of Good Governance and Combating Corruption and Maladministration: The Case of Botswana, *Law, Democracy and Development,* Vol 12 Issue 1, pp 49-72.
[68] World Bank 1980 *Sub-Saharan Africa: From Crisis to Sustainable Development*, Washington DC: World Bank
[69] Santiso Carlos (2001), "Good Governance and Aid Effectiveness: The World Bank and Conditionality", *The Georgetown Public Policy Review*, Vol. 7 No.1, pp 1-22, at p 5.

First, the end of the Cold War stopped the political hypocrisy that ignored political corruption.[70] Until the 1990s, the interest in combating corruption ebbed and flowed. But with the convergence of many factors, the focus on corruption was renewed. The end of the Cold War reduced the incentive to tolerate corrupt regimes, along with the transition of centrally planned economies to market economies that offered new opportunities for legal and elicit profits.[71]

Second, the insufficiency of Washington Consensus in alleviating poverty made development economists turn to the fields of sociology and political science and included the functioning of institutions into their conceptual framework. Hitherto, corruption was seen as a social problem but there is evidence of the pathology of corruption actively hindering institution building and effectiveness of aid and development programs.

Third, with the liberalisation of markets, it was challenging for countries to fight against corruption unilaterally, since it transcends borders of other states. The proceeds of corruption are often transferred abroad, which leads to international disputes involving companies, especially banks in various countries.[72] The globalisation and digitisation of international finance made it easier to dispose of the fruits of corruption. Organised crime and proceeds of corruption threaten the integrity of the financial system since it is difficult to separate bribes and drug money from legitimate transactions.[73] National authorities exercise only partial control over such integrated and digitised financial transaction, therefore, it becomes imperative for states to cooperate.

Fourth, with the mounting evidence establishing a nexus between corruption and transnational organised crime, the international community has recognised that the fight against corruption and transnational organised crime are not mutually exclusive,

[70] Vito Tanzi supra 35
[71] Rose Ackerman 1999 supra 33
[72] Argandoña Antonio "The United Nations Convention Against Corruption and its Impact on International Companies" *Chair of Economics and Ethics,* Reseacrh Paper No. 656, October 2006
[73] Glynn Patrick et al "Globalization of Corruption" in Kimberly Ann Elliott (ed) *Corruption and the Global Economy*, Institute of International Economics

rather they are two sides of the same coin.[74] The concealment of the proceeds of crimes is made possible by the corruption. Since both corruption and organised crime are transnational in nature, there is a requirement for broad-based international cooperation that would create an equitable framework for international relations and enable governments to tackle corruption.[75]

Fifth, civil society and non-governmental organisations have played an important role in highlighting and publicising the problem of corruption; this led to greater demand of transparency and accountability.

Sixth, the current global environment is conducive for formulating an international coordinated approach to combat corruption. The admitted complexities and sensitivities of corruption make the formulation of an acceptable and effective legal regime an exigent process. The causes and manifestations of corruption differ from state to state and consequently the preventive, enforcement and prosecutorial measures may not have uniform results across various states. The need to have cooperation based framework led to regional agreements to combat corruption and paved the way for a truly international Convention in the form of the United Nations Convention Against Corruption.

In addition to these factors, International Financial Institutions (IFIs) have led to the promotion of corruption as a policy problem that requires the attention of the international community. IFIs did not engage with corruption explicitly until the 1990s. The World Bank had faced criticism for lending to regimes that were known to be corrupt. In its defence the World Bank had averred that it is bound by Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), which prohibit decision-making on the basis of political considerations.[76] However,

[74] Babu Rajesh "United Nations Convention Against Corruption: A Critical Overview" available at URL http://ssrn.com/abstract=891898 last accessed on 01-02-2017; Beare Margaret (2003) *Critical Relections on Transnational Organized Crime, Money Laundering and Corruption*, Toronto: University of Toronto Press; Buscaglia Edgardo (2003) "Controlling Organized Crime and Corruption in the Public Sector" *Forum on Crime and Society* vol 3 No. 1/2; Shelly Louise and Picarelli John T. (2002) "Methods not Motives: Implication of the Convergence of International Organized Crime and Terrorism" *Police Practice and Research* Vol. 3 No.4 pp 305-318.

[75] Argandona supra 72

[76] Article IV Section 10 of Articles of Agreement states "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political

by the 1980s, the World Bank had introduced the notion of good governance as a precondition for lending. In 1996, the Bank revised its guidelines to include corruption and fraud as grounds for cancelling contracts where borrowers had not taken appropriate.[77] The anticorruption rhetoric that came from IFIs provided new visibility to corruption and need to combat it at an international level. Pertinently, corruption allowed the IFIs to explain their failures and retain their relevance in the post-Cold War era.

sewew

1.5 Review of Literature

1.5.1 The Road to UNCAC: A Background

The anticorruption discourse has moved from focusing on bribery to wider spectrum of offences (Posadas 2002; Babu, 2006). While corruption has been dealt with since antiquity, it has indubitably become an item on the international agenda (Webb, 2005). This is partly due to new corruption opportunities created at the end of the Cold War by moving towards privatisation and deregulation (Rose-Ackerman, 1999). However, the focus on corruption has been galvanised by the awareness of the symbiotic relationship between corruption and transnational organised crime (Beare 2003; Buscaglia 2003; Shelley and Picarelli 2002). Corruption is an international phenomenon in its scope, substance and consequences (Glynn et. al. 1997; Posada, 2000; Rose-Ackerman, 1997).

The returns of corruption are often transferred to different countries that can potentially lead to international disputes involving companies, especially banks in various jurisdictions. Governments, international agencies, Non-Governmental Organisations and Transnational Corporations are concerned about the effects of corruption, though from different vantage points, which range from global criminal networks to distortion of trade (Argandoña 2006).

---

character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially…"

[77] Guidelines Procurement under IBRD Loans and IDA Credits, The World Bank, Washington DC available at URL http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-01-99-ev3.pdf last accessed 25-06-2017.

Consequently, there has been a proliferation in international efforts to curtail corruption. While it is imperative for a national government to combat corruption, there is also concurrence on having a broad based international cooperation approach (Johnston and Kpundeh 2004, Argandoña 2006). This understanding was rendered in the form of regional co-operation agreements to combat corruption (Posadas, 2000; Webb, 2005) and the language of these agreements varied from legal instruments to political declarations (Webb, 2005).

Since the United Nations is an organisation with a global membership, it is uniquely positioned to deal with global challenges (Babu, 2006). Furthermore, the United Nations has been working on the prevention and eradication of the corruption for many years. The United Nations Convention Against Corruption (UNCAC) flourished from the Vienna Declaration adopted by the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders in April 2000 and the *travaux preparatoires* for the UN Convention against Transnational Organized Crime (Argandoña 2006). It was in this context that the UN Office of Drugs and Crime (ODC) through the UN General Assembly established an Ad Hoc Committee for the negotiation of a comprehensive convention to combat corruption.

1.5.2 An Overview of the Legal Regime Under UNCAC

The United Nations Convention Against Corruption created global anticorruption standards and obligations. With a membership of 180 parties, the UN Convention can be considered as a universal instrument and a leading anticorruption tool (Low, 2006). The UNCAC is distinguished from its predecessors by its extensiveness in dealing with corruption and related offences. The Ad Hoc Committee was instructed to negotiate a broad and comprehensive convention that would employ a wide range of legal tools to combat corruptions and its various manifestations (Rose, 2015).

The UN Convention measures carry varying degrees of obligations that range from mandatory to discretionary provisions. It contains chapters on prevention, criminalisation and law enforcement, international cooperation, asset recovery and technical assistance and information exchange.

1.5.2.1 Prevention

UNCAC emphasises the importance of preventing corruptions by making institutional and systemic barriers key in the fight against corruption (Larson 2011; Babu 2006; Webb 2005; Brunelle-Quraishi 2011). By going further than previous conventions, the provisions on prevention of corruption under UNCAC cover public and private sectors (Low, 2006). It also underscores the importance of civil society and NGOs in having a more effective framework to combat corruption.

1.5.2.2 Criminalization

The UNCAC criminalizes trading in influence, concealment and laundering of proceeds of corruption and obstruction of justice, in addition to basic forms of corruption inter alia bribery and embezzlement of public funds. Furthermore, it requires states to declare these acts as offences in their domestic law by way of amendments or, if required, by enacting new laws (Babu 2006; Webb 2005).

1.5.2.3 Asset Recovery

Asset recovery was a pressing issue for many developing states where grand corruption has deprived them of their national wealth. This legitimate concern has been expressed by the Nyanga Declaration, which states that over the decades an estimated US$20-40 billion had been appropriated by corruption from some of the poorest countries in the world and kept abroad in the form of cash, stocks, bonds, real estate and other assets (Nyanga Declaration 2001). The IMF had estimated that around 3 to 5 percent of the world's Gross Domestic Product is laundered on an annual basis and assumed that a significant portion of the activity involved the proceeds of corruption (IMF 2001). Hitherto the challenges to asset recovery could be attributed to factors like a lack of political will or a deficient legal framework or lack of technical expertise in countries where such assets where being diverted from (Jorge, 2003). During negotiations, the representatives from Group of 77, European Union, African states and Latin American countries insisted for a mechanism to enable repatriation of assets that had been stolen (Ad Hoc Committee 2002). As a

result of these negotiations, asset recovery as well as measures dealing with money laundering and prevention has been dealt with as a separate chapter. Asset recovery is a 'fundamental principle' of UNCAC; although according to the travaux preparatoires the phrase has no legal consequence (Ad Hoc committee 2002; Webb 2005).

The provisions under UNCAC are significant due to the promise of a wider scope of cooperation vis-à-vis asset recovery as opposed to regional conventions. Most provisions of the chapter on asset recovery are mandatory with qualifying clauses such as 'in accordance with the fundamental principles of its domestic law' or 'to the greatest extent possible.' Therefore the effectiveness depends on individual states and their courts and civil society (Webb 2005; Brunelle-Quraishi 2011; Jorge 2003; Babu 2006).

1.5.2.4 International cooperation

States are sovereign equals and international cooperation is an extension of respecting the sovereignty and equality of all states. The Convention provides detailed provisions to create a broad spectrum of cooperation. The duty to cooperate applies irrespective of how the offence is worded as long as it has been implemented domestically (Low 2006). Under Chapter IV of the Convention, states have agreed to cooperate in every aspect to combat corruption. The Convention binds states to render specific forms of mutual assistance in gathering and transferring evidence for use in court and extradite offenders.

The success of the fight against transnational crime is in part dependent on the effectiveness of international cooperation in criminal matters. Furthermore, the attainment of the objectives of a domestic criminal justice system is usually contingent on international cooperation (Stessens 2000). Countries are required to take measures to support the tracing, freezing, seizure and confiscation of the proceeds of corruption (Larsen 2011; UNCAC 2003).

The Convention also requires the establishment of a central authority to ensure the prompt execution of mutual legal assistance requests. Under the Convention, bank secrecy laws and fiscal laws are no longer grounds for refusing assistance.

1.5.3 Efficacy Barriers to UNCAC: Issues and Challenges

1.5.3.1 Monitoring and Compliance Mechanism

Clear and precise monitoring provisions help in implementing conventions (Argandoña, 2006). However, during negotiations, wide ranges of interests are accommodated and may lead to obligations that are ambiguous or too flexible. In return, ambiguous obligations may pose a challenge for enforcement of the convention (Chayes and Chayes, 1995).

An effective and robust monitoring mechanism is pivotal to the implementation of the convention. Since the UNCAC has no follow-up mechanism, monitoring programs are essential to determine whether states are complying with the provisions. The two key elements of a monitoring mechanism are effectiveness and objectivity (Babu, 2005).

The diversity of UNCAC in terms of parties and subject matter make monitoring both essential and challenging. It is also crucial to have mechanisms in place for states that lack the financial or technical capacity to implement provisions of the UN Convention. Additionally multiplicity of efforts must be avoided at the regional level, which makes coordination and cooperation between UNCAC and regional conventions imperative (Heineman and Heimann, 2006).

The application of law originating from conventions is heterogeneous. Many factors have been identified that affect the degree of compliance from state to state (Chayes and Chayes, 1995; Haas, 2000; Guzman, 2005; Benvenisti and Hirsch 2004) but there is agreement that the social and political circumstances of a state play a crucial role in compliance. At the time of negotiations, there conflicting opinions on including a monitoring system. Some states suggested a subsidiary monitoring system and a peer

review system with sanctions for non-compliance, which was rejected as states felt it was adversarial and would violate the sovereignty of states (Webb 2005).

In light of these disagreements, the decision on a monitoring system was deferred to the First Conference of State Parties (Heinmann 2005). Some of the alternative monitoring mechanisms considered were the self-assessment mechanism, which is considered to be most lenient; another mechanism discussed the establishment of an expert panel that will review the compliance of states although expert panels are considered adversarial and intrusive.

An implementation review mechanism was set up by the third CoSP and can be described as a peer review mechanism. Under the said mechanism, a systematic assessment of states' performance is done by other states. The objective of such an undertaking is to assist in improvement of policy making and compliance with established standards and principles. The process is ensconced in mutual trust and relies profoundly on the shared confidence in the process (Pagani 2002; Dimitropoulos 2016). A peer review process is formal, systematic and representative of the entire membership and a method for formalising cooperation.

The entire process of review in its current form is opaque and contrary to the principles of transparency and impartiality that is enshrined in the text of the UN Convention.

1.6 Objective and Scope of Study

Corruption is one of the greatest impediments in meeting the legitimate aspirations of the citizens of any state; and it will persist unless a comprehensive strategy is formulated that is implemented not only domestically but also globally, deploying modern technology. Thus, for instance, an integrated and digitised world makes it easier to conceal and transfer the proceeds of crime and corruption, the same technology can be used to have a comprehensive and cooperation based framework that will help in overcoming the uneven framework to combat corruption.

The literature on the subject of corruption is vast and the current study will not be able to address the myriad of issues that forms the centre of these studies. The present study will limit itself to presenting a critical review of the various provisions of the United Nations Convention Against Corruption. While the nexus between transnational organized crime and corruption is acknowledged, this study will not delve into the details of transnational organized crime. Furthermore, the study will not deal with the range of crimes associated with corruption *inter alia* money laundering.

The objective of this study is to understand and analyse the anti-corruption measures under United Nations Convention Against Corruption. This study is an attempt to understand whether the UN Convention Against Corruption is an effective international legal instrument to fight corruption.

1.7 Research Questions

1. What are the current status, direction and development of international regime to combat corruption?
2. Which compliance and monitoring mechanisms can give efficacious results?

1.8 Hypothesis

Corruption cannot be combated without a robust monitoring and enforcement mechanism.

1.9 Research Methodology

Following a doctrinal approach to this study, various primary and secondary sources will be referred and analysed. While insights may be taken from economic, political and social studies, the focus will remain on the legal aspects of corruption and the anti-corruption regime established under UNCAC.

1.10 Plan and Chapterisation of the Study

This study has been divided into six chapters, including the introduction and conclusion. A brief overview of the chapters follows:

Chapter 2: Global Response to Corruption

This chapter will explain and analyse the evolution of anti-corruption laws that led to the UN Convention Against Corruption. Under this chapter, various national, regional and international efforts to combat corruption will be discussed along with their impact on the text of the UN Convention Against Corruption.

Chapter 3: Legal Regime under UNCAC: Issues and Challenges

Apropos to the previous chapter, this chapter will study the law, policy and institutional framework under the UN Convention Against Corruption. The wide spectrum of corruption and related offences and mechanisms under the Convention will be discussed and analysed. The normative value and the enforcement challenges of UNCAC will also be discussed under this chapter.

Chapter 4: India and UNCAC

This chapter will identify and analyse the legal regime to combat corruption in India. Furthermore, this chapter will seek to analyse India's response to the UNCAC and its implementation in order to understand how India will fulfill its commitments under the UN Convention.

Chapter 5: Conclusion

The findings of the aforementioned chapters will be summarised and evaluate the outcome of the study and give recommendations.

CHAPTER 2

GLOBAL RESPONSE TO CORRUPTION

GLOBAL RESPONSE TO CORRUPTION

Introduction

Corruption is a contentious concept since it is related to some of the core functions of a state. It is challenging to formulate an international legal instrument that would be effective and yet not impinge on the sovereignty of states. Therefore, corruption has been addressed at regional as well as international level and has resulted in 'hard law' and 'soft law' documents. With the passage of time, a trans-boundary approach became necessary in light of the fact that domestic anti-corruption laws were not always applicable to bribing foreign officials. From the advent of anti-corruption initiatives, to present day, the focus has shifted from bribery to a much larger range of offences. The legal regime under international law today is a result of previous efforts, which are discussed briefly hereunder. This chapter is a survey of various domestic, regional and international initiatives that led to UNCAC.

Section 1 of this chapter deals with the US Foreign Corrupt Practices Act, 1977 (FCPA), which was enacted as a response to the Watergate Investigations. The FCPA is important, as it was the first anticorruption legislation with an international dimension. Furthermore, the enactment of FCPA also resulted in the United States rallying for more international anticorruption efforts to level the playing field. Another domestic legislation was enacted by Sweden in 1965, which was amended in 1978. The Swedish Penal Codes prohibits bribery of foreign public officials. However, it is based on the principle of reciprocity and is applicable only in states that have prohibited bribery of Swedish public officials. Section 2 of this chapter is an analysis of the OECD efforts against corruption. Section 3 of this chapter is an analysis of regional anticorruption agreements. These regional agreements established various monitoring and follow up mechanisms that are also analysed. Section 4 of this chapter is an account of the contributions of the United Nations before the United Nations Convention Against Corruption. This section will trace the various measures taken under the aegis of the United Nations that set the stage for UNCAC.

2.1 Domestic Legislation

2.1.1 The US Foreign Corrupt Practices Act, 1977

The largely unchallenged hegemony of Transnational Corporations (TNCs) in international trade led to normalisation of bribery. The practice was prolific and considered legal in developed countries until the Watergate investigations in the United States. One of the earliest actions to combat corruption with extra-territorial application was the enactment of the Foreign Corrupt Practices Act of 1977, whereby the United States outlawed transnational bribery.[78] There were investigations into the conduct of US corporations in financing domestic political campaigns; this in turn led to an investigation into the role of major US corporations funding foreign political campaigns and the dubious payments and contributions made to foreign government officials. Thus, the issue of bribery and corruption were catapulted to the international centre stage. To understand the magnitude of the problem, the US agency - Securities and Exchange Commission (SEC)- ran an investigation into the conduct of US corporations, while initiating a voluntary disclosure program, where American corporations were invited to disclose unreported foreign payments; more than 500 companies admitted to making previously undeclared "questionable" payments to foreign official.[79]

The FCP Act provided punitive measures to deter bribery of foreign officials by US corporations and made bribes non-deductible as costs for the purpose of taxation. The move was deemed to be one that would hurt the corporate interest of the United States and US corporations argued that the law put them at a disadvantage vis-à-vis their competitors who were not prohibited to bribe under their domestic laws.[80] The FCPA had two main components; it made bribing of foreign officials a crime, and provisions pertaining to accounting practices.[81] Under the FCP Act, "an offer, payment, promise

[78] For a detailed history of the Foreign Corrupt Practices Act *see* Mike Koehler (2012) "The Story of the Foreign Corrupt Practices Act" *Ohio State Law Journal*, available at URL http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Koehler.pdf (FCPA), as amended, 15 U.S.C. §§78m(b)(2), 78(m)(b)(3), 78 dd-1, and 78ff(2000)
[79] Noonan JT., *Bribes*, University of California: 1984, p 674.
[80] Vito Tanzi "Corruption Around the World: Causes, Consequences, Scope and Cures" *IMF Staff Papers*, Vol 45, no.4, December 1998.
[81] See *Supra* FCPA

to pay or authorization of the payment of any money, or offer, gift, promise to give or authorization of giving of anything of value" will be considered as a corrupt practice.

The 1988 amendment to the FCPA clarified the scope of the act and gave one exception along with two affirmative defences.[82] Under the exception, FCPA does not apply to payments made to foreign government officials for routine governmental action.[83] This exception is also known as the "grease payment" exception and has to be construed in a limited manner to address actions that are regularly and commonly performed by the government officials and do not require any discretion while making decisions.[84] The first affirmative defence pertains to foreign payments that are lawful in the jurisdiction of the recipients' country,[85] and was included with the objective to remove potential conflict of jurisdiction. The second affirmative defence pertains to *bona fide* expenditure incurred directly related to promotional activities or the execution of contract.[86] The test of this defence is whether the purpose of such expenditure was corrupt.[87]

The FCPA applies to any person who has a certain degree of connection with the United States and is found to have indulged in corrupt practices involving foreign officials. Furthermore, US businesses, TNCs trading securities in United States, American nationals, citizens and residents fall within the purview of the Act, regardless of whether they are physically present in the United States. The Act also covers transactions that are directly attributable to a foreign official, party or candidate.[88]

As was expected, the consequences of the Watergate investigations were not contained in the United States; the ramifications were felt in Honduras, Japan, Netherlands, and Italy, and only exemplified that deep-seated corruption is not peculiar to developing countries. Two of the most publicized scandals were seen in

[82] Posadas Alejandro (2000), "Combating Corruption under International Law", *Duke Journal of Comparative and International Law,* p 345-414.
[83] See §§78dd-1-(b), 78dd-2-(d)
[84] Jeffrey Bialos and Gregory Husisian (1997) *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies*
[85] 15 USC §§78dd-1(c)(1), 78dd-2(c)(1)
[86] See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2)
[87] Bialos *supra* 84
[88] Posadas *supra 82*

Netherlands and Japan. The Vice-Chairman of Lockheed admitted to paying millions of dollars to a high government official in Netherlands and investigations revealed it was a member of the Dutch royal family. As a result of the investigations, Prince Bernhard was stripped of his position and resigned from all military and political posts.[89] In Japan, Prime Minister Kakuei Tanaka was forced to resign and submit to prosecution when the Lockheed investigations revealed that illicit payments of around $25 million were made to high ranking Japanese officials. Eventually, Tanaka was charged with accepting ¥500 million and sentenced to prison for four years.[90]

2.1.2 The Swedish Penal Code, 1965

The Swedish Penal Code came into force in 1965; bribery is prohibited under Chapter 17, Section 7, which deals with active bribery and Chapter 20 Section 2, which deals with passive bribery. As a result of global events including the Lockheed hearings, the United Nations General Assembly Resolution and OECD guidelines, the Swedish Penal Code was amended *vide* legislation and came into force on 1st January 1978.[91] As a consequence of this amendment, the corruption of public officials and employees of private industry was punishable under the same provisions of law. There is a clear prohibition of illicit payments to foreign government officials albeit the law works on the principle of reciprocity and is applied to officials in countries that have prohibited illicit payments by their nationals to Swedish officials.

The individual effectiveness of these laws in curbing foreign corruption is limited. The FCPA is applicable only to US corporations, citizens and officials that too with affirmative defences mentioned before. The Swedish law is only applicable in countries with reciprocal laws prohibiting bribery of Swedish officials. Over the years, these domestic legislations had limited success in curbing corruption; however,

[89] See Ben Rich, Leo Janos (1996) *Skunk Works: A Personal Memoir of My Years of Lockheed*; Back Bay Books.
[90] See Chalmers Johnson "Tanaka Kakuei, Structural Corruption, and the Advent of Machine Politics in Japan", *The Journal of Japanese Studies,* Vol 12 No,1 (Winter 1986) pp 1-28. URL http://www.jstor.org/stable/132445 last accessed on 06-04-2017
[91] See Bogdan, Michael, "International Trade and the New Swedish Provisions on Corruption", *The American Journal on Comparative* Law, Vol 27, No.4 (Autumn 1979) pp 665-677

these domestic legislations raised awareness and lay the foundation of future multilateral efforts to combat corruption.

2.2 The Contribution of the Organisation for Economic Co-operation and Development (OECD)

The Organisation for Economic Cooperation and Development (OECD) was formed in 1961 when it succeeded the Organisation for European Economic Cooperation, a body that was formed as a consequence of the Marshall Plan.[92] The OECD collects data from member countries and analyses them to project short and medium term economic developments. Based on the findings, the Council makes decisions and governments carry out the implementation of the same.[93] The OECD has a current membership of 35 states.[94]

Corruption was part of the OECD agenda since the 1970s, especially due to the influence exerted by the United States after it enacted the FCPA.[95] The initial anticorruption measures from the OECD were in the form of recommendations. In 1976, a guideline for multinational enterprises (MNEs) was annexed to a declaration on International Investment and Multinational Enterprises. The guidelines expressed the expectation that MNEs will refrain from indulging in illicit activities and that they are expected to maintain appropriate ethical behaviour.

The OECD was used as a forum to push for international business reforms after the FCPA due to the concern of American corporations that it would lose business to other competitors who were not bound by such anti-bribery laws.[96] The concerns of US corporations on losing business to competitors led to the 1988 amendment of the

[92] For text of Marshall's Harvard Speech *see* URL http://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm last visited on 21-04-2017; for more information in the OEEC *see* http://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm last visited on 21-04-2017

[93] http://www.oecd.org/about/whatwedoandhow/

[94] See http://www.oecd.org/about/membersandpartners/

[95] Posadas *supra* 82 at p 376.

[96] Posadas *id* at 376

FCPA; and to advise the President to negotiate an agreement under OECD.[97] The impetus for pushing reforms at the international level came with the Clinton Administration in 1993. Secretary of State, Warren Christopher and Assistant Secretary of State for Economics and Business Affairs, Daniel Tarullo, prioritised the OECD bribery negotiations a State Department priority.[98] The objective was to level the international playing field by expanding FCPA-like obligations onto foreign competitors.[99]

The proposal was strongly opposed by European countries like France and Germany that argued that the FCPA was an "illegitimate exercise in extraterritoriality, seeking to extend the US law beyond US borders." Germany even argued that the mixing of morality with taxation is a peculiar philosophy.[100] The United States retorted by saying that under the OECD, countries would be free to legislate the offences under their laws in conformity with their constitution, but states must proscribe bribery. The negotiations were bolstered by other factors like the end of the Cold War, economists highlighting the pernicious effects of bribery and corruption in general. These factors were compounded by the fact that a number of European and Asian countries were embroiled by corruption scandals, which made the setting conducive for an international effort on bribery.[101]

2.2.1 Legal Regime Under OECD

By 1994 the OECD adopted the OECD Recommendation on Bribery in International Business Transactions.[102] The Recommendation, under Part III, deals with domestic measures, where each state party has to take "concrete and meaningful steps" in conformity with its jurisdictional and basic legal principles. These steps include criminalising bribery of foreign official; the revision of civil, commercial and

---

[97] *id*; *also see* Rossbacher, Henry H., and Young, Tracy W (1997) "The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption", *Penn State International Law Review*; Vol 15, No.3, Article 4, p 527.
[98] Glynn et al *Supra* 73 at p 20.
[99] *id*
[100] *id* at p 20
[101] *See* Posadas *supra* 82 at p 377; Glynn *supra* 73 at p 20.
[102] OECD Recommendation on Bribery in International Business Transactions adopted on 27 May 1994, C (94)75/FINAL, International Legal Materials, Vol 33, (1994), p 1389.

administrative law to make bribery illegal; the amendment of tax legislation, regulations and practice if they favour bribery; changing, where required, the banking, financial and other relevant provisions in order to make them available for inspection or investigation; examining and revising laws and regulations pertaining to public licences, subsidies, contracts etc. to control bribery of foreign officials.[103] The Recommendations also asked member countries to consult and cooperate with other countries in matters of investigation and other legal proceedings, like extradition.[104] It also recommended using existing bilateral and other agreements for mutual legal assistance on matters of bribery.[105] The OECD Committee on International Investment and Multilateral Enterprises (CIME) was asked to follow up on the Recommendations and submit a report within three years.[106]

The "Revised Recommendations on Bribery in International Business Transactions" was submitted by CIME in 1997, which encouraged the OECD to elaborate a treaty on the topic. Consequently, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This was a legally binding international instrument that addressed the 'supply side' of bribery. It is pertinent to note the binding nature of the OECD Convention because it deviates from the OECD's practice of using non-binding recommendatory instruments on a wide variety of subjects.[107]

In order to ensure compliance with the OECD Convention, a monitoring mechanism was established called the "OECD Working Group on Bribery in International Business Transactions."[108] This Working Group was entrusted with overseeing the implementation the OECD Convention as well as the "Recommendation on Further Combating Bribery of Foreign Officials in International Business Transactions." The

[103] See Part III *id*
[104] Part IV (i) *id*
[105] Part IV (ii) *id*
[106] Report by the OECD Committee on International Investment and Multinational Enterprises (CIME) to the OECD Council at Ministerial level in 1997
[107] See Rose Cecily *International Anticorruption Norms: Their Creation and Influence on Domestic Legal Systems*, London: Oxford University Press at p 76; also see Posadas supra 74 at p 379-380
[108] For a detailed analysis see Rose Cecily *id* Chapter 2 *The Domestic Influence of OECD Anti-Bribery Convention and the Working Group*, p 74

latter is another anticorruption instrument of the OECD, which is not binding in nature. All signatories of the Convention had be part of the Working Group.[109]

The OECD Working Group has also sought the adoption of anti bribery norms by non-members by using regional initiatives, programmes etc. After the OECD Anti Bribery Convention, the Working Group started creating entities to promote the OECD agenda in non-member states; one such example is the Asian Development Bank and OECD anticorruption initiative created in 1999. After the enactment of the UNCAC, the Initiative seeks the effective implementation of the UNCAC by capacity building based on cooperation, exchange of expertise and peer learning.[110] The main goals of the ADB/OECD Initiative are regular meetings and self-reporting, thematic reviews, capacity building seminars and regional anticorruption conferences.[111]

2.2.2 Review Mechanism under OECD

The OECD uses a peer review mechanism that is mandatory. It is pertinent to note that the reports of these peer review have to be published and states cannot block it. The OECD mechanism of review is the strongest review mechanism for an international legal anticorruption instrument in place.

2.3 Regional Efforts Against Corruption

The post cold-war era saw an influx of information and money alongside the ramifications of organised crime that shattered the belief of corruption being a domestic problem. The cross-border nature of the issue at hand could no longer be denied, and as a response the first wave of efforts came in the form of regional agreements. The language of these agreements varied from political declarations to being legally binding documents. Some of these agreements are discussed below:

---

[109] Jakobi Anja (2010) "E Pluribus Unum? The Global Anti-corruption Agenda and its Different International Regimes" in Wolf Sebastian and Schmidt-Pfister Diana (eds.) *International Anti-corruption Regimes in Europe* Baden-Baden: Nomos at p 95

[110] For details on the ADB/OECD Initiative see URL https://www.oecd.org/site/adboecdanti-corruptioninitiative/ADB-OECD-Initiative-Information-Sheet.pdf

[111] *id*

2.3.1 The Organization of American States Inter-American Convention Against Corruption, 1997

The Organization of American States (OAS) was the first regional body to create a multilateral agreement on corruption. The OAS decided, in 1994, to address the problem of corruption and bribery.[112] The Miami Summit led to the Free Trade Agreement of the Americas (FTAA) but was also the place where the Declaration of Principles and Plan of Action were signed with the clear admission that corruption went further than bribery.[113] This was significant since corruption was linked with larger economic and political aspirations of the region.[114] Consequently, the Plan of Action sought the commitment of the signatories to act on corruption under existing international law framework on cooperation and with new agreements and arrangements.[115]

This initiative led to the drafting and subsequent adoption of the Inter-American Convention against Corruption (OAS Convention). The Convention was signed by 22 states and came into force in 1997.[116] The Convention currently has 33 ratifications and is open to accession for non-OAS members.[117] The initiative for the Convention came from Venezuela along with a group of Latin American countries.[118] One of the

---

[112] Posadas supra 82
[113] Posadas supra 82
[114] *Summit of the Americas: Declaration of Principles and Plan of Action*, 34 I.L.M. 808 (1995). The Declaration and Principles and Plan of Action was signed by Antigua and Barbuda, Argentina, The Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Saint Lucia, St. Vincent, Grenadines, Suriname, Trinidad and Tobago, The United States, Uruguay and Venezuela. It recognised that "effective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of economic system that undermines the legitimacy of political institutions."
URL http://www.jstor.org.ezproxy.jnu.ac.in/stable/pdf/20698458.pdf
[115] Signatories commit to "develop within the OAS, with due regard to applicable treaties and national legislation, a hemispheric approach to acts of corruption in both the public and private sectors that would include extradition and prosecution of individuals so charged, through negotiations of a new hemispheric agreement or new arrangements within existing framework for international cooperation." *Id,* pp 818-819.
[116] Inter-American Convention Against Corruption (OAS Convention) held at Caracas on 29th March 1996 "35 ILM 724" entered into force on 6th March 1997 available at http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp last visited on 22-04-2017
[117] Article XXIII of the OAS Convention *id*
[118] Gantz David, "Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus" *Northwestern Journal of International Law and Business* (1998) 457, p 477

distinctive characters of this Convention is the involvement of developed countries along with a number of middle range and poor countries.[119]

The OAS Convention was more ambitious and comprehensive as it addressed passive corruption along with active corruption.[120] The Convention encourages governments to deal with domestic corruption while criminalizing bribing foreign officials. The OAS Convention creates a two-tier system whereby active and passive bribery are considered to be illicit acts as soon as the Convention comes into force and transnational bribery and domestic illicit enrichment will be considered illegal when signatories have incorporated these offences in their domestic legal systems.[121]The Convention requires state parties to criminalise the solicitation, acceptance, or offer of illicit payments; acts or omissions of government officials for the purpose of illicit benefits for himself or third party; fraudulent use or concealment of property derived from such activities; and the participation as a principal, accomplice or accessory after in any acts mentioned.[122] Furthermore, State Parties can consider criminalising offences such as improper use of classified information; or government property; or acts or omissions for personal or third party benefit which are received by virtue of his position for purpose of administration, custody or other reasons.[123] Pertinently, even if State Parties do not establish the abovementioned as offences, the Convention binds them to provide assistance and cooperation vis-à-vis the offences under the Convention.

As regards the scope of transnational bribery, the OAS Convention covers bribery for the purpose of contract or business but also includes bribery for the purpose of any act or omission in the performance of a public official. However, the OAS Convention was primarily concerned with domestic corruption, as is reflected in the language of the Convention.[124] The scope of the stipulation under Article VIII of the Convention

[119] Rose-Ackerman Susan (2002) "Corruption and the Global Corporation: Ethical Obligations and Strategies" in Michael Likosky (ed.) *Transnational Legal Processes*, London: Butterworth, pp 148-171
[120] Posadas *supra* 82.
[121]Webb Philippa "United Nations Convention Against Corruption: Global Achievements or Missed Opportunity" *Journal of International Economic Law* 8(1), pp 191-229; Also See Posadas *supra* 82 pp 384-385;
[122] Article VI Acts of Corruption OAS Convention.
[123] Article XI of OAS Convention
[124] Article VIII Inter-American Convention Against Corruption is the only provision that directly pertains to transnational bribery but is subject to the legal system of member states. Article VIII reads

is not clear; however, some scholars believe the language of Articles VIII and IX, giving State Parties an option to not adopt transnational bribery or illicit enrichment if these are inconsonant with the state's constitution.[125] Even so, the language of Article VIII is mandatory and may be interpreted in a manner that sanctions bribery of foreign officials is mandatory but the treatment of the offence can differ subject to their domestic legal systems.[126]

2.3.1.1 Legal Regime under OAS Convention

The elements of bribery under the OAS Convention are broader than other Conventions like the OECD Convention that follows the FCPA closely. Under the OAS Convention it is required that bribery is done "in connection with any economic or commercial transaction."[127]

The OAS Convention had also departed from the standard thus far which had a higher tolerance for facilitation payments or grease payments. Furthermore, the defences and exceptions under the FCPA have not been extended to this Convention. Whether the Convention applies to facilitation payments can be deduced from scope of the Convention. The Convention applies to bribery "in connection with any economic or commercial transaction" and since facilitation payments are done for commercial transaction, it can be contended that the OAS Convention is applicable.[128]

The Convention applies to nations or persons who habitually reside in the territory of a State Party; however, the Convention is silent on the treatment of legal persons and does not cover officials of international organisations. The proceeds of bribery are to

---

as: "Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish 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 function." *See Inter-American Convention Against Corruption* URL http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp

[125] Posadas *supra* 82; also see Low Lucinda, "The United Nations Convention Against Corruption: The Globalization of Anti-corruption Standards", *Conference of the International Bar Association, International Chamber of Commerce and OECD*, "The Awakening Giant of Anticorruption Enforcement", London, England May 2006.

[126] Posadas *supra* 82

[127] Article VIII supra

[128] Posadas *supra* 82

be seized but the Convention also provides for sharing of such proceeds with a state that may have assisted in the investigation or proceedings.[129] This provision may be considered as an incentive for developing countries to actively participate in combating transnational bribery.

The OAS Convention is based on mutual cooperation and assistance in matters of investigation, prosecution and punishment of the acts that mentioned there under. The Convention also curtails the practice of states using bank secrecy laws as a way to refuse assistance.[130] Moreover, the Convention ensures that state parties either prosecute or extradite.[131] In order to fulfill this provision, the Convention alternates as an extradition treaty, meaning thereby even in the absence of a specific treaty in place with a host country, the OAS Convention can serve as the legal basis for extradition.

2.3.1.2 Review Mechanism under OAS Convention

The shortcoming of the OAS Convention was that it failed to set up a review mechanism in order to monitor its implementation called the Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption (MESICIS for its Spanish Acronym).[132] The Conference of Parties set up a follow up mechanism later and implemented a peer review system.[133] The review system involves two bodies – the Conference of Parties and the Committee of Experts.

The Committee is responsible for obtaining and analysing data and to prepare a report, which is to be presented before the Conference of Parties. States under review submit a self-assessment based questionnaire. Civil society also participates in the process and submits its response to the same questionnaire. During the first round of evaluation, states are reviewed on preventive measures, oversight bodies and mechanisms to foster the involvement of civil society and NGOs. The final report is submitted to the Conference of States Parties and published. The strong suits of the

[129] Article XV OAS
[130] Article XVI OAS
[131] Article XIII OAS
[132] Webb *supra* 121
[133] OAS General Assembly Resolution AG/RES.1784 (XXXI-O/01), 5th June 2001; also see http://www.oas.org/juridico/english/faq_ac.htm#1

OAS review mechanism are a well-designed questionnaire, civil society participation and plenary discussion of draft reports. However, there has been criticism for the mechanism as well. The process is slow and sometimes lacks the expertise of some experts. The Committee of Experts have now started *in situ* visit, a measure that was not part of the original peer review mechanism. The Committee is supposed to work on the principle of cooperation and can only recommend improvements. The peer-review mechanism set up under OAS Convention is considered as a realistic method of monitoring and a similar mechanism can now be seen in UNCAC.

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

At the end of World War II, ten European countries – Belgium, France, Sweden, Norway, the Netherlands, Denmark, Luxembourg, Ireland, Italy and the United Kingdom founded the Council of Europe.[134] In the next three decades, its membership increased to 23 with Austria, Finland, Spain, Switzerland and other countries becoming a part of the Council of Europe. With the fall of the Soviet Union, many east European countries also became a part of the Council. The initial issues addressed by the Council of Europe pertained to human rights, rule of law, parliamentary democracy; however, with the fall of the Berlin wall the Council of Europe expanded its scope of function to include constitutional and economic reforms.

As per Council of Europe, corruption threatens rule of law, human rights, good governance and can undermine democratic institutions and impede economic development and its involvement in the fight against corruption is imperative as "it jeopardizes the very foundation of the core values it safeguards"[135] One of the earliest developments under the COE was a recommendation by Committee of Ministers to

[134] The Council of Europe was founded on 5th May, 1949. See Council of Europe website available at URL https://www.coe.int/en/web/about-us/who-we-are visited on 18-04-2017; also see Encyclopaedia Britannica https://www.britannica.com/topic/Council-of-Europe visited on 18-08-2017

[135] *See* Council of Europe Online Resources available at URL https://edoc.coe.int/en/corruption/7297-greco-group-of-states-against-corruption-the-council-of-europe-anti-corruption-body.html last visited on 18-04-2017

take measures against economic crimes *inter alia* the offence of bribery.[136] At the 19th Conference of Ministers of Justice held in Valetta in 1994, it was agreed between the member states that corruption had to be addressed at European level as it threatened the stability of democratic institutions. Since then the COE has developed several activities to combat corruption in Europe that eventually led to the formation of the Group of States against Corruption (GRECO).[137]

2.3.2.1 COE Legal Instruments to Combat Corruption

The approach of COE towards corruption was to adopted multifaceted standard setting instruments, which include The Criminal Law Convention on Corruption, The Civil Law Convention on Corruption[138] that would improve the capacity of states to combat domestic and transnational corruption and GRECO was established as a sophisticated monitoring mechanism, entrusted with ensuring compliance.[139]

2.3.2.1.1 The Criminal Law Convention on Corruption, 2002

The Criminal Law Convention on Corruption (COE Criminal Convention) was adopted in 1999 and came into force in 2002; it currently has 47 ratifications and accessions.[140] The Convention was ambitious in its scope and pertains to public as well as private sectors along with transnational cases of bribery of foreign public officials, officials of international organisations, judges and officials of international

---

[136] *See* Recommendation No. R(81) 12 available at URL https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cb4f0 last visited on 18-04-2017

[137] *Id* p 2

[138] The Criminal Law Convention on Corruption (ETS 173), The Civil Law Convention on Corruption (ETS 174) and also include , The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), The Twenty Guiding Principles against Corruption (Resolution(97)24), The Recommendation on Codes of Conduct for Public Officials (Recommendation No. R (2000)10) and The Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec (2003)4).

[139] Article 14 of COE Civil Convention and Article 24 of COE Criminal Convention establish that GRECO will undertake monitoring of compliance.

[140] The Convention was open for ratification to non-European countries that participated in its elaboration and for accession to the European Union as well as non-member states. On ratification, states become a part of GRECO. For further information see URL https://www.coe.int/en/web/Conventions/full-list/-/Conventions/treaty/173 last visited on 20-04-2017

courts.[141] However, the Convention has been narrowed the criminalisation of conduct to active and passive bribery along with laundering of proceeds of crime and trading in influence and aiding and abetting of the mentioned activities but it leaves out conduct such as embezzlement, nepotism and insider trading.[142] For the purpose of mutual support on the subject of tracing, seizure and freezing, the Convention uses the term "facilitating" without imposing a duty to partake in such actions, but does not talk of repatriation of such property.[143] The Convention provides grounds on which mutual legal assistance may be refused,[144] but bank secrecy laws can no longer be used as a ground to refuse cooperation.

2.3.2.1.2 The Civil Law Convention on Corruption, 2003

The Civil Law Convention on Corruption (COE Civil Convention) was opened for signatures in 1999 to member states along with non-member states that participated in its drafting process. It is also open for accession to non-member states as well as the European Union. The Civil Convention entered into force in 2003 with 14 ratifications and currently has 35 states that have either ratified or acceded to the Convention.[145] The COE Civil Law Convention was an attempt to define common international rules for civil law and corruption.[146] Contracting Parties have to make provisions under their domestic law "for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."[147] The language of the Convention is legally binding and applies to public as well as private sector.[148]

---

[141] *See* Articles 5, 6, 9, 11 of COE Criminal Convention.
[142] Articles 2-14 of the COE Criminal Convention pertain criminalisation requirements under the Convention *see* URL https://www.coe.int/en/web/Conventions/full-list/-/Conventions/rms/090000168007f3f5 last visited on 20-04-2017
[143] Article 23 COE Criminal Convention
[144] Article 26(2) of COE Criminal Convention states "Mutual legal assistance can under paragraph 1 of this article may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public*."
[145] For details see URL <http://www.coe.int/en/web/Conventions/full-list/-/Conventions/treaty/174/signatures?p_auth=9PIWSyqU> last visited on 20-04-2017
[146] See http://www.coe.int/en/web/Conventions/full-list/-/Conventions/treaty/174 last visited on 20-04-2017
[147] Article 1 COE Civil Convention *See* URL http://www.coe.int/en/web/Conventions/full-list/-/Conventions/rms/090000168007f3f6 last visited on 20-04-2017
[148] Webb *supra* 121 p 200

The ambit of the Civil Law Convention is narrower and restricts itself to bribery and similar acts, as opposed to the Criminal Law Convention that has a broader range of offences. The provisions under the Civil Law Convention can be divided into three chapters i.e. measure to be taken at domestic level, international cooperation and monitoring of the implementation.

The Convention deals with compensation for damages and may cover damage, loss of profit or non-pecuniary loss.[149] A person, or the state itself, may be liable to pay such damages if they have committed or authorised an act of corruption or not taken reasonable steps to prevent such acts. To establish liability of the defended, it has to be proven that the plaintiff suffered damage and that there is a causal link between the act or omission of the defendant and the damage caused to the plaintiff.[150] Member States have to provide domestic law protection to employees against inequitable treatment for reporting suspected corruption to the authorities.[151] The Convention also places a duty to cooperate vis-à-vis service of documents, collection of evidence, and recognition and enforcement of foreign judgments. The Civil Law Convention also reiterates that GRECO would be responsible for monitoring its implementation.

2.3.2.2 Group of States against Corruption (GRECO)

To understand the monitoring mechanism of the above-mentioned Conventions, it is imperative to understand the nature and function of GRECO. The objective of GRECO is to improve the capacity of member states to combat corruption. Monitoring their compliance with the COE anti-corruption standards does this and the process of peer review is used to evaluate performance and create peer pressure. The process also helps to identify the shortcomings of domestic anti-corruption policies necessary institutional, legislative and practical reforms.

The COE Secretariat in Strasbourg, France assists GRECO in the monitoring process and the Secretary General of the Council of Europe appoints the Executive Secretary to head GRECO. Since 2010, all COE members have become members of GRECO.

[149] Article 3 COE Civil Law Convention
[150] Article 4 COE Civil Law Convention
[151] Article 9 COE Civil Law Convention

Furthermore, any state that becomes a part of the COE Civil or Criminal Law Conventions *ipso facto* accedes to GRECO and will have to undergo the evaluation process. GRECO membership is open to all countries that are willing to fully participate in the mutual evaluation and compliance procedures. It currently has 49 member states.

2.3.2.2.1 Functioning of GRECO

The Statute and Rules of Procedure govern the functioning of GRECO. Each Member State has to appoint two representatives are a part of the plenary meeting with a right to vote.[152] States also have to provide a list of experts who can be part of the evaluation process.

2.3.2.2.2 Evaluation Process

The GRECO monitoring is cyclic, comprises of two stages: one, is a horizontal evaluation procedure wherein all members are evaluated on the grounds set in the Evaluation Round. This process leads to recommendation if domestic systems found deficient in fighting corruption. The second stage involves monitoring compliance with the recommendations of peer review procedure. Under this process, GRECO appoints ad hoc team of experts on the basis of a list proposed by Member States for evaluating a Member State. The evaluation process is the keystone of the GRECO procedure.[153] Evaluation is done on the basis of questionnaires, requests, and examination of information both oral and written, as well as visits to states under evaluation.

The Evaluation Rounds cover specific themes. The first evaluation round was done between the years 2000 and 2002 and pertained to independence, specialisation and means of national bodies engagement in prevention and combating corruption; furthermore, it looked at the extent and scope of immunities of public officials from

[152] See URL http://www.coe.int/en/web/greco/about-greco/how-does-greco-work last visited on 20-04-2017
[153] Webb supra 121 p 200

arrest and prosecution.[154] The second evaluation round was between 2003-2006. The focus of this round was on the proceeds of corruption including its identification, confiscation and seizure. This round also evaluated the prevention and detection of corruption in public administration and preventing the use of legal personality as a shield for corruption.[155] The third evaluation round was in January 2007 and addressed the provisions of the Criminal Law Convention and transparency of party funding.[156] The fourth evaluation round was launched in 2012 and focused on the prevention of corruption in members of parliament, judges and prosecutors. The most recent round was the fifth evaluation round which was launched in 2017 "aims at preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies."[157]

Given the nature of its work, the Organization for Economic Cooperation and Development (OECD), The United Nations Office on Drugs and Crime (UNODC), The Organization of American States (OAS) and the International Anti-corruption Academy (IACA) have provided observer status to GRECO.

2.3.3. Convention of the European Union on Fight Against Corruption Involving Officials of the European Communities or Officials of Member States, 2005

The formation of the European Union was a watershed moment in the development of anti-corruption strategies. The EU is a centralised institution of European countries that comprises of 28 countries that has more than half a billion people and has the GDP of more than $20 trillion dollars.[158]

---

[154] *id*
[155] *id*
[156] id
[157] *See* http://www.coe.int/en/web/greco/conferences/high-level-launch-fifth-evaluation-round last visited on 20-04-2017
[158] European Union Gross Domestic Product based on purchasing-power-parity estimate for 2017 see IMF World Economic Outlook Database http://www.imf.org/external/pubs/ft/weo/2016/02/weodata/weorept.aspx?sy=2015&ey=2020&scsm=1&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPPGDP%2CPPPPC&grp=1&a=1&pr.x=72&pr.y=29 last accessed on 06-04-2017

In the 1960s and 1970s, consolidation of authority was on priority for the European institutions, ergo, the anti-corruption efforts in Europe that focused on combating fraud against the financial interests of the European Union received little support.[159] The development of a framework to protect the financial interests of European Community also faced a jurisdictional hurdle since it relies on member states on matters of criminal prosecution of fraud and recovery of funds where required.[160] Given the disparity between the criminal statutes of member states and how these were enforced created hurdles in the fight against fraud. In the late eighties, the European Court of Justice developed the principle of assimilation and applied it to fraud in EC thereby taking an important step in the direction of resolving jurisdictional impediments. The idea was further reiterated in the *Greek Maize Case*[161] wherein it was established that member states are to ensure that violations of Community laws are treated in substance and procedure as equivalent to violation of domestic law of similar nature and importance. While the principle of assimilation finds place in the Maastricht Treaty, it places monitoring difficulties because of the discretion enjoyed by national law enforcers.[162]

By early 1990s, stricter measures were developed by way of reporting obligations and audit programs. However, these were piecemeal and sectorial responses that were further complicating an already complex regulatory environment. In 1995 two pivotal steps were taken; first, *vide* Council Regulation 2988/95 a legal framework was established for administrative sanctions including sanctions to be applied by national authorities.[163] Second, the Convention on the Protection of Community Financial Interests (Protection Convention), a draft of which had previously been rejected in 1976 was concluded and published in the Official Journal. The Protection Convention defined fraud and imposes duties on member states to impose criminal penalties in matters of serious fraud and cooperation in order to ascertain jurisdiction. The

[159] See Simone White Protection of the Financial Interests of the European Communities: The Fight Against Fraud and Corruption 7(1998) URL http://etheses.lse.ac.uk/2599/1/U615548.pdf last accessed on 20-04-2017
[160] See Simone White *id*
[161] See Case 68/88 *Commission v Greece* [1989] ECR 2965
[162] Article 209 Maastricht Treaty
[163] Simone White *supra 159*

objective of the Protection Convention was to strengthen cooperation and to harmonise rules and regulations.[164]

The European Union had also approved two documents namely the Protocol to the Convention on the Protection of the Communities' Financial Interests[165] (EC Corruption Protocol) and the Convention on Corruption involving Officials (EU Corruption Convention).[166] Both these instruments adopted the assimilation principle, which meant member states to similarly apply the definitions of corruption to European and national officials.[167] The EC Corruption Protocol was directed at creating a common legal basis for the protecting EC's financial interests under criminal law. The protocol entered into force in 2002.

Under the EU Corruption Convention, member states were required to ensure that acts of active and passive corruption are a punishable criminal offence. Heads of businesses were to be declared criminally liable for active corruption by a person working under the authorization of the business entity. The Convention also wanted to establish an evaluation mechanism regarding the anti-corruption efforts of member states. The Convention came into force in 2005. However, member states were already changing domestic laws to be in conformity with the OECD Convention thereby mitigating some of the ratification problems in the area of corruption. Both, the protocol and the Convention, considered punitive measures required to be effective, proportionate and dissuasive including custodial sentences that can give rise to extradition.

The EC Corruption Protocol was limited to acts that would adversely affect the financial interests of the Community whereas the EU Corruption Convention addressed corruption without delving into the causes of corruption. These features typified the concern of corruption in an integrated market and the growing collective purse that was entrusted to both national and community officials. The fast

[164] Simone White *id*
[165] Council Act of 27 September 1996 Drawing up a Protocol to the Convention on the Protection of European Communities' Financial Interests, 1996 O.J. (C 313) 1
[166] On the basis of Article K.3 (2)(c) of the Treaty of the European Union on the Fight Against Corruption Involving Officials of the European Communities or the Officials of Member States of the European Union 1997 O.J. (C 195) 1
[167] EC Corruption Protocol, Article 4 Supra 165; EU Corruption Convention Article 4 Supra 166

diminishing borders within the European Union also underscored the concerns to deter and control corruption.

Initially, corruption was not of the utmost priority under the EU agenda. However, with globalisation and increase in cross-border mobility along with technological advances, it could no longer be relegated to a second level priority. The enlargement of EU into Central and Eastern Europe compounded the situation in Europe. These candidate countries were making a transition from communism to market-based economies and the process offered immense opportunity for corruption and organised crime. The time was also marked with an unprecedented move, the EU membership was made conditional on the Copenhagen criteria on grounds of democracy, and rule of law, human rights and market based economies.

2.3.3.1 Institutional Framework

On its own, the EU has a weak legislative and institutional framework to combat corruption; therefore, it relies on international instruments including the UNCAC and the Council of Europe Civil Law Convention on Corruption. The COE framework set up a monitoring mechanism in 1999 called the Group of States Against Corruption (GRECO).[168] This mechanism is based on mutual evaluation and peer pressure.[169] It comprises of a horizontal evaluation process that leads to recommendation of legislative, institutional and practical reforms.[170] In addition to evaluation, there is also a compliance procedure to assess whether member are implementing recommendations.[171] The GRECO works in a rotational manner that covers specific themes like the engagement of national bodies in combating corruption, the approach to proceeds of corruption and transparency of party funding.

Like the OAS Convention, the GRECO also gathers information *vide* questionnaires along with meetings with public officials and civil society representatives during *in situ* visits. On the basis of the above information the group of experts gives a draft

[168] See URL http://www.coe.int/en/web/greco last visited on 20th April 2017
[169] See URL http://www.coe.int/en/web/greco/about-greco/how-does-greco-work
[170] *id*
[171] *id*

report to the country under evaluation for comments and the final draft is submitted to GRECO for examination and adoption. The report may lead to recommendations that are to be implemented within a period of 18 months or observations that are not formally required to be reported on during the next round of evaluation.

One of the strength of the above mentioned monitoring systems lies in ensuring implementation of recommendations. It is also pertinent to note that the Lisbon Treaty and EU Stockholm Programme envisioned the EU becoming a part of GRECO so as to subject EU institutions to GRECO evaluation.[172] If this were to happen, the EU institutions will be subject to external assessment and scrutiny and make the Brussels bureaucracy accountable.

2.3.4 African Union Convention on Preventing and Combating Corruption, 2006

In the post colonial world African states set aside their differences to establish the Organisation of African Unity in 1963.[173] The original purpose of the OAU was to "promote the unity and solidarity of African States" and to eradicate all forms of colonialism.[174] The OAU was succeeded by the African Union in 2000, with the aim to expedite political and economic integration of Africa, along with addressing social, political and economic problems in the continent.[175] By 2003, the AU had adopted the African Union Convention on Preventing and Combating Corruption, which entered into force on 5 August 2006.[176] As of 2016, the Convention 54 countries out of which

[172] See Lisbon Treaty Title 6, Article 220 (1) "The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialized agencies, the Council of Europe, The Organisation for the Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development."
[173] Dugard, CJR (1967), "The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism", *International and Comparative Quarterly*, Vol. 16 (1) at p 157
[174] *See* the OAU Charter
[175] See AU in a Nutshell available at URL https://www.au.int/web/en/au-nutshell last visited on 24-04-2017
[176] African Union Convention on Preventing and Combating Corruption, adopted at Maputo, 11 July 2003, "43 ILM 1" available at URL http://www.eods.eu/library/AU_Convention%20on%20Combating%20Corruption_2003_EN.pdf last visited on 22-04-2017.

37 have ratified the AU Convention.[177] The objectives of the AU Convention are discussed under Article 2 and aim to formulate mechanisms that can curtail corruption by coordinating and harmonising laws and policies to effectively prevent, detect, punish and eradicate corruption.[178]

The Convention does not define corruption but within the context of the Convention "means the acts and practices including related offences proscribed" under the Convention; these include *inter alia* illicit enrichment, use or concealment of proceeds of crime, and participation in the crime. The AU Convention is extensive and uses mandatory language to place a duty on states to adopt legislative and other measures in order to establish offences under the Convention, to "strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force", [179] to establish anticorruption authorities and agencies, to protect whistleblowers amongst other obligations. [180] State parties also need to adopt legislative and other measures to give effect to the right of access to information.[181] The Convention asks the State Parties to adopt legislation to bring more transparency to the funding of political parties.[182] The offences within the AU Convention are also deemed to be extraditable offences.[183] It is pertinent to note that the AU Convention addresses issues like human rights and social justice and the importance of civil society.[184]

[177] See "List of Countries that have ratified the African Union Convention on Preventing and Combating Corruption" available at URL https://www.au.int/web/sites/default/files/treaties/7786-sl-african_union_Convention_on_preventing_and_combating_corruption_21.pdf last visited on 22-04-2017
[178] Article 2, AU Convention *id;* for a detailed discussion and comparative analysis of the AU Convention see Snider Thomas R., Kidane Won (2007) "Combating Corruption through International Law in Africa: A Comparative Analysis" *40 Cornell International Law Journal*, p 691-748.
[179] Article 5 of the AU Convention
[180] *id*
[181] Article 9 of the AU Convention
[182] Article 10 of the AU Convention
[183] Article 15 of the AU Convention
[184] Articles 3 and 12 of the AU Convention

2.3.4.1 Follow up Mechanism

The AU Convention is monitored by an Advisory Board, which shall comprise of 11 members elected by the Executive Council from a list of experts proposed by State Parties.[185] The Executive Council, while electing the members of the Boards, also has to give adequate gender representation and equitable geographical representation.[186] State parties have to report to the Board annually and have to involve civil society in the monitoring process; the Board appraises the Executive Council of the progress made by State Parties.

The review mechanism under the AU Convention is still developing and information regarding the review mechanism and its dynamics are not readily available. Since 2009, the Board has submitted a self-assessment questionnaire to State Parties to assess the implementation of the Convention.[187]

2.4 United Nations' Contribution in the Fight against Corruption before UNCAC

The United Nations' response to corruption has been ad hoc and therefore has ebbed and flowed over the decades. Needless to say, therefore, that the development of an international regime against corruption under the aegis of United Nations has not been linear. Every period is marked by material and ideological reconstruction between the ideas of state sovereignty and international law.[188]

The post-colonial world saw the third world collectively trying to redefine the power structures of the time and to underscore the inequitable nature of international law as it was. Around 1950s, states started asserting the principle of permanent sovereignty over natural resources a "fundamental principle of contemporary international law"

[185] Article 22 of the AU Convention
[186] *id*
[187] The only information available on the subject can be found on the Advisory Board on Corruption's website at URL http://www.auanticorruption.org/resources/category/reports. The questionnaires that are sent by State Parties are not available in the public domain and therefore any examination or scrutiny of the same is not possible at this time.
[188] Chimni, Bhupinder S. "Third World Approaches to International Law: A Manifesto." *International Community Law Review* 8 (2006): 3, p 7.

considering it as a "basic constituent of the right to self-determination" and an innate and essential element of state sovereignty.[189] The third world was mindful to avoid the onerous and unjust arrangement that were enforced on them during the colonial period and wanted to redefine the relationship between TNCs and natural resource rich states, especially with regards to exploitation of such natural resources. The discussion on permanent sovereignty over natural resources also embodied the conflict of interest between capital importing and exporting nations.[190] The rationale behind demanding a new international legal and economic order was succinctly articulated by President Allende before the United Nations saying "There is a clear-cut dialectic relationship; imperialism exists because under-development exists; under-development exists because imperialism exists."[191]

The involvement of the United Nations in the TNCs problématique came at a tumultuous time. An investigative reporter from the United States had asserted that the International Telephone and Telegraph Company (ITT) was in collusion with the United States Central Intelligence Agency (CIA) to block the election of President Allende, who had stated that he would nationalise ITT's share in the national phone company –around 60%- in Chile. On the basis of these allegations, the United States Senate Foreign Relations Committee established a Subcommittee on Multinational Corporations from 1973 to 1976.[192]

Furthermore, Philippe de Seynes, the United Nations Under-Secretary-General, drafted a resolution calling for the formation of Group of Eminent Persons "to study the impact of multinational corporations on economic development and international relations."[193] The aim was to develop a focal point under the aegis of the United Nations in order to create the institutions necessary for a new international economic

[189] For further discussion *see* Hossain Kamal, "Introduction to Permanent Sovereignty over Natural Resources in International Law", at x, in Kamal Hossain and Subrata Roy Chowdhury (eds.) Permanent Sovereignty Over Natural Resources in International Law (1984): Palgrave Macmillan; Antony Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", *34 Harvard International Law Journal*, pp 472-475 (1993);
[190] Hossain Kamal, *id*, at x
[191] General Assembly A/PV 2096, 4th December 1972
[192] Sagafi-Nejad Tagi, *The United Nations and Transnational Corporations: From Code of Conduct to Global Compact*, Bloomington & Indianapolis: Indiana University Press, 2008.
[193] *Id 192 at p 52*

order. The hearings and reports of this Group led to the establishment of the UN Commission on Transnational Corporations (UNCTC).

The Group of 77 (G-77) with the support of the Soviet bloc believed that one of the steps towards having an equitable international legal and economic order was to formulate a code of conduct for TNCs, which would be legally binding, and that the formulation of a code of conduct has to be the priority of UNCTC. In March of 1975, the first session of the UNCTC was held. The CTC established a preliminary programme, which focused on five areas a) preliminary work on formulating a code of conduct; b) establishing a comprehensive information system; c) the social, political and economical effects of the operations and practices of TNCs; d) organising and conducting cooperation programmes, at the request of governments, on technical aspects pertaining to TNCs; e) work on the definition of TNCs. These areas were identified on the basis of a list submitted by Member States of the G-77, Italy, France, UK, and the United States along with a third list presented by Bulgaria, Ukrainian SSR and USSR.[194] The first session was centred on drafting a code of conduct for TNCs and it was decided that the UNCTC should prepare a comparative study of various existing international codes and guidelines.[195]

When the Watergate investigations revealed the staggering levels of corruption and its cross-border nature, States introduced – and withdrew - proposals for a General Assembly resolution on corruption.[196] The United Nations accepted a draft presented by developing countries including Algeria, Benin, Egypt, Gabon, Libya, Madagascar, Somalia, Togo, Tanzania, Argentina, Bolivia, Cuba, Colombia, Costa Rica, Ecuador,

[194] *See* 1976 UNYB 484
[195] *id* p 484
[196] In 1975, The United States, Iran and Libya introduced proposals. The Iranian proposal asked the Secretary General to conduct a study on ways to combat corruption including the use of codes of conduct. The proposal also called on for governments to take strict action against corruption and the participation of non-governmental organisations to assist. The Libyan proposal focused more on the involvement of transnational corporation in corruption and called for sanctions, including international boycotts against those corporations found guilty of bribery. The Libyan proposal also condemned the "immoral activities" of transnational corporations that threatened the safety and security of people and states. The United States' proposal called for international cooperation to fight corruption and asked for the General Assembly to condemn both active and passive corruption. Also *see* 1975 United Nations Year Book p 486-487.

Guyana, Peru, Venezuela, Yemen, Iran, Iraq, Pakistan and Central European countries like Romania and Yugoslavia.[197]

On 15 December 1975, the United Nations General Assembly (UNGA) adopted a resolution condemning all corrupt practices including bribery.[198] The resolution primarily highlighted the concern of the developing countries over transnational corporations and their corrupt practices. By citing previous resolutions, this resolution reiterated the right of states to take appropriate legal action within their jurisdictions against TNCs that are found to be violating host states' laws.[199] The resolution called for greater cooperation between home and host countries to prevent illicit practices and to prosecute those engaging in them.[200]

The Resolution requested the Economic and Social Council (ECOSOC) to direct the UNCTC to include the question of illicit practices of TNCs in its programme of work and on the basis of its study make recommendations to effectively prevent illicit practices.[201] During the assembly debates on TNCs, several States, including Kuwait, Benin and Honduras described their experiences with TNCs and discussed the actions taken by them.[202] At the same time, Canada had expressed concerns over possible interference in internal matters while dealing with corruption; other states like Federal Republic of Germany and United States had emphasized the need to cover bribery from supply as well as demand side.[203] Notwithstanding the lack mandatory

---

[197] *id*

[198] UN General Assembly Resolution, *Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved*, A/RES/3514 (15 December 1975) available at URL https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/002/27/IMG/NR000227.pdf?OpenElement last accessed 20-04-2017

[199] The Resolution cited the Declaration on the Establishment of a New International Economic Order (A/RES/S-6/3201 available at URL http://www.un-documents.net/s6r3201.htm last visited on 20-04-2017), the Programme of Action on the Establishment of a New International Economic Order (A/RES/S-6/3202 available at URL http://www.un-documents.net/s6r3202.htm last visited on 20-04-2017) and the Charter of Economic Rights and Duties of States (A/RES/29/3281 available at http://www.un-documents.net/a29r3281.htm last visited on 20-04-2017); the language of CERDS was used to underscore that TNCs should not violate laws and regulations of host countries.

[200] Supra 192

[201] *id*

[202] *See* 1975 United Nations Year Book p 487 available at URL http://cdn.un.org/unyearbook/yun/chapter_pdf/1975YUN/1975_P1_SEC2_CH13.pdf last visited on 20-04-2017

[203] *id*

provisions, this was indubitably the first international acknowledgment of corruption in international business transactions.

In accordance with UNGA Resolution 3514, the Secretary General requested information from governments *vide* a note verbale and eventually a report was prepared on measures against corrupt practices of TNCs, their intermediaries and others involved. The report assessed the range of potential measures to combat corruption at all levels, that is, private, national as well as international. This landmark resolution developed several important legal principles, including the right of host states to take action and the duty of TNCs to abide its laws.[204] The resolution also placed an equal duty on the home state to prevent corrupt practices of TNCs and suggested bilateral and multilateral cooperation between states.[205]

On 5 August 1976, the ECOSOC took note of the report presented by the CTC and approved the programme of work on the issues pertaining to TNCs.[206] The Council also requested for the views and proposals on a code of conduct by states to be submitted to the Secretary General. On the same date, the ECOSOC established an Ad Hoc Intergovernmental Working Group (Ad Hoc Group) to examine the problem of corrupt practices, especially bribery, and elaborately discuss an international agreement to prevent and eliminate illicit payments with respect to international commercial transactions.[207] One of the key features of the agreement was to recognise bribery as an extraditable offence; it also exalted states to take a multitude of steps for the prevention of corruption at the national level.

The ECOSOC had reiterated that the formulation of a code of conduct for TNCs should be given highest priority and its work in the field of corruption was in no way to impede the process.[208] When the Ad Hoc Group presented its first report to the

---

[204] Supra 191 para 1
[205] *id*
[206] 1976 UNYB p 460
[207] *id* p 460; *also see* ECOSOC Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices in International Commercial Transactions, 5 July 1977, International Legal Materials, Vol 16 (1977), p 1236 available at URL https://www.jstor.org/stable/20691789?seq=1#page_scan_tab_contents last visited on 20-04-2017
[208] *id* p 461; *also see* Resolution 69 ECOSOC reaffirms that "the formulation of a code of conduct by the Commission on Transnational Corporations should be given the highest priority and that the

United Nations in 1977 it was received with cynicism. Many states were of the view that the issue of illicit payments should be taken up with the code of conduct for TNCs and this process was causing duplicity of efforts.[209] Yugoslavia, speaking on behalf of the G-77 said that the text of report was far from satisfactory and the CTC should give priority to the code of conduct, which should be a legally binding instrument that can deal with corrupt practices.[210]

The Ad Hoc Group submitted its final report to ECOSOC in 1978 with a draft international agreement to prevent and eliminate illicit payments in international commercial transactions, along with proposals pertaining to other actions against corrupt practices.[211] The Ad Hoc Group recommended convening a diplomatic conference to conclude the draft agreement.[212] The United States had introduced a draft resolution to convene a conference of plenipotentiaries to conclude the agreement on illicit payments; the ECOSOC did not take any action on this draft, which was subsequently withdrawn.[213] India, in 1980, on behalf of the G-77, introduced a draft resolution before the ECOSOC stating *inter alia* that a code of conduct for TNCs should be take precedence over an international conference on illicit payments, as was proposed by the United States.[214]

However the entanglement of the code of conduct with the international illicit payments issue led to an impasse. The opposing interests of the North-South stalled work on the subject through the 1970s and 1980s. The code of conduct for TNCs was considered to be contentious due to diverging views on sovereignty over natural resources, right to expropriate and compensation to corporations along with the nature of the code under international law. The process was deemed infructuous and was eventually abandoned. In July 1992 the Secretary General reported that consensus

---

conclusion of an international agreement on illicit payments should in no way interfere with or delay that priority."

[209] 1977 UNYB p 531-532 available at URL http://cdn.un.org/unyearbook/yun/chapter_pdf/1977YUN/1977_P1_SEC2_CH11.pdf last visited on 20-04-2017

[210] *id* p 532

[211] *id* p 532

[212] *id* p 532

[213] 1979 UNYB p 628 available at URL http://cdn.un.org/unyearbook/yun/chapter_pdf/1979YUN/1979_P1_SEC2_CH9.pdf last visited on 20-04-2017

[214] The ECOSOC transmitted both proposals to UNGA, which did not act on either *see* Posadas p 368

could not be reached on the code of conduct for TNCs and was of the view that a different instrument on foreign investment would be conducive. Even before this statement by the Secretary General, the CTC had started working on areas diverging from their original mandate. These new areas included intellectual property, the relationship between the environment and TNCs, and trade related investment measures.[215]

The international legal and economic paradigm shifted in the 1980s, and only hastened the process of calling off the pursuit of a code of conduct for TNCs. International negotiations had moved away from regulating the conduct of TNCs to the standard of treatment.[216] The Uruguay Round of GATT, the fall of the soviet bloc in Europe and Central Asia along with rampant liberalisation in developing countries had changed the how international trade and economics was conceptualised in the post-colonial era. In a globalised world, the concern for corruption was through another menace, in form of transnational organised crime.

2.4.1 United Nations' New Approach Towards Corruption

A rapidly globalising world also revived interest vis-à-vis organised crime. With the passage of time there was irrefutable evidence of the nexus between transnational organised crime and corruption, and the international community was coming to terms with the fact that the fight against transnational organised crime and corruption are not mutually exclusive.[217] The United Nations had encouraged the international community to take cognisance of the threat of organised crime; and consequently a study related to ECOSOC's work on organised crime reintroduced corruption into the

---

[215] 1990 UNYB 497 available at URL http://cdn.un.org/unyearbook/yun/chapter_pdf/1990YUN/1990_P3_CH5.pdf last visited on 20-04-2017

[216] 1988 UNYB pp 427-428

[217] *See* James H. Mittelman and Robert Johnston, "The Globalization of Organized Crime, the Courtesan State, and the Corruption of Civil Society", *Global Governance*, Vol 5, No.1 (1999) p 103-126; *also see* Louise I Shelly and John T Picarelli, "Methods not Motives: Implications of the Convergence of International Organized Crime and Terrorism", *Police Practice and Research*, 2002, Vol 3, No.4, pp 305-318; Margaret Beare, *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption,* Toronto: University of Toronto Press (2003); Edgardo Buscaglia, "Controlling Organized Crime and Corruption in the Public Sector", Forum on Crime and Society, VOl 3 No.1/2 2003

United Nations' body of work.[218] As Boutros Boutros-Ghali, Former UN Secretary-General, had once articulated, the new world order makes transnational organised crime a "universal force" which is not bound by frontiers and "takes advantage of new technologies to insinuate itself insidiously into the machinery of national economies."[219] From the 1980s, a number of manuals were prepared on the subject of organised crime, corruption and international cooperation as a means to fight this menace;[220] but by 1994 two significant steps were made in the fight against corruption. The first event was when OECD asked that bribery of foreign officials be criminalised; second, governments of the Americas committing to fight corruption making the fight against corruption regional. These events led to a draft resolution for a United Nations Declaration on Corruption and Bribery in Transnational Commercial Activities, which was later adopted in 1996. This resolution came close on the heels of another UNGA resolution, which was annexed with the "international code of conduct for public officials".[221]

---

[218] The ECOSOC in Resolution 1989/70 on International Co-operation in Combating Organized Crime states that "organized crime has increased in many parts of the world and has become more transnational in character, leading, in particular, to the spread of such negative phenomena as violence, terrorism, corruption, illegal trade in narcotic drugs and, in genera, undermining the development process, impairing the quality of life and threatening human rights and fundamental freedoms.." *See* Un Document E/RES/1989/70 available at URL https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1989/ECOSOC/Resolution_1989-70.pdf last visited on 20-04-2017; *Also see* Posadas p 370

[219] Boutros Boutros-Ghali, "Transnational Crime: The Market and the Rule of Law", *Vital Speeches of the Day* 61, No.5 (15 December 1994) p 131.

[220] In 1989, the Government of Netherlands and the Department of Technical Co-operation and Development held a seminar in Hague on the subject of Corruption in Government. A draft manual was reviewed with practical recommendations to combat corruption including strengthening international cooperation and a code of conduct for public officials. This seminar also linked organised crime with corruption along with other illicit activities like trafficking of drugs. The Secretary General complete the manual in 1990 and sought national efforts along with suggestions to assist countries in developing their own anti-corruption programs. The recommendations on international cooperation for preventing crime and criminal justice along with recommendations on corruption were adopted by the UNGA in the late 1990. For further discussion *See* Posadas *supra* 82 p 371

[221] UN General Assembly Resolution 51/59 on "Action Against Corruption", 12 December 1996 UN Document A/RES/51/59 (1996). The code was to serve as an additional tool to enable members in the fight against corruption. It took note of the gravity of the situation and expressed that corruption endangers the security and stability of societies and jeopardises social, economic, and political development. It reiterated the importance of international cooperation to prevent and control corruption. The code of conduct was divided into five parts pertaining to general principles for public officials, disclosure of assets, prohibition of gifts and favours, provisions of confidentiality etc. *also see* Part I International Code of Conduct for Public Officials as Annexed to UNGA Resolution 51/59 available at URL http://www.un.org/documents/ga/res/51/a51r059.htm last visited on 20-04-2017.

2.4.1.1 The U.N. Declaration Against Corruption and Bribery in International Commercial Transactions, 1996

The 1996 UN Declaration was adopted without a vote in December 1996. The preambular paragraphs of the declaration condemned all corrupt practices and reaffirmed the rights of states to legislate, investigate and prosecute corruption. The Declaration also emphasised the need to a transparent environment for international commercial transactions and the need to understand social responsibility and standard of ethics on the part of TNCs and individuals. The Declaration exalts states to take measures at different fora and to take actions to deter corruption like criminalise and prosecute corruption in international commercial transactions along with denying tax deductibility of bribes. Another important item addressed in the declaration was the subject of illicit enrichment a concept that had originated that was enshrined by the Latin American countries in OAS Convention.

It is pertinent to note that the UN Declaration of 1996 also defined bribery and included active and passive bribery in its purview.[222] The declaration was not binding but was important as it expressed the concerns of the international community as well as its interest in developing anti-corruption measures.[223]

Read in its entirety, the Declaration also reflects the need to have a balanced approach to improve international business environment but with respect for transparency, human rights, sovereignty, territorial jurisdiction and the rule of law.

---

[222] Paragraph 3 of the Declaration states that bribery can include "the offer, promise or giving of any payment, gift or other advantage, directly or indirectly, by any private or public corporation, including a transnational corporation, or individuals from a State to any public official or elected representatives of another country." It also defines the demand side of bribery by stating that bribery may include *inter alia* "the soliciting, demanding, accepting or receiving, directly or indirectly, by any public officials or elected representatives of a State from any private or public corporation, including transnational corporations, or individuals from another country of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transactions". *See* UNGA Resolution 51/191 on The UN Declaration Against Corruption and Bribery in International Commercial Transactions, UN Document A/RES/51/191 (1996) available at URL http://www.un.org/documents/ga/res/51/a51r191.htm last visited on 20-04-2017

[223] Posadas *supra* 82 p 374

2.4.1.1 United Nations Convention Against Transnational Organized Crime, 2003

The United Nations had been working on issues of transnational organised crime for many years. The UN Crime Prevention and Criminal Justice Program (UNCPCJP) has debated and scrutinised various aspects of transnational organised crime.[224] The Commission on Crime Prevention and Criminal Justice was established by the ECOSOC in 1992, which replaced the Committee on Crime Prevention and Control.[225] In April 1993, the Commission *vide* the Report of the Commission on Crime Prevention and Criminal Justice on its session recommended the adoption of a draft resolution to convene a Ministerial Conference on Organized Transnational Crime.[226] The ECOSOC adopted the recommendation and requested the Secretary-General to organise a conference with the mandate *inter alia* to "consider whether it would be feasible to elaborate international instruments, including Conventions, against organised transnational crime."[227]

With the support of the United Nations General Assembly, the World Ministerial Conference was held in Naples, Italy in 1994 and was it unanimously adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime (Naples Declaration).[228] The Naples Political Declaration and the Global Action Plan had emphasised the need to accumulate a critical mass of knowledge on the structure and dynamics of organised transnational crime; it was imperative to have this knowledge for informed decision-making and taking action at national and international levels.[229] The international community was grappling with the fact that

---

[224] Vlassis Dimitri, "The UN Convention Against Transnational Organized Crime", in Mats R. Berdel, Monica Serrano (eds.), *Transnational Organized Crime and International Security: Business as Usual?* at p 83.

[225] *See Establishment of the Commission on Crime Prevention and Criminal Justice* (1991) UN Doc. E/RES/1992/1.

[226] Draft Resolution IV *World Ministerial Conference on Organized Transnational Crime* E/1993/32-E/CN.15/1993/9 available at URL https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_02/E-1993-30_E-CN15-1993-9_E.pdf last visited on 22-04-2017

[227] *World Ministerial Conference on Organized Transnational Crime* E/RES/1993/29

[228] *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* A/RES/49/159 available at URL http://www.un.org/documents/ga/res/49/a49r159.htm last visited on 22-04-2017

[229] *Report of the Secretary General,* Implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, E/CN.15/1996/2, 4 April 1996 and Addendum 1

there was no singular behaviour paradigm of organised transnational crime and therefore there was no constant or accessible target. These organisations can vary in terms of size, activities, international presence, and their relationship with power structures in home and host states.[230] Moreover, infiltrating these organisations for recce and collection of evidence is problematic.

The report of the Secretary General did report a favourable climate to formulate an international Convention on organised transnational crime.[231] The report also recommended establishing a central repository for information on "legislation, regulatory measures and organizational structures, designed to prevent and control organized transnational crime, along with bilateral and multilateral cooperation agreements."[232]

The United Nations Convention against Transnational Organized Crime (UNCTOC) was the first legally binding international instrument to address corruption.[233]Even before elaborating an international Convention on corruption, the United Nations had produced a number of non-binding instruments on the subject. The process of developing a binding international legal instrument on corruption was galvanised during the negotiations of the UN Convention against Transnational Organized Crime, which came into force in 2003.

While the UNCTOC has provisions pertaining to active and passive bribery, the scope of the Convention makes its application limited to the involvement of organised criminal groups.[234] Article 9 of the UNCTOC deals with "measures against corruption" and states are requested to adopt "measures to promote integrity and to prevent, detect and punish corruption of public officials."[235]

---

available at URL http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.15/1996/2 last visited on 22-04-2017

[230] *id*

[231] *id*

[232] *id*

[233] UN Convention Against Transnational Organized Crime (UNCTOC) 40 I.L.M. 353

[234] Article 3(1) and Article 8 UN Convention against Transnational Organized Crime available at URL https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf last accessed on 22-04-2017

[235] Article 9 *id*

During the negotiations of the UNCTOC, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime had said the elaboration of an independent international instrument to combat corruption would be advisable. An informal preparatory meeting of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption took place in 2001. The General Assembly *vide* a resolution titles "Preventing and Combating Corrupt Practices and Transfer of Funds to the Countries of Origin" requested the ECOSOC to prepare a draft Terms of Reference for negotiating an anticorruption Convention.[236]

The General Assembly also came to the conclusion that an independent international legal instrument against corruption is necessary and established the Ad Hoc Committee for the Negotiation of Convention against Corruption, and was given the mandate to negotiate a broad and effective Convention using a comprehensive and multidisciplinary approach. Between 2002 and 2003 the Ad Hoc Committee developed the UNCAC and the approved draft was adopted by the General Assembly in October 2003.[237]

Conclusion

The foregoing survey shows that there are four major approaches in the fight against corruption. The first approach is criminalising bribery of foreign officials and placing stringent accounting standards, as seen in OECD countries. The second approach uses international cooperation to combat corruption at domestic level. The third approach based on better procurement processes and increase in transparency. Finally, concepts like good governance are used to promote policy approaches as done by the Council of Europe. All these efforts made it possible to have an international convention with an obligation to fight corruption. These conventions and measures acted as a springboard for the formulation of the United Nations Convention Against Corruption.

---

[236] UNGA *Preventing and Combating Corrupt Practices and Transfer of Funds of Illicit Origin and Returning such Funds to the Countries of Origin*, A/RES/56/186

[237] United Nations Convention Against Corruption UNGA Resolution 58/4 of 31st October 2003 A/RES/58/4

ANNEXURE

FEATURES OF ANTICORRUPTION INTERNATIONAL LEGAL INSTRUMENTS[238]

Substantive and Procedural Provisions	OAS Convention	OECD Convention	COE Convention and Protocol	AU Convention	UNCAC
Active bribery of domestic official	Article VI(1) (a)		Article 3	Article 4(a)	Article 15
Active bribery of foreign public official	Article VIII	Article 1; restricted to international business transaction	Article 5		Article 16
Bribery of officials of international organisations		Article 1(4)	Articles 6, 9, 10 & 11 cover active and passive bribery		Article 16 covers active and passive bribery
Active bribery in private sector			Article 7	Article 11	Article 21
Passive bribery in private sector			Article 8	Article 11	Article 21
Diversion of monies, securities, for undue advantage own or third party	Article XI (1) (b)			Article 4(d)	Article 17
Trading in influence			Article 12	Article 4 (f)	Article 18
Transparency in political funding				Article 10	
Bank secrecy	Article XVI		Article 23	Article 17	Article 40
Corporate liability		Article 2	Article 18	Article 11(3)	Article 26
Laundering of proceeds of crime		Article 7	Article 13	Article 6	Article 23
Illicit enrichment	Article IX; controversial due to burden of proof being transferred to defendant			Article 8	Article 20
Accounting offences		Article 8	Article 14		
Protection of witness, informers	Article III(8)		Article 22	Article 5	Article 32
Extradition	Article XIII	Article 10	Article 27	Article 15	Article 44
Monitoring and follow up	No mechanism initially. Set up after the Declaration of Mer del Plata	Article 12 conducted in 2 phases	Article 24 GRECO mechanism	Article 22 Advisory Board	No mechanism set up initially. Set up in 2009

[238] Carr Indira (2006), "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?" *3 Manchester Journal of International Economic Law*, Vol.3 Issue 3

ANNEXURE

Offences Covered under Various International Legal Instruments[239]

Offences and related provisions	UNCAC	AU	OECD	COE	IACAC
Active bribery of domestic official	Yes	Yes	-	Yes	Yes
Active bribery of foreign public official	Yes	-	Yes	Yes	Yes
Bribery of officials of international organisations	Yes	-	Yes	Yes	-
Active bribery in private sector	Yes	Yes	-	Yes	-
Passive bribery in private sector	Yes	Yes	-	Yes	-
Diversion of monies, securities, for undue advantage own or third party	Yes	Yes	-	-	Yes
Trading in influence	Yes	Yes	-	Yes	Yes
Transparency in political funding	-	Yes	-	-	-
Bank secrecy	Yes	Yes	Yes	Yes	-
Corporate liability	Yes	Yes	Yes	Yes	-
Laundering of proceeds of crime	Yes	Yes	Yes	Yes	-
Illicit enrichment	Yes	Yes	-	-	Yes
Accounting offences	Yes	Yes	Yes	-	-
Protection of witness, informers	Yes	Yes	-	Yes	Yes
Extradition	Yes	Yes	Yes	Yes	Yes
Monitoring and follow up	Yes	Yes	Yes	Yes	Yes

[239] Carr, Indira. "'The Public Rules for Private Enterprise: Corporate Anti-Corruption Legislation in Comparative and International Perspective." (2009).

CHAPTER 3

LEGAL REGIME UNDER UNCAC: ISSUES AND CHALLENGES

LEGAL REGIME UNDER UNCAC: ISSUES AND CHALLENGES

Introduction

The United Nations Convention Against Corruption (hereinafter referred to as UNCAC for the sake of brevity) is a multilateral treaty that was promoted by the UN Office on Drugs and Crime (UNODC). It was signed by 95 states in Merida, Mexico in 2003 and came into force in 2005. As of 2017 the UN Convention has 140 signatories and 181 parties. UNCAC is a legally binding anti-corruption agreement that focuses on five core areas: prevention, law enforcement, international cooperation, asset recovery and technical assistance.

UNCAC is significant as it underscores the acknowledgment of the international community that corruption is unequivocally damaging; and while the potential answer to the problem of corruption is increasing the enforcement power of each state, there is a need to involve the collective law enforcement power of the international community since the problem is transnational in nature. The United Nations has taken the stand that each state must commit more resources towards increasing the efficacy of their respective anti-corruption measure, but also emphasised the need to collaborate in a transnational effort between nations.

The expedited nature of the negotiations are noteworthy especially given the length of UNCAC, which has 71 articles divided over eight chapters. Furthermore, UNCAC attracted few reservations to its substantive provisions. Most of the reservations made by states pertain to settlement of disputes and extradition, while the rest do not undermine the integrity and the spirit of UNCAC.[240]

The developmental history of the legal regime against corruption indicate that the international community has used soft law and hard law instruments to gather consensus and create an environment of international cooperation to combat corruption. The history of these instruments can also trace the change in the

[240] For a detailed list of declarations and reservations *see* URL https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-14&chapter=18&lang=en last visited on 30-04-2017.

understanding of corruption and broadening scope of the spectrum of offences. UNCAC is a consolidation of all the international efforts that have been made thus far and is places a legal obligation on states to take concrete steps towards preventing and fighting corruption. The formulation of UNCAC is a watershed moment as so many sovereign states have agreed to a binding international legal instrument that can have far-reaching domestic consequences. Furthermore, states have also agreed to open themselves to scrutiny to determine the level of compliance with UNCAC. This chapter will analyse the legal framework under UNCAC and the degree of obligations that are placed on states by its various provisions.

The UN Convention can be distinguished from previous conventions on the basis of its comprehensive nature. The Ad Hoc Committee fulfilled its mandate of negotiating a convention using a comprehensive and multidisciplinary approach to fight corruption, which employs a wide range of legal tools. The founding pillars of UNCAC so to speak can be divided in to the areas of preventive measures, criminalisation and law enforcement, international cooperation and asset recovery and technical assistance and information exchange.[241]

With a membership of 181 parties, UNCAC is the leading anticorruption tool under international law and has created global anticorruption standards and obligations. On the one hand, such a large and strong membership, including those who have never been a part of anticorruption conventions signifies the potential to create an international anticorruption infrastructure based on cooperation. On the flipside, in order to reach consensus with such a large number of states meant that the substantive provisions of the UN Convention had to be drafted in a manner so as to be acceptable to different forms of governments. Many of the provisions of UNCAC are not self-executing and require states to implement them through national laws and enforcement. The provisions on cooperation is self executing but has to work in tandem with existing treaties in the field of extradition and mutual legal assistance along with national laws.

[241] See generally "Highlights of the UN Convention Against Corruption", UNODC Update, available at URL https://www.unodc.org/unodc/en/treaties/CAC/Convention-highlights.html last accessed on 24-04-2017.

The provisions of UNCAC may be divided on levels of implementations as hard obligations and soft obligations. Some of the provisions under UNCAC are mandatory in nature; some impose a requirement but provide discretion, while others need to be "considered" by states. The variables within UNCAC increase the complexity of analysing the UN Convention in its entirety and the impact it can have on fighting corruption. As mentioned earlier, there are other factors at play such as the capacity of countries to implement the provisions of the Convention that also compound the complexity of an analysis. Even though UNCAC is coveted to be a universal instrument, it will still result in a wide array of national obligations. Furthermore, it is pertinent to note that due to the varying degree of obligations, UNCAC does not result in a harmonious global anticorruption standard. UNCAC should be seen as another step in the international law regime to combat corruption that would work in tandem with other international, regional and national laws to ensure the legal loopholes are eventually tied up.

3.1 Legal and Policy Framework Under UNCAC

3.1.1 Prevention

To arrive at a long-term solution for corruption, it is imperative to develop sustainable efforts to fight it. Hitherto, the approach to corruption has been to define an offence in a limited manner and to impose sanctions on it. However, prevention of corruption is germane to the idea of successfully fighting corruption. The multifaceted nature of corruption makes it crucial to prevent corruption in order to combat it.[242] UNCAC is a step forward from previous Conventions as its preventive measures are applicable on a broad range of actors including the judiciary, public sector civil servants, candidates for public office as well as private actors like banks, corporations and civil society organisations.[243]

[242] Heineman B.W. and Heimann F (2006), "The Long War Against Corruption" *Foreign Affairs*, 85(3) at p 75.
[243] See Chapter II of United Nations Convention Against Corruption available at URL https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf; also see Rose *supra* 107; Snider Thomas R., Kidane Won *supra 178.*

UNCAC recognises the need to preempt corruption and uses institutional and systemic barriers as key tools to combat corruption.[244] While UNCAC mandates a broad range of measures to be taken to prevent corruption, a few key ones are discussed hereunder. Member States are required to ensure the existence of independent anticorruption bodies that would be capable of implementing, coordinating and overseeing anticorruption policies.[245] Regulatory and institutional innovation witnessed in the 1990s had led to the development of specialized anti corruption bodies. These anticorruption bodies act as intermediaries between the government and public opinion and their autonomy is of paramount importance.[246] These anticorruption bodies are publically funded with the specific objective to combat corruption and to reduce opportunity structures for its occurrence.[247] Though at first glance the provision appears to be binding, it gives Member States the discretion of if and how they want to implement the article.

UNCAC requires States to "endeavour to apply" codes or standards of conduct for public functions.[248] Additionally the Convention also implores states to endeavour to take measures pertaining to recruitment, remuneration and education of civil servants to enhance awareness of risks of corruption.[249] The chapter on prevention also asks states to consider establishing measures to facilitate the reporting of corruption by public officials.[250] However one of the most controversial provisions of UNCAC pertained to the oversight of campaign finance.

3.1.2 Private Sector Measures

UNCAC calls on countries to take steps, in accordance with the fundamental principles of their domestic law, to prevent private sector corruption by placing civil and criminal deterrents to private sector corruption. The measures under Chapter II of

[244] Larson Erik N (2011), "The United Nations Convention Against Corruption" in Lukas Achathaler, Domenica Hofmann, Matthias Pázmándy (eds.), *Korruptionsbekämpfung Als Globale Herausforderung: Beiträge aus Praxis und Wissenchaft.* Wiesbaden: VS Verlag, p 11.
[245] Article 6 of UNCAC *supra* 237
[246] Article 6(2) of UNCAC *id.*
[247] Sousa Luís (2009), "Anti-corruption Agencies: Between Empowerment and Irrelevance", *Crime, Law and Social Change*, Springer Verlag, Vol 52 No.1, p 5-22 at p 6.
[248] Article 8(2) of UNCAC *supra* 237
[249] Article 7 of UNCAC *supra* 237
[250] Article 8(4) of UNCAC *id*

the Convention reflect concerns over the supply side of corruption and have underscored the role played by the private sector. Under its provisions, UNCAC required the accounting and internal control standards akin to the FCPA's books and records provisions.[251] However it is important to note that UNCAC also promotes codes of conduct by corporations, best practices and compliance programs, increasing corporate transparency, which include disclosing the identity of legal and naturals persons involved in the establishment and functioning of corporate entities, restricting the activities of former public officials and disallowing tax deductibility of bribes.[252]

The measures to prevent money laundering use hard law language and *prima facie* place an obligation on states to formulate comprehensive domestic regulatory and supervisory regime for banks and non banking financial institutions in order to deter and detect all forms of money laundering by customer identification, record keeping and reporting suspicious activity.[253]

The cross boundary nature of money laundering is reflected in AML provisions by calling upon states to ensure that administrative, regulatory, law enforcement and other authorities dedicated to money laundering have the requisite ability to exchange information at domestic as well as international level.[254] In order to facilitate the exchange of information and coordination, states shall consider establishing a financial intelligence unit (FIU) at the national level for collecting, analysing and disseminating information relevant to potential money laundering.[255]

Under the AML provisions, it is pertinent to note that UNCAC calls upon states use various regional, inter-regional and multilateral efforts on money laundering as guidelines.[256] UNCAC has gone further than previous international instruments as it calls for preventive measures, as opposed to just criminalising the act of money laundering

[251] Low Lucinda, *supra* 125
[252] Article 12of UNCAC *supra 237*
[253] Article 14(1)(a) of UNCAC *id*
[254] Article 14(1)(b) of UNCAC *id*
[255] *id*
[256] Article 14(4) of UNCAC

3.2 Criminalisation and Law Enforcement

The provisions pertaining to criminalisation and law enforcement are not self-executing and require states to enact laws in order to establish the acts mentioned as offences. These provisions set UNCAC apart from previous conventions by giving a wide and comprehensive list of illicit activities that need to be established as offences. One of the critical challenges is determining which acts are corrupt and need to be sanctioned. Public opinion can vary widely on what constitutes public corruption. Furthermore, harmonising efforts were complicated because there was no uniformity in international instruments on the scope of crimes and language that could lead to varying interpretations.

Most often bribery was the focus of anticorruption instruments as became symbolic of the offence of public corruption.[257] The consequence of this approach has restricted the scope and application of anticorruption efforts and tools while not paying sufficient attention to other enabling activities through the misuse of authority and position, which falls under the scope of corruption.[258]

UNCAC endeavours to cover a wider range of actions and gives wider meaning to corruption, which is not limited to bribery. Acts of embezzlement, misappropriation by public officials[259], trading in influence[260], abuse of function[261], illicit enrichment[262], money laundering[263] and obstruction of justice[264] have been covered under UNCAC. However, the articulation of these provisions under UNCAC varies from mandatory, to permissive and other formulations.[265] When seen in conjunction with the broad conceptualisation of these offences, the complete scope of their

[257] The Inter American Convention against Corruption, OECD Anti Bribery Convention and the CoE Criminal Convention have primarily dealt with bribery,
[258] Henning Peter J (2001), "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law", *18 Arizona Journal of International and Comparative Law,* p 796.
[259] Article 17 of UNCAC
[260] Article 18 of UNCAC
[261] Article 19 of UNCAC
[262] Article 20 of UNCAC
[263] Article 23 of UNCAC
[264] Article 25 of UNCAC
[265] Low *supra 125*

implementation at domestic level will still lead to different interpretations and degrees of enforcement.

3.2.1 Criminalisation Requirements

Criminalisation of Bribery

Article 15 deals with bribery of a public official. This provision uses mandatory language to criminalise domestic bribery. The justification for criminalising bribery can be based on protecting the integrity of the public office; to protect the proper functioning of public administration; and to safeguard transparency and competition.[266] Bribery is often defined as the abuse of public office for private gains, wherein abuse may refer to the demand or supply sides of bribery.[267] UNCAC also contains a semi-autonomous definition of 'public official', which regards certain categories of people as officials, without regard to domestic law, but will also bind those persons defined as public officials under domestic law.[268] The definition covers all branches of government including the executive, legislative, administrative, judicial and persons who perform public duty, officials of public agencies and enterprises. UNCAC, however, does not define a public enterprise. In an era where more and more public undertakings are being privatised, this issue is pertinent to identify those who are responsible for public enterprises.[269]

Article 16 deals with bribery of foreign public official, or officials of public international organisations. This provision is akin to the US FCPA and the offence of transnational bribery in OECD Anti-Bribery Convention.[270] Article 2(b) of the Convention defines 'foreign public official' in a semi-autonomous way and is similar to those in the FCPA and the OECD Convention. Under Article 16, supply and demand sides of bribery are mentioned and are required to be criminalised by state

[266] Brunelle Quraishi, Orphelie (2011) "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis" *Notre Dame Journal of International & Comparative Law* Vol 2 Issue 1, Article 3 at p 22.
[267] Article 15 (a) and (b) of UNCAC
[268] Article 2 of UNCAC
[269] Lucinda Low *supra* 125
[270] Article 1(1) of OECD Anti-bribery Convention

parties. Article 16(1) covers the supply side of bribery whereas Article 16(2) covers the demand side. It is pertinent to note that where Article 16(1) is mandatory, states need to 'consider' criminalising the demand side under Article 16(2).[271] The reluctance to cover demand side of bribery can be attributed to legal issues such as sovereignty, jurisdiction, enforcement, and implementation. For sovereign states it is more viable to enact laws as home states that have extraterritorial jurisdiction.[272]

The inclusion of officials of public international organisations is also significant as it reflects that international organisations have profound economic impact, in terms of aid and developmental projects. This category has been added to an anticorruption Convention for the first time.[273]

Bribery in private sector is covered under Article 21 of UNCAC. The article is non-mandatory ("shall consider") and applies to economic, financial or commercial activities.[274] The language of the provision is similar to bribery of officials. On the supply side of bribery it covers promise, offer, giving or receiving undue advantage to a private person in order that the person should act or refrain from acting in breach of his or duties.[275]

Before UNCAC, the COE Criminal Law Convention had already criminalised commercial bribery.[276] Similarly, the EU has also asked member states to criminalise private sector bribery.[277] Before UNCAC, private corruption was dealt with under civil law.[278] During negotiations, the inclusion of the private sector exemplified the divergent views on how to deal with it. It is axiomatic to say that the private sector is now involved in more and more public oriented activities through privatisation and outsourcing. The line between the private and public sectors is blurring and therefore

---

[271] See Article 16 UNCAC
[272] Salbu Stephen R, "A Delicate Balance: Legislation, Institutional Change and Transnational Bribery", (2000) *33 Cornell International Law Journal*, at p 676.
[273] Snider and Kidane *supra 178*
[274] Article 21 of UNCAC
[275] *id*
[276] Article 7 COE Criminal Law Convention *supra 138*
[277] Joint Action 98/742/JHA adopted by Council on basis of Article K.3 of Treaty of European Union available at URL http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33074&from=EN last visited on 05-05-2017
[278] Stessens Guy (2001), "The International Fight Against Corruption", *72 International Review of Penal Law*, at 914.

it would be necessary and prudent to incorporate the private sector in anticorruption strategies.[279] At the time of negotiations, the European Union supported by a Group of Latin American and Caribbean States stated, "adopting a limited approach would adversely affect the implementation of the future Convention."[280] The United States had opposed the idea of including private-to-private corruption under the UNCAC with the fear that extending the treaty could create a private right of action.[281]

3.2.1.1 Bribery Related Offences

UNCAC is set apart from its predecessors by the width of offences covered by it. Whereas most international Conventions were focusing on the supply side of bribery, UNCAC covers other bribery related offences *inter alia* trading in influence, embezzlement, laundering of proceeds of crime.

3.2.1.1.1 Embezzlement: under article 17 of UNCAC the embezzlement, misappropriation and diversion of property by a public official is criminalised. The public sector provision on embezzlement is drafted using mandatory language ["shall adopt"]. The private sector equivalent is not mandatory and drafted using exhorting language ["shall consider"].[282] These provisions are applicable to domestic actions and not transnational corruption *per se.*[283]

3.2.1.1.2 Trading in influence: This provision is aimed at public officials and is non-mandatory ["shall consider"].[284] It pertains to cases where influence is used to obtain undue advantage for a third party. Pertinently, UNCAC provisions also apply to transactions with any other person and are not limited to public office.[285] The earlier drafts of UNCAC had a broader scope for undue advantage that encompassed

[279] Webb *supra* 115; Babu *supra* 74; also see Vlassis Dimitri "The Negotiation of the Draft United Nations Convention against Corruption", *Forum on Crime and Society*, Vol 2 No.1, December 2002.
[280] These states were of the opinion that targeting the public sector only would undermine any chances of success of the Convention. See Brunelle Quraishi *supra* 266; Webb *supra* 115; Report of the Ad Hoc Committee for the Negotiations of a Convention Against Corruption, A/AC.261/9 (2003).
[281] *Id* Brunelle Quraishi *supra* 266 at p 30.
[282] Article 22 of UNCAC
[283] Brunelle Quraishi *supra* 266 at 36; also see Snider and Kidane *supra* 178
[284] Article 18 UNCAC
[285] Lucinda Low *supra* 125

any favourable decision.[286] Similar provisions are found in the COE Criminal Law Convention and codes of many European countries.[287] In the United States, the Lobbying Disclosure Act also deals with improper influence.[288]

***3.2.1.1.3 Abuse of Functions*:** abuse of function is defined as "the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining undue advantage."[289] This provision applies only to public officials and uses non-mandatory language making it a discretionary offence.

***3.2.1.1.4 Illicit Enrichment*:** article 20 of UNCAC applies in cases of disproportional assets of public officials that cannot be justified by his or her income. The offence is similar to that in AU Corruption Convention[290] and the OAS Convention against Corruption.[291] This provision can raise a constitutional challenge vis-à-vis burden of proof. In most criminal proceeding there is a presumption of innocence, however in case of illicit enrichment the prosecution has an advantage, as there is a presumption of guilt. Keeping this in mind, UNCAC provides escape clauses on the basis of constitutional and fundamental principles of a state's laws.

3.2.1.2 Ancillary Crimes

***3.2.1.2.1 Laundering of the Proceeds of Corruption*:** the provisions under UNCAC are more elaborate than other anticorruption Conventions. Money laundering is the process by which the source and origin are obscured.[292] Money laundering on its own is not an act of corruption, but it is a key method for making the proceeds

---

[286] *id*; Revised Draft United Nations Convention Against Corruption, Article 21 UN Doc. A/AC.261/3/Rev.4
[287] Article 12 COE Criminal Law Convention supra
[288] Lobbying Disclosure Act of 1995, PL 104-65, 109 Stat. 691, 19 December 1995, U.S.C. § 1601
[289] Article 29 of UNCAC
[290] Article 8 AU Convention against Corruption *supra*
[291] Article IX of OAS Convention Against Corruption *supra*
[292] The term "money laundering" is a colloquial phrase that was first used during the Watergate investigation to describe the process of transforming illegal into legal assets. See Schneider, Friedrich; Windischbauer Ursula (2010) "Money Laundering: Some Facts" *Economics of Security Working Paper, No.25*, available at URL https://www.econstor.eu/bitstream/10419/119350/1/diw_econsec0025.pdf last visited on 06-05-2017

thereof usable.[293] Due to the disparity in treatment of money laundering in various jurisdictions, unilateral and bilateral measures would be ineffective.[294] In 1988, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances criminalised money laundering.[295] Since the Convention has a narrow mandate it applies only in cases of laundering proceeds from drug related crimes. Over a period of time money laundering has been included in different international legal instruments including the OECD Anti-bribery Convention, UNCTOC and UNCAC. It is noteworthy that UNCAC describes money laundering as a stand-alone crime albeit using non-mandatory language and without prejudice to AML provisions.[296] UNCAC provision on money laundering is two-fold; the first part dealing with transfer of property and its concealment is binding; whereas the provision on use of property and participation is left to the discretion of state parties.

***3.2.1.2.2 Concealment, Obstruction of Justice, Participation and Attempt*:** concealment is a non-mandatory offence. The offence refers to concealment or continued retention of property with knowledge of that it is the result of any offence under UNCAC. Obstruction of justice is a mandatory provision and includes false testimony, interfering in testimony or production of evidence in a corruption related proceedings. Interference can be by way of use of force or threat or intimidation with law enforcement or prosecutors exercise of official duties.[297] Obstruction of justice is peculiar to UNCAC and has not been criminalised by other anticorruption instruments. The provision is directed towards the goal of strengthening investigation and prosecution in cases of corruption.[298] Acts of instigations, assistance and accomplice are also criminalised under UNCAC.[299]

---

[293] Cecily Rose *supra* 107 at 15.
[294] Shelton Dinah (2000), *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford p 246.
[295] UN ECOSOC *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 19th December 1988 available at URL https://www.unodc.org/pdf/Convention_1988_en.pdf last visited on 07-05-2017. Article 3 of the Convention pertains to "Offences and Sanctions". It does not mention money laundering as an offence but discusses the elements of the crime.
[296] Article 23 of UNCAC
[297] Lucinda Low *supra* 125
[298] Carr Indira (2006), "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?" *3 Manchester Journal of International Economic Law*, Vol.3 Issue 3, at p 21.
[299] Article 27 of UNCAC

3.2.2 Law Enforcement

In addition to criminalisation provisions, Chapter III also contain provisions relevant to the scope, law enforcement and interpretative issues; and make help in the harmonization of anticorruption laws.[300] Basic criminal law concepts of intent, liability, and limitation are discussed hereunder, along with the liability of legal persons and freezing, seizure and confiscation of proceeds of corruption.

***3.2.2.1 Jurisdiction*:** UNCAC confers jurisdiction when the offence is committed in the territory of a state party or when such an offence is committed by or against a national of a state party or the state itself.[301] UNCAC also places a duty to consult on states when more than one state is exercising jurisdiction. Article 42(5) of the Convention reads:

> "*If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting investigations, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions*." [emphasis added].

While states are required to consult, the provisions do not go beyond the OECD Convention.[302] UNCAC is silent on priority of jurisdiction and does not provide any direction on how multijurisdictional proceedings should be streamlined to avoid multiplicity.

***3.2.2.2 Liability of Legal Persons and Corporate Sanctions*:** UNCAC's approach to corporate corruption is equivalent to the OECD approach of "effective, proportionate and dissuasive" sanctions. It is pertinent to note that the UNCAC allows states to

[300] Low Lucinda *supra* 125
[301] Article 42 of UNCAC
[302] Lucinda Low *supra* 125, Brunelle Quraishi *supra* 266

establish criminal, civil or administrative liability as opposed to corporate criminal liability that United States and some other countries.[303]

***3.2.2.3 Whistleblower Protection*:** Illicit activities usually occur between parties that are complicit to a crime. This makes prosecution of said crimes difficult and challenging. Therefore whistleblowers play a pivotal role in the investigation and prosecution of corruption. UNCAC calls for states to "consider incorporating" measures for the protection of *inter alia* witnesses, experts, informants, victims.[304] It is surprising that the language used for these provisions is weak and diluted since whistleblowers are crucial to identify and combat corruption. Admittedly, protection of witnesses is expensive and many states might not have the resources or wherewithal to provide such protection, but the international community can address these issues with a more cooperative approach.[305]

***3.2.2.4 Intent and Sanctions*:** Prosecuting crimes of transnational nature are often difficult to prosecute due to the burden of proof on the prosecution. Under the basic tenets of criminal law, the prosecution has the burden of proving the accused intended the actions and consequences they stand accused of or had the *mens rea* to commit the said crime. The interpretation and elements of *mens rea* may be defined differently in various jurisdictions and legal systems.[306] Under common law, corruption requires intent to commit the act as well as the consequences. Other jurisdictions may not require intent to proven by the prosecution.[307] UNCAC requires intent in the offence of bribery and all related offences.[308] By clearing stipulating the construction of intent under UNCAC, the Convention has mitigated the debate on whether a subjective or objective test needs to be applied.[309] The Convention allows the inference of intent from other evidence by stating, "knowledge, intent or purpose required as an element

[303] Article 28 of the UNCAC
[304] Articles 32 and 33 of UNCAC
[305] Brunelle Quraishi *supra* 266 at 49
[306] Nicholls Ruth (2005), "Corruption in the South Pacific: The Potential Impact of the UN Convention Against Corruption on Pacific Island States" *2 New Zealand Yearbook of International Law,* 207-277 at 227.
[307] Brunelle Quraishi *supra* 266
[308] Articles 15 to 27 UNCAC
[309] Indira Carr *supra* 292 at 21

of an offence established in accordance with this Convention may be inferred from objective factual circumstances."[310]

As regards sanctions, UNCAC stipulated that "each Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence."[311] UNCAC provides a list of acts that need to be criminalised, but the sanctions to these offences are not extensive in nature.[312] Furthermore, it provides no guidance on how gravity is to be assessed, whether gravity refers to the act or its consequences. It is left to the discretion of states to assess and apply it. This approach brings into question the aim of harmonising laws and sanctions across states, with such broad discretionary powers the treatment of crimes and corresponding sanction there is bound to be disparity.[313]

***3.2.2.5 Private Right of Action*:** one of the novel approaches under UNCAC has been measure on civil liability and damages. This adds another weapon to the arsenal of anticorruption measures by introducing civil and administrative sanctions. The language of the provision gives states tremendous latitude on determining the parameters of a private right of action. It allows states to "consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instruments […];[314] meaning thereby that states can take measures to address the consequence of corruption.

3.3 Asset Recovery

Corruption can affect all aspects of life, and while it is difficult to quantify, it can be better understood with numbers. World Bank estimates that more than $1 trillion is paid as bribes every year, but the number does not account for embezzlement of

[310] Article 28 of UNCAC
[311] Article 30 of UNCAC
[312] Indira Carr *supra* 298 at 34
[313] *id*
[314] Article 35 of UNCAC

public funds and plundering by government officials.[315] An estimated $600 billion and $1.8 trillion is illegally laundered mostly from the proceeds of corruption.[316]

Former leader like Indonesia's Suharto is believed to have embezzled between $15-35 billion, while Zaire's Mobutu and Ferdinand Marcos from Philippines had allegedly embezzled around $5 billion each.[317] Corruption impoverishes nations, as was reported in a 2004 report by the African Union claimed that Africa loses $148 billion annually to corrupt practices. To put that in perspective, the amount represents 25% of the GDP of Africa.[318]

The glacial pace of government and the ease of electronic transfers have compounded the issue, along with the fact that most of the beneficiaries of corruption are in power and there is lack of political will to pursue action and recover assets.[319] Furthermore, the lack of specialized technical expertise in victim states and domestic institutional challenges make it more difficult to keep capital flight in check. Repatriation of embezzled money is a crucial matter for developing countries, which have usually been the victims of kleptocrats. Over the past two decades, a framework of international agreements and standards dealing with anti-corruption measures, law enforcement and money laundering have included asset recovery provisions, particularly the recommendations of the Financial Action Task Force, which includes mechanisms to facilitate detection and recovery of proceeds of crime.[320]

While Conventions such as the AU Convention and OAS Convention have provided for seizure and confiscation of assets, asset recovery was not addressed. UNCAC moves a step further by going beyond seizure and confiscation by including repatriation of assets gained by illicit activities.[321] UNCAC lists repatriation, as

---

[315] World Bank, *Combating Corruption* see URL http://www.worldbank.org/en/topic/governance/brief/anti-corruption last visited on 20-05-2017

[316] Smith Jack, Pieth Mark, Jorge Guillermo "Recovery of Stolen Assets: A Fundamental Principle of UN Convention Against Corruption" *Resources of U4* available at URL http://www.repatriationgroup.org/wp-content/uploads/2017/02/U4-Brief.pdf last visited on 20-05-2017

[317] Global Corruption Report (2004), *Transparency International,* London: Pluto Press at 13.

[318] Smith Jack et al. *supra 316*

[319] *id*

[320] UNODC *Stolen Asset Recovery: Towards A Global Architecture for Asset Recovery*, available at URL https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Global_Architecture.pdf last accessed on 25-05-2017

[321] Articles 51-59 of UNCAC

"fundamental principle of the Convention and States are to provide the widest measure of cooperation and assistance in this regard"[322]

The UN General Assembly considered a draft resolution from Nigeria on behalf of G-77 and China on illegal transfer and repatriation of funds during UNCAC negotiations.[323] The demand originally was to have a separate international legal instrument on the matter but was included in terms of reference of the Ad Hoc Committee for the negotiations of UNCAC.[324] The need to have provisions for repatriation of stolen assets was underscored by the UN Security Council resolution deciding that UN members were to take measures to freeze funds removed from Iraq and transfers them to the Development Fund for Iraq.[325]

Eventually, UNCAC dealt with asset recovery as a separate chapter. The subject of asset recovery was important to developing countries, which had witnessed the plundering of their countries to enrich a few and needed these resources to reconstruct and rehabilitate societies. There was fierce debates on the asset recovery during negotiations as the needs of countries seeking repatriation of stolen assets had to be reconciled with the legal and procedural safeguards of countries whose assistance is sought.[326] While adopting the draft of UNCAC, the General Assembly had also recalled efforts such as its resolutions on "Preventing and Combating Corrupt Practices and Transfer of Funds of Illicit Origin and Returning such Funds to Countries of Origin;[327] the ECOSOC resolution titled "Strengthening International Cooperation in Preventing and Combating the transfer of funds of Illicit Origin, Derived from Acts of Corruption, including Laundering of Funds, and in Returning such Funds."[328]

UNCAC requires state parties to take measures for direct recovery of property, mechanisms for recovery through confiscation and international cooperation and

[322] See UN Doc. A/58/422/Add.1 7 October 2003 available at URL http://www.unodc.org last accessed on 20-05-2017.
[323] UNGA Resolution 55/61, 2001
[324] Vlassis, Dimitri supra 224
[325] Philippa Webb *supra* 125 p 207; also see Security Council Resolution 1483 of 2003
[326] Babu *supra 74* p 22.
[327] UN General Assembly Resolution A/56/186 of 21 December 2001 and A/57/244 of 20 December 2002
[328] ECOSOC Resolution E/2001/13 of 24 July 2001

return of assets. In order to prevent and detect transfer of proceeds of crimes, parties must require their financial institutions to verify customers; to take steps to identify the beneficial owners of the deposits; and to scrutinise accounts maintained by or on behalf of people performing prominent public functions.[329] The purpose of such scrutiny is to detect suspicious transactions in order to report them to competent authorities and not to deter legitimate customers from doing business with financial institutions. States can also have financial disclosure mechanisms for public officials.[330]

On the matter of recovery of assets, the state parties, in accordance to its domestic law, can permit another state party to initiate civil actions in its courts to establish title over stolen property[331]; or permit its courts to order to pay compensation or damages to state party harmed by the offence[332]; or permit its court to recognise the claim of another state as the legitimate owner of property acquired by illicit activities.[333]

Another mechanism for recovery of stolen assets is by way of cooperation in confiscation.[334] The provision states parties shall take measures to permit its competent authority to give effect to orders of confiscation issued by the court of another state party;[335] also to permit the competent authorities, where jurisdiction in present, to order the confiscation of property of foreign origin by way of adjudication of an offence of money laundering. Consequently, state parties shall permit its competent authorities to freeze or seize assets by an order for the same issued by a court or competent authority of a requesting state, provided that a reasonable basis are provided by the requesting state that there are sufficient grounds for such actions. Under UNCAC, a request by a state party for confiscation of proceeds of crime, property etc. shall be given effect to the greatest extent possible.[336]

---

[329] Ramesh Babu *supra 74* p 23
[330] Article 52 of UNCAC
[331] Article 53 (a) of UNCAC
[332] Article 53 (b) of UNCAC
[333] Article 53 (c) of UNCAC
[334] Article 54 of UNCAC
[335] As per the travaux preparatoires the order of confiscation in para 1(a) may be interpreted broadly to include monetary confiscation but should not be seen as requiring enforcement of an order by a court that does not have criminal jurisdiction. Also see Ramesh Babu *supra 74* p 23
[336] Article 55 of UNCAC

If the requesting party does not provide sufficient and timely evidence or if the property is of a *de minimus* value, cooperation may be refused or interim measures may be lifted. Before lifting provisional measures, the requested state shall, where possible, give the requesting state an opportunity to give reasons for continuing such measures.[337] It is pertinent to note that the provisions shall not be construed in a manner to prejudice the *bona fide* rights of third parties.[338]

Insofar as the return and disposal of assets are concerned, the confiscated property shall be returned to its prior legitimate owners. In case of embezzlement and laundering of embezzled public funds, where confiscation was executed in accordance with Article 55 of UNCAC, the requested party shall return the confiscated property to the requesting state party.[339] State parties shall also consider establishing a financial intelligence unit entrusted with the responsibility for receiving, analysing and dissemination to competent authorities reports of dubious financial transactions.[340]

While UNCAC does not bring a conceptual revolution in terms of recovery of assets, it provides a consolidated framework that erodes any legal obstacles that may hinder such proceedings. Be that as it may, the effectiveness of these provisions still largely depends on individual jurisdictions and courts.

At the first Conference of State Parties (CoSP) in 2006, the Open-ended Intergovernmental Working Group on Asset Recovery was established. The Working Group was entrusted to assist the CoSP in developing cumulative knowledge in the field of asset recovery, especially for the implementation of articles 52-58 of UNCAC; to encourage cooperation within the existing framework of bilateral and multilateral initiatives and to help in implementation of the relevant provisions; and to identify areas, which require capacity building. Furthermore, the Working Group was

[337] Article 55 (8) of UNCAC
[338] Article 55 (9) of UNCAC
[339] The travaux preparatoires reflect that the requested state should consider a waiver of the requirement of final judgment in cases where such judgment is could not be obtained for reasons of death, flight or absence or in other appropriate cases.
[340] Article 58 of UNCAC

to facilitate exchange of information among states, build confidence and cooperation between states.[341]

Additionally, UNCAC provides the legal underpinning for UNODC and the World Bank Group's Stolen Asset Recovery initiative (StAR Initiative), launched in 2007. The objective of the StAR initiative is to use the convening powers of UNODC and WBG to enhance cooperation between developed and developing countries and to persuade countries to ratify and implement UNCAC. Furthermore, it aims to build partnerships in order to enhance capacity building in the areas of legislation, investigation and enforcement to enable developing counties in recovery of stolen assets.[342]

3.4 International Cooperation

International cooperation is the central point on which UNCAC is based. Chapter IV of the Convention highlights the need to promote and strengthen international cooperation for better and more effective law enforcement. Article 43 requires states to cooperate where appropriate and in consistence with their domestic legal systems. Ergo, countries are required to undertake measures that will support tracing, freezing, seizure and confiscation of the proceeds of corruption.[343] Given the transnational nature of corruption it is imperative to have international cooperation. Furthermore, the need for international cooperation stems from sovereign equality of states that limits the investigatory, prosecutorial and enforcement powers to the territory of a state save for legislations that have extraterritorial applications such as the FCPA.

UNCAC applies the condition of dual criminality whereby the conduct must be criminalised under the laws of both state parties.[344] With regards to extradition, UNCAC stipulates:

---

[341] Resolution 1/4 CAC/COSP/2006b available at URL https://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session1-resolutions.html

[342] For further reading *see Stolen Asset Recovery Initiative: Challenges, Opportunities and Action Plan* (2007), World Bank Group: Washington DC; *Management of Returned Assets: Policy Considerations* (2009), World Bank Group: Washington DC;

[343] Articles 44 to 50 of UNCAC

[344] Article 43(2) of UNCAC

"This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party."[345] (emphasis added)

UNCAC creates a treaty within a treaty without having to fall back on domestic laws or other international legal instruments. The provisions on extradition deal with issues such as preventive custody pending extradition, evidentiary matters, and prosecution where only one offence among many is extraditable.[346]

Article 46 elaborates on measures of mutual legal assistance, pertinently the establishment of a central authority to see that rapid mutual assistance can be provided.[347] The UN Convention also states that bank secrecy cannot be a ground to refuse mutual legal assistance requests.[348]

3.5 Follow up and Monitoring Mechanism

For any Convention, its follow up and monitoring mechanisms will determine its efficacy and relevance, as an effective and robust follow up mechanism is key for implementation. Clear and precise monitoring terms further help in the implementation of Conventions.[349] Compliance can be understood as the degree to which a state conforms to its legal obligations. International legal instruments need to create institutional and organisational incentives for compliance, sans which these documents may be reduced to mere words.[350] However, enforcement does not guarantee compliance because of the variable involved at the domestic level. States entering an international agreement can decide which design elements are to be included in an international legal agreement; this in turn decides the probability of

[345] Article 44(1) of UNCAC
[346] Article 44 of UNCAC
[347] Article 46 (13) of UNCAC
[348] *ibid*
[349] Argandoña *supra 72*
[350] Rose- Ackerman Susan (2004), "Establishing the Rule of Law" in Robert Rotberg (ed), *When States Fail: Causes and Consequences*, Princeton: Princeton University Press at p 83.

compliance.[351] The enforcement of international legal agreements usually diminish the rights of a state, insofar as the conduct of a sovereign state is being dictated by the agreement and any deviation from the said agreement may bring sanctions or disrepute at the least. In a multilateral system, there are many stakeholders that can lead to long negotiations and fierce debates. During such negotiations wide ranges of interests are accommodated and may lead to obligations that are ambiguous or too flexible. The ambiguity of obligations can pose a challenge for the enforcement of the UN Convention.[352]

UNCAC has no enforcement powers; therefore, a follow up monitoring mechanism is essential to determine the level of compliance. The diversity of subject matter and states under UNCAC make monitoring essential and challenging. While being mindful of the limitation of previous Conventions and their follow mechanisms, the negotiations on UNCAC's follow up mechanism were heated. Austria and Netherlands had submitted proposal for a monitoring mechanism, which included establishing a CoSP to facilitate training and technical assistance while working in cooperation with NGOs and regional organisations.[353] It further recommended periodically reviewing the implementation of the Convention and making recommendations to improve the Convention.[354] Recommendations were also made to establish a subsidiary body of ten experts elected by state parties, which would review the implementation of the Convention.[355] This review mechanism did not include on site visits and were to be done every five years.[356]

An alternative proposal was submitted by Norway that was more rigourous. It included a two step evaluation process akin to the OECD Convention that would focus on domestic compliance as required under the Convention and evaluate the

[351] States have several legal tools at their disposal such as the ability to make a formal treaty as opposed to a soft law document, or provide for sanctions in case of violations, or to have compulsory jurisdiction over disputes. For further reading see Guzman T. Andrew, "The Design of International Legal Agreements" *European Journal of International Law* (2005) Vol. 16 No.4 p 579-612 at p 580.
[352] Chayes Abram and Chayes Antonia (1995), *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, Massachusetts: Harvard University Press, p 7.
[353] Webb *supra* 125 p 220; also see *Proposals and Contributions Received From Governments: Austria and The Netherlands: Amendments to Article 66 to 70,* UN Doc.A/AC.261/L.69 (2003)
[354] Proposals and Contributions from Governments Austria and The Netherlands *id* Article 66 of UNCAC
[355] *id* Articles 67 and 68 of UNCAC
[356] *id*

structures put in place for enforcement of laws with on site visits to facilitate such evaluation.[357] This proposal also included positive and negative measures such as focused technical assistance and suspension from UNCAC. Many states felt this was an adversarial approach and would violate the sovereignty of states and neither of the proposals gathered sufficient support.[358] Developing countries like Egypt and Peru were in favour of establishing Commissions as subsidiary bodies that would evaluate the implementation of UNCAC as well as provide technical assistance where necessary; whereas, Thailand was concerned about the deterrent effects of a strong monitoring mechanism.[359] The underlying sentiment of UNCAC is of international cooperation and having a strong monitoring and follows up mechanism could have derailed the effort. Furthermore, there were concerns about politicisation of the monitoring mechanism and can potentially result in political intervention.[360]

Most of the provisions of UNCAC are not self-executing and gives wide discretionary powers to states to decide the implementation and its extent into domestic laws. The basic tenet of international law is *pacta sunt servanda,* which legally obligates states to comply with treaties upon ratification.[361] Yet, non-compliance and incomplete compliance are significant hurdles in realising the goals set out under international legal instruments. Violations may arise out of ambiguous or indeterminate language of a treaty; or capacity limitations of parties to carry out the undertakings; or the temporal dimension of social, economic and political changes as contemplated by treaties.[362] All treaties are open to interpretation, but unlike domestic law there is no apex court that can give an authoritative interpretation that must be adhered to.

In its final version, the UNCAC created a mechanism for improving the capacity and cooperation of states by establishing the Conference of State Parties (CoSP).[363] The CoSP was entrusted with periodically reviewing the implementation of UNCAC.[364]

---

[357] Proposals and Contributions Received from Governments: Norway: Amendments to Article 68 UN Doc. A/AC.261/L.78 (2002)
[358] Philippa Webb *supra* 125
[359] Babu *supra 74* at 26
[360] *id*
[361] Article 36 of Vienna Convention on Law of Treaties, entered into force on 27 January 1980, 1155 U.N.T.S 331; for detailed discussion see Chayes and Chayes *supra 352* at 8.
[362] *Id* at 10
[363] Article 63 of UNCAC
[364] *id*

Pertinently, the final version of UNCAC did not lay down a monitoring or review mechanism but left it to the discretion of the CoSP to see whether such mechanisms would be required for effective implementation.[365]

The first two sessions of the CoSP were focused on issues pertaining to asset recovery mechanisms, technical assistance and the guiding principles to decide on a review mechanism.[366] The third CoSP decided on using the non-adversarial method of peer review by way of which systematic examination and assessment of the performance of a state would be done by other states. The process is ensconced in mutual trust and relies profoundly on the shared confidence in the process.[367] Some of the other monitoring mechanisms that were considered included self-assessment, which was considered to be the most lenient and establishing a panel that will review the compliance of states. The argument against expert panels is that they are adversarial and intrusive. The UNCAC has clearly stated that the objective of a review mechanism would not include a ranking among states.[368]

The current process includes a self-assessment checklist, a desk review and an interaction between the reviewed state and reviewing states. The self-assessment is done *vide* a questionnaire that is filled out by the state under review by appointing experts for this purpose. An analysis of the responses is done under a desk review, which may be followed by an on-site visit with the consent of the reviewed state. The review process is carried out by two other member states, one of which is from the same region as the state being reviewed. The review panel submits its report on the basis of the information gathered and highlights the challenges, successes and observations for future implementation. It is pertinent to highlight that these reports

---

[365] *id*

[366] *Report of the Conference of States Parties to the UNCAC on its First Session* CAC/COSP/2006/12, Amman Jordan; *Report of the Conference of States Parties to the UNCAC on its Second Session* CAC/COSP/2008/15, Nusa Dua Indonesia.

[367] Peer review mechanism has been described as "…the systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed state improve its policy making, adopting best practices and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the states involved in the review, as well as their shared confidence in the process." *See* Pagani Fabricio (2002) "Peer Review as a Tool for Co-operation and Change" *11 African Security Review*, at 15; also see Georgios Dimitropoulos (2015) "Compliance Through Collegiality: Peer Review in International Law" *37 Loyola International and Comparative Law Review.*

[368] Report of the Conference of States Parties to the UNCAC on its Third Session CAC/COSP/2009/15, Doha, Qatar.

are confidential although the terms of reference encourage that state parties publish the report as an exercise of its sovereign rights.[369] The entire process of review in its current form is opaque and contrary to the principles of transparency and impartiality as enshrined in the text of UNCAC.

3.6 Issues and Challenges

With a near universal membership and a myriad of pressing issues dealt with in its body, the UNCAC was hailed as a major step towards the fight against corruption. In their commitment towards realising the goals of the Convention, the CoSP formulated a monitoring mechanism for the implementation of the Convention. Despite all these measures, the language of UNCAC limits its effectiveness. Most of the provisions of the Convention are not mandatory or self-executing in nature.

3.6.1 Language of UNCAC

UNCAC uses vague and qualified language for some of the key provisions and leaves a lot to the discretion of states. While a cursory reading of the Convention would seem like the criminalisation provisions have accomplished a lot by criminalising eleven illegal activities. This is more than UNCTOC, which criminalised four illegal activities. However a perusal of UNCAC shows that of the eleven criminal activities only five have used a mandatory language.

UNCAC is also surfeited with the use of qualified provisions. These provisions ask state parties to take measures subject to or in accordance with their domestic laws and legal principles. This is approach is contrary to Article 27 of the Vienna Convention on Law of Treaties that provides that domestic law is no justification for a state's failure to performs its obligations under a treaty.[370] The Convention is also replete with the use of vague and exalting norms that lack content and are open to interpretation.

---

[369] Rose Cecily *supra 107*

[370] Article 27 VCLT available at URL https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf last accessed on 10-06-2017

3.6.2 Review Mechanism

UNCAC does not create a robust monitoring and review mechanism and was one of the most debated provisions during negotiations. Even after the Convention came into force, it took the state parties three CoSP to arrive at a mechanism to monitor the implementation of UNCAC. The terms of reference provide for review to be conducted in two cycles with each cycle being five years long; in the first cycle the implementation of the criminalisation and law enforcement measure will be reviewed along with the measures on cooperation. The subsequent cycle will pertain to asset recovery and preventive measures. As compared to other review mechanisms, UNCAC is less transparent. Moreover, the self-assessment questionnaire forms the basis of a desk review followed by an on-site visit, if the state under review permits. The result of this assessment is confidential, though states are encouraged to publish the report. The confidential nature of these reports has bearing on the legitimacy of the process of review and is contrary to the spirit of transparency and accountability.

Conclusion

UNCAC was a big step towards formalising cooperation in the fight against corruption. Since many states, including India are in the process of implementing its provisions, it is early to determine whether UNCAC will succeed in its mandate. However, for any convention that places a broad range conditions on states, UNCAC needed a robust monitoring and compliance mechanism. Peer review mechanisms are used in many conventions, as they are considered non-invasive and can bolster cooperation between sovereign states. Notwithstanding the process of self-assessment, conventions like the OECD Bribery convention and the GRECO mechanism have a more robust monitoring and implementation mechanism.

In light of vague and hortatory provisions and a weak enforcement system, the UNCAC can be considered as a framework for the future, as opposed to a comprehensive international legal instrument on corruption. It is yet to be seen whether the use of non-mandatory language will hinder the development of these norms under international law in the future. Having a strong and robust mechanism is

key to preventing and combating corruption in countries like India. The next chapter will examine the influence of the UNCAC on the anticorruption regime in India.

ANNEXURE

REVIEW AND FOLLOW UP MECHANISMS

	OAS Convention	GRECO	OECD Convention	UNCAC
Assessment mechanism	Questionnaire	Questionnaire	Questionnaire	Questionnaire
Peer Review	Yes	Yes	Yes	Yes
In situ visits	No	Yes	Yes	Yes, with permission of state being reviewed
Civil society inputs	Civil society questionnaire	Upon invitation	Yes during in situ visit	No
Plenary body discussion of reports	Yes	Yes	Yes, adopted by the plenary body	No
Follow up on recommendations	Yes	Yes	Yes	No
Publication of reports	Yes, country and civil society reports	If authorised by states, yes	Yes	No, states can use sovereign right to publish

CHAPTER 4

INDIA AND UNCAC

INDIA AND UNCAC

Introduction

Kautilya's *Arthashastra* is often mentioned while discussing corruption. Kautilya had given a detailed list of corrupt practices like *pratibandh* (obstruction), *upabhoga* (embezzlement), *vyavahar* (trading) and *avastara* (fabrication of accounts).[371] Kautilya is usually cited to underscore the antiquity of corruption in society but provides little comfort in the face of growing discontent over the frequency and magnitude of corruption in societies all over the world. Corruption is difficult to define objectively and with the advent of the 24-hour cycle of media, most of the coverage is *ex post facto* and sensationalistic in its nature and approach. These factors have muddled the focus on corruption and can cause corruption fatigue. India in the last decade has been rattled by scams of gargantuan proportions.[372] Most of these scams received continuous media coverage and let to significant outrage, especially in the Indian middle class.[373]

India is susceptible to grand corruption in areas of non-transparent dealings such as import of arms or other matters that are subject of national security considerations. Bulk commodities, large-scale infrastructure, allocation of natural resources such as coal and other minerals, or telecommunication spectrums have all shown vulnerability to collusion between the bureaucrats, private sector and politicians.[374] Despite the fact that corruption is now seen a salient feature of Indian lives, the discourse around the subject has been reduced to political rhetoric and a method of vilification. This predicament is compounded by chasm between policy options and empirical research

[371] Kautilya is also known as Chanakya. See Kautilya's Arthashastra translated by R. Shamasastry (1915) available at URL http://www.columbia.edu/itc/mealac/pritchett/00litlinks/kautilya/index.html last visited on 25-05-2017

[372] For example in the 2G Telecommunication Case the Comptroller And Auditor General estimated a loss of Rupees 1.76 Trillion ($27 Billion) to the exchequer. While it is admitted that these loses are notional, they still reflect the magnitude of *male fide* on the parts of ministers and private sector executives.

[373] The Indian class is far from a monolithic group. It is best understood as a group of heterogeneous income, values and intellectual leanings. *See* Sitapathi Vinay (2011), "What Anna Hazare's Movement and India's New Middle Classes Say About Each Other" *Economic and Political Weekly Vol XLVI No. 30*, pp 39-44 at p 40.

[374] Sridharan Eswaran (2014), "India: Democracy and Corruption", *Democracy Works Conference Paper*, available at URL https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/upiasi/India%20-%20Democracy%20and%20Corruption.pdf last accessed on 30-05-2017

on corruption.[375] India had signed UNCAC in 2005 and ratified it in 2011. Furthermore, India has also ratified the UN Convention on Transnational Organized Crime that also mandates criminalisation of corruption and bribing of public officials. Additionally, India is also party to the India-Brazil-South Africa Cooperation (IBSA) that looks to combat corruption and foster social responsibility and transparency.[376] India also became a member of the Financial Action Task Force in 2011, an intergovernmental body that aims to curb money laundering and financing of terrorism.

4.1 Causes of Corruption in India

The causes of corruption in any country can be complex and diverse. It is not possible to discuss the causes of corruption in India extensively within the scope of this paper; however some of the major causes of corruption in India are discussed below:

4.1.1 *Complexity of Regulatory Framework*

Independent India was a state-led economy under the First Prime Minister, Jawaharlal Nehru. Over the years, the model was skewed into an onerous system of "License Raj". As with most regulatory frameworks, it complexity can either secure the welfare of consumers or can be exploited as a tool for corruption. This depends on the overall quality of governance and institutions in a state.[377] In 1991 the Indian markets underwent 'pro market' reforms. However, most of the lucrative sectors of the economy are still restricted with considerable discretion at the hands of regulatory authorities. These sectors have proven to be vulnerable to *quid pro quo* deals over allocation as was seen in the coal allocations and 2G telecommunication scandals.[378]

[375] Sukhtankar Sandip, Vaishnav Milan, "Corruption in India: Bridging Research Evidence and Policy Options", *India Policy Forum 2014-15* pp 193- 278 at p 199.
[376] The IBSA was formed in 2003 to promote South-South cooperation; See URL http://ibsa.nic.in/intro_public_administration.htm last accessed on 20-05-2017
[377] Seim Line Tøndel, Søreide Tina "Bureaucratic Complexity and Impact of Corruption in Utilities" *Utility Policy* 17 (2009) 176-184.
[378] For detailed discussion see supra 375

On the subject of corruption in India, the literature divides bribes into voluntary bribes and coercive bribes.[379] Coercive bribes are paid for what an official is duty bound to do anyway. Voluntary bribes can also be called facilitative bribes and would probably be recognised by most Indians as corruption they face during their interaction with state machinery. Voluntary bribes can also be paid in a collusive setting wherein a bribe is paid to circumvent regulations or to illegally obtain licences or government contracts.[380] Another kind of corruption is extractive in nature and would cover offences such as embezzlement, non-performance or unreasonable delay.[381] While India has a fairly robust framework of anticorruption laws the weak monitoring and accountability mechanisms along with wide discretionary regulatory powers weaken many anticorruption programmes.[382] Some of the key anticorruption measures are mentioned below.

4.1.2 Inadequate Regulation of Political Finance

Private contributions and membership dues financed traditionally political parties India. Corporates could legally contribute to parties but were subject to restrictions.[383] The Representation of People Act of 1951 had imposed a cap on the amount that could be spent on election campaigns. Within the next decade, concerns over 'black money' and political funding were expressed.[384] In 1968 a ban on corporate donations led to reliance on black money to fund political campaigns.[385]

The Supreme Court held in 1974 that any expenditure made by the party and supporters without the authorization of the political candidate would not be counted in

[379] Dasgupta Arindam (2007) "Corruption" in *Oxford Companion to Economics in India*, K. Basu (ed.), New Delhi: Oxford University Press; also see Basu Kaushik (2011) "Why, for a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal" Ministry of Finance, Government of India
[380] *Supra* 370
[381] *id*
[382] Sridharan Eswaran *supra* 374
[383] See E. Shridharan (2006) "Electoral Finance Reform: The Relevance of International Experience" in *Reinventing Public Service Delivery in India: Selected Case Studies*, Vikram Chand (ed.) New Delhi: Sage; also see Gowda, Rajeev and Sridharan E, (2012) "Reforming India's Party Financing and Election Expenditure Laws" *Election Law Journal*, Vol 11, No.2
[384] Black money is a term used to describe funds that are raised by tax evasion or through illicit activities. The Santhanam Committee on Prevention of Corruption of 1964 and the Wanchoo Direct Taxes Enquiry Committee of 1971 both mentioned the nexus between black money and political funding.
[385] Gowda Supra 383

as the candidate's election expense.[386] Consequently, the Representation of People's Act was amended to include the verdict of the Supreme Court as Explanation 1 to Section 77(1). These changes opened the floodgates as the restrictions on expenditure by a candidate became farcical. Over the decades, India has witnessed bigger and more expensive elections without transparency on matters of funding. However one of the key developments was the enactment of the Election and Other Related Law (Amendment) Act passed in 2003, which made contributions by individuals and companies 100 percent tax deductible. This Act incentivises open contributions by donors. It is pertinent to note that while this Act deals with contributions, it did not deal with party expenditure.

4.1.3 Lack of Enforcement Capacity

According to one study, India has the smallest number of government employees as a ratio of its population among G20 countries.[387] The administrative services of India are responsible for implementation and enforcement of a myriad of scheme, regulations along with the responsibility of enforcement. The judiciary also suffers from being understaffed where it is estimated that the proportion of judicial and police officials is on 16.5 per one million residents.[388] Furthermore, the ratio of police officers is an abysmal 122.5 per 100,000 people. Most often the positions for judicial officers and police officers lies vacant while the current machinery faced daunting odds to implementation and enforcement.

4.2 Anticorruption Regime and Transparency Measures in India

4.2.1 Efforts to Combat Corruption in India

India prides itself in being the largest democracy in the world but has been suffering from corruption for a long time. Over the years many committees have been entrusted

[386] *Kanwar Lal Gupta v Amar Nath Chawla* 1975 AIR 208
[387] Supra 375
[388] *id*

with understanding and giving possible solutions to successfully curb and combat corruption. Some of the committees formed over the years include:

4.2.1.1 Tarkunde Committee Report, 1975

The Tarkunde Committee is also known as the J.P. Committee. A committee had been appointed to study and report on electoral reforms and some of its important recommendations were to make the Election Commission a three-member body; the minimum age for voting should be 18 years of age. It recommended the formation of voter council in as many constituencies as possible to enable free and fair elections.

4.2.1.2 Goswami Committee on Electoral Reforms, 1990

One of the key recommendations of this committee was to place a time limit for bye-elections. Furthermore, the committee recommended legislative measures to eliminate rigging, booth capturing and intimidation.

4.2.1.3 Vohra Committee Report on Criminalisation of Politics, 1993

The aftermath of serial bomb blasts in Mumbai, India in 1993 led to the formation of the Vohra Committee. Some parts of the Report are accessible, while the rest are yet to be published. The Vohra Committee Report highlighted the criminal-bureaucrat-politician nexus as one of the reasons for the malaise of corruption in India.

4.2.1.4 Indrajit Gupta Committee on State Funding of Elections, 1998[389]

This eight-member committee was set up by an all-party conference on state funding of elections. The Committee submitted its report in January 1999 and recommended *inter alia* that it should be mandatory for political parties to submit annual accounts to the income tax department and show receipts for expenditure. Furthermore, it

[389] Available at URL http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf last accessed on 1-07-2017

recommended that parties must submit a complete account of election expenditure to the Election Commission.

4.2.2 Prevention of Corruption Act, 1988

India was a centrally regulated, public enterprise led economy before liberalisation in 1991. One of the first measures to combat corruption was in the form of the Prevention of Corruption Act, 1947 (PCA) that had incorporated sections from the Indian Penal Code. In 1963, the Santhanam Committee had made recommendations to curb corruption including the formation of the Central Vigilance Commission (CVC) to be headed by a commissioner for a period of five years and the appointment of a Chief Vigilance Officer in every ministry.[390] Furthermore, the Committee also proposed amendments to the Prevention of Corruption Act to include disproportional assets of civil servants a criminal offence. The PCA was amended again in 1988 and is related to the prevention of corruption in India and all related matters;[391] it criminalised illicit gratification of public servants from the demand and supply side. Under the Act, 'public servants' have been defined to include any person in the service of the government or is paid by the government. Its ambit covers local authorities, government companies, or other bodies owned and controlled by the government. Furthermore, it includes the judiciary and institutions that receive funding from the government.[392]

The Central Bureau of Investigation (CBI) was set up in 1963 with investigative powers.[393] Through its investigative powers included cases of corruption, it was primarily a police agency and could not operate at state level since law and order is a state subject. All 29 states of India have anticorruption bureaus and many have Lokayuktas (ombudsman). Lokayuktas are set up at the discretion of the state and

[390] Report of the Committee on Prevention of Corruption available on URL http://cvc.nic.in/scr_rpt_cvc.pdf last accessed on 25-05-2017
[391] Prevention of Corruption Act, Act No. 49 of 1988, enacted on 9 September 1988
[392] *id* Section 2(c)
[393] The origins of the CBI can be traced to the Special Police Establishment set up in 1941. Its functions included investigation of bribery and corruption with respect to the War and Supply Department of India established during World War II. The Delhi Special Police Establishment Act of 1948 was brought in force to oversee matter of corruption after the War. The DPSE was renamed as the CBI through a resolution by the Home Ministry dated 01-04-1963 *See* URL http://cbi.nic.in/history.php last visited on 30-05-2017

lack any police powers of investigation and arrest. The CVC was made a statutory body to supervise the CBI in 1998.

The CBI usually investigates offences under the PCA and the Act provides for setting up special courts to try such matters. In the case of *State of Madhya Pradesh v Ram Singh* the Supreme Court of India held that PCA should be interpreted liberally so as to advance its objective.[394] The apex court has also held that the offence has to be proven beyond reasonable doubt by way of direct or circumstantial evidence; where such causal link is not established the conviction is untenable in law.[395]

An Amendment Bill to amend the PCA is under consideration by Parliament.[396] The Bill proposes to remove Section 13, defining criminal misconduct by public servant with a narrower definition. As per the Bill, any non-pecuniary benefit that cannot be intentioned with fraud or is indirect cannot be penalised as corruption. The Bill also seeks to raise the threshold of proof in cases of disproportional assets. In its present form the PCA considers disproportional assets, in cases of known income of public servant, as proof of corruption.[397] The Bill requires the prosecution to prove that the public servant had an intention to illicitly enrich himself.[398] However, one of the most pertinent changes by the Bill is the insertion of Section 17A.[399] This section will make it obligatory on probe agencies to obtain sanction of Lokpal or Lokayukta in cases involving employees of the Union and States respectively prior to any investigation against public servants, except when caught red handed.

It also suggests that the requirement of prior sanction be extended to retired government servants. It is imperative to highlight that the power to give this sanction has been shifted to an authority "competent to remove" person from office. In other

[394] See *State of Madhya Pradesh v Ram Singh* (2000) 5 SCC 88.
[395] See *Banarasi Dass v State of Haryana* 2010 (2) ACR 1344 (SC).
[396] Report of the Select Committee of Rajya Sabha on the Prevention of Corruption (Amendment) Bill, 2013, presented to the Rajya Sabha on 12th August 2016 available at URL http://rajyasabha.nic.in/rsnew/committees/prevention_corruption.pdf last visited on 2-06-2017.
[397] Section 13(1)(iii)(e) of the PCA, 1988 says it is criminal misconduct "…if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income."
[398] Supra 379
[399] Clauses 12 and 14 *id*

words, this gives politicians wider powers to decide whether or not to constitute an inquiry against a public servant.[400]

4.2.3 Right to Information Act, 2005

The Right to Information Act, 2005 was enacted under the UPA I government and aims *inter alia* to promote transparency in governance and to prevent corruption.[401] Citizens are empowered to obtain information held by public authority but are subject to exceptions vis-à-vis national interest, right to privacy and legislative privileges.[402] Under the Act, a wide variety of information is made available by public authorities including the decision making process, in a time bound manner. The RTI Act created information commissions at state and central level to look into complaints of inaccessibility of information or refusal of access or failure to respond within the prescribed time. Though the system is not perfect, it does provide an unprecedented access to common citizens and improved transparency in accessing information.

4.2.4 Foreign Contribution Regulation Act, 2010

The Foreign Contribution Regulation Act, 2010 pertains to acceptance and utilization of foreign contribution and applies to a broad range of public office holders including judges, political parties and government corporation employees. The Act uses a broad definition of foreign source to include foreign companies, TNCs, foundations, and individuals.

4.2.5 Lokpal and Lokayuktas Act, 2013

After intense protests against corruption the legislation was notified in 2014 to have a Lokpal for the Union of India and Lokayuktas at state level. The objective behind these autonomous positions was to create an anticorruption ombudsman that would have the power to investigate alleged acts of corruption including under PCA.

[400] Feature 15.2 of Amendment Bill *id*
[401] Right to Information Act, No. 22 of 2005, enacted on 15 June 2005.
[402] Section 8 *id*

Furthermore, the legislation would create an obligation on civil servants to disclose assets of him and immediate family to the competent authority within 20 days of taking office. However, up until this point no Lokpal has been appointed.

The anticorruption movement in India had a watershed moment in 2011 when a large-scale anticorruption sentiment was seen across the country in response to various scandals. The Indian National Congress led UPA faced a legitimacy crisis and faced a heavy defeat in the general elections of 2014.[403] However the reforms since 2011 have barely made a difference to the ground reality of corruption.

India is the largest democracy in the world, however, corruption puts at risk the integrity and legitimacy of many institutions that are essential for a healthy democracy. Some scholars have attributed corruption in India to four major factors – lack of enforcement capacity, complexity of regulatory framework, and shortcoming of public sector recruitments and paucity of measure regulating political funding.[404]

4.2.6 Whistle Blowers Protection Act, 2011

This Act was enacted with the objective of establishing a mechanism that would provide safeguard to people who make disclosures regarding acts of corruption or willful misuse of power or discretion by a public authority and criminal offences by public servants. The Act seeks to protect the identity of the whistleblower and any disclosure of the same can lead to imprisonment or fine. Once the disclosure made is deemed to be of public interest, the competent authority can initiate an inquiry or proceedings. A Bill to amend the Act is pending before the Rajya Sabha. Under the Whistle Blower Protection (Amendment) Bill, 2015 seeks to prohibit the reporting of corruption related disclosure if it falls within 10 categories of information including *inter alia* economic, scientific interest and security of India; cabinet proceedings; intellectual property and information received in fiduciary capacity.[405] Any public interest disclosure that falls within these 10 categories will be referred by the

[403] Centre for Study of Developing Societies (2014) *India National Election Study*, CSDS, New Delhi
[404] Supra 375
[405] Whistle Blowers Protection (Amendment) Bill, 2015, Bill No. 154 of 2015 available at URL http://www.prsindia.org/uploads/media/Public%20Disclosure/Whistle%20Blowers%20(A)%20bill,%202015.pdf last visited on 1-06-2017

competent authority to a government authorised authority, this authority will take a decision on the matter that will be binding. This provision is modeled on Section 8(1) of the RTI Act. However, it is pertinent to note that the RTI Act deals with public disclosure of information whereas the Whistle Blowers Act pertains to protected disclosures.

4.3 India's Compliance with UNCAC

After ratifying UNCAC, India had to incorporate the measures that needed execution at State level. These reforms included the Companies Act, 2013 that included various stipulations on corruption, record keeping, money laundering and good governance. Under the Companies Act, 2013 if the Registrar of Companies is of the opinion the record and books of a company do not disclose a full and fair statement, the ROC can call upon companies to furnish additional information for his satisfaction or may carry out an inquiry into the matter.[406]

The Act also defines 'fraud' to include "act, omission, concealment of any fact or abuse of position committed by any person or any other person with their connivance in any matter, with intent to deceive, to gain undue advantage from, or to injure the interest of, the company or any of its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss."[407]

The Prevention of Money Laundering Act is correlated to the PCA and identifies section 7 to 10 of PCA as offences whose proceeds will be considered as proceeds of crime. The PML Act imposes an obligation on banks, financial institutions and other intermediaries to maintain records of transactions and client identities. The PML provides for provisional attachment of properties of those accused of money laundering. The Reserve Bank of India (RBI) and Securities Exchange Board of India (SEBI) also regulate banks and market intermediaries and specify the Know Your Customer (KYC) requirement and other AML measures. Some of these measures include client due diligence, establishing customer identity, and reporting suspicious

[406] Section 206, Companies Act, 2013 available at URL https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf last accessed on 10-06-2017
[407] Section 447 of Companies Act, 2013

transactions to the Financial Intelligence Unit. As regards the protection of whistleblowers, a legislation was enacted in 2011 and an amendment bill in before the Rajya Sabha.

In India, the Department of Personnel and Training (DoPT) has decided to carry out the self-assessment required under UNCAC by forming a core group of serving officers from various ministries to make contributions in honorary capacity. The DoPT has published a Request for Proposal (RPF) in 2012 to invite independent experts for the process of self-evaluation. The request was closed due to lack of eligible applicants.[408]

4.4 Conclusion and Recommendations

In an environment like India's, where corruption is entrenched and systemic, law cannot be expected to provide a universal cure. There are, however, solid reforms that are necessary to end the impunity with which corruption thrives in the Indian society. While there may be a difference in opinion on a bottom-up[409] or a top-down approach to corruption[410] there is agreement that a single approach towards corruption cannot be effective.

Legal Reforms

Anticorruption reforms in the form of legislations are key in the fight against corruption. The dynamic nature of the problem makes it imperative to assess the relevance and efficacy of legislations. In addition to having legislative changes that address corruption, there is also a need to structure, where necessary restructure, economic interactions with the purpose of curtailing corruption.[411]

---

[408] Invitation for Submission of Expression of Interest No. 371/6/2012 available at URL http://www.davp.nic.in/WriteReadData/ADS/eng_32201_2_1213b.pdf last accessed on 10-06-2017

[409] Bottom up herein means empowering citizens and giving them not just access to information but also reforming the bargaining power, collective action and improved coordination at the bottom level. See Sukhtankar and Vaishnav *supra* 375

[410] A top down approach would mean sweeping reforms in the manner and function of political parties and their funding. The Election Commission has proposed that it should be mandatory for parties to maintain records that are audited periodically. See Sridharan *supra* 374

[411] Sukhtankar and Vaishnav *supra* 375 at p 240.

This is especially true for allocation of natural resources, where rent seeking is omnipresent. There are currently two bills under consideration – the Mines and Minerals (Development and Regulation) Amendment Bill (2015) and the Coal Mines (Special Provisions) Bill, (2015). Under these bills the allocation of mining leases would employ a more transparent method of auction. This is not to say that the auctioning process is without trouble, however it is better than the arbitrary allocation method that has been followed.[412]

To tackle collusive corruption the Public Procurement Bill (2012) aims to regulate central government procurement and by increasing transparency of the process. This bill talks of bidding being the default method of public procurement. Like the PCA (Amendment) Bill, the Public Procurement Bill also contains provisions on bribery. The Public Procurement Bill covers any Ministry or Department and Public Sector Undertaking of the Central government but does not cover States and local governments. A well-designed and implemented public procurement policy can increase fiscal savings from procurement expenditures. Further, it can aid in a shift towards rule based institutional procurement. The Bill is still under consideration and the Ministry of Finance is seeking suggestions to refine it.[413]

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill (2011) also contains provisions on bribery and criminalises active and passive bribery. According to scholars, these domestic reforms can be attributed to membership of international bodies like the UNCAC which incentivise domestic changes.[414]

---

[412] Klemperer Paul (2002) "What Really Matters in Auction Design", *Journal of Economic Perspectives* 16(1) pp 169-189; in 2015 a news report suggested that the government would cancelled newly auctioned licences on grounds of collusion between firms to keep the bid artificially low. Available at URL http://blogs.economictimes.indiatimes.com/et-editorials/clean-up-coal-scrap-flawed-auctions/ last visited on 15-06-2017.

[413] Asher Mukul, Sharma Tarun and Sheikh Shahana "Revamping Public Procurement" The Hindu, April 23, 2015 available at URL http://www.thehindu.com/opinion/op-ed/revamping-public-procurement/article7130910.ece

[414] Morlino Leonardo (2005) "Anchors and Democratic Change", *Comparative Political Studies*, 38(7) pp 743-770.

All the above legislative reforms notwithstanding, the legal process in India is extremely slow. Even with a legal regime to fight corruption it is imperative to have a judiciary that is expeditious is disposing of cases against those accused of corruption.

Incentivising Performance and Ending Impunity

This is a recurring recommendation in anticorruption literature and is one of the most straightforward and viable solutions for rent seeking. The only qualification is a strict enforcement of both incentive and punishment. In a system that seeks punish rent seeking; the protection of whistleblowers is pivotal. The Whistle Blowers Protection of 2011 was a step towards the protection of those who might help in uncovering rent seeking, however the Amendment Bill before the Rajya Sabha waters down some of the important features of the whistleblowers protection. Another important step would be to introduce better auditing mechanisms including random assignment of independent auditors.[415]

Political and Electoral Reforms

One of the basic and frequently discussed remedies is transparency in political party funding and its finances. In 2013, the Central Information Commission (CIC) ruled that political parties would fall under the purview of "public authorities" under the RTI Act. Soon after, the parliament introduced a bill to remove political parties from the scope of the RTI Act. This move by the CIC brought legal arguments about the appropriate authority to decide whether political parties are public authorities or not. It was contended that Election Commission of India should have jurisdiction over the working and functions of political parties in India. The whole debate was rendered moot when CIC declared that its decisions could not be implemented as political parties had refused to cooperate.[416]

The Election Commission is a constitutional body and has proposed enhanced authority to regulate political parties. As per its current mandate, the EC cannot take

[415] Sukhtankar and Vaishnav *supra* 375 at p 232
[416] See URL http://www.livemint.com/Politics/6aCyQVcv86V0J7RGfBQefM/Political-parties-under-RTI-CIC-puts-matter-in-abeyance.html last accessed on 20-06-2017

action against parties that flout norms or where parties are set up to exploit tax benefits and loop holes. A suggestion that comes up frequently is to have regular and independent audits of political parties, which are then disseminated to the public; political parties have vociferously opposed this move. Additionally, election related disclosures and ECI power to disqualify those found guilty of falsifying information has also been considered. Furthermore, the ECI has also suggesting paying journalists for favourable reports are considered an "electoral offence" and punishable under the Representation of People Act.[417]

The biggest obstacle for any reform is political will. Political parties in India are content with *status quo* and rarely show any inclination to push reforms. The recent spate of reforms can be attributed to public outrage that mobilised people to the streets in India. Some of the changes to pertinent legislation show the insidious attempt to subvert processed by which greater transparency and accountability can be induced into the Indian political system. The rate of disposal of corruption charges in India is abysmal and worsens impunity. Understanding the shortfalls of current agencies led to the enactment of the Lokpal Bill but it is yet to seen whether the Lokpal system will be able to combat corruption in India.

[417] On the point of voting patterns and the impact of corruption and criminality, Sukhtankar and Vaishnav has analysed empirical data to conclude that information on criminality of incumbent and challenger have no significant impact on incumbents vote share. For details see Sukhtankar and Vaishnav *supra* 375

CHAPTER 5

CONCLUSION

CONCLUSION

Corruption pervades all societies regardless of their level of development. What drives corruption at a human level is for sociologists and anthropologists to debate and hypothesise. But this much can be said that unless the social forces and factors that drive corrupt behaviour are understood, any attempt to prevent it would only scratch the surface. Do poverty and inequality exacerbate corruption? Is there a form of governance that is adept at curtailing corruption? These questions are germane to the study of corruption but are not engaged within the scope of this dissertation.

The international community has been tentative in its approach towards corruption for a long time as the political aspects of corruption delayed efforts to shape an international response. Therefore, the response towards corruption was piecemeal and was restricted to defining an illicit act and imposing sanctions on it. Within the United Nations, corruption was addressed by many developing countries but these efforts were subsumed under economic or organised crimes. While most countries outlawed domestic bribery, the bribery of foreign public officials was not addressed. It was during the Watergate investigations in the United States that the problem of bribing public officials came to the forefront.

The Watergate investigation was a watershed moment in the fight against corruption as it illustrated the pernicious effects of corruption such as subversion of democracy and the rule of law. In response to these investigations, the United States enacted the Foreign Corrupt Practices Act (FCPA) in 1977. The FCPA provides punitive measures to deter bribery of foreign officials by US Corporations. Furthermore, it curbs the practice of tax deduction on bribes. The FCPA has two main components; it prohibits US corporations from bribing foreign officials; and includes provisions on accounting standards. Subsequent to the Watergate investigations, the UN General Assembly (UNGA) adopted a resolution highlighting the concerns of developing countries over transnational corporations (TNCs) and their corrupt practices.[418] This resolution reiterated the sovereign right of states to take appropriate legal action against TNCs that violate the laws of the host state. The resolution further requested the UN Economic and Social Council (ECOSOC) to direct the UN Commission on

[418] Supra 198

Transnational Corporations (UNCTC) to include the issue of illicit practices of TNCs in its programme of work and make recommendations based on its study. The work of the UNCTC was stalled by the political impasse due to diverging views on matters of sovereignty over natural resources, right of a state to expropriate and compensation along with the nature of the Code of Conduct for TNCs. A conjunction of economic and political events in the 1990s like the end of the Cold War, the liberalisation of markets and a series of corruption scandals set the stage for the international community to finally address corruption as a stand alone problem. It is also pertinent to note that it was during this period that IFIs, hitherto silent on corruption, started addressing corruption and attributed the failure of its efforts on bad governance and corruption. Another platform that was used to push the anticorruption agenda was the Organisation of Economic Cooperation and Development (OECD). The OECD was used by the United States as a forum to push for anticorruption efforts, especially since American corporations stated that the Foreign Corrupt Practices Act, 1977 put them at a disadvantage vis-à-vis its international competitors who were not bound by such anticorruption laws. Though these efforts were resisted by states in OECD, the conjunction of the several factors ensured that the efforts of the United States prevailed. As opposed to other anticorruption efforts, the OECD only addresses bribery and has one of the most stringent monitoring mechanisms. However the OECD has restricted itself to bribery of domestic and foreign public officials and is quite similar to the US FCPA.

The first wave of international efforts to combat corruption came in the form of regional agreements. The language of these agreements varied from being legally binding documents to being mere political declarations. This period saw the adoption of the Inter-American Convention against Corruption in 1997 (OAS Convention), the Council of Europe Civil and Criminal Conventions on Corruption between 2002 and 2003 (COE Conventions), and the African Union Corruption Convention in 2003 (AU Convention). These regional conventions were comprehensive in terms of the offences they addressed. These conventions are important since they provided a consensus-based framework to address cross-border issues and were based on international cooperation and harmonised the legal and institutional framework to prevent and combat corruption. These regional agreements provided the baseline for an international convention in the form of the United Nations Convention Against

Corruption (UNCAC) adopted by the UNGA in 2003 and came into force in 2005. UNCAC was able to further build on the issues and principle under regional conventions and with 181 parties is a truly universal legal instrument against corruption.

While there are similarities in these conventions, there are also key differences in subject matter covered. Consider the example of prevention under UNCAC. It goes further than previous agreements and is applicable on a broad range of actors such as the judiciary, public sector civil servants as well as private entities like banks and corporations. UNCAC uses institutional and systemic barriers as a key tool to fight corruption. However, the language used for these provisions under UNCAC is discretionary and does not bind states to implement them. Similarly, UNCAC has identified areas from where corruption may stem like campaign finance, public procurement systems and has recommended establishing independent bodies to oversee these activities. Furthermore, UNCAC has provisions on auditing and accounting standards and money laundering as preventive private sector measures. However, the UN Convention does not use binding terms for these provisions. The inclusion of campaign finance under preventive measures was a contentious matter during negotiations and was eventually worded as a discretionary provision.

UNCAC's provisions on criminalisation of bribery cover domestic public officials, foreign public officials as well as officials of public international organisations. The chapter on criminalisation under UNCAC is extensive and covers bribery and related offences. UNCAC uses mandatory language to criminalise bribery of national and foreign public officials and applies to all branches of the government.[419] There is disparity in the treatment of the supply side and demand side of bribery under UNCAC since offering of bribes has been mandatorily criminalised whereas the solicitation and acceptance of bribes has been drafted as a discretionary provision.[420] This disparity may be attributed to the unwillingness of states to criminalise behaviour of another state's public officials. With regards to private sector measures, the criminalisation of bribery applies to the demand side as well as the supply side of

[419] Article 13 *id*
[420] Article 21 *id*

bribery but is again drafted in non-mandatory language.[421] This is disappointing since the boundaries between public and private sector is diminishing and it is crucial to bring the private sector under the purview of anticorruption laws. In addition to the offence of bribery, UNCAC has includes bribery related offences such as trading in influence, illicit enrichment, embezzlement, abuse of function, money laundering and obstruction of justice. While the chapter on criminalisation under UNCAC is extensive it suffers from vague and non-mandatory language. Out of the eleven criminalisation provisions only five have used mandatory language; of which four provisions were already found in the United Nations Convention on Transnational Organised Crime. Before UNCAC, the COE Criminal Law Convention had already criminalised commercial bribery.

But UNCAC takes a step further from previous conventions vis-à-vis money laundering. Money laundering on its own is not a corrupt act, it is however an important method for making the proceeds of corruption usable. In 1988 the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances criminalised money laundering, but the scope of this convention was restricted to laundering proceeds from drug related crimes. Money laundering was also included in the OECD Anti-bribery Convention and the UN Convention on Transnational Organised Crime. The UNCAC describes money laundering as a stand-alone problem.

Asset recovery is another significant issue that UNCAC deals with in a separate chapter. While the AU Convention and the OAS Convention provide for seizure and confiscation of assets, asset recovery is not addressed. In addition to seizure and confiscation, UNCAC includes provisions for repatriation of stolen assets. UNCAC provides a consolidated framework that erodes any legal obstacles that may hinder the recovery of assets. UNCAC also provides the legal underpinning to the UN Office of Drugs and Crime (UNODC) and the World Bank Group's Stolen Asset Recovery Initiative (StAR Initiative). The StAR Initiative aims to use the convening powers of the UNODC and WBG to enhance cooperation between developed and developing

[421] *id*

countries and enhance capacity building in areas of legislation, investigation and enforcement to enable developing countries to recover of stolen assets.

Anticorruption legal reforms are necessary to fight corruption. While legislations can be enacted to fight corruption is important to assess their efficacy and relevance. In addition to legal reforms, economic interactions need to be structured, or in some cases restructured to curtail corruption. UNCAC encourages transparent procurement policies, and since India has ratified the UN Convention it introduced the Public Procurement Bill (2012), which aims to fight collusive corruption by regulating the central government procurement and increasing transparency of the process. In its present form the Bill is extremely complex and can dilute accountability. Further the Bill does not apply to post tendering practices such as contract management and payment that need to be added to bring transparency to the whole process.

A recurring recommendation to fight corruption is to incentivise performance and ending impunity. Given the clandestine nature of corruption, whistleblowers play a pivotal role in ending impunity and punishing rent seeking behaviour. It would be prudent for any country to provide the utmost level of protection to those who risk their personal safety to reveal corruption.

UNCAC calls upon states to consider incorporating measure for protection of whistleblowers, informants and witnesses. However, it is disappointing to see that he provisions are not mandatory. In India, the Whistle Blower Protection Act, 2011 was passed in 2014 to protect public interest disclosures. However, the Whistle Blower Protection (Amendment) Bill (2015) is a step backwards. The Amendment Bill seeks to prohibit disclosure of information protected under the Official Secrets Act, 1923 even if the objective is to uncover acts of corruption or criminal activities. It further prohibits public interest disclosure if such information would prejudice the interest of sovereignty and integrity of India. The Amendment Bill would effectively prohibit any disclosure that cannot be made under the RTI Act, 2005. This is a very concerning development since transparency and accountability are the bedrock on which anticorruption policies are based upon. India has an abysmal record of protecting whistleblowers and the new amendment will further worsen the condition of those trying to expose corruption.

The biggest obstacle to combat corruption is the lack of political will. It is shocking that nearly 23 years after giving a report on the nexus between criminals, bureaucrats and politicians, the Vohra Committee Report has not been made public in its entirety. Political parties in India seem to be content with the *status quo* and rarely push for sweeping reforms. A recurrent feature of anticorruption measures includes bringing transparency in political party funding. In 2013 the Central Information Commission ruled that political parties in India would fall within the purview of "public authorities" under the RTI Act. Soon after a bill was introduced in parliament to remove political parties from the scope of the RTI Act. The reluctance of political parties to function in a more transparent manner is not restricted to India. The provisions under UNCAC on transparency of party funding are discretionary, a theme that is recurrent is most international instruments against corruption with the exception of the AU Corruption Convention.

In addition to the abovementioned legislations, the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill (2011) was also introduced before the parliament and seeks to criminalise active and passive bribery of foreign public officials; this development can be attributed to membership of international conventions like UNCAC.

UNCAC relies on a follow up monitoring mechanism to determine the level of compliance. The diversity of subject matter under UNCAC makes monitoring both essential and challenging. During negotiations, Norway had proposed a two-step evaluation process akin to the one under OECD. This proposal included positive and negative measures such a focused technical assistance and suspension from UNCAC. However, UNCAC was based on the underlying sentiment of international cooperation and it was felt that a strong monitoring mechanism could derail efforts. Most of the provisions of UNCAC are not self-executing and states have been given wide discretionary powers to determine its implementation. The third Conference of Parties decided on using a non-adversarial method of peer review, which would conduct systematic examination, and assessment of the performance of states and the degree of compliance.

The process currently includes a self-assessment checklist by way of a questionnaire, a desk review and an interaction between reviewing states and the reviewed state. The review panel submits its report based on the information gathered and highlights the successes, challenges, and observations for future implementation. It is pertinent to note that these reports are confidential although the terms of reference encourage states to publish the findings of the report, in exercise of its sovereign rights.

In sum, the UNCAC is a comprehensive international legal instrument with varying degrees of obligation; and therefore faces direct and indirect compliance challenges. The language of the Convention has been watered down to create consensus but may also have stymied the evolution of certain legal norms in international law. The Convention also does not define corruption, though this can be attributed to ensuring a wider and larger applicability of the Convention. It is imperative to not undermine the importance of UNCAC that signifies the normative consensus on corruption. However, UNCAC cannot be considered as a comprehensive international legal instrument either. Though the Convention deals with a myriad of issues related to corruption, the language and monitoring mechanism thereunder could fetter the implementation of the Convention.

As with all international legally binding instruments, a balance has to be achieved between sovereignty of states and international obligations. The UNCAC seems to defer to domestic laws and has provided states with broad discretionary powers to determine how the convention is applied domestically. The UNCAC can thus be considered as a work in progress and as more information comes in on its implementations, the CoSP can take measures to improve the provisions of the Convention.

One of the biggest hurdles in this process will be the absence of a robust monitoring mechanism. Peer pressure would have worked more effectively if the monitoring mechanism was accessible to the public and would have resulted in international as well as domestic pressure to adhere to the convention. The UNCAC is an extensive international legal instrument with varying degrees of obligation. Its drawbacks notwithstanding, UNCAC is a huge step toward developing normative consensus on corruption under international law.

UNCAC review mechanism is largely an intergovernmental procedure and since the report is not published, ordinary citizens, civil society and other stakeholders do not get the opportunity to engage with the process and review the report. The involvement of the civil society is not mandatory and makes the mechanism weaker than other mechanisms such as those under OECD, OAS Convention and GRECO. Transparency and civil society involvement need to be improved under UNCAC.

Bibliography

Primary Sources

Documents and Reports

- 1975 United Nations Year Book
- 1976 United Nations Year Book
- 1977 United Nations Year Book
- 1979 United Nations Year Book
- 1988 United Nations Year Book
- 1990 United Nations Year Book
- African Union Convention on Preventing and Combating Corruption, adopted at Maputo, 11 July 2003, 43 ILM 1
- Centre for Study of Developing Societies (2014) *India National Election Study*, CSDS, New Delhi
- COE Civil Convention
- Council Act of 27 September 1996 Drawing up a Protocol to the Convention on the Protection of European Communities' Financial Interests, 1996 O.J. (C 313) 1
- ECOSOC Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices in International Commercial Transactions, 5 July 1977, International Legal Materials, Vol 16 (1977)
- ECOSOC Resolution E/2001/13 of 24 July 2001
- *Establishment of the Commission on Crime Prevention and Criminal Justice* (1991) UN Doc. E/RES/1992/1.
- Draft Resolution IV *World Ministerial Conference on Organized Transnational Crime* E/1993/32-E/CN.15/1993/9
- Inter-American Convention Against Corruption (OAS Convention) held at Caracas on 29th March 1996 "35 ILM 724" entered into force on 6th March 1997
- Lobbying Disclosure Act of 1995, PL 104-65, 109 Stat. 691, 19 December 1995, U.S.C. § 1601

- *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* A/RES/49/159
- Prevention of Corruption Act, Act No. 49 of 1988, enacted on 9 September 1988
- Proposals and Contributions Received from Governments: Norway: Amendments to Article 68 UN Doc. A/AC.261/L.78 (2002)
- Recommendation No. R(81) 12 COE
- Report of the Ad Hoc Committee for the Negotiations of a Convention Against Corruption, A/AC.261/9 (2003).
- Report of the Indian Committee on Prevention of Corruption available on URL http://cvc.nic.in/scr_rpt_cvc.pdf
- *Report of the Conference of States Parties to the UNCAC on its First Session* CAC/COSP/2006/12, Amman Jordan; *Report of the Conference of States Parties to the UNCAC on its Second Session* CAC/COSP/2008/15, Nusa Dua Indonesia.
- Report of the Conference of States Parties to the UNCAC on its Third Session CAC/COSP/2009/15, Doha, Qatar.
- *Report of the Secretary General,* Implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, E/CN.15/1996/2, 4 April 1996
- Report of the Select Committee of Rajya Sabha on the Prevention of Corruption (Amendment) Bill, 2013, presented to the Rajya Sabha on 12th August 2016
- Resolution 1/4 CAC/COSP/2006b
- Right to Information Act, No. 22 of 2005, enacted on 15 June 2005.
- OAS General Assembly Resolution AG/RES.1784 (XXXI-O/01), 5th June 2001
- OECD Recommendation on Bribery in International Business Transactions adopted on 27 May 1994, C (94)75/FINAL, International Legal Materials, Vol 33, (1994)
- *Summit of the Americas: Declaration of Principles and Plan of Action*, 34 I.L.M. 808 (1995).

- UN Convention Against Transnational Organized Crime (UNCTOC) 40 I.L.M. 353
- UN Doc. A/58/422/Add.1 7 October 2003
- UN ECOSOC *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 19th December 1988
- UN General Assembly Resolution 51/59 on "Action Against Corruption", 12 December 1996 UN Document A/RES/51/59 (1996).
- UNDP (1997) "Governance for Sustainable Human Development: A UNDP Policy Document"
- UNGA Resolution 51/191 on The UN Declaration Against Corruption and Bribery in International Commercial Transactions, UN Document A/RES/51/191 (1996)
- World Bank 1980 *Sub-Saharan Africa: From Crisis to Sustainable Development*, Washington DC: World Bank
- *World Ministerial Conference on Organized Transnational Crime* E/RES/1993/29

Books

- Beare Margaret (2003) *Critical Relections on Transnational Organized Crime, Money Laundering and Corruption*, Toronto: University of Toronto Press
- Bauer P (1984) *Reality and Rhetoric: Studies in the Economic of Development*, London: Weidenfeld and Nicolson. p 35.
- Ben Rich, Leo Janos (1996) *Skunk Works: A Personal Memoir of My Years of Lockheed*; Back Bay Books.
- Burbach et al 1997 *Globalization and Its Discontents*, London: Pluto Press
- Chayes Abram and Chayes Antonia (1995), *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, Massachusetts: Harvard University Press.
- Dasgupta Arindam (2007) "Corruption" in *Oxford Companion to Economics in India*, K. Basu (ed.), New Delhi: Oxford University Press

- E. Shridharan (2006) "Electoral Finance Reform: The Relevance of International Experience" in *Reinventing Public Service Delivery in India: Selected Case Studies*, Vikram Chand (ed.) New Delhi: Sage
- Friedrich Carl J (1972), *The Pathology of Politics: Violence, Betrayal Corruption, Secrecy and Propaganda*, New York: Harper & Row, pp 127-141.
- Friedrich, Carl J., (2007) "Corruption Concepts in Historical Perspective" in Heindenheimer, Arnold J., Johnston, Michael, *Political Corruption: Concepts and Contexts,* New Jersey: Transaction Publishers
- Gardiner, John (1993) "Defining Corruption" in Maurice Punch, Emile Kolthoff, Kees van der Vijver, and Bram van Vliet, (eds) *Coping with Corruption in a Borderless World: Proceedings of the Fifth International Anti-Corruption Conference*, Deventer and Boston: Kluwer Law and Taxation Publishers.
- Global Corruption Report (2004), *Transparency International,* London: Pluto Press at 13.
- Glynn Patrick et al "Globalization of Corruption" in Kimberly Ann Elliott (ed) *Corruption and the Global Economy*, Institute of International Economics
- Gupta Sanjeev et al "Corruption and the Provision of Health Care and Educational Services" in Arvind Gupta (ed.) *The Political Economy of Corruption*, London and New York: Routledge
- Heindenheimer, Arnold J., Johnston, Michael (2007), "Introduction to Part I" in Heindenheimer, Arnold J., Johnston, Michael (eds.) *Political Corruption: Concepts and Contexts,* New Jersey: Transaction Publishers.
- Hossain Kamal, "Introduction to Permanent Sovereignty over Natural Resources in International Law", at x, in Kamal Hossain and Subrata Roy Chowdhury (eds.) Permanent Sovereignty Over Natural Resources in International Law (1984): Palgrave Macmillan
- Huntington, Samuel P., (1968), *Political Order in Changing Societies*, New Haven: Yale University Press
- Huther Jeff, Shah Anwar (2000) "Anticorruption Policies and Programs: A Framework for Evaluation", *Policy Research Working Paper 2501*, Washington: World Bank.

- Jain, Arvind K (2002), "Power, Politics, and Corruption" in Arvind K. Jain (ed). *The Political Economy of Corruption*, London and New York: Routledge
- Jakobi Anja (2010) "E Pluribus Unum? The Global Anti-corruption Agenda and its Different International Regimes" in Wolf Sebastian and Schmidt-Pfister Diana (eds.) *International Anti-corruption Regimes in Europe* Baden-Baden: Nomos at p 95
- Lambsdorff Johann "Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries" in Susan Rose-Ackerman (ed)
- Larson Erik N (2011), "The United Nations Convention Against Corruption" in Lukas Achathaler, Domenica Hofmann, Matthias Pázmándy (eds.), *Korruptionsbekämpfung Als Globale Herausforderung: Beiträge aus Praxis und Wissenchaft.* Wiesbaden: VS Verlag, p 11.
- Lowenstein, Daniel H (1989), "Legal Efforts to Define Political Bribery", *Political Corruption: A Handbook*, New Brunswick: Transaction Publishers
- Machiavelli, Niccolò, *The Prince*, written c. 1505
- Mander J., (1996) "Facing the Rising Tide" in J Mander and E Gold smith (eds.) *The Case Against the Global Economy*, San Francisco: Sierra Club Books p 3-19
- Margaret Beare, *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption,* Toronto: University of Toronto Press (2003)
- Mauro, Paolo (2007) "The Effects of Corruption on Growth and Public Expenditure" in *Political Corruption: Concepts and Contexts* (eds.) Arnold Heindenheimer and Michael Johnston New Brunswick, London: Transaction
- Michael Johnston "The Definition Debate: Old Conflicts in New Guises" in Arvind K. Jain (eds). *The Political Economy of Corruption*, London and New York: Routledge.
- Noonan JT., *Bribes*, University of California: 1984, p 674.
- Rose Cecily *International Anticorruption Norms: Their Creation and Influence on Domestic Legal Systems*, London: Oxford University Press at p 76

- Rose- Ackerman Susan (2004), "Establishing the Rule of Law" in Robert Rotberg (ed), *When States Fail: Causes and Consequences*, Princeton: Princeton University Press at p 83.
- Peck Linda Levy (1990) *Court Patronage and Corruption in Early Stuart England*, Boston: Unwin Hyman
- Philp Mark, "Conceptualizing Political Corruption" in *Political Corruption: Concepts and Contexts* (eds.) Arnold Heindenheimer and Michael Johnston New Brunswick, London: Transaction
- Rose-Ackerman Susan (2002) "Corruption and the Global Corporation: Ethical Obligations and Strategies" in Michael Likosky (ed.) *Transnational Legal Processes*, London: Butterworth, pp 148-171
- Rose-Ackerman Susan (2006) "Introduction and Overview" in Susan Rose-Ackerman (ed.) *International Handbook on the Economics of Corruption*, Cheltenham, Northampton: Edward Elgar
- Rose-Ackerman, Susan (1999) *Corruption and Government: Causes, Consequences and Reforms*, Cambridge and New York: Cambridge University Press.
- Rousseau, Jean Jacques (1985) *A Discourse on Inequality* New York: Viking Press
- Sagafi-Nejad Tagi, *The United Nations and Transnational Corporations: From Code of Conduct to Global Compact*, Bloomington & Indianapolis: Indiana University Press, 2008.
- Senturia, JA,. (1935) *Corruption: Political Encyclopedia of the Social Sciences*, Vol.4. New York: Crowell-Collier-Macmillan, Berg et al (1976) *Corruption in the American Political System* Morrison, NJ: General Learning
- Shelton Dinah (2000), *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford p 246.
- Steward F and Berry A (1999) "Globalization, Liberalization and Inequality: Expectations and Experience" in Ngaire Woods and A Hurrell (eds.) *Inequality, Globalization and World Politics* Oxford: Oxford University Press, p 150-186.

- *Stolen Asset Recovery Initiative: Challenges, Opportunities and Action Plan* (2007), World Bank Group: Washington DC; *Management of Returned Assets: Policy Considerations* (2009), World Bank Group: Washington DC
- Theobald, R., (1990) *Corruption, Development and Underdevelopment*, Durham, NC: Duke University Press
- Van Klaveren Jacob (1989) "Corruption as a Historical Phenomenon" *Political Corruption: Concepts and Contexts* (eds.) Arnold Heindenheimer and Michael Johnston New Brunswick, London: Transaction at p 83-84.
- Van Klaveren, J., (1989) P*olitical Corruption: A Handbook,* New Brunswick, NJ: Transaction. Rogow, A. and Lasswell, HD., (1963) *Power, Corruption and Rectitude* Englewood Cliffs, NJ: Prentice Hall
- Woods Ngaire, (1999) "Order, Globalization and Inequality in World Politics" *Inequality, Globalization and World Politics* Oxford: Oxford University Press p 8-35
-

Case Law

- *Banarasi Dass v State of Haryana* 2010 (2) ACR 1344 (SC).
- Case 68/88 *Commission v Greece* [1989] ECR 2965
- *Kanwar Lal Gupta v Amar Nath Chawla* 1975 AIR 208
- *State of Madhya Pradesh v Ram Singh* (2000) 5 SCC 88.

Articles

- Anderson, Lisa. "Demystifying the Arab Spring: Parsing the Differences between Tunisia, Egypt, and Libya." *Foreign Affairs* (2011) p 2-7.
- Antony Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case", *34 Harvard International Law Journal*, pp 472-475 (1993);

- Argandoña Antonio "The United Nations Convention Against Corruption and its Impact on International Companies" *Chair of Economics and Ethics,* Research Paper No. 656, October 2006
- Asher Mukul, Sharma Tarun and Sheikh Shahana "Revamping Public Procurement" The Hindu, April 23, 2015 available at URL http://www.thehindu.com/opinion/op-ed/revamping-public-procurement/article7130910.ece
- Babu Rajesh "United Nations Convention Against Corruption: A Critical Overview" available at URL http://ssrn.com/abstract=891898
- Banfield EC (1958) *The Moral Basis of a Backward Society*, New York: Free Press; Wraith, R. and Simkins, E., (1963) *Corruption in Developing Countries*, London: Allen and Unwin
- Bardhan Pranab, 1997, "Corruption and Development: A Review of Issues", *Journal of Economic Literature*, Vol XXXV (September), pp 1320-1346.
- Bardhan, Pranab (1997). "Corruption and Development: A Review of Issues." *Journal of Economic Literature* 35(3) pp 1320-1346.
- Basu Kaushik (2011) "Why, for a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal" Ministry of Finance, Government of India URL http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf
- Bogdan, Michael, "International Trade and the New Swedish Provisions on Corruption", *The American Journal on Comparative* Law, Vol 27, No.4 (Autumn 1979) pp 665-677
- Boutros Boutros-Ghali, "Transnational Crime: The Market and the Rule of Law", *Vital Speeches of the Day* 61, No.5 (15 December 1994) p 131.
- Brown Ed, Cloke Jonathan (2004) "Neoliberal Reforms, Governance and Corruption in the South: Assessing the International Anticorruption Crusade" *Antipode 36(2)*, pp 272-294.
- Brunelle Quraishi, Orphelie (2011) "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis" *Notre Dame Journal of International & Comparative Law* Vol 2 Issue 1, Article 3 at p 22.
- Buscaglia Edgardo (2003) "Controlling Organized Crime and Corruption in the Public Sector" *Forum on Crime and Society* vol 3 No. ½

- Carr Indira (2006), "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?" *3 Manchester Journal of International Economic Law*, Vol.3 Issue 3
- Carr Indira (2006), "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?" *3 Manchester Journal of International Economic Law*, Vol.3 Issue 3, at p 21.
- Carr, Indira. "'The Public Rules for Private Enterprise: Corporate Anti-Corruption Legislation in Comparative and International Perspective." (2009).
- Chalmers Johnson "Tanaka Kakuei, Structural Corruption, and the Advent of Machine Politics in Japan", *The Journal of Japanese Studies,* Vol 12 No,1 (Winter 1986) pp 1-28. URL http://www.jstor.org/stable/132445
- Chimni, Bhupinder S. "International Institutions Today: An Imperial Global State in the Making." *European Journal of International Law* 15.1 (2004): 1-37.
- Chimni, Bhupinder S. "Third World Approaches to International Law: A Manifesto." *International Community Law Review* 8 (2006): 3, p 7.
- Colclough C (1991) Structuralism versus Neo-liberalism: An Introduction in C Colclough and J Manors (eds.) *States or Markets? Neo-liberalism and the Development Policy Debate* p 1-25
- Denoeux G (2007) "Corruption in Morocco: Old Forces, New Dynamics and a Way Forward", *Middle East Policy* XIV(4): 134-151.
- Doig Alan and Riley Stephen (1998), "Corruption and Anti-corruption Strategies: Issues and Case Studies from Developing Countries, in UNDP (ed.), *Corruption and Integrity Improvement Initiatives in Developing Countries*, New York: United Nations Development Program, pp 45-62.
- Dugard, CJR (1967), "The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism", *International and Comparative Quarterly*, Vol. 16 (1) at p 157
- Edgardo Buscaglia, "Controlling Organized Crime and Corruption in the Public Sector", Forum on Crime and Society, VOl 3 No.1/2 2003

- Gantz David, "Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus" *Northwestern Journal of International Law and Business* (1998) 457, p 477
- Georgios Dimitropoulos (2015) "Compliance Through Collegiality: Peer Review in International Law" *37 Loyola International and Comparative Law Review.*
- Gowda, Rajeev and Sridharan E, (2012) "Reforming India's Party Financing and Election Expenditure Laws" *Election Law Journal*, Vol 11, No.2
- Guzman T. Andrew, "The Design of International Legal Agreements" *European Journal of International Law* (2005) Vol. 16 No.4 p 579-612 at p 580.
- Heineman B.W. and Heimann F (2006), "The Long War Against Corruption" *Foreign Affairs*, 85(3) at p 75.
- Henning Peter J (2001), "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law", *18 Arizona Journal of International and Comparative Law,* p 796.
- Holman Frank E. (1946), "Forms of Government" *American Bar Association Journal*, Vol 32, No.4, pp 190-194 available at http://www.jstor.org/stable/25715533 last accessed on 10-01-2017.
- Huber, Evelyne, and Frederick Solt. "Successes and Failures of Neoliberalism." *Latin American Research Review* 39, no. 3 (2004): 150-164.
- Jacob van Klaveren (1957), "Corruption as a Historical Phenomenon" in Heindenheimer and Johnston
- Jain A.K (2001), "Corruption: A Review" *Journal of Economic Survey 15(1)*, p 71-121
- James H. Mittelman and Robert Johnston, "The Globalization of Organized Crime, the Courtesan State, and the Corruption of Civil Society", *Global Governance*, Vol 5, No.1 (1999) p 103-126
- Jeffrey Bialos and Gregory Husisian (1997) *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies*
- Klemperer Paul (2002) "What Really Matters in Auction Design", *Journal of Economic Perspectives* 16(1) pp 169-189

- Krueger Anne O. (1974), "The Political Economy of Rent-Seeking Society" *The American Economic Review* Vol. 64 No.3 pp 291-303.
- Leff, Nathaniel, (1964), "Economic Development Through Bureaucratic Corruption", *American Behavioral Scientist*, pp 8-14
- Louise I Shelly and John T Picarelli, "Methods not Motives: Implications of the Convergence of International Organized Crime and Terrorism", *Police Practice and Research*, 2002, Vol 3, No.4, pp 305-318
- Low Lucinda, "The United Nations Convention Against Corruption: The Globalization of Anti-corruption Standards", *Conference of the International Bar Association, International Chamber of Commerce and OECD*, "The Awakening Giant of Anticorruption Enforcement", London, England May 2006.
- Mauro Paulo "Corruption and the Composition of Government Expenditure" *Journal of Public Economics* 69 (1998) pp 263-279;
- Mbao Melvin, Komboni GG (2008), "Promotion of Good Governance and Combating Corruption and Maladministration: The Case of Botswana, *Law, Democracy and Development,* Vol 12 Issue 1, pp 49-72.
- Mike Koehler (2012) "The Story of the Foreign Corrupt Practices Act" *Ohio State Law Journal*, available at URL http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Koehler.pdf (FCPA),
- Moore M (1991) Rent Seeking and Market Surrogates: The Case of Irrigation Policy in C Colclough and J Manors (eds.) *States or Markets? Neo-liberalism and the Development Policy Debate* p 279-305.
- Morlino Leonardo (2005) "Anchors and Democratic Change", *Comparative Political Studies*, 38(7) pp 743-770.
- Murphy Mark (1995) "International Bribery: an Example of Unfair Trade Practices" *Brook Journal of International Law*, Vol 21, pp 385-391
- Nicholls Ruth (2005), "Corruption in the South Pacific: The Potential Impact of the UN Convention Against Corruption on Pacific Island States" *2 New Zealand Yearbook of International Law,* 207-277.

- Nye, Joseph N. (1967), "Corruption and Political Development: A Cost-Benefit Analysis" *The American Political Science Review*, Vol. 61 (2), pp 417-427.
- Padideh Ala'i, "The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption", *33 Vanderbilt Journal of Transnational Law* 877, pp 884-885.
- Pagani Fabricio (2002) "Peer Review as a Tool for Co-operation and Change" *11 African Security Review*, at 15
- Passas, Nikos. "Global Anomie, Dysnomie, and Economic crime: Hidden Consequences of Neoliberalism and Globalization in Russia and Around the World." *Social Justice 27.2 80* (2000): 16-44.
- Peters JG and Welch S,. (1978) "Political Corruption in America: A Search for Definitions and A Theory", *American Political Science Review* 72: 974-984
- Posadas Alejandro (2000), "Combating Corruption under International Law", *Duke Journal of Comparative and International Law,* p 345-414.
- Rossbacher, Henry H., and Young, Tracy W (1997) "The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption", *Penn State International Law Review*; Vol 15, No.3, Article 4, p 527.
- Salbu Stephen R, "A Delicate Balance: Legislation, Institutional Change and Transnational Bribery", (2000) *33 Cornell International Law Journal*, at p 676.
- Santiso Carlos (2001), "Good Governance and Aid Effectiveness: The World Bank and Conditionality", *The Georgetown Public Policy Review*, Vol. 7 No.1, pp 1-22, at p 5.
- Schneider, Friedrich; Windischbauer Ursula (2010) "Money Laundering: Some Facts" *Economics of Security Working Paper, No.25*, available at URL https://www.econstor.eu/bitstream/10419/119350/1/diw_econsec0025.pdf last visited on 06-05-2017
- Seim Line Tøndel, Søreide Tina "Bureaucratic Complexity and Impact of Corruption in Utilities" *Utility Policy* 17 (2009) 176-184.
- Shah, Anwar, and Mark Schacter (2004). "Combating Corruption: Look Before You Leap." *Finance & Development* 41(4) pp 40-43.

- Shelly Louise and Picarelli John T. (2002) "Methods not Motives: Implication of the Convergence of International Organized Crime and Terrorism" *Police Practice and Research* Vol. 3 No.4 pp 305-318.
- Shleifer, A and Vishny, R., "Corruption", *The Quarterly Journal of Economics*, Vol 108:3, p 616.
- Simone White Protection of the Financial Interests of the European Communities: The Fight Against Fraud and Corruption 7(1998) URL http://etheses.lse.ac.uk/2599/1/U615548.pdf
- Sitapathi Vinay (2011), "What Anna Hazare's Movement and India's New Middle Classes Say About Each Other" *Economic and Political Weekly Vol XLVI No. 30*, pp 39-44 at p 40.
- Smith Jack, Pieth Mark, Jorge Guillermo "Recovery of Stolen Assets: A Fundamental Principle of UN Convention Against Corruption" *Resources of U4* available at URL http://www.repatriationgroup.org/wp-content/uploads/2017/02/U4-Brief.pdf
- Snider Thomas R., Kidane Won (2007) "Combating Corruption through International Law in Africa: A Comparative Analysis" *40 Cornell International Law Journal*, p 691-748.
- Sousa Luís (2009), "Anti-corruption Agencies: Between Empowerment and Irrelevance", *Crime, Law and Social Change*, Springer Verlag, Vol 52 No.1, p 5-22
- Sridharan Eswaran (2014), "India: Democracy and Corruption", *Democracy Works Conference Paper*, available at URL https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/upiasi/India%20-%20Democracy%20and%20Corruption.pdf
- Stessens Guy (2001), "The International Fight Against Corruption", *72 International Review of Penal Law*, at 914.
- Sukhtankar Sandip, Vaishnav Milan, "Corruption in India: Bridging Research Evidence and Policy Options", *India Policy Forum 2014-15* pp 193- 278 at p 199.
- Szeftel M (1998) Misunderstanding African Politics: Corruption and the Governance Agenda, *Review of African Political Economy* p 221-240.

- Tanzi Vito and Davoodi Hamid "Corruption, Public Investment, and Growth" IMF Working Paper WP/97/139 available at URL https://www.imf.org/external/pubs/ft/wp/wp97139.pdf
- Tullock, Gordon, 1996, "Corruption Theory and Practice", *Contemporary Economic Policy*, Vol XIV (July), pp 6-13; Becker Gary S., Stigler George J., 1974, "Law Enforcement, Malfeasance and Compensation for Employees", *Journal of Legal Studies* (January), pp 1-18.
- ul Haque Nadeem and Sahay Ratna (1996) "Do Governemtn Wage Cuts Close Budget Deficits? The Costs of Corruption" *IMF Staff Papers* 43. No.4 (December) pp 754-778
- Ungureanu Adelin (2015) "Forms of Government Theoretical and Practical Expose" *Juridical Current Vol 8 Issue 4*, pp 133-142
- Viswanathan Shiv, "Anna Hazare and the Battle Against Corruption" *Cultural Critique*, Vol 81 (Spring 2012), pp 103-111; also see Sitapati, V. (2011). What Anna Hazare's Movement and India's New Middle Classes Say about Each Other. *Economic and Political Weekly*, 39-44.
- Vito Tanzi "Corruption Around the World: Causes, Consequences, Scope and Cures" *IMF Staff Papers*, Vol 45, no.4, December 1998.
- Vlassis Dimitri "The Negotiation of the Draft United Nations Convention against Corruption", *Forum on Crime and Society*, Vol 2 No.1, December 2002.
- Vlassis Dimitri, "The UN Convention Against Transnational Organized Crime", in Mats R. Berdel, Monica Serrano (eds.)*, Transnational Organized Crime and International Security: Business as Usual?* at p 83.
- Webb Philippa "United Nations Convention Against Corruption: Global Achievements or Missed Opportunity" *Journal of International Economic Law* 8(1), pp 191-229

Websites

- Article 27 VCLT available at URL https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

- Available at URL http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf last accessed on 1-07-2017
- European Union Gross Domestic Product based on purchasing-power-parity estimate for 2017 see IMF World Economic Outlook Database http://www.imf.org/external/pubs/ft/weo/2016/02/weodata/weorept.aspx?sy=2015&ey=2020&scsm=1&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPPGDP%2CPPPPC&grp=1&a=1&pr.x=72&pr.y=29
- Guidelines Procurement under IBRD Loans and IDA Credits, The World Bank, Washington DC available at URL http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-01-99-ev3.pdf
- Draft Resolution IV *World Ministerial Conference on Organized Transnational Crime* E/1993/32-E/CN.15/1993/9 available at URL https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_02/E-1993-30_E-CN15-1993-9_E.pdf
- http://www.coe.int/en/web/Conventions/full-list/-/Conventions/treaty/174
- http://www.coe.int/en/web/greco/about-greco/how-does-greco-work
- http://www.coe.int/en/web/greco/conferences/high-level-launch-fifth-evaluation-round
- http://www.oecd.org/about/membersandpartners/
- http://www.oecd.org/about/whatwedoandhow/
- http://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf p 14
- Indian Companies Act, 2013 available at URL https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf
- http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp
- *Inter-American Convention Against Corruption* URL http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp
- Invitation for Submission of Expression of Interest No. 371/6/2012 available at URL http://www.davp.nic.in/WriteReadData/ADS/eng_32201_2_1213b.pdf

- Joint Action 98/742/JHA adopted by Council on basis of Article K.3 of Treaty of European Union available at URL http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33074&from=EN
- Kautilya's Arthashastra translated by R. Shamasastry (1915) available at URL http://www.columbia.edu/itc/mealac/pritchett/00litlinks/kautilya/index.html
- List of Countries that have ratified the African Union Convention on Preventing and Combating Corruption" available at URL https://www.au.int/web/sites/default/files/treaties/7786-sl-african_union_Convention_on_preventing_and_combating_corruption_21.pdf
- Report of the Select Committee of Rajya Sabha on the Prevention of Corruption (Amendment) Bill, 2013, presented to the Rajya Sabha on 12th August 2016 available at URL http://rajyasabha.nic.in/rsnew/committees/prevention_corruption.pdf
- Rose-Ackerman Susan "Corruption and Development" *Annual World Bank Conference on Development Economics*, available at URL http://documents.worldbank.org/curated/en/719821468740214930/pdf/multi0page.pdf#page=39
- Part I International Code of Conduct for Public Officials as Annexed to UNGA Resolution 51/59 available at URL http://www.un.org/documents/ga/res/51/a51r059.htm
- United Nations Convention Against Corruption available at URL https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf;
- Whistle Blowers Protection (Amendment) Bill, 2015, Bill No. 154 of 2015 available at URL http://www.prsindia.org/uploads/media/Public%20Disclosure/Whistle%20Blowers%20(A)%20bill,%202015.pdf
- World Bank, *Combating Corruption* see URL http://www.worldbank.org/en/topic/governance/brief/anti-corruption last visited on 20-05-2017
-

Annexure: Complete Text of the United Nations Convention Against Corruption