

***UNITED NATIONS  
HANDBOOK  
ON***

***(DRAFT)***

***PRACTICAL ANTI-CORRUPTION  
MEASURES FOR PROSECUTORS  
AND INVESTIGATORS***

July 2004

### **Disclaimer**

**The views expressed herein are those of the Authors and editors and not necessarily those of the United Nations**

## **EQUIP YOURSELF**

The **United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators** is part of a larger package of materials intended to provide information and resource materials for countries developing and implementing anti-corruption strategies at all levels, as well as for other elements of civil society with an interest in combating corruption. The package consists of the following major elements.

The **United Nations Guide for Anti-Corruption Policies** which contains a general outline of the nature and scope of the problem of corruption and a description of the major elements of anti-corruption policies, suitable for use by political officials and senior policy-makers.

The **United Nations Anti-Corruption Toolkit**, which contains a detailed set of specific Tools intended for use by officials called upon to elaborate elements of a national anti-corruption strategy and to assemble these into an overall strategic framework, as well as by officials called upon to develop and implement each specific element.

The **Compendium of International Legal Instruments on Corruption**, in which all the major relevant global and regional international treaties, agreements, resolutions and other instruments are compiled for reference purposes. These include both legally binding obligations and some so-called "soft-law" (or normative) instruments intended to serve as non-binding standards.

Examples of **Country Assessments**, as well as all four publications, are available on the Internet, on the United Nations Office of Drug Control (UNODC) web page:

**<http://www.unodc.org/corruption.html>**

To assist users who do not have Internet access, individual publications are produced and updated as necessary.

## FOREWORD

### United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators

The Practical Measures Against Corruption Manual produced by the United Nations has proved to be of value to law enforcement personnel in many countries for more than a decade. Over the years, however, several major developments in international anti-corruption efforts have occurred as corruption issues surfaced repeatedly as a major concern of Member States, and on 30 September 2003 they successfully finalised the UN Convention Against Corruption after two years of deliberations.

The Convention marks a major step forward in international cooperation against corruption and is a demonstration of near universal concern at the challenges corruption poses to countries around the world and in every stage of development. A summary of the instrument is included in the introductory part of this *Handbook*. References to relevant specific provisions of the Convention appear throughout the *Handbook*, and a more detailed review is included in Chapter 12 dealing with international judicial co-operation.

The nature and effects of corruption are unique to each country and society. This *Handbook* takes its place among the toolkit that continues to be developed by the United Nations Office on Drugs and Crime. This is intended to provide a range of options that enable each country to assemble an effective integrated strategy, adapted to meet its own particular needs.

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Major contributors to the *Handbook* are Barry Hancock of the International Association of Prosecutors, Jeremy Pope and Diana Miller, both of TIRI (the governance-access-learning network), and Fiona Darroch (who prepared the case study on the Lesotho Highlands Water Supply prosecutions).

The first version of the Manual could not have been attempted without the invaluable support of the United States Department of Justice, and in particular that of Michael A. A. DeFeo. This second version (now entitled the “United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators”) would not have been possible without the support of the U.S. Department of Justice, and in particular John Harris, Senior Counsel for International Policy; Kenneth Harris, Associate Director, Office of International Affairs; and Sima Serrafin, Assistant United States Attorney for the District of Columbia.

Drafts of the *Handbook* were thoroughly commented on by both a Government of South Africa Task Team and by the Regional Office for Southern Africa of the United Nations Office on Drugs and Crime (UNODC/ROSA). These comments, together with the draft Handbook, were presented and further discussed during two Working Meetings organised by UNODC, held in Pretoria (16 to 18 October 2002) and Cape Town (21 to 23 October 2002).

The International Association of Prosecutors (IAP) fed in the views of its members in some twelve countries from around the world. The development of this edition of the Handbook has been widely welcomed. The expectation is that elements of the *Handbook* will form the basis for other publications, tailored to meet the needs of a particular developing country or region.

The *Handbook* itself will continue to be developed. Practical training and case studies will be added, setting out practical examples to enhance the usefulness of the *Handbook* as a training tool. This will provide information about the conditions under which a particular programme may be able to work, and how various practical anti-corruption measures can be adapted to suit the circumstances of a particular developing country.

To achieve this, key staff from UNODC may need to first work with partners in key countries and regions who have been tasked with adapting the *Handbook* to local circumstances and then to disseminate successful outcomes that may warrant replication in other, similar countries.





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# ***INTRODUCTION***

## **THE UNITED NATIONS CONVENTION AGAINST CORRUPTION**

### **Article 1\***

#### **Statement of purpose**

The purposes of this Convention are:

- a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- c) To promote integrity, accountability and proper management of public affairs and public property.

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One of the landmark developments in the fight against corruption around the world is the United Nations Convention against Corruption. Negotiations among Member States were concluded in Vienna on 30 September 2003, after two years of deliberation. At the official opening ceremony in Merida, Mexico, in December 2003, nearly 100 States signed the new instrument, a number indicative of the height of concern about the problem, and getting the new Convention off to a very promising start.

The Convention marks a major step forward in international cooperation against corruption. References to specific provisions of the Convention appear throughout this *Handbook* and a more detailed review has been included in Chapter 12, on the topic of international judicial cooperation.

The Convention covers a wide range of measures, both domestic and international, and by no means all are mandatory. Some provisions require stated actions by State Parties (“Each State Party shall...”) and others specify the legitimacy of certain actions but do not make them compulsory (“State Parties may...”).

At first sight the second category may seem a trifle odd. State does not require “permission” from others to take constitutionally-permissible steps to counter corruption. However, many of these are provisions that many negotiators wished to have as mandatory, but on which a sufficient consensus has not yet been reached. The expectation is that in future revisions of the Convention these provisions will be revisited to see whether a consensus has emerged in favour of at least some being made mandatory then.

*Substantive Highlights of the UN Convention against Corruption include:*

**Prevention.** It is a fact of life that corruption can only be prosecuted after the fact, and that prosecutions are time-consuming, costly, uncertain, and can only be brought when evidence of corrupt conduct is available. First and foremost, any anti-corruption strategy should have a strong emphasis on prevention.

An entire chapter of the Convention is therefore dedicated to prevention, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements as to financial and other disclosures, and appropriate disciplinary measures.

Transparency and accountability in matters of public finance should also be promoted. Specific requirements are identified for the prevention of corruption in particularly vulnerable areas of the public sector, such as the judiciary and public procurement. Those who use public services are entitled to expect a high standard of conduct from their public servants.

Preventing public corruption also requires an effort from members of society at large. For these reasons, the Convention calls on countries actively to promote the involvement non-governmental and community-based organizations,sss and to raise both public awareness of corruption and what can be done to combat it.

**Article 6\***

**Preventive anti-corruption body or bodies**

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate that prevent corruption by such means as:

(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

(b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

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**Criminalization.** The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some instances, states are obliged to establish offences; in others they are required to “consider” doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also “trading in influence” and the concealment and “laundering” of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also covered. Other offences address problematic areas in the private sector.

**International cooperation.** States Parties agree to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. They are bound by the Convention to render specific forms of mutual legal assistance in the gathering and transfer of evidence for use in court, and to extradite fugitive suspects. They are also required to undertake measures that will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

**Chapter IV**  
**International cooperation**

**Article 43\***

**International cooperation**

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.
2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

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**Asset recovery.** In a major breakthrough, countries agreed on providing international assistance for asset recovery. This is described as being “a fundamental principle of the Convention.”

The issue is one of particular importance for many developing countries where high-level corruption has plundered the national wealth, and where resources are sorely needed for the reconstruction and rehabilitation of failed institutions under new governments. Reaching agreement on this chapter involved intense negotiations, as the needs of countries seeking the return of illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance would be sought.

Several provisions specify how cooperation and assistance will be rendered. In the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it. The proceeds of other offences covered by the Convention would also be returned to that country, where there was proof of ownership by, or recognition of harm done to, the requesting state. Where this is not the position, priority consideration would be given to the return of confiscated property to the requesting state to enable it to return the assets to prior legitimate owners, or use it to compensate other victims of the offence.

**Chapter V**  
**Asset recovery**

**Article 51\***

**General provision**

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

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Effective asset-recovery provisions will support the efforts of countries to redress some of the worst effects of “grand corruption” while sending at the same time, a message to other officials who may be tempted to move illicit assets off-shore that there is no place where they are safe.

**Implementation mechanisms.** The states that have signed the Convention are now developing the required legislative and administrative measures, and ratifying the new instrument. When the Convention has 30 ratifications, it will come into force as between those state signatories. To promote and review implementation, a Conference of the States Parties has been established by the Convention. This will meet regularly and serve as a forum both for reviewing implementation by States Parties and for facilitating the activities envisaged by the Convention.

**The Convention and the Handbook.** By Article 60, each State Party, to the extent necessary, is required to implement training programmes for personnel responsible for preventing and combating corruption, including the use of evidence gathering and investigative measures. This *Handbook* has been designed as a contribution by the UNODC to these ends.

## **Chapter VI**

### **Technical assistance and information exchange**

#### **Article 60\***

##### **Training and technical assistance**

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:
  - (a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;
  - (b) Building capacity in the development and planning of strategic anti-corruption policy;
  - (c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;
  - (d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;
  - (e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;
  - (f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;
  - (g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;
  - (h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;
  - (i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and
  - (j) Training in national and international regulations and in languages.
2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.
3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements.
4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.
5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.
6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.
7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.
8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

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## CHAPTER 1

# THE ROLE OF THE PROSECUTOR AND THE INVESTIGATOR

### A. THE ROLE OF THE PROSECUTOR

There is considerable diversity in prosecution-investigator arrangements both between countries of the common law and the civil law traditions and within each grouping. Systems of prosecution reflect existing indigenous law to the extent that it has been recognized by the legal system, and in many countries systems includes laws that date back, some cases for generations, to periods of colonization or other foreign occupation. To varying degrees, too, many have embraced more recent reforms to the common law or to European law and have incorporated these into local law, to which, of course, has to be added the separate legal development of each jurisdiction.

Given the multiplicity of arrangements to which these processes have given rise, it is not possible to identify a consistent model at common law for defining the prosecutor-investigator relationship, and within the civil law system there are variations as well. However, there are universally-recognised basic values, and concerns for human rights, that should underpin the prosecution-investigator functions, however these are apportioned, which are addressed later in this Chapter.

In the civil law tradition, the prosecution of suspected offenders is undertaken by a special prosecuting authority, either a public prosecutor or an investigating judge. Where an investigation is in the hands of a judicial officer, continuing judicial oversight is guaranteed. In common law countries, where this does not occur, investigators and prosecutors must, on occasions, apply to a court for permission to conduct certain categories of coercive activity. Later Chapters of this *Handbook* should be read with this particular distinction in mind.

Many common law countries have a strict divide, at least on paper, between the investigator and the prosecutor. The prosecutor is kept apart from the investigation in order to be able to assess the adequacy of evidence, etc. dispassionately and objectively. This is a differentiation that is difficult to sustain in practice, and the dividing line is gradually becoming blurred, especially in specialist cases such as major corruption investigations. Investigators will frequently need the assistance of prosecutors when it comes to assistance with investigatory processes, rather than with an investigation itself. However, increasingly prosecutors are being drawn into much closer relationships with investigators, and it is against this background that this manual has been prepared. It is written, too, in recognition of the fact that there are many commonalities between the various procedural systems, and the fundamental values and ethics that underpin the investigation and prosecution processes are, in truth, universal.

Dr Tony Krone has observed that:

The prosecutor is acquiring an increasingly important role in investigations spurred on by two main factors, which of themselves reflect underlying tensions between the often competing imperatives of fairness and efficiency in common law criminal procedure. The first factor is the desire for efficiency and the need to coordinate investigation and prosecution efforts for the pursuit of crimes that are complex, or that are particularly difficult to regulate or investigate. This has already been recognised for some time in relation to environmental prosecutions which have also been managed without necessarily relying on criminal sanctions. The second is the increasing demand placed on the prosecutor to objectively provide full disclosure of the prosecution case and objectively assess the prosecution case. Increasing attention must therefore be paid by prosecutors to examine exculpatory evidence in the hands of the prosecutor and to consider the nature of the investigation. In both these respects, existing procedures have been shown to be inadequate and the prosecutor is being made responsible for maintaining the integrity of the justice system. The questions that then remain are whether the trust placed in the prosecutor is deserved, whether prosecution decision making is open and transparent and to the extent that it already is, whether it will remain so, and whether there are sufficient accountability mechanisms in place. Certainly, there is a need for guidelines for the investigative prosecutor as that office takes on an increasingly important role.<sup>1</sup>

These comments have much in common with the concerns expressed by critics of the civil law processes.

## **B. THE LAWYER AS PROSECUTOR AND AS DEFENDER**

The role of the prosecutor is significantly different from that of a lawyer for the defence. The defence lawyer has some duties wider than that of simply defending a client, such as not knowingly misleading the court. In contrast, the prosecutor represents society, and therefore has a duty to ensure that a defendant receives the fair trial that is guaranteed by the country's constitution and that is recognised internationally as a fundamental human right by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It is therefore for the prosecutor to defend the public interest – which is to ensure that the Rule of Law is respected, that an accused person receives a fair trial, and that only the guilty are convicted. The prosecutor can only achieve these goals by being objective, honest, impartial and independent.

It is because of the special nature of a prosecutor's role that he or she is obliged to make disclosure to the defence of evidence which might be helpful to the defence but which the prosecutor is not intending to use. Many prosecutors would wish that a similar obligation were imposed on the defence !

The duties and responsibilities of the public prosecutor have been described in the following terms:

... the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions secured over a period. The duty of the prosecutor, as I see it,

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<sup>1</sup> The issues are discussed at length in Dr Tony Krone, *The Limits of Prosecution Authority* (Australian Institute of Criminology paper presented at the Regulatory Institutions Network, Australian National University, 18 November 2003).

is to present to the tribunal a precisely formulated case for the [State] against the accused, and to call evidence in support of it. If a defence is raised that is incompatible with his case he will cross-examine, dispassionately and with perfect fairness, the evidence so called, and then address the tribunal in reply, if he has the right, to suggest that his case is proved. It is not rebuff to his prestige if he fails to convince the tribunal of the prisoner's guilt. His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result. ... It may be argued that it is for the tribunal alone, whether magistrate or jury, to decide guilt or innocence.<sup>2</sup>

In the United Nations Guidelines on the Role of Prosecutors<sup>3</sup>, these duties are described as follows:

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

The standards for prosecutors have been articulated by the International Association of Prosecutors, and these bear setting out in full<sup>4</sup> :

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<sup>2</sup> In a speech, by Christmas Humphreys, Senior Prosecuting Counsel at the Old Bailey, at the Inns of Court in 1955: [1955] CrimLR 739,740-41.

<sup>3</sup> Guidelines on the Role of Prosecutors; adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990  
[http://www.unhchr.ch/html/menu3/b/h\\_comp45.htm](http://www.unhchr.ch/html/menu3/b/h_comp45.htm)



### *1. Professional Conduct*

Prosecutors shall :

- at all times maintain the honour and dignity of their profession;
- always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- at all times exercise the highest standards of integrity and care;
- keep themselves well-informed and abreast of relevant legal developments;
- strive to be, and to be seen to be, consistent, independent and impartial;
- always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- always serve and protect the public interest;
- respect, protect and uphold the universal concept of human dignity and human rights.

### *2. Independence*

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

### *3. Impartiality*

Prosecutors shall perform their duties without fear, favour or prejudice.

In particular they shall:

- carry out their functions impartially;
- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- act with objectivity;
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- always search for the truth and assist the court to arrive at the truth and to do dictates of fairness.

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4 Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on 23 April 1999; <http://www.iap.nl.com/stand2.htm>

#### *4. Role in criminal proceedings*

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- c) when giving advice, they will take care to remain impartial and objective;
- d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore;

- preserve professional confidentiality;
- in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;
- and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- seek to ensure that appropriate action is taken against those responsible for using such methods;
- in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

#### *5. Co-operation*

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

- co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and

- render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

#### 6. *Empowerment*

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- to objective evaluation and decisions in disciplinary hearings;
- to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

### **C. THE DECISION TO PROSECUTE**

In common law jurisdictions, prosecutors are faced daily with decisions as to whether or not to prosecute. In some countries in the civil law tradition, however, (e.g. Czech Republic, Croatia) the decision to prosecute presents no problems: the prosecutor, under the principle of strict legality, is required to prosecute every case where there is sufficient evidence to sustain a prosecution. In others (e.g. Belgium) the prosecutor has the discretion to drop a case completely if there is no public interest in a particular prosecution continuing. In yet another group of civil law countries, prosecuting authorities not only have a discretion whether or not to prosecute, but also have the ability to drop some categories of cases on conditions and without convictions, provided the suspected offender agrees (e.g. to being bound over, or to paying a fine, as in Germany and in The Netherlands).

The exercise of discretion whether or not to prosecute is an exceedingly onerous task, such are the consequences for the suspect, for the victim and for the community alike. A decision to prosecute should only be taken after the evidence and the surrounding factors, including those favourable to the suspect, have been carefully considered. An misguided decision to prosecute can erode public confidence in the criminal process, as well as inflicting undeserved stress on a person wrongfully charged.

A Canadian justice minister once observed that the carrying out of the duties of a prosecutor is difficult:

It requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress...[T]here is no recipe that guarantees the right answer in every case, and in many cases reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error.<sup>5</sup>

However, it has seldom been the position in the common law world that those suspected of criminal offences must automatically face prosecution. A charge is viewed as only being appropriate if it is in the public interest (a situation that also prevails in some countries of the civil law tradition). In determining where the public interest lies, a prosecutor must examine all the factors and the circumstances. These will vary from case to case, and no two cases will be exactly the same. In countries where prosecutors have discretion, they do not act as a “rubber stamp”, as it is not considered appropriate to pursue every single case without regard to the justice of the situation. In general, however, the more serious the offence, the more likely it is that the public interest will require a prosecution if there are reasonable prospects of obtaining a conviction.

In defence of the “legality principle”, and of always prosecuting when there is sufficient evidence to sustain a conviction, it can be said that this helps to eliminate potential areas for corruption within the legal process by removing the discretion. If a suspect is to escape conviction, it must be after the evidence has been heard publicly, in open court. It will not be the result of a decision taken behind closed doors, in a prosecutor’s office. At the level of constitutional principle it is defended as preventing a vacuum in accountability.

As one prosecutor has written:

The constitutional legislator had to solve a very serious problem. If public prosecutors were to be independent, they could not be subject to monitoring by other powers... but [without] monitoring there would be a lack of accountability in the system... so the legislators thought it would solve the problem by preventing prosecutors from having any discretion in starting up a criminal action [by providing] for mandatory criminal action. The outcome is that the legality principle makes the fundamental principles of our Constitution more effective.<sup>6</sup>

The writer acknowledges that the mandatory system would work more effectively when the law provided fewer crimes than it does at present, and argues that “administrative sanctions can be more effective against less serious illegal behaviour”.

In order to ensure consistency in decision making and to promote public understanding of the role of the prosecutor, some countries publish formal statements of their prosecution policies.

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5 Morris Rosenberg, Deputy Minister of Justice, Canada quoted in *The Statement of Prosecution Policy and Practice* (Hong Kong).

6 Gherardo Colombo, *Discretionary power of public prosecution: opportunity or legality principle – advantages and disadvantages* (Council of Europe, Celle, 24 May 2004).

## D. UNIFORM GUIDELINES FOR INVESTIGATIONS

The Conference of International Investigators periodically brings together the major investigative bodies attached to international and bilateral organisations that are involved in providing aid and support.

Their working conferences are designed to improve co-operation among the agencies, to establish good practices in investigations and to give investigators an opportunity to meet and discuss matters of mutual interest. Some 80 representatives from about 30 organisations, including the World Bank and the United Nations, participated in a recent conference, in Brussels in April 2003, where the theme was co-operation in the fight against fraud and corruption.

During the conference the delegates developed 'Uniform Guidelines for Investigations'<sup>7</sup> which the conference expects to be adopted by the organisations that attended. Adopting these Guidelines helps the agencies involved in this type of inquiry the better to carry out their investigations in an open, transparent and accountable manner, and thereby ensure both the protection of fundamental rights and the interests of their organisations. The Standards also act as an international benchmark for the investigative agencies adopting them.

The Standards provide as follows:

### **Principles**

- A. Investigation is a profession requiring the highest personal integrity.
- B. Persons responsible for the conduct of an investigation should demonstrate competence.
- C. Investigators should maintain objectivity, impartiality and fairness throughout the investigative process and timely disclose any conflicts of interest to supervisors
- D. Investigators should endeavour to maintain both the confidentiality and, to the extent possible, the protection of witnesses.
- E. The conduct of the investigation should demonstrate the Investigator's commitment to ascertaining the facts of the case.
- F. Investigative findings should be based on substantiated facts and related analysis, not suppositions or assumptions.
- G. Recommendations should be supported by the investigative findings.

### **Procedural Guidelines**

#### *Preparation*

- 1. Complaints brought to the attention of the Investigating Officer (IO) should be subject to careful analysis and handling.
- 2. Complaints, which may include criminal conduct or acts contrary to the rules and regulations of the Organization, should be registered, reviewed and evaluated to determine if they fall within the jurisdiction or authority of the IO.
- 3. Information received by the IO should be protected from unauthorized disclosure.
- 4. The identities of those who make complaints to the IO should be protected from unauthorized disclosure.
- 5. Every investigation should be documented by the IO.
- 6. Decisions on which investigations should be pursued, and on which investigative activities are to be utilized in a particular case, rest with the IO, and should include in any decision whether there is a legitimate basis to warrant the investigation and commit the necessary resources.
- 7. The preparation for the conduct of an investigation should include necessary research of the relevant national laws, and rules and regulations of the organization; the evaluation of the risks involved in the case; the application of analytical rigor to the evidence to be obtained and the assessment of the value, relevance and weight of the evidence; the measurement of the evidence

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7 [europa.eu.int/comm/anti\\_fraud/press\\_room/pr/2003/09\\_en.html](http://europa.eu.int/comm/anti_fraud/press_room/pr/2003/09_en.html)

against the relevant laws, rules and regulations; and the consideration of the means and time by which the findings should be reported and to whom.

8. The planning and conduct of the investigation should reasonably ensure that the resources devoted to an investigation are proportionate to the allegation and the potential benefits of the outcome.

9. The planning should include the development of success criteria for the identification of appropriate and attainable goals for the investigation.

#### *Investigative Activity*

1. Investigative activity should include the collection and analysis of documents and other material; the review of assets and premises of the Organization; interviews of witnesses; observations of the Investigators; and the opportunity for the subject(s) to respond to the complaints.

2. Investigative activity and critical decisions should be documented regularly with the IO managers.

3. Investigative activity should require the examination of all evidence, both inculpatory and exculpatory.

4. Evidence should be subject to validation including corroborative testimonial, forensic and documentary evidence.

5. To the extent possible, interviews should be conducted by two Investigators.

6. Documentary evidence should be identified and filed with the designation of origin of the document, location and date with the name of the filing Investigator.

7. Evidence likely to be used for judicial or administrative hearings should be secured and custody maintained.

8. Investigative activities by an IO should not be inconsistent with the rules and regulations of the Organization, and with due consideration to the applicable laws of the State where such activities occur.

9. The IO may utilize informants and other sources of information and may assume responsibility for reasonable expenses incurred by such informants or sources.

10. Interviews should be conducted in the language of the person being interviewed using independent interpreters, unless otherwise agreed.

11. The IO may seek advice on the legal, cultural, and ethical norms in connection with an investigation.

#### *Confidentiality and the protection of witnesses*

1. Where it is has been established that a witness, or other person assisting in the IO's investigation, has suffered retaliation because of assistance in an investigation, the IO should undertake, or otherwise engage management to undertake, actions so as to prevent such acts from taking effect or otherwise causing harm to the person.

2. Where an individual makes a complaint on a matter subject to the authority of the IO, that individual's identity should be protected from unauthorized disclosure by the IO.

3. Where there has been an unauthorized disclosure of the identity of a witness, or other person assisting in the IO's investigation, by a staff member of the IO, available disciplinary measures should be pursued.

#### *Due Process*

1. Subjects of investigation should be advised by the IO of the complaints against them, with the time and manner of disclosure to be made keeping in mind fairness to the subject, the need to protect the integrity of the investigation and the interests and rules of the Organization.

2. Investigative methods may include the gathering of documentary, video, audio, photographic or computer forensic evidence at the election of the IO, provided such activities are not inconsistent with the applicable rules and regulations of the Organization, and with due consideration to the applicable laws of the State where the activity occurs.

3. Information received from witnesses and subjects should be documented in writing.

#### *Findings*

1. Where the investigative findings substantiate the complaint, those findings should be reported to the appropriate managers along with recommendations for corrective action, where appropriate, which may include redress in courts, in disciplinary or debarment proceedings and in other sanctions available to the manager, and for the steps needed to minimize the risk of recurrence.
2. Where investigative findings are either insufficient to substantiate or discredit the complaint, those findings should be reported and the affected subject cleared.
3. Where investigative findings adduced during an investigation tend to show that the laws of a State have been violated, consideration should be given to referring the case to the appropriate national law enforcement agency.
4. Where there are investigative findings tending to prove that the complaint was made in bad faith or with malicious or negligent disregard of the facts, the IO may recommend that appropriate action be taken against the complainant. However the mere fact that the complaint is found by the IO to be unsubstantiated is insufficient for such response.
5. The standard of proof should conform to the standards required by the Organization and/or by the national jurisdiction for referrals to them, but should generally be reasonably sufficient evidence.
6. The IO should strive to ensure that its recommendations are implemented in a timely fashion and reviewed.

It is against the background of these principles and the ethics they embody that this *Handbook* has been prepared.

## **E. THE ROLE OF THE INVESTIGATOR/PROSECUTOR OUTSIDE THE FIELD OF ENFORCEMENT**

This *Handbook* has been prepared on the basis that most investigators and prosecutors will not see their role as being confined merely to performing their functions within existing rules and frameworks. They will, of course, respect the rules in their day-to-day activities, but should be alive to the continuing and broader need for reforms, and contribute insights from their daily work. In particular, they will have a strong interest in corruption prevention. There can be no doubt that investigators and prosecutors are uniquely placed by their work experience to play a continuing role in shaping their country's anti-corruption agenda.

For this reason, the *Handbook* goes beyond the everyday business of investigation and prosecution. It includes material designed to stimulate investigators and prosecutors to develop the reform element of their role in an informed and effective fashion.

## CHAPTER 2

### CORRUPTION DEFINED

There is no comprehensive, and universally accepted definition of corruption. The origin of the word is from the Latin *corruptus* (spoiled) and *corrumpere* (to ruin; to break into pieces). The working definitions presently in vogue are variations of "the misuse of a public or private position for direct or indirect personal gain".<sup>8</sup>

Attempts to develop a more precise definition invariably encounter legal, criminological and, in many countries, political problems. When the negotiations of the United Nations Convention against Corruption began in 2002, one option under consideration was to avoid the problem of defining corruption by simply listing a whole series of specific types or acts of corruption. After much discussion "corruption" was not defined at all, but repeated examples of what is covered by the expression appear throughout the text.<sup>9</sup>

Many specific forms of corruption are clearly understood as such, and are the subject of numerous legal and academic definitions. Many are criminal offences, although in some cases governments consider that a specific form of corruption (such as nepotism) may best be dealt with by way of regulatory or civil law controls. Some of the more commonly encountered forms of corruption are considered below.

#### **1. "Grand" and "petty" corruption**

"Grand corruption" is an expression used to describe corruption that pervades the highest levels of government, engendering major abuses of power. A broad erosion of the rule of law, economic stability and confidence in good governance quickly follow. Sometimes it is referred to as "state capture", which is where external interests illegally distort the highest levels of a political system to private ends.

"Petty corruption", sometimes described as "administrative corruption", involves the exchange of very small amounts of money, and the granting of small favours. These, however, can carry considerable public losses, as with the customs officer who waves through a consignment of high-duty goods having been bribed a mere \$50 or so.

The essential difference between grand corruption ("state capture") and petty corruption (day-to-day administrative corruption) is that the former involves the distortion of central functions of government by senior public officials; the latter develops within the context of functioning governance and social frameworks.

Corruption is said to be "systemic" where it has become ingrained in an administrative system. It is no longer characterised by actions of isolated rogue elements within a public service. Where minor acts of petty corruption occur it is often thought best to leave these to be dealt with by way

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<sup>8</sup> <http://www.ustreasury.hu/nc500/lessons/glossary.htm>

<sup>9</sup> Issues relating to attempts to define corruption for purposes such as policy development and legislative drafting are discussed in more detail in the United Nations Manual on Anti-Corruption Policy, Part II.



of administrative sanction (demotion, dismissal etc.), rather than invoke the whole weight of the criminal process.

When patterns of “petty corruption” are uncovered, investigators should consider whether it is possible for them to track the way in which the proceeds are dispersed. Frequently, the front-line officials are not the principal villains but are being manipulated by their superiors.

## **2. “Active” and “passive” corruption**

In discussions of corruption offences the expressions “active bribery” and “passive bribery” often occur. “Active bribery” usually refers to the act of offering or paying a bribe, while “passive bribery” refers to the requesting or receiving of a bribe. A corrupt transaction may be initiated under either rubric: by a person who offers a bribe or by an official who requests one. These definitions, used in a number of legal systems, are employed in this *Handbook*.

There is a difference between a corrupt action and an attempted, or incomplete, offence. For example, “active bribery” would cover cases where the payment of a bribe has taken place, but might not cover cases where a bribe was offered but not accepted. In the formulation of comprehensive national anti-corruption strategies care should be taken to ensure that both situations are covered.

## **3. Bribery**

### **Article 15\***

#### **Bribery of national public officials\***

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

\*UN CONVENTION AGAINST CORRUPTION

Bribery is the act of conferring a benefit in order improperly to influence an action or decision. It can be initiated by an official who asks for a bribe, or by a person who offers to pay one. Bribery is probably the most common form of corruption. Definitions or descriptions appear in several international instruments, in the domestic laws of most countries as well as in academic publications.

Typically, it is used to describe a payment extracted by a public official from an unwilling member of the public before the citizen can receive the service to which he or she is entitled. Strictly speaking, such a transaction is not one of a “bribe” being given by an accomplice in corruption, but a “payment being extorted” from an unwilling victim. However, in this *Handbook* the more common usage is adopted.

The “benefit” conferred by a “bribe” can take a variety of forms: cash, company shares, inside information, sexual or other favours, entertainment, employment or, indeed, the mere promise of a benefit in the future (such as a retirement job).

The benefit can pass directly to the person bribed, or indirectly, to a third party such as a friend, relative, associate, favourite charity, private business, political party or election campaign.

The conduct for which the bribe is paid can involve a positive act on the part of the official (the making of a particular decision), or it can be passive (with the official declining to do something that he or she is obliged to do). It can be a bribe paid “according to the rule” (to obtain something the official is withholding but is under a public duty to provide); or it can be “against the rule” (a payment to encourage an official to ignore the rules in favour of the person offering the bribe). Bribes can be paid individually, on a case-by-case basis, or as part of a continuing relationship in which officials receive regular benefits in exchange for regular favours.

Once bribery has occurred, it can lead to other forms of corruption. By accepting a bribe, an official becomes susceptible to being blackmailed and coerced into further, and more serious, derelictions of public duties.

Most international and national legal definitions seek to criminalise bribery in all its forms. However, some seek to limit criminalisation to situations where the recipient is a public official or where the public interest is affected, leaving other cases of bribery to be resolved by non-criminal or non-judicial means. Some countries exclude bribery in the private sector, however, Article 21 of the UN Convention does provide that States Party “shall consider” criminalizing forms of bribery in the private sector.

In some jurisdictions where only the bribing of public officials is criminalised, the definition of “public official” is defined so broadly as to extend to a private individual e.g. to a person who is not actually a public official but who is temporarily discharging public functions. Examples of such functions would be the discharge of electoral functions, or where there is a jury, the performance of jury duties.

Any public official who has the power to make decisions or take actions affecting others is at risk, although some functions are more vulnerable than others (tax collection, customs, and offices that issue permits). Politicians, regulators, law enforcement officials, judges, prosecutors and inspectors are also potential targets.

**Specific examples of bribery include:**

- a) Corruption against the rule. A payment or benefit is provided to ensure that the giver or someone connected to him or her receives a benefit to which they are *not* entitled.
- b) Corruption with the rule. A payment is made to ensure that the giver or someone connected to him or her actually receives a service to which they *are* lawfully entitled.
- c) Offering or receiving improper gifts, gratuities, favours or commissions. In some countries, public officials commonly accept tips or gratuities in exchange for their services, frequently in violation of relevant codes of conduct. As links always develop between payments and results, such payments become difficult to distinguish from bribery or extortion.
- d) Bribery to avoid liability for taxes. Officials in revenue collecting agencies, such as tax and customs, may be asked to reduce the amounts demanded or to overlook evidence of wrongdoing, including evasion or similar crimes. They may also be invited to ignore illegal imports or exports, or to turn a blind eye to illicit transactions, such as money-laundering.
- e) Bribery in support of fraud. Payroll officials may be bribed to participate in abuses such as listing and paying non-existent employees (“ghost workers”).

- f) Bribery to avoid criminal liability. Law enforcement officers, prosecutors, judges or other officials may be bribed to ensure that criminal activities are not properly investigated or prosecuted or, if they are prosecuted, to ensure a favourable outcome.
- g) Bribery in support of unfair competition for benefits or resources. Public or private sector employees responsible for making contracts for goods or services (public procurement) may be bribed to ensure that contracts are made with the party that is paying the bribe, and on unjustifiably favourable terms. Where the bribe is paid out of the contract proceeds themselves, it is described as a "kickback" or secret commission.
- h) Private sector bribery. Corrupt banking and finance officials are bribed to approve loans that do not meet basic security criteria and are certain to default, causing widespread economic damage to individuals, institutions and economies. Just as bribes can be offered to public officials conducting public procurements, so, too, can bribes pollute procurement transactions wholly within the private sector.
- i) Bribery to obtain confidential or "inside" information. Employees in the public and private sectors are often bribed to disclose confidential information and protected personal details for a host of commercial reasons.
- j) Influence peddling: Public officials or political or government insiders sell illicitly the access they have to decision-makers. Influence peddling is distinct from legitimate political advocacy or lobbying (see Article 18 of the UN Convention). In some countries, legislators demand bribes in exchange for their votes in favour of particular pieces of legislation.

#### **4. Embezzlement, theft and fraud**

In the context of corruption, embezzlement, theft and fraud all involve stealing by an individual exploiting his or her position of employment. In the case of embezzlement, property is taken by someone to whom it has been entrusted (e.g. a payclerk).

Fraud involves the use of false or misleading information to induce the owner of property to part with it voluntarily. For example, an official who helps himself to part of a shipment of food aid, but is not responsible for its administration, would be committing theft; an official who induces an aid agency to oversupply aid by misrepresenting the number of people in need of it, would be committing fraud.

"Theft", per se, goes well beyond the scope of any definition of corruption. Using the same example of the relief shipment, an ordinary bystander who steals aid packages from a truck would be committing theft, but not of a kind that would fall within commonly-accepted definitions of corruption. However, "embezzlement" - essentially the theft of property by someone to whom it was entrusted - is universally regarded as falling within corruption definitions wherever it occurs, carrying with it, as it does, a breach of a fiduciary duty.

Examples of theft, fraud and embezzlement abound. Virtually anyone responsible for storing or handling cash, valuables or other tangible property is in a position to steal it or to assist others in stealing it, particularly if auditing or monitoring safeguards are inadequate or non-existent. Employees or officials with access to company or government operating accounts can make unauthorized withdrawals, or pass to others the information required for them to do so.

Elements of fraud can be more complex. Officials may create artificial expenses; "ghost workers" may be added to payrolls, "ghost roads" may be constructed at great cost, and false bills submitted for non-existent goods, services, or travel expenses. The purchase

or improvement of privately-owned houses and farms may be billed against public funds – for example, government-paid workers may be used illegally to repair and paint officials' private homes. Employment-related equipment, such as motor vehicles, may be used for private purposes without requisite permissions. The costs to the public purse may not seem great, but in one case, the illicit use of a World Bank-funded fleet of vehicles to take the children of officials to school was accounting for fully 25 per cent of the fleet's total running costs.

### **5. Extortion**

Whereas bribery involves the use of payments and positive incentives, extortion relies on coercion to induce cooperation, such as threats of violence or the exposure of sensitive information. As with other forms of corruption, the loser can be the general public interest, individuals adversely affected by a corrupt act or decision, or both. In extortion cases, however, there is a very real "victim": the person who is coerced into submitting to the will of the official.

Extortion may be committed by government officials but they can also be the victims of it. For example, a person seeking a favour can extort payment from an official by making threats. Investigators are all too often the subject of threats to themselves and their families' safety.

In some cases, extortion may differ from bribery only in the degree of coercion involved. A doctor may solicit a illicit payment for seeing a patient more quickly than would otherwise be the case. But if the need to see the doctor is a matter of medical urgency, and the payment must be made to gain access to the doctor, the demand can be more properly characterised as "extortion".

Officials in a position to initiate or conduct criminal prosecution or punishment can use the threat of prosecution or punishment as a means for extortion. In many countries, people involved in minor incidents, such as traffic accidents, may be threatened with more serious charges unless they "pay up". Alternatively, officials who have committed acts of corruption or other wrongdoings may be threatened with exposure unless they themselves pay up. Low-level extortion, such as the payment of "speed money" to ensure timely consideration and decision-making of minor matters by officials, is widespread in many countries.

In many situations it is not always clear what the position is: when a citizen makes a payment without being asked, the individual may simply be making it because of an understanding that if the payment is not made, the services to which the citizen is entitled will be withheld. Here the system itself is systemically corrupt. The position is further complicated where a society has long-standing traditions of gift-giving unconnected to expectations of special or improper treatment.

### **6. Abuse of discretion**

#### **Article 19\***

##### **Abuse of functions**

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, 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 an undue advantage for himself or herself or for another person or entity.

\*UN CONVENTION AGAINST CORRUPTION

In many cases, corruption involves the abuse of discretion. A customs official may have to assess the value of a consignment of goods or decide which of several similar categories should be used to assess duty. An official responsible for government contracting may exercise discretion to purchase goods or services from a company in which he or she holds a personal interest. Another may propose real estate developments that will increase the value of his or her own property.

Such abuses are often associated with bureaucracies in which there are broad individual discretions and inadequate oversight and accountability structures. They also flourish where decision-making rules are so complex that they neutralize the effectiveness of any accountability mechanisms that do exist. Many anti-corruption strategies involve a reassessment of all areas of discretion, and attempt to limit these to a minimum.

### **7. Favoritism and nepotism**

By definition, favouritism, nepotism and clientelism all involve abuses of discretion, although a number of countries do not criminalise the conduct (Article 7 of the UN Convention covers merit selection without even mentioning nepotism). Such abuses usually involve not a direct personal benefit to an official but promote the interests of those linked to the official, be it through family, political party, tribe, or religious group.

A corrupt official who hires a relative (nepotism) acts in exchange, not of a bribe but of the less tangible benefit of advancing the interests of others connected to the official. The unlawful favouring of - or discrimination against - individuals can be based on a wide range of group characteristics: race, religion, geographical factors, political or other affiliation, as well as personal or organizational relationships, such as friendship or shared membership of clubs or associations.

This being said, there are occasions where public policy dictates that “affirmative action” programmes be implemented, or that steps be taken to ensure that the public service is fully representative of the people it serves. In these examples, discrimination is likely to be lawful, or even required by law.

### **8. Creating or exploiting conflicting interests**

As noted in the United Nations Manual on Anti-corruption Policy, most forms of corruption involve the creation or exploitation of some conflict between the professional responsibilities of an individual and his or her private interests. The offering of a bribe creates such a conflict where none may have existed hitherto.

By contrast, most cases of embezzlement, theft or fraud involve an individual yielding to temptation and taking undue advantage of a conflict that already exists. In both the public and private sector, employees and officials are routinely confronted with circumstances in which their personal interests conflict with those of their responsibility to act in the best interests of the state or their employer. Well-run organisations have systems to manage these situations, usually based on clear codes of conduct.

### **9. Improper political contributions**

It is extremely difficult to make a distinction between legitimate contributions to political organizations, and payments made to influence events illicitly once the recipients are in power. A donation made because a donor supports a political party and wishes to increase its chances of being elected is usually not a corrupt act; it is an important part of the political system of many countries, and in some it is considered to be a basic right of self-expression protected by the constitution. A very large donation made with the intention or expectation that the party will, once in office, unduly favour the interests of the donor is tantamount to the payment of a bribe.

In most democracies regulating political party financing has proved difficult, even in those countries that opt for the public funding. A common approach to combating the problem is to require the disclosure of contributions, so ensuring that both the donor and recipient are politically accountable. Another measure is to limit the size of individual contributions to prevent the danger some donors having too much influence.

## CHAPTER 3

### PRECONDITIONS FOR SUCCESSFUL INVESTIGATIONS

There are no universal rules for investigating corruption, but some of the following elements, if incorporated into national strategies, will assist in the development of structures that facilitate the carrying out of investigations effectively. Information derived from investigations should be capable both of supporting criminal prosecutions and of assisting in the reorganisation of public or private administration to make these more resistant to corruption.

The autonomy and security of investigations are both important, not only to encourage and protect those who report corruption or assist in other ways, but also to ensure that the results of investigations, whether they uncover corruption or not, are valid and credible.

#### **1. Independence and accountability of investigators and prosecutors**

It is axiomatic that victims, witnesses and informants must receive protection against those under investigation. Equally important is the “protection” of officials responsible for investigating corruption through guarantees of independence. Functional independence ensures that investigations are effective, by reducing opportunities for corrupt officials to interfere. Independence also instils confidence both in the investigators and in the bureaucracies or agencies they investigate. Where the investigation is independent, the public at large is assured that complaints will be investigated professionally and fairly, and that the investigators and prosecutors can be trusted to act properly and in the public interest.

Article 36 of the UN Convention Against Corruption is mandatory on State Parties. It requires each of them “in accordance with the fundamental principles of its legal system, [to] ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence.”

The mechanics of functional independence vary from one system to another. Most incorporate elements of judicial independence to ensure the integrity of court proceedings, but the means for securing autonomy for the prosecutorial and investigative functions differ. In systems where criminal investigations are carried out by magistrates or other judicial officials, such functions fall within the ambit of judicial independence.

Where investigations and prosecutions are carried out by non-judicial personnel (e.g. in common law jurisdictions), judicial oversight may still play a role in guaranteeing their independence and their accountability. As such oversight applies only to cases that come before the courts, other ways must be found to monitor key functions, such as the conduct of investigations and the manner in which decisions are taken to determine what is to be investigated and ultimately whether a prosecution is to be brought.

#### **Article 11\***

##### **Measures relating to the judiciary and prosecution services**

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and

without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

\*UN CONVENTION AGAINST CORRUPTION

The problem of *quis custodiet ipsos custodes?* (Who shall guard the guardians?) also arises when structures are being developed to separate corruption investigations from other elements of government activity. Just as the agencies involved must be independent enough to protect their functions against improper interference, they must also be subject to sufficient oversight to prevent abuses and to identify any occurrences of corruption on the part of investigators and prosecutors themselves. Although the problem of internal corruption is common in law enforcement and prosecutorial agencies generally, it is arguably more critical in dedicated anti-corruption agencies. Where these exist there will almost certainly be attempts to bribe, coerce or otherwise influence investigators, often by sophisticated and powerful corrupt officials or organized criminal groups. For their own protection, as well as to serve the public interest, it is essential for investigators to be accountable for their actions. Such oversight should not extend, however, to interference with operational decisions, such as whether a particular individual should be investigated, what methods should be used, or whether a case warrants criminal prosecution. Decisions to discontinue investigations should, however, be subject to independent scrutiny.

## **2. Codes of conduct**

The codification of clear and unambiguous standards of conduct, in which all applicable standards are assembled into a comprehensive code for specified groups of employees, serve several purposes:

- a) They establish the standards which the leaders of the organization and all the managers are pledged to follow (and so set a clear example of “walking the talk”).
- b) They elaborate what is expected of a specific employee or group of employees, thus helping to instill fundamental values that curb corruption. In many cases, codes are also “aspirational”: they include descriptions of conduct that is expected as well as procedural rules and penalties for dealing with breaches of the code.
- c) They provide a basis for employee training and the discussion of standards of conduct.
- d) They can form the basis for disciplinary action in cases where an employee breaches or fails to meet prescribed standards and set out procedures and sanctions for non-compliance.
- e) They enable employees to know in advance (as is their right) what the standards are, making it more difficult to fabricate disciplinary action as a way of improperly intimidating or removing employees.

Codes of conduct will often include anti-corruption elements, but also common are such basic performance standards as fairness, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, responsible use of organizational resources and, where appropriate, standards of conduct towards the public.



Codes may be developed for the entire public service, specific sectors of the public service or, in the private sector, specific companies or professional bodies such as doctors, lawyers or public accountants. Several models have been developed to assist those developing such codes.

However, it is important to bear in mind the fact that the way in which a code is created can be at least as valuable as the resulting code itself. By engaging staff across an organization in discussions as to the organization's values and the standards of conduct expected of all staff, the content of the code is internalized and a sense of ownership developed. Imposed codes of conduct have seldom had any significant effect.

Following consideration of corruption issues by the Fifth Session of the United Nations Commission for Crime Prevention and Criminal Justice, the General Assembly in 1996 adopted an International Code of Conduct for Public Officials<sup>10</sup>. The Code (which has no legal force as such) emphasizes:

- (a) The need for loyalty of officials to the public interest.
- (b) The pursuit of efficiency, effectiveness and integrity.
- (c) The avoidance of bias or preferential treatment, and ensuring responsible administration of public funds and resources.
- (d) The avoidance of conflicts of interest by disqualification or non-participation where a private interest conflicts with a public responsibility while in office and with respect to previous offices, and
- (e) The need for disclosures of assets, the refusal of gifts or favours and the protection of confidential information obtained in the course of public office.

The Code also discusses issues arising from conflicts between partisan political activity and the public interest, stressing the need to contain partisan political activity by public officials and outlining exceptions to the general principle. Officials should not engage in major political activity unless their office is itself a political one, that is, an elected office. Routine political activities should be limited to those that do not impair either the function of the office or public confidence in it, thus a flexible balance is struck that would vary according to the nature of both the political activities in question and the particular public office involved.

Of particular importance is the Code of Conduct for Law Enforcement Officials developed by the UN High Commissioner for Human Rights and adopted by General Assembly resolution 34/169 of 17 December 1979<sup>11</sup>.

This stresses that:

- (a) In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons (Article 2).
- (b) The use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used (Article 3).

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10 <http://www.un.org/documents/ga/res/51/a51r059.htm>

11 [http://www.unhchr.ch/html/menu3/b/h\\_comp42.htm](http://www.unhchr.ch/html/menu3/b/h_comp42.htm)

- (c) Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper. (Article 4).
- (d) No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment (Article 5, embodying standards from other UN instruments).
- (e) Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required (Article 6), and that,
- (f) Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts. Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and within their agencies (Article 7).

As with the United Nations, the Council of Europe has developed a Model Code for the Conduct of Public Officials<sup>12</sup> for use by countries engaged in the drafting of their own codes of conduct. Many of the standards are similar, but the Council of Europe's Code covers a wider range of public service conduct.

The more important elements from an anti-corruption standpoint include:

- (a) Avoidance of conflicts of interest (articles 8 and 13-16),
- (b) A duty to act loyally (article 5), legally (article 4), and impartially (article 7);
- (c) Prohibitions concerning gifts, improper offers and other forms of undue influence (articles 18-20); and,
- (d) The accountability of public officials (articles 10, 25)

Of particular interest are Articles 13-16, which deal with conflicts of interest in more detail than most other instruments. The provisions cover a range of possible conflicts of interest, and place positive obligations on the official involved (who will often be the only person aware of the existence of a conflict). The official is required to identify and disclose potential conflicts, to take appropriate steps to avoid them, and to comply with any legal or operational decisions taken by others to resolve any conflicts. It also requires that any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

The need to strike a balance between legitimate forms of political activity and partisanship are also discussed. The provisions deal with public officials in general but not with those who serve, by reason of their election, to partisan political positions.

<b>Article 8*</b> <b>Codes of conduct for public officials</b>
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<sup>12</sup> <http://cm.coe.int/ta/rec/2000/2000r10.htm>

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.
2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.
3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.
4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.
5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.
6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

\*UN CONVENTION AGAINST CORRUPTION

### **3. Adequate training and resources for investigators**

Adequate training and resources are necessary to ensure that reported cases are dealt with effectively and to encourage those aware of corruption to come forward with information. As observed above, informants are more likely to assume the risk of reporting if they are confident that effective action against corruption will be the result. Such confidence requires assurances not only that investigations will themselves be independent and free of corruption, but also that investigators are actually capable of detecting it, gathering evidence against offenders, and taking whatever measures are needed to discipline the offender and to eliminate recurrences. The commitment of significant resources to these ends also sends a powerful signal that, at the highest levels of Government, there is a strong commitment to the prevention and elimination of corruption. This commitment can serve both to deter potential offenders and to encourage informants to come forward.

The wide range of corruption types requires an equally wide range of specific skills and knowledge on the part of investigation teams. Most will find frequent need for legal and accounting skills to identify, preserve and present evidence in criminal proceedings and disciplinary proceedings. The number of investigators with the necessary skills and training to work effectively generally depends on the extent of the resources available. As well as personnel and funding, other resources, such as systems for the creation, retention and analysis of records, are also important. The strongest evidence of high-level corruption will often be a long-term pattern of complaints about lesser abuses.

## **B. CASE SELECTION STRATEGIES**

Not every suspected case can be fully investigated and prosecuted. Given the extent of corruption, the range of cases likely to exist, the variety of possible outcomes, and the limits imposed by

human and financial resource constraints, most national anti-corruption programmes will find it necessary to make priority choices as to the cases to pursue, and the outcomes to seek.

Prioritizing involves the exercise of considerable discretion. This must be managed carefully to ensure consistency, transparency and the credibility of both the decision-making process and its outcomes. A major element of the process is the setting and, where appropriate, the publication of criteria for case selection (sometimes referred to as a prosecution policy paper)<sup>13</sup>. This can help to ensure that like cases are dealt with alike, and reassure those who make complaints, as well as members of the general public, that a decision not to pursue a particular reported case is based on objective criteria and not on improper or corrupt motives.

Criteria generally to be considered should include the following:

**1. Seriousness and prevalence of the type of corruption**

Assuming that the fundamental objective of a national anti-corruption strategy is to reduce overall corruption as quickly as possible, priority may be given to cases that involve the most common forms of corruption. Where large numbers of individuals are involved, the cases will often lead to proactive outcomes such as the setting of new ethical standards and training of officials, rather than criminal prosecutions and punishments. Where there are patterns of widespread and longstanding misdemeanours, forms of amnesty may be appropriate so that a new page is turned, where officials are made aware that their working environment has changed and that the rules will henceforth be enforced.<sup>14</sup>

**2. Legal nature of the alleged type of corruption**

Broadly speaking, corruption offences can be characterized being either criminal or administrative misconduct. Conduct that is not a crime cannot be punished as such. The nature of the offence will also often determine which agency deals with it and how it is prioritized.

**3. Cases that are needed to set precedents**

Priority can be given to cases that raise social, political or legal issues which, once an initial "test" case has been resolved, will be applicable to many future cases. Examples include dealing publicly with common conduct not hitherto perceived as being corrupt in order to change public perceptions, and cases that test the extent of criminal corruption offences, and so either set a useful legal precedent or establish the need for legislation to close a legal gap. In the case of legal precedents, time-consuming appeals may be required which is another reason for starting court proceedings as soon as possible after a case that raises the relevant issues has been identified.

**4. Viability or probability of satisfactory outcome**

Cases may be downgraded or deferred if an initial review establishes that no satisfactory outcome can be achieved. Examples include cases in which the only desirable outcome is a criminal prosecution, but a suspect has died or disappeared, or essential evidence has been lost. A suspect may also already be in prison serving a lengthy term, or be extremely old or critically ill. In the last two instances it may not be in the public interest to prosecute as this could be seen to be excessively oppressive conduct. Part of the assessment of such cases should also include a review of possible outcomes to see if other appropriate remedies may be available.

**5. Availability of financial, human and technical resources**

The overall availability of resources is always a concern in determining how many cases can be dealt with at the same time or within a given period. The tendency for the burden of particular cases to fluctuate as investigations proceed requires a periodic reassessment of caseloads.

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<sup>13</sup> The Code of Conduct for Prosecutors in the United Kingdom, issued under Section 10 of the Prosecution of Offences Act, gives guidance on the general principles to be applied when making decisions about prosecutions. <http://www.cps.gov.uk/publications/prosecution/>

<sup>14</sup> For a discussion, see "Dealing with the past; amnesty, reconciliation and other alternatives: Case Study No.27 UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

Generally such factors will not be related to the setting of priorities with respect to the type of case taken up or the priority of individual cases, but there are exceptions. A single major case, if pursued, may result in the effective deferral of large numbers of more minor cases, and the unavailability of specialist expertise may make specific cases temporarily impossible to pursue. An assessment of costs and benefits before decisions are made is thus important. In the case of "grand corruption" and transnational cases there can be substantial costs in areas such as travel and foreign legal services, but the public interest may demand that examples are made of corrupt senior officials for reasons of deterrence and credibility, to recover large proceeds hidden either at home or abroad and to restore faith in government.

#### **6. Criminal intelligence criteria**

As overall expertise and knowledge are gained and greater numbers of individual cases are dealt with, intelligence information can be gathered and assessed. Such an evaluation will usually include research and the detection of overall corruption patterns, with conclusions being drawn about which the most prevalent offences are, and which are causing the most social or economic harm. It will also include the gathering of confidential information about corruption patterns and links between specific offenders or organized criminal groups. Such procedures will assist in identifying cases with high priority and those that merit the allocation of significant resources.

### **C. CASE MANAGEMENT**

Some corruption cases are simple and straightforward, with witnesses and evidence readily available. In some, a simple integrity test may have established the corrupt tendencies of an official, meaning that no further investigation is necessary. Where corruption is systemic, the challenge is one of volume. It is all too easy for an enforcement agency to devote itself almost entirely to addressing minor infractions, to the neglect of more serious and much more damaging conduct on the part of more senior officials. This may call for processes that are essentially administrative in nature, rather than invoking the full force and weight of the criminal law. It is rather a matter of engineering fundamental changes in expectations of long standing, rather than invoking a multitude of criminal procedures.

More serious corruption investigations (particularly those involving high-level or "grand" corruption) can be time-consuming, complex and expensive. To ensure the efficient use of resources and successful outcomes, the elements and personnel involved must be managed effectively. Teams working on specific cases will often require expertise in the use of investigative techniques ranging from financial audits to intrusive techniques.

If, from the outset, legal proceedings are not excluded as a possible outcome, there may also be a need for legal expertise in areas such as the law of evidence and the human rights constraints on search and seizure. In complex investigations, teams may be assigned to specific target individuals, or to focus exclusively on individual aspects of the case. One group might be engaged in the tracing of proceeds, for example, while others interview witnesses or maintain surveillance of suspects.

These functions should be conducted in accordance with an agreed strategy and coordinated under the supervision of an investigative manager or lead investigator who should receive information about the progress of investigators on a regular and frequent basis.

The sequencing of actions can be of the greatest importance. The interviewing of witnesses and the conducting of search and seizure operations run the risk of disclosing to outsiders the existence of an investigation and, to some degree, its purpose. Thus, they should not be

undertaken until after other measures have been taken that will only be effective if the target has not been alerted. On the other hand, such procedures may become urgent if it appears that evidence could be destroyed or illicit proceeds moved outside the jurisdiction. Coordinating these fluctuating factors to maxim effective requires competent and well-informed senior investigators.

Investigative management must be flexible and take account of information as it accumulates. Investigators develop theories about what an individual item of information may mean and how the various pieces may fit together, but such theories may require refinement as an investigation proceeds. Investigators must always be open to other possibilities when new evidence appears that is inconsistent with the particular theory that is being pursued. Investigations of particular incidents of corruption will often turn up evidence of other, hitherto unsuspected, corruption or other forms of criminal activity.

#### **D. SELECTION OF THE INVESTIGATION TEAM**

The selection of an effective team is crucial to the success of an investigation. Members should possess the specific investigative skills likely to be needed, should have proven integrity, and should be willing to undertake the work. The team must be made aware of the personal implications of the investigation, in particular when undercover work is to be conducted. Skills needed to conduct large-scale corruption investigations typically include financial investigation, undercover and surveillance, information technology, interviewing and witness preparation, report writing and the ability to analyse intelligence. The backgrounds of investigators should be thoroughly checked from time to time, including social and family ties and lifestyles.

#### **E. MANAGEMENT OF INFORMATION**

##### **1. Internal information**

As an investigation proceeds, information should be made available promptly to those who may require it. It should be retained in a format that is cross-referenced and is quickly accessible so that it can be reviewed as needed and so that links to other relevant information can be made.

Each piece of information should be assessed for its relative reliability, sensitivity and confidentiality. The assessment should be linked to the information itself as the degree of sensitivity may not be apparent to those unfamiliar with the information. For example, disclosure of facts that may seem insignificant in the context of a continuing investigation may inadvertently identify a source who had been promised anonymity, thus possibly endangering the source and certainly undermining the ability of investigators to obtain similar information in the future.

##### **2. Media relations**

Another critical element is media relations. Ensuring that accurate, timely and appropriate information is passed to the media is important for ensuring the transparency and the credibility of investigations. More fundamentally, media scrutiny and publicity are essential for gaining cooperation from the public, as well as for raising public awareness of the corruption phenomenon and for generating political will.

Ensuring that the media have access to accurate and authoritative information may also help to reduce any tendency to report information that is incorrect or harmful to the investigation. On the other hand, it is essential that information is not made available that might jeopardize a fair trial being given to a suspect. If an investigator has behaved abusively in this or in other respects, a court may discharge an accused on the grounds of prejudice without even hearing the case.



1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:
  - (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
  - (b) Ensuring that the public has effective access to information;
  - (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
  - (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
    - (i) For respect of the rights or reputations of others;
    - (ii) For the protection of national security or ordre public or of public health or morals.
2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

\*UN CONVENTION AGAINST CORRUPTION

Information intended for publication must be reviewed carefully, both to ensure accuracy and to eliminate disclosures that could be harmful to the investigation. Only authorised individuals should be permitted to release information or participate in press briefings. Those in contact with the media should be competent both in media relations and in the subject matter under discussion. They should not comment on matters that are beyond their expertise, and they should ensure that the information that is given to the media is consistent.

### **3. Checks and balances (“guarding the guards”)**

In an ideal world, the media has integrity. In reality, in many countries the media is effectively “for sale” to the highest bidder. Corrupt individuals can manipulate the media to enhance their image or suppress or confuse information about their activities. This can be done to build public support in their favour, however misguided, that can, of itself, create problems for investigators. Media manipulation can also obstruct more general programmes to raise public awareness and to build cooperation with the enforcement agencies.

The aim of an awareness-raising programme should be to win the active cooperation of the media to achieve the broad public dissemination of the standards of conduct expected of individual public officials and of the existence of complaints mechanisms where these standards are not met. Such public awareness should lead to greater accountability of officials in the delivery of government services. The importance of public trust in their government and its anti-corruption institutions is often underestimated. Without a basic level of public trust, public complaints mechanisms (*see below*) will not work and witnesses will not come forward to facilitate the investigation and the prosecution of anti-corruption cases in the courts.

It is beyond the scope of this handbook to discuss how the media as an institution can be strengthened and checks and balances introduced, however in some countries, professional journalist associations and media councils have been established to monitor the integrity of newspapers and journalists.

### **4. Public complaints mechanisms**

Public complaints mechanisms enable those confronted by corrupt practices or maladministration, to report such practices in the expectation that appropriate action will follow. Complaints mechanisms should be permanent institutions, and more may be needed. Different institutions can ensure that both citizens and public servants are able to report corrupt behaviour such as disloyalty, breach of trust, conflicts of interest, waste, or bad judgment without the risk of suffering any personal or financial advantages. The protection of “whistleblowers” is discussed in a separate chapter.

#### *(1) External mechanisms*

Various types of external complaint mechanisms can be provided for members of the public. A leading example, found in many countries around the world, is the Office of the Ombudsman.<sup>15</sup> In some countries, too, public servants are considered free to raise their concerns with members of the legislature or, in serious cases, directly with law enforcement agencies. However, it is usually considered to be desirable for institutions to be able to sort out internally all but the most serious of their problems.

#### *(2) Internal reporting procedures*

Government departments with effective integrity regimes generally have well-developed procedures to deal with complaints about potential dishonesty and problems of supervisory and personal relationships. Such procedures should establish clearly what it is that constitutes a reportable incident or allegation, and to whom and how a report should be made.

Each organization is generally in a position to develop rules appropriate to its own culture and to that of the organizations with which it interacts. A supervisor would normally be the first point of contact of any allegation, but an ethics officer for the entire organization may be designated as the primary referral point as allegations frequently concern the supervisor or others in positions of authority above the level of the complainant. Some government agencies go so far as to provide an external organisation to handle complaints in the first instance to overcome this problem. The chain of referral to the appropriate investigating authority should be clear, with time limits and explicit standards governing the categories of allegation that must be referred for review by a criminal justice authority.

#### *(3) Comparison*

A computerized programme can generate reporting comparisons concerning the making of complaints as between service delivery in differing geographical areas at the sub-national level.

## **F. MANAGING THE SECURITY OF INVESTIGATIONS AND INVESTIGATORS**

The maintenance of security is also a critical function. As noted previously, protecting the confidentiality of informants and other sources is often the only way to ensure cooperation; the leaking of sensitive information may endanger informants and warn targets, allowing them to modify their behaviour, conceal or destroy evidence, or make other attempts to corrupt or disrupt the investigative process. Maintaining effective security requires an assessment of the full range of possible attempts to penetrate or disrupt anti-corruption investigators, both in general and in the context of specific investigations. Attempts may also be directed at obtaining information or denying information to investigators by disrupting, doctoring or destroying it; there may be intimidation, or even murder of the investigators themselves.

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<sup>15</sup> For a discussion of the role of the Ombudsman, see <http://www.transparency.org/sourcebook/10.html>.



The following areas should be assessed:

### **1. Physical premises**

The premises where investigators base their work and store information should be chosen with a view to being able to control entry, exit and access so that unauthorized persons may be kept out. Premises should also be resistant to attempts by anyone trying to gain entry when they are unoccupied. Where premises are part of larger law-enforcement or other government institution, they should also be separated physically from the rest of the establishment where they are located.

Threats to destroy evidence by demolishing the premises themselves employing such methods as arson or explosives may also require consideration. Important, too, can be security against various forms of electronic surveillance, such as concealed microphones and transmitters. Thus premises should be chosen that are resilient to surveillance techniques, and there should be regular "sweeps" to detect devices that may have been installed since the most recent inspection. Where particularly critical information is at risk, it may be necessary to store copies offshore.

### **2. Personnel Security**

The physical security of personnel must be guaranteed to ensure that competent investigators can be employed. A particular risk is posed where corrupt individuals succeed in gaining employment with the agency. Generally, employees should be carefully screened, examining their past history, life-styles, family ties and their other relationships to identify any factors that might suggest a vulnerability to corruption. Such screening should be a continuous processes, not a one-off exercise before personnel are engaged. The very fact that they are working in the anti-corruption area can render them logical targets for the corrupt.

Potential threats to physical safety should be assessed regularly and, when identified, vigorously pursued. Other protective measures include advice with respect to security precautions, maintaining anonymity and providing weapons for use in self-defence.

### **3. Information, documents and communications**

A constant concern is that critical information does not fall into the hands of investigative targets and so frustrate attempts to obtain evidence against them. Addressing such concerns requires that steps that attract public attention are not taken prematurely; that documents are used, stored and transported in secure conditions; that access to copying equipment is limited and monitored; and that channels of electronic communication including wireless telephones, fax machines, radios, electronic mail and other media are resistant to unauthorized interception or monitoring. Where the physical security of channels cannot be ensured, the use of encryption or similar technologies should be undertaken to ensure that unauthorised persons who access the data cannot decipher it. As noted, in extreme cases it may be necessary to store vital documents and recordings in bank vaults in foreign countries.

### **4. Relationships with other agencies**

#### **Article 36\***

##### **Specialized authorities**

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

\*UN CONVENTION AGAINST CORRUPTION

Anti-corruption agencies must ultimately account for their activities. This requires a degree of timely reporting of information to the political or judicial bodies responsible for the agencies' oversight. The precise timing of a particular disclosure may vary, and can be a difficult issue. As a general principle, investigations should be reviewed externally only after they have been concluded. If abuses occur before investigations are over, some harm will occur and, in some cases, this will be irreversible. In such a case, it is appropriate for an investigator to be permitted to consult a more senior official for advice and guidance. Many systems make provision for such an eventuality.

#### **5. Threat assessment**

Threats to the security of investigators and investigations should be assessed both in general terms and in the context of each specific case. Relevant factors will include the number of individuals suspected, the extent to which they are organised and the sophistication of the corruption under investigation. Also relevant are the determination of the individuals or group targeted, the magnitude and scope of the corruption and its proceeds, whether the targets are involved in crimes other than corruption, and whether there is any specific history of violence or attempts to obstruct investigations or prosecutions.

### **G. INVESTIGATIVE TECHNIQUES**

Financial investigations into the life-styles, bank accounts and personal dealings of suspected corrupt individuals have been shown to be a successful method of proving criminal acts. The following are some of the other approaches that have proved to be highly effective in the investigation of widespread large-scale corruption

#### **1. Focus investigations**

If the results of a corruption investigation suggest that corruption and bribery in a certain public service is widespread, one can concentrate on the systematic checking of the assets of as many suspected bribe takers as is feasible (See Financial Investigations, Chapter 8).

Such an exercise may, however, not yield enough information to warrant further investigation. Some official activities almost "invite" widespread corruption as they create opportunities for large numbers of low-paid officials to receive small-scale bribes.

The issuing of licences and permits are good examples. Many people from whom bribes can be extracted visit the agencies on a daily basis. Quite often, the frustrations of applying for a driving licence, obtaining permission to construct a new home, requesting copies of documents or seeking just about any other service to the public, involves an endless tangle of government "red tape" and delay. Such an environment breeds frustration and the making of small payments to resolve it. Indeed, some posit that some systems are deliberately designed to create opportunities for those who work in it to levy their "customers". Others go so far as to suggest that historically this has been a way for a state to avoid having to pay its employees adequately. In such cases, an investigation into the working files and practices of an agency will be much more effective and efficient than trying to investigate the financial records of its employees.

Before devoting efforts to any investigation, it is important to evaluate the most cost-effective means of deploying staff. It may most effective simply to have senior managers replaced and new working practices introduced that eliminate – or at least reduce – opportunities for bribe-taking, coupled with an unambiguous warning to officials that the rules have changed and will henceforth be enforced.

#### **2. Terms of reference**

Before starting a major investigation, clear and comprehensive terms of reference (TOR) should be drafted. These should contain a comprehensive list of all the resources anticipated as being needed, be they human, financial or material. Particular consideration should be given to any

need for additional resources to maintain the secrecy of the investigation. The suspect public servant may have connections to other public servants who could alert him or her to the investigation; he or she may even be a member of the criminal justice system and thus have access to restricted information. It is therefore essential, from the outset, to evaluate methods for ensuring the confidentiality of the investigation.

Steps taken to protect the security of the investigations could include:

- a) Renting non-police or undercover locations and making them secure;
- b) Using fictitious names to purchase or rent equipment; and
- c) Using stand-alone computer systems not linked to any other governmental operation.

### **3. Policy document**

In addition to the TOR, a policy and procedures document should be maintained. This should include a clear description of the facts giving rise to the investigation; all decisions taken during the investigation, along with their justifications; and the reasons for the involvement or non-involvement of the senior management of the institution for which the suspect works. There can be hidden costs in an investigation, such as loss of morale within the institution where the suspect works and a potential loss of public trust. Every major investigation must be evaluated on a case-by-case basis with regard to its cost and the benefits to the government and the public.

## **H. DISPOSING CORRUPTION CASES**

Cases where corruption on the part of individuals is identified can be dealt with in several ways:

- a) By criminal or administrative prosecutions, leading to possible imprisonment, fines, restitution orders or other punishment;
- b) By disciplinary actions of an administrative nature, leading to possible employment-related measures such as dismissal or demotion;
- c) By bringing or encouraging civil proceedings in which those directly affected (or the State) seek to recover the proceeds of corruption or ask for civil damages; and,
- d) Through remedial actions, such as the retraining of individuals or restructuring of operations in ways that reduce or eliminate opportunities for corruption (but without necessarily seeking to discipline those involved).

Generally, the same detection techniques, investigative procedures and evidentiary requirements will apply, regardless of the process chosen. However, because of the serious penal consequences facing convicted offenders, the evidence for criminal prosecutions will usually have to meet higher standards of reliability and probative value than is the case for administrative action. The decision as to whether to apply criminal sanctions or to seek less drastic remedies can be an exceedingly difficult one. It must balance moral and ethical considerations against pragmatic costs and benefits, and is itself, susceptible to corruption in systems where there are relatively broad areas of prosecutorial discretion.

Criminal prosecutions may be either not possible or undesirable in the following circumstances:

### **1. The conduct may not be a crime**

In some cases, behaviour might be considered as being "corrupt" for the purposes of a national anti-corruption programme or the internal codes of a company or government agency. But however unethical it may be, the conduct will not necessarily constitute a criminal offence. It may be a type of conduct that has been overlooked in the development of the criminal law, or be conduct (such as purely private-sector malfeasance) that is seen as corrupt but has been judged by

the country's legislators as not being sufficiently harmful to the public interest as to warrant criminalization.

## **2. Available evidence may not support prosecution**

The burden of proof in criminal prosecutions demands relatively high standards because of the penal consequences involved. In some cases, there may be sufficient evidence to justify lesser corrective measures but not to support a criminal prosecution. (Administrative sanctions do not usually require proof beyond reasonable doubt but only on the balance of probabilities.)

Where the evidence in a particular case is insufficient, the authorities must generally decide whether the circumstances warrant the additional delay and expense needed to gather sufficient additional evidence so that criminal proceedings can be brought, or whether disciplinary or other remedial actions should be pursued instead. One "cost factor" in such cases is the cost of leaving a corrupt official in place long enough to complete a full criminal investigation where, for tactical reasons, he or she cannot be suspended while the investigation is taking place.

## **3. Prosecution may not be in the public interest**

In some cases, the conduct under examination may amount to a crime but the public interest is better served by some other course of action being followed. For instance, where large numbers of officials are involved, the costs of prosecution include not only litigation costs and the overloading of the court system to the detriment of other litigants.

Discretionary decisions not to proceed to prosecution can be problematic. On the one hand, it may be very expensive to prosecute offenders on a case-by-case basis, but if a decision is made not to prosecute, it may create the impression that the justice system itself is corrupt, thus encouraging corruption in other sectors and seriously eroding any deterrence value in criminal justice measures. Where such a decision is made, it must be well documented and made in the most transparent way possible so that any public perception of corruption in the investigation and prosecution processes is dispelled.

Criminal prosecutions and punishments can effectively remove corrupt officials from positions where they can commit further offences, and can deter the individuals involved and others in similar positions. Since much corruption is economic in nature, and is pre-planned rather than spontaneous, general deterrence is likely to form a significant part of the criminal justice component of anti-corruption strategies.

High financial and human costs impose practical limits on the extent of such prosecutions, however, and attempting large numbers of prosecutions as part of an anti-corruption drive can have the consequence of creating pressures on investigators or prosecutors that lead them to bend the rules and so distort or corrupt the criminal justice system itself. In dealing with corruption, it is always important to avoid creating any perverse incentives.

In formulating anti-corruption strategies, criminal prosecution and punishment should be seen as only one of a series of options. Consideration should always be given to other possibilities, ranging from preventive measures (such as education and training) to administrative or disciplinary sanctions that remove offenders more expeditiously and at a lesser cost to the organisation and society as a whole.

### **Article 30\***

#### **Prosecution, adjudication and sanctions**

1. Each State 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.
2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.
3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.
5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.
6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.
7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:
  - (a) Holding public office; and
  - (b) Holding office in an enterprise owned in whole or in part by the State.
8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.
9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.
10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

\*UN CONVENTION AGAINST CORRUPTION

## CHAPTER 4

### DETECTING CORRUPTION

It is a sobering thought that every corruption offence represents a failure of some sort in a system designed to prevent corruption from occurring in the first place. Investigators and prosecutors are well placed to determine where the weak points are in the administrative systems of their own countries, and to take steps to see if these can be strengthened. They also have to live with the fact that such is human nature that corruption can never be entirely eradicated.

A key problem faced by those investigating corruption is detecting the fact that corruption has taken place. Unlike many traditional crimes, such as assault or theft, corruption frequently does not have an obvious victim. There are no victims likely to complain. Furthermore, secrecy frequently surrounds corrupt activities so that there are few overt occurrences likely to be reported by witnesses, unless they are “insiders”.

However, corruption is decidedly not a “victimless” crime; the victim in many cases is the “public interest”. In the absence of an awareness of this, individuals are unlikely to risk the personal consequences, both professional and social, of reporting the misdemeanors of their colleagues and, still less, those of their superiors.

These present acute problems for the investigator and prosecutor which are examined throughout this Handbook.

#### ***j) Pro-active and reactive detection***

Detection can be broadly divided between pro-active and reactive detection.

*Pro-active detection* takes place where a law enforcement agency initiates an undercover investigation in order to pursue intelligence it may have received possibly from an anonymous source, another agency or perhaps from a telephone interception. The principal feature is that this form of detection is intelligence-based as opposed to being complaint-based. A prime example of the pro-active approach is integrity testing, discussed in Chapter 11.

*Reactive detection* takes place where a formal complaint is received by the law enforcement agency. These may come from the community, from government agencies, local councils or private companies. They have as their core feature an official complaint (sometimes anonymous) which can form the basis for investigation by an anti-corruption organisation. Where the complaint comes from a government agency, it may be based on information derived from disclosure and reporting requirements as well as audits and inspections.

#### ***ii) Improving reactive detection***

Although pro-active investigations can produce highly-successful outcomes, they can also result in expensive failures, and in extreme cases can endanger the lives of undercover operatives and civilian informants. Pro-active detections will usually represent only a small proportion of the operational work of an anti-corruption agency as experience suggests that the great bulk of investigations are complaint-based.

Increased reporting of instances of corruption can be fostered in a variety of ways. Strategies for public servants can include:

- Imposing obligations (backed up by disciplinary sanctions) on public servants to report all the instances of corruption that they observe. (Unfortunately, success with this approach has generally been elusive);
- Providing regular ethics training to public servants to improve standards of integrity and decision-making in the workplace. (This can include “corruption sensitivity training” to render public servants more sensitive to corruption and more aware of situations and behaviour that can lead to corruption), and
- Providing whistleblower protection to complainants (discussed in Chapter 7).

Strategies for the general public can cover:

- Public awareness campaigns that convey anti-corruption messages and a belief that the government is serious in its wish to combat corruption;
- Educational programmes which incorporate into the school syllabus anti-corruption awareness;
- Engendering a high level of public confidence in the integrity and professionalism of anti-corruption law enforcement agencies in their handling of complaints.

One way in which to measure the level of public confidence in anti-corruption agencies is to compare the overall number of complaints received with the proportion that are not anonymous.

### **1. Disclosure and reporting requirements**

Requiring public officials to make periodic disclosures of their assets can increase both the risks for corrupt officials and at the same time provide investigators with an instrument with which to detect corruption. It is, of course, naive to expect corrupt officials to place their ill-gotten gains on the public record. However, they have to overcome hazards in concealing their illicit wealth, and where reporting failures do come to light these failures, by themselves, can be used to discipline officials without the need to find evidence of their corrupt acts. Comparisons of declared wealth with life-styles give added teeth to this process.

Where an official is not honest in complying with reporting requirements, more thorough investigations may be triggered, including an examination of possible conflict of interest situations. The official may ultimately be held to be liable not only for non-compliance with a reporting obligation, but for corruption itself.

Disclosure and reporting requirements can also provide a valuable check for conflicts of interest situations.

To deter corrupt officials from trying to avoid liability for corruption by committing less serious disclosure and reporting offences, sanctions for non-disclosure or false reporting should be severe. They should always give rise to the prospect of dismissal. Thus a corrupt pattern of behaviour can be brought to an end even where inadequate disclosure has been successful in concealing the underlying corruption.



Regular periodic disclosure is essential (rather than simply requiring disclosure on taking up and leaving office) as this may allow a pattern of corruption to be detected and terminated while it is still taking place.

The categories of officials required to make disclosures can be limited to those in positions of higher risk, rather than have a blanket requirement imposed on the whole public service and create needless administrative burdens.

## **2. Public Audits and inspections**

Public audits and inspections include audits of records, physical inspections of premises and assets, as well as interviews with members of the public and others who might have relevant information. This process can be used proactively by managers and investigators, as a means of monitoring the quality and integrity of public administration and identifying possible abuse. Inspections and audits can also be used reactively, as a means of investigating those already suspected of corruption or other malfeasance.

Audits may be conducted on an internal or local basis, but overall anti-corruption strategies should provide for a central, national audit agency with adequate resources and expertise. In order to audit senior levels of government, the agency must enjoy a substantial degree of autonomy, approaching or even equal to that of judicial independence. This independence should extend to decisions about which officials, sectors or functions should be audited, how audits should be carried out, the formulation of conclusions about the results of audits and, to some degree, the publication or release of such conclusions.

The agency should be required to report to the legislature rather than to the executive whose affairs it inspects.

Auditors should have the power to conduct regular or random audits to provide overall deterrence and surveillance. They should also specifically target individuals or agencies suspected of malfeasance. In many countries, their mandate goes beyond suspected malfeasance, as auditors are also responsible for identifying and addressing cases of waste or inefficiency deriving from problems other than crime or corruption. Where problems are identified, auditors generally have the power to recommend administrative or legal reforms to address institutional or structural problems, and can refer cases to law enforcement agencies if criminal wrongdoing is suspected.

Auditors should be supported by legal powers that require individuals or agencies being audited to cooperate, and they should have rights of access to bank records. They should not themselves become law enforcement agencies. In most countries, once criminal offences are suspected, higher standards of procedural safeguards are applied to protect the human rights of those involved and criminal investigations can involve the use of more coercive powers to gather evidence and to detain suspects. Auditors, too, have a broader mandate, in that they are often concerned with addressing wider concerns, such as value for money and government efficiency.

## **3. Integrity testing**

Acts of “petty corruption”, in particular, can be extremely difficult to prove. Integrity testing is a way of overcoming this problem, but it does have to be conducted very carefully.



The object is to "test" the integrity of an official, not to try to render an honest one corrupt through a process of entrapment. Most countries have "agent provocateur" rules in their criminal codes, which act as a judicial check on what is permissible and what is not. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind. It is important to ensure that the degree of temptation is not extreme and that the test is one that an objective bystander would assess as being basically fair and reasonable. The technique of integrity testing is discussed in detail in Chapter 11.

#### **4. Opportunities to report corruption**

Before corruption can be reported, it first must be identified. Thus, the general population and specific target groups may need to be educated as to what constitutes corruption. This would cover the full range of corruption types, the true costs and consequences of corruption and, more generally, the wider benefits to all of high standards of integrity in public administration and private business alike.

Many people have a very narrow appreciation of corruption and do not always understand that certain types of behaviour are not "fair game" but can be harmful. Others may understand the harm but lack either the motivation or the confidence to report it. This can be because they see the problem as pervasive and resistant to change, or because they view the complaints mechanisms as being unreliable, or even dangerous to use. More usually, there is a fear of the social consequences of reporting the illicit activities of colleagues. In environments where corruption has become institutionalized and accepted, considerable educational efforts will be needed if the popular perception that corruption is a natural or inevitable phenomenon is to be changed. It must be recognised as being socially harmful, morally wrong and, in most cases, a crime.

Managers in the public service must be required to assume responsibility for dealing with corruption in the activities for which they are responsible. They must know what they should do when cases arise and be "visible" so that those likely to report corruption are aware of their existence and can readily contact them with information. Although minor incidents can often be handled by responsible managers internally, there should be clear procedures to be followed when serious instances of corruption arise. In particular, managers should be discouraged from trying to conduct major investigations themselves. Professional investigators are trained in interviewing witnesses and in the recording and preservation of evidence; public service managers are not.

#### **5. Security against retribution**

Victims and witnesses cannot be expected to come forward if they have reason to fear possible retribution. Precautions against retribution are commonly incorporated into instruments dealing with corruption and organized crime, especially where the problem is acute. This is particularly true in cases of official corruption. Those who have information are often subordinates of a corrupt official, and the status of the corrupt official can afford opportunities to retaliate. To facilitate complaints against superior line managers, some countries enable government agencies to appoint an outside organisation to serve as the first recipient of complaints made by their staff.

Measures are usually formulated to protect not only the informant but also the integrity and confidentiality of the investigation. In order to prevent intimidation and any tampering with an investigation, common precautions include guarantees of anonymity for an informant; measures to prevent officials under investigation for corruption from having any access to investigative personnel, files or records; and the power to suspend or transfer a suspected official during the course of an investigation.

In these cases, where the informant is an "insider", additional precautions may be needed. Many countries have adopted "whistleblower" laws and procedures to protect insiders in both the public and private sectors who come forward with information. Additional protection may include shielding an informant from civil litigation in areas such as defamation and possible breaches of confidentiality agreements. There may also be a need to safeguard public officials from criminal liability for the disclosure of official secrets (e.g. where corruption in defence procurements is reported).

Protection should also extend to cases where the information is ultimately proved to be wrong, provided the informants have acted in good faith. It has to be said, however, that even those whistleblowers regarded by the public as "heroes" tend to pay a very high price for their courage. Non-governmental organisations can sometimes assist by ensuring that potential whistleblowers are aware of the risks they are assuming, and that they present their complaints in the most effective way.<sup>17</sup>

On the other hand, safeguards may also be needed where informants act in bad faith, particularly in cases where they are permitted to retain their anonymity or are shielded from legal liability. To balance the interests involved, some countries limit legal protection to cases of disclosures made in good faith, or create civil or criminal liability for cases where the informant has acted in bad faith or where the belief that malfeasance had occurred was not based on reasonable grounds.

In cases where the information proves to be valid and triggers official action, the anonymity of the informant cannot always be maintained, making retribution a possibility. Legislation may provide for compensation or for the transfer of the informant to another agency. If an informant is in serious danger, relocation and a new identity unknown to the offenders may be needed under a witness protection scheme (these are discussed in Chapter 6). However, legislation has its limits and it is not always as effective in providing protection for whistleblowers as many would like it to be.

#### **6. Exchanging information with other investigative agencies**

Given the need for autonomy and independence on the part of investigators, and taking into account the extreme sensitivity of many corruption cases, care must be taken when establishing relationships between anti-corruption (criminal) bodies and other government agencies (e.g. internal inspection and audit within government agencies). In environments where corruption is believed to be widespread, complete autonomy is advisable. Nonetheless, it will always be important for anti-corruption investigators to interact effectively with other official entities. For example, information from tax authorities or agencies investigating money-laundering or other economic crimes may uncover evidence of corruption or of unexplained wealth that may have been derived from corruption. Audits of government agencies may disclose inefficiencies or malfeasance that is not tantamount to corruption but warrants the attention of other agencies. Criminal investigators should be able to pass these matters on to them.

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<sup>17</sup> An example in the UK is Public Concern At Work: <http://www.pcaw.co.uk/> Public Concern at Work is an independent authority on whistleblowing. It provides free help to prospective whistleblowers, advises on whistleblowing laws and helps organisations create a culture where it is safe and accepted for staff to blow the whistle.

## CHAPTER 5

### LEGAL PROVISIONS TO FACILITATE THE GATHERING AND USE OF EVIDENCE IN CORRUPTION CASES

Where legal provisions are designed to facilitate the collection of evidence there is a need to strike a balance between ensuring effective investigations, in particular of high-level corruption cases, on the one hand, and basic principles of a presumption of innocence and the expectations of a right to privacy of the ordinary citizen on the other.

Perhaps the most difficult issue facing prosecutors in large-scale corruption cases – and particularly when seeking to recover illicit proceeds – is meeting the basic requirements of the burden of proof. The human rights guarantees contained in the constitutions of most countries reflect international standards and rightly require that persons accused of a crime be presumed innocent until their guilt is established beyond reasonable doubt, by a competent, independent and impartial tribunal.<sup>18</sup>

However, more so than in any other area of offending, proof of an actual corrupt act can be difficult to establish. This can result in what amounts to a de facto immunity in particular for major offenders. Not only can material evidence be all but impossible to obtain, but senior officials can bring pressure to bear on investigators, can ensure that agencies are under-resourced, and are often in a position to obstruct investigations by destroying or concealing evidence. Pervasive corruption can so weaken investigative and prosecutorial agencies that gathering any evidence of real probative value becomes highly problematic. In developing anti-corruption measures, legislatures face the difficult task of finding approaches that strike a proper balance between the need to take effective measures to protect the public interest (through fighting corruption effectively and retrieving its proceeds) and to respect the basic rights of those implicated in investigations.

The basic presumption of innocence is a fundamental and universal human right. However, apart from human rights considerations, practical concerns frequently arise. Societies emerging from periods of widespread systemic corruption and whose people are the victims of looting by their political elites, are commonly faced with the task of re-establishing the rule of law and basic human rights standards. Some states must rebuilding their entire criminal justice system. There is always the danger that, if basic standards are compromised, effective anti-corruption measures may be achieved and criminal justice institutions rehabilitated, but at the cost of an erosion of human rights and a consequent loss of public confidence in their system of governance.

Having said that, there are a number of measures available to address the problem of providing proof in corruption cases which do not compromise basic human rights standards. The feasibility of each measure, and the extent to which it can be enacted, will vary as between different jurisdictions. However, there are legislative approaches which have been found to be effective in

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<sup>18</sup> Universal Declaration of Human Rights, Art. 11 para 1; the International Covenant on Civil and Political Rights, Art. 14 para 2, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 para 2, the American Convention on Human Rights, Art. 8 para 2, and the African Charta of Human and Peoples Rights, Art. 7 para 1.

facilitating the gathering of evidence and that at the same time, comply with international and domestic human rights standards. The superior courts of countries with highly-respected human rights legal traditions have examined these provisions carefully and found that they neither derogate from the presumption of innocence, nor do they erode the right to a fair trial. At the end of the day, however, it is for each country to find its own solutions, taking into account international and regional human rights conventions, as well as national legal principles.

Examples of measures which have been held to meet the highest standards include the following:

### **1. Measures which expedite the gathering and production of evidence**

The burden of proof beyond reasonable doubt rests on the prosecution throughout all criminal trials. Without detracting from this principle, there are ways in which to expedite the gathering and production of the evidence needed for prosecutors to discharge that burden. Legislation may increase the scope of coercive investigative powers or simplify the formal requirements for evidence to be admissible in court proceedings. Increasingly, the law must deal with evidence stored or transmitted using electronic information and communications technologies. Access to bank records and to the files of lawyers who have facilitated criminal activity must also be provided.

Generally, the use of powers in support of an invasive criminal investigation or based on a reasonable belief that a crime may have taken place are the subject of additional safeguards. However, more routine powers of audit or personal disclosure are commonly applied to all public servants, regardless of whether or not there are any suspicions. These may be supplemented by criminal offences for such as making false disclosures of personal assets and liabilities, or obstructing inspections or audits. In this way, corrupt officials who fail to comply with transparency requirements that would otherwise risk exposing their corrupt conduct, do not escape prosecution, but are convicted of false disclosure offences.

### **2. The use of non-criminal proceedings**

The basic presumption of innocence and the burden of proving guilt beyond a reasonable doubt is limited to criminal cases. The International Covenant on Civil and Political Rights and other international and regional human rights instruments as well as national human rights protections apply only to cases where a person is “...charged with a *criminal* offence...”

A narrow interpretation would not apply the presumption to instances where there were no prosecutions, even if criminal or quasi-criminal measures such as the confiscation of property (civil forfeiture) were applied. A broader interpretation would extend the presumption to all procedures or proceedings, regardless of whether or not they might lead to criminal or quasi-criminal sanctions. Thus, in some countries, it is open to investigators to use forms of non-criminal proceedings where the lower burden of “proof on the balance of probabilities” applies.

Such non-criminal proceedings might include all or any of the following:

#### **Civil or preventive forfeiture of corruption proceeds**

The lower, balance-of-probabilities standard of proof may be used where allowed by domestic laws in any case where remedies are being sought but where no one has been actually charged with the commission of a crime. This approach may also be used for the recovery of assets if the remedy is fashioned, not as a form of criminal confiscation and punishment, but in such a way that it amounts to the civil recovery of wrongfully obtained assets, and their return to their rightful owners. In this way it is enough to establish that a person is in possession of assets that do not belong to him or her, without having to prove that they have acquired possession illegally.

A huge and unexplained sum of money in the bank account of a junior customs official would be an example of this. There will be every reason to believe that the official has acquired the funds corruptly, but there may be no actual proof that this is the case.

Precisely how the distinction is made will depend on the formulation of domestic human rights and procedural principles, and how officials and the courts apply these in practice. The use of civil or preventive proceedings is also a significant issue in international cooperation, as some countries allow the broad use of such proceedings and remedies, while others limit their use in order to ensure that they are not used to circumvent or to undermine the human rights safeguards that apply to criminal proceedings.

Countries such as Italy<sup>19</sup>, Ireland<sup>20</sup> and the United States<sup>21</sup> provide, under varying conditions, for the civil (or “preventive”) confiscation of assets suspected to be derived from certain criminal activities. Unlike confiscation in criminal proceedings, such forfeiture laws do not require proof of illicit origin “beyond reasonable doubt”. Instead, they consider proof on a balance of probabilities, or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.

The European Court of Human Rights has reviewed the compatibility of this provision with the principle of the presumption of innocence.<sup>22</sup> Based on three criteria for determining the criminal nature of a provision - the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty - the Court concluded that a confiscation classified as a preventive measure does not have the degree of severity as that of a criminal sanction.

The Commission assigned particular relevance to the fact that (i) the confiscation did not imply a judgment of guilt, but rather that of the social danger of the respondent, based on the well-founded suspicion of his participation in a Mafia-type organization and (ii) it was applied only to such properties, that on a balance of probabilities, were found to be derived from illicit sources.<sup>23</sup>

#### **Article 31\***

##### **Freezing, seizure and confiscation<sup>24</sup>**

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

19 Art. 2ter Italian Law No.575/ 1965, provides for the seizure of property, owned directly or indirectly by any person suspected of participating in a Mafia-type association, when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said property constitutes the proceeds of unlawful activities. The seized property becomes subject to confiscation if no satisfactory explanation can be provided for its lawful origin.

20 According to the Proceeds of Crime Act 1996 of Ireland the High Court upon application can seize assets that are suspected to be derived from criminal activity. Seizure can be ordered without prior conviction or proof of criminal activity on the part of the (civil) respondent, who, to defeat the claim, is required to establish the innocent origins of his suspicious and hitherto unexplained wealth.

21 The US Forfeiture Laws introduced the concept of “civil action” against the property itself, which allows for proving the illicit origin on a balance of probabilities.

22 European Human Rights Commission, No. 12386/ 1986

23 With regard to the property right as provided by Art. 1 Protocol No. 1 to the European Human Rights Convention, the European Human Rights Court affirmed the proportionality of the preventive confiscation as an instrument in the fight against the Mafia.

24 For a further discussion, see “Criminal confiscation”, Case Study# 33, and “Property Penalty”, Case Study# 34, UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

- (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.
4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.
10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

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### *The use of regulatory, administrative or disciplinary proceedings*

The presumption of innocence and a high standard of proof apply to cases involving a strictly “criminal” offence, but many countries have administrative or regulatory provisions that are similar to criminal ones, but which do not lead to criminal punishments. These are often limited in their application to specific categories of natural or legal persons. Where private-sector bribery is not made a crime, administrative offences and punishments established for the purpose of regulating companies or financial markets might still be applied to sanction the conduct – and on the basis of proof on the balance of probabilities.

Regulations and codes of conduct for public servants can also adopt this approach. So, too, can codes for regulated professions, such as medicine and the law, with sanctions for corrupt conduct leading to professional discipline, suspension, or the removal of practising privileges, again when proven on the balance of probabilities.



### **3. The use of a reduced burden of proof in specific elements of criminal proceedings**

In some legal systems, after the basic legal burden of proof has been discharged, certain facts may be presumed to the advantage of the State until the contrary is proved.<sup>25</sup>

#### ***Criminal forfeiture of assets on a reduced burden of proof***

One example, which commonly arises allows the proceeds of crime to be traced, seized and forfeited based on a reduced standard of proof, once someone has been convicted of a crime. Where provided by law, such mechanisms may be useful for recovering the proceeds of corruption, but they usually cannot be used to establish criminal guilt or to impose sanctions other than the recovery of proceeds. In cases where suspected offenders are dead, out of the jurisdiction or cannot be prosecuted for other reasons, some countries have laws that allow for confiscation without any prosecution – simply the presentation of evidence that an offence has been committed, and that the targeted assets are the proceeds

The formulation of such provisions differ,<sup>26</sup> but most are based on the concept that the assets of a person convicted of certain crimes should be presumed to be derived from criminal activities, unless he or she is willing to produce a satisfactory explanation for their lawful origin. The "burden of providing a satisfactory explanation" only becomes effective once the prosecution has established that the offender is in direct or indirect control of assets that appear to be out of all proportion to the offender's personal circumstances. Only once this stage has been reached is the offender required to provide an explanation, which, if credible, discharges the presumption.<sup>27</sup>

Courts that have reviewed these provisions have found them to be fully consistent with the presumption of innocence.<sup>28</sup> For example, the European Court for Human Rights examined the

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25 For a further discussion, see "Meeting the burden of proof in corruption-related proceedings", Tool # 37, UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

26 E.g. Art. 12 para 7 of the TOC Convention calls upon State Parties to consider the possibility of requiring that an offender demonstrates the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

27 Examples of such provisions in national laws include Art. 12sexies Italian Law No. 356/ 1992; Section 4 Singapore Confiscation of Benefits Act; Section 12A Hong Kong Prevention of Bribery Ordinance; Art. 34a Norwegian General Civil Penal Code; Art. 78d German Criminal Code; Art. 36 and 40 Kenyan Narcotic Drugs and Psychotropic Substances Act. No.4/ 1994; Art. 8 Japanese Anti-Drug Special Law and the Art. 72 AA UK Criminal Justice Act 1988, as amended by the Drug Trafficking Act 1994.

28 The Italian Constitutional Court and Court of Cassation had to consider whether Art. 12sexies of the Law 356/ 1992 did comply with the presumption of innocence as provided by the Italian Constitution. Art. 12sexies establishes, in case of conviction for certain serious criminal offences, mandatory confiscation of all monies, property and other pecuniary resources, which are under the direct or indirect control of the offender, when their value appears to be out of all proportions to his income and he is unwilling or unable to provide a satisfactory explanation. Both courts concluded that the presumption of innocence was not applicable to Art. 12sexies Law. 356/ 1992. According to the courts, the purpose of the provision was not to sanction the offender, but rather to prevent the financing future criminal activities (Cassazione Penale, Sezione VI, 15 April 1996 and Corte Costituzionale, Ordinanza N. 18/1996). The House of Lords in Regina v. Rezvi had to consider whether the various assumptions contained in Section 72 AA of the Criminal Justice Act 1988, were compatible with the presumption of innocence. Art. 72 AA provides for the assumption that any property appearing to the court to be held by or transferred to the defendant at the date of the conviction was received by him as a result of or in connection with the commission of offences to which this act applies. The key issue to be examined by the Lords was, whether the confiscation order based on Art. 72AA implied that the offender had committed other crimes besides the one he had been found guilty of. The Lords concluded that confiscation was a "financial penalty" imposed for the offence of which the offender has been convicted and involved no accusation of any other offence. (see also McIntosh v. Lord Advocate, 2001 and Regina v. Benjafield 2000).

consistency with the European Human Rights Convention (Art. 6 para. 2 ) of a confiscation order made under the United Kingdom's drug legislation.<sup>29</sup> The key question was whether the prosecutor's application for a confiscation order following the accused's conviction amounted to the bringing of a new "charge" within the meaning of the Article.

The Court recognized that the legislation required the British court to assume that the defendant had been involved in other unlawful drug-related activity prior to the offence for which he was convicted. However, it affirmed that a confiscation under the UK Drug Trafficking Act 1994 did not involve any new charge, since the purpose of the procedure was not to obtain the conviction or acquittal of the defendant. Hence it could not be concluded that the applicant was being charged with a criminal offence beyond the one for which he had already been found guilty.

#### *Criminal offences in which some elements are presumed against the accused*

A second common example is the establishment of criminal offences in which, once some elements are proven, others may be presumed against the accused in the absence of evidence to the contrary. The most common use of such measures in anti-corruption legislation is the creation of the offence of "illicit enrichment". By this, significant unexplained wealth is presumed to have been illicitly acquired once the basic acquisition of the wealth is proved, and is shown to be disproportionate in relation to the known means of the accused.

The burden of proof beyond reasonable doubt remains on the prosecution throughout. But if the accused is unable to produce an explanation as to the lawful origin of the wealth (either an explanation that is simply "credible" or else established on the balance of probabilities) the illicit origins of the wealth will be presumed. The approach involves no element of unfairness. The accused person is uniquely placed to provide an explanation of the assets where they have been obtained lawfully. Indeed, he or she may be the only person in a position to do so. It is this unusual situation that warrants the adoption of such an approach. Again, the constitutionality of this type of provision has past judicial examination in superior courts.

In systems where asset disclosure is mandatory, proof that a public servant had more wealth than he or she had declared would result in conviction for illicit enrichment unless the accused public servant could show a legitimate source for the wealth.

Such provisions are unquestionably effective, and are based on the policy that a person in possession of wealth is in the best possible position to produce evidence as to how it was acquired. In some countries these provisions are regarded as valid. In others the provisions are thought to infringe the right to remain silent, despite the fact that the accused is not formally compelled to give an explanation, and that it is always open for an accused to provide the necessary proof without personally giving evidence. The difference depends to a large degree on how the presumption of innocence and the right of silence are interpreted in each country.<sup>30</sup>

One line of interpretation holds that the presumption of innocence includes the right to be presumed innocent on each essential element of an offence. In support of this thesis it is argued that safeguards are needed to ensure that the innocent are not convicted, that legislatures must be prevented from rendering trials unfair through converting difficult investigative or evidentiary

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<sup>29</sup> European Court of Human Rights, Case of Phillips v. the UK, No. 41087/1998

<sup>30</sup> Following the Art. IX of the OAS Corruption Convention, most of the American Countries have established the (mere) possession of unexplained wealth as a criminal offence, while the US and Canada did to comply on the grounds, that the offence of illicit enrichment would place the burden of proof on the defendant and, therefore, be contrary to the presumption of innocence.



problems into offence elements that are then presumed against the accused.<sup>31</sup> The contrary thesis holds that, once the core elements of an offence have been proved beyond reasonable doubt, an evidentiary burden is raised whereby the defence must rebut prosecution evidence by proving additional facts against the prosecution's case. In this model, once it is proved that an accused public official has wealth that exceeds all legitimate known sources, an evidentiary burden may be imposed for the accused to show that the wealth was probably obtained legitimately.<sup>32</sup>

If there is some factual link so that, once the prosecution's case is established, there is little or no rational explanation in the absence of further evidence being provided other than the guilt of the accused, the presumption is more than likely to be upheld as being constitutional.<sup>33</sup>

There can be no doubt that the offence of "illicit enrichment" can be a valuable tool in fighting corruption. Low-level customs officers may be driving late model Mercedes that could not conceivably have been acquired through earned income. Given that the officials are in positions where they *can* take bribes, the assumption would be that the officers *have* enriched themselves illicitly, unless they can show that they have won a lottery or perhaps inherited wealth from a rich relation. This sort of situation is far easier to investigate and prove than is a pattern of consistently corrupt conduct over a significant period of time.

<p style="text-align: center;"><b>Article 20*</b> <b>Illicit enrichment<sup>34</sup></b></p>
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31 E.g. *R. v. Vaillancourt* [1987] 2 S.C.R. 636 at 656, and *R. v. Whyte* [1988] 2 S.C.R. 3. In both, the Canadian Supreme Court holds that the right to the presumption of innocence under Art. 11(d) of that country's *Charter of Rights and Freedoms* extends to each essential element of the offence, and that this rule must be applied in such a way that a person accused of a crime cannot be convicted if there remains any reasonable doubt about innocence or guilt.

32 This approach was followed by the U.K. Judicial Committee of the Privy Council in a 1993 appeal from Hong Kong (*Attorney General of Hong Kong v. Lee Kwong-kut* [1993] A.C. 951). The Privy Council, examined whether Section 10 of the Hong Kong Bill of Rights Ordinance 1991 had entrenched the presumption of innocence by providing that any present or former public servant, who maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall be guilty, unless he gives 'a satisfactory explanation' to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control. The Court held that Section 10 casts a burden of proving the absence of corruption upon a defendant. But before prosecution had to prove beyond reasonable doubt the accused's public servant status, his standard of living during the charge period, his total official emoluments during that period, and that his standard of living could not reasonably, in all the circumstances, have been afforded out of his total official emoluments. The court observed that where corruption is concerned, there was a need – within reason – for special powers of investigation and an explanation requirement. Specific corrupt acts were inherently difficult to detect, let alone proved in the normal way. Accordingly, section 10 was found consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary (*Attorney General v. Lee Kwong-kut*, 1993, AC 951).

33 In the *Salabiuka* Case the European Human Rights Court examined whether the French Customs Code (Art. 414, 417 and 392) infringed the presumption of innocence as provided by Art. 6 para. 2 ECHR (*Salabiuka v. France* [1987] ECHR, Case No. 14/1987). As applied by the French courts, these norms provide that any person in possession of goods, which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him and shall, therefore, be guilty of the offence of smuggling. The Court affirmed that in principle, State Parties to the European Human Rights Convention may, under certain conditions, penalize a simple objective fact as such. The European Human Rights Convention clearly does not prohibit presumptions of law or fact in principle. It does, however, require the Contracting States to remain within certain limits as regards criminal law. Art. 6 para 2 of the Convention does not regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits, which take into account the importance of what is at stake and maintain the rights of defence.

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

\*UN CONVENTION AGAINST CORRUPTION

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34 For further discussion, see "Illicit enrichment", Case Study# 32; UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

## **CHAPTER 6**

### **INFORMANTS, WITNESSES AND THEIR PROTECTION**

Corruption investigations require the identification of individuals who are in a position to assist in an investigation by providing information about a corrupt official and his or her activities. Successful law enforcement investigators must be experienced in the identification and handling of witnesses (who may have reported a single instance of corrupt conduct) and “sources” (able to provide information on a continuing basis). This places a heavy onus on investigators to exercise good judgment in managing the activities of sources and witnesses and to have appropriate procedures for the processing of the information they provide and, if necessary, for protecting their identity.

Given the consensual and secretive nature of many corruption offences, in the majority of cases persons who have information about them fail to report it to the police, because they fear the consequences and because they might incriminate themselves. This is as true of the public sector as it is in the world of private business.

Some countries are introducing compulsory reporting obligations for corruption offences directed at categories of persons such as auditors, public officials and supervisory authorities. Where there is such a duty to report, it is most likely to be effective if there are rules providing protection from adverse consequences for those who fulfil their obligations.

Information sources represent an extraordinarily powerful investigative tool for investigators facing the challenge of major corruption cases. Investigative responsibilities when using sources require that law enforcement agencies establish internal protocols and procedures to minimise the possibilities for misunderstandings.

A comprehensive interviewing strategy should be designed. This should include measures to cope with obstructive lawyers, to provide witness protection, to protect the credibility of the witness and to reduce any opportunities there may be for defence lawyers to attack the propriety of the management of a witness. The best way to avoid allegations of illegal enquiry methods or promises made to witnesses by the investigating team is to record all interviews electronically.

Witnesses may themselves have a criminal background that renders them less credible. If investigators are to be able to counter this, witnesses need to be open with them about their involvement in prior criminal acts, particularly if these include acts of corruption for which suspects are being investigated. Nothing is more damaging to a prosecutor’s case than to have an important witness exposed as a criminal for the first time in cross-examination before a trial judge or jury. The criminal background of any such witness should be disclosed to the court at an early stage in the proceedings, and certainly before the witness is submitted to cross-examination.

Witnesses must be protected from threats. The level of protection provided will vary depending on the nature and extent of the individuals' cooperation with law enforcement and the degree of risk to which they are exposed. Many may require little or no protection after reporting acts of petty corruption. Others, unfortunately, may need much.

The most cost-effective means of providing protection is to keep the identity of witnesses confidential for as long as possible. However, at the extreme end of the scale, witness protection programmes may be needed. These can include temporary financial assistance to witnesses and the establishment of new identities for them. Formal witness protection programmes often include the temporary or permanent relocation of a witness or victim. These relocations may need to include family members, and usually require direct financial assistance to the witness during an initial, and often prolonged, period of relocation. New identities are sometimes created for a witness, who is expected to sever all ties with his or her former community.

The very great stress and personal costs of a formal relocation are such that a psychological assessment of a witness (and, if relevant, members of his or her immediate family) should be made to determine whether they are capable of withstanding the pressures of a relocation programme. It is not uncommon for witnesses, in spite of personal danger, to return to their familiar haunts because of an inability to cope with the change. On the other hand, some witnesses are able to adapt easily to a new life and identity, and can be successful participants in witness protection programmes.

Effective witness protection does not always require relocation. Some witness assistance may be very short term, and in the form of a temporary hotel stay. Assistance may be limited to police escorts to and from judicial proceedings, or a guard being placed on a home. Where it is necessary for a witness to move to another location, but can safely retain his or her identity, law enforcement agency representatives can help witnesses to contact available government or private social services to facilitate temporary housing and to secure employment. Witnesses who are in prison may need to be separated securely from the general prison population.

Any necessary protection methods should be in place during all stages of a criminal proceeding. However, the critical periods for witnesses are usually at the time of an arrest and during the court hearing. Once a conviction has been obtained, the threat usually, but not always, diminishes. By then any harm to a witness would be a matter of straightforward revenge, rather than an attempt to prevent the witness from giving evidence at the trial.

Maintaining the confidence of a witness is of the highest importance. The mere willingness of an investigator to keep witnesses informed of the progress of a criminal prosecution can help allay fears and apprehension. This not only serves to instil confidence in the witness that he or she has not been "abandoned", but can also help the witness the better to adapt to the protective measures being taken on his or her behalf.

Working with witnesses requires special skills and the law enforcement investigator should expect to encounter difficulties. Some cooperating witnesses attempt to disrupt the overall investigative strategy of a case to further their own personal goals – as frequently a witness will have a personal agenda that their complaint is intended to promote. Efforts to conceal the identity of confidential informants may not be successful, resulting in a serious breach of the informant's

expectations of the law enforcement agency. It can also be that some witnesses provide false information, or exaggerate facts, after an investigator has become reliant on their truthfulness.

### **1. Informants and other sources**

Information sources can be classified by the nature and extent of the cooperation they provide to investigators. Generally, they divide into three categories: “confidential sources”, “confidential informants”, and “cooperating witnesses”. Distinguishing between the types of sources can facilitate the internal administration of an investigative agency.

Confidential informants are likely to be persons who are themselves engaged in criminal activities or associated with persons who are. Confidential informants are often paid by law enforcement agencies and their relationship with investigators is expected to be a continuing one. Their status as an informant, and the information they provide, are kept absolutely confidential and thus (unlike a cooperating witness) they are not expected to testify in court or otherwise participate publicly in any prosecution.

The various motivations for someone to act as a confidential informant include revenge, financial gain, or the desire to further a beneficial relationship with the investigator. Some confidential informants may see their cooperation with law enforcement agencies as a type of informal “insurance policy” which could merit leniency should they be arrested for criminal acts in the future. Use of this class of source requires a high level of administrative control in addition to well-developed protocols for the handling of the source and the protection of his or her identity. Exceptional levels of skill are demanded of investigators who work with confidential informants, and they should receive specialized training.

Confidential sources are those who provide information obtained by virtue of their lawful employment. For example, a hotel employee with access to registration records, or a travel agent with knowledge of travel plans, would usually be classified as confidential sources. The motivation for a confidential source’s cooperation with law enforcement may stem from a sense of public duty, a friendship with a law enforcement officer, or the sheer excitement derived from assisting the police clandestinely. Confidential sources are normally not paid for their assistance and they require a lower level of management by investigators. For their protection, these sources will often ask that the information they provide be used discreetly, or that a formal and open request for the information they have given be made by the agency if the information is to become part of judicial proceedings or a matter of public record. Special care must be taken where a country has privacy or data protection laws, and attention paid to the fact that the employment of the source will probably be at risk.

Cooperating witnesses are sources that assist law enforcement officials in a confidential manner but who are expected eventually to be witnesses in public judicial proceedings. Cooperating witnesses may be involved in the corrupt dealings under investigation or be closely associated with the activities. A cooperating witness sometimes acts as an operative of the police in an undercover investigation and may need to know aspects of the investigative plan. Motivation to act as a cooperating witness can include the same factors that influence a confidential informant, i.e. revenge, financial gain, and leniency in punishment or non-prosecution for prior criminal acts. The distinguishing characteristic of cooperating witnesses is the fact that their identity and cooperation with law enforcement will ultimately be publicly disclosed. Accordingly, these types of sources can require relocation or other special protection by law enforcement when their role becomes public.

## 2. Administrative procedures

Law enforcement agencies that use sources successfully as an investigative technique usually have established internal procedures and protocols. Failure to impose a regime of investigative protocols can have disastrous consequences for sources and investigators alike.

Administrative protocols usually include the following:

- a) Use of written agreements clearly defining the separate responsibilities of both a source and the law enforcement agency.
- b) Establishment of a system of code words or numerical sequences to replace source names in general investigative files to prevent disclosure of a source's identity.
- c) Information received from sources held separately from general investigative files.
- d) Limitation of access to source files within the investigative agency.
- e) Routine audit of financial records associated with source operations.
- f) Use of a third party in making any payments to a source.

Hotel rooms or specialized vehicles may be used for debriefing meetings with a source to prevent inadvertent disclosure of a source's association with law enforcement officials. As noted, specialized reporting formats to document source information and to conceal the identity of the source can also assist.

Any administrative system for the utilization of sources should include the periodic review of source files at the managerial or executive level of the investigative agency. This is of the highest importance where sources are participating in criminal activities under law enforcement authorization. Cooperating witnesses, for example, may be acting as operatives in an undercover investigation of a money-laundering scheme. Close monitoring and supervisory review of the activities of these sources may prevent a complex investigation failing because of misconduct on the part of the source.

Some law enforcement protocols include prohibitions against utilizing individuals as sources who occupy certain professions or positions. Prohibited professions can include lawyers, clergymen, and physicians, all of whom normally receive information under legally recognized principles of professional confidentiality. Elected or appointed public officials can often be utilized as sources, but only under special authorization from the highest level of the law enforcement agency.

The use of cooperating witnesses often necessitates prosecutorial participation early on in the investigative process in common law jurisdictions. This is essential if the source's motivation to cooperate is the prospect of receiving leniency for prior criminal activity. The plea negotiation process can serve to further an investigation by facilitating the co-operation of one criminally implicated person, as a confidential witness, against others of greater culpability in a criminal organisation. Prosecutorial assistance and cooperation is thus essential when defining and authorizing the *quid pro quo* of the source's cooperation. Investigators may also have to obtain judicial approval of any resulting agreement as well as the cooperation of a source's lawyer.

## 3. Protection of cooperating witnesses

### Article 32\*

#### Protection of witnesses, experts and victims

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
- (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
  - (b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.
3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.
5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

\*UN CONVENTION AGAINST CORRUPTION

A corrupt official can use intimidation and the threat of personal injury to witnesses or their families as a means to protect a criminal gang and its members from prosecution. More violent corrupt officials may move beyond mere threats to committing aggravated assault or even murder to prevent witnesses from testifying against their criminal enterprise. Such means can subvert the entire legally constituted judicial process. Accordingly, protection of witnesses is one of the most crucial of law enforcement functions.

The handling of a corrupt official's capability to threaten, intimidate and commits acts of violence against witnesses, requires both reactive and proactive measures by law enforcement agencies.

A *reactive approach* is exemplified by aggressive and relentless investigation of any threats or acts of violence directed at victims and witnesses in criminal cases. Corrupt officials must be made to recognize that law enforcement agencies will not tolerate the intimidation of witnesses, and that they can expect a swift and effective response from police authorities.

The *proactive approach* to the protection of victims and witnesses in criminal prosecutions by law enforcement involves making routine witness threat assessments from early on in the investigation, and having witness assistance and protection programmes available. The threat assessment should be conducted by investigators on behalf of all the witnesses or victims who are expected to give evidence against the corrupt official. Highly structured groups with known propensities for violence are usually pose a greater risk than does a loosely organised group with a fluid leadership structure. However, a structured group may be willing to suffer the temporary loss of some of its members through prosecution whereas a small, loosely-structured group may react violently to any perceived prosecutorial threat. Investigators should clearly establish the profile of any criminal group in relation to its likely response to witnesses.

Even where there are no expectations of threats to a witness, the witness should still be asked whether he or she has been the subject of any approaches, and care still taken during a court hearing to ensure that the witness waits in a suitably safe location. Only where it is necessary should witnesses be required to attend at court. Where their appearance will be required, vulnerable witnesses can benefit from visiting the courtroom in advance when the court is not sitting, to familiarise themselves with the surroundings and the formalities.

Except where it is required to prove a case, witnesses' addresses should not appear on copies of their statements and on other documents submitted to the defence. Some countries permit written statements - where the presiding judge so allows - to be presented to the court in lieu of a witness appearing in person, where the witness has been the subject of intimidation or has disappeared.

Throughout, special care should be taken to ensure that witnesses are treated with care and respect. Injustices should not be done to members of the public simply by virtue of their having become unwittingly caught up in a criminal trial.



## CHAPTER 7

### WHISTLEBLOWER PROTECTION

#### Article 33\*

##### Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

\*UN CONVENTION AGAINST CORRUPTION

Recent public inquiries into major disasters and scandals have shown that a workplace culture of silence in the face of malpractices can cost hundreds of lives, damage thousands of livelihoods, cause tens of thousands of jobs to be lost and undermine public confidence in major institutions. In some cases, victims may be compensated but no one held accountable for what has happened. Even anonymous “telephone hot-lines” may make little impact, especially in countries emerging from totalitarian regimes, whose contemporary culture frequently regards anonymous denunciations as being abhorrent aberrations from the past.

A culture of inertia, secrecy and silence breeds corruption. People are often aware of forms of misconduct but are either too tolerant of their work colleagues or too frightened to report them. Non-reporting persists not only because of misplaced loyalties, but principally because a person who “blows the whistle” is almost certain to be victimized. To overcome this, and to promote a culture of transparency and accountability, a clear and simple framework must be established that encourages “whistleblowing” and protects “whistleblowers” from victimization.<sup>35</sup>

The purpose of whistleblower protection is to encourage people to come forward to report crime, civil offences (including negligence and breaches of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against reprisal.

#### **1. A law to protect whistleblowers**

The main purpose of whistleblower laws is to provide legal protection for those who, in good faith, report cases of maladministration, corruption and other illicit behaviour inside their organization.

Some whistleblower laws are only applicable to public officials while others provide a wider field of protection, including private sector organisations and companies. Experience shows that the existence of a law alone is not sufficient to instil trust in potential whistleblowers. The law must provide for a mechanism that allows the institution to deal with the content of the message and not “shoot the messenger” as is often the case. In other words, the disclosure must be treated objectively and, even if it proves to be false, the law must apply as long as a whistleblower acted in good faith. It must also apply irrespective of whether or not the information disclosed was

<sup>35</sup> For a discussion, see “Whistleblowers: Protection of Persons Who Report Corruption”: Tool# 36 UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html). See also <http://www.transparency.org/sourcebook/25.html>

confidential, and even if the whistleblower may have technically breached the law by blowing the whistle. Nor should it be for the whistleblower to have to “prove” that he or she acted in good faith.

The first aim of any whistleblower act is to provide the person making the disclosure with legal remedies should he or she be victimized, dismissed or treated unfairly in any other way for having revealed the information. The best way to protect a whistleblower is to keep his or her identity, and the content of the disclosure, confidential for as long as possible and perhaps for it never to be revealed at all.

The part of the whistleblower law that seeks to protect whistleblowers from unfair dismissal must be compatible with the labour laws of the country concerned. In particular, where the "employment-at-will" doctrine or similar legal principles allow employers to dismiss employees without reason, the law must create exceptions from that over-arching principle. At the same time, an employer also needs protection, to ensure that "blowing the whistle" does not become an easy way for an employee to avoid dismissal, or to avoid other form of disciplinary action. However, it is a fact of life that those who do “blow the whistle”, more often than not, wind up leaving their employment of their own free will.

## **2. Implementation**

Generally, the law should provide for at least two levels at which whistleblowers can report their concerns.

The first level should include entities within the organization for which the whistleblower works, such as supervisors, heads of the organization or internal or external oversight bodies created specifically to deal with maladministration within the agency where he or she works.

Whistleblowers should also be able to turn to a second level of institution if their disclosures to a first-level institution have not produced appropriate results and, in particular, if the person or institution to which the information was disclosed:

- a) Decided not to investigate.
- b) Failed to complete the investigation within a reasonable time.
- c) Took no action regardless of the positive results of the investigation, or
- d) Failed to report back to the whistleblower within a given time.

Whistleblowers should also be given the option to address second level institutions directly if they:

- a) Have reasonable cause to believe that they would be victimized if they raised the matter internally or with the prescribed first-level external body; or
- b) Reasonably fear a cover-up.

Second-level institutions could be an Ombudsman, an anti-corruption agency, an Auditor General or a member of the Legislature.

Experience shows that whistleblower laws alone do not encourage people to come forward. In a survey carried out among public officials in New South Wales, Australia, regarding the effectiveness of the Whistleblower Act 1992, 85 per cent of the interviewees were unsure about the readiness of their employers to protect them. Some

50 per cent stated that they would refuse to make a disclosure for fear of reprisal. The Independent Commission against Corruption (ICAC) of New South Wales concluded that, in order to help the Whistleblower Act work:

- a) There must be a real commitment within an organization to act upon disclosures and to protect those making them; and
- b) An effective internal reporting system established that is widely publicized throughout the organization.

In order to ensure effective implementation of whistleblower legislation, those who receive disclosures must be trained in dealing with them. Whistleblowers often invest much of their time and energy on the allegations they make. They suffer from a high level of stress. If their expectations are not managed properly, it might prove fatal for the investigation and damage trust in the investigating body. In particular, the investigation process and the expected outcome (criminal charges, disciplinary action) must be explained to the whistleblowers, as well as the likelihood of producing sufficient evidence to take action, and the duration and difficulties of investigation. Whistleblowers should also be informed that the further the investigation proceeds, the more likely it will become for their identity to be revealed and for them to be subjected to various forms of reprisal. During an investigation, whistleblowers should be kept updated about progress made. Any concerns about the effectiveness of their protection must be acknowledged.

The law will never be able to provide full protection, and whistleblowers must always be made aware of this simple fact. It is therefore essential that the investigating body makes every effort to ensure that whistleblowers will "last the distance" by keeping them informed about the steps being taken. They should, if necessary, be given legal advice and counselling.

The most effective way of protecting whistleblowers is to maintain confidentiality regarding their identity and the content of their disclosures. Some country experiences, however, show that the recipients of disclosures do not pay enough attention to this. Information is leaked quietly, rumours spread, and whistleblowers suffer a variety of reprisals. It is not enough to prohibit the leakage of information. Instead, it may be more effective to train the recipients of disclosures on how to conduct investigations while protecting the identity of the whistleblower for as long as possible.

The provision relating to whistleblowers in the UN Convention Against Corruption is non-mandatory, but anti-corruption experts advise that such laws are essential to the success of any national effort to combat corruption.

## CHAPTER 8

### FINANCIAL INVESTIGATIONS

#### Article 58\*

##### Financial intelligence unit

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.<sup>36</sup>

\*UN CONVENTION AGAINST CORRUPTION

In addition to assessments of directly or indirectly owned assets and the cost of maintaining extravagant lifestyles, financial investigations can be an extremely effective tool for unearthing corruption. Particularly valuable in this context is any national requirement that senior officials and public decision-makers regularly declare their assets and liabilities, and anti-money-laundering provisions that require the reporting of significant financial transactions.

In-depth investigations into the origins of property held in the name of third parties should be made only when there are reasonable grounds to suppose that third parties may be holding assets on behalf of suspected officials. Ideally, national laws should provide for the comprehensive registration of significant assets (such as land, company share ownership and motor-vehicles) and for the identification of their beneficial owners. Particular forms of abuse which have been targeted by the Financial Action Task Force of the OECD include “bearer bank savings books” and “bearer shares”, ownership of which passes through a simple change in possession, leaving no paper trails.

Investigative agencies must have a right of access to official registers, to company and bank documentation and to credit card records.

Anonymity of ownership is the natural ally of the criminally corrupt. If the legislation of a country does not provide for transparency, financial monitoring will probably not produce the meaningful results that it might do otherwise.

#### 1. Targeting

Once grounds for suspicion have been established and a particular suspect identified, the screening should also include persons with whom they have strong ties, such as family members and close business associates. The proceeds of corruption are commonly deposited in bank accounts held in the name of a spouse, and, less frequently, those of children, brothers or parents. Land and shares, too, are frequently registered in the names of others to the same ends.

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<sup>36</sup> For examples, see “The Australian Transaction Report and Analysis Centre (AUSTRAC)” Case Study# 28 and “Financial Intelligence Processing Unit, Belgium”, Case Study# 29; the “Croatian Anti-Money-Laundering Department” Case Study# 30; and the “Dutch office for the disclosure of unusual transactions (MOT), Case Study# 31; UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

When financial investigations are used reactively, after a suspect has been caught and the crime identified, the parameters of the financial investigation will already be more narrowly defined. The finances of the suspect can be investigated to identify assets for subsequent forfeiture or simply to uncover additional evidence of the crime. Forensic accountants can unravel even the most complex and confusing financial crimes, especially where there are specific targets on which to focus their efforts.<sup>37</sup>

In cases where an anti-corruption agency intends to use the financial assets and purchasing power of a suspect to uncover potential corruption and there is no particular offence to provide a starting point, the task is much more difficult. Proactive monitoring, examining possible indicators of corruption such “living beyond one's means”, requires the clever use of available resources and careful consideration as to who will be investigated, and why. In most jurisdictions a selective allocation of resources will be necessary.

The careful selection of a target group should include the likelihood of uncovering corruption. For example, if available data suggest that employees of the authority issuing driving licenses have solicited bribes, it may be tempting to launch a review of financial disclosures and tax returns filed by employees of that office. Such an exercise will, however, be most likely be fruitless. The bribes paid are likely to be small and used as “pocket money” rather than deposited in bank accounts or used to make large purchases. A more fruitful target may well be their immediate superiors, who may be taking a significant cut of the illicit earnings.

Investigators should focus on reviewing the financial positions of those whose public duties expose them to a higher level of potential bribes. It may be probable that a larger percentage of employees in a motor driver licensing office are soliciting bribes than there are in a public procurement office, but there is a greater likelihood of uncovering indicators of corruption when reviewing the financial positions of procurement officials where pay-offs can be extremely large.

## **2. Indicators**

Initial screening may be restricted to a few significant assets that are given priority over others, such as homes, second houses or holiday homes, means of transport and other items of significant value.

The instruments used to investigate disproportionate living standards include public registers, credit card accounts (including credit card accounts held off-shore), expensive parties and wedding celebrations, children’s school fees and private foreign travel. Bank and company documentation may contain further information. Requiring the verification of expenses incurred by the public officials or persons close to them can also prove to be extremely effective.

Illicit funds are frequently hidden in foreign bank accounts registered under false names or in those of corporations. Illegally-acquired property can be registered in foreign jurisdictions using false identities while the corrupt official enjoys the use of the property in his or her home country. If the jurisdiction where the assets are held has signed a mutual legal assistance treaty (discussed in Chapter 14), it may be possible to obtain help from the authorities there in identifying them.

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37 For a practical example, please refer to the Lesotho case study in the Annex.

## CHAPTER 9

### ELECTRONIC SURVEILLANCE

Electronic surveillance encompasses the use of electronic means to gather information and intelligence. It can include covert activities, such as video recording, wiretapping or eavesdropping; or it can include the use of audio and video recorders and transmitters, secreted on, or used by, cooperating witnesses and informants.

*Covert* surveillance, as discussed in this chapter, is undertaken where none of the parties whose activities are being observed is aware that law enforcement is secretly listening and/or watching. By contrast, *consensual* recordings always involve the knowledge and consent of at least one of the parties to a conversation or activity.

Electronic surveillance, as an investigative tool, is often the only method available to investigators that can penetrate the veil of secrecy that habitually surrounds corrupt activities. The most commonly used form of electronic surveillance is consensual and can involve the assistance of collaborating witnesses, whistleblowers, victims of extortion and other recipients of corrupt proposals.

The lack of tolerance for covert activities on the part of a government stems from a distrust of government in general. In many countries, past abuses of governmental authority arising from political interests, personal vendettas and other nefarious motives have all served to instil public distrust to the point where society is unwilling to entrust the Government with the unbridled authority to 'spy' on the activities of the citizenry.

In most democratic societies, members of the public enjoy a right to privacy from government intrusion and to the expectation that their words and actions will not be subject to interception by the police. Where one of the parties to a corrupt or criminal conspiracy decides to expose the enterprise using electronic means to secure evidence, however, society usually tolerates the invasion of an otherwise private affair. Societies do not readily tolerate their government 'spying' on the conversations and activities of citizens without the consent or knowledge of any of the parties. This gives consensual surveillance decided advantages over completely covert operations.

#### **1. Covert interceptions and recording**

The covert category of electronic surveillance includes wiretapping, eavesdropping and video surveillance operations. However, in many countries wiretaps and eavesdropping are illegal in the absence of judicial authorization, and usually very strict guidelines must be observed before a judge will grant a court order authorizing them. Guidelines can help assure the protection of individual rights to privacy and, at the same time, allow for the use of wiretaps during investigations of serious criminal activity and for security intelligence.

Covert interceptions of the private words and activities of citizens are arguably the most invasive and aggressive sort of governmental intrusion into individual privacy. Notwithstanding, it is sometimes the only method available to law enforcement officers to collect sufficient evidence to prosecute criminal enterprises. The extreme sensitivity with which the public views such law enforcement effort demands that strict guidelines and oversight of covert operations should be

firmly in place. Covert interceptions should be used as a last resort, and then only after all other efforts at evidence collection have failed or are unlikely to be effective.

## **2. Application for court order**

Government wiretaps and eavesdropping, if permitted at all, generally require court orders based on a detailed showing of probable cause. To obtain a court order in a common law country, a three-step process is generally involved:

- a) The law enforcement officer responsible for the investigation draws up a detailed affidavit showing that there is probable cause to believe that the target telephone or other communication device is being used, or will be used, to facilitate a specific, serious, indictable crime.
- b) A lawyer for the government works with the law enforcement officer to prepare an application for a court order, based upon an affidavit drawn up by the officer.
- c) The lawyer presents the application *ex parte* (i.e. without an adversary hearing) to a judge authorized to issue court orders for electronic surveillance. (A junior law enforcement agent should generally not be allowed to make applications for court orders directly to a judge.)

Requests for court orders should generally contain the following information:

- a) The identity of the law enforcement officer making the application and of the high-level government lawyer authorizing the application;
- b) The facts and circumstances of the case justifying the application, including details of the particular offence under investigation, the identity of the person allegedly committing it, the type of communications sought, and the nature and location of the communication facilities;
- c) Whether other investigative procedures have been tried and have failed, or why they would be likely to fail or be too dangerous to employ;
- d) The period of time involved in the interception; and
- e) The facts concerning all previous applications involving any of the same suspects or locations.

## **3. Issuance of a court order**

In order to keep intrusions into personal privacy to a minimum, before a judge can approve an application for electronic surveillance and issue a court order, the judge should be required first to determine that:

- a) There is probable cause for belief that an offence covered by the law is being committed, or is about to be committed;
- b) There is probable cause for belief that particular communications concerning that offence will be obtained through such an interception;
- c) Normal investigative procedures have been tried and have failed, or appear on reasonable grounds to be unlikely to succeed or to be too dangerous to employ;
- d) There is probable cause for belief that the place where the communications are to be intercepted are being used, or are about to be used, in connection with the commission of such an offence, or are leased to, listed in the name of or are commonly used by the person under suspicion.

In addition to showing probable cause, one of the main criteria for determining whether a court order should be issued is whether normal investigative techniques have been, or are likely to be,



unsuccessful. Electronic surveillance is a tool of last resort and should not be used where other less intrusive methods of investigation could reasonably be employed. Normal investigative methods usually include visual surveillance, interviewing subjects, the use of informers and telephone record analysis. Such techniques, however, often have limited value. Continuous surveillance by police can create suspicion and therefore be hazardous. Surveillance alone will not disclose the contents of a personal meeting or of a telephone conversation, and questioning suspects or executing search warrants can often jeopardize an investigation.

Whereas informants are useful and should be sought out by police, the information they provide does not always reveal all of the players or the extent of an operation, and great care must be taken to ensure that the informants are protected. Moreover, because informants are often criminals themselves, they may not be believed in court. Telephone record analysis is helpful but does not reveal the contents of conversations, nor do records always reveal the identities of parties to the conversations. As mentioned elsewhere, other methods of investigation that may be tried include undercover operations and “stings” (Chapter 10). Although effective in some cases, undercover operations are difficult and dangerous, and “sting” operations are costly and not always successful.

If a judge approves an application, a court order may be issued specifying:

- a) The identity (if known) of the person whose communications are to be intercepted;
- b) The nature and location of the communication facilities;
- c) The type of communications authorised to be intercepted and the offence to which they relate;
- d) The agency authorized to perform the interception and the person authorizing the application; and
- e) The period of time for which interception is authorized.

A court order may also require that interim status reports are filed with the issuing judge for so long as the wiretap or eavesdropping is in progress.

Once covert electronic recordings commence, law enforcement officers should limit interception of communications to those relating to the offences specified in the court order. Before the surveillance actually begins, a government lawyer should convene a meeting with the officers who will participate in the case to ensure that recorded material conforms to the crimes alleged in the enabling affidavit. Turning off the recording equipment and then performing a spot check every few minutes to determine if the conversation has turned to the subject of the court order usually accomplishes minimization, and avoids picking up unrelated gossip. Nevertheless, special problems may arise where criminals communicate in codes that are designed to conceal criminal activity in what sounds like an uninteresting or unrelated discussion. If an intercepted communication is in a code or foreign language, and someone is not simultaneously interpreting the code or foreign language, the conversation should be recorded and minimization deferred until an expert in that code or language is available to interpret the communication. Should a wiretap or eavesdropping effort fail to meet the minimization parameters, then the risk is that all of the evidence obtained from the wiretap might be ruled inadmissible.

#### **4. Recording**

All intercepted communications should be recorded whenever possible. As a practical matter, law enforcement officers should make working copies of the original tapes. The case officer should screen conversations that tend to prove that a crime has been, is being or will be committed. A compilation of relevant conversations, together with the corroborating surveillance reports, can often provide probable cause for search warrants and/or arrest warrants.



### **5. Termination of covert electronic surveillance**

In order to continue an interception beyond the time limit set by the original court order, the responsible law enforcement officer, through a government lawyer, should be required to apply for an extension based upon a new application. When the period of a court order expires, the original tapes should be made available to the issuing judge and sealed under court supervision. The tapes should be maintained in such a fashion for a period of years.

### **6. Consensual recording operations**

Unlike covert electronic surveillance operations, consensual operations involve the cooperation of at least one party who is trusted by the criminal target. The cooperating witness could be a person who is suffering extortion or being victimized in some manner, or may be an ostracized member of a criminal enterprise with a personal vendetta. Again, the witness may be a criminal trading information in exchange for leniency from the court. The vast majority of electronic surveillance operations involve such witnesses.

In corruption investigations and other so-called “victimless crimes”, the time needed to complete a corrupt transaction is not usually critical, and frequently involves the payment of cash by one party to another. That fact is important for anti-corruption investigators. In the case of a government inspector demanding a bribe from a citizen or where, conversely, where a citizen offers a bribe, there is often sufficient time for an honest citizen or government employee to notify the appropriate authorities before any transaction takes place and so ensure that the transaction can be recorded.

The criminal seeking leniency can usually to some extent control the timing of meetings with targeted criminals. Such flexibility presents the opportunity for law enforcement officials to prepare the cooperating person to respond in such a way that electronic surveillance methods can be employed.



## CHAPTER 10

### UNDERCOVER OPERATIONS

The use of the undercover investigator or cooperating witness acting on behalf of law enforcement provides a path towards investigative success when addressing criminal activity where secrecy and conspiracies are the distinguishing characteristics.

Not only the United Nations Convention against Transnational Organised Crime but also the new Convention Against Corruption recognises the special place of special investigative techniques. Article 50 of the Corruption Convention mandates that “each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary ... to allow for the appropriate use by its competent authorities of controlled delivery and ... special investigative techniques, such as electronic or other forms of surveillance and undercover operations .. and to allow for the admissibility in court of evidence derived therefrom.”

#### **Article 50\***

##### **Special investigative techniques**

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.
4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

\*UN CONVENTION AGAINST CORRUPTION

The undercover technique is essential in those cases where corrupt individuals conspire together in secret to achieve criminal goals. A corrupt judge, police officer, or other public official generally engages in contact only with other corrupt parties, so that there are few, if any, persons who are able to witness and expose their corrupt practices. Many crimes of corruption occur with little evidence of criminal activity, and without the testimony of an insider or conspirator a successful prosecution of such crimes is unlikely. In countries where the use of the undercover technique is allowed, the use of an undercover investigator posing as a purchaser of a judicial or

political favour, coupled with demonstrative evidence such as surreptitious audio and video recordings, can provide conclusive evidence of corrupt activity.

The credibility of a professional, well-trained law enforcement investigator who has personally observed, heard, or spoken with the defendant during the course of the criminal activity is generally unimpeachable. This evidence can be especially powerful when the undercover agent has played the role of a victimized businessman or target of an organised crime activity. The effect of overwhelming evidence gathered through use of the undercover technique can bring offers of cooperation and pleas of guilty from defendants, so eliminating the need for long and expensive trial processes.

### **1. The definition of “undercover operations”**

The word ‘undercover’ implies engaging in a secret investigation. The identity of the law enforcement agent is disguised in order to detect, prevent or secure evidence of criminal activities. Undercover operations can be classified as simple or complex. Simple undercover operations usually last less than six months, have a limited budget, and have no sensitive issues that would elevate the operations to a higher level of review within the investigating agency.

A simple undercover operation might include the undercover officer who buys drugs from a local drug seller on two or more occasions with the investigative goal of identifying and successfully searching and seizing the drug dealer's supply, or that of the supplier. Some simple undercover operations require the use of a storefront rented for a brief period or the use of vehicles or vessels registered under fictitious identities. Simple undercover operations are sometimes used to gather the predicate evidence that can lead to a more complex undercover operation.

A complex undercover investigation is usually long term and more sophisticated in both the use of specialised techniques and the creativity of the investigation itself. Complex investigations can include investigations of public officials, even if the investigation is of short duration. The sensitivity of the investigation can elevate such cases to a “complex” status. A complex undercover operation will sometimes include the operation of a business and the utilization of business proceeds to finance the continuation of the undercover investigation. Any complex investigation would usually be subject to periodic review by an undercover review committee, especially if the investigation is expected to be lengthy or highly expensive.

### **2. Oversight of the undercover operation**

Law enforcement agencies should establish guidelines or protocols for the use of undercover techniques. Operations should always be carefully reviewed prior to implementation. They should be monitored closely by the agency leadership and prosecutors not only to ensure that they take place within the law but also to minimise the risk of personal injury to undercover agents or innocent parties. Similarly, the risks to property, financial loss, and irreparable damage to third parties must be kept to an absolute minimum. The propriety of a government’s agents engaging in any kind of criminal activity, even as a possible facilitator, must be kept under review. Guidelines should be in place to protect privileged or confidential relationships from interference. These should also address any legal or ethical issues which otherwise might prevent the successful prosecution of offenders at the conclusion of the undercover operation. A defendant's customary argument is that the particular crime with which he or she is charged would not have taken place but for the government’s actions in encouraging or facilitating it. This defence is not usually successful where high professional standards have been observed by the investigators. Only through the use of published guidelines and close monitoring of an undercover operation can the legality and ethical nature of the undercover law enforcement investigation be assured.<sup>38</sup>

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38 The US Federal Government’s guidelines may be seen at <http://www.usdoj.gov/olp/fbiundercover.pdf>.

Authorization to use undercover techniques should only be granted to the higher levels of an investigative agency. An undercover review committee can be used as a screening and monitoring device to ensure that all safeguards and legal considerations are in place. This committee might include representatives from legal, financial and investigative departments within the investigative agency who are neutral in their involvement in a particular investigation but experienced in identifying the strengths and weaknesses of an undercover proposal. Simple undercover operations might be approved by the local investigative agency head in conjunction with the approval of a local chief prosecutor.

### **3. Prohibited conduct in undercover operations**

To place matters beyond doubt, certain types of conduct on the part of undercover agents and operatives, such as participating in acts of violence, should be expressly prohibited by law. In practice, significant complex undercover operations have been terminated to prevent an undercover agent from having to participate in acts of violence, or to forestall planned acts of violence by the subjects of the investigation. Innovative investigative planning and enforcement action, however, can often prevent acts of violence from taking place, yet still allow an undercover operation to continue without serious disruption of its investigative goals. An undercover agent, who is unexpectedly placed in a situation where a threat of serious bodily harm or death to the agent or third party is imminent, should be expected to act in accordance with his or her legal duties, even if this would effectively end the undercover operation.

Undercover agents or their operatives should also be prohibited from instigating or initiating any plan to commit a crime. This prohibition is closely linked to the legal prohibition found in the criminal law of many countries to the effect that persons cannot be prosecuted for a crime that has been induced by agents of the government. This presumption should be negated where a person charged with such an offence is shown to have demonstrated a predisposition to commit the offence. The fact that the government, through its agents, participated or in some manner facilitated the criminal offence should not be a bar to prosecution if evidence of predisposition on the part of the accused is present. For example, a person who is seeking a means to launder proceeds from criminal activities should not be regarded as having been “entrapped” by government agents who operate an undercover money laundering business, and accept the proceeds for transmittal to third parties.

High moral and ethical standards must be looked for in the selection of undercover agents. Any immoral activity by an undercover agent known to the accused may be used to undermine the agent’s credibility at trial, or even to blackmail him or her. To prevent such activity from detracting from the professionalism of the undercover agent, proper instructions on techniques to avoid compromising situations should be provided.

### **4. Authorized activities for undercover agents**

Prior to the implementation of an undercover operation, prosecutorial support and guidance are generally required. In addition to a prosecutor’s office agreeing to support the operation on a continuing basis, a commitment to prosecute those charged as a result of the undercover operation should be obtained in jurisdictions where the investigative and prosecutorial functions are separate. Prosecutorial assistance should also include permission for an undercover agent to engage in certain activities which might otherwise be illegal. Generally, participation in minor crimes and petty offences can be authorized if circumstances require such acts in furtherance of the investigation.

Certain levels of criminal activity (such as giving false testimony in judicial proceedings) should require authorisation at the highest level of a law enforcement agency and in serious cases might require notification to, and approval by, a higher supervising court. Any serious criminal offence which the undercover agent or operative may be required to commit while in the course of

undercover activities must be closely reviewed, and wherever possible approved by prosecuting officials in advance of the act. Emergency circumstances may require the undercover agent to act independently and without prior approval, but proper training and professional judgment can minimize the risks that this entails.

#### **5. Preparing the undercover agent**

Undercover agents should be carefully selected and properly trained in the use of undercover techniques. In addition to being knowledgeable about the guidelines for undercover operations, the agent should be well versed in the relevant laws, especially those relating to entrapment and illegal government actions. Undercover agents should be expected to be capable of operating with limited supervision and minimal assistance from fellow officers. This requires the undercover agent to be mature in judgment and extremely skilled in the specialized field of undercover activity. Psychological testing is recommended for undercover agents to ensure they are able to cope with the stress and demands placed on them. Poor selection of an undercover agent can lead to poor results in the particular investigation, and, ultimately, a diminution of the credibility of the law enforcement agency itself.

Sophisticated undercover investigative programmes include the identification of law enforcement agents who have skills or prior experience in the target area of a particular investigation. For example, an investigator with experience in the banking industry may be a suitable candidate for an undercover operation involving financial services. Once identified as a potential undercover agent, psychological testing will identify other personal traits indicating both the ability to manage stress and to be assertive and self-reliant. The undercover agent should be as closely matched as possible to the role he or she is expected to play. Region accents, dress and cultural awareness should be taken into account. Wherever possible, the creation of elaborate false histories for an agent should be avoided, especially where these involve false claims of prior imprisonment. However, scenarios establishing the background of the agent as bona fide and “trustworthy” to the subjects must be contrived, including such items as fictitious identity cards, credit histories, vehicle registries and other manifestations of normal living activity.

If a cooperating witness or other non-law enforcement operative is being used in an undercover operation, proper instructions should be provided. These should be reduced to a written agreement and signed by all the interested parties. Guidelines for the handling of cooperating witness should be provided by the law enforcement agency. Any business relationship the operative has had with the undercover operation must be clearly reviewed and recorded to minimize the possibility of future claims for damages being made against the law enforcement agency. The prosecutor should meet with the operative and clearly define what is expected of the cooperating witness and the nature and extent of any assurances that he or she can be given.

#### **6. Extraordinary investigative techniques to complement the undercover investigation**

Most undercover operations utilize other unusual investigative techniques to enhance the collection of evidence. The use of body transmitters or concealed recording devices is a standard procedure in many undercover investigations. Where undercover businesses are operated, audio and video recording devices should be used to augment the observations and activities of undercover agents.



## CHAPTER 11

### INTEGRITY TESTING

Unless a corrupt act is exposed, how do we know whether a particular official is corrupt? How can we ensure that corrupt officials are not promoted to positions where they can wreak even more harm to the public interest than they are doing already? And, in handling allegations of corruption made against police officers in particular, how do we ensure that morale is not adversely affected while these are investigated? Or that complainants – and innocent parties – are protected when they are acting in good faith? Allegations are easily made, and when they are not based on fact they can be morally damaging. Even more importantly, how can evidence be obtained quickly and cheaply when there is a belief that corrupt patterns of behaviour have developed in particular areas of public sector activity?

Acute difficulties arise when complainants have a history of criminal involvement (especially where their complaints are made against the police). This gives a complainant a low level of personal credibility, so how can reliable evidence (either of integrity or of corrupt tendencies) be produced and presented to a court if need be, in ways consistent with the constitutional rights of officers as citizens, and in ways in which neither the complainant nor the person complained about is unduly “threatened”?

The answer to each of these questions would seem to lie in “integrity testing”.

The classic examples of the use of integrity testing lie in the area of countering corruption in police forces. In various parts of the developed world, police corruption scandals have come in cycles. Rampant corruption has been exposed; clean-up measures have been implemented; corrupt police have been prosecuted or dismissed. But within a few years, a bout of fresh scandals has emerged.

This, it is now realised, is because whole reform strategies have been misplaced. They have been founded on the mistaken belief that simply getting rid of “rotten apples” would be sufficient to contain the problem. It is now clear that it is not enough to “clean up” an area of corruption when problems show. Rather, systems must be developed which ensure that there will be no repetitions and no slide back into systemic corruption. It is in the essential field of follow-up and monitoring that integrity testing really comes into its own. It has emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean.

So it is that integrity testing is now considered to be an effective instrument that embraces both the prevention and the prosecution of corruption.

The objectives of integrity testing are to:

- a) Determine whether or not a particular public civil servant or branch of government is likely to engage in corrupt practices.



- b) Increase the actual and perceived risk to corrupt officials that they may be detected, thereby deterring corrupt behaviour and encouraging officials to report instances when they are offered bribes (many genuine offers of bribes will be taken for being integrity tests and be reported to protect the official's job); and to
- c) Identify officials, such as police officers, who are working in areas exposed to corruption as being honest and trustworthy, and therefore likely to be suitable for promotion. (For this reason it is essential that any regime of integrity testing include random elements and not rest solely on suspicion; passing an integrity test should be recorded as a credit to an official's record, and not imply that there has been an allegation of corruption against the official that an integrity test has failed to confirm).

Integrity testing has been used effectively to "test" whether public officials of all description resist offers of bribes and refrain from soliciting them. As such they are proving to be an extremely effective and cost-efficient deterrent to corruption.

### ***1. Targeted and random integrity testing***

In an integrity test a scenario is created in which, say, a public civil servant in an everyday situation is offered a modest bribe by the person conducting the test, or else is presented with a situation in which he or she has an opportunity to ask for one. The bribe offered must be modest so that the test will be seen by a court as being "fair", and not the creation of a situation in which a bribe is offered that is so large that even the honest might be tempted to take it.

Integrity testing can also be used as a "targeted test" to help verify the genuineness of an allegation or a suspicion of corrupt behaviour. Members of the public, criminals or other officials may have provided information to law enforcement authorities alleging that a certain person or group of persons in a particular government agency are taking or demanding bribes. Quite frequently, a complainant alleges that a specific official has solicited a bribe, but without the independent evidence provided by an integrity test, a case would simply rest on the word of the complainant against that of the official; not a situation that prosecutors want if they can avoid it.

In countries where courts are hostile towards evidence obtained through integrity testing, the technique still has considerable value. Reliable data can be collected that can assist in gauging the extent of corrupt practices within a particular group and be used to determine whether these should be the focus of other forms of investigative methods.

### ***2. Fairness***

In democratic societies, it is generally considered to be unacceptable for a government to engage in activities that encourage individuals to perpetrate crimes they might not otherwise commit. It is, however, usually quite acceptable for a government to observe whether or not someone is willing to commit a crime under ordinary, everyday circumstances. For that reason, integrity testing must be carried out with the strictest discipline. Integrity testing, like other forms of intrusive technique, is an "aggressive" exercise of state power. To avoid the criticism of abuse of power, audio or video recordings of the actual event should be made to verify that the accused person was not acting other than of his or her own free will, and that government agents have not behaved unfairly or coercively. Such recordings also help to ensure that a government has sufficient evidence to pursue a successful prosecution.

As an additional safeguard for all concerned, witnesses should be placed in the vicinity of the test to corroborate what is seen and heard on recording devices. Both random and targeted tests must be as realistic as possible in order not to expose the subject of the test to a temptation greater than

that to which he or she is normally exposed. In order to ensure the fairness of the test, and for it to be accepted by both those subjected to it and the general public, the methods and scenarios used should be evaluated and approved by competent authorities.

### ***3. Random repetition***

Experience in police forces where integrity tests are carried out show that it is not enough to "clean up", once and for all, a specific area where problems have surfaced. Rather, systems must be developed that help to ensure that follow-up testing is undertaken. The most desirable situation possible includes wide-spread publication of the fact that random integrity testing of officials is taking place. The actual number of tests need not be large. The very fact that officials know that the tests are taking place will encourage them to report approaches, as they will not know which are genuine and which are "tests".

### ***4. Integrity testing and constitutional concerns***

Although integrity tests can be extremely effective as an investigative tool as well as being an excellent deterrent, not all courts readily accept them as a valid method of collecting evidence.

Notwithstanding, there are substantial reasons for its use. It is one of the most effective tools for identifying and eradicating corrupt practices in government services within a short period of time. Where corruption is rampant and levels of public trust are low, it is one of the few tools that can promise immediate results and help restore trust in public administration. It cannot be stressed enough that legal systems that provide for "agent provocateur" scenarios should try to ensure that they are never designed to instigate conduct that makes criminals out of those who might otherwise have reacted honestly. It is therefore important to ensure that the degree of temptation is not extreme and unreasonable.

Many criminal law systems exclude evidence of an agent provocateur when the provocation is considered to be excessive. However, in the United States (arguably a country in which constitutional protections are invoked more frequently than elsewhere), integrity testing is widely used in the private sector, both in screening applicants for jobs and in the workplace, without any serious constitutional impediments being experienced.

### ***5. Integrity testing in New York City – theory put in to practice***

Since 1994, the New York City Police Department (NYPD) has been practising a very intensive programme of integrity testing. Simply stated, this means that the Internal Affairs Bureau creates scenarios based upon known acts of police corruption, such as the theft of drugs and/or cash from a street level drug dealer, to test the integrity of NYPD officers. The tests are carefully monitored and recorded using audio and video electronic surveillance and numerous "witnesses" are placed at or near the scene.

The NYPD strives to make the scenarios as realistic as possible and they are based on extensive intelligence collection and analysis. All officers are aware that such a programme exists and that their own conduct may be subjected, from time to time, to such tests (although they are not told about the frequency of such tests which has produced a sense that they are far more frequent than they are in practice).

Integrity tests are administered on both a targeted and a random basis. That is, certain tests are directed or "targeted" at specific officers who are suspected of having committed corrupt acts, usually based upon one or more allegations from members of the public, criminal informants or even other officers,

However, in addition a proportion of the tests are directed against officers selected at random, based upon the knowledge that they are engaged in work which is susceptible to certain acts of theft or corruption. All the tests are carefully planned to avoid entrapment, and no officer is “enticed” into committing an act of corruption. The scenario merely creates realistic circumstances in which an officer might choose to engage in a corrupt act.

More than 1,500 integrity tests are administered each year among a force of 40,000 officers. The data produced by these tests provides reliable, empirical evidence of the rate of corruption among NYPD officers. The results have been both useful and instructive.

The rate of failure (i.e., when the subject engages in a corrupt act) in the “targeted” tests is significant. About 20 per cent of the officers tested on this basis fail the test, whereupon they are prosecuted and removed from the force. This would seem to validate both the reliability of carefully analysed public complaints and allegations of police corruption, and the efficiency of the specific integrity tests employed.

In contrast with the comparatively high number who fail the “targeted” test, only about one per cent of the officers who are subjected to “random” tests fail. This would seem to support the long held view of senior NYPD management that the vast majority of its officers are not corrupt.

In addition to providing valuable empirical evidence about the rate of corruption among police officers, integrity testing has produced very useful lessons about the strengths and weaknesses of the supervision and control of police officers in the field. Such lessons are used to develop better training and more effective policies to ensure that police services are provided effectively and honestly.

The NYPD has also seen a dramatic rise in the number of reports by police officers themselves of offers of bribes since the integrity-testing programme was initiated. Some of the rise is undoubtedly attributable to the fact that NYPD police officers are concerned that their actions are now the subject to monitoring, and that even a single failure to report a corrupt offer could subject them to disciplinary action.

Building on the New York success, the UK London Metropolitan Police has initiated a similar programme of integrity testing, administered by specialist internal Anti-Corruption Units, and early reports indicate that they are obtaining some of the same benefits.

In tandem with integrity testing there should be independent Police Complaints Boards – so that the police are not left in the position of investigating complaints against themselves – and with civil society representation to assure the public that the procedures adopted are thorough and appropriate

#### **1.1 6. Investigative techniques: Wider uses of integrity testing**

The concept need not be confined to police activities. In some countries hidden television cameras have been used in the ordinary process of criminal investigations to monitor the illicit activities being conducted in the chambers (or private offices) of judges, capturing corrupt transactions between judges and members of the legal profession. The “integrity testing” technique might therefore be developed in the context of judicial integrity testing. It would also have potential for use in other areas where the public sector is engaged in direct transactions with members of the public, particularly in customs.

It would be interesting, too, to see the effect of this same approach in the area of international government procurement contracts. One could arrive at a situation where major international corporations bidding on government contracts in a developing country had to contend with an integrity testing programme, knowing that the payment of any bribe (or even the failure to report the solicitation of a bribe) would subject them to instant exposure as a corrupt company, and to public blacklisting. It would seem to be a simple matter to use integrity testing to cull out junior staff who are taking a large number of small bribes. Yet junior officials do not lie at the heart of the corruption problem. It will be more difficult to adapt the methodology to counter those senior officials who are involved in a small number of highly-lucrative transactions.

The possibilities the technique presents for the developing world have yet to be thoroughly explored. However, on face value there would seem to be considerable merit in establishing a system that is known to all officials (be they police, customs or elsewhere in the system), at the very least, as a means for tackling and reducing levels of petty corruption.

## CHAPTER 12

# THE FRAMEWORK FOR INTERNATIONAL JUDICIAL COOPERATION

It is now widely accepted that measures to address corruption must go beyond domestic criminal justice systems. In a modern world, “no country is an island” in the sense that it can quarantine itself from the impact of events elsewhere. Corruption is no exception, and its links to international organised crime, drug trafficking and terrorism is plainly recognised.

The growth in understanding of both the scope and seriousness of the problem of corruption is reflected in the evolution of international action against it. This has progressed from general consideration and declarative statements<sup>39</sup>; to the formulation of practical advice<sup>40</sup>; to the development of binding legal obligations; and now to the emergence of numerous cases in which one country has sought the assistance of another, not only in the investigation and prosecution of corruption cases but also in the pursuit of their illicit proceeds.

This understanding has also progressed from relatively narrowly-focused measures directed at specific crimes (such as bribery) to more broadly-focused measures against it; from regional instruments developed by groups of relatively like-minded countries (such as the Organisation of American States,<sup>41</sup> the African Union,<sup>42</sup> the OECD,<sup>43</sup> and the Council of Europe<sup>44</sup>), to the globally-based United Nations Convention Against Corruption.<sup>45</sup> Actions on specific issues within specific regions have become more general in order to deal with the problem more effectively.

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

40 See, for example, the United Nations Manual *Practical Measures against Corruption*, ECOSOC Res.1990/23, annex, recommendation #8 and International Review of Criminal Policy, Special Issue, Nos. 41 and 42, New York 1993. This has since been revised and updated and is a companion volume to this Tool-kit.

41 Inter-American Convention Against Corruption, OAS General Assembly resolution A/RES.1398 (XXVI-0/96) of 29 March 1996, annexes.

42 African Union Convention on Preventing and Combating Corruption, Maputo Mozambique, 11 July 2000, available from the AU on-line at:

[http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Treaties\\_Conventions\\_&\\_Protocols.htm](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Treaties_Conventions_&_Protocols.htm).

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

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

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

## **1. The United Nations Convention against Corruption of 2003**

Concern about corruption as an international problem has increased greatly in recent years. The most dramatic development has been the signing in December 2003 of the United Nations Convention Against Corruption in Mérida, Mexico. The Convention will enter into force when it has been ratified by 30 countries.

The Convention represents a major step forward in the global fight against corruption, and in particular in the efforts of UN Member States to develop a common approach to both domestic efforts and international cooperation. The Convention can be seen as the product of a series of both procedural and substantive developments.

In formulating the terms of reference for the negotiation of the Convention, the relevant Intergovernmental Open-ended Expert Group concluded that the new convention should be “comprehensive” (in the sense that it should deal with as many different forms of corruption as possible), and “multidisciplinary” (in the sense that it should contain the broadest possible range of measures for countering corruption).<sup>46</sup> The Group began the development of a broad inventory of specific forms of corruption, including areas such as trading in official influence, general abuses of power, and various acts of corruption within the private sector which had not been dealt with in many of the earlier international instruments.<sup>47</sup>

Building on the broad range of measures included in the Convention Against Transnational Organized Crime, the Expert Group called for the creation of specific criminal offences and for the provision of fresh investigative and prosecutorial powers. All of these basic elements appear in some form in the final Convention, with criminal offences specifically tailored to corruption.<sup>48</sup> To go beyond the scope of the Convention Against Transnational Organized Crime, a series of specific preventive anti-corruption measures were added, both to promote transparency and high standards of conduct (particularly in the public service) and to provide approaches for preventing corruption from taking place.<sup>49</sup> A further significant development was the inclusion of a specific Chapter dealing with the recovery of assets, a major concern for countries pursuing the assets hidden abroad by former leaders and senior officials found to have engaged in corruption.

The text of the new Convention covers the following major areas:

**Chapter I General Provisions.** The opening Articles include a statement of purpose (Article 1) which covers both the promotion of integrity and accountability within each country and the support of international cooperation and technical assistance between States Parties. They also include definitions of critical terms used in the instrument. Some of these are similar to those

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<sup>46</sup> Report of the Meeting of the Intergovernmental Open-ended Expert Group, A/AC.260/2, particularly at paragraph 27, and A/RES/56/260, paragraph 2 calling for a “broad and effective” instrument, and paragraph 3, calling for a “comprehensive and multidisciplinary” approach in developing the instrument.

<sup>47</sup> A/AC.260/2, paragraph 27

<sup>48</sup> For a complete review of the history of the negotiations and consideration of specific issues, see the official records of the Ad Hoc Committee, available from the UNODC web-site at: [http://www.unodc.org/unodc/crime\\_cicp\\_convention\\_corruption\\_docs.html](http://www.unodc.org/unodc/crime_cicp_convention_corruption_docs.html). In particular see the successive texts of the revised draft Convention, A/AC.261/3 and A/AC.261/3/Rev.1 – Rev.5 and the footnotes to specific provisions.

<sup>49</sup> For example, Article 8 deal with codes of conduct and other measures specifically directed at public servants and public service situations, whereas Article 13 deals with the more general participation of society in preventing corruption.

used in other instruments (in particular the Convention Against Transnational Organized Crime), but those defining “public official”, “foreign public official”, and “ official of a public international organization” are new. These definitions are important for determining the scope of application of the Convention in these areas.

**Chapter II Preventative measures.** The Convention contains an inventory of preventive measures which go far beyond those of previous instruments in both scope and detail, reflecting the importance of prevention and the wide range of specific measures which have been identified by experts in recent years. Particular requirements include:

- 1 the establishment of specialized procedures and bodies to develop domestic prevention measures;
- 2 money-laundering and other provisions similar to those in other anti-crime instruments;
- 3 preventive measures specific to corruption, such as general requirements dealing with transparency in public administration;
- 4 specific measures dealing with particularly critical areas such as public sector staffing, public procurement, and judicial institutions; and
- 5 the disclosure of assets, incomes and other important personal information by public officials.

Specific Articles dealing with the prevention of private-sector corruption and the participation of society in anti-corruption efforts are also included.

**Chapter III Criminalization and law enforcement.** The development of the Convention reflects the recognition that although efforts to control corruption must go beyond the criminal law, criminal justice measures are still a major element in the package. The Convention calls on States Parties to establish or maintain a series of specific criminal offences including not only long-established crimes such as various forms of bribery and embezzlement, but also conduct which may not yet be criminalised in many states, such as trading in official influence and other abuses of official functions. The manner in which corruption has manifested itself in different countries and the apparent “novelty” of some of the offences pose significant legislative and constitutional challenges. To accommodate these factors some of the Convention’s requirements are either optional on the part of States Parties (“...shall consider adopting...”) or subject to domestic constitutional or other fundamental requirements (“...subject to its constitution and the fundamental principles of its legal system...”). An example of this is the offence of illicit enrichment, in which the onus of proving that a significant increase in the assets of a public official was not illicit is placed on the official concerned. This has been shown to be a powerful anti-corruption instrument in the hands of many states, but is a matter of controversy in others.

Other criminal justice measures are similar to those of the 1988 United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 Convention Against Transnational Organized Crime. These include offences relating to obstruction of justice and money laundering, jurisdiction, the seizing, freezing and confiscation of proceeds, protection of witnesses and other matters relating to investigations and prosecutions. The subject of the sharing or return of corruption proceeds is also dealt with, but in a separate part of the Convention.

**Chapter IV International cooperation.** The Convention deals with the same basic areas of cooperation in the course of investigations and other law-enforcement activities as previous instruments, including the extradition of offenders, mutual legal assistance and less-formal forms of cooperation. A key issue goes beyond previous treaties. Many delegations were willing to



accept that some countries, for constitutional or other jurisprudential reasons, could not criminalise specific types of corruption, but wanted to ensure that those countries would still be obliged to cooperate with others that had done so. The result was a compromise, in which dual criminality requirements are deemed fulfilled if the “conduct underlying” the offence for which assistance is sought constitutes a criminal offence (however described) in both of the countries involved, even if the wording of the offences was not identical. In addition to cooperating in criminal cases, States Parties are called upon to consider assisting one another in civil or administrative proceedings as well.

**Chapter V Asset recovery.** As noted above, the development of a legal basis for cooperation in the tracing, seizing, freezing and return of assets derived from, or associated in some way with, corruption was of major concern to developing countries. A number of these countries were then actively seeking the return of assets alleged to have been corruptly obtained by former senior officials.<sup>50</sup> To assist delegations, a technical workshop featuring expert presentations on asset recovery was held during the negotiations, and the subject matter was discussed extensively.<sup>51</sup>

Generally, countries seeking assets sought to establish presumptions that would establish their right to ownership of the assets and give priority to their return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the incorporation of language that might compromise basic human rights and procedural protections associated with criminal liability. From a practical standpoint, there was also an effort to make the process of asset recovery as straightforward as possible, provided basic safeguards were not compromised.

The provisions of the Convention dealing with asset recovery begin with the statement that the return of assets is a “fundamental principle” of the Convention. The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. In cases of embezzled public funds, the funds are returnable directly to the requesting State Party. Funds derived from other corruption offences are returnable directly to the requesting State Party where it has established its ownership. Where this has not been achieved, consideration must be given to returning the funds either to the requesting State or to a prior legitimate owner. Alternatively, they can be used to compensate the victims of the crime.<sup>52</sup>

**Chapter VI Technical assistance and information exchange.** The provisions for technical assistance (including research, analysis and training) are similar to those developed with respect to transnational organised crime. However, the broader and more extensive nature of corruption is expected to generate significant differences when these provisions are implemented. Cases involving transnationality are likely to overlap with the Convention Against Transnational Organised Crime of 2000.

**Chapter VII Mechanisms for implementation.** The concluding provisions of the new Convention establish a Conference of States Parties to assist countries in carrying out the various obligations it contains, reviewing implementations and developing recommendations to improve the Convention and its implementation. The resolution whereby the General Assembly adopted

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<sup>50</sup> This was the subject of extensive research and discussion for some time prior to the mandate of the Ad Hoc Committee. See, for example, reports of the Secretary General to the General Assembly at its 55<sup>th</sup> session (A/55/405, see also A/RES/55/188); 56<sup>th</sup> session (A/56/403) and 57<sup>th</sup> session (A/57/158).

<sup>51</sup> See A/AC.261/6/Add.1 and A/AC.261/7, Annex I.

<sup>52</sup> Article 57, paragraph 3, subparagraphs (a)-(c).



the Convention declares it to be open for signature and ratification, and Article 68 provides that it comes into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification acceptance, approval or accession. The adopting resolution also calls upon the Secretary General to support and assist Member States in their efforts to ratify and fully implement the Convention, and urges Member States to provide the necessary resources to carry out this work.

## **2. The United Nations Convention against Transnational Organized Crime of 2000**

The United Nations Convention Against Transnational Organized Crime, adopted by the UN Millennium General Assembly in November 2000, is focused on the activities of organized criminal groups. It does, however, recognize that, in many cases, corruption is both an instrument and an effect of organized criminal activity, and that a significant portion of the corruption associated with organized crime is sufficiently transnational in nature to warrant the development of several provisions in the Convention. The Convention is a binding international legal instrument, although the degree to which each individual provision is binding depends on the particular wording used. It is presently open for signature and ratification, and may achieve the necessary number of ratifications, to come into force during 2002 or 2003.

The Convention establishes four specific crimes to combat activities commonly used in support of transnational organized crime activities: participation in organised criminal groups, money-laundering, corruption and obstruction of justice. States Parties are required to criminalize those activities, as well as to adopt legislation and administrative systems to provide for extradition, mutual legal assistance, investigative cooperation, preventive and other measures, as necessary, to bring existing powers and provisions up to the standards set by the Convention. In addition to establishing a corruption offence (Article 8), the instrument also requires the adoption of measures to prevent and combat corruption (Article 9).

The criminalization requirements include central provisions that are binding on States Parties, and supplementary provisions that are discretionary. The mandatory corruption offences capture both active and passive corruption: "...the promise, offering or giving..." as well as "...the solicitation or acceptance..." of any "undue advantage".

In both offences, there must be:

- (i) a "public official" *and*
- (ii) the advantage conferred must be linked in some way to his or her acting corruptly, or refraining from acting, in the course of official duties, *and*
- (iii) the advantage corruptly conferred may be conferred directly or indirectly.

States Parties are also required to criminalize participation as an accomplice in such offences.

As well as the mandatory offences, States Parties are also required to consider criminalizing the same conduct where the person promising, offering or giving the benefit is in one country and the public official who requests or accepts it is in another. States Parties are also required to consider criminalizing other forms of corruption. In cases where the public official involved was working in a criminal justice system and the act of corruption was directed at distorting legal proceedings, the Convention offence relating to the obstruction of justice would also usually apply.

In addition to criminalization requirements, the Convention also requires the adoption of additional measures against corruption. The text calls for "...legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public

officials". It does not specify details of the measures to be adopted, but requires steps to ensure that officials take effective action, including granting appropriate authorities sufficient independence to protect them against inappropriate influences.

Other Convention provisions may also prove useful in specific corruption cases, notably the Articles establishing the money laundering offence and providing for the tracing, seizure and forfeiture of the proceeds of crime. The Convention requires States Parties to adopt, to the greatest extent possible within their domestic legal systems, provisions to enable the confiscation of any proceeds derived from offences under the Convention and any other property used in, or destined for use in, an offence under the Convention. Courts or other competent authorities must have powers to order disclosure or seizure of bank, financial or commercial records to assist in asset tracing. Bank secrecy cannot be raised as an obstacle to either the tracing of the proceeds of crime or the provision of mutual legal assistance in general. Once proceeds or other property have been confiscated, they can be disposed of in accordance with the domestic laws of the confiscating State, but that State is required to give "...priority consideration..." to returning them to a requesting State Party in order to facilitate the compensation of victims or the return of property to its legitimate owner.

The application of the Convention of 2000 is generally limited to cases that involve an "organized criminal group" or events that are "transnational in nature". The requirements of transnationality and organized criminal group involvement have to be met if the various international cooperation requirements are to be invoked in corruption cases. Where these requirements are met, a wide range of assistance and cooperation provisions apply as between States Parties to the Convention to assist in investigations and, ultimately, to help secure the extradition or prosecution of offenders.

### ***3. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997***

The OECD concluded the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in November 1997. It came into force on 15 February 1999. As of early 2004, some thirty-five countries had ratified the Convention. Given the role of the private sector in international corruption and its impact on development in the developing world, the Convention is of considerable significance.

As its name implies, the OECD Convention is relatively narrow in its scope. The sole focus is to use domestic law in exporting countries to criminalize the bribery of foreign public officials. It applies both to active and passive bribery but does not apply to forms of corruption other than bribery, i.e. to bribery that is purely domestic or to bribery in which the direct, indirect or intended recipient of the benefit is not a public official. Nor does it apply to illicit political donations (arguably the largest loophole in the Convention's framework). Excluded, too, are cases where a bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

The obligation to criminalize includes any case where the offender offers, promises or gives "...any undue pecuniary or other advantage ...to a foreign public official..." in order to induce the recipient or another person to act or refrain from acting in relation to a public duty, if the purpose was to obtain or retain some business or improper advantage in the conduct of international business. States Parties are required to ensure that incitement, aiding and abetting or authorizing bribery is also criminalized, which means that lawyers and accountants who knowingly provide professional services in support of such bribery are also liable to prosecution. The offences in the OECD Convention must also apply to corporations and other legal persons, in

addition to individuals. Attempts at bribery and conspiracies to bribe, which pose a problem for some legal systems, must be criminalized if the equivalent conduct of bribing a domestic public official is criminalized. Prosecutorial discretion is recognized, but the Convention requires that it should be exercised on the basis of professional rather than political criteria.

Punishments must be "effective, proportionate and dissuasive", and of sufficient seriousness to trigger the application of domestic laws governing mutual legal assistance and extradition. Any proceeds, or property of equivalent value, must be either the subject of powers of seizure and forfeiture or the imposition of equivalent monetary sanctions. Bribing foreign public officials must also trigger national money-laundering laws to the same extent as the equivalent bribery of a domestic official. In addition to criminal, civil and administrative penalties to ensure compliance, the instrument also requires measures to be taken so as to deter and detect bribery in the form of accounting practices in order to prevent domestic companies from concealing bribes paid to foreign officials.

Since the OECD Convention came into force, the OECD Working Group on Bribery in International Business Transactions has adopted a rigorous process of assessing the status of implementation and compliance with its terms. Not only do countries assess their own progress, they also assess that of other States Parties. Since 1999, peer review has taken place in over half of the 34 States Parties. For each country the Working Group conducted an evaluation that was then made available to the public.

#### **4. Criminal Law Convention on Corruption of 1998**

The Committee of Ministers of the Council of Europe adopted the text of the Criminal Law Convention on Corruption in November 1998. In addition to European countries, it is also open for signature and ratification by other, non-Member States that participated in its negotiation. Other States can also join by accession once the instrument is in force, provided that certain preconditions are met, including the consent of all the contracting States that sit in the Committee of Ministers of the Council.

The required 14 ratifications for the Criminal Law Convention on Corruption to enter into force was reached on 1 July 2002. As of July, 2004, some thirty signatures had been followed by ratifications/accessions and sixteen States had signed but had not yet ratified.<sup>53</sup>

The Convention applies to a broad range of occupations and circumstances but is relatively narrow in the scope of the actions or conduct that States Parties are required to criminalize. It contains provisions criminalizing a list of specific forms of corruption; and it extends to active and passive forms of corruption as well as to both private and public sector cases.

The OECD Convention also deals with a range of transnational cases. Bribery of foreign public officials and members of foreign public assemblies is expressly included; offences established pursuant to the private sector criminalization provisions would generally apply in transnational cases in any State Party where a portion of the offence had taken place sufficient to trigger domestic jurisdictional rules. Most of the offences established are limited to "bribery", which the instrument does not define. Trading in influence and laundering the proceeds of corruption must also be criminalized, but the instrument does not deal with such forms of corruption as extortion, embezzlement, nepotism or insider trading. As with other international instruments, it does not seek to define or criminalize "corruption" in general terms.

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53 Source, Council of Europe Treaty Office: <http://conventions.coe.int>

The Convention requires States Parties to ensure that they have specialized "persons or entities" dedicated to the fight against corruption. These must be given sufficient independence, training and resources to enable them to operate effectively. It also provides for the protection of informants and witnesses who cooperate with investigators, the extradition of offenders, mutual legal assistance and other forms of cooperation. The tracing, seizing and freezing of property used in corruption, and the proceeds of corruption, are also provided for, but the text is framed in terms of international cooperation and does not deal with the return or other disposal of recovered proceeds. Mutual legal assistance may be refused if acceding to a request would undermine the fundamental interests, national sovereignty, national security or 'ordre public' (public interest) of the requested Party. Most importantly, it may not be refused on the grounds of infringing bank secrecy.

#### **5. Civil Law Convention on Corruption of 1999**

The Council of Europe's Civil Law Convention on Corruption of 1999 was the first attempt to define common international rules for civil litigation in corruption cases. The Convention requires States Parties to "cooperate effectively" in civil cases, to take steps to protect those who report corruption, and to ensure the validity of private sector accounts and audits.

Whereas the Criminal Law Convention seeks to control corruption by ensuring that offences and punishments are in place, the Civil Law Convention requires States Parties to ensure that those affected by corruption can sue the perpetrators under civil law, effectively drawing the victims of corruption into the anti-corruption strategy of the Council.

Generally, this has the advantage of making corruption controls partly self-enforcing by empowering victims to take action on their own initiative. On the other hand it entails some loss of control on the part of Government agencies. Some potential litigants may effectively be excluded by their lack of resources, but in some jurisdictions such a right can give rise to class actions, brought on behalf of a large number of victims. Corporate civil litigants, on the other hand, do have the financial means to bring a civil action. However, they are likely to settle proceedings purely on business or economic grounds, and this may not accord with the overall anti-corruption strategy of the Government.

Some argue that creating a civil action may also give rise to conflicting or parallel civil and criminal proceedings, and a need for rules to resolve such problems. This is to overlook the fact that many criminal offences (e.g. of assault) carry with them rights to sue for compensation in the civil courts. There is much to be said for the civil law countries' procedure of combining both criminal and civil proceedings into the one single court action.

As with the Criminal Law Convention, the Civil Law Convention is drafted as a binding legal instrument. Civil law provisions must be enacted that ensure that anyone who has suffered damage resulting from corruption can recover "...material damage, loss of profits and non-pecuniary loss." Damages can be recovered against anyone who has committed a corrupt act, authorized someone else to do so, or failed to take reasonable steps to prevent the act, (including the state itself), provided that a causal link between the act and the damages claimed can be proved. This provision sits well in a European context. However, for developing countries there would be the possibility that civil claims could be mounted against the state on the grounds of public officials being involved in acts of corruption that have caused losses to third parties, e.g. in the tender processes of an exercise in public procurement. This could mean that the public interest could be damaged twice over; first, as victims of the corrupt actors, and then again as having to pay damages as compensation for what they have done. These would be losses a developed country might be expected to absorb, but could be catastrophic for a very poor one.

Courts are also given the power to declare contractual obligations to be null and void where the consent of any party to the contract has been "undermined" by corruption.

In the scope of the types of corruption to which it applies, the Civil Law Convention is narrower than its criminal law counterpart as it extends only to bribery and similar acts. It does, however, apply to such acts in both the private and the public sector.

The Civil Law Convention on Corruption reached the 14 ratifications required for it to enter into force on 1 November 2003. As of July, 2004, the total number of ratifications/accessions stood at twenty-one, and the total number of signatures not yet followed by ratification was seventeen.<sup>54</sup>

#### **6. Convention on the Protection of the European Communities' Financial Interests and Protocols thereto of 1995**

The Convention (1995) and its two protocols (1996 and 1997) represent an early attempt on the part of the European Union (EU) to address forms of malfeasance that are harmful to the financial interests of the Union itself. They are legally binding on Member States and address corruption and other financial or economic crimes, as well as related conduct, but only insofar as the conduct involved affects the interests of the EU itself. The Convention deals with a list of conduct designated as "fraud affecting the European Communities' financial interests".

The first protocol deals with active and passive corruption, and the second with money-laundering and the confiscation of the proceeds of fraud and corruption. The forms of active and passive corruption dealt with in the first protocol generally consist of bribery and similar conduct, in which some promise, benefit or advantage is solicited, offered or exchanged in return for undue influence on the exercise of a public duty.

The forms of fraud set out in the Convention of 1995 itself cover other areas of corruption, such as the submission of false information to a public authority to induce it to pay funds or transfer property that it would not otherwise have done. The first protocol distinguishes between the criminal conduct of officials, who can commit "passive corruption" by requesting or receiving bribes or similar considerations, and others, who commit "active corruption" by promising or giving such considerations for improper purposes.

The other instruments require States Parties to incorporate ("transpose") the principles set out into their national criminal law, which would generally result in offences being applicable to everyone who engages in the prohibited conduct. Generally, the question of the liability of legal persons, such as corporations, would be covered by the same principle. Article 3 of the Convention further calls for the heads of businesses or those exercising control within a business to be held criminally liable in cases where a business commits a fraud offence.

#### **7. The Convention on the Fight against Corruption involving European Community Officials or Officials of Member States of 1997**

The Convention incorporates essentially the same terms as the 1995 Convention on the Protection of Financial Interests (*see above*), but the coverage has been broadened to include conduct on the part of officials of the European Community and its Member States. The conduct to which it applies is essentially bribery and similar offences that States Parties are required to criminalize. It does not deal with fraud, money-laundering or other corruption-related offences.

#### **8. The Inter-American Convention against Corruption of 1996**

The principal focus of the anti-corruption strategy of the Organisation of American States (OAS) has been the Inter-American Convention against Corruption of 1996. The Inter-American

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<sup>54</sup> Source, Council of Europe Treaty Office: <http://conventions.coe.int>

Convention is drafted as a binding legal instrument, although some specific provisions contain language that limits or provides some element of discretion with respect to its application. Perhaps its most imaginative advance in the fight against corruption was to provide that the fact that an act of corruption involved political motives or purposes did not necessarily render those offences "political offences". This closed off an escape route for fugitive officials who might otherwise claim exemption from legal assistance and extradition procedures.

Generally, the obligations to criminalize acts of corruption are mandatory. States Parties need only "consider" taking other steps, such as certain preventive measures. The instrument has been in force since 6 March 1997, having been ratified by 20 OAS countries. Countries that are not OAS members may also become Parties by acceding to it.

It is open to States Parties to apply the Convention to other forms of corruption if other countries agree. The instrument also applies to attempted offences and to various categories of participant, such as conspirators and those who instigate, aid or abet offenders. States Parties are required to adopt transnational bribery and illicit enrichment as domestic offences, and to ensure that adequate provision is made to facilitate the required forms of cooperation, such as mutual legal assistance and extradition.

Questions of transnational bribery and illicit enrichment are dealt with separately. Faced with constitutional difficulties on the part of some states, those offences are made subject to the Constitution and fundamental principles of the legal system of each State Party, and acknowledge that constitutional constraints may preclude or limit full implementation. Where this is the case, and a State Party does not establish offences for those reasons, it is still obliged to assist and cooperate with other States Parties in such cases, "...insofar as its laws permit." Transnational bribery and illicit enrichment are designated "acts of corruption", making them subject to the other provisions of the instrument.

The transnational bribery provision requires that States Parties "...shall prohibit and punish..." the offering or granting of a bribe to a foreign Government official by anyone who is a national, habitual resident, or a business domiciled in their territory". The language is broader than that of the equivalent provisions of the OECD Convention, covering not only bribery where the purpose relates to a contract or business transaction but also any other case where the bribe is connected to "any act or omission in the performance of that official's public functions." The illicit enrichment provision simply requires the establishment of an offence for the accumulation of a "significant increase" in assets by any public official if that official cannot reasonably explain the increase in relation to his or her lawful functions and earnings.

The foregoing criminalization requirements are essentially mandatory. In addition, States Parties are also asked to consider a series of further offences that, if adopted, also become "acts of corruption" under the Convention, and trigger its cooperation requirements even among states that have not adopted them:

- a) The improper use of confidential information by an official;
- b) The improper use of Government property by an official;
- c) The seeking of any decision from a public authority for illicit gain; and
- d) The improper diversion of any state property, monies or securities.

The Convention creates a series of preventive measures although, as noted above, they are not mandatory:

- a) Standards of conduct for public functions and mechanisms to enforce them;
- b) The instruction of public personnel on ethical rules and their responsibilities;
- c) Systems for registering the incomes, assets and liabilities of those who perform public functions;
- d) Government revenue and control systems that deter corruption;
- e) Tax laws that deny favourable treatment for corruption-related expenditures;
- f) Protection for those who report corruption;
- g) Oversight bodies to prevent, detect, punish and eradicate corruption; and
- h) The study of further preventive measures.

As with several other instruments, bank secrecy cannot be invoked as a reason for not cooperating, but where information protected by bank secrecy is disclosed, it cannot be used for purposes outside the scope of the initial request without authorization from the state that provided it. The Convention does not require States Parties to create retroactive crimes but it does apply to acts of corruption committed before it came into force.

#### **9. Southern African Development Community (SADC) Protocol on Corruption**

In addition to defining and describing corruption as a problem, the purposes of the SADC Protocol on Corruption are threefold: to promote the development of anti-corruption mechanisms at the national level, to promote cooperation in the fight against corruption by States Parties, and to harmonise anti-corruption national legislation in the region.

The Protocol provides a wide set of preventive mechanisms which includes the development of codes of conduct for public officials, transparency in the public procurement of goods and services, access to public information, protection of whistle-blowers, establishment of anti-corruption agencies, the development of systems of accountability and control, participation of the media and civil society, and the use of public education and awareness as ways of introducing zero tolerance of corruption.

#### **10. Economic Community of the West African States (ECOWAS) Protocol on the Fight Against Corruption of 2001**

The Member States signed the Protocol on the Fight Against Corruption in Dakar, Senegal, in December 2001. The aims and objectives of the Protocol are to:

- i) promote and strengthen the development in each of the State Parties effective mechanisms to prevent, suppress and eradicate corruption,
- ii) intensify and revitalise cooperation between State Parties, with a view to making anti-corruption measures more effective, and
- iii) promote the harmonization and coordination of national anti-corruption laws and policies.



## CHAPTER 13

### EXTRADITION

#### Article 44<sup>\*55</sup>

##### Extradition

1. 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.
2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.
3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.
4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.
5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.
6. A State Party that makes extradition conditional on the existence of a treaty shall:
  - (a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
  - (b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.
7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.
8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.
9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.
10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is

<sup>55</sup> For a further discussion, see “Extradition”, Tool # 42, UNODC Anti-Corruption Toolkit, Second Edition, February 2004; [http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)



present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

\*UN CONVENTION AGAINST CORRUPTION

“Extradition” is the surrender by one state, at the request of another, of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting state. Although new forms of judicial cooperation in criminal matters have been developed, such as transfer of proceedings, “extradition for trial” has maintained its importance because the place where the offence was committed is considered the most convenient place to try an offender.

When a suspect or convicted person is located in a foreign state (the “requested state”), a prosecutor or investigating judge of the requesting state may decide to have that person extradited from the requested state to face trial or the enforcement of the sentence pronounced in the requesting state.

## **B. LEGAL BASIS FOR EXTRADITION**

### ***1. From bilateral treaties to regional agreements and multilateral schemes for***

## **extradition**

There is neither a legal nor a moral duty upon a state to extradite in the absence of a specific agreement binding it to do so. Because of this principle, many states, in particular those of the common law tradition, will not extradite in the absence of a treaty or an ad hoc agreement such as an Exchange of Letters. Those states, as well as many other states, have traditionally based their extradition relationships on bilateral treaties. Many countries do not permit extradition for the purpose of questioning a fugitive or for their being investigated.<sup>56</sup>

With the inherent difficulties of separately negotiating a large number of bilateral instruments, increasingly countries have resorted to regional agreements and multilateral schemes for extradition. (The 50-odd countries of the Commonwealth, formerly the "British" Commonwealth, have had their own collective arrangements for extradition since 1966.) In the face of crimes with effects of international proportion, more general multilateral conventions have been developed, directed at particular crimes such as terrorist acts, drugs and organized crime. These conventions commonly include articles relating to extradition, such as the following:

- convention offences are deemed to be included as extraditable offences in any treaty existing between Contracting Parties,
- A convention is considered to be a treaty for extradition purposes, where extradition is conditional on a treaty and no treaty exists between two Contracting Parties,
- The convention offences are considered extraditable if extradition is not conditional on a treaty.
- State parties are obliged either to extradite alleged offenders or to bring them before their own courts with jurisdiction based on e.g. the nationality of the offender (the principle of *aut dedere aut judicare*).

### **2. Extradition without a treaty**

Some states allow extradition without a treaty, on the basis of national legislation, which imposes in principle a condition of reciprocity. This is the basis for the Commonwealth Scheme, referred to above, which is not treaty-based.

In a reply to the questionnaire prepared by the UN Secretariat-General on the United Nations Declaration on Crime and Public Security over one half (sixteen out of twenty-six) of the responding states indicated that extradition for offences not covered by a treaty or to states where no treaty existed might be permitted on a discretionary basis, subject to applicable domestic constitutional or legal constraints.

## **C. EXTRADITABLE OFFENCES**

### **1. From the "list" approach to the "eliminitive" approach**

Most extradition treaties developed in the late 1800's to the early-to-mid 1900's defined extradition crimes by reference to a list of offences. Such lists are generally stagnant, and governments fail to bring them up to date to cover new crimes and changing terminologies as these emerge. To make matters worse, on occasions certain serious offences were omitted from the list from the outset. Where it is not possible to supplement the particular treaty by means of a Declaration of Reciprocity, a fugitive is likely to escape extradition.

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<sup>56</sup> E.g. Chile has twice refused to extradite former President Menem of Argentina on the grounds that he has not been charged with any criminal offence.  
[http://support.casals.com/aaafash1/new\\_busca.asp?ID\\_AAAControl=10450](http://support.casals.com/aaafash1/new_busca.asp?ID_AAAControl=10450)

In more recent treaties this approach has generally given way to an “elimination” test: any offence punishable in both the requesting and the requested state, by a minimum penalty defined by the two states (such as two years’ imprisonment), is considered to be sufficiently serious as to warrant being an extraditable offence.

## **2. Relaxed application of the dual criminality principle**

For extradition to be available, the act/s in question must constitute a crime in both the requesting and requested state. This rule serves two different purposes: first, to ensure the lawfulness of any form of deprivation of liberty according to the law of the requested state on the grounds that no individual may be arrested or detained on account of facts which are not punishable under the laws of that state; and second, to respect the rule of reciprocity in international proceedings.

Many extradition cases fail because of a technical approach to dual criminality that stresses even very slight differences between the ways in which particular states have defined, named or prove criminal offences. For example, what may be called “theft” in one state may be named “larceny” in another. Although the conduct of the alleged offence may include all of the elements of fraud, as defined in both states, the definitions of the offences created to counter them may differ. Therefore, states have been looking for a more modern test for dual criminality; one that focuses not on technical terms or definitions but on the substantive underlying conduct. This new test, which has greatly simplified and improved extradition practices where it has been introduced, examines whether the conduct alleged against the fugitive would constitute a criminal offence in the requested state, regardless of whether the offences in the two states carry different names or have different constituent elements.

But not all problems have been solved. In relation to the corruption of public officials the problem may arise where states only punish corruption of their own public officials, not that of public officials of other states. (If A requests B to extradite X, charged with corruption of a public official in A, B may not be able to extradite X because the facts, had they been committed on B’s territory, would not constitute an offence.) This has proved an obstacle to extradition in a number of cases.

A flexible solution is the ‘transformative’ interpretation, which is followed in such countries as Germany, Austria and the Netherlands. In this approach, the requested state substitutes its own national elements for foreign national elements in the definition of the crime in an extradition request. Accordingly, for the purpose of extradition, bribery of national and foreign public officials is treated as being the same.

## **D. BARS AND LIMITS TO EXTRADITION**

### **1. The “Political offence” and the “fiscal offence” exceptions**

There is no internationally accepted criteria or definition of the term “political offence” or the rule that bars extradition for such an offence.

A distinction is often made between “purely political offences” (offences of opinion, political expression or those which otherwise do not involve the use of violence such as treason and espionage) and “relative political offences” (which involve violence as an incidence of the political motivation and goal of the actor, but which do not constitute wanton or indiscriminate violence directed against an internationally protected person, such as a civilian, i.e. it does not constitute an act of “terrorism”).

In the Inter-American Convention Against Corruption of 1996 it is provided that, for the purposes of extradition and mutual legal assistance, “the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption

was committed for political motives or purposes, *shall not suffice in and of itself* to qualify the act as a political offence or as a common offence related to a political offence.” This is seen as an important provision in a region where corrupt senior public officials had previously been known to flee in to neighbouring countries with vast sums of money and to be given political asylum there.

There is a general trend towards restricting, if not excluding altogether, the applicability of the political offence exception in respect to violent criminal acts. Traditionally, fiscal offences have been omitted from the scope of extraditable crimes, either through an explicit provision or by omission from the lists of extraditable offences.

The traditional reluctance of countries to refuse to include tax offences within the scope of extradition (for the most part because states have no mutual interest in enforcing law peculiar to other state’s political-economic system) is now breaking down owing to increased concerns about organized crime, drug trafficking, money laundering, massive tax evasion, and violations of currency laws. The UN Convention Against Transnational Organized Crime explicitly prohibits States Parties from refusing a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

## **2. Non extradition of nationals**

In many states, particularly of the civil law tradition, the extradition of a state’s own nationals is prohibited, whether by constitutional law or practice. In their replies to a questionnaire prepared by the UN Secretariat-General on the United Nations Declaration on Crime and Public Security<sup>9</sup>, only fourteen of the twenty-eight responding states indicated that their law allowed for the extradition of their nationals. The position differed greatly among the states that allowed for this, the matter being governed by treaties or agreements. Attitudes to extradition appear to be softening, particularly in Western Europe, where the rights of extradited persons are protected by a regional human rights convention.

In most instances, countries that do not extradite nationals have domestic jurisdiction to prosecute their own nationals for offences committed in the territory of another state (“*judicare*” instead of “*dedere*”). In their replies to a questionnaire prepared by the UN Secretariat-General on the United Nations Declaration on Crime and Public Security<sup>10</sup>, sixteen of the states that responded to the survey indicated that their laws provided for obligatory or discretionary jurisdiction in such cases. Preconditions for such jurisdiction varied in accordance with general factors, such as national criminal legislation, applicable treaties and case-specific factors, such as the nature of the crime and the admissibility of evidence.

Notwithstanding, practical problems continue significantly to impede the effectiveness of this alternative to extradition. It often seems to be the case that, despite best efforts to complete investigations and bring a case to trial, an adequate case cannot be assembled. Foreign witnesses may not be available or other evidence may be insufficient or inadmissible. Ten out of the eighteen responding states reported that between 1996 and 1998, having refused extradition, they had subsequently prosecuted their own nationals on the grounds of *aut dedere aut judicare*. One solution is for legislation to provide for the conditional extradition of a national, subject to the requirement that he or she be returned promptly after trial to the extraditing country to serve any sentence there.

## **3. Other bars**

Where the defence of “double jeopardy” is contained in a treaty, its success will depend largely on the similarity of the charges for which the fugitive has been requested and for which he has been already prosecuted, acquitted or convicted. Most treaties contain a defence to extradition where the prosecution at issue is barred by a statute of limitations of the requested or requesting

state. The treaties vary as which country's statute is to be relied upon, or whether it is the longer of the two. In recent years the Member States of the European Union have initiated a process in which many such barriers have been reconsidered. Among other things, this has led to a lessening of the severity of the rule prohibiting extradition where, under the law of the requested state, the individual is immune from prosecution or punishment by reason of lapse of time.

Other, more recent, barriers focus on the situation of a fugitive after extradition, such as the "non-discrimination" rule. In instances in which the ambit of the political offence exception is either limited or eliminated, the rule relating to discrimination has to be relied upon more heavily than usual. Other concerns highlight the possible application of the death penalty, or likely violations of basic human rights.

#### **4. Specialty rule**

It is an established principle in extradition law that a person who has been extradited may not be proceeded against, sentenced or detained for any offence committed prior to his surrender other than that for which he was surrendered. Nor can he or she be restricted in their personal freedom for any other reason, other than with the consent of the requested state or of the extradited person. This so-called principle of "specialty" not only protects the fugitive's rights to the extent that it prevents the fugitive from being requested for one offence and tried for another. It also upholds the contractual nature of the agreement between the two states, in that the requesting state has to accept that the requested state has granted extradition for the offences specified, and not for others.

### **E. PROCEDURAL ISSUES**

#### **1. A slow and cumbersome system**

International conventions and treaties usually include very few provisions on procedural issues. These are left to be governed largely by the national laws of the states involved.

The traditional system for applying for mutual legal assistance is somewhat complex:

*A two-stage system in the requesting state:* The authorities of the requesting state forward a request for a fugitive's extradition to the authorities of the requested state. The request usually originates with the prosecuting authority with jurisdiction in the criminal case in question (public prosecutor or court), and is formalized and prepared for transmission by the responsible administrative authority of the requesting state. *This is followed by the use of diplomatic channels:* The administrative authority of the requesting state generally transmits the request to its embassy in the requested state, which forwards the request on to the requested state's Ministry of Foreign Affairs. That Ministry then forwards it to its Ministry of Justice, which then sends it on to the appropriate prosecuting office or court, depending upon that country's legal system.

*Then follows a two stage-system in the requested state:* In the requested state the procedure can be divided into two stages. First, there is a judicial stage, in which a court decides on whether the domestic legal requirements for the extradition of the person have been met. The second is administrative. Where the court has found in favour of the request, the responsible administrative authority (e.g. Minister of Justice) has to decide whether or not the extradition will be granted. The judiciary examines whether the legal requirements in the treaty or in domestic legislation have been met, but extradition itself remains a prerogative of the government, as an act of state. The administrative authority of the requested state takes the final decision and informs the authorities of the requested state of its decision through diplomatic channels.

## **2. Extradition proceedings are not themselves deemed to be criminal proceedings**

The rules of procedure applicable to criminal cases are usually not applicable to extradition cases, other than “due process” and “fundamental fairness” requirements.

A long-standing “rule of non-inquiry” requires that it is not for a court to take into account the likely treatment of a fugitive if he or she is extradited to the requesting country. The assessment of such grounds is usually left to the discretion of the administrative authority. That authority also has the power to require the requesting state to provide any necessary assurances before extraditing the fugitive. These might include undertakings for the return of that person upon completion of the legal proceedings, that the fugitive will not be tried before a special or military tribunal, or that the death penalty will not be imposed in the event of a conviction for a capital offence.

The issue of the evidence to be provided by the foreign state in support of an extradition request remains contentious, particularly as between civil and common law countries.

For civil law countries, the issuing of a warrant of arrest within a requesting state constitutes evidence that a judicial authority within that state has determined that there is sufficient evidence for the person to stand trial. On that basis, they expect the authorities in the requested state to be able to accept and rely on that determination, and not to look behind it to reassess the underlying basis for the finding.

By contrast, however, common law countries have traditionally required not only that the warrant be provided but also that a submission of evidence by the foreign state be made that is sufficient to meet a prescribed domestic standard. Many such states also demand that, before extradition can be granted, the evidence be in a form that complies with their own domestic law. To meet this burden the requesting authorities can be required to generate an entirely new package of evidence that they would not normally put together and which might not be used (or perhaps even be useable) in any ultimate domestic trial process, against the fugitive. The same problem can also arise between countries with the same general traditions but with differing rules of evidence and differing approaches to extradition.

Considerable reform has been achieved in this area. Several common law countries (such as Australia and the United Kingdom) have eliminated the requirement for evidence in prescribed circumstances. Others (such as the United States) have adopted a lower threshold of proof and will accept evidence adduced in a summary form, without requiring that the evidence meet their own normal evidentiary standards. To the extent that there remain states that require the submission of evidence in a form admissible under domestic law, there is still the need to develop ways and means of reducing the burden of needlessly demanding evidentiary requirements. Enhanced communication between the relevant authorities in the different states in order to increase understanding can help to ameliorate this.

## **3. Modernization and simplification of the procedure**

### **a) Provisional arrest**

More recent international instruments provide that, prior to the filing of a formal extradition request, a requesting state may request the provisional arrest of a fugitive. Provisional arrest can be necessary to avoid the risk of the fugitive disappearing while the extradition request and accompanying documentation is being prepared by the requesting state. Existing treaties provide



for periods of up to sixty days of provisional arrest, after which a fugitive must be released if no formal extradition request is presented.

The mechanics of provisional arrest are essentially informal. The liaison office of Interpol, usually located within the principal or central law enforcement agency of each Interpol Member State, sends a message to the Interpol liaison office in the state where the person is believed to be located. If the whereabouts of the person sought are unknown, the Interpol Headquarters (in Lyon, France) then issues an “international warrant” (a so-called “red notice”), or an “alert”, or both, to some or all of its liaison stations. A study carried out by Interpol’s General Secretariat in 1997, showed that a majority of the Organization’s member countries consider that an Interpol “red notice” is regarded as being a valid request for provisional arrest. Immigration and customs agencies are also advised of the request.

The rapidly growing computerization of law enforcement agencies means that these notifications are generally recorded promptly in the databases of the different law enforcement agencies, leading to greater effectiveness in tracking and apprehending fugitives.

Reasons for not executing requests for provisional arrests include:

- i) an inability to locate the subject;
- ii) a failure of the request to satisfy legislative or constitutional requirements in the requested state;
- iii) a lack of information sufficient to determine whether the request meets applicable requirements;
- iv) the withdrawal of the request;
- v) the absence of dual criminality; and
- vi) the lack of a treaty or relevant national law applicable to the requesting state.

Where states permit direct requests for provisional arrest, additional conditions are usually applied.

**b) Direct contact between ministries of justice or through designated central authorities**

At the regional level, the reliance on the diplomatic channel for the communication of extradition requests has given rise to unnecessary delays whereas direct contact between Ministries of Justice or through designated central authorities have offered more satisfactory alternatives. As with Mutual Legal Assistance, central authorities are usually established to receive and consider extradition requests. Such authorities serve as a point of contact between Governments, assessing incoming requests in order to refer them to the appropriate domestic agencies for follow-up or drawing the attention of a requesting state to any problems or insufficiencies.

Although changes in many of these areas can only be brought about by legislation and appropriate treaty revision, other significant improvements can be facilitated more simply. In the course of its presidency of the European Communities in 1992, the United Kingdom initiated discussions with other Member States, which resulted in agreement on several practical steps that could be taken to remove avoidable delays. A number of improvements resulted, including the publication of a guide to the extradition procedures of the states concerned. These contain flow charts, a list of contact points and other information of a practical nature. In 1994, the Secretariat of the Council of Europe was given the task of extending this text to include all parties to the 1957 European Convention on Extradition.

Such initiatives do not necessarily require a regional or sub-regional setting. For example, the preparation of a practical guide to domestic extradition law and practice can be undertaken

unilaterally and distributed by the central authority to states with which there are existing extradition agreements, or to all parties to the 1988 Convention. The availability of such a practical explanatory note is also of value in the preliminary stages of extradition treaty negotiations with states that have little or no experience of local requirements

c) [Use of modern means of communication](#)

A concern with administrative efficiency is evident in the many precedents that authorize the use of electronic means of communication.

d) [Simplified extradition procedures](#)

In recent years a development that has also commanded attention is the provision for summary or simplified procedures to expedite the extradition process when the fugitive does contest extradition. Where the fugitive consents to extradition, surrender may be enforced without any other formalities always provided that consent has been freely given. This approach has been adopted in a number of regional arrangements including the Benelux Treaty of 1962, the 1990 Schengen Convention and the 1995 Convention on Simplified Extradition Procedure between the Member States of the European Union. It is also found in Article 6 of the Model Treaty on Extradition, adopted in 1990 by the General Assembly of the UN.



## CHAPTER 14

### MUTUAL LEGAL ASSISTANCE

Mutual legal assistance<sup>57</sup> is an international cooperation process by which states seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases, and, in tracing, freezing, seizing and ultimately confiscating criminally derived wealth. It covers a wide and ever-expanding range of assistance. It may include search and seizure; production of documents; taking of witness statements by video-conference; and temporary transfer of prisoners or other witnesses to give evidence.

It differs from traditional cooperation between law enforcement agencies. Law enforcement cooperation enables a wide range of intelligence and information sharing, including that of witnesses providing they agree to give information, documents or other evidentiary materials voluntarily. If a witness is unwilling, coercive measures will be needed, usually in the form of a court order from a judicial officer.

It also differs from extradition, although many of the legal principles underlying mutual legal assistance are derived from extradition law and practice. Extradition involves the surrender of a person from one sovereign jurisdiction to another and fundamentally affects the liberty and possibly life of that person. Accordingly, extradition law, practice and procedure typically enable less flexibility and room for discretion in granting a request than mutual legal assistance.

A United Nations expert working group (EWG) brought together in Vienna in December 2001 recommended that states take the following actions in order to facilitate the providing of effective mutual legal assistance. For the purpose of this *Handbook* only a few relevant points are mentioned:

#### B. STRENGTHENING EFFECTIVENESS OF CENTRAL AUTHORITIES

##### 1. *Establishment of effective central authorities*

The United Nations Conventions on drugs and crime all contain extensive and broadly similar provisions relating to the provision of mutual legal assistance. Included in their provisions are requirements for each Party to notify the Secretary-General of the United Nations of the “central authority” designated by it to receive, transmit and execute Letters of Request for mutual legal assistance. This is critical information for requesting states in planning and drawing up requests. It must be accurate, up-to-date and widely available to all those who frame or transmit mutual legal assistance requests. States that have not already done so should establish a central authority for the purpose of facilitating the making of requests for mutual legal assistance made under Article 7 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the 1988 Convention)<sup>58</sup> and addressed to other States Parties, and for it to execute promptly requests received from other States Parties. Central authorities

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<sup>57</sup> For a further discussion, see “Mutual Legal Assistance”, Tool # 43, UNODC Anti-Corruption Toolkit, Second Edition, February 2004;

[http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

<sup>58</sup> <http://www.incb.org/e/conv/1988/articles.htm>

should be staffed with practitioners who are legally trained and who have developed institutional expertise in the area of mutual legal assistance. The designation of authorities with important national drug control capability in other fields (e.g., health ministries), but little if any in international mutual legal assistance, should be avoided.

## **2. Ensuring the dissemination of up-to-date contact information**

Parties to the 1988 Convention should ensure that contact information contained in the United Nations Directory of competent authorities under article 7 of the Convention is kept up to date, and, to the extent possible, provide information for contacting its central authority via phone, fax and Internet.

## **3. Ensuring round-the-clock availability**

Both with respect to the 1988 Convention and generally, the central authority of a state should, to the greatest extent possible, provide a means for contacting an official of the central authority for the purposes of executing an emergency request for mutual legal assistance if necessary after working hours. If no other reliable means is available, states may consider ensuring that their Interpol National Central Bureau or other existing channel is able to reach such an official after working hours.

## **4. Consistency of central authorities**

The EWG noted the wide and growing range of international conventions, each requiring Parties to afford one another the widest measure of mutual legal assistance in relation to the offences covered by the particular convention, and each requiring for that purpose the designation of a central authority. The EWG noted the potential for the fragmentation of effort and for inconsistencies of approach if different central authorities are designated for different groups of offences. States are therefore urged to ensure that their central authorities under the 1988 Convention, the UN Convention on Transnational Organized Crime of 2000, are a single entity of the kind described in this section. This will make it easier for other states to contact the appropriate component for all kinds of mutual legal assistance in criminal matters, and will facilitate greater consistency of mutual legal assistance practice for different kinds of criminal offences.

## **5. Reducing delay**

The EWG noted that significant delay in the execution of a request is often caused by delays in consideration of the request by the receiving central authority and the transmission of the request by the central authority to the appropriate executing authority. States should take appropriate action to ensure that requests are examined and prioritized by central authorities promptly upon receipt, and transmitted to executing authorities without delay. States should consider placing time limits upon processing of requests by central authorities. States are encouraged to afford foreign requests the same priority as similar domestic investigations or proceedings. States should also ensure that executing agencies do not unreasonably delay processing of requests. Appropriate coordination arrangements should be in place in federal jurisdictions where constituent states have execution responsibilities to minimize the risk of delayed responses.

# **C. ENSURING AWARENESS OF NATIONAL LEGAL REQUIREMENTS AND BEST PRACTICE**

There is a need to increase the availability of practical guides regarding the national mutual legal assistance legal framework and practice (both domestic manuals and guides for foreign central authorities). It is important that domestic authorities be aware of the availability of mutual legal assistance and know the procedures to follow to obtain that assistance in relation to an investigation or prosecution. It is also very useful, particularly in larger jurisdictions, where there may be several authorities involved in the making or execution of such requests, to provide for the sharing of information between those authorities.

States should adopt mechanisms to allow for the dissemination of information, regarding the law, practice and procedures for mutual legal assistance and on making requests to other states, to domestic authorities. One possible approach is to develop a procedural manual or guide for distribution to relevant law enforcement, prosecutorial and judicial authorities. Other useful mechanisms include the distribution of a regular newsletter and the convening of domestic practitioners meetings to provide updates on cases, legislation and other developments.

The provision of information to foreign authorities was also highlighted as an important measure to facilitate effective cooperation. States should develop guidelines on domestic law and procedures relating to mutual legal assistance to inform foreign authorities on the requirements that must be met to obtain assistance. Any such guidelines should be made available to foreign central authorities through a variety of methods, such as, for example, publication on a website, direct transmission to law enforcement partners in other states and distribution through the United Nations Office on Drugs and Crime or other international organizations.

#### **1. Increasing training of personnel involved in the mutual legal assistance process**

Effective implementation of mutual legal assistance instruments and legislation is not possible without personnel well trained in the applicable laws, principles and practices. States should use a broad range of methods to provide such training, in a manner that will allow for the expertise to be sustained, for example:

- a) Lectures and presentations by central authorities as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial authorities;
- b) Special workshops or seminars on a domestic, regional or multi-jurisdictional basis;
- c) Introducing programmes on mutual legal assistance as part of the curriculum for law schools or continuing legal education programmes; and
- d) Exchanges of personnel between central authorities of various jurisdictions.

### **D. EXPEDITING COOPERATION THROUGH THE USE OF ALTERNATIVES WHEN APPROPRIATE**

#### **1. Using police channels where formal coercive measures are not required**

The EWG emphasized that, except for coercive measures normally requiring judicial authorisation, formal mutual legal assistance will not always be necessary to obtain assistance from other states. Whenever possible, information or intelligence should initially be sought through police-to-police contact, which is faster, cheaper and more flexible than the more formal route of mutual legal assistance. Such contact can be carried out through ICPO/Interpol, Europol, through local crime liaison officers, under any applicable memoranda of understanding, or through any regional arrangements that are available.

#### **2. Where evidence is voluntarily given or is publicly available**

While as a general rule police-to-police contact cannot be used to obtain coercive measures for the sole benefit of the requesting state, it may be used to obtain voluntarily given evidence, and evidence from public records or other publicly available sources. Again, the method has the advantage of being faster and more reactive than formal requests. Certain categories of evidence or information may also be obtained directly from abroad without the need for police channels, for example publicly available information stored on the Internet or in other repositories of public records.

#### **3. Accelerating an effective response to urgent formal requests**

Many states will permit very urgent requests to be made orally or by fax between law enforcement officers so that advance preparations can be made or urgent non-coercive assistance given, at the same time as a formal request is routed between the two central authorities.

#### **4. Informing the central authority of prior informal contacts**

The formal request should state that a copy has been sent by an informal route to avoid duplication of work. Similarly, where there has been prior police-to-police contact, the Letter of Request should state this and give brief details.

#### **5. Using of joint investigation teams**

States should use joint investigation teams between officers of two or more states where there is a transnational aspect to the offence, for example in facilitating controlled deliveries of drugs or in cross border surveillance operations. States should make full use of the benefits of the exchange of financial intelligence (in accordance with appropriate safeguards) between agencies responsible for the collating of financial transaction data and, where necessary, develop or enact the appropriate enabling legislation.

### **E. MAXIMISING EFFECTIVENESS THROUGH DIRECT PERSONAL CONTACT BETWEEN CENTRAL AUTHORITIES OF REQUESTING AND REQUESTED STATES**

#### **1. Maintaining direct contact throughout all stages of the request**

An earlier review had stressed the importance of personal contacts to achieve open communication channels and to develop the familiarity and trust necessary to achieve the best results in mutual legal assistance casework. The EWG reaffirmed that personal contact between members of central authorities, prosecutors and investigators from the requesting and requested states remains crucially important at every stage of the mutual assistance process. To facilitate this, contact details, including phone, fax and, where available, email addresses, of the responsible officials, should be clearly stated within the Letter of Request. Sometimes it may be desirable to establish contact with the official in the requested state before sending the request in order to clarify legal requirements or simplify procedures. Such contact can be initiated through the police-to-police means listed above, including through existing police attaché networks, or between prosecutors or staff of central authorities, through the UNDCP list of competent authorities, through networks such as the European Justice Network of the European Union, or through less formal structures such as the International Association of Prosecutors or simply personal contacts.

#### **2. Benefits of Liaison Magistrates, Prosecutors and Police Officers**

The EWG also encouraged states to take initiatives such as exchanges of liaison police officers, magistrates or prosecutors with states with which there is significant mutual legal assistance traffic. This can be done either by posting a permanent member of staff to the central authority of that country, or by arranging short-term exchanges of staff. Experience shows that such "on-site" initiatives produce faster and more useful mutual legal assistance than is usually possible when dealing from a "distance".

### **F. PREPARING MLA REQUESTS**

Mutual legal assistance (MLA) is one of the most important weapons the justice system has against serious international crime. Requests often need to be generated at very short notice and in ways that avoid the legal pitfalls and obstacles that exist when different legal systems are trying to lend each other their criminal justice powers. In response to this need the United Nations Office on Drugs and Crime's Legal Advisory Programme is developing a computer-based mutual legal assistance request drafting utility to help practitioners streamline the process of making requests.<sup>59</sup>

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<sup>59</sup> Details will be given on the UNDOC website when the facility becomes available (<http://www.unodc.org>)

The new drafting tool will guide casework practitioners through the preparation of Letters of Requests with a series of templates. Caseworkers fill in the various data fields and make selections from drop-down menus in each template in order to prepare requests. The programme will not allow users to move from one section to the next until all of the information is fully and correctly entered. This will ensure that requests will not be rejected due to errors or omissions. When completed, the programme will automatically generate a correct, complete and effective request. The programme will also give access to relevant multilateral, bilateral, regional treaties and agreements and national laws, and include a case management tracking system for incoming and outgoing requests.

The preparation of a request for assistance involves the consideration of a number of requirements, including treaty provisions (where applicable), domestic law, and the requirements of the requested state. Too meticulous attention to detail, however, could result in a request that was unduly lengthy, or was so prescriptive that it prevented the requested state from using alternative methods to securing the desired end result. Those preparing requests should apply the following basic principles:

- a) Be very specific in presentation;
- b) Link the existing investigation or proceedings to the assistance required;
- c) Specify the precise assistance sought, and
- d) Focus, where possible, on the end-result and not on the method of securing that end-result (for example, it may be possible for the requested state to obtain the evidence by means of a production or other court order, rather than by means of a search warrant: if you ask for a search warrant and the local law does not allow for this, you risk a failed request.)
- e) To assist in the application of the above principles, the EWG has developed checklists and tools for use in preparing requests. The checklists set out both the requirements generally expected of requests and additional specific requirements for certain areas of assistance. The checklists are available from ??????????ANDREW WELLS TO INSERT PLEASE

## **G. ELIMINATING OR REDUCING IMPEDIMENTS TO EXECUTION OF REQUESTS IN THE REQUESTED STATE**

### **1. Interpreting legal requirements flexibly**

In general, states should strive to provide extensive cooperation so as to ensure that national law enforcement authorities are not impeded in pursuing criminals who seek to shield their actions by spreading the evidence and the proceeds of their crimes across different jurisdictions. As described below, states should examine whether their current framework for providing assistance gives rise to any unnecessary impediments to cooperation and, to the extent possible, reduce or eliminate them. In addition, those preconditions to the provision of cooperation that are retained should be interpreted liberally in favour of cooperation; the terms of applicable laws and treaties should not be applied in an unduly rigid way that impedes, rather than facilitates, the granting of assistance.

### **2. Minimizing grounds for refusal and exercising them sparingly**

If assistance is to be rendered as extensively as possible between states, the grounds upon which a request may be refused should be minimal, limited to protections that are fundamental to the requested state. Many of the existing grounds of refusal in mutual legal assistance are a "carry over" from extradition law and practice, where the life or liberty of the target may be more directly and immediately at stake. States should carefully examine such existing grounds of refusal to determine if it is necessary to retain them for mutual legal assistance.

An area of particular concern is dual criminality. Opinions are divided, with some states requiring dual criminality for all requests, some for compulsory measures only, some having discretion to

refuse on that basis where it is absent, and some with neither the requirement nor the discretion to refuse. Because of the problems that can arise from the application of the concept of dual criminality to mutual legal assistance, the EWG recommended that states consider restricting or eliminating the application of the principle, in particular where it is at present a mandatory precondition. Problems can also arise from the application of the *ne bis in idem* principle. Article 14-7 of the International Covenant on Civil and Political Rights (ICCPR) (as do numerous countries' constitutions) states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted. *Ne bis in idem* frequently features as grounds for refusal of assistance.

States applying this ground for refusal should use a flexible and creative approach so as to minimize the circumstances where assistance is likely to be refused. For example, they should be prepared to accept an undertaking that a requesting state will not prosecute a person who has already been prosecuted in respect of the same conduct in the requested state, where assistance is being sought for a person to aid investigations in the requesting state. Some states do not apply this ground for refusal at all, and other states may wish to consider whether it is possible for them to adopt such a course of action. Grounds for refusal should only be invoked when it is absolutely unavoidable.

### **3. Reducing use limitations**

Traditionally, evidence transmitted in response to a request for mutual legal assistance cannot be used for purposes not described in the request unless the requesting state has contacted the requested state and asked for express consent to other uses. In order to avoid cumbersome requirements that are often not really necessary, many states provide for a more streamlined approach in their mutual legal assistance practices. For example, many modern mutual legal assistance treaties require a requested state to advise if it wishes to impose a specific use limitation; if the advisory is not stated as being necessary, there will be no limitation as to use. Such methods provide adequate control for the requested state in important cases and at the same time facilitate efficiency in the many cases that are not sensitive.

### **4. Ensuring confidentiality in appropriate cases**

Some states are not in a position to maintain the confidentiality of requests, and the contents of requests have on occasions been disclosed to the subjects of the foreign investigation/proceedings, thereby potentially prejudicing the investigation/proceedings. Confidentiality of requests is often a critical factor in the execution of requests. Accordingly, the EPG recommended that where a specific request is made, the requested state should take appropriate measures to ensure that the confidentiality of the request is maintained. In circumstances where it is not possible to maintain confidentiality under the law of the requested state, the requested state should notify the requesting state at the earliest possible opportunity and, in any case, prior to the execution of the request, to allow the requesting state to decide if it wishes to continue with the request in the absence of confidentiality.

### **5. Execution of requests in accordance with procedures specified by the requesting State**

It is important to comply with all of the formal evidentiary/admissibility requirements stipulated by the requesting state to ensure that a request achieves its purpose. It has been noted that failure to comply with such requirements often makes it impossible to use the evidence in the proceedings in the requesting state, or at the least, causes delay, (for example where the requested material has to be returned to the requested state for certification/authentication in accordance with the request). The requested state should make every effort to achieve compliance with specified procedures and formalities to the extent that such procedures/formalities are not contrary to the domestic law of the requested state. States are also encouraged to consider whether domestic laws relating to the reception of evidence can be made more flexible so as to overcome problems with the use of evidence gathered in a foreign state.



## **6. Coordination in multi-jurisdictional cases**

Increasingly, there are cases in which more than one state has jurisdiction over some or all of the participants in a crime. In some cases, it will be most effective for the states concerned to choose a single venue for prosecution; in others, it may be best for one state to prosecute some participants while one or more other states pursue the remainder. In general, coordination in such multi-jurisdictional cases may avoid a multiplicity of requests for mutual legal assistance from each state with jurisdiction. Where there are multiple requests for assistance in the same case, states are encouraged to closely consult in order to avoid needless confusion and duplication of effort.

## **7. Reducing the complexity of mutual legal assistance through reform of extradition processes**

Traditionally, some states have refused to extradite their nationals for trial abroad. A number of countries have provisions in their constitutions prohibiting this practice. Whereas in the past it was defensible as a general rule, today with an increasing number of states subjected to the human rights jurisdictions of regional and other courts, the claim that a fair trial can only be guaranteed in the country of nationality has lost much of its force.

On occasions, however, such states are prepared to prosecute their nationals in their own courts, resulting in lengthy and complex requests for mutual legal assistance to obtain the necessary evidence from the country where the crime took place. Recent increases in the number of states that will either extradite their own nationals or who will temporarily extradite them on the basis that any sentence can be served in the state of nationality, reduce the need for the additional mutual legal assistance requests that would otherwise be needed. The remaining states that do not extradite nationals should consider whether this impediment can be reduced or eliminated. If this is not possible, the states concerned should seek to coordinate with a view to ensuring an effective domestic prosecution in lieu of extradition.

## **8. Cooperation with respect to confiscation (enforcement of civil forfeiture, asset sharing)**

There are particular impediments to assistance with respect to the freezing/seizure and confiscation of proceeds of crime. As noted in the report of the EWG in relation to freezing/seizure, it can be difficult to obtain assistance on the urgent basis required because of delays inherent in the mutual legal assistance process. Problems also arise because of the differing approaches to the execution of mutual legal assistance requests and varying systems for confiscation. The 1988 Convention permits a state to comply with a request for freezing/ seizure or confiscation by directly enforcing the foreign order or by initiating proceedings in order to obtain a domestic order.

As a result the policies adopted can differ as between states. Furthermore, the states that do obtain domestic orders do so on the basis of varying domestic asset confiscation regimes. In some states there is a requirement to provide evidence of a connection between the particular property sought to be confiscated and a criminal offence. Other states employ a “value” or “benefit” concept whereby there need only be evidence that the property is linked to a person who has been accused or convicted of a crime, and then the order is enforced directly. Experience in this area clearly demonstrates that the direct enforcement approach is much less resource intensive, avoids duplication of evidence provision and court findings, and is significantly more effective in affording the assistance sought on a timely basis. The EWG strongly recommended that states that have not done so already should adopt legislation to permit the direct enforcement of foreign orders for freezing/seizure and confiscation. In the interim, where a state is seeking assistance by way of freezing/seizing or confiscation of assets, prior consultation will be required to determine which system is employed in the requested state in order that requests can be properly formulated.

The EWG also noted that several jurisdictions have adopted - or are in the process of adopting - regimes for civil forfeiture (i.e. without the need to obtain a criminal conviction as a prerequisite for final confiscation). The EWG supported the use of civil forfeiture as an effective tool for restraint and confiscation. It was, however, recognized that this created new challenges because most current mutual legal assistance regimes are limited only to crime and are not yet applicable to civil forfeiture. The EWG has recommended that states ensure that their mutual assistance regimes apply to requests for evidentiary assistance or confiscation order enforcement in civil forfeiture cases.

Problems also arise with requests relating to freezing/seizure and confiscation because of insufficient communication about applications for discharges of an order or other legal challenges brought in the requested state. It is critically important that the requesting state be informed of any such application in advance so that it can provide additional evidence or information that may be of relevance to the proceedings. Once again, the importance of communication is emphasized. The EWG noted the importance of an equitable sharing of confiscated assets between the requesting and requested state as a means of encouraging cooperation, particularly with states that have very limited resources to execute requests effectively.

#### ***9. Reducing impediments to mutual legal assistance brought about by third parties***

Accused or other persons may seek to thwart criminal investigations or proceedings by legal actions aimed at delaying or disrupting the mutual legal assistance process. For example, one suspect sued his own government for damages for defamation when news of its application to the Swiss authorities leaked to the public, and managed to force the government to withdraw the request.

It may well be a matter of fundamental rights to provide an opportunity for third party participation in certain proceedings arising from the execution of a request for mutual legal assistance. However, states should ensure that, wherever possible, their legal frameworks do not provide fortuitous opportunities for third parties to delay unduly the provision of assistance or to completely block execution on technical grounds. In addition, the modern trend in taking witness evidence in a requested state is to defer objections based on the law of the requesting state until after the testimony has been transmitted to the requesting state, so that its courts may decide on the validity of the objection. That avoids the possibility of an erroneous ruling in the requested state and allows the requesting state to decide matters pertaining to its own laws.

#### ***10. Consulting before refusing/postponing/conditioning cooperation to determine, if necessary***

Where a requested state considers that it is unable to execute a request, formal refusal should not be made before consulting with the requesting state to see if the problems can be overcome, or the request modified to enable assistance to be given. For example, where assistance cannot be given because of an ongoing investigation or prosecution in the requested state, it may be possible to agree to the postponement of the execution of the request until after the domestic proceedings are concluded. In another example, consultation may lead to the modification of a request for search and seizure that could not be fulfilled under the law of a requested state to a request for a production order, that could. Where, however, it is not possible to resolve the issue, reasons should be given for refusal.

Cost may be another factor. In an age in which law enforcement agencies are under extreme pressure to deliver services to their own communities, the demands of a particular request for assistance may be such as to impose an unrealistically heavy



burden on a requested state. In an ideal situation the burden of meeting requests received more or less balances out that of the requests made.

#### **11. Making use of the most modern mechanisms for providing MLA**

The EWG noted the opportunities presented by modern technology to expedite the provision of assistance in criminal matters and to maximize the effectiveness of mutual assistance processes. The EWG also noted developments in international forums such as the European Union (Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 22 May 2000) and the Council of Europe (Convention on Cyber Crime) in relation to the taking of evidence via video-link and the interception of electronic communications.

It has been recommended that states give consideration to acceding to such Conventions where possible and appropriate, and to developing the ability through their domestic legislation or otherwise to facilitate transnational cooperation in the following areas:

- a) The taking of evidence via video-link;
- b) The exchange of financial intelligence between agencies responsible for collating financial transactions data;
- c) The exchange of DNA material to assist in criminal investigation;
- d) Interception of communications; and
- e) The provision of assistance in computer crime investigations, including:
  - i) Expeditious preservation of electronic data;
  - ii) Expeditious disclosure of preserved traffic data;
  - iii) Allowing interception where telecommunication gateways are located in the territory of the requested state, but are accessible from the territory of the requesting state; and
  - iv) Monitoring electronic communications on a "real-time" basis.

## CHAPTER 15

### INTERNATIONAL REPATRIATION OF ILLICIT ASSETS

“Crime must not pay”, it is said, and over the years many countries have rightly enacted legislation that provides for the seizure and forfeiture of the proceeds and instrumentalities of crime.<sup>60</sup>

At the domestic level, these have worked to varying degrees of effectiveness. However, in the recent past there have been a number of instances where corrupt leaders in some countries have systematically looted the state treasury. They have sold state-owned resources illegally, diverted loans from international lending institutions, embezzled project funding contributed by donor agencies, and then often spirited the proceeds abroad.

In some cases the amounts involved have run into many billions of dollars, giving rise to the belief that there are astronomical sums stashed away in safe banking havens around the world. Although the amounts that have been secreted off-shore are undoubtedly considerable, in all likelihood the bulk of the looted funds have long gone, having been used by the corrupt leaders in the past to cement their hold on power through generous patronage.

Because of such occurrences and the prodigious sums that can be involved, repatriation of assets stolen by high level public officials through corrupt practices has become a pressing issue for a number of countries. To date, it must be said, successes in repatriation have been few. Most cases take years to conclude and all are extremely costly. It is rare, too, for more than a fraction of the illicit funds to be repatriated to the country from which they were stolen. This is one of the major challenges at the forefront of the UN Convention Against Corruption.

The problems hindering repatriation vary depending on the particular countries involved. Nevertheless, current and past cases seem to have some similar elements. For example, the following factors have hindered the recovery of assets:

#### **1. Lack of an appropriate legal framework**

Recent recovery efforts have demonstrated that existing legal frameworks fail to provide a sufficiently practical basis for the recovery of assets diverted through corrupt practices. Multilateral and bilateral mutual legal assistance treaties are generally too limited in their scope, and are often not applicable other than in the context of the specific cases for which they were originally designed. As a consequence, no standard procedures have been developed.

Recovery strategies also vary, from “civil” recovery (as damages) to “criminal” recovery (as a punitive measure), and to a mix of both. Each method has its particular strengths and weaknesses, and the final choice adopted by a particular country depends on whatever will work best in that jurisdiction. Selection of the appropriate strategy requires specialized legal expertise. The United Nations Convention Against Transnational Organized Crime (TOC) provides possible responses

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60 For a further discussion, see “Recovery of illegal funds”, Tool # 44, UNODC Anti-Corruption Toolkit, Second Edition, February 2004;  
[http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_Edition2.pdf](http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf)

to some of the problems, but, because of its limited scope, these are only applicable in certain specific categories of case.

## **2. Legal problems encountered**

In the initial phase of recovery, assets must be traced, the various players involved and the roles they have played identified, and their potential criminal or civil liabilities determined. However, exchanges of information between various jurisdictions, as well as between the public and the private sphere, are frequently extremely cumbersome, and at times impossible. In such an environment, efforts can fail in this initial phase because of the difficulties envisaged by the investigators.

The central legal problems relate to jurisdiction and territoriality. Where legal systems are incompatible, particularly when cases involve cooperation between civil law and common law systems, cooperation is intrinsically difficult. Mutual legal assistance treaties (MLAT's) have often proved to be ineffective when the objective has been to trace and freeze assets as a matter of urgency. Overcoming jurisdictional problems can slow down investigations, often fatally. By the time investigators get access to documents in one jurisdiction, the illicit assets may have been moved to another.

Legal problems differ significantly depending on the legal traditions of the jurisdiction in which the recovery effort is pursued, and the particular approach chosen (civil or criminal recovery). Civil (i.e. non-criminal) law, allowing for confiscation and recovery based on the balance of probabilities, has a clear advantage, as the evidentiary threshold is not as demanding as it is with criminal actions. On the other hand, access to information is not as easy to gain. Coercive investigative powers in civil proceedings are limited and, other than in some common law countries, the freezing of the assets can be difficult.

Civil recovery also opens alternative approaches as far as civil actions against third parties are concerned. For example, in some common law countries (where compensation goes beyond simple economic damage and where moral and punitive damages are possible), actions against the facilitators of the looting may be available. Another advantage of civil recovery consists of a free choice as to the jurisdiction in which the recovery of the proceeds of corruption is to be pursued.

In the case of criminal recovery, prosecution must follow preset jurisdictional conditions. By contrast, civil recovery can be pursued almost anywhere in the world and, what is more, in several jurisdictions at once. This can be particularly important where there is the risk that the offender might transfer his or her loot to a "non-freezing-friendly" jurisdiction.

### **Article 35\***

#### **Compensation for damage**

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

\*UN CONVENTION AGAINST CORRUPTION

However, the criminal law approach does have some advantages. It provides investigators with privileged access to information, both at the national and international level and the investigative powers of a prosecutorial office make it easier to overcome bank secrecy as well as to obtain freezing orders. At the same time, however, the final step of securing confiscation and refunding

to a victim can prove more complex, as most legal systems still require that the illicit origin of the proceeds be established beyond any reasonable doubt. In civil proceedings, the link between the assets and the criminal acts at their origin must be established only on the grounds of the balance of probabilities, also known as “a preponderance of the evidence”.

Criminal recovery requires fewer investigative resources on the part of a requesting state when most of the investigative work is undertaken by law enforcement agencies of the requested country. However, where private law firms need to be engaged, the costs can be considerable.

A clear disadvantage of criminal recovery arises where strict requirements have to be met under the national law of a requested country before the collaboration of its authorities can be obtained. Courts in requested countries often set preconditions prior to their agreeing to freeze assets or to keep them frozen (e.g. an undertaking that the requesting country will file criminal charges or commence forfeiture proceedings).

Repatriation in most cases, too, can be granted only after a final decision has been made in criminal or forfeiture proceedings. Those proceedings must comply with the procedural requirements of due process of the requested state. The courts may also want to establish that the proceedings in the requesting country satisfy fundamental human rights principles. Many requesting countries have found some or all of these requirements difficult to meet.

A clear advantage within many civil law jurisdictions is the possibility for a victim to participate in the criminal proceeding as a *parte civile* (civil party). Such status enables the victim to have access to all the data available to the prosecution, and enables the criminal court to decide on the (civil) compensation due to the victim without his or her having to commence a separate civil action.

In common law systems, the wide discretionary powers of the prosecutor to engage in plea-bargaining has proved to be effective in recovering assets. In particular, where the main objective is not so much to obtain convictions for criminal acts, but to recover assets for the benefit of the public, offenders may be offered immunity from prosecution (in part or in full) in exchange for their fullest collaboration in the location of the diverted assets.

The impediments mentioned above, however, touch only upon a few of the more obvious problems involved.

### **3. The United Nations Convention against Transnational Organized Crime (TOC)**

The United Nations Convention Against Transnational Organized Crime (TOC) of 2000, though primarily designed to combat offences that are both transnational in nature and involve organized criminal groups, will help to provide some solutions. Once in force, the TOC Convention will be applicable to a number of corruption offences, such as the embezzlement of state resources, fraud, theft, extortion and other forms of abuse of public power for private gain. Each of these is likely to be considered as “serious crimes” under the national law of a States Party.

The transnational nature of transfers of stolen property will always be present in repatriation cases. Meeting the second limb of the test – the involvement of an organized criminal group in the activity – might, however, be problematic. Fortunately, the TOC Convention provides a wide definition of the meaning of an “organized criminal group”. This is described as being a “structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this [TOC] Convention, in order to obtain directly or indirectly a financial or material benefit”.

Thus the Convention may be applicable in a wide number of circumstances, particularly as it includes liability on the part of lawyers, bankers and accountants (who are likely to provide some of the “three or more persons” in the “organised criminal group”). In any event, in many recent cases, the principal perpetrators have relied on a network of close associates who have participated in, and benefited from, the process.

The TOC Convention obliges a State Party to provide mutual legal assistance for investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. The requesting Party must, however, have reasonable grounds to suspect that such offences are transnational in nature and involve an organized criminal group. Mutual legal assistance may include such measures as the identification, tracing, freezing or seizing and confiscating of the proceeds of crime. A request, however, can only be executed in accordance with the domestic law of the requested State.

The TOC Convention further requires a State Party, when it receives a request for mutual legal assistance in relation to the confiscation of proceeds, to submit it to its competent authorities for the purpose of obtaining an order of confiscation and, if granted, to give effect to it.

The success of the TOC Convention will mean that prosecutors handling cases of large-scale corruption will be able in future to operate within a new and functional legal framework. In particular, they will be able to obtain the cooperation of other State Parties to identify, trace, freeze or seize assets deriving from a wide variety of corrupt practices.

The ultimate destination of the assets, however, remains problematic. According to Article 14 of the TOC Convention, State Parties are required to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party. The provision insofar as return is concerned, however, is not mandatory, and it only become applicable where a requesting State Party intends to compensate the victims or to return the proceeds to their legitimate owners.

It may be comparatively easy to claim repatriation where assets have been directly diverted from state resources, but the situation is less clear with regard to the proceeds of corruption when they are derived from other sources. In such cases, the interests at stake for the victim country are less clear unless it can demonstrate that its public interest has suffered damage as a result of the criminal activity. Where the requesting country cannot show that it is the true owner of the funds in question, it is open to the requested country to confiscate the funds as criminal proceeds and simply to keep the funds for itself. In such an event, the primary objective would still have been met. The criminals would have been stripped of the benefits and both they and the public at large will have seen that, at least on some occasions, “crime does not pay”.

# THE LESOTHO CORRUPTION TRIALS – A CASE STUDY<sup>61</sup>

Prepared by Fiona Darroch<sup>62</sup>

*This study deals with two cases: one concerns Sole, a national of Lesotho, whose trial and subsequent appeal has been completed. The second concerns Acres, a Canadian company which was subsequently debarred from all World Bank-funded projects for a period of three years.*

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<sup>61</sup> Copyright 2003, 2004 Fiona Darroch. Fiona Darroch has asserted her right to be identified as the author of this work.

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The Lesotho Highlands Water Project came into being by a Treaty signed between Lesotho and South Africa in October 1986. The purpose of the Project was to create a system of dams and tunnels which would provide water for South Africa, and electricity for Lesotho. By the terms of the Treaty, various bodies and roles were established for the administration of the project. The Lesotho Highlands Development Authority (LHDA) took responsibility for matters within Lesotho,



the Trans-Caledon Tunnel Authority (TCTA) for those in South Africa and a joint body, the Joint Permanent Technical Commission (JPTC). Masupha Sole was appointed as the Chief Executive of the LHDA, a position of substantial power and influence over the project.

In 1993, a civilian government was elected to power in Lesotho. The Minister for Water and Energy included the Dams within his brief. He was appraised of concerns being expressed about the conduct of the Chief Executive in the execution of his duties. Under the Treaty, wide powers had been given to this office, and therefore considerable influence could be wielded by its occupant. It seemed to many associated with the project that there was cause for concern in the way that Sole was using both his power and his influence. The Minister ordered an audit of two officials, Mochebelele (Chief Delegate for Lesotho on the JPTC) and Sole. Mochebelele was fully exonerated, but substantial irregularities emerged out of the audit of Sole. These extended from straightforward red flags, (his housing, cars and travel arrangements) to the possibility that he had manipulated the tendering process for what later transpired to be his own ends, and there was a suspicion that he had taken bribes. Sole was dismissed in 1996. He resisted his dismissal in an audacious way, considering how events would unfold, by challenging both the dismissal itself and the Minister's powers to dismiss him. Both challenges failed.

Sole was now sued in civil court by the LHDA, who were seeking to retrieve some of the money they had lost by the mishandling of certain tenders, which had resulted in the financing of the contracts at commercial, higher rates than had originally been available from the South African Development Bank. LHDA lawyers were searching for money which, it suspected, had been taken by Sole. As the documents for trial came into their possession, they came upon evidence that Sole had a Swiss bank account. Sole vigorously and repeatedly denied the existence of any such accounts. Application was made to the Swiss authorities to divulge the contents of various accounts, belonging to various people who appeared to be involved in the construction of the Dams. 'Intermediaries' emerged, that is people who themselves held Swiss bank accounts, through whose accounts large sums of money passed, on their way from corporate accounts to one of the many which Sole had himself opened in Switzerland. The Swiss magistrate ruled that the accounts should be divulged, which decision was upheld by the Swiss Federal Court, and the accounts were released.

This was a critical moment. The Lesotho government found itself in a unique position, with evidence of wholesale bribery. The civil trial continued, with Sole's defeat, and an award made against him in damages for 8.9 million maloti. Sole appealed, unsuccessfully.

In July 1999, The World Bank was appraised of the evidence of corruption which had now come to light, whereupon it instituted its own investigation into the dealings of those implicated in the matter. An 'outside' firm of experts was engaged by the Bank, and a hearing took place to consider debarring Acres, after which the Sanctions Committee concluded that there was insufficient evidence, at that time, to debar Acres from doing business with the Bank. The Bank indicated that it would re-open its investigation in the light of any new evidence emerging from the criminal proceedings against Acres. This present study addresses the systemic differences between a World Bank and a criminal investigation.

Also in July 1999, the Lesotho Government, through its Attorney General, took the decision to mount criminal prosecutions, for the common law offence of bribery, against Sole, the intermediaries through whose accounts the money had passed, and the companies whence the payments originated. Clearly this was likely to be an exceptionally expensive undertaking, but the Government was deeply committed to excising bribery from its administration, and accordingly it turned to the international community for assistance. A meeting was held in Pretoria in November 1999, at which assistance was promised by a number of the parties who attended. The group included the major development banks, the European Union, the commercial banks involved in financing the dams and a number of government representatives. To date, no

financial assistance at all has been forthcoming from any of the parties. The World Bank has cooperated by providing to the Court documentation which emerged during the course of its investigation.

The Lesotho government had now committed itself to this path of action, and it appointed a highly experienced expatriate Irish judge to try matter initially. The government was aware of the huge significance which would be attached to the trials, given their international dimension. It wished to invest in unquestioned efficiency, and to ensure that no opprobrium could attach itself to the process, from the very start.

There were a number of preliminary issues which arose before the trials began. Out of the ten preliminary issues on which the judge was asked to rule, this study examines the rulings on the four most important:

'citation' – whether the company should be named on the indictment

'joinder' – who appears on the indictment to be jointly tried with other defendants

'bribery' – what are the elements of the offence which have to be proved by the prosecution?

'jurisdiction' – should the case be tried in Lesotho or another country?

### **Sole's trial**

The effect of the 'joinder' ruling had been that the defendants were now to be tried sequentially. Sole's trial was the first, beginning in June 2001. This study examines the law applicable to the framing of the charge; it goes on to look at the forensic evidence and how it was obtained. The study includes a brief account of Sole's defence, and his silence during his trial, the legal implications of his earlier refusal to produce foreign bank records, and the circumstantial evidence from which the Court was invited to infer his guilt. This included the representation agreements, which were the contractual routes by which the money travelled through many different accounts from the companies concerned to Sole's own accounts. Sole was found guilty, and his recent appeal against conviction has failed. His appeal against sentence saw the reduction of his term of imprisonment from 18 years to 15.

### **Acres' trial**

Acres is, as far as the writer has been able to determine, the first company to be tried for its complicity in bribing a public official outside its own jurisdiction. Its trial, beginning in February 2002, followed that of Sole, and was presided over by Judge Lehohla, a judge of the High Court of Lesotho. The issues facing the defendant company were complex. The study considers the implications of corporate liability, and in particular looks at the representation agreement from a corporate perspective. The representation agreement between Acres and an intermediary is examined closely, as it formed the basis of the trial judge's conviction that Acres had indeed bribed Sole, with the agreement amounting simply to an insurance policy against the day when such bribery came to light. The study touches on the forensic evidence which formed a mainstay of the prosecution case, and then examines the judgment in detail, with particular reference to the view which the trial judge formed of much of the evidence given on behalf of the defendant company. Acres was found guilty, and fined \$3.8m (Canadian). The fine was suspended, against the day when Acres' appeal was heard in Lesotho. In the event the appeal was, in essence, unsuccessful, but Acres was acquitted on one of the charges and the fine was reduced. Subsequently there was a finding by the Debarment Committee of the World bank that Acres had been guilty of corruption and the company was debarred from tendering for World Bank-funded projects for a period of three years.

### **Assistance**

Whilst the trials themselves are landmark cases, unprecedented, amounting to a tremendous blow against corruption, being struck by one of the poorest countries in the world, the wider implications associated with them give less cause for satisfaction. The costs of the trials are

undoubtedly punitive for Lesotho. This study poses questions for other very poor states which are to consider bringing similar prosecutions.

The responsibility for cooperation in this process, which resides with the states where many of the implicated corporations and where consultants are registered or bank, has undoubtedly been evaded to a lesser or greater extent by their governments. That evasion has been characterised by flimsy investigations, and a lack of communication which can only send a discouraging message to others considering travelling the same path.

Perhaps the greatest concern emerges from the failure of the international community to make good its commitment to financial support for these prosecutions, which it gave to the Lesotho government in Pretoria in November 1999. That failure casts a long shadow over the will of the international community to unite in support of the eradication of international bribery and corruption and to uphold the principles now enshrined in the OECD Convention Against Bribery of Foreign Public Officials in International Business Transactions of 1997.

#### **The way forward**

Whilst states are diffident about providing funds directly for prosecuting such trials, the study suggests alternative ways in which support could be proffered in the future.

FD  
July 2003

## **THE LESOTHO CORRUPTION TRIALS – A CASE STUDY**

### **I. INTRODUCTION**

#### **Background**

The construction of the Katse and Mohale Dams, the Transfer Tunnels in Lesotho, and their associated projects, has involved the Lesotho Highlands Development Authority (LHDA) in doing business with a wide range of transnational corporations (TNCs) within the country. The LHDA is the organisation set up by the terms of the Treaty between Lesotho and South Africa to run the whole project. During the course of the mid 1990's, the behaviour of Masupha Sole, the Chief Executive of the LHDA, caused deep concern. This gave rise to investigations by the Lesotho government which ultimately led to the revealing of evidence that a large number of TNCs had made payments into Swiss bank accounts from which payments had then been made to Sole, by 'intermediaries'. The Lesotho government decided to mount prosecutions against Sole, and a number of the implicated companies and intermediaries, for bribery. A number of major international financial institutions (IFIs) had provided finance for different parts of the project, including the World Bank, ('The Bank') the European Investment Bank (EIB), the South African Development Bank, Banque Nationale de Paris, Credit Lyonnais, Hill Samuel, Dresdner, and a number of Export Credit Agencies (ECAs). Some of these bodies, (The Bank and EIB) have conducted their own investigations or audits into the conduct of the Defendants. Whilst the EIB has decided not to pursue the matter, The Bank's investigation is not yet complete, and it has reserved the right to pursue debarment proceedings against two of the TNCs concerned, if it were to find new evidence which had arisen over the course of the criminal trials. The private finance institutions appear not to have investigated the concerns, and the ECAs to a greater or lesser extent have satisfied themselves that no further investigation is necessary.

The trials, which are now being conducted in the Supreme Court of Lesotho, at Maseru, hold anything from a grim to an inspiring fascination for different sectors of the watching international community.

#### **1.1 1.2 Prosecuting corruption**

Corruption is a particularly perfidious feature of a developing economy, with long-term effects which reach far into the socio-economical structure, in particular where bribery has found its way into major public procurement projects. Corruption is notoriously hard to prove, and therefore as hard to bring to trial, since by its very nature, the trails leading to its detection can be carefully concealed, by a combination of complex banking procedures, flexible use of the law and skilful commercial manoeuvres. It is interesting to note that, although detailed findings lie outside the scope of this paper, certain companies have modified their identities in recent years, making their prosecution far harder to achieve.

Whilst there is no universal definition of corruption, it is generally accepted to be the payment of money, to a public official, in return for the promise of favoured treatment. Much has been written about the detailed consequential effects of corruption – it is seen as morally repugnant, economically disempowering, and it distorts the faith which people expect to repose in their public officials. When funds, particularly those originating from the public purse, are siphoned off into private bank accounts of public officials, immediately distrust and uncertainty arise, but many other negative and long-term consequences also flow. One of these is the encouragement of the proposition that some countries are more susceptible to the use of bribery than others, which then works to become a self fulfilling prophecy. Critically, it is the adoption of this self-fulfilling prophecy which provides the justification for the kind of criminal conduct which is so often privately offered by a company doing business in the developing world. Paradoxically, many

such countries simply do not have budgets which will allow for the sort of expense which is incurred by mounting prosecutions of such bribery.

Corruption shares the platform with bribery – it is the same platform from which one player will assert that slipping a quiet sum of money into the right pocket, (or concealed bank account) is ‘the way in which business has been done, unwaveringly, the world over, since people began to do business with each other – indeed, it will be always be thus’; another player will flatly deny liability for corruption arising from the payment of huge incentive-based sums of money into influential pockets (or concealed bank accounts); yet another will profess ignorance of any corrupt consequence which might or might not flow from their compliance with the terms of a contract properly negotiated with an agent in a foreign land, without whose services there he maintains that he could not otherwise have successfully conducted his business.

Such views are most frequently expressed by members of the commercial community, whose primary objective is to build up its business. The norms exist as unwritten conventions, encapsulated in the proposition that the end not only justifies the means – in some circumstances, it cannot be achieved without the use of such means. Such views are normally accompanied by the counterweight proposition that in any case, it is the way in which business is ‘normally done’ in certain parts of the world. In other words, there is acknowledged to be a symbiotic quality in the relationship between briber and bribee.

A unique aspect of the trials has been the approach adopted by the Lesotho prosecuting authorities to the symbiotic nature of bribery, in charging the alleged bribers as well as the bribed. This even-handed approach has been reflected in the judgments of the court of first instance, where both briber and bribee have been found guilty.

**1.2    *The cases are unique examples of such prosecutions. They are unique because they provide the first examples of the prosecution of TNCs outside the country of their registration, for bribery in the country, Lesotho, where the effect of their bribery is most keenly felt. The cases are complex, and raise a wide range of issues:***

### **1.3    The real costs of prosecution**

In an impecunious country, what are the wider implications for its government when it considers bringing a similar set of prosecutions? A government will carefully assess the *attendant* risks and benefits which might accompany such actions, in addition to the usual considerations it must give to the prospects of success in a complex prosecution for bribery, where the evidence is invariably difficult to gather. Such risks may be financially or politically obvious and substantial; the benefits may only become tangible as the due process of the law is worked through. At best, the financial benefits of any fine imposed after conviction upon a company are uncertain. The Lesotho government took the view it could not afford to allow the country to be observed to tolerate bribery.

### **1.4    Assistance from the OECD**

The Organisation for Economic Cooperation and Development (OECD) is a group of some 30 or so member countries, who are committed to the principles of market economy and pluralistic democracy. Members have bound themselves to work towards the eradication of bribery and corruption by becoming parties to the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions of 1997.

(i)        The government of a country where a convicted company is registered may be a member of the OECD. By way of an example, in the first line up of defendants in Lesotho, nearly all of the corporate defendants were registered in OECD countries. In pursuance of its obligations under the OECD Convention, such governments may care to re-examine, and perhaps modify, their

domestic policy in respect of mutual legal assistance. The subtler role played by an OECD government in curbing corruption *amongst its own corporate entities* can be perceived by other states and players to be anything from unfathomable, through minimalist, to downright obstructive.

(ii) The policy of a government concerning corruption will be judged not only by reference to the laws it passes under its obligations as a party to this Convention, but also by the degree of *meaningful* extra-legal co-operation which it offers to a prosecuting authority in another country and which will form a significant part of the yardstick by which the success of such policy will be judged by the wider community, when assessing the aftermath of a significant battle in the war against corruption.

### **1.5 Due Diligence considerations**

'Due Diligence' is a widely cast phrase covering the mechanisms which can be used to detect the existence of corruption.

(i) The financing of LHWP has been Byzantine in its complexity: a number of the implicated companies have combined to form different consortia, involving correspondingly different financing arrangements. Banking institutions, in particular international financial institutions (IFIs) may now think it appropriate to re-examine the 'due diligence' procedures which they use to examine the probity of their clients, before concluding loan agreements with them. Where an IFI has, even unwittingly, facilitated corruption, a real question emerges as to the extent to which that IFI has discharged its fiduciary obligations under its own instruments.

(ii) Recipient countries (those who are borrowing money for projects) may consider the use of new due diligence mechanisms to protect their interests against corrupt practices on the part of those associated with such projects.

### **1.6 Investigation where corruption is suspected by an IFI.**

If an IFI is put on notice, by an audit, by a whistleblower or by some other method, that there is some doubt about the probity of its client's business methods, and therefore the use of its funds then a series of questions arises:

What marks the limits to its powers of investigation?

What determines such limits?

If those limits leave an investigation flawed or inadequate, should their powers be extended?

Should they be transparent? If so, to whom should the information be released, and in what form?

Should the investigative process be disclosed?

Is the commercial vulnerability of a client, which may be engendered by such an investigation, a factor which should be considered proportionately, or should the duty of an IFI to investigate, to a forensic standard, now become paramount, together with the power to impose the sort of penalties which will leave no doubt in anyone's minds about the IFI's view of the use to which its money has been put, *directly or otherwise*.

Finally, is it time for a company's probity to be analysed generally in the same way as its financial and technical capacity, before loans can properly be made? The issue which has emerged over the Lesotho cases is – are the procedures which are currently in place sufficiently strict or vigorous?

### **1.7 Corporate liability**

The community of trans-national corporations (TNCs) is experiencing considerable concern about the Lesotho trials, and the implications of criminal liability for bribery. Part of that concern focuses upon the methods by which they do business in countries where, for one reason or another, they use a representative or agent. The routes taken and the destinations chosen for moneys paid to agents, either under representation agreements or otherwise are core subject matter of these cases. Some TNC's may now conclude

that representation agreements of certain types are dangerously controversial instruments in the prevailing climate of hostility towards bribery and corruption. Nevertheless, where the competition for new business involves calls for various kinds of assistance, the use of a highly lucrative incentive based contract with an agent – whereby the agent gets paid only when the contract is awarded to the company concerned – inevitably admits the possibility that bribery and corruption may be potential outcomes.

Another interesting group of questions is: Does the principle of corporate liability extend across a consortium of TNCs in a joint venture? Where the lead partner has created a corrupt relationship with a representative, requesting if not explicitly, other members of the consortium to contribute to the corrupt payments, (from which the other companies may or will benefit), does the liability for the bribery extend to include all those who made such contributions? Therefore is there a corresponding duty on the part of companies joining a consortium to use due diligence procedures of its own to ensure that such payments are not made by or to its partners, under *any* guise?

### **1.8 Financial assistance, or the lack thereof**

During the course of researching for this paper, it became quite clear that a commitment was *understood* to have been given by the international community to the government of Lesotho, to provide them with financial assistance for the prosecution of these trials. The commitment was most publicly made at a meeting held to discuss the matter, in Pretoria in November in 1999<sup>63</sup>. There, it was revealed that a wide range of payments had been made to Mr Sole which he could not or would not explain or justify. Those payments originated from contractors/consultants working on the project, either as individual contracting/consulting corporations, or as members of various consortia, a lead member of which had created the relationship with the intermediary.

As the prosecutions began to take shape, it became clear at an early stage that every possible technical point would be taken by the defendants and their top flight legal teams, as they considered the gravity of the charges laid against them, and the possible consequences to the corporation, of conviction. The whole undertaking would be fiercely expensive. After accepting the offers of financial support from a number of parties attending the meeting, including the World Bank and the European Union, the Lesotho government commenced the trials. After a preliminary ruling in the High Court of Lesotho the trials were separated, the DPP of Lesotho began the process by trying Mr Sole, then Acres, a Canadian company, and most recently Lahmeyer from Germany. Others lie ahead.

It is the clear recollection of a number of people who attended the meeting in Pretoria that undertakings were given there, not just by the World Bank but also by the EU and others at the meeting, to provide financial support for the Lesotho government. Since then, no financial support whatsoever has been forthcoming, from any institution, governmental or financial outside Lesotho. The Lesotho government continues to work its way through the prosecutions and now the appeals. The question which has arisen in the minds of some who have contributed to the research for this paper is – if the international community as a whole is as determined as it professes itself to be, to fight corruption, then what is the reason for it to stand back and allow Lesotho, one of the world's poorest countries, to bear the whole of the financial burden of conducting these trials alone, including the cost of providing legal aid for the defendant Sole?

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<sup>63</sup> The following banks and organisations attended the meeting: World Bank, their lead investigator (a lawyer), members of the Lesotho Government and their legal advisors, representatives of the South African Government (Dept of Water Affairs and Forestry), ABN-AMRO, Banque Nationale de Paris, British High Commission Lesotho, Credit Lyonnais, Development Bank of South Africa, European Investment Bank, European Union, Lesotho Highlands Development Authority, Lesotho Highlands Water Commission, Trans Caledon Tunnel Authority.

## 2. HISTORY OF THE LESOTHO HIGHLANDS WATER PROJECT.

### The Treaty

In October 1986, the Treaty on the Lesotho Highlands Water Project Between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho was signed. The purpose of the Treaty was to set up the machinery which would result in the creation of a system for controlling the flow of the Senqu/Orange River, to provide water to the Republic of South Africa, and electricity for the Kingdom of Lesotho<sup>64</sup>. The multi billion rand project is referred to as The Lesotho Highlands Water Project ('LHWP'). The two countries shared responsibility for the parts of the project within their borders: two parastatal authorities were created: the Lesotho Highlands Development Authority ('LHDA'), and the Trans-Caledon Tunnel Authority ('TCTA') in South Africa. The Joint Permanent Technical Commission ('JPTC') was also created by the Treaty. Composed of delegations of three members from each Party to the Treaty, the Commission was given monitoring and advisory powers over the activities of the LHDA, as well as the right 'to subject to management audit all those aspects of the management, organisation and accounts of the ... Authority relating to the delivery of water to South Africa'<sup>65</sup>. The terms of the Treaty obliged the LHDA to consult the JPTC and obtain its approval for 'all budgets', implementation plans for each phase of the project, the design of project works, tender procedures, tender documents, the appointment of consultants and contractors, and the appointment of staff other than the Chief Executive.<sup>66</sup>

### 1.3 2.2 Sole's appointment to the position of Chief Executive

Masupha Ephraim Sole was appointed to the position of Chief Executive of the LHDA<sup>67</sup> in November 1986. He had been a 'public servant', that is to say employed by the Lesotho Government, since 1972, reaching the position of Senior Engineer, Water Affairs.<sup>68</sup> The new position of Chief Executive was extremely powerful and influential.

In 1993, a civil government was elected to govern Lesotho. The Minister for Water and Energy included the LHDA in his brief. Rumours had begun to circulate that there were irregularities within the LHDA, such as the fiddling of expense accounts. The Minister therefore decided to conduct an audit into the LHDA, which was performed by Ernst and Young. That audit showed the existence of administrative irregularities, which resulted in a specific audit of the performances of Sole and Mochebelele, the latter being the Chief Delegate for Lesotho to the JPTC. Both men were suspended for the duration of the audit. Mochebelele's conduct was found to be satisfactory, and his suspension was lifted. However, the audit found all sorts of irregularities in Sole's dealings. He had abused the housing scheme, he had charged his personal expenses to LHDA, he had taken his wife overseas at the expense of the LHDA, he had provided jobs for members of his family – there was sufficient evidence of these sorts of irregularities to warrant the Minister's decision to order a disciplinary enquiry, at the end of 1994.

Sole applied to the court to challenge the Minister's powers to hold such an enquiry. He argued that, as Chief Executive of the LHDA, an appointment made under the Treaty, the Minister had no power to conduct such an enquiry into his conduct. Both Sole and the LHDA instructed Senior Counsel, (the most senior advocates) for these proceedings. However, the court ruled that the Minister *had* acted lawfully, when he ordered such an enquiry. At the enquiry, Sole elected to be represented by senior counsel once more, and senior counsel was then instructed to represent the LHDA. The enquiry continued throughout 1995, and concluded with Sole's dismissal from

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<sup>64</sup> see Art 4(1) of the Treaty

<sup>65</sup> see Art 9

<sup>66</sup> see Art 9(11)

<sup>67</sup> see Art 9(21)

<sup>68</sup> This was a crucial issue, whether Mr Sole was acting as a public official when seconded to the LHDA. One of the elements of the common law offence of bribery is that the bribee is a public official, or acting in his capacity as such.



LHDA in 1996. He unsuccessfully challenged his dismissal, and in January 1997 he made an application to the High Court for a judicial review of the Minister's decision to dismiss him. This also failed.

During the course of the disciplinary enquiry, some classic 'red flags'<sup>69</sup> had showed up, indicating that there were serious causes for concern. Sole was clearly living beyond his means – this was demonstrated in the classic 'red flag' ways, by his houses, his cars and his travelling arrangements. The Minister now wanted to know, could funds which had been misappropriated by Sole be recovered? His concerns arose from certain contracts which had been dealt with in such a way that the LHDA had eventually suffered a substantial loss of funds. In 1990, a consortium (LHPC) led by Spie Batignolles, a French company, had been designated as the 'preferred tenderer' for the construction of the transfer tunnel from Katse to Muela. Subsequently, a consortium of substantially the same companies (MHPC) was awarded contracts for the Muela Power Station civil works, (Contract 129A) and the Muela Dam infrastructure and operations building, (Contract 129B). There were alleged irregularities concerning the awards of both of these contracts.

In the tenders for 129A, the lowest tenderer had been a company called Skanska. MHPC's tender contained a modification which had not been revealed when the tenders were opened, but which had the effect of reducing its tender price. Contract 129A was awarded to MHPC, with the result that the African Development Bank withdrew from sponsoring the contract, and the LHDA was obliged to finance the work with commercial loans

In the negotiations which arose from 129B, MHPC required the escalation clause to be applied before, rather than after the deduction of advance payments, which had the effect of increasing the contract price. The LHDA negotiating committee refused to agree to this, as it would have been unfair on the unsuccessful companies who had tendered on the basis that escalation clause should only be applied after the advance payments had been deducted. The MHPC responded by going over the heads of the negotiating committee, dealing directly with Sole, who signed the letter of acceptance. The European Commission, the sponsor for the contract, refused to pay the amount by which the contract was now increased, and again the LHDA had to finance that part of the contract elsewhere.

During the course of the disciplinary enquiry, Sole had refused to reveal his bank accounts. The Minister decided to instigate civil proceedings, for the recovery of money misappropriated, and for damages, arising out of the contract awarded wrongly to the MHPC.

### **3 CIVIL PROCEEDINGS INSTITUTED FOR THE RECOVERY OF MONEY LOST FROM THE LHDA BY SOLE**

Civil proceedings were commenced during late 1996. During the exchanges of documents relevant to the trial, a process known as 'discovery', Sole had been requested, by LHDA, to make available for inspection 'all defendant's bank account records for the period January 1988 to date'. Not satisfied with Sole's response, in August 1996, Senior Counsel for the LHDA then made an application to court to compel Sole to reveal the existence and contents of those statements. In January 1997, Sole finally revealed his accounts in Maseru, and his credit card accounts. At a hearing in November 1996, Sole, under cross examination by Guido Penzhorn, Senior Counsel for LHDA, was asked whether he had other accounts in South Africa, or overseas. He replied 'No' to both questions. By the beginning of 1997, in his fourth sworn affidavit, Sole deposed that he had now provided every document he was able to obtain, that he could obtain no further documents and that he had no others in his possession. Subsequently, an application was made to the Court to subpoena Sole's bank manager, by which means further bank accounts were revealed. One of these indicated the existence of an account in a Ladybrand bank. By the same method, the documents containing information on this account were produced in court in April and May 1997. In the Ladybrand account lay evidence of bank accounts held in the Union Bank of Switzerland, Zurich, and a further unrevealed bank account in Bloemfontein.

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<sup>69</sup> The name given to irregularities which give rise to suspicion of corruption

In May 1997, Mr Sole swore another affidavit, in which he deposed:

As regards an alleged bank account held by myself at the Union Bank of Switzerland, Zurich, Switzerland, I wish to place on record that I do not hold any such account at said bank, nor have I in the past held any such account at said bank for the period referred to.

In August 1997, the Swiss authorities received an application by the Lesotho government for the disclosure of Sole's bank accounts. The application was resisted by all the contractors/consultants, working in Lesotho, who also held Swiss bank accounts. The matter was dealt with expeditiously by the Swiss authorities, and the Swiss magistrate, Mme Cova made closing orders, in September 1998 for the disclosure of the accounts. Her decision was appealed, but upheld, in the Federal Court in Lausanne, and in early 1999, the Swiss authorities handed the bank records to the Lesotho ambassador.

The Swiss application was crucial to the whole matter. In making such an application under Swiss law, it is not sufficient simply to indicate that there is a suspicion that money nefariously obtained has been placed in a Swiss bank account. For jurisdiction to be exercised, there has to be an objective and evidential basis for the suspicion which gives rise to the application. In this instance, the connections were drawn between Sole, the Chief executive of the LHDA, the intermediaries with whom he was friendly, and the contractors and consultants who were at work on projects in the LHWP. Huge sums of money were finding their way from the contractors/consultants through to the accounts of Sole, the man who was in a position to award contracts on the project. These bank accounts were secret, insofar as their existence was repeatedly denied, on oath, and in court, by Sole himself. Such a combination of factors inevitably led to the conclusion that bribery, on a massive scale, had been occurring. The LHDA then froze payments to the contractors who they suspected were involved in the matter. The civil proceedings concluded in October 1999 with judgment for 8.9 million maloti given in favour of the LHDA. Sole's appeal against this judgment was dismissed in April 2001.

## **CRIMINAL PROCEEDINGS AGAINST SOLE.**

### **Introductory**

In July 1999, Sole was charged under Lesotho law with the common law offence of bribery; subsequently, those contractors and consultants who had allegedly made payments to him were similarly charged, as were the 'middle men', or *intermediaries*, through whose control the money had passed en route from the corporations to Sole. Judge Brendan Cullinan was appointed to try the case, together with two associates, which is the custom in South African and Lesotho. His Lordship is an experienced South African judge, formerly Chief Justice of Lesotho, now retired. He was appointed by the Lesotho Government specifically to try Sole, as the Lesotho authorities anticipated the complexities of the matters before the court, and they wished to ensure that no opprobrium whatsoever could be attached to the process which lay ahead. As an expatriate judge, His Lordship could not be accused of partisan judgment, and his substantial experience would enable him to clarify the issues to be decided at the earliest possible point in proceedings. (This did not stop an unsuccessful application on the part of Sole's legal team to the Court for His Lordship to be recused and his judgment vacated, made even *after* he had delivered his verdict, on the grounds of an alleged irregularity in the manner by which he was appointed by the Lesotho authorities to try the case.)

### **4.2 The law in Lesotho.**

The law in Lesotho generally follows the laws of the Republic of South Africa. This is a hybrid system, originally based upon Roman-Dutch principles, reflecting the legal legacy of the Dutch settlement in South Africa. With British colonisation, these principles were overlaid with British case law, with subsequently enacted laws being based upon British domestic legislation. Until 1961, when South Africa became a republic, the final Court of Appeal had been the Privy Council

in the UK. Whilst there is generally consonance between the principles contained within the two systems, in the absence of express statute law and where South African law requires construing, the Court will revert to the Roman Dutch principles upon which South African common law is based, construed in the light of subsequent English case law. It is a characteristic of the remarkable complexity of these cases that so many of the issues which arose to be decided involved His Lordship conducting a comprehensive review of the law derived from its first expressed principles, and moving on through hundreds of years of decided cases.

#### 4.3 The start of the proceedings

In December 1999, the following companies and individuals appeared, charged with the common law offence of bribery, in the High Court in Maseru, before Acting Judge Cullinan.

Accused 1. Masupha Ephraim Sole	Chief Executive, LHDA
Accused 2. Jacobus Michiel du Plooy	Intermediary
Accused 3. Highlands Water Venture	Consultant Engineering Group
Accused 4. Universal Development Corporation (Panama)(UDC)	Intermediary
Accused 5. Electro Power Corporation (Panama)(EPC)	Intermediary
Accused 6. Max Cohen	Intermediary
Accused 7. Sogreah	Consultant Engineering Group
Accused 8. Spie Batignolles	Consultant Engineering Group
Accused 9. Lesotho Highlands Project Contractors(LHPC)	Consultant Engineering Group
Accused 10. Associated Consultants and Project Managers(Bam's company)	Intermediary
Accused 11. Margaret Bam	Intermediary
Accused 12. Asea Brown Boveri Schaltanlagen, GmbH Germany	Consultant Engineering Group
Accused 13. Asea Brown Boveri Generation AG Sweden	Consultant Engineering Group
Accused 14. Lahmeyer International GmbH	Consultant Engineering Group
Accused 15. Acres International Limited	Consultant Engineering Group
Accused 16. Dumez International	Consultant Engineering Group
Accused 17. Sir Alexander Gibb and Partners	Consultant Engineering Group
Accused 18. Cegelec	Consultant Engineering Group
Accused 19. Coyne et Bellier	Consultant Engineering Group

The indictment contained nineteen counts, the first sixteen being counts of bribery, the latter three being counts of fraud and perjury concerning Sole alone.

Seven of the accused did not attend the initial hearing: UDC (Panama), Electro Power Corporation (Panama), Max Cohen, Asea Brown Boveri Schaltanlagen GmbH Germany, Asea Brown Boveri Generation AG, Sweden, Dumez International and Cegelec. Cohen, an intermediary, disappeared. He had used his Panamanian companies to channel payments to Sole.

Subsequently the Crown sought to separate the trials of Sogreah, Spie Batignolles, LHPC, Sir Alexander Gibb and Partners, and Coyne et Bellier. (Sogreah, Coyne et Bellier and Sir Alexander Gibb and Partners had each made earlier and unsuccessful applications for the charges to be dismissed on the grounds that they had not been correctly cited on the indictment). Separate trials were ordered in respect of Sogreah, Spie, LHPC, Sir Alexander Gibb and Partners, and Coyne et Bellier.

Now HWV, a consortium, made an application to the court seeking an order declaring that as it was a partnership, it had been improperly cited. It argued that each member of the consortium was a separate legal entity, and as such the consortium could not properly be tried as one single defendant. This application succeeded.

Following the death of Mr Bam in 1999, the Crown withdrew charges against his company, ACPM, although this company continued to appear on the indictment where the particulars of the

offence related to certain counts of bribery, as did the names of companies and individuals who had not attended in the first place.

By February 2001, the landscape had altered substantially. The indictment, still consisting still of 19 counts, in respect of five accused, was examined by Cullinan AJ. He reviewed the rulings which had been made earlier in response to applications by a number of the original defendants. Taking into account the impact which the absence of certain other defendants had had upon proceedings, he now summarised the indictment as follows:

Count 1: Accused 1 & Accused 2 (involving partners of HWV)  
Count 2: A1 (involving UDC Panama, EPC Panama, Max Cohen, Sogreah)  
Count 3: A1 (involving UDC Panama, EPC Panama, Max Cohen, Spie Batignolles)  
Count 4: A1 (involving UDC Panama, EPC Panama, Max Cohen, LHPC)  
Count 5: A1 (involving ACPM, Asea Brown Schaltanlagen, GmbH Germany)  
Count 6: A1, A14  
Count 7: A1 & A14.  
Count 8: A1, A11 & A14  
Count 9: A1 & A15  
Count 10: A1, A11 & A15  
Count 11: A1 (involving Dumez International)  
Count 12: A1 (involving Dumez International)  
Count 13: A1 & A11 (involving Dumez International)  
Count 14: A1 (involving UDC (Panama), EPC(Panama), Max Cohen and Sir Alexander Gibb & Partners Ltd)  
Count 15: A1 (involving UDC (Panama), EPC(Panama), Max Cohen and Cegelec)  
Count 16: A1 (involving UDC (Panama), EPC (Panama), Max Cohen and Coyne et Bellier)  
Counts 17, 18, and 19: A1.

The five accused who remained charged before Cullinan AJ were were now Sole, (A1) du Plooy, (A2), Margaret Bam, (A11) Lahmeyer International GmbH (A14) and Acres International Ltd (A15).

#### **4.4 Preliminary applications:**

Sole, du Plooy, Lahmeyer and Acres each made applications to the Court for rulings on certain aspects of the trials: their legal teams had all met on 2<sup>nd</sup> May 2000, and now each took a variety of points, sequentially, which had the effect of extending the proceedings substantially. Those of greatest significance are examined within this study. In summary, these applications concerned:

##### **Citation (Whose name should be on the indictment?).**

Acres and Lahmeyer took the view that they should not have been cited as corporations – any alleged bribery was something for which the particular authorized representative of the corporate body should be cited as the accused. One wonders which employees of the respective companies would have found their names on the indictment, if this application had succeeded. Cullinan AJ. reviewed the case law comprehensively, together with the legislative provisions of both South Africa and Lesotho. In examining the text books, in the older versions, whilst he found support for the defence's proposition, however, at p60 of his judgment he said:

...it seems to me that a practice has grown up in the last 40 – 50 years which I have little doubt that I should now follow. The learned author Johann Kriegler has this to say of s332 (2) in Hiemstra: Suid Afrikaanse Strafproses, 5 ED p 875....

According to the literal wording of sub-section (2) the corporate body should not be summoned in its own name but rather a director or servant thereof in his capacity as representative of that corporate body.....It is however doubtful that this was indeed the intention of the legislature. In practice this seldom if ever happens and there are no known judgments to this effect since the coming into operation of Act 51 of 1977. This practice has furthermore the advantages (a) that the

name of the case remains constant irrespective of the identity of the representative; and (b), what is even more important, that a clear distinction is drawn between the citation of the natural person in terms of sub-section (2) qua representative, and his personal citation by reason of sub-section (5). The risk of imperfect citations, as in *S v Freeman* 70 or irregular substitutions, as in *R v Erasmus* 71 is thereby diminished..

With this point settled in favour of the prosecution, the companies of Acres, Lahmeyer and Spie remained named as defendants.

#### **4.4.2 Joinder (Whose name appears on the indictment, to be jointly tried with other defendants?)**

Sole objected to being tried with any of the other accused. Whilst Du Plooy, one of the intermediaries, did not object to being tried with Sole on Count 1, he did not wish to be tried with him in respect of any of the other charges. The basis of their applications was simply that the 'same offence' for which they were to be tried was literally just that...whereas the Crown argued that the 'same offence' meant 'the same species of offence', which therefore allowed for the use of the term 'at different times', 'any number of persons, and in particular 'may be charged with substantive offences'. The argument for Sole and Du Plooy was that under common law, in particular the case of *R v Peerkhan and Laloo* 72 the same offence means exactly this, and could only be altered by express statutory provision. Senior Counsel for the Prosecution argued that such provision was arguably contained within the Code of Criminal Procedure.

Cullinan AJ reviewed the authorities and textbooks, and concluded as follows;

#### **4.5 'The same offence'.**

The Crown charged a number of Defendants with the same offence – however, this did not mean the same offence at different times, unless it was a single continuing offence, being committed by different people at different times. There might be different roles played in the commission of one offence, at different times: for example where there is an offence of theft, there could be the connected offence(s) of receiving. However, if the 'same offence' were to be construed as meaning the 'same species of offences', this would open to the door to the possibility of unlimited joinder of unconnected offences. Accordingly, the words 'the same offence' should be given their ordinary and natural meaning.

#### **4.6 'Substantive offences'**

Substantive offences, as referred to in the 1917 Code at s 140 refers to the substantive offence of the principal offender, the accessory after the fact or the substantive offence of receiving. Cullinan AJ referred to the dicta of Innes CJ in *R v Mlooi* and others 73:

The first paragraph provides that any number of persons charged with committing or procuring the same offence 'or with having after the commission of the offence harboured or assisted the offender' may be charged with 'substantive offences' in the same indictment, although the principal offender is not charged. And the second paragraph enacts that one who harbours or assists the offender after an offence may be charged in the same indictment with the principal offender. There the Legislature was dealing in terms with the crime of being an accessory after the fact, and the language used goes to show that it was to be dealt with as a substantive offence and not as a crime covered by the main offence.

Whilst Senior Counsel for the Crown argued that a joint trial was a more expeditious way of administering justice, His Lordship took the view that this would not be either favourable to, or in the interests of the accused. Joining the defendants on the indictment was beyond the Court's

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70 1970(3) SA 700 (N)  
71 1970 (4) SA 378 (R)  
72 1906 TS 798  
73 1925 AD 131

jurisdiction, contrary to the provisions of the 1917 Code and would therefore constitute an irregularity. The Court could not proceed to a trial knowing that there was such an irregularity.

#### **4.7 Conclusion**

Although some of the Defendants consented to be tried with others, Sole and Duplooy did not. His Lordship concluded with this passage: quoting from Gardiner and Lansdown<sup>74</sup>, p 292

Where at trial an indictment or charge is held bad for misjoinder, the prosecutor is entitled to elect which of the accused he will, upon that indictment or charge, proceed against individually, and, as against that one whom he elects, the indictment or charge will be good...

He went on:

The Crown ...is free to withdraw rather than amend the present indictment and present another. The Crown of course is free to proceed solely against the first accused [Sole]. The Crown may not, however, join another or other accused on such an indictment, as such joinder will only be regular in respect of the count or counts in which *all* accused so joined are charged. Alternatively, therefore, the Crown may elect to proceed jointly against the first accused and another or other accused in respect of a count or counts in which all the accused so joined are charged.

The effect of this ruling, against irregular joinder, was the separation of all the trials, each defendant being proceeded against individually. If Sole were to be charged on one count with one company and one intermediary, it would lead to a multiplicity of trials, that is, Sole would have had to face some 12 trials, which not have been fair. In passing, one observes that this may not have been the result sought by the companies concerned. His Lordship noted that the impact of this ruling, were Sole to be tried alone, would be that the allegations against other defendants would remain, to be tried in their absence. The companies concerned would suffer the stigma of a lengthy wait for the matters to be resolved, were they not to consent to joint trials, as indeed has proved to be the case.

#### **4.8 Bribery (What are the Elements of the Offence Which Have to be Proved?)**

##### **Particulars of the offence**

Defence counsel argued that particulars of the offence of bribery as set out were insufficient to found the basis of a conviction. In his ruling, Cullinan AJ once more comprehensively surveyed the common law offence of bribery, beginning at its genesis in the two Placaaten of the States-General of the United Netherlands of 1<sup>st</sup> July 1651 and 10<sup>th</sup> December 1715, forming part of the Roman- Dutch law of South Africa. The terms of the Preamble are cast very wide: learned authors writing in the second half of the 20<sup>th</sup> century, to which His Lordship went on to refer, have discussed the nature and extent of the offence: In 1919, the common law definition of bribery was defined in the First Edition of Gardner and Lansdown, *South African Criminal Law and Procedure* thus:

It is a crime at common law for any person to offer or give to an official of the State, or for any such official to receive from any person, any unauthorised consideration in respect of such official doing or abstaining from or having done or abstained from, any act in the exercise of his official functions.

In Hunt and Milton, *South African Criminal Law and Procedure* (Common Law Crimes) Vol II, Revised 2 Ed, this was refined as follows:

The trilogy of leading Appellate Division decisions on the subject of bribery – *R v Sacks and Another* 1943 AD 413, *R v Patel* 1944 AD 511 and *R v Chorle* 1945 AD 487 – were largely determined by the contents of the Placaats. However, it is submitted that although the Placaats thus form the basis of common-law bribery in our law, they should on the one hand not be restrictively construed in the fashion of a modern penal statute, nor, on the other, regarded as a complete statement on the subject of common-law bribery. For instance, it is submitted that it is

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<sup>74</sup> 'South African Criminal Law and Procedure'

bribery to solicit official action with a promise of consideration not only to the official or his relatives, (as stated in the Placaats) but to anyone else as well. And the accused must, (in accordance with the general principles governing all common-law crimes) both act unlawfully and have mens rea).

In his ruling, Cullinan AJ refers to the definitions at p 219, and 227 of Hunt and Milton:

Bribery (as a briber) consists in unlawfully and intentionally offering to or agreeing with a state official to give any consideration in return for action or inaction by him in an official capacity.

Bribery (as a bribee) is committed by a State official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity.

#### **4.8.2 Elements of the offence**

His Lordship went on to set out the elements of the offence, in a passage which has proved to be critical to the prosecution of these trials, for it identifies the roles played by briber and bribee as being similar in all respects. For the offence to be proved, it is essential that the following elements are found to be common to both briber and bribee:

unlawfully

intentionally

a state official

(i) offering or agreeing to give any consideration

(ii) agreeing to take any consideration

In return for action or inaction by the bribee in an official capacity.

#### **4.8.3 The indictment (the document setting out the charges)**

Two specimen indictments were provided in this ruling, taken from pp 231/2 of Hunt and Milton. His Lordship went on to analyse the indictment in the case, (a substantial document), by reference to these requirements. Whilst taking the view that the 'Summary of Substantial Facts' did 'descend to evidence in places', as did parts of the 'Preamble to the Charges', nevertheless the indictment contained the following sufficient clear definitions:

Sole's status was that of a Public Official.

the LHDA was defined as a statutory body.

Sole was responsible for the execution of the policy of the LHDA, and therefore 'he was in a position to make or influence decisions improperly benefiting contractors'.

certain of the accused were those involved with the LHDA on a contractual basis, and stood to gain from contracts they were awarded,

others were 'intermediaries', providing the conduit through which payments were made to Sole.

the payments alleged to be bribes were made, it was said, in respect of action or inaction by Sole in his official capacity, and intended to influence him in that capacity, or used by intermediaries for this purpose.

the individual charges, which referred to the individual defendants, arose out of acts which were performed wrongfully, intentionally and corruptly, with a common purpose.

#### **4.8.4 Sole's duty as a public official**

The question was what determined the limits and nature of Sole's duties as a public official.

Cullinan AJ now refined the elements of the offence further: he referred to the words of Mason J, in *S v Lavenstein*<sup>75</sup>:

Duties of officials are of two kinds, imperative or discretionary. As a rule, bribes are not offered in connection with imperative duties of officials, a duty which the law directs an official specifically, to do, and as to which he has no discretion. The greater number of cases are those in which an official has a discretion. If the official has a discretion, what the law requires of an official is to exercise that discretion with sole regard to the public interest. This is his duty. That is the act he has to do. When once he exercises his discretion with regard to the private interests of any

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75 1919 TPD 348

individual, he is doing an act in conflict with his duty, and that to my mind is the only reasonable interpretation of the words of the statute. That was the interpretation put upon it in *Swemmer's* case 76; *because why do people bribe? They bribe an official not to exercise his discretion with sole regard to the public interest; they bribe in order that he shall exercise his discretion with regard to their interest, and that is bribing a person with the object of inducing him to do an act in conflict with his duty* [italics added]

And then from Baker J in *S v van der Westhuizen*<sup>77</sup>:

It is a crime for an official to accept money in return for doing his duty. As has been said, it is immaterial that the solicited action is in the public interest: it is contrary to the public interest to secure a public benefit by bribery' (*R v Lavenstein*<sup>78</sup> at p353).

His Lordship took the view that there was therefore no need for the Crown to allege that any benefit flowed *improperly* from the action or inaction by Sole. Neither was there any need for the inaction or action by Sole to have been taken in *his* official capacity – *an* official capacity would suffice. It was however, necessary for the Crown to allege that the Defendants action's had been both unlawful and intentional. In reviewing other previous indictments, he concluded that:

[T]he time honoured formula is 'unlawfully, intentionally and corruptly'...

#### 4.8.5 Shared responsibility for the offence of bribery

The core of this ruling was His Lordship's unambiguous view of the nature of the offence:

*The offence of the briber and the bribee are similar in all respects, except that one offers or agrees to give and the other agrees to receive.* It is not necessary to prove that consideration changed hands, that e.g. the bribe money was paid and accepted. As for the briber, the crime is complete when he makes the offer (or agrees to give consideration) to the bribee (per Gardiner JP in *R v Kutבודian* 79 at pp192/193). As for the bribee, his offence is complete when he agrees to take the consideration. I would respectfully agree with the suggestion by Hunt and Milton op.cit. at p 229 that where receipt by the bribee precedes agreement on his part, that nonetheless the offence is committed at the latter stage, that is, upon his part, upon agreement.[italics added].

It was this last sentence upon which much would depend in the trial. It was not necessary for the Crown to show exactly what it alleged Sole had done or not done. Consideration did not have to be paid or accepted, it was enough that agreement between briber and bribee should be reached. '...it is immaterial (as far as the briber is concerned) that his goal is not achieved.....Where the bribee accepts or even solicits a corrupt offer, the bribery is wrapped in a cloak of secrecy, which may or may not ultimately be removed'.

Cullinan AJ concluded that it was not necessary for the Crown to plead or prove any specific alleged action or inaction in an official capacity on the part of Sole. The offence would be complete at the moment when the agreement was reached. This ruling has a generic relevance to the prosecution of bribery in jurisdictions where the common law offence of bribery forms part of the canon of criminal law: the offence is unambiguously committed by both briber and bribee, and therefore both may be prosecuted for their individual roles in its commission.

#### 4.9 Jurisdiction (Should the Matter be Tried in Lesotho or Another Country?)

This was a particularly important preliminary ruling, on an application which was brought because the evidence against the Defendants was circumstantial rather than direct, gathered in part in other jurisdictions, and from which the prosecution required the Court to draw inferences if it was to secure a conviction.

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76 1917 TPD 455

77 1974 (4) SA 61 ( C)

78 1919 TPD 348

79 1930 CPD 191



It was argued by Defence Counsel that the High Court of Lesotho did not have jurisdiction to try these matters. Their reasoning ran thus: the Court had ruled earlier that the offence of bribery is complete when agreement has been reached between the parties, that is for the briber when he makes the offer and for the bribee when he agrees to take the bribe. Accordingly, the prosecutors could not say where the offence had allegedly taken place, as payments had been made *after* the offence had allegedly been committed. In addition, since the payments had been made *outside* the territorial jurisdiction, (i.e. in Switzerland), then the Court had no jurisdiction to try the matter. Prosecuting counsel argued that the principle of strict territoriality had now given way to a more flexible approach, in which choice of jurisdiction will be based upon where the effects of the offence are seen to be most harmful.

#### 4.9.1 The location of the offence

His Lordship proceeded to decide the matter on the basis that the locations of the offences were unknown. He observed that 'as a starting point, the Roman Dutch law as to criminal jurisdiction exhibited a good deal of flexibility, more flexibility indeed than that reflected in the early English cases'; he cited Watermeyer CJ in *R v Holm*, *R v Pienaar*,<sup>80</sup> quoting Carpsovius: There are three *fora competentia* in which an offender may be tried, the *forum domicilii*, the *forum delicti commissi* and *forum apprehensionis*. [Roughly translated, these are the three possible jurisdictions in which an offence may be tried: where an offender lives, where he is alleged to have committed the offence and where the offence was discovered]. His Lordship continued that 'ultimately international law saw the development on a universal pattern of a number of underlying principles determining jurisdiction. Those principles evolved in step with the case law...'

He examined the line of English cases where an offence had been committed partly in one jurisdiction, partly in another, beginning by considering a proposition not dissimilar to that which had been put by Sole's counsel.

In *R v Burdett*<sup>81</sup>, a case from 1820, Abbott CJ found that the offence, a libel written in one county for publication in another, was not an entire crime in either of the counties. However, his brother judges did not agree with him, taking the view that the crime was triable in either county.

In a later case, *R v Keyn*<sup>82</sup>, the proposition was that where there is a continuing act, the offence should be tried in the jurisdiction where the offence takes effect.

In *Macleod v Attorney General for New South Wales*<sup>83</sup>, the defendant was convicted in New South Wales of bigamy under a statute which provided 'whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.' Their Lordships on the Privy Council held that there had been no jurisdiction in New South Wales to try an offence committed in America. Specifically, they ruled 'All crime is local. The jurisdiction belongs to the country where the crime is committed, and except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever'. Cullinan AJ pointed out that this had referred to an offence which had been *wholly* committed by a national in a foreign jurisdiction, where the express words of the statute did not extend extra-territorially.

Turning to the emerging body of international law, His Lordship reviewed the '*Lotus* case<sup>84</sup>', where a French ship, The *Lotus*, had collided with a Turkish ship, The *Boz-Kourt*, on the high

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<sup>80</sup> 1948 1 SALR 925 (A)

<sup>81</sup> (1697) 1 Ld Raym. 148

<sup>82</sup> (1867-77) L.R. 2 Ex. D. 63

<sup>83</sup> (1867-77) L.R. 2 Ex. D. 63

<sup>84</sup> cite

seas, resulting in the loss of the Turkish ship and the lives of some of its passengers and crew. When the *Lotus* put in to port in Turkey, the officer of the watch was arrested, tried and convicted of culpable homicide. The French disputed Turkey's exercise of its jurisdiction in the Permanent Court of International Justice. France argued, in the Permanent Court of International Justice, that only the flag-state had jurisdiction over acts committed on board a vessel on the high seas, whereas Turkey argued that the effects had been felt on the Turkish ship, which was an extension of Turkish territory. The court divided 6-6 on the issue, and the President's casting vote produced the decision that Turkey had not violated international law by trying the Frenchman, since there was no international law preventing the Turks from bringing such a prosecution.

His Lordship examined cases of high treason, conspiracy to defraud, possession of opium on an aeroplane flying between Bahrain and Singapore, and others, as he traced the emerging body of law on the limits of jurisdiction where an offence has been committed in two jurisdictions. The landmark case where the issue arose and was finally resolved in the House of Lords is *Treacy*.

#### **4.9.2 Where the offence is committed in two jurisdictions**

In 1970, *R v Treacy*<sup>85</sup> was decided in the House of Lords. This case concerned an appellant who had written and posted a letter in England, to a woman in Germany, demanding money with menaces. He had been charged under s21 of the Theft Act 1968. The Court of Appeal had ruled that the offence continued, from the point at which the letter was sent to the point when it was received. Accordingly, 'on that view the appellants' demand was made both in England and Germany, but he would still be triable for the offence in England, although he might also be triable for an offence in Germany'.

In the House of Lords judgment, at pp121-2, Lord Diplock examined the extraterritorial application of the Theft Act, which was not explicit in the statute:

When Parliament, as in the Theft Act 1968, defined new crimes in words which as a matter of language do not contain any geographical limitation either as to where a person's punishable conduct took place or, when the definition requires that the conduct shall be followed by specific consequences, as to where those consequences took effect, what reason have we to suppose that Parliament intended any geographical limitation to be understood?

The only relevant reason, now that the technicalities of venue have long since been abolished, is to be found in the *international rules of comity* which, in the absence of express provision to the contrary, it is presumed Parliament did not intend to breach.....[italics added]

The consequences of recognising the jurisdiction of an English court to try persons who do physical acts in England which have harmful consequences abroad as well as persons who do physical acts abroad which have harmful consequences in England is not to expose the accused to double jeopardy. This is avoided by the common law doctrine of 'autrefois acquit' and 'autrefois convict'<sup>86</sup>, a doctrine which has always applied whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court...

Addressing the limitation of this ruling, he continued, at pp123/4

For reasons I have stated earlier, the rules of international comity, in my view, do not call for more than that each sovereign State should refrain from punishing persons for their conduct within the territory of another sovereign State, where that conduct has had no harmful consequences within the territory of the State which imposes the punishment.

#### **4.9.3 The continuing offence**

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<sup>85</sup> (1971) AC 537

<sup>86</sup> A defendant tried once, and convicted or acquitted, may not subsequently be charged for the same offence. See *Connelly v DPP* [1964] AC at 1254; see also *R v Thomas Sim Beedie* [1997] 3 WLR 758

In *R v Baxter*<sup>87</sup>, a Court of Appeal case where the appellant had made fraudulent football pools claims, sent by post from Northern Ireland to the promoters in Liverpool, Sachs LJ addressed the question of the *continuing* offence:

It matters not whether on any particular set of facts the attempt is best described as a continuing offence (as where a time bomb set to explode at a given hour in this country is being sent by rail) or as a series of offences (as where there are series of blows on a cold chisel to force a door open). If the time bomb is discovered on the train it matters not whether it is known on which side of some border it was placed there. At the moment of discovery it can plainly be said of the person who put it there that he is attempting to cause an explosion.

He went on to say that accordingly, the matter could be tried where the result was intended to occur.

The concept of the continuing offence was revisited in *R v Doot*<sup>88</sup>, a drug trafficking case where the appellants had conspired either in Belgium or Morocco to import cannabis to England, and thereafter export it to Canada and ultimately the USA. Whilst the Court of Appeal ruled that the conspiracy was complete when the agreement was reached, and therefore quashed that conviction, the House of Lords ruled that the offence of conspiracy continued as long as the agreement to conspire existed. Lord Wilberforce said, at pp 942/3,

In my opinion, the key to a decision for or against the offence charged, can be found in an answer to the question why the common law treats certain actions as crimes. And one answer must certainly be because actions in questions are a threat to ....society. Judged by this test, there is every reason for, and none that I can see against the prosecution.....It hardly seems in accordance with the rules of international comity that our courts should treat the respondents with special leniency because their crimes were more likely to ruin young lives in the United States of America than in this country.

#### **4.9.4 The attempted offence**

In *DPP v Stonehouse*<sup>89</sup>, the House of Lords confirmed the jurisdiction of the English court to try an *attempted* offence, in which the acts had been committed abroad but their consequences were intended to have effect in England. Said Lord Keith of Kinkel:

Thus I consider it to be established that where a state of affairs which the law of England regards as criminal has been brought into existence abroad and continues to exist in England, without ever having come to rest, by reason of its effects being intentionally felt here, then any person whose act caused that state of affairs has committed an offence under English law and may be tried by the English courts.

This was a permissive principle, rather than a mandatory rule, however, ruled Gubbay JA in a Zimbabwean case, *S v Mharapara* 90, as he confirmed jurisdiction in Zimbabwe of a theft in which all the constituent elements occurred in Belgium, with the harmful effects intended in Zimbabwe.

*Mharapara*, in Cullinan AJ's view, was particularly relevant, since it addressed a set of facts which was arguably parallel to those in this case – the fact that the elements of the offence were not to be seen within the jurisdiction did not mean that the matter could not be tried there; in fact it could, since the harmful effects of the offence were experienced within the jurisdiction where the trial was held.<sup>91</sup>

#### **4.9.5 'International comity'**

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<sup>87</sup>[1974] Crim. L.R. 583

<sup>88</sup>(1973) AC 807

<sup>89</sup>(1978) AC 55

<sup>90</sup>1986 (1) SA 556 (ZSC),

<sup>91</sup>See Appendix 3, where the Appeal Court concurred with this ruling.

He reviewed other English and Commonwealth case law, in particular referring to the survey of the position by La Forest J in *Lipman v R*<sup>92</sup>. What emerged was the strengthening concept of international comity in deciding whether jurisdiction was appropriate.

In a Privy Council decision in *Liangsiriprasert v US Government*<sup>93</sup>, (a case in which a US undercover agent set up a deal by which drugs to be imported from Thailand to the US, with payment in Hong Kong – the appellant was appealing the order given to Hong Kong for his extradition), Lord Griffiths said:

Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.

This passage was cited in *R v Bow Street Metropolitan Stipendiary Magistrates and Others, ex parte Pinochet Ugarte (Amnesty International and Others Intervening)*(No 3)<sup>94</sup>. In a House of Lords ruling, Lord Goff said:

...I consider that the common law of England would, applying the rule laid down in *Liangsiriprasert v US Government*<sup>95</sup>, also regard as justiciable in England a conspiracy to commit an offence anywhere which was triable here as an extra-territorial offence in pursuance of an international convention, even although no act was done here in furtherance of the conspiracy. I do not think that this would be an unreasonable extension of the rule. It seems to me that on grounds of comity, it would make good sense for the rule to be extended in this ways in order to promote the aims of the convention.

#### **4.9.6 Principles of international law**

His Lordship went on to examine sources of international law. He quoted Professors Starke and Dugard, from *Akehurst*<sup>96</sup>, setting out the principles which have emerged to form the grounds in international law upon which courts may exercise criminal jurisdiction. In summary, these principles are

The territoriality principle –

where an offence is committed in part in both states, then both states have jurisdiction to prosecute. This embraces the 'objective', where the effect of the crime is felt, and the 'subjective', where the crime was planned.

The nationality principle –

where a state may prosecute its nationals for crimes committed anywhere in the world. Historically, this principle has found greater favour with judges outside the UK than within.

The protective principle –

where a state may prosecute acts 'prejudicial to its security, even when committed by foreigners abroad'.

The universality principle –

where some states claim jurisdiction over all crimes. This can lead to inconsistency with norms of international law, in particular in the absence of a convention, but is viewed as being 'less objectionable' when applied to certain acts which threaten the international community as a whole – such as war crimes, piracy, hijacking and terrorism.

At p135 of *Akehurst*, Professor Dugard comments on the Lotus case, where the objective territoriality principle underlay Turkey's claim to exercise jurisdiction:

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<sup>92</sup> 1985 21 DLR (4th) 174; 1986 LRC (Crim) 86

<sup>93</sup> (1991) 1 AC 225

<sup>94</sup> 1999 2 All ER 97. HL

<sup>95</sup> (1991) 1 AC 225

<sup>96</sup> Akehurst's Modern Introduction to International Law. (ed Malanczuk, Peter) Routledge 1997

Although the principle of the *Lotus* Case that a state may exercise jurisdiction over acts occurring abroad in the absence of a prohibitory rule remains unchanged, states have sought to limit the exercise of extraterritorial jurisdiction in criminal matters to cases in which there is a direct and substantial connection between the state exercising jurisdiction and the matter in question. Failure to establish such a connection may result in an abuse of right.

The authors go on to distinguish between the constituent parts of the offence and what amount to '*mere repercussions*', the latter potentially giving rise to impropriety under international law. The limits have not been clearly established, although there should be a 'direct and substantial connection' between the state exercising jurisdiction and the matter over which jurisdiction is being exercised.

His Lordship then examined these principles in the light of what is said by the authors of Gardiner and Lansdown, *South African Criminal Law and Procedure* Vol V.(1982). In this volume, once more, the authors write that the continuous offence is triable when its impact is felt in another jurisdiction. They consider the cases of *Treacy* and *Stonehouse*, and approve Lord Diplock's approach in *Treacy*.

Cullinan AJ quoted the following passage:

It is accordingly submitted that there may be circumstances where, in a case reflecting foreign and domestic elements, it becomes irrelevant to ask where the crime was committed or whether the last essential act occurred within the territory of the Republic. Our courts may find themselves not compelled to disclaim jurisdiction if satisfied that either a *substantial element* of the offence or the *harmful effect* occurred within the Republic.[italics added]

#### **4.9.7 Constitutional law in Lesotho**

Sole's lawyers argued that the Constitution of Lesotho, and the High Court Act 1978, as amended by Act 34 of 1984 limited the Courts jurisdiction to deal with extra-territorial matters. His Lordship dealt with this shortly, by ruling that where the Act did not specify jurisdiction, then the principles of common law and compliance with international law applied. They also argued that for the Court to exercise jurisdiction, then the offence must be an offence where committed. This approach also failed. His Lordship's view was that he '[could not] see that the foreign justiciability of bribery (whether involving a foreign national or foreign official) when committed abroad, [could] affect its justiciability in the State of forum'.

#### **4.9.8 Harmful consequences**

His Lordship then examined the term 'harmful consequences', as it provided a nexus with the offence which would give the Lesotho High Court jurisdiction to try the offences. As far as bribery was concerned, he could see that corrupt payments would if paid, or could, if not paid, fall into that category. In the sense that there was no contractual quarrel over the work of the contractors/consultants, there was arguably no direct financial damage to the national economy, but he took the view that the bribing of a public official would constitute harmful consequences to Lesotho.

In an expert opinion provided to the Court at the hearing at which Sole was sentenced, provided by Lala Camerer, (an expert in the analysis of corruption and anti-corruption controls), the harmful consequences of corruption in general we described under the following heads:

- 'It affects the economy by undermining growth and development through hindering or deterring foreign or local investment'
- It affects the quality and composition of public expenditure projects.
- It undermines the fiscus through non-optimal collection of taxes and revenues as the unofficial underground economy flourishes;
- It distorts policy and resource allocations, thereby increasing inefficiency
- It undermines trust and credibility in institutions and procedures
- It threatens human security through linkages with drugs and organised crime, and

Because of the unjust access it facilitates to often limited social and political goods and services, corruption can create social and political unrest if it goes unchecked.

Her expert opinion was that such bribery is akin to a cancer within society, leading to unproductive public spending, excessive bureaucracy, and the distortion and weakening of the economy. She added that in her experience the use of bribery creates uncertainty, exacerbates poverty and inequality, and has the cumulative effect of slowing the growth rate of an economy.

#### **4.9.9 Conclusions**

His Lordship synthesised the common law with international law, and concluded as follows: revisiting Lord Diplock's words on the international comity theory, (the obligation of a state to act in cooperation and friendship with other states) in *Treacy*<sup>97</sup>, he took this view:

'No doubt these [latter] words may be considered a convenient tag, but they nonetheless seem to me to shift the emphasis: international comity merely permits of the assumption of jurisdiction, *because of* harmful consequences to the State of forum. In brief, Lord Diplock's dicta constitute in my view an application or revitalisation of the 'effects' principle, as an extension to the objective territorial principle'. He reiterated his concurrence with the judgment of Gubbay CJ in *Mharapara*<sup>98</sup>, and the requirement of an impact or intended impact of the offence where the offence has been planned and executed beyond the jurisdiction, observing that 'It is hard to imagine the impact of a crime upon a territory which is not harmful in effect'.

The test, in his view had to be based upon the place of actual or intended harm. He was entirely satisfied that there was no breach of international comity caused by the trial being conducted in Lesotho. Neither could it be argued against the boundaries of the application of the universality principle that the consequences of the offence were either incidental or insubstantial, when millions of Maloti/Rand were flowing into Sole's bank accounts.

Having accepted jurisdiction, His Lordship commented there were similarities between conspiracy and bribery, one such being the continuing nature of the offence. If payments were made outside Lesotho, they were made with the expectation that Sole would continue to exercise his influence, in an official capacity, in Lesotho, in favour of the contractors/consultants, over a substantial period of time.

His comprehensive survey of the jurisdictional question will lend assistance to countries considering a decision to prosecute under their obligations, particularly within those states who are parties to the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions.

The arguments which ranged over the course of these preliminary applications will carry significance in all common law jurisdictions, where such trials may occur in the future. Citation, the definition of the offence, the jurisdiction within which it may be tried and who should correctly be tried for it were all hurdles which had to be cleared by the prosecutors before any of the trials could properly commence. Each of the points which were taken by the Defendants and responded to by the Prosecution may be taken up in future prosecutions in common law jurisdictions. The comprehensive manner in which they were argued by both prosecution and defence will be of corresponding interest and assistance.

## **5 THE TRIAL OF MASUPHA EPHRAIM SOLE.**

### **5.1 The indictment**

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<sup>97</sup> op cit

<sup>98</sup> op cit

The trial of Sole finally began on 11 June 2001. Sole was charged with 16 counts of bribery and 2 of fraud. During the course of his trial, Sole did not give evidence on his own behalf: this point is addressed fully later in this study; it is mentioned here as a crucial part of the backdrop to the proceedings.

The indictment now alleged that :

(i) Sole was a civil servant, in the employ of the Lesotho Government, and therefore a public official. Whilst retaining that status, he was seconded to the LHDA as its Chief Executive Officer. HWV, Sogreah, Spie Batignolles, LHPC, ABB Germany, ABB Sweden, Lahmeyer, Acres, Dumez, Gibb, Cegelec and Coyne were contractors and/or consultants who were contractually involved in the building of the LHWP.

(ii) the counts of bribery arose from

payments made by those contractors and consultants to Sole, into his Swiss bank accounts, either directly or through intermediaries, intended for his benefit in Lesotho, which money he then transmitted to Lesotho, either directly or through South Africa.

Contracts negotiated, concluded and executed in Lesotho by the contractors/consultants, from which they would benefit

Variation orders and/or contractors claims arising out of those contracts

Payments made or to be made, by the LHDA to those contractors/consultants under those contracts, payments being made, initiated or authorised in Lesotho.

(iii) on a series of occasions, within certain periods, but on unknown dates, the contractors/consultants offered payments to Sole, in return for him exercising his influence/powers in his official capacity to further their private interests, which payments Sole accepted.

To secure a conviction, the Crown had to prove the four elements of the offence:

that Sole was acting as a State official

that he behaved unlawfully, intentionally and corruptly

that he agreed to take consideration (money, in this case)

in return for doing or not doing something in his official capacity.

## **5.2 Was Sole acting as a State official?**

The question as to whether Sole was acting as a State official' was a matter of law rather than evidence. At trial, Sole's lawyers maintained that he was not a 'state official', as he had been 'seconded' to the LHDA. They argued in addition that he was not being paid pension for the period during which they said he had left the public service to go and work at LHDA. The meaning of 'secondment' was examined, and whether it amounted to a full transfer, but Cullinan AJ took the view that since his contract of employment was *resumed*, this indicated that his main contract of employment in the public service was simply suspended, and that he remained a public officer, holding the post of Chief Executive of the LHDA during the course of his employment, from which he resigned with effect from 22<sup>nd</sup> December 1998.

## **5.3 Public or State official – are they different?**

The question then arose as to whether there was a difference between a public officer and a State Official, for the purposes of proving the offences. Cullinan AJ once more conducted a comprehensive view of the case law. At p 31 of this judgment, he had this to say:

A convenient summary of the authorities relevant to this issue is to be found in *Milton*<sup>99</sup>..at pp 222/223. The learned author states the following 'somewhat negative propositions enunciated in the cases':

The bribee need not be a judicial official [*S v Benson Aaron*<sup>100</sup> at 131]

The term 'state official' cannot be confined to members of the 'public service' as defined in the Public Service Act [*R v Sacks*<sup>101</sup> at 423].

A person may be a state official even though his employment is not permanent. It may be temporary and even terminable at the will of the State [*R v Sacks* at 426]

A 'person recognised by law as holding an office and [who] has authority by virtue of that office to act on behalf of the Executive Government in a defined matter or manner' is a 'state official' even if he is not remunerated at all or if he is remunerated from some source other than State funds. [*R v Muller*<sup>102</sup> , *Manillal v R*<sup>103</sup>, *S v Makhunga*<sup>104</sup>].'

His Lordship went on to set out the basis upon which Sole was employed, which was under an order pursuant to the Treaty which had led to the establishment of the LHDA. He looked at the status of the Treaty: specifically, under Article 7, a power was granted to the Lesotho government, to appoint a Chief Executive, whose responsibility it was, *inter alia*, to implement the policies of the Board of the LHDA. The Chief Executive was under an obligation to consult with the JPTC, and to present proposals for the implementation, operation and maintenance of the Lesotho part of the project. At the same time as the Treaty was signed, (24<sup>th</sup> October 1986), an Authority Order took effect, setting out the powers of the LHDA, and the provision for the appointment of its Chief Executive.

The Board of Directors was modified, by subsequent orders during the following five years, but continued both to include the Chief Executive, and to reflect in its make-up that it was under the control of central Government:

- (i) by s25 of the Order, public funds were used to pay the Chief Executive;
- (ii) by s13, the Minister as the agent of the Government would determine the 'remuneration fees and allowances for expenses' to be paid to members of the board;
- (iii) by s30, the Minister had powers to control loans raised by the authority, to submit the annual audit, and supervise or control a number of other areas, such as the acquisition of mineral rights, protection of fisheries, assessment of compensation to affected people, and so forth. His over-riding power under s59 of the Order contained power to make further regulations, including 'conferring powers and imposing duties [upon] the Authority...and...generally for carrying into effect the principles and purposes of [the ] Order'.

His Lordship went on to look at the public functions of the LHDA itself. By s24 of the Order, the LHDA is obliged to consult with relevant governmental departments and statutory bodies who would be affected by its operations, both ancillary and related. He also noted that the Order makes provision for offences and penalties which would protect such functions. He had heard argument that the LHDA was a parastatal body, with a degree of autonomy, but his view was that this was a particular type of parastatal, which amounted to a Government body, controlled by Government.

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<sup>99</sup> South African Criminal Law and Procedure Vol II (Common Law Crimes) Revised 2 Ed(1982) Reprint 1992

<sup>100</sup> 1893 Hertzog 125

<sup>101</sup> 1943 AD 413

<sup>102</sup> 1934 NPD 140

<sup>103</sup> 1944 NPD 332

<sup>104</sup> 1964 (3) SA 513 ( C)



He concluded that ...'it is difficult to imagine a post of a greater public character than that of the Chief Executive. Clearly the accused was, in effect, employed by the Government, and derived his authority from the public sector. On consideration of all the above authorities I consider that his employment would meet the test set in any of those cases. I wish to emphasise, that even were it not the case that the accused was also a seconded public officer, I am satisfied that in any event, for the purposes of the common law offence of bribery, he was a State official at the relevant time'.

#### **5.4 Forensic expert evidence.**

Evidence was called by the Crown to show that Sole had indeed had bank accounts in Switzerland. A forensic accounting expert and advocate, Jean Roux, (a director of PriceWaterhouseCoopers, Forensic Services (Pty) was called as an expert witness for the Crown. He had conducted a lengthy and painstaking investigation into Sole's financial affairs, and uncovered a series of accounts of which Sole had, during the civil proceedings denied the existence. He compiled a 'Final Report' on his investigations, in which he set out what payments had been made by whom, to whom, and when. The report formed the bedrock of the case for the Crown. A legal dispute arose as to whether his opinion on the evidence was admissible. His Lordship admitted the report as evidence, and dealt with the question of Jean Roux's opinion in his judgment, in which he said that he had not had to refer to Mr Roux's expertise, as the schedules of payments were perfectly comprehensible. Once more having surveyed the authorities and textbooks on this point, he referred to the words of Bekker J in *Herholt*<sup>105</sup>, concurring himself with the role which the report played in the proceedings:

*The report....serves as an 'essential, if not obligatory' purpose, namely 'to direct the attention of the accused, and the Court, to every and any particular book, account, entry or figure therein appearing, on which it will seek to rely for a conviction on any particular charge'. For my part, the report, and the witness' evidence thereon serves to place the evidence before the Court in manageable form. Thereafter the aspect of conclusions and findings is left to the Court.*

#### **5.5 'Following the money'**

In any trial for fraud, corruption or bribery, a conviction will depend upon the prosecution's ability to show where the payments were made, to whom and by whom. In this case, the crucial information, concerning payments by contractors and consultants to other parties who then paid Sole, and their own payments to Sole, was revealed in the parts of the Swiss bank accounts which had been produced after the rulings of the Examining Magistrate for the Canton of Zurich.

An application made to the Swiss courts for such information is a complex matter. The prosecution is not permitted to go on a 'fishing expedition', trawling through a set of bank accounts in order to find sufficient evidence to enable it to construct its case. It must make its application with particularity, giving the reasons that it has for suspecting that activities within an account will reveal grounds for bringing a criminal prosecution. Where the reasons are insufficiently defined, information in the accounts will not be revealed. It is also important to note that where an account contains many entries and withdrawals of different sums of money, tracing a direct connection between the payments that is sufficient to give rise to the inference of bribery cannot sometimes be achieved.

A reference to the full transcript of Cullinan's judgment is appended to this study, and the reader is invited to refer to it for the Judge's analysis of each of the contractors/consultants' payments. In this paper, it suffices to reflect on the manner, the amount and the secrecy which surrounded the payments, all of which were made into Swiss bank accounts. For example, at p60, Cullinan AJ notes that HWV had supplied LHDA with a list of six European banks for use during their commercial dealings with each other. None of them were Swiss.

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105 (1) 1956 (2) SA (W)

There were relationships of considerable commercial complexity between various members of consortia. Contracting and consulting companies joined and reformed different groups. For example, in 1986, Sogreah had originally been involved in LHWP in a joint venture with Gibb, a British company – ('Gibb-Sogreah HJV'). It was a partner in Sogreah, Coyne, Gibb ('SCBG') which was in turn a partner in the joint venture Lesotho Highlands Consultants ('LHC'). It held bank accounts in the name of Sogreah, Coyne et Bellier. It was involved in six other contracts, some of which were inter-connected.

The payments which were moved were very substantial: for example on 19th April 1991, Cegelec transferred 1,612,000.00 French francs (FFs) from an account with Credit Comm. De France, Paris, to a Universal Development Corporation ('UDC') account held at UBS, Zurich, an account under the control of Mr Cohen. On the same day, Coyne transferred 11,400.57 FF from an account with Societe Generale SA Paris to the same account. On 22<sup>nd</sup> April, Sogreah, 103,585.49 FF from its account at Societe Generale SA, Grenoble, to the same account. On 24 April, the UDC account indicated a transfer to Sole's account at UBS, Zurich of the sum of £20,986.36, which was reflected in Sole's account by the same transaction number. His Lordship concluded that, whilst the source of the payment could have been Cegelec alone, the timing of the payment (two days after Sogreah had made its transfer) and the three Consultants/Contractors joint association with LHWP, Cohen and Sole led him to be satisfied that all three had made contributions to the payment made to Sole.

In summary, on the basis of Mr Roux's unchallenged figures, over a period of nine years, via intermediaries using a series of different Swiss bank accounts, Sole received 8,058,877.00 Maloti, equiv to the same number of South African Rand (SAR). His Lordship, having summarised the payments relating to each count, at p124, said:

The above schedule serves to further convey the sheer scale of the banking operations conducted by the accused. The accounts maintained by him in Switzerland could not be described as normal business, current or cheque accounts where one expects to see a frequency of transactions. Those accounts were sustained solely by payments by the intermediaries and served as a conduit pipe for such: frequently only a small balance was maintained on such accounts and monies received from the intermediaries were often transferred elsewhere within a matter of days, or on the day of receipt, or even beforehand in anticipation of such receipt.

The money which Sole received into his Swiss bank accounts was then put to work, in a wide range of other banks: he invested money in short-term, fiduciary deposits, either with the bank which received the money, a foreign branch of that bank, or elsewhere with the assistance of the agency of the Swiss banks – no less than 26 banks, over the period concerned, benefited from his business. His Lordship calculated, at p128 of his judgment that at 31<sup>st</sup> December 1996, Sole's European assets amounted to over 6 million SAR. He added analysis of the investments made in SA by Sole: at that same point in time, he was satisfied that Sole had transferred probably more, but certainly not less than 430,000.00 Maloti from his Ladybrand account into his account in Maseru.

#### **5.6 The relevance of Sole's silence during criminal proceedings.**

Sole chose not to give evidence at his trial. In his ruling, Cullinan AJ reviewed the law and concluded as follows, at p 203:

I consider however that no adverse inference should be drawn from the accused's silence in the sense that it is an evidential item bolstering the Crown case, and it certainly cannot cure defects in the Crown case. Such silence is not evidence in the case. Nonetheless, there may be cases where the strength of the Crown's case is such, that the result of the accused's silence is that no reasonable doubt exists in the mind of the Court, and the Crown's prima facie case becomes a case beyond reasonable doubt.

Sole's silence may have had just such an effect as His Lordship sets out in the last part of the above passage. In any event, it has given rise to great speculation amongst trial observers. Of

course, it remains speculation, in the absence of any other explanation; however, during my research for this work, the disturbing suggestion has been made to me by several people that Sole has been threatened into silence, by others who have their own nefarious interests to protect. At the other end of the spectrum is the prospect that his silence has been bought, although this seems generally to be thought a less credible alternative, considering the length of his sentence.<sup>106</sup>

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<sup>106</sup> See comment on this from Their Lordships in Sole's appeal ( App3).

### 5.7 Sole's failure to produce his foreign bank records.

This failure on Sole's part was comprehensive and ongoing. During the civil proceedings in November 1996, Sole had been cross-examined by Senior Counsel for the LHDA on the subject of such records. He had been asked whether he had produced all the accounts in his possession, having been ordered to do so in October of the same year. After some questions and answers concerning the ambit of the October order, Advocate Penzhorn SC put it to him:

'Well, now that I have referred you to the actual order, could you please list to His Lordship the other accounts that you hold. You say that you have a call account with?'

'Standard Bank in Maseru, savings account with Stanbic, another savings account in Lesotho Bank for the mortgage, the one that goes with the mortgage of the house.'

'Yes, anything else?'

'No, that is all.'

'Do you have accounts in South Africa?'

'No'

'Do you have accounts overseas?'

'No'.

Thereafter, Sole filed four further affidavits (sworn statements) to which he annexed details of his account with Barclays/Stambic/Standard Bank, Maseru, omitting the period between 21<sup>st</sup> Dec 1993 and 18<sup>th</sup> Nov 1998, during which money arrived in the account from the Ladybrand account. He added details of his Lesotho Bank account, credit card correspondence, concerning credit card facilities based in SA, and bank statements from his children's savings accounts.

In an affidavit dated 30<sup>th</sup> Jan 1997, he stated:

11. In the circumstances I state:

that I have furnished the Plaintiff with a copy of every document that I have been able to obtain;

that (with the exception of the American Express documents) I am unable to obtain any further documents;

that I do not have in my possession any further documents referred to in the order of the Chief Justice.

Sub-poenas (summons to appear in court) were applied for by the LHDA, issued by the court and served on the relevant bank managers. This resulted in the emergence of the existence of further bank accounts in the Lesotho Bank, and the account held with Standard Bank Lesotho Ltd. Entries to this account revealed the existence of a Ladybrand account, and in Court again in April and May 1997, Rambobedi J made a specific order requiring the accused to produce 'all bank records' for the period 1<sup>st</sup> January 1988 to 30<sup>th</sup> October 1996, in respect of 'any accounts held by him at the UBS, Zurich', and similarly in respect of the Standard Bank account he held in Bloemfontein. Sole responded by swearing another affidavit, on 9<sup>th</sup> May 1997, in which he stated that the Bloemfontein account had been closed for 'approximately three years if not longer', but that he was endeavouring to procure the documentation. However, on the subject of accounts in UBS Zurich, he stated:

6.1. As regards an alleged bank account held by myself at the Union Bank of Switzerland, Zurich, Switzerland, I wish to place on record that I do not hold any such account at said bank, nor have I in the past held any such account at said bank for the period referred to...

and referring to his Bloemfontein account,

7. I have every intention of abiding by said Court Order, insofar as it may be humanly possible, and wish to draw this Honourable Court's attention to the fact that notwithstanding my request for all information relating to the Standard Bank account by not later than 12 noon on Wednesday 7<sup>th</sup> May 1997, I have to date heard nothing from Standard Bank in Bloemfontein.

In a further affidavit sworn on 10<sup>th</sup> June 1997, in response to the LHDA's application for a declaration that Sole held a Swiss bank account, Sole stated:

I do not and have never conducted a banking account with the Union Bank of Switzerland....I deny that I did not comply with this order .... I repeat that I have never conducted a Swiss banking account. I deny that I have defied Orders of this Court. I repeat that I do not conduct and have never conducted a banking account with the Union Bank of Switzerland.

Whilst Sole's lawyers argued that the record of this part of the previous civil proceedings was irrelevant to the criminal proceedings now under way, His Lordship, at p170, concluded that the statements were relevant, and could be admitted, simply as evidence that he made such statements. He went to find, in the face of the evidence that:

He manifestly did hold such accounts, and accordingly I find that he lied, and lied under oath, a number of times, in the High Court. His statements therefore, while exculpatory in form, have an inculpatory effect: they inevitably indicate that he wished at all costs to conceal those accounts, raising the inference that the accounts were not held and operated for a valid purpose, and indeed, in all the circumstances, supporting the inference of corrupt transactions.

And at p175, addressing the argument that Sole's trial was prejudiced by the inclusion of passages from the civil proceedings:

I cannot see, in the exercise of my residual discretion, that any aspect of unfairness arises or that the prejudicial effect of the evidence of what transpired in the civil proceedings... outweighs its probative value, and I hold that the said evidence is admissible in these proceedings against the accused.

### **5.8 Circumstantial evidence**

In the criminal trials examined in this paper, (those of Sole and Acres), circumstantial evidence was relied on by the Crown to secure convictions. Circumstantial evidence is described as the body of surrounding evidence from which the Court is invited to *infer* guilt, in the absence of a direct evidential nexus between accused and the alleged crime. South African and Lesotho law on this point is based upon the rules set out by Watermeyer J in the case of *R v Blom*<sup>107</sup>, with which Cullinan AJ began his analysis:

In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

The second of those two propositions did not mean, according to Appellate Court authorities, that each fact should be taken individually and subjected to such a test, but that the facts as a whole, or cumulatively, must give rise to an inference of guilt which is beyond reasonable doubt. It was summed up by His Lordship thus:

The Court cannot convict an accused unless, on the proved facts, the inference of guilt is, not alone a reasonable inference, but is the only reasonable inference.

The Crown argued that circumstantial evidence in the cases of Sole and Acres was to be found that:

in the use of the intermediary through whose offices payments to Sole were made by the consultants/contractors,

by the use of representation agreements, which reflected the contractual or allegedly corrupt nature of the relationships between the intermediaries, Sole and the consultants/contractors.

### **5.9 The intermediaries**

His Lordship examined the roles played by Cohen, Du Plooy and Bam, each of whom was described, for the purposes of the trial, as an intermediary. He intended to establish whether or not their activities 'constituted a link' between the Consultants/Contractors and Sole. (p179 of his judgment).

#### **Cohen**

Cohen had been established in Lesotho by 1984. He maintained a suite at the Lesotho Sun hotel. Cohen had had financial dealings with Sole early on in his employment at the LHWP, at the least by assisting him in opening his first Swiss bank account. The key issue for His Lordship was the evidence, in UDC and EDC bank accounts which reflected payments into those accounts from which, shortly afterwards, sums were paid out to Sole. UDC and EDC had no apparent involvement in the LHWP, and no evidence was adduced of any skills or expertise he brought to the project.

#### **Du Plooy**

Du Plooy was seen by His Lordship to have no connection with the LHWP, neither was there any evidence before the court of his occupation or profession. He dealt, even with correspondence, through his Swiss bank account, at Nordfinanz Bank Zurich. His connection with the consultants/contractors was through the 'Consultancy Agreement' which he signed with HWV on 11<sup>th</sup> Oct 1990 at Zurich, giving an address in Zurich for Du Plooy, and an address c/o Impregilo, Milan, for HWV. . A payment of \$1m would be made to Du Plooy in his capacity as a consultant 'only in case of award' of Contract 123, (Construction of Katse Dam and Appurtenances). The 'Consultancy Agreement', also known as a 'Representation Agreement' provided, amongst other things, that Du Plooy had been appointed 'in order to obtain, both in the negotiation and execution stages, suitable information and introductions to facilitate the award and the execution of Contract 123. Invoices supplied during the proceedings by Du Plooy did not tally with the terms of his Agreement, which in any event was subject, in the event of a dispute, to Swiss law.

#### **Bam**

Bam had been a civil engineer, and the Chairman of Lesotho Consulting Engineers(Pty) Limited,('Lescon'). He was known to be a close friend of Sole. The addresses he used, as he and his wife opened up accounts in Switzerland were variously in Gabarone, Botswana, and at his consulting firm, Lescon in Maseru, Lesotho. He changed his Swiss address three times. He received large sums of money into these accounts, with sixty percent of the money he received being channelled to Sole, on a regular and frequent basis.

## **6. REPRESENTATION AGREEMENTS**

### **Generally**

When a corporation seeks to secure new business in a country of which it has no previous knowledge, it may seek out someone with local expertise who agrees to act in its interests, and then draw up a representative agreement with them. This is a genre of agreement which is widely used in the international commercial community. Some companies keep representative relationships warm against the day when they might need such local expertise. Payment under such agreements is frequently triggered by the signing of the contract which the representative has been engaged to obtain for the company. It is a convention attached to such agreements that payments can be made to the representative in any currency, into an account in any country. It is also a convention that such payments are calculated as a % of the value of the contract. In passing, it is worth noting that if one does not get paid *at all* unless the contract is

awarded to the company one represents, and then only on the *signing* of the contract does a huge sum become payable, it is difficult to avoid the general observation that the terms of such an agreement are highly conducive to bribery<sup>108</sup>.

These contracts are to be seen throughout the two cases which are the subject of this study. Cullinan AJ, during his ruling, posed a series of questions as he considered the representation agreement as a means by which money was paid to Du Plooy, Bam and Mrs Bam. His Lordship posed a number of key questions about the representation agreement during his judgment:

At p184, he asked of Du Plooy's arrangement:

What need was there for either party therefore, purportedly associated by the common bond of business in Lesotho, to enter into contractual agreement and conduct financial transactions in a foreign country, far removed from the LHWP, if their relationship was *bona fide*?

This question was posed again in the trial of Acres: part of the argument which has emerged during the course of these trials is that a 'representative' is looking for some security for his money, and that he is entitled to have his money paid in whatever currency he wishes, in whatever bank. The residual question is why such banks did not feature in the list supplied by HWV to LHDA.

2. At p186, and concerning Du Plooy he asked, where a consultant only becomes payable with the award of the contract...

How can a consultant give such an undertaking *bona fide*? [to supply necessary information, as well as to undertake to secure a contract]. *Surely the consideration which he offers and which he executes is the services which he renders, and not the results thereof.* [italics added]

3. At p 187, and looking at the evidence of payments made individually to Mr and Mrs Bam, he asked:

What ...was the purpose, under a representation agreement, of such large payments [as were made] to Mrs Bam on a personal Swiss bank account?

4. At p 189 he observed that:

Payments from Acres to Mr Bam and from Mr Bam to the accused were effected over a period of six years. If nothing more than a bona fide representation agreement was concerned, where seemingly nothing more technical than the good-will of [Sole] was sought, how exactly did Mr Bam obtain and preserve such goodwill? What methods did he use? Surely, over a period of six years, the inference of bribery would arise.

At p 190 His Lordship asks:

- a) Any representation agreement would presumably have been negotiated with Associated Consultants and Project Managers (ACPM) [A consultancy of which the two directors were Mr and Mrs Bam.] Why then was payment made to the personal account of Mr Bam?
- b) Why ...was *any* payment made to Mrs Bam? [emphasis added]

Why was resort had to payment to a Swiss bank account? Why not pay ACPM or indeed Lescon locally?

## 6.2 Conclusions

### 6.2.1 The transactions

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<sup>108</sup> For further discussion, see p 44

In the last pages of his judgment, Cullinan AJ surveyed the whole complex financial picture which had emerged during Sole's trial. He observed that the counts with which Sole was charged reflected arose from transactions which were 'inextricably bound together', by the contemporaneous and complex payments made by the consultants/contractors, to the intermediaries and from those intermediaries to Sole. At p 191, he took the following view of the relationship between the intermediaries and Sole:

The initial opening of [Sole's] first Swiss bank account, and the transfer thereto by Mr Cohen on behalf of UDC, of the sums of £2,500.00 and \$2,500.00 in February 1988, seems to have set the train in motion. Thereafter the purpose of numerous payments of large amounts of money by three intermediaries to [Sole] over a period of nine years, can only have had and can only have been understood by [Sole] to have one purpose, that is, a corrupt one.....The payments by the intermediaries were made for a purpose and it follows that they informed [Sole] of such purpose. In brief, [Sole] must then have known of the source (the identity of the Consultant/Contractor) as well as the purpose of each payment, and in particular what was expected of him in return for such payment; alternatively a payment might well have been made in respect of consideration already granted by the accused.

#### **6.2.2 The contractors/consultants roles**

He went on, at p 193, to review the knowledge and intent to be imputed, in his view, to the Consultant/Contractors.

He observed that Mr Cohen could be credited with having started the business of corruption, by opening Sole's Swiss account three months before receiving his own payment from Spie Batignolles, followed by other French companies, Gibb and the LHPC, a consortium of which the lead partner was Spie Batignolles. Dumez had already made a direct approach to [Sole] before any system had set in. His Lordship thought it 'hardly likely that [Sole], over the ensuing seven to eight years, did not do likewise with the other Consultants/Contractors, who were contributing to his financial welfare'. He later made the point that the best way for Sole to ensure, particularly where he received a percentage, that he was receiving the correct amount, 'was surely by communication with the Contractor/Consultant himself'

He looked at the lack of association between Acres, Dumez and Lahmeyer, whose interests had been served by Bam, and found that the likelihood of all eleven Consultants/Contractors being individually or collectively deceived by their individual consultants, over the period concerned, was extremely unlikely.

He viewed the conduct of business via undisclosed Swiss bank accounts, when none of the Consultants/Contractors were based in or operated out of Switzerland as being a clear indication that the representation agreements were not conducted *bona fide* (in good faith)

#### **6.2.3. Sole's defence**

It was suggested on his behalf by his lawyers that he had no power to award contracts, variation orders etc. His Lordship, at p218, took the view that he nevertheless held a position of 'pervasive powerful influence'. As an experienced Engineer, and the Chief Executive, his recommendations 'would carry much weight'.

#### **6.2.4. Sole's silence**

His Lordship's inclusion of extracts from the civil proceedings within the criminal trial, containing evidence of Sole's repeated mendacity, enabled him to be satisfied that this pointed to the 'covert nature of the Swiss bank accounts', for which there was only one reasonable explanation. He commented that Sole's silence did not affect his ruling, since he could decide the case without reference to it, and he proceeded to find Sole guilty of the eleven counts of bribery of which he stood accused.



I am satisfied beyond reasonable doubt, as the only reasonable inference, that in the eleven counts of bribery involved, the accused and the relevant Consultant/Contractor in each count, unlawfully, intentionally and corruptly entered into a corrupt agreement, whereby the accused agreed to further the private interests of that Consultant/Contractor in its involvement with the LHWP, pursuant to which agreement the Consultant/Contractor paid the accused the particular sum of money which I have previously specified under each count.

Sole was subsequently imprisoned for eighteen years. His appeal was heard in April 2003. It failed in all material respects, but his sentence was reduced to one of 15 years.

#### **1.4 7 THE CHARGES AGAINST ACRES**

Acres Company has not felt able to discuss the trial with the writer of this case study despite efforts made by the writer to speak with the company and with its legal advisers.

##### **1.4.1 7.1 Background**

The history of Acres' association with Lesotho began in 1981, when Acres became involved in the construction of Moshoeshoe Airport, near Maseru. Between 1981 and 1986, both Acres and Lescon, (Mr Bam's engineering consultancy) worked together on the airport project, as part of the Delcanda consortium. The Lesotho Highlands Development Authority (LHDA) was established during this period, and by a competitive bidding procedure, Acres was awarded Contract 19 by the LHDA during April 1987, under which it would provide technical assistance to the LHDA. This effectively meant the provision of qualified professional staff to the LHDA and in particular, to the technical division, concerning the main construction works. For example, Mr Jonker, of Acres, acted as assistant to Mr Sole. Mr Witherall, of Acres, took over that position, from October 1989. Under the provisions of Contract 64, appointing him to that position, Mr Witherall had very wide powers within the LHDA, which allowed him, for example, to deal with contractors and authorise payment of contractors when Sole was not there to do so, (including at one point, payments by LHDA to Acres itself).

In 1989, Acres was advised by Sole that the LHDA would 'sole-source' Contract 65 from Acres, with financing by the World Bank. For a fuller examination of the procurement process, see Appendix 4. Contract 65 was, similarly, a contract for technical assistance to the LHDA, and the services provided related to the establishment and implementation of the construction contract for Katse Dam, the transfer Tunnel and Delivery Tunnels going South. This contract was signed by Acres in February 1991, in Maseru. The sequence of events leading up to the signing of the contract formed a part of the Crown's evidence against Acres, is dealt with below.

#### **7.2 The role of The World Bank in the proceedings.**

In a meeting of bank officials and members of the Lesotho Government in Maseru in July 1999, the Bank's attention was drawn to the whole matter, including the Government's view that corruption had occurred, and that a criminal prosecution of the contractors/consultants was under consideration.

The WB's response was a decision to investigate the matter, under the auspices of its Anti-Corruption and Fraud Investigation Unit (ACFIU) a small department which had been initiated by the Bank's President, Mr Wolfensohn, in 1996. The number of

allegations, and the ambit of the investigation exceeded the capacity of the AFCIU, which after considering a number of firms then engaged the services of Arnold and Porter, an American firm of considerable experience in forensic investigation with no conflict of interest in the matter, to conduct an investigation into those companies and consultants against whom there appeared to be evidence of corrupt practices.

The investigative procedure itself is determined by WB, and will not generally result in the publication of evidence gathered during the process. Findings are now provided to member governments, where such findings give rise to the consideration of a criminal prosecution. In OECD countries, or under the US Foreign and Corrupt Practices Act, this is a significant development. In this particular case, another of its unique features was the inclusion of the WB investigations in the criminal proceedings against Acres.

### **7.3 The World Bank investigation**

In March 2001 Acres was served with a notice initiating debarment proceedings, (debarment being the World Bank's ultimate sanction). Five months later, in August 2001, Acres responded, by denying the suggestion that there were any irregularities in its dealings in Lesotho. The keynote of their denials was that they had no idea that Bam, their representative, had been passing on to Sole money he received under his agreement with Acres. The Bank's investigation encompassed a review of documentation, which it requested from all the parties who were the subjects of the investigation. Acres complied with their requests, over time, having requested and received extensions for compliance. Acres employees were not interviewed, although personnel at the LHDA in Lesotho were. By the time Acres had produced all of the documents the Bank had requested "it was too late to start conducting interviews".. The investigative procedure does not ultimately carry any criminal sanctions. Whilst the information contained in the Bank statements indicated that money had been passed to the Chief Executive of LHDA, it did not, of itself, amount to proof that Acres had known the final destination of its payments to Bam.

### **7.4 The World Bank hearing**

The Bank replied to Acres response in September 2001, on the merits of their arguments. It had always contemplated that there would be a hearing. Acres provided a rejoinder in October 2001, and at the end of that month, a hearing took place. The form of the hearing did not amount to a "trial." Submissions were made by all the parties concerned: Acres, Lahmeyer, Sogreah and Max Cohen, who had been implicated by the evidence gleaned from the Swiss Bank accounts. No witnesses were called, and there was no oral evidence given, although each of the parties were represented by their lawyers. There were separate hearings for each respondent. There is no opportunity in this procedure for the evidence before the Committee to be tested in cross-examination. The Sanctions Committee of the Bank, with whom a recommendation to the World Bank's President on debarment rested, deliberated, and in February 2002 wrote to Acres, telling them of the result of their deliberations which were that there was not sufficient evidence supplied to them to debar Acres from receiving future support from the WB. However, Acres were also informed that this was an interim view, which depended upon the Bank's examination of any further evidence which might come to light, during the criminal proceedings.

The Bank resolved to revisit the matter after Acres' trial had concluded, and to re-assess its view of the matter in the light of any new evidence which had emerged during the trial itself. After Acres was found guilty, in November 2002, the Bank returned to review that

evidence. Its investigation continues, and did not come to any conclusions. The Acres appeal was dismissed in August 2003. Nonetheless, it was not until July 2004 that the Sanctions Committee finally determined that Acres' conduct warranted debarment, for a period of three years. (By then the business had been sold to a competitor.)

Ironically, the trial verdict itself appeared to have only a collateral impact upon the Bank's deliberations. The Bank's investigative procedure reflects its autonomous approach to such matters. For the same reasons as it found itself unwilling to help finance impoverished Lesotho's litigation, (i.e. because it will not sanctify domestic litigation in case there is impropriety in the procedure, nor will it create a precedent for supporting litigation), it did not be bound by the findings of the Appeal Court in Lesotho. Had Acres successfully stymied being debarred, it would have given rise to the following interesting scenario: Acres lost its appeal in Lesotho. The Bank decided that no new evidence emerged during the trial to provide a reason for Acres debarment and confirmed its original findings. Acres could return the next day to do business in Lesotho, under threat of the withdrawal of World Bank funding should it refuse to do business with Acres on the grounds that this was a breach of the Bank's rules for international competitive tendering.

As against these criticisms, a distinctly positive feature of the trial was the Bank's willingness to allow its own investigations to form part of the body of evidence placed before the court, at the request of the Lesotho prosecutors.

## **8 THE CRIMINAL TRIAL ITSELF.**

### **8.1 The charges**

Acres trial began in February 2002, presided over by Lehohla J. The charges against the company were that:

between June 1991 and January 1998, Acres paid 493 061.60 Canadian dollars, into a Swiss bank account belonging to ZM Bam, who then transferred a sum from that account to Sole.  
during the same period, 180 825,48 Canadian dollars were paid by Acres into the Swiss bank account of Mrs Bam, who then transferred the money indirectly to Sole.

The Crown alleged that the payments were made with the intention of paying bribe moneys to Sole, and that these Swiss Bank accounts constituted conduits through which such payments could be made at arms length. The representation agreement was allegedly an insurance policy, against the day when the payments made by Acres to Sole, through the offices of ACPM and Mr Bam were investigated.

In their rebuttal, Acres claimed that Mr Bam, through his organisation ACPM, had been properly engaged by them to act as Acres' representative in Lesotho. The payments, said the company, were properly made under the terms of the Representative Agreement; further, the company did not know that payments would be made to Sole from those accounts by Bam, and certainly did not intend for such payments to be made.

In his judgment in the trial of Sole, Cullinan AJ had earlier identified many of the issues which were to resurface as the Crown prosecuted Acres – the nature of representation agreements, the role of the intermediary, and the law which governs bribery. Judge Lehohla was now required to consider these issues in greater depth

### **8.2 Corporate liability, and citation.**

At the start of the trial, Acres once more argued that the company should not be tried, for an offence which was allegedly committed by an employee, without the knowledge of the board. Lehohla J ruled, in line with Cullinan AJ's decision in *Sole*, that the doctrine of corporate liability remained unchanged, and Acres was correctly cited in its own name. In his ruling, drawing from '*South African Criminal Law and Procedure*' Vol 1' Burchell and Hunt, His Lordship took the view that 'a corporate body can be convicted of virtually any crime requiring *mens rea*. ....The fact that what the servant does was expressly forbidden by the company makes no difference provided that in doing so, he sought to further the interests of the company.'

During the interviews for this case study, the criminal implications of corporate liability have repeatedly appeared as issues which trouble a TNC, and parts of the legal community. The questions most frequently emerging have been these:

The doctrine of corporate liability is already vulnerable to criticism outside the commercial community, in a climate where it is seen by many to be a rather flimsy tool with which to enforce good corporate governance, which legislation in many countries now seeks to strengthen. If such liability were to be reduced, would such criticism not intensify?

If an employee behaves in a way which is directly contrary to company policy, *without* the knowledge of his employer, is it fair that the employer should then be liable to the fullest extent, which is arguably a *criminal conviction*, for its employee's conduct?

Does this liability found an obligation on the part of the employer to *police* the conduct of its employee?

Is this a practical burden, which an employer can and should shoulder effectively? If the answer to that question were to be no, then what is the alternative?

### 8.3 The evidence at trial

#### 8.3.1 Agreed evidence:

a number of aspects of the evidence in the trial were agreed at the start:

Acres had used LHDA money to pay the Bams.

The payments *were* made, indeed other payments were admitted by Acres, even though they were not recorded in the Swiss bank records

The contents of the Swiss bank records became uncontested evidence.

The evidence of other bank accounts held by Sole, Acres, Bam and his wife in both Lesotho and South Africa was agreed.

#### 8.3.2 Circumstantial evidence:

As in *Sole's* trial, the Crown had no evidence of a direct agreement between Acres and Sole - any conclusion that bribery had occurred could only be drawn on the basis of an inference reasonably derived from the whole body of evidence put before the court, according to the common law in this area. Legal argument ensued, as to whether the inferences should be looked at in their totality, or individually: once again this centred on the correct interpretation of the rationale in the case of *R v Blom*,<sup>109</sup>:

The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

Senior Counsel for Acres argued that the inferences which the Crown invited the court to draw were based on conjecture and speculation, not upon facts provided to the Court. His Lordship approached the question thus:

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<sup>109</sup> op cit

Suffice it to say any inference that the Court should draw from the circumstantial evidence must be the only reasonable one in the circumstance and it must be consistent with all proved facts as I understand the rationale in *Blom* above to be.

### **8.3.3 Oral evidence**

Opening the evidence for the prosecution was a Mr Putsoane, an engineer, who had joined the LHDA in 1985/6 as a road design engineer. He had gone on to become the senior engineer responsible for road infrastructure projects in 1987, thereafter Acting Chief Executive and finally Deputy Chief Executive. During his evidence, he explained the process leading up to the award of contracts, and set out the ways in which the Chief Executive could and indeed did exert a huge influence over such awards:

Whether or not there was a requirement for the pre-qualification of tenderers was a decision which would be taken by the Chief Executive.

The evaluation of tenders would be done by the evaluation committee, members of which were appointed by the Chief Executive. The committee would report to the Chief Executive, who would then decide on what recommendations would be made to the Board.

Where outside specialists were required in the evaluation process, then the financial regulations required that such persons would be appointed by the Chief Executive, or be recommended for appointment to the Board by the Chief Executive.

(iv) Tenders for contracts were offered when there was competitive bidding for a contract. It was a procedure in which a representative could play anything from a supporting role to a crucial one.

Sole-sourcing: sole sourcing a contract was, as the words suggest, where a company was invited to negotiate a contract without competition from others. If a company did not produce an adequate proposal in response to such an invitation, or its proposal was too expensive, it was excluded from the shortlist of those invited to tender thereafter for that contract.

Mr Putsoane explained that tenders were ranked in order of preference, with the Chief Executive, Sole, generally recommending the highest. He also had the final decision in determining which tenderer to recommend. Negotiations with the successful tenderer were then conducted by a negotiating committee which was appointed by Sole. The essential parts of the negotiations would then be recorded in the MOU; this would be signed by Sole, on behalf of the LHDA. In his evidence, Mr Putsoane testified that Sole exercised power and influence over LHDA matters extending beyond the boundaries of his role as Chief Executive. By Article 9 of the Treaty, Sole was obliged to consult the JPTC throughout the decision-making process, particularly where such decisions concerned expenditure. However, he did not do so: according to testimony given by Mr Molapo, a member of the JPTC at the relevant time, Sole did not consult the JPTC either before sending out a request for proposals, or before concluding the Memorandum of Understanding, or before sending out the letter of intent, or before signing Contract 65, in February 1991. By allowing Acres to mobilise *before* the contract was signed, the JPTC was faced with a *fait accompli*. Sole also dismissed people from the LHDA who he perceived not to acknowledge his authority. The Crown argued that it was this oblivious sort of approach which led to Sole's eventual downfall.

### **8.4 Acres relationship with the LHDA.**

Acres had first worked in Lesotho in the early 1980's, with Delcanda International, as part of a consortium building Moshoeshoe airport. Acres relationship with the LHDA itself began with Contract 19, a contract for technical assistance, covering a period from 1987- 1990. A letter was produced at the trial, dated 3<sup>rd</sup> Dec 1987, in which Mr Jonker, the Executive Vice President of Acres offered his services as assistant to the LHDA's Chief Executive. The offer was accepted. Documents at trial showed Acres present at LHDA management meetings. Mr Putsoane had worked for the LHDA for a number of years in different capacities. He was in a position to describe the close nature of the relationship between Acres and the LHDA. He had worked with Acres personnel, who had operated line positions in the engineering divisions of the LHDA. He is

quoted as saying that 'Acres persons ....were actually part and parcel of the LHDA. They acted similar to every other employee of the LHDA'. The Acres personnel in the LHDA were housed in the same office. Senior Acres personnel were involved in the LHDA at the highest level, from an early stage. Mr Jonker was assistant to Sole, Mr Witherell was Design Engineer, technical manager and then Assistant Chief Executive, and Mr Brown Design Manager. The dynamics of these relationships were complex:

There was an obligation to train Basotho engineers so that they could ultimately take over the project. Such engineers were to be trained by Acres, under contracts 19 and 65. Basotho engineers in the project were aggrieved by Sole's special relationship with Acres, which they thought worked to their detriment, when Acres personnel were promoted ahead of Basotho candidates, and when Basotho engineers were not provided with the training to which they were entitled. This discontent was minuted in meetings, the minutes being produced in evidence.

Acres was clearly so deeply embedded in the LHDA, working so closely with the Chief Executive that at times the distinctions between whose interests were being served became blurred: the question arose: what role was to be played by a representative acting in the interests of Acres? What was the demonstrable need for such a representative? Although Acres had now been working in Lesotho for eight years, Mr Putsoane and others working in the LHDA over the period did not know that Bam was acting in the interests of Acres. None of the witnesses was aware of any relationship at all between Acres and ACPM, (Bam's firm).

Throughout the documentation in the trial, there was no evidence of an entity called ACPM. It was an entity with no address save for at the bank in Switzerland. No-one had heard of it, and it was not registered in Lesotho. There was no correspondence in evidence, nor invoices produced on behalf of ACPM to give any indication of its existence. Lehohla J criticised Acres for failing to exercise due diligence as it established its relationship with ACPM or Mr Bam. In the case of Mr Bam, an exercise in due diligence would inevitably have revealed that in the first place, so far from being able to represent the interests of Acres exclusively, (as required by Contract 65), Bam was already on the pay roll of other consultants and contractors on the Water Project, such as Dumez, Lahmeyer.

The secrecy with which these arrangements were surrounded gave rise to a suspicion in the mind of His Lordship, expressed later in his judgment at p65:

I accordingly accept the submission that it seems the arrangement with Z M Bam was not intended to bear any exposure to the light of any type. This conclusion rightly follows because there is not even a document copied to Z M Bam. I further accept the soundness of the argument which is in sequel that the fact that Masupha Sole knew can hardly, in the circumstances, be imputed to the LHDA. Clearly the work that he did or the tasks that he had to perform are thereby consigned to the category of clandestine ones.

It follows then that if the relationship was not generally known it would fittingly belong to the 'red flag' category. It requires not a quantum leap but hardly half a step to conclude likewise with regard to the sums involved, Z M Bam was paid huge amounts of money for not doing any of the things stipulated in the contract, and for that matter while he was sitting in Botswana'.

## **8.5 The Representation Agreement between Bam and Acres**

This agreement clearly contained 'red flags': this term is commonly used to describe features of business conduct which give rise to a suspicion that corruption may be concealed beneath the surface. In such an agreement, terms may constitute 'red flags' as much by their absence as by their presence. In an article in 'Fighting Bribery: a

Corporate Practices Manual<sup>110</sup> Michael Davies Q.C, Chairman of the Committee on Corruption and Bribery, of the Canadian Council for International Business sets out a helpful and comprehensive list of potential red flags which could emerge during the exercise of due diligence by a corporation in evaluating a potential representative, where the candidate:

- does not reside in the same country where the customer or the project is located.
- does not have any significant business presence within the country
- represents other companies with a questionable reputation
- requests that commissions be paid into a third country or to a numbered bank account or to some other person
- requires payment of the commission, or a significant portion thereof in advance of, or immediately upon, award by the customer of the contract to the company
- claims that he can help secure the contract because he knows all the right people
- has a family or other relationship that could improperly influence the customer's decision; or
- arrives on the scene just before the contract is about to be awarded.

A more detailed analysis of the evidence of corruption within a representation agreement can be drawn from the body of case law in the Arbitration Tribunal of the International Chamber of Commerce, (ICC) where disputes over many such agreements are adjudicated. Such agreements will customarily contain a term which indicates which jurisdiction will apply in the event of a contractual dispute. In the agreement between ACPM (Bam) and Acres, the law of Ontario was selected for that purpose.

In arbitration proceedings, to adjudicate a dispute between the parties to an agreement as in the trial of Acres, direct evidence of corruption is not generally forthcoming; the forensic powers of criminal investigation are not available to the tribunal either, and therefore it is, as in the Acres case, only circumstantial evidence which is available from which to draw inferences. Such evidence may be found concealed within either the vague or the very detailed terms of the contract, but it is the real intent of the parties, evinced by their conduct, which indicates the true nature of the contract which was agreed between them. It was this methodology which Lehoullier J used to conclude as he did, that the agreement between Acres and Bam concealed bribery.

Disproportionately high fees will give rise to the suspicion of corruption: it was agreed that Bam was paid very highly, although Acres maintained that the fee was not out of line with other similar remunerative packages. The argument for a corporation runs that the fee is what can be negotiated, according to what the services of the agent/representative are actually worth. This may include benefits other than those immediately set out within the body of the Representation Agreement, such as the maintenance of the presence of the corporation in the country concerned, the long term value to the corporation of the project, cross-subsidies where a government is involved, prestige, or the use of novel technology. Such secondary benefits from Bam's representation were not adduced in evidence by Acres, however.

The absence of transparency on the part of the agent's company or consultancy will tend to found a suspicion of corruption. Whilst there may be arguable reasons for such lack of transparency, (such as commercial confidentiality) ,where there is a dearth of information without any such justification (such as tax optimisation, circumvention of laws prohibiting agents or fear of envy) an inference of corruption may easily be drawn.

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<sup>110</sup> Published by the ICC Standing Committee on Extortion and Bribery, May 1999

The nature of the relationship between the representative and the public official may give rise to an inference of corruption. This is a problematic question. In a small community, such as Lesotho, when Bam and Sole already had a commercial and social relationship arising from the employment of Bam's consultant engineering company, Lescon, in the LHWP, it would be harder to distinguish between the personal and professional parts of their friendship. The fact that they were clearly close to each other did not appear to have given rise to further investigation by the companies who used Bam as their representative. It was therefore at least possible that an inference might be drawn from their failure to investigate.

The nature of services to be performed by the agent may give rise to an inference, in particular where there is confusion about the nature of those services. During its trial, it does not appear to have been clearly explained by Acres exactly what services Bam performed for them under the terms of the agreement between them other than those set out in Schedule 1 to the Representation Agreement. No contemporaneous records were produced, in the form of assessments, instructions or invoices, and the terms of the agreement itself were indeterminate on the question of the more subtle role Acres claimed Bam to have performed for them.

Remuneration into a bank account outside the jurisdiction of the agent, whilst not necessarily being evidence of corruption, must begin to look like it, when the bank accounts are cloaked in secrecy. In Acres' trial, the company had appeared to flout the Lesotho exchange control regulations, but it maintained that it was not itself subject to such laws, and indeed had not been charged with offences under those regulations. It was the company's case that it was legal and customary to pay its representatives in whatever currency, into whichever bank was selected by the person concerned. In taking this view, the company appeared to be either naïve or indifferent to the consequences of a breach of the regulations governing the conduct of those domiciled in Lesotho. 111

#### **8.6 Arguments about the representation agreement between Acres and Bam**

Nothing in the Acres trial was more contentious than the competing values attached to this agreement by the prosecution and defence. The earlier agreement for Contract 19 was not produced in evidence by Acres. It was the agreement concerning Contract 65 upon which argument centred.

At the end of 1988, Bam went to work at the Botswana Housing Corporation in Botswana, remaining there until Feb 1991. During this period, the representation agreement was negotiated between him and Acres, concerning Contract 65. Drafts passed between Acres and Bam. The agreement was finally signed between Acres and an organisation of Mr Bam's, called ACPM, of which the two Directors were Mr and Mrs Bam, in November 1990. Mr Bam's name does not appear on the agreement, neither does his wife's. No evidence was adduced of the work which ACPM otherwise did. Payments under the agreement were to be made by Acres into the bank accounts which Mr and Mrs Bam held in Switzerland. ACPM had a Swiss address, care of the bank in Switzerland..

The services which Bam was to provide were appended to the Agreement, at Schedule 1. ACPM's obligations were to:

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111 For further reading, see 'Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals', by Matthias Scherer [2002] Int. A.L.R



Keep Acres informed of all developments with respect to the services.  
 Keep Acres informed of general conditions and developments in Lesotho which could affect Acres interest in undertaking the services of which could adversely affect Acres ability to complete the services in a fully effective manner.  
 Make Acres known to and assist if necessary in registering Acres with appropriate agencies and staff  
 When requested by Acres, collect appropriate documents and information for forwarding to Acres.  
 Promote Acres interest in Lesotho by presenting brochures and other publicity material to appropriate officials  
 Assist Acres in seeking, negotiating and securing a contract or contracts in Lesotho for the performance of the services.  
 Assist Acres in the conduct of business, financial and other affairs of Acres in Lesotho so as to meet the legal requirements of the Government of Lesotho and properly and lawfully to minimize taxes and other public impositions to be met by Acres  
 Provide to Acres support facilities in regard to office, secretarial, accounting, banking, telecommunication and other such matters as mutually agreed from time to time.  
 Assist Acres maintain good relationships with LHDA and assist in expediting payments due to Acres in accordance with its Agreements with LHDA.

Issues arising out of these obligations lay at the heart of the trial. They should be seen in the light of the chronology of events, which is set out below.

#### Chronology:

End	1988	Bam left Lesotho to work in Botswana
28 <sup>th</sup> April	1989	Sole informs Acres that LHDA would sole-source from Acres for Contract 65.
19 <sup>th</sup> May	1990	Memorandum of Understanding signed, re Contract 65.
24 <sup>th</sup> July	1990	Letter of intent, sent by Sole to Acres
14 <sup>th</sup> Aug	1990	Undertaking to pay, by Sole to Acres
September	1990	Acres claimed an advance payment under unsigned contract
23 <sup>rd</sup> Nov	1990	Acres signed RA with ACPM
28 <sup>th</sup> Nov	1990	Witherell, (Acres employee on contract with LHDA) authorises payment to Acres for services rendered under Contract 65.
29 <sup>th</sup> Nov	1990	250,000. maloti paid to Acres by LHDA
4 <sup>th</sup> Jan	1991	1.16million Canadian Dollars by LHDA
28 <sup>th</sup> Jan	1990	Acres paid Z.M.Bam Canadian Dollars 180,000.00
21 <sup>st</sup> Feb	1991	Sole signed Contract 65.
13 <sup>th</sup> Mar	1991	World Bank approval of Contract 65.

#### It was the Crown's case that:

The services to be performed by Mr Bam, as set out in Schedule 1 to the Representation Agreement were already *being* performed for Acres: support facilities, secretarial services, accounting, banking and telecommunications facilities, all these had already been put in place under Contract 19.  
 Payments to Acres were already being processed by Mr Lightfoot, who also dealt with Acres bank business and records. Peat Marwick dealt with the Registrar of Companies. In any event, Mr Witherall, acting as assistant to Mr Sole, would have been able to deal with anything which arose during the normal course of business.  
 There was no evidence to indicate that Mr Bam had assisted in the negotiation of Contract 65. There were no invoices setting out the work which had been done by Bam, and for which he was being paid.  
 What remained of the terms of Bam's services to be rendered under the agreement was to make the company known in appropriate quarters, and to promote it generally. The Crown's case was that Acres was already at the heart of the LHDA, so introduction and promotion were no longer relevant.  
 Bam was already engaged with LHDA through his own company, Lescon, under Contract 45. Therefore there was a fundamental conflict of interest which precluded Bam from acting as an agent for a contractor/consultant.

#### It was Acres case that:

1. In the occasionally fraught political climate of Lesotho, they needed a suitably qualified representative to protect their interests, and to promote Acres in Lesotho:

2. The payments made to Mr Bam were legal, indeed they were reflected in the company's accounts. What Mr Bam might do with the money thereafter was a matter for him
3. The services they required of him could be performed over the telephone from Botswana.
4. He was an engineer, with exactly the kind of qualifications they needed, with years of experience in this area, and a knowledge and experience of Lesotho from which they would derive substantial benefit.

In any event, his expertise was required in the administration of the contract rather than achieving its award, with particular reference to the volatile political situation in Lesotho at the time.

Acres had put the following proposition to the World Bank during its debarment proceedings, which formed part of the body of evidence before the court in this case. 'Post award of both contracts, Bam's role fell principally into two areas : (1) political intelligence, and (2) intelligence concerning Acres personnel performance' This, they said, explained the absence of documentation concerning the Representation Agreement. Lehohla J found an inconsistency between this scarcity and the profusion of references provided by Defence witnesses to invoices found in the documentation underlying money transfers to Bam's account in Geneva. Additionally, he found that the evidence provided to the Court indicated that in fact Acres staff performed functions connected with the security situation and political events.

The Court considered how Mr Bam could have performed those particular functions himself, from Botswana, where he was in full time employment during the relevant period leading up to the signing of Contract 65. At p50 of his judgment, His Lordship said: 'On the face of it Z M Bam who also performs the same functions on behalf of Acres would seem to be serving in this regard as nothing else but a fifth wheel to the cart'.

The Crown invited the Court to conclude that the representative agreement was in fact a sham, put in place to conceal acts of bribery.

### **8.7 The signing of Contract 65.**

The significance of the *sequence* of events leading up to the signing of Contract 65 was drawn to the Court's attention by the prosecution. By the 23<sup>rd</sup> of November, 1990, the date on which the Agreement between ACPM and Acres was signed, Acres had already begun work, but not yet been paid. At p128 of *R v Acres*, Lehohla J observed that Mr Hare, for Acres, agreed that Acres had started work under Contract 65, but was not as yet getting paid for doing it, neither was there a contract in place. The consequences of this state of affairs for Acres could have been dire. By 25<sup>th</sup> September 1990, the Acres mark up, a crucial term of the contract, had still not been agreed. The company badly needed an advance payment, and a signed contract. By 23<sup>rd</sup> November, all but two minor terms of Contract 65 had been agreed. On the 28<sup>th</sup> November, Acres own employee, Mr Witherell, authorised advance payments to Acres on the part of Sole, which were made on the 29<sup>th</sup>.

At p 98 of his judgment, Lehohla J examined the role ACPM was supposed to play in getting Contract 65.

In terms of this agreement ACPM was to assist Acres in getting contract 65 and also perform certain services during the life time of the contract. For this Z M Bam would receive 3.6% of the net value of the contract with Acres. Bearing in mind Acres' mark up of 14. 7% this meant that he would get approximately 25% of Acres profit. The question that immediately arises is why pay him 25% occasioned by the mark up in circumstances where contract 65 is in the bag.

At p100, His Lordship addressed the extra-territorial nature of the RA, citing Cullinan AJ in *R v Sole*:

What need was there for either party therefore, purportedly associated by the common bond of business in Lesotho, to enter into contractual agreement and conduct financial transactions in a foreign country, far removed from the LHWP, if their relationship was bona fide.

It is interesting to note that the whereas the RA was signed by ACPM, the bank accounts into which the moneys were paid were opened in the names of Mr and Mrs Bam, which would appear to have presented Acres with some difficulty had there been some contractual dispute between the parties at a later stage.

#### **8.8 'Following the money.'**

Tracing the transfer of moneys from consultants/contractors to the Bam accounts in Geneva, Mr Roux, the forensic expert, adopted the approach that if a transfer was made by the consultant/contractor, and a payment out of the account made to Sole's account within a sufficiently short period of time, or where there was no other transaction in that specific account for a specific period, then it could be assumed that the money was used to pay Sole. The pattern of payments revealed that as a general rule, 60% of the money paid to Bam was passed on to Sole within a very short period of time after he had received it from Acres. By the agreement, Bam was to be paid 4 x Canadian \$180,000.00 followed by 69 consecutive monthly sums of Canadian \$7,826. By comparison with the earnings of others involved in the LHDA, including the salary of Sole himself, these were very substantial sums.

At p 89 of his judgment, Lehohla J took the view that ...'It simply defies intelligence that Acres would have paid Z M Bam these huge monthly amounts, over and above the Canadian \$180,000.00 for 'intelligence'. In fact, even if Z M Bam was in Lesotho working honestly on a full time basis in respect of the representative agreement, it is highly unlikely that Acres would have paid him so much'.

The amount paid to Bam exceeded the official salary Sole received himself, (Maloti 8,365.18 per month).

Acres conceded, in written submissions, that:

For purposes of this case it is accepted that the payments from Bam to Sole were made unlawfully, and this has already been found by another court of this Division in the case *R v Sole*.

The central question for the tribunal was this: did Acres know that 60% of the funds it passed to Bam were then passed to Sole?

Lehohla J was in no doubt of the answer to this question. At p61 of his judgment he said:

In my view however it would defy common sense that Acres should pay so much money as it did consistently over a period spanning the duration of this practice without knowing that its money was being used through their agent to pay the Chief Executive of an organisation in which they had a direct interest.....Furthermore it is inconceivable that he [Bam] would use this unlawful means of securing Acres' interest by, as it were, rubbing the right way the only man who mattered, namely Sole, without Acres' knowledge.

The last three payments made by Acres to Bam, of \$10,500 Canadian represented 40% of the earlier payments. Acres argued that this reduction represented an adjustment of the money owed to Bam under a re-calculation of the contract price. The reduction in monthly payments occurred at almost the same calendar moment at which Sole lost his application for judicial review of the decision to dismiss him, which the Crown alleged was the clearest indication that with the end of his influence in the LHDA, there was no further purpose to be served in paying Sole. Acres argued that this reduction was a bona fide consequence of their recalculation of what was owing to Bam under the terms of their agreement with him.

#### 1.4.2 8.9 Defence Evidence

##### 8.9.1 Mr Witherell – Assistant Chief Executive at LHDA

He was perhaps the best placed of all Acres personnel to give evidence in its defence, he had provided an affidavit for the World Bank investigation, but the court was informed that he could not travel from Canada to attend the hearing because he was indisposed. There was no opportunity for him to be cross-examined on the contents of the affidavit.

##### 8.9.2. Mr Hare - Vice President of Acres, Overseas Business Director

He gave evidence of Acres' strong anti-corruption policy, and the due diligence which it used before entering an agreement with Mr Bam. He did not provide documentary evidence to support this evidence, such as a written application on Bam's behalf for the job, any other document setting out his qualifications for the position as Acres representative, or references in support of his application. Bam's pre-existing relationship as Lahmeyer's agent had not, it seemed, been discovered, and the qualifications Bam had indicating his political acumen, together with the benefits it would bring to Acres in the execution of Contract 65 were not addressed other than in the most general of terms. There did not appear to be an appreciation on Mr Hare's part of the conflict between Lescon, Bam's engineering company and ACPM, his other organisation, either.

Mr Hare testified that it had been unintentional for Bam's name to be omitted from the RA, and that his suspicions had not been aroused by the provision of a Swiss Bank Account for payments to Bam under the Agreement.

Different drafts of the Agreement had been prepared, and sent for the approval of Acres Chairman. His Lordship took the view that in such a detailed procedure, there was no room for any error: he found, at p112, that Acres *intended* the Agreement to be with ACPM, without reference to Bam himself or his wife. What he described as 'peculiarities' in the agreement led him inexorably to the conclusion that this agreement was a vehicle to commit bribery.

Mr Hare gave evidence of another agreement between Acres and its representative in Zambia: Acres, he said, used agents as a matter of course for overseas operations, when in unfamiliar territory. It emerged as he was cross-examined that such agreements were far less frequently used than was first thought by Mr Hare. Whilst he had suggested that 'hundreds' of such representatives had been used by Acres, it transpired that in fact only 28 agreements had been reached, over a period of 22 years, of which 21 had expired. (see p116 of judgment)

Mr Hare also testified to the boundaries of Mr Witherell's job description. Here he was addressing the impropriety of Mr Witherell, an Acres man, signing the authorisation for Acres payment in place of Sole, in advance of Contract 65 itself being signed. Mr Hare maintained that although Mr Witherell received all the communications between LHDA, the World Bank and the JPTC, he did not and would not have passed information relating to these on to Acres in Canada. Lehohla J found this not to be credible, see p120. His Lordship found a number of aspects of Acres conduct which lacked the integrity to which the company laid claim in their policy statements.

Lehohla J was particularly ruthless about the evidence of Mr Hare, at the best criticising his selective memory, at worst viewing him as being deliberately untruthful in his interpretation of events. For example: the minutes of a JPTC meeting of 19<sup>th</sup> September 1990 were exhibited – the part relating to Contract 65 read as follows:

##### **Noted**

That although repeatedly requested from the LHDA no further information had been received regarding the status of the above Contract.

##### **Resolved**

- 1 That LHDA be informed that mobilisation of Acres personnel under the 'unawarded' contract is not acceptable to JPTC.

- 2 That the above action by the LHDA without JPTC's prior approval is in contravention of the Treaty, and that this fact is brought to the attention of the LHDA.  
That the LHDA be advised to consider funding of the above services under VO (Variation Order) to TA1.

This showed that the LHDA, or Sole, had not in fact cooperated with the JPTC as required to do, and as was suggested it had done, by Mr Hare.

In addition, Acres obtained its bank guarantees from The Royal Bank of Canada, having represented that Contract 65 had been awarded to Acres, long before the conditions within the letter of intent had been met, or the contract signed. To his Lordship, this amounted to a deliberate misleading of the Royal Bank. At p130 of his judgment, he listed the reasons why he found Mr Hare's evidence to be inconsistent, contradictory and improbable, and finally untruthful. Some of these reasons are summarised below:

Contract 65 was secured without Mr Bam's assistance.  
Acres had no need at this point for an agent in Lesotho  
No clear answer had emerged as to what precisely Mr Bam was to do for Acres.  
The due diligence applied by various members of Acres to the engagement of Mr Bam was arbitrary, inadequate and not in accordance with Acres stated policies.  
The fact that the representative agreement went through a series of drafts indicated that it was a carefully considered document, which was deliberately drafted thus, omitting the name of Mr Bam, whose name appeared on the bank accounts into which payments were made. It amounted to an insurance policy against the day when such payments might come to light.  
Acres had a direct conflict of interest with Lahmeyer, consulting on LHDA. The compromise of that conflict was epitomised by their joint instruction of Bam as their companies' agent.  
By making payments in Switzerland to Mr Bam for work done in Lesotho, the Exchange Control Regulations of Lesotho were flouted by both parties to the agreement.  
Acres at one stage shared lawyers with Sole, which appeared to his Lordship to be highly irregular, as did consulting with Sole over the trials.

#### **8.9.3. Mr Brown - Senior Representative for Acres at LHWP**

His Lordship's view of the remaining defence evidence given by Acres personnel did not improve. He found witness Mr Brown unwilling to answer questions with sufficient specificity, particularly those which dealt with the nature of his own relationship with Sole, Acres' relationship with Sole, either of their relationships with JPTC, or the implications of Lescon's subconsultancies in the LHDA, either in the infrastructure, construction or engineering department. Mr Brown did not appear to his Lordship to appreciate the conflict of interest between Lescon, (Bam's company) and ACPM (the signatory to the representation agreement), or that ACPM, Acres and Lahmeyer also breached the exclusion clause contained within Contract 65, by which a representative could only act exclusively in the interests of Acres. His Lordship's view was that Mr Brown did not address the validity of the representation agreement. In general, he found that the evidence given by Mr Hare and Mr Brown was untruthful: at p162, he said

In a way Acres, by having them give evidence in the manner they did, has shown its true colours namely that it is prepared to bend the truth in order to secure an acquittal. A company which is prepared to do this will also not shrink from paying bribes. These two witnesses came to extract Acres out of the bad situation and in the process have exposed it in worse light. Never could the expression suit the situation more fittingly than they went for the wool and have come home shorn.

#### **8.9.4. Mr Gourdeau**

Acres then called Mr Gourdeau, an expert witness who would give evidence on the use of representatives in engineering practice. Mr Gourdeau's brief appears to have been rather narrowly drawn: he testified that he did not know much about the case itself, he had not read large parts of the Crown's evidence and therefore was not in a position to comment specifically upon the aspects of the representation agreement which were put to him by the Crown. He found himself unable to acknowledge that the Representation Agreement between Acres and ACPM *could* be used as a vehicle for bribery. His Lordship found that Mr Gourdeau was not the

objective and impartial witness he had been held out to be, by Acres, neither had he managed to reconcile what had happened here with international practice in the engagement of a *bona fide* representative. That failure did not assist Acres. His Lordship commented on this in a telling passage;

‘Sheep or springbok’ (p174)

‘This unreasonable refusal to acknowledge the obvious is much reminiscent of herd boys who were in the habit of stealing and eating a farmers sheep. Because they feared that little boys who participated in the eating might let on that this act of illegality goes on in the veldt the bigger ones busied themselves drumming into the heads of little culprits that this is not a sheep, but a springbok. So it occurred that even where an innocent resemblance was noted between the hooves of the sheep and a springbok he was fetched a vicious blow with a cosh for mouthing that innocent observation within the hearing of the bigger herd boys who once more made him repeat after them ‘this here thing is not a sheep but a springbok’.

#### **8.9.5. Mr Gibb – Acres employee**

Acres called Mr Gibb, who testified that the reductions by 60% in payments to Bam were nothing to do with Sole’s unsuccessful application for a judicial review of his dismissal, and his final, failed bid to return to the LHDA, although the two events were almost contemporaneous. Mr Gibb explained that the reduction arose from projections for Acres total service provision which were adjusted. The timing of the adjustment of the payments was described by Mr Gibb as being ‘opportune’ because of an impending visit from Acres management.

Mr Gibb also testified that a reduction was required in the percentage which was due to Bam. Again, there seemed to be no overweening reason why the reduction should have taken place at that particular moment. No post signature written amendments to the RA emerged during the course of Acres evidence; in fact it appeared from Mr Gibb’s testimony that any variations in the agreement were dealt with verbally. His Lordship’s view was that the absence of any written evidence of variations to the agreement indicated that Acres did not intend to be bound by its terms.

The absence of invoices presented a substantial problem for Acres at the trial. No guidelines were adduced by the company for the remuneration of their representatives, and accordingly there was no written record of the nature of the services performed for them by Bam, their expectations of him, or the basis on which he would be remunerated. A range of exemplar agreements were adduced by Acres, to indicate their practice in other countries, which appeared to show the inconsistency in their approaches to the engagement of representatives.

#### **8.9.6. Mr Burnett – expert witness**

Mr Burnett was called by Acres to parry the evidence of Mr Roux. The essence of his testimony was that there was no evidence of a contractual relationship between Acres and Sole, or any evidence to support the proposition that there was any intention on the part of Acres to bribe Sole. His Lordship found that Mr Burnett had not looked at the accounts themselves, but gave his evidence on the basis of his analysis of Mr Roux’s report. It appeared to His Lordship, that he had not ensured that he had seen the supporting documentation which would have enabled him to give a view on the authenticity of the representative agreement, (such as invoices issued under the agreement); he nevertheless prefaced his report thus....‘[this report] includes all matters relevant to the issues on which [his] expert evidence is given.’ (p196) He was not aware of the chronology leading to the signing of the Representative Agreement, neither did he know that Bam had been in Botswana for the period in question. He was adamant that there was no basis for inferring a link between Sole and Acres, through the vehicle of Bam’s bank accounts, that there was no observable pattern in the payments out. He appeared, to His Lordship, to give evidence which simply concurred with the earlier evidence of Mr Gibb, leading His Lordship to comment unfavourably once more upon a defence witness’ lack of impartiality. This did more than not assist Acres, in His Lordship’s mind, as he indicates at p 200 of the judgment:

The court thus naturally demurs at DW6's [Burnett] partiality. The fact that he expressed views quite literally with blinkers on does not say much for his objectivity and his expertise. What is more Acres bona fides are to large measure seriously compromised by all this to the extent that Acres were a party to DW6 entering the witness box with the benefit of a completely one-sided picture of what really happened in this case.

#### **8.9.7. Mr Meyer - Seconded from Lahmeyer, he had been a member of the Lesotho Delegation of the JPTC**

Acres called Johannes Meyer. He had arrived in Lesotho in 1988, and staying until 1996. He was asked to give evidence on the propriety with which Contract 65 had been negotiated and signed. He spoke of the role of the JPTC in negotiations, and testified that the letter of intent in respect of this contract did not receive approval from the JPTC. He also agreed that mobilisation had not been authorised by the LHDA or the JPTC, in contravention of the Treaty, that payment of the advance moneys to Acres was 'highly irregular', and that Contract 65 was signed without JPTC approval.

### **8.10 Judgment**

#### **8.10.1 Acres evidence**

In his colourful judgment, Lehigh J repeatedly alluded to the deception which in his view characterised the dealings which had involved money being transferred from contractors and consultants working in Lesotho, into undeclared Swiss bank accounts, whereupon it was moved once more into the accounts of Sole. He found himself deeply unimpressed with the witnesses for the defence. One of his principal criticisms was that they each appeared to be more concerned with presenting a positive interpretation of Acres' conduct than they were with giving evidence in an appropriate and straightforward way. His judgment, when assessing the defence evidence, repeatedly reflected his frustration that an obvious answer was not forthcoming to an obvious question.

#### **8.10.2 Circumstantial evidence**

The law on circumstantial evidence was set out in *R v Sole*, by Cullinan AJ, and it was followed in his ruling by Lehigh J. The principles had been set out in *R v Blom*<sup>112</sup>, (see above) and followed in the subsequent jurisprudence from which Lehigh derived his ruling in *Acres*. The evidence must be viewed, he said at (p 226), in its entirety; the Court must then decide whether the inference of bribery is the only reasonable one which can be drawn from 'the complete picture painted by all the established facts'.

He attached importance to the ruling in *R v de Villiers*<sup>113</sup>:

In a case depending upon circumstantial evidence....the Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter another way, the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with innocence.

He cited Lord Coleridge in *R v J A Dickman*<sup>114</sup>, who described the cumulative effect of circumstantial evidence in a way which was positively poetic:

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<sup>112</sup> op cit

<sup>113</sup> 1944 AD 493

<sup>114</sup> 1910 CAR 3200

It is perfectly true.....that this is a case of circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength and proportion to the character and variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. The network may be a mere gossamer thread, as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through. It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances, all pointing in the same direction, convincing in proportion to the number and variety of those circumstances and their independence one of another, although each separate piece of evidence, standing by itself, may admit of an innocent interpretation, yet the cumulative effect of such evidence may be....overwhelming proof of guilt. Ask yourselves then, what is the cumulative effect then upon your minds of so many, so varied, so independent pieces of evidence, all pointing, it is said, in one direction, all tending, it is said, to inculcate the prisoner and the prisoner alone in the commission of this crime?

### 8.10.3 The Representation Agreement

The inferences the Crown had sought to persuade the Court to draw were that Acres knew that the money it paid to Bam was being used to pay Sole, and that the representation agreement Acres made with Bam amounted to an attempt to camouflage the fact. His Lordship concurred, regarding the RA as analogous to an alibi set up by a criminal who anticipates the chance of detection. The performances of defence witnesses, as he added it all together, appeared to be characterised by vagueness, evasion and mendacity over the spectrum of their evidence. The representation agreement itself between Acres and ACPM appeared to lack the sort of specificity which might have given it credibility: the chronology leading to the signing of Contract 65 pointed, according to his Lordship, to the redundancy of the representation agreement in any event, but this was exacerbated by the incompatible or deceitful roles played by Bam, Lescon, ACPM and the collection of secret bank accounts in Switzerland. At p242, His Lordship commented thus:

I may add only for purposes of emphasis that where an accused gives false evidence, the Court is at large to infer that there is something he wishes to hide, adding then an element of suspicion to the facts which may otherwise have been neutral.

Citing *R v Bardhu*<sup>115</sup>, Lehigh J dealt with the incredibility of Acres' defence:

The accused has given an explanation which has been rejected – one which cannot even possibly be true....the court should not....find on his behalf some explanation which, if given, might perhaps have been true, but which he himself has not given.....' [per Lehigh J] 'I agree entirely with this statement.]

The nub of His Lordships view is contained towards the end of his judgment, where he sets out a pragmatic perspective of the matter as he saw it:

'The court is of a firm view that if Z.M. Bam could keep all the money he received from Acres for himself, he surely would have done so. There is no suggestion based on any evidence that Z.M.Bam would have paid Sole out of generosity or some other obligation, contractual or otherwise. Acres certainly haven't offered any sensible explanation for the payments made by them to Z.M.Bam. I need once more emphasise that no onus lies on Acres at all to prove its innocence...

Lehigh J was unequivocal in his findings. He took the view that the representation agreement was a sham, given the lie by the evidence before the court; that Acres knew that Sole was being paid by Bam with money from Acres, that Acres benefited from bribing Sole, to the detriment of other competitors. He found that Contract 65 had been unfairly awarded to Acres, and found the company guilty of the offences with which it had been charged.

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115 1945 AD 813



The company's public response to this verdict was public and unequivocal. In summary, it did not accept that it had received a fair trial: in its view, His Lordship had failed to grasp the complexity of the issues before him, and it indicated that it had no doubt that the verdict would be overturned when the matter came before a more experienced bench of South African judges in the Lesotho Court of Appeal<sup>116</sup>.

#### **8.11 Sentence.**

His Lordship fined Acres \$3.8 million (Canadian), which was in his calculation the sum which the company had made from Contract 65. His Lordship took the view that the scale of the bribery was in line with the scale of the project, and that the scale of the sentence should reflect the scale of that bribery, particularly since it was foreign sponsored corruption which was the most significant factor. His Lordship commented on the 'unique contemptuousness of their irresponsible remarks' following the verdict in the trial, which he said were 'superbly out of step'. He was convinced that the bribery had taken place over a long period, secretly and carefully planned. It was a course of conduct which had been deliberate, and for which the company had shown no remorse. His view was that it regretted that it had been caught. At the hearing at which this sentence was imposed, Acres did not appear, and in mitigation did not supply any evidence to substantiate the claim they put forward that severe hardship would be felt by the employees who would be laid off by the imposition of such a fine. In a subsequent appeal, the Court ruled that the fine would be suspended pending the hearing of the appeal against the verdict and the sentence.

#### **8.12 Acres Appeal**

Acres' appeal was heard in the Appeal Court in Maseru, on 6 August 2003, before three Judges of Appeal: Steyn P, ad Ramodibedi and Plewman JJA. Their Lordships noted in the preamble to their judgment, delivered on 15 August 2003, that there had been little dispute over the material facts of the case. Acres had conceded, through their Counsel, that the payments that had been made by Bam to Sole had been funded by payments made by Acres to Bam. Such payments had been made unlawfully. It was not in dispute that the evidence adduced by the Crown concerning the pattern of payments placed an obligation upon Acres to explain their payments to Bam. Without an acceptable explanation, then an inference could be drawn that Acres was guilty of bribery.

The history of Acres involvement in the project, and the company's relationship with Bam was examined by their Lordships, from its early involvement in Lesotho as a consultant on the Lesotho Airport contract, through Contract 19, and its close involvement with LHDA, its relationship with Lescon, (Bam's company), to the sole sourcing basis upon which it was awarded Contract 65. Their Lordships examined the Representation Agreement, (RA) the exact manner in which Acres concluded Contract 65, and the timing of the payments which were made by Acres into the Swiss bank account of Mr Bam, from the initial payments until the moment when payments ceased. They reviewed the oral evidence which had been given during the trial by individual witnesses.

#### **The Crown's case**

The Crown argued, as it had in the lower court, that from the body of circumstantial evidence provided to the court, the only reasonable inference which could be drawn was that Acres knew that it was paying Bam to bribe Sole. It contended that the RA was a device used to conceal the true nature of the payments made, ultimately to Sole. It maintained that the pattern of payments into Bam's Swiss bank accounts substantiated the proposition that these were bribe monies. The payments were not justified by the work alleged to have been done by Bam, under the terms of the RA, neither were any invoices produced by Acres to indicate the exact nature of the services rendered for such payments. In addition, the payments had been shrouded in secrecy, with witnesses from the LHDA testifying that they did not observe Bam to have been involved in any of the activities which were described in the agreement. The Crown reiterated its invitation to the

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<sup>116</sup> Pat Adams press release collection

Court to draw further inferences from the fact that the payments had been made into an overseas bank account. Their Lordships' attention was drawn to the influential position which Sole occupied 'at all material times until after his dismissal in October 1995', and the favour in which he held Acres, notwithstanding his non-compliance with the JPTC procedures which should have governed the awarding of all contracts.

### **Reasoning by inference**

Their Lordships were clear that the appeal rested upon a single issue:

It is clear that the single issue which this Court is called upon to decide is whether the appellant has discharged the evidential burden it accepted.

They outlined the correct approach to adopt, when obliged by the nature of the evidence to reason by inference. They observed that the problem was not unusual, and that the rules to be applied were 'in no sense new'. Their Lordships went on to review the law, set out in *R v Blom* 1939 AD 188.

In summary, the court must look at the whole picture, as reflected in the second rule in *Blom*:

When reasoning by inference, a conclusion on the basis that the inference sought to be drawn is consistent with all the proved facts, can only be drawn if the proved facts are such that they exclude every reasonable inference save the one sought to be drawn.

The nature of inferential reasoning had been at the heart of Acres' trial, and their Lordships saw it as being at the heart of their appeal. .

In an essay entitled 'Fiat Justitia' (Essays in Memory of Oliver Deneys Schreiner), H C Nicholas, (referred to by their Lordships as the learned judge), discussed the rules relating to inferential reasoning and their relationship to the onus which rests with the prosecution in a criminal case. An excerpt from this essay appears in the judgment, and is reproduced below, since it sets out the refinements of the rule in *Blom*.

The second rule of logic in *Blom* is a salutary rule, whose field or application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact must convict the accused. It does not licence speculation as to facts not proved by the evidence, nor does it mean that the State is obliged to close every avenue of escape which might otherwise be open to an accused. In investigating other reasonable inferences, the field of inquiry may be limited by the fact that the accused has given an explanation, or by the fact that he has failed to give an explanation where one was called for in the circumstances.

Accordingly, their Lordships would not take each circumstance separately, giving Acres the benefit of reasonable doubt for each one. The court's duty was 'to weigh the cumulative effect of all the proven facts taken together' and thereafter consider its conclusions on the basis of the inference it has drawn. Their Lordships referred to the judgement of Marais A.J.A., in *Moshephi and Others v R* (1980-1984) L.A.C. 57, where he said,

There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.

The court must consider other possible inferences that may be drawn from proved facts. If any of them is reasonable, then the inference of guilt cannot be drawn. This does not mean, however, that the court may speculate on the possible existence of other facts that might justify the same

conclusion. However, an explanation proffered by an accused will not give rise to an inference of guilt if it is reasonable.

Their Lordships, having observed that certain evidence had been admitted in the lower court which was inadmissible, took the view that the correct approach was 'to consider the importance and effect of such evidence and weigh it in the overall balance.' The evidence which they regarded as being inadmissible was that which related to payments made by other contractors which found their way to Sole. In addition, their Lordships ruled that the court of first instance had misdirected itself, on the Crown's submissions on a possible contravention of the currency regulations by Bam, aided and abetted by Acres, however, such misdirections were viewed as inconsequential.

### **The RA**

Their Lordships considered the RA, to determine whether it was a genuine contract, or a sham, to be used as a conduit for bribery. They reviewed the evidence before the lower court: the circumstances leading up to the signing of Contract 65; sole-sourcing; the document itself; the nature of the services to be performed, under the RA; arrangements for payment under the RA, and the manner in which changes were made, after Sole's employment was terminated.

They observed that ACPM was an entity which was never formally constituted, and unknown to anyone other than Bam and Acres. Using the name 'ACPM' had the effect of disguising the identity of the recipient of the funds paid by Acres, although Acres were aware who they were paying. The inference drawn from this by Lehohla J was, in their view, correct.

They also observed that the only changes to the RA were to the arrangements for payment, notwithstanding 'material developments' in the relationship between Acres and LHDA. Arrangements for payment served to 'buttress' the inference which was drawn: payments to a non-existent agency, called ACPM, in a nominated Swiss bank account number; the transaction itself was recorded in 'obscure or opaque terminology', evidenced in letters between Hare and Bam, which led their Lordships to agree with Lehohla J that the evidence given by Hare was mendacious.

The services to be performed under the terms of the RA were examined by their Lordships, as was the evidence which was given by witnesses from LHDA of the need for such services. Acres maintained, through the evidence of Hare, and in its representations during the World Bank investigation that the agreement required Bam to provide political intelligence. This requirement was not reflected in the terms of the Schedule to the agreement, where the services had been set out. The evidence of Hare and Brown was re-read by their Lordships, who found that the lower court had correctly rejected it.

Acres contended that the RA was in the tradition of standard international practice, which was accepted by their Lordships. However, what was not accepted was that the cost of using Bam was built into the contract price. Their Lordships could see no justification for such a cost, in the light of the services provided by Bam, which were conceded to have been flimsy, and which their Lordships viewed judged to be of no significance. 'Bam could have played no role in securing the contract, and in fact played no such role'. They found the evidence in the lower court that Bam had been employed in Botswana at the time when Acres was engaged on the contract was reliable. Moreover, since Acres had been 'extensively and lengthily' involved in Lesotho during the eighties, then there was no need for a representative. Their Lordships concluded that Bam had not in fact rendered the services which were set out in the RA. The payments he received were in any event disproportionately high, either for the services he did render under the contract or otherwise.

### **The payments**

Their Lordships went on to analyse the patterns and amounts of payments made by Acres to

Bam, the inferences which the Court had been invited to draw therefrom, and Acres attempts to explain such payments. Agreeing with Lehigh J, they took the view that the evidence of the Swiss Bank records and the forensic report of Jean Roux would, 'in the absence of an acceptable explanation, constitute damning support for the Crown's contention'. In particular, they looked at the evidence of Gibbs, which was to address the point that the money paid to Bam was reduced in January 1997. Their Lordships were unconvinced that this reduction was under the terms of the RA, which they thought unjustified. In particular, they noted the extraordinary co-incidence of the timing, since it coincided exactly with Sole's final departure from the LHDA, and with that, the conclusion of the services he had been able to render to Acres.

In reviewing the other evidence adduced by the Crown to support their contention that Acres had made payments to Bam knowing that a proportion of those payments were destined for Sole, their Lordships did not single such submissions out for individual debate. They concluded that, having reviewed the evidence, they had followed the Court's ruling in *Moshepi and Others v Rex*, in 'looking at the mosaic as a whole', and in doing so, had concluded that Acres had not provided a satisfactory explanation for the body of evidence pointing to the conclusion that they had bribed Sole. Acres appeal in respect of Count 1 therefore failed.

#### *Count 2.*

This count related to money which was paid into Mrs Bam's account, no part of which was ever paid to Sole. The Crown had invited the court to infer, in the absence of an explanation for the payment, that the same intention should be ascribed to this payment as to those charged under Count 1. Their Lordships, having used the same reasoning, and examined all the circumstances surrounding this one off payment, took the view that there was a reasonable doubt that Acres intended to bribe Sole with this money, and accordingly allowed the appeal to succeed.

#### *Sentence.*

Counsel for Acres submitted that the lower court had failed to take into account the consequences of a bribery conviction for the company. He also submitted that Lehigh J had 'overemphasised what it perceived to be aggravating circumstances and the need for deterrence'.

Their Lordships began consideration of the sentence by reviewing the correct approach to be taken in sentencing a corporation. Whilst it was correct that an offending company should be obliged to part with its illegally gained profits, the court should not ignore other relevant considerations, and simply settle on a sentence which equated to the financial benefits which had been reaped by the corporation. There was also a requirement for consistency between offenders which had been convicted of the same crime. In this case however, trying to find a monetary equivalent to the sentence of 12 years imprisonment imposed upon Sole was 'well-nigh impossible', so a fresh approach would be taken. First, the sentence would only reflect punishment for Count 1, since the appeal on Count 2 had succeeded. Second, the lower court had, in the opinion of their Lordships, had over-emphasized the aggravating features of the crime, when considering sentence, and minimized the mitigating features which were on the record. These latter were:

...the [effect that the] extra-curial impact the conviction will have, not only on the corporation itself, but also on its employees who number some 1000 persons. The reputation of the appellant will be sullied by the conviction and it will live in the shadow of the taint of the corruption. As an international corporation it is to a considerable extent dependent on project activities undertaken and funded by development agencies both international such as the World Bank and by national governments. Its capacity to be gainfully involved in such work will for some time be seriously and negatively impacted. Such profits as it may have made on Contract 65, will, we are certain, be dissipated by not only the very large fine we intend to impose, but also by all the costs it incurred in the various protracted proceedings not only in these courts, but also before the World Bank. Its travails are also by no means over. An embargo by the World Bank and other institutions such as eg donor agencies is no remote possibility.

Their Lordships nevertheless viewed the offence as one of extreme gravity. They alluded to the evidence of Camerer, on the effects of corruption on society as a whole, and reviewed the recent judgments for the same offence. They quoted Cullinan AJ, in *R v Sole*:

Corruption is inimical to sound public administration, itself essential to the strength of constitutional democracy; it also threatens investor confidence, development projects and employment including in Lesotho...We endorse these sentiments. Lesotho is a small land-locked country. It has limited resources. Its economic development was seriously damaged because of the policies and actions of its large and powerful neighbour and the sanctions imposed on that country. The LHWP was a visionary initiative to put the country back on the road to recovery. It's cynical exploitation by the appellant – motivated as it was by greed, – is the more reprehensible.

Their Lordships commented on the need to exclude anger from the sentencing procedure, and took particular note of the courage, determination and competence shown by the Lesotho authorities in bringing such prosecutions:

They set an example of good governance and have delivered a blow on behalf of all countries who face major challenges in strengthening their infrastructure through project activity. This Court particularly commends the Director of Public Prosecutions and his team for their dedicated and resolute efforts.

Acres was fined M15 million. At the time of writing, Acres is paying the fine by instalments, pleading an inability to pay it outright in full. In July 2004 it was debarred from all World Bank-funded projects for a period of three years.

Both Acres and other companies involved in the proceedings have undergone corporate reconstructions. Whether these have been designed to try to escape the impact of debarment – and whether they will have that effect – are yet to be seen.

## **Conclusion**

Acres' appeal marked the end of a long and expensive matter. Their Lordships were unequivocal in their assessment of the trial in the lower court. In commenting on the colourful judgment of Lehohla J, they remarked that 'the simple fact is that the record shows that the appellant was given a fair trial and that there is not the slightest indication or suggestion to the contrary'. Whilst the second count was successfully appealed, and the sentence marginally reduced, the central issues upon which the court of first instance had been asked to rule were left largely undisturbed.

## **9. MUTUAL LEGAL ASSISTANCE - THE ROLE OF OECD**

### **9.1 The OECD Convention and "past offences"**

A number of the parties involved in payments which were made directly or indirectly to Sole were companies registered in states which are parties to the OECD. They are listed below, together with the Contracts to which they were parties. Legislation passed pursuant to the OECD Anti-Bribery Convention post-dates the offences. Nevertheless, the purpose of that Convention arguably includes cooperation from governments of states who are parties to it.

#### **Contractors**

Dumez International – registered in France.

Spie Batignolles – registered in France.

Contract 104

Contract 111

Contract 109B

Contract 118/5-6

Highlands Water Venture (HWV), a joint venture,  
including

Impregilo – registered in Italy

	Keir International – registered in the UK	Contract 123
	Lesotho Highlands Project Contractors( (LHPC)	
	a joint venture, including	
	Spie Batignolles	
	Ed Zublin AG .	Contracts 124, 125
5.	Muella Hydro Power Contractors (MHPC)	
	a joint venture, including inter alia	
	Spie Batignolles	
	Ed Zublin AG	Contract 129B
6.	Asia Brown Boveri Generation AG Sweden	Contract 134
	registered in Sweden	
	Asea Brown Boveri Schaltanlagen, GmbH	Contract 135
	Registered in Germany	
Consultants		
1.	Gibbs-Sogreah Joint Venture (GSJV) comprising	
	Sir Alexander Gibb and partners, registered in UK	
	Sogreah, registered in France	Contract 12
2.	Lesotho Highlands Consultants (LHC) comprising	
	Sir Alexander Gibb and partners	
	Sogreah	
	Coyne et Bellier – registered in France	Contract 15
3.	Sir Alexander Gibb and partners comprising	
	BB Joint Venture and LHDA	Contracts 108, 26, 28
4.	Sir Alexander Gibb	Contracts 103, 41, 41A, 58, 59
5.	Lesotho Highlands Consultants (LHC) comprising	
	Sogreah, Coyne et Bellier, and Sir Alexander Gibb	Contract 45
6.	Sogreah	Contract 29
7.	Lesotho Highlands Tunnel Partnership (LHTP) comprising	
	Lahmeyer International GmbH inter alia –	
	registered in Germany	Contract 46
8.	Lahmeyer MacDonald Consortium comprising	
	Lahmeyer International GmbH inter alia	Contract 51
	(Mott MacDonald registered in the UK)	
9.	Acres International Ltd	
	registered in Canada	Contracts 19, 65
11.	CGEE Alstom and General Electric merged to form	
	Cegelec.	CHECK Contract 117

The OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions came into force in 1999. Signatories to the Convention must already be members of the Working Group, they must have accepted the Revised Recommendation of 1997 of the

Council on Combating Bribery, together with the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials<sup>117</sup>.

The overall purpose of the Convention is to prevent bribery in international business, to which end it requires those countries which have signed and ratified it to establish the criminal offence of bribing a foreign public official, as well as the means by which detection of the offence might be achieved. The offence of bribery for member countries

Must apply to all persons.

Must apply to the offering, promising or giving of a bribe, regardless of the use of intermediaries or if the advance is for a foreign public official or a third party

Must apply regardless of the form the bribe takes: the offering of *any* advantage may be caught by the offence

Must prohibit bribery for obtaining or retaining 'business or other improper advantage in the conduct of international business'.

The definition of 'foreign public official' includes any person holding a legislative, administrative or judicial office, any person exercising a public function or any official or agent of a public international organisation.

Parties have requirements to satisfy under the Convention:

Effective, proportionate and dissuasive criminal penalties must be imposed for the offence of foreign bribery – although where the legal system does not admit criminal corporate liability, non criminal penalties must be applied.

Jurisdiction: this must be established where an offence is committed in whole or in part in its territory. Where a party already has jurisdiction to prosecute nationals abroad, the offence of foreign bribery must be established according to the same principles.

Money laundering: where an offence has been established in relation to domestic bribery, the same offence must be established in relation to foreign bribery.

Certain accounting and audit practices liable to conceal foreign bribery are to be prohibited.

Mutual legal assistance must be shown between Parties.

Bribery of a foreign public official will be an extraditable offence, under the laws of the Parties and the extradition treaties existing between them. .

Detailed and substantial measures have been taken to monitor the implementation of parties obligations under the Convention, using a two-part peer reviewed process of questionnaires and evaluation.

The OECD has done much to build an anti-corruption framework, exemplified in its OECD Principles of Corporate Governance. There are revised Guidelines which contain recommended measures to prevent the furnishing and solicitation of bribes. There are initiatives which address the demand side of bribery, such as the 1998 OECD Council Recommendation on Improving Ethical Conduct in Public Service. Other initiatives address the need for co-operation with Non OECD economies.

## **9.2 Points for consideration by members of the OECD.**

In summary, the OECD initiatives have heralded a new approach towards the excision of corruption from the economic community. Whilst some consider progress to be slow, there is nevertheless evidence of a seismic shift away from the notion that corruption is a norm of business. However encouraging this groundshift towards the eradication of corruption appears, certain questions remain at large.

Where will a government's competing duties lie, when an allegation of corruption emerges from the dealings of a company which has received export credit insurance for the

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<sup>117</sup> For full text, see [www.oecd.org](http://www.oecd.org).

contract in question? In a company which is in constant dialogue with its government over a wide range of issues, how can the decision not to prosecute be *seen* to be an impartial one?

What domestic political pressures might be applied to a government considering such a prosecution? For example, in the case of Acres, during the mitigation which preceded the sentence it received, (which remains suspended until the appeal has been heard), the company suggested, although it did not produce evidence in support, that jobs in its workforce would be threatened by the imposition of a heavy fine. This made no appreciable impression upon Judge Lehohla, who drew comparisons between the consequences of unemployment for Canadians and for Basutos. Had such a prosecution taken place in Canada, what might have been the effect of such mitigation?

Whether a prosecution of Acres would ever have taken place in Canada is an interesting question. How would such an investigation have been conducted? The verdict of the trial in the High Court in Maseru, largely upheld by the Court of Appeal, lies uneasily next to the Code of Conduct used by Acres to govern its dealings, from which the company has repeatedly made the point that it has a completely clean record in this area, and a clear company policy forbidding bribery.

The jurisdictional issue: practically, as the OECD Convention is gradually implemented, who will now decide in which jurisdiction an alleged offence should be tried? For example, consider the position of the Lesotho government where the Canadian government had looked at prosecuting Acres, but then decided not to do so? Would the Lesotho authorities have gone on to make a decision to prosecute, themselves? What criticisms might have been levelled at them for doing so, where the Canadians had decided not to?

It is a wide spread view amongst those who study corruption that transparency is the most powerful weapon to use in its defeat. In any decision to prosecute or not, the reasoning behind that decision (particularly where the decision is *not* to proceed,) will have to open itself to some degree of scrutiny if it is to be an effective part of the transparent process.

Comparisons between judiciatures are inevitable. In Cullinan AJ's judgment, he sets out the markers of corruption. His ruling was that the offence is committed at the point when an agreement between briber and bribee is reached. It is very unlikely, given the nature of such an agreement, that there will be any direct evidence of its existence; the only evidence is likely to be circumstantial. How will evidence of this sort, gathered in one country or countries be sure of compliance with the evidential rules of a third jurisdiction?

What steps, if any, are now being taken by any OECD country to investigate the Lesotho activities in Lesotho of companies registered within their jurisdiction, in accordance with their obligations under the spirit of the Anti-Bribery Convention, to cooperate with other states in the eradication of bribery and corruption? To mount a full criminal investigation of each company's activities with cooperating teams of lawyers specialising in this kind of work, in the light of Judge Cullinan's rulings, would be prohibitively expensive for the Lesotho government. This would be a perfect opportunity for concerned member countries to come in behind the Lesotho prosecuting team with support. The opportunity has not been taken thus far. During research for this article, on more than one occasion this question has arisen: If OECD countries are so uninterested in supporting a series of prosecutions of companies registered within their jurisdiction, what inferences should be drawn from that apparent reluctance?



Some major obstacles have been placed in the way of prosecution by companies changing their identities, or being sold, and so forth.<sup>118</sup>, with the consequence that they are not, or are no longer the named defender. For example, Spie Batignolles unsuccessfully ran this argument as a preliminary issue before its trial resumes later in 2004. Other companies have evaded or avoided prosecution by similar moves. The complexity and ensuing expense which would be incurred by the Lesotho Government as it traced the assets of the company originally charged would be prohibitive. Lesotho is an impoverished country: half of its two million population live below the poverty line, and according to WB statistics, GNP per capita is \$540. Such added expenses would impact further upon the domestic economy.

## **10 LESSONS FROM THE LESOTHO TRIALS TO BE LEARNT BY OTHER DEVELOPING COUNTRIES CONSIDERING PROSECUTION OF A COMPANY FOR BRIBERY.**

### **10.1 Funding.**

The promise of financial assistance enabled the Lesotho government to decide to commence a series of extremely complex and expensive prosecutions. The subsequent absence of funds has impeded the rate at which such prosecutions have been able to be brought. The prosecuting authorities would have benefited immeasurably from the opportunity to conduct swift investigations, (with the meaningful cooperation of other state authorities), into some of the European registered companies who have been squarely implicated in the matter by their indirect payments to Sole. Neither the means nor the cooperation has been forthcoming from any OECD member countries.

A country to whom financial assistance has been offered will need to establish ways in which such a promise can be kept.

### **10.2 Outside assistance.**

Bribery is notoriously difficult to detect and prosecute. For the due process of a trial to be perceived as beyond suspicion, it is recommended that expertise independent of the prosecuting authority is engaged in circumstances where there may be scarce local experience of the legal complexities of such trials. In developing countries, lawyers possessing such expertise are as yet liable to be in short supply. The corollary of that will be the avoidance of any suggestion of corruption within the due process of the trial. Where bribery on an international scale is alleged to occur, then it is likely that the prosecuting authority itself may have been vulnerable to bribery.

### **10.3 Mutual legal assistance.**

Where bribery appears to have reached international proportions, meaningful and prompt mutual legal assistance is essential. Such assistance in these trials has come from the Swiss authorities, but no other European country has distinguished itself thus, during the investigations to date. The Lesotho prosecutors were very substantially assisted by the cooperation and abilities of Mme Cova, the examining Swiss magistrate responsible for revealing Sole's Swiss bank accounts. Without this sort of prompt assistance, there is a real danger that the will to prosecute will be inevitably eroded by the political will of a government, for example where it is facing an election.

In Lesotho, through the list system of proportional representation, Sole (notwithstanding his imprisonment for corruption) was elected to Parliament as a member of the Opposition Basutho National Party. It was that party's express intention, had they won the election in June 2002, to drop the investigations. One can speculate upon the associations which led to such an interesting state of affairs, but this feature of the cases simply

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<sup>118</sup> Research on these issues will be included in the up date on this paper being prepared for TIRI (the governance access-learning network) in the autumn of 2004 . See [www.tiri.org](http://www.tiri.org).

underlines the necessity for prompt cooperation between governments over this type of prosecution.

#### **1.5 10.4 Political concerns**

The Lesotho government has found the weight of these trials 'onerous and burdensome'. Lesotho is a small country, with few natural resources, not much manufacturing industry and a currently shrinking economic base. The main cash flows in the past have been from remittances sent by miners working in South Africa. This source is dwindling, owing to conditions in the mining industry and the depreciated value of the rand. The financing of a prosecution of this sort has been an extremely expensive business at the best of times, since it required the briefing of Senior and Junior Counsel from Durban, and the engagement of forensic consultants.

Concerning the appointment of Judge Cullinan, the Lesotho government representative to whom I spoke, explained the decision to appoint an expatriate judge, a former Chief Justice of Lesotho, giving two reasons:

(i). These are very high profile cases. The accused companies are very well known names in the construction industry, and vulnerable to the reputational damage which would accrue from any conviction. It was anticipated that the accused companies would take all the technical points they possible could, to obstruct the prosecution. This has turned out to be a prophetic view. An experienced judge was required who would be able to command credibility by reason of his long experience, and who could provide comprehensive rulings within a reasonable time, so as not to delay matters unduly. Cullinan AJ was finally required to rule on at least ten preliminary applications. Each ruling was comprehensive and meticulous, and it could not be said that there had not been a fair trial of all of the issues.

(ii). There could be no suggestion that the trials were unfair or corrupt, if they were conducted by a prestigious judge brought in from outside Lesotho.

#### **10.5 Funding.**

##### **10.5.1 World Bank**

Concerning funding, the Bank was one of a number of institutions which made a commitment to provide financial support to the Lesotho Government for the trials. Subsequently they resiled from that decision. Although they remained concerned to assist, and indeed have done so substantially with the provision of documentation and so forth, no funding was finally forthcoming. They had not been obliged to make such a commitment, and they were not obliged to give reasons for their change of heart. The consequence of the absence of any funding from any outside source for these trials has been the diversion of Lesotho resources from other, more deserving sources.

The World Bank has responded to my questions on the subject thus:

The Bank is a development bank: its mandate does not contain a budget for funding litigation. The Bank has explored a number of options for financial assistance for the Lesotho authorities, but all involved the Government borrowing money, which it was unwilling to do.

Had it made a direct financial contribution to the prosecution of these trials, then this would have set a precedent which might prove troublesome for the Bank in the future: for example, where a country proposed litigation which was doubtful of success, or where the legal system lacked integrity and could not ensure a fair trial of the issues.

##### **10.5.2 European Investment Bank (EIB)**

When EIB was appraised of the corruption which had gone on, EIB decided to conduct its own audit. It was provided with access to all documentation, and in a written answer to a question put by an MEP, indicated that since the money it had lent was not used in any of the projects which were currently the subject of scrutiny, then it would not proceed further with the matter.

In a written answer to Dr Caroline Lucas, MEP, dated November 28<sup>th</sup> 2002, D de Crayencour wrote thus:

In addition to its regular monitoring, in 2000 the EIB commissioned an audit on its own initiative in order to determine possible implications of irregular practices on the project components it had funded under Phase 1A.....This audit was closely coordinated with the European Commission and with OLAF, the specialised EU antifraud institution, and concluded that:

There was no direct or specific misuse of EIB funds;

Indirect misuse of EIB funds could not be proven; for each of the contracts financed by EIB real services and goods had been delivered to the project.

The audit was made available to OLAF and the Lesotho prosecutors.

A slightly different answer was given to the questions posed by MEP Di Pietro to Commissioner Nielson. The questions were as follows:

1. Does the Commission intend to honour the promise of financial support for the government of Lesotho to enable the corruption case to be carried to its conclusion in the High Court?
  2. Does the Commission intend to check whether the EDF and the EIB showed due diligence in relation to the grants and loans granted in connection with the Lesotho Highlands Water Project?
- Does the Commission intend to make every effort to ensure that companies found guilty of corruption are excluded from any future projects financed by development assistance and Member States export credit agencies or with funds from EU institutions?

Commissioner Nielson responded thus:

'P-3211/02EN  
Answer given by Mr Nielson  
on behalf of the Commission  
(7 January 2003)

The case, to which the Honourable Member refers, concerns a large construction project in Lesotho which was co-financed by the European Development Fund (EDF) together with several other international donors.

The question regarding the possible reactions of the export credit agencies of the Member States and regarding eventual sanctions taken by the European Investment Bank is outside the scope of the Commission's competencies.

Since the questions refer to ongoing criminal court cases, the issue should be considered carefully with due regard for the right of defence of the companies and persons involved and the presumption of innocence.

The Honourable Member refers to a promise which the Commission should have made to finance the costs of the Lesotho court case. For this, the Honourable Member bases himself on an article published in a South African newspaper.

The Commission cannot confirm that any such promise was ever made.

In addition, the present case is pending before a criminal court handled by the Public prosecutor. It would seem to be falling outside the EDF's mandate to finance a particular criminal law suit against particular individual companies.

With regard to the specific company to which the Honourable Member refers, the Commission should further point out that the contracts awarded to this company were not financed by the EDF, but by other donors.

In the first part of 2000, the Commission engaged independent auditors to examine whether EDF funds had been misused. They were asked to analyse whether the awarding of the contracts, riders, variation, orders, etc had been executed properly, or might have been biased to favour certain contractors.

The general conclusion from this audit was that it was not possible to demonstrate that there had been a direct misuse of EDF funds. ***The audit revealed that even if there had been any misuse, for the EDF such a misuse was not likely to be large; since the EDF funding was topped at a fixed amount, the principal victim of any misuse seemed to be the Government of Lesotho, who had to finance any expenditure not covered by the donors. ....'***[emphasis added]

The Commissioner went on to state that the EU procurement rules in respect of companies convicted of corrupt practices prevent such companies from invitations to tender or from future contracts.

## **10.6 The expenses of the trials**

### **10.6.1 Sole**

It was a matter of great importance to the Lesotho authorities that Sole be given, and be seen to be given, a fair trial. By the conclusion of the civil proceedings, Sole had no money left. Judgement against him had been given in the sum of M8.9 million, and his house and property were sequestered. As he faced his criminal prosecution, he made a successful application for Legal Aid, which meant that the Lesotho government now paid for both his prosecution and his defence.

### **10.6.2 Acres**

In principle, costs are not recoverable from the Defendant in a criminal trial in a common law jurisdiction. Whilst some of the expenditure on the trials could be recouped by the imposition of fines upon the company, this was uncertain. Acres has yet to pay the balance of its fine, and if it were refuse to pay the balance, (M13 million), the Lesotho Government could yet have to institute enforcement proceedings against the Company. Such proceedings would almost inevitably be in Canada, involving the Government in yet further expensive litigation.

## **10.7 Mutual legal assistance.**

The prosecuting authorities in Lesotho have been at pains to emphasise that they were given the most comprehensive and timely support by the Swiss authorities. Such support has not been forthcoming in their dealings with other authorities concerning companies registered in their jurisdictions.

The Government of Lesotho is heavily committed to eradication of corruption of this sort, being aware of the sort of benefits which Sole was capable of bestowing from his position of influence. Such benefits included the tangible and intangible benefits of his position, together with his capacity for patronage and a quiet word in the appropriate ear. It was also a matter of grave concern to the Government that someone facing such corruption charges should have been included in the list of candidates for election by the Basutho National Party. How Sole was able to get into such a position as he faced criminal prosecution is a matter of conjecture. Such political manoeuvring only increased the pressure under which the Government has already found itself.

## **11 THE WAY FORWARD**

Legislative steps have been taken in OECD countries which are designed to facilitate the prosecution of bribery in those countries. However, at a practical level, in less well-off countries, the investigative procedures leading up to the issue of a summons will often be a major expense to be borne by the government. There is a strong argument for the international community, either under the auspices of the World Bank or the UN, to

provide an international team of forensic analysts/auditors, who would be available to assist in the investigative process in appropriate cases.

Also at a practical level, there is a strong argument for the international financial community to provide a recipient country, at its request, with the free use of an *independent* financial advice team, to examine the probity of companies looking to do business there. Where the institutional capacity of a country has not yet been fully developed, this sort of assistance may be welcome. Such a team might assist over a wide range of aspects of a major project, including assessments of corporate probity, tendering, insurance and project finance, accounting, time-line analyses and the law. Legal aspects of such assistance might also include drafting provisions within a contract for penalties for bribing. In this context it should be noted that although the World Bank publishes the corporations it has debarred from bidding for World-Bank-financed projects, other IFIs and development agencies do not do so.

London  
July 2004

## **ANNEX**

### **Trial Countdown:**

May 2002 – Masupha Ephraim Sole, former chief executive officer of the Lesotho Highlands Development Authority found guilty of 11 counts of bribery and two counts of fraud.

June 4, 2002 – Mr. Sole sentenced to 18 years in jail.

June 2002 – The trial of Acres International, the first of 12 Western contractors accused of paying Mr. Sole off, hears final arguments. Judge Mahapaela Lehohla retires to consider his decision.

August 2002 – Trial against Lahmeyer International GmbH (Germany) begins.

September 13, 2002 – Decision expected on Acres International trial.

September 17, 2002 - Lesotho High Court finds Acres International guilty on two counts of bribing a local official.

October 28, 2002 - Acres sentenced, fined R22.5m (US\$2.25m, £1.43m) in the Lesotho High Court

### **Judgment R v Acres(at first instance)**

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=157>

### **Judgment: R v Acres (Court of Appeal)**

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=5437>

*[Note: Attached to this Press Release are two documents: a statement by South African Minister of Water Affairs and Forestry, Ronnie Kasrils (dated: 21 May 2002), and a letter from Mr. Sigvaldason, Acres' Chairman, responding to the Minister's statement (dated: 27 August 2002).]*

### **Judgment: R v Sole (at first instance)**

<http://www.odiousdebts.org/odiousdebts/publications/CullinanJSoleJudgement.pdf>

### **Press report: Acres reaction to conviction of Sole**

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=4669>

### **Remarks on sentencing Sole at first instance**

<http://www.odiousdebts.org/odiousdebts/publications/SoleSentence.pdf>

### **Judgment: R v Sole (Court of Appeal)**

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=titles&SubID=795>

### **Appeal Judgment - Crown v. Lahmeyer International GmbH**

The full judgment pertaining to the Lesotho Court of Appeals decision to uphold the conviction of Lahmeyer International on several counts of bribery connected to the Lesotho Highlands Water Project.

April 10/2004

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=titles&SubID=795>