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**Master Programme of International Human  
Rights Law**

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International Law against  
Corruption – An Icelandic  
Perspective

Master thesis  
20 points

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Spring 2005

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# Summary

Corruption, in one form or the other, is a worldwide problem and harmful to public interests. In this thesis an effort is made to define corruption, its main causes are discussed and its many harmful consequences for economic development and governance. In this connection the main emphasis is on the links between corruption and internationally recognised human rights standards, i.e. how corruption can lead to violations of human rights and undermine the protection they are supposed to provide and how human rights can be a powerful tool to prevent and contain corruption.

In the last decade or so corruption and its extensive harmful effects have gradually been recognized by the international community and organisations. The international community has as well increasingly realised the need for cooperation in the fight against this phenomenon. In the last ten to fifteen years many international declarations, recommendations and conventions have been agreed on to prevent and combat corruption. The thesis gives an overview of the development and some of the most important efforts and initiatives made in this field. The main emphasis is, however, on the international anti-corruption conventions which have been adopted and are legally binding for the states parties.

In the latter part of the thesis the focus is on Iceland and the corruption which is arguably an issue in the Icelandic society. International anti-corruption conventions which have been adopted by international organisations of which Iceland is a member are viewed, particularly provisions which are of relevance for Icelandic conditions as described.

Then the thesis deals with how corruption issues in Iceland have links to some internationally recognised human rights standards as well as how such standards and international mechanisms which monitor compliance with them can possibly give victims of corruption additional protection. Finally it is briefly described how good governance guidelines may be relevant in this connection.

# Abbreviations

AU	African Union
COE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
GRECO	Group of States against Corruption
HRC	Human Rights Committee
ICC	International Chamber of Commerce
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
IMF	International Monetary Fund
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
SADC	Southern African Development Community
TI	Transparency International
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNDP	United Nations Development Fund

# 1 INTRODUCTION

Corruption is a word we normally associate with poor, non-democratic countries. But during my stay in Sweden, a country which is normally looked upon as free of corruption, frequent news of corruption cases have caught my attention and interest<sup>2</sup>. In my home country a number of cases has come to light, where abuse of public interest has been either proved or alleged. Among these are cases of price-fixing among oil companies, two widely criticized appointments of judges to the Icelandic Supreme Court, pharmaceutical company paid travel by medical doctors, and finally, a government report outlining a very widespread prevalence of tax evasion. From further away, news of corruption in the United Nations system and corruption cases against prominent politicians, such as Italy's Prime Minister also caught my interest. All this contributed to my thoughts on whether corruption is not a larger problem in western democracies that I had previously considered.

In my human rights law studies, I have learned that human rights violations and corruption are often linked and frequently threaten the same interests and in countries with high level of corruption human rights are also frequently abused. I also realised that the international community is increasingly cognisant of the harm corruption can cause and has started cooperating actively against this menace.

When the time came to select the subject for my master's thesis, I felt that the subject of corruption in international law would be interesting and broadly relevant, including in the context of my home country. Therefore, I decided to examine international law against corruption from an Icelandic perspective. In Iceland, however there has been very limited research into corruption. Therefore, quality research reports are very scarce. Consequently, I have frequently had to resort to my own knowledge and judgements.

In the thesis I will review the phenomenon of corruption and how it is dealt with in international law. I will give a general overview of the efforts of international and regional organisations and institutions to prevent and combat corruption, with the main emphasis on the legally binding instruments. The main focus will be on legislative obligations according to the international and regional conventions which are of particular relevance to Iceland, i.e. conventions that Iceland has already ratified as well as conventions which have been adopted by international organisations of which Iceland is a member. These organisations are the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe (COE). Current situation in Iceland will be evaluated and Icelandic legislation will be reviewed with the aim of evaluating what is in place and in particular what is missing so that Iceland

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<sup>2</sup> See e.g. articles in *Sydsvenskan* 5, 7, 9 and 10 October 2004.

can fulfill those aforementioned obligations. It must, however, be emphasised that this will be a brief description and therefore certainly not exhaustive. I will also point out to what extent those conventions seem to deal with the kind of corruption which is arguably an issue in the Icelandic society. Finally I will discuss briefly if corruption in Iceland can possibly be seen as a breach of, or a threat to, international human rights standards and/or good governance guidelines.

Corruption is a multi-faceted phenomenon and its treatment in law can only be understood in that wider context. Therefore before turning the attention to the international organisations and instruments it is necessary to discuss briefly what corruption is, what are its causes and consequences, why and how corruption is an international issue and how corruption has a human rights and governance dimension to it.

# 2 CORRUPTION

## 2.1 A DEFINITION

The word "corruption" comes from the Latin verb "corruptus" which literally means a broken object. Conceptually, corruption is a form of behaviour, which departs from ethics, morality, tradition, law and civic virtue.<sup>3</sup>

Before turning to how corruption is defined in international law let us consider the following examples. Do they constitute corruption?

A Senate President in Nigeria helped himself to a "Christmas bonus" of \$200,000, spent \$320,000 on furnishing his house; acquired eight additional cars irregularly and let contracts to a company in which he had an interest at inflated prices.<sup>4</sup>

According to a World Bank report from 2000 the fee for blocking bills in the Polish Parliament was \$3 million.<sup>5</sup>

A civil service reform implemented in an African country revealed that more than 30% of the people allegedly employed by the government were "ghost workers". Their salaries would go to officials' friends, relatives or fictitious names.<sup>6</sup>

I suppose the vast majority of people in every country of the world would agree that those were obvious examples of corruption. But things are not always so clear and often it is not easy to decide if a certain behaviour amounts to corruption or not.

Some individuals define corruption very narrowly. Others want to use a broader definition, even a very broad one. Individual respondents participating in a major research project in Australia differed, for example, sharply in their views as to what was a corrupt behaviour<sup>7</sup> and according to a survey conducted in Hungary in 2000 gratuities to physicians were considered as corruption only by just over one quarter of the population, while tips were considered corruption by one fifth.<sup>8</sup>

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<sup>3</sup> UNODC: "Corruption", <http://www.unodc.org/unodc/en/corruption.html#what>.

<sup>4</sup> Pope, J. and TI 2000, p. 49.

<sup>5</sup> Pope, J. and TI 2000, p. 54.

<sup>6</sup> UN: "United Nations Manual on Anti-Corruption Policy", p. 10, <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

<sup>7</sup> Pope, J. and TI 2000, p. 13-14.

<sup>8</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 500, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).



It can also differ considerably between societies and cultures if a certain behaviour is considered to be corrupt or not. In many countries, for example, it is not necessarily considered corrupt if the recipient of a passport or other documents pays a “tip” for the good service. In some other countries people would without doubt define this as an obvious example of corruption. The difference between a corrupt and non-corrupt payment is, however, not always obvious to the general public, because both sides to a corrupt deal have an interest in blurring the meaning of the payment and therefore bribes will, for example, frequently be disguised as gifts.<sup>9</sup> The acceptability of proposals to make payments public can be used to test the “cultural” justification for such payments. Olusegun Obasanjo, President of Nigeria, once said that “the distinction between gifts and bribes is easily recognisable. A gift can be accepted openly; a bribe has to be kept secret”.<sup>10</sup>

One must also keep in mind that in most countries there are laws against corruption and even though people may tolerate small payments it doesn't mean they approve of them. They may simply perceive them as the most workable way of obtaining things they want or need. Definitions of acceptable behaviour may also change once people are informed of the costs of the payments.<sup>11</sup>

Since what is considered corrupt behaviour varies considerably from country to country, culture to culture and individual to individual it is hardly surprising that there is no single, comprehensive, universally accepted definition of corruption. Possible definitions have been discussed for a number of years but the international community has not been able to agree on a common definition.<sup>12</sup>

The traditional definition of corruption is *the misuse of public power for private profit*. Abuse of power for personal gain, however, can occur in both the public and private domains. Therefore a broader definition has been adopted by some of the actors of the international community. For example, Transparency International, the major international NGO in the anti-corruption field, defines corruption as *the misuse of entrusted power for private benefit*. In this there are three elements i) a misuse of power; ii) power that is entrusted (i.e. it can be in the private sector just as much as in the public); and iii) a private benefit (i.e. not necessary personal to the person misusing the power, but including as well members of his or her immediate family and friends).<sup>13</sup>

The United Nation's Global Programme against Corruption also includes

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<sup>9</sup> Rose-Ackerman, S. 1999, p. 98.

<sup>10</sup> UNDP: “Fighting Corruption to Improve Governance”, p. 8, [http://www.undp.org/governance/docsaccount/fighting\\_corruption\\_to\\_improve\\_governance.pdf](http://www.undp.org/governance/docsaccount/fighting_corruption_to_improve_governance.pdf).

<sup>11</sup> Rose-Ackerman, S. 1999, p. 110.

<sup>12</sup> COE, “Explanatory Report on the Criminal Law Convention on Corruption”, p. 1, <http://conventions.coe.int/treaty/en/Reports/Html/173.htm>.

<sup>13</sup> Pope, J. and TI 2000, footnote p. 1.

both the public and the private sector in its definition of corruption as *the abuse of power for private gain*.<sup>14</sup>

The World Bank on the other hand has defined corruption as *the abuse of public office for private gain*. This definition is narrow but arguably sufficiently broad to cover most of the corruption the Bank encounters, since the Bank lends primarily to governments and supports governments policies, programs, and projects.<sup>15</sup>

Even though corruption in the private sector has become increasingly more important, not least with the wave of privatisations of services and businesses which have traditionally been run by the state in many countries, international instruments have tended to focus more on corruption in the public sector.

There are two separate categories of corruption in the public sector: corruption *according to rule*, i.e. when a public official is receiving private gain illegally for doing something which he or she is required to do by law and corruption *against the rule*, i.e. when a public official is receiving private gain illegally for doing something which he or she is prohibited from doing.<sup>16</sup>

When the corruption compromises public policy making, its design and implementation it is often classified as *grand corruption*. Grand corruption pervades the highest levels of a national government, usually involves politicians as well as bureaucrats, and often involves large international bribes and hidden bank accounts.<sup>17</sup>

It is *petty corruption* when the public office is used for private benefit in the actual course of public service delivery, such as tax collection, customs, licensing, and inspections. Petty corruption can involve the exchange of very small amounts of money, e.g. the bribing of custom border officials or the employment of friends and relatives in minor positions.<sup>18</sup>

Sometimes a difference is made between *isolated and systemic corruption*. Where corruption is isolated noncorrupt behavior is the norm. Where corruption is systemic, formal rules against corruption remain in place, but they are superseded by informal rules. The law is not enforced or is applied in a partisan way, and informal rules prevail.<sup>19</sup>

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<sup>14</sup> UNODC: "Corruption", <http://www.unodc.org/unodc/en/corruption.html#what>.

<sup>15</sup> WB: "Helping Countries Combat Corruption. The Role of the World Bank", p. 8-9, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>.

<sup>16</sup> Pope, J. and TI 2000, p. 3.

<sup>17</sup> WB: "Helping Countries Combat Corruption. The Role of the World Bank", p. 9, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>.

<sup>18</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 10, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>19</sup> WB: "Helping Countries Combat Corruption. The Role of the World Bank", p. 10-11 and 13, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>.

Corruption can take many forms and the prevalence of the various forms may differ from country to country and even if no common definition has yet been found by the international community to describe corruption as such, everyone seems at least to agree that certain political, social or commercial practices are corrupt. Corruption tends to include several of the following elements:

### **2.1.1 BRIBERY**

Bribery is the bestowing of a benefit in order to unduly influence an action or decision. It can be initiated by a person who seeks bribes or by a person who offers and pays bribes. *Active bribery* refers to the offering or paying of the bribe, while *passive bribery* refers to the receiving of the bribe. The “benefit” can be virtually any inducement, such as money, company shares, inside information, sexual favours, entertainment, employment or the mere promise of incentives.<sup>20</sup>

The benefits gained can be direct or indirect. It can be described as indirect gains when the benefits flow e.g. to a friend, family, private business, campaign funds or political parties.<sup>21</sup>

### **2.1.2 EMBEZZELMENT AND FRAUD**

These offences involve the taking or conversion of money, property or valuable items by an individual who is not entitled to them but, by virtue of his or her position or employment, has access to them. Employment-related equipment, such as motor vehicles, may be used for private purposes. Those offences do not include “theft” per se but only situations involving a public official or where the public interest is crucially affected.<sup>22</sup>

### **2.1.3 EXTORTION**

Extortion relies on coercion, such as the use or threat of violence or the exposure of damaging information, to induce cooperation. Extortion can be committed by government officials but they can also be victims of it. An example of extortion is when police officers threaten to arrest people to extract money from them.<sup>23</sup>

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<sup>20</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 11-12, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>21</sup> UN: “United Nations Manual on Anti-Corruption Policy”, p. 10, <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

<sup>22</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 13-14, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>23</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 14-15, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

#### **2.1.4 CONFLICT OF INTEREST / INFLUENCE PEDDLING, INSIDER TRADING**

A conflict of interests arises when a person, often a public sector employee or official, is influenced by personal considerations when doing his or her job. Thus, decisions are made for the wrong reasons. This kind of corruption involves, for example, engaging in transactions, selling influence, or acquiring a position that is incompatible with one's official duties for the purpose of illegal enrichment. An example of this kind of corruption is when a public official, who has access to secret information, uses the information to take decisions concerning personal investments.<sup>24</sup>

#### **2.1.5 FAVOURITISM, NEPOTISM AND CRONYISM**

Favouritism is a general term used to describe use of power to make decisions on the basis of personal relations rather than on objective grounds. There are several forms of favouritism. Among the most commonly cited are nepotism and cronyism. Nepotism applies to a situation in which a person uses his or her public power to obtain a favour for a member of his or her family. Cronyism is a broader term than nepotism, and covers situations where preferences are given to friends and colleagues and favoured political supporters. These two kinds of corruption, nepotism and cronyism, can easily overlap.

#### **2.1.6 POLITICAL CORRUPTION**

Political corruption is the abuse of entrusted power by political leaders for private gain, with the objective of increasing power or private wealth. It need not involve money changing hands; it may take the form of granting favours that "poison politics and threaten democracy".<sup>25</sup> An example of political corruption is when political parties or candidates receive money in exchange for the good-will towards the entity or group making the contribution.

## **2.2 CAUSES AND CONSEQUENCES**

To be able to deal with corruption in an effective way it is obviously very important to analyse and understand its causes and consequences.

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<sup>24</sup> UN: "United Nations Manual on Anti-Corruption Policy", p. 12, <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

<sup>25</sup> Hodess, R.: "Introduction" in TI: *Global Corruption Report 2004*, p. 11, <http://www.globalcorruptionreport.org/>.

## 2.2.1 THE CAUSES OF CORRUPTION

Why corruption develops varies from one country to the next and there is seldom a single identifiable cause. Some of the causes which have been suggested are: poverty; poor administrative structures; weak judicial, legislative and regulatory frameworks; inadequate education; and cultural and social value systems that condone corrupt practices. Other possible causes are inadequate civil servants' remuneration; too broad discretionary powers of civil servants and a lack of accountability, monitoring and transparency. It has also been argued that planned economies, where many prices are below market-clearing levels provide incentives to payoffs<sup>26</sup> and so does the presence of organised crime.

It is often claimed that poverty is a very important factor in the development of corruption and that can be true. It is, for example, obvious that the risk of corruption in the public sector increases if the civil-service wages are so low that they do not allow public workers to support their families. If poverty was, however, the only cause of corruption it would be hard to explain the fact that corruption is a serious problem in many rich countries and also the fact that most of those involved in “grand corruption” have much more than they and their families will ever need. It can therefore be argued that corruption “can emerge from wealth and abundance, or it can emerge from the lack of it”.<sup>27</sup>

Other factors that may not be causes of corruption but can certainly encourage it are a low educational level which keeps the population passive and ignorant of its rights and the lack of political will to fight corruption. The motivation to remain honest may be further weakened if senior officials and political leaders use public office for private gain or if those who resist corruption lack protection.<sup>28</sup>

## 2.2.2 THE CONSEQUENCES OF CORRUPTION

It has been pointed out that “corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community.”<sup>29</sup> It is now generally recognised that corruption undermines economic development and poses a threat to governance, democratic institutions and human rights. Those many harmful consequences of corruption are, for example, recognised in the first paragraph of the preamble of the UN Convention against Corruption which states that the States parties to the Convention are “concerned about seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy,

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<sup>26</sup> Pope, J. and TI 2000, p. 19.

<sup>27</sup> Pope, J. and TI 2000, p. 7.

<sup>28</sup> WB: “Helping Countries Combat Corruption. The Role of the World Bank”, p. 12, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

<sup>29</sup> Pope, J. and TI 2000, p. 3.

ethical values and justice and jeopardizing sustainable development and the rule of law”.

This list of harmful consequences of corruption is, however, by no means exhaustive. Corruption can, for example, be a serious threat to the environment. Many countries have enacted laws to protect the environment and have created special agencies to enforce these laws. Complying with such environmental regulations imposes on firms costs that can be avoided by bribery.<sup>30</sup>

### **2.2.2.1 Corruption and Economic Development**

In the last ten years or so research on the effects of corruption has grown very much and few continue to argue that corruption has positive effects or that it may grease the wheels of commerce, as some used to suggest. The economic costs of corruption are, however, hard to calculate, partly because corrupt transactions are secret and also because the real cost of corruption is not the bribes themselves, but the cost of the underlying complicated economic distortions corruption triggers.

The sums involved in grand corruption are often hard to believe, but the aggregate costs of petty corruption, in terms of both money and economic distortions, may be as great if not greater.<sup>31</sup>

Corruption causes competitive disadvantage for honest business, unpredictability for investments and added costs. Corrupt low-level officials often introduce inefficiencies, e.g. in the form of additional delays and red tape<sup>32</sup> and managers of companies in highly corrupt countries may have to spend many hours every week dealing with state officials.

Corruption also undermines the prospects for economic investment because foreign firms are less interested in investing in societies where there is an additional level of “taxation”.<sup>33</sup> Corruption distorts economic and social development and undermines the effectiveness of aid and threatens to erode political support for it. The World Bank has, for example, identified corruption “as the single greatest obstacle to economic and social development”.<sup>34</sup>

Corruption is especially brutal to the poor, who can not compete with those willing to pay bribes. It is therefore often claimed that corruption affects the

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<sup>30</sup> WB: “Helping Countries Combat Corruption. The Role of the World Bank”, p. 18-19, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>.

<sup>31</sup> WB: “Helping Countries Combat Corruption. The Role of the World Bank”, p. 19, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>.

<sup>32</sup> Rose-Ackerman, S. 1999, p.121.

<sup>33</sup> UNODC: “Corruption”, <http://www.unodc.org/unodc/en/corruption.html#what>.

<sup>34</sup> WB: “Anticorruption”, <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>.

poor disproportionately. Surveys, i.a. from West Africa, South Asia and Peru seem to confirm this.<sup>35</sup>

### 2.2.2.2 Corruption and Governance

It can be argued that the reduction of corruption is not an end in itself but it is instrumental in reaching the broader goal of more effective, fair and efficient government.<sup>36</sup>

The terms *governance* and *good governance* are being increasingly used in development literature. Governance is usually described as the process of decision-making and the process by which decisions are implemented (or not implemented). There is, however, no universally consistent definition of the concept of governance. The WB, for example, has defined governance as “the exercise of political power to manage a nation’s affairs”.<sup>37</sup> The UNDP, on the other hand, has defined it as the “exercise of economic, political, and administrative authority to manage a country’s affairs at all levels”.<sup>38</sup>

It has increasingly been realised by the international community that corruption and governance are closely linked. Corruption makes it more difficult for governments to form and carry out coherent policies; to respond to citizen’s needs and to use resources in effective ways.<sup>39</sup> From the citizen’s point of view, corruption can render official procedures unpredictable, slow, expensive and arbitrary.<sup>40</sup> Therefore corruption ultimately results in a decrease in the trust of the public towards the state. An environment characterized by poor governance offers greater incentives and more scope for corruption. It can even be argued that corruption is “in fact the single Achilles’ heel of *all* levels of governance, thus making anti-corruption the absolute and necessary core of all successful governance-systems”.<sup>41</sup>

Those close links between governance and corruption have been realised by the major international financial institutions, such as the World Bank (WB), United Development Programme (UNDP) and the International Monetary

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<sup>35</sup> Executive summary of the TI: *Global Corruption Report 2004*, p. 5, <http://www.globalcorruptionreport.org/>.

<sup>36</sup> Pope, J. and TI 2000, p. 11.

<sup>37</sup> Koch, I. E.: “Good Governance and the Implementation of Economic, Social and Cultural Rights” in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 84.

<sup>38</sup> UNDP: *Fighting Corruption to Improve Governance*, p. 13, [http://www.undp.org/governance/docsaccount/fighting\\_corruption\\_to\\_improve\\_governance.pdf](http://www.undp.org/governance/docsaccount/fighting_corruption_to_improve_governance.pdf).

<sup>39</sup> Johnston, M., “The Political Costs of Corruption”, p. 2, <http://www1.oecd.org/daf/nocorruptionweb/pdf/Johnston2.pdf>.

<sup>40</sup> Johnston, M., “The Political Costs of Corruption”, p. 7, <http://www1.oecd.org/daf/nocorruptionweb/pdf/Johnston2.pdf>.

<sup>41</sup> Buckley, M.: “Anti Corruption Initiatives and Human Rights: the Potentials”, in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 198.

Fund (IMF). Those organisations approach the issue of corruption as a governance issue. They, and many bilateral aid agencies and regional development banks, as well, have adopted guidelines on good governance and corruption and are increasingly basing their aid and loans on the condition that reforms ensuring good governance are undertaken. Those institutions are, however, primarily concerned with economic development and their focus is therefore on the economic aspects of governance.

There is no universally consistent definition of the concept of *good governance*. Therefore it can not be delimited in a very precise way. There is, however, agreement on the basic contents of the concept. Good governance can be understood as a set of characteristics, such as participation, the rule of law, transparency, responsiveness, consensus orientation, equity and inclusiveness, effectiveness and efficiency and accountability. These characteristics assure i.a. that corruption is minimized, that the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. For governance to be good it should at least build on *transparency, accountability, participation, consensus-orientation* and *non-corruption*.<sup>42</sup>

Most of the international instruments referring to good governance are not legally binding treaties, but rather soft law documents, such as international organisations programs, policies and resolutions. There is not enough practice to argue that good governance guidelines have become binding as customary international law. Consequently it can not be argued that states have a duty under customary international law to exercise good governance. The good governance guidelines carry, however significant weight since they have been adopted by very influential international institutions, such as the WB, IMF and the UNDP.<sup>43</sup>

In this connection it should, however, be mentioned that even though international law does not impose on states what kind of government they should have it can be argued that there is an increasing pressure on states to exercise democratic governance.<sup>44</sup> Some of the obligations of states under human rights convention such as the political rights provided for in article 25 of the International Covenant on Civil and Political Rights (ICCPR) are, for example, very much in “the nature of democratic participation”.<sup>45</sup> It should also be pointed out that States Parties to human rights conventions have undertaken certain obligations which are very much linked to

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<sup>42</sup> See e.g. UNDP: *Fighting Corruption to Improve Governance*, p. 13.

[http://www.undp.org/governance/docsaccount/fighting\\_corruption\\_to\\_improve\\_governance.pdf](http://www.undp.org/governance/docsaccount/fighting_corruption_to_improve_governance.pdf).

<sup>43</sup> Alfredsson, G.: “The Usefulness of Human Rights for Democracy and Good Governance”, in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 24.

<sup>44</sup> See e.g. Allan, R.: “Article 21” in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague, 1999, p. 446-448.

<sup>45</sup> Nowak, M., 1993, 436.



important good governance guidelines. This can, for example, clearly be seen in General Comment no. 25 of the Human Rights Committee (HRC) dealing with article 25 of the ICCPR which emphasises the importance of *participation* and uses the word very frequently. In the General Comment the HRC also emphasises that “genuine periodic elections in accordance with subparagraph (b) of article 25 are essential to ensure accountability of representatives for the exercise of the legislative or executive powers vested in them”.<sup>46</sup> Accountability is also an important element of good governance guidelines. Another example of the many links between human rights standards and good governance guidelines is the link between the freedom of expression and transparency. As pointed out by the HRC in paragraph 2 of its General Comment no. 19, dealing with article 19 of the ICCPR, freedom of expression “includes not only freedom to impart information and ideas of all kinds”, but also freedom to “seek” and “receive” them. The right to seek and receive information is obviously also a vital part of *transparency*, an important element of good governance.

All this leads one to the conclusion that even though good governance guidelines are not legally binding, as such, under international law many important elements of good governance are also important elements of certain human rights. States Parties to human rights conventions which protect those rights are consequently under legal obligations to respect them.

It is often maintained that democracies are better able than other governance systems to deter corruption through institutionalised checks and balances and other accountability mechanisms.<sup>47</sup> This argument also refers to the fact that democracy, as a competitive political system, can be a check on corruption. “For elected politicians the most immediate form of “punishment” occurs at the polls”.<sup>48</sup> In contrast, the argument goes, non-democratic states are especially susceptible to corrupt incentives because their rulers have the potential to organize government with few checks and balances.

Those are good arguments. It must, however, be recognised that no system of government and administration is immune to corruption and democracy per se does not bring an end to corruption. Under democracy corruption sometimes merely takes new forms, e.g. becomes more decentralised instead of being concentrated in the head of state and his family.<sup>49</sup> And political corruption can obviously be a threat to democracy, e.g. election rigging and corrupt financing of political parties and campaigns. Some people even consider that corruption now represents one of the most serious threats to the stability of democratic institutions.<sup>50</sup>

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<sup>46</sup> HRC: General Comment no. 25 (Article 25), paragraph 9.

<sup>47</sup> Pope, J. and TI 2000, p. 47.

<sup>48</sup> Rose-Ackerman, S. 1999, p.127.

<sup>49</sup> Coronel, Sheila S.: “Recovering the Rage: Media and Public Opinion”, in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 222.

<sup>50</sup> COE, “Explanatory Report on the Criminal Law Convention on Corruption”, p. 1-2, <http://conventions.coe.int/treaty/en/Reports/Html/173.htm>.

It is therefore vital to contain corruption to defend and promote democracy. This is particularly important in emerging democracies because if it isn't done a large number of people can become disillusioned and start to miss the old undemocratic political systems. A Freedom House study, released the 6th of April 2004, that found that pervasive corruption is a major impediment to the development of democracy in transitional societies, seems to confirm this.<sup>51</sup>

There are not only many close links between good governance and corruption. There are also many links between human rights and good governance. Those important links have, for example, been realised by the UN Commission on Human Rights which stated i.a. in its resolution 2000/64 of 26th of April 2000: "The Commission on Human Rights recognizes that transparent, responsible, accountable, and participatory government, responsive to the needs and aspirations of the people, is the foundation of which good governance rests, and that such a foundation is a sine qua non for the promotion of human rights".<sup>52</sup>

Good governance does, however, not necessarily go hand in hand with human rights thinking. The concept of good governance aims first and foremost at providing the best possible conditions for an economic environment.<sup>53</sup> It has development as its main goal, not legal security for the individual. It can, however, hardly be claimed that a corrupt government that rejects both transparency and accountability is likely to respect human rights. Good governance and democracy contribute to respect for human rights. "Governments which are accountable to the people and represent the will of the people as expressed by the people are more likely to care about human rights".<sup>54</sup>

### **2.2.2.3 Corruption and Human Rights**

Corruption has widespread consequences for human rights and produces human rights violations, both directly and indirectly. When people have to pay bribes to access food, health-care, housing, property, education and jobs basic human rights are clearly violated. In many developing countries ordinary citizens have to routinely bribe unscrupulous government workers, such as personnel at schools, hospitals and municipal offices in order to access to such basic rights or other public services already paid for in taxes

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<sup>51</sup> Freedom House, Press Release, 6 April 2004,

<http://www.freedomhouse.org/media/pressrel/040604.htm>.

<sup>52</sup> UN Commission on Human Rights Resolution 2000/64, "The role of good governance in the promotion of human rights", [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2000-64.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2000-64.doc).

<sup>53</sup> Koch, I. E.: "Good Governance and the Implementation of Economic, Social and Cultural Rights" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 92.

<sup>54</sup> Alfredsson, G.: "The Usefulness of Human Rights for Democracy and Good Governance" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 26.

and government fees.<sup>55</sup> A survey conducted in 2001-2002 revealed, for example, that more than half of the users of public hospitals in Bangladesh had to bribe for access to a service. In Pakistan 92 per cent of households with experience of public education had to pay bribes.<sup>56</sup>

Those examples clearly demonstrate how petty corruption affects the enjoyment of the basic human rights of the people living in those two poor countries to health and education in a very harmful way. Grand corruption often affects human rights in the same way. In countries where the most basic rights to health, education and security are limited, under pressure or even non-existent, public resources that should be financing civic services for citizens frequently find their way to the private bank accounts of corrupt officials. It is, for example, estimated that Mohamed Suharto, president of Indonesia 1967-1998, embezzled US\$ 15 to 35 billion<sup>57</sup> and bankers have estimated that US\$ 20 billion is held in the private Swiss bank accounts of African leaders alone.<sup>58</sup>

It has also been shown that corruption tends to steer public expenditure towards areas that will facilitate corrupt transactions. Therefore corrupt officials rather want to spend public resources on defence than education or other basic civic services.<sup>59</sup>

Corruption does not, however, only produce violations of economic, social and cultural rights. In many cases it also threatens civil and political human rights and leads to all kinds of violations of those rights. Corrupt governments, for example, often try to cling to power to protect their privileges and the grand corruption opportunities that their governing positions give them.<sup>60</sup> Under such conditions governments tend to violate all kinds of civil and political rights, such as the right to a fair trial, the right to privacy, freedom of expression and freedom of association and even the right to life<sup>61</sup> and the right not to be tortured.<sup>62</sup>

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<sup>55</sup> Buckley, M.: "Anti Corruption Initiatives and Human Rights: the Potentials", in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 11.

<sup>56</sup> Kaufmann, D. and Kraay, A.: "Governance Matters III: new indicators for 1996-2002 and methodological challenges" in TI: *Global Corruption Report 2004*, p. 301, <http://www.globalcorruptionreport.org/>.

<sup>57</sup> Hodess, R.: "Introduction" in TI: *Global Corruption Report 2004*, p. 13, <http://www.globalcorruptionreport.org/>.

<sup>58</sup> Buckley, M.: "Anti Corruption Initiatives and Human Rights: the Potentials" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 181.

<sup>59</sup> Cartier-Bresson, J.: "The Causes and Consequences of Corruption: Economic Analyses and Lessons Learnt" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 18.

<sup>60</sup> In this connection it could be mentioned that a new report made for the United States Senate claims that Augusto Pinochet, the former dictator of Chile, who has been accused of various human rights violations, including murder and torture, has been trying to hide 30 million US \$ on secret bank accounts in the US. See e.g. Morgunbladid 18 Mars, p. 20.

<sup>61</sup> Here reference can be made to the case of the journalist Heorhiyi Gongadze, which possibly involves both the human rights to freedom of expression and the right to life. Gongadze was known for his investigations of corruption in the government of Ukraine when he was murdered in the year 2000. The former president of the country has been accused of ordering the murder. See e.g. Frettabladid, 14 Mars 2005, p. 8.

Corruption is, however, not only leading to human rights violations in countries which are governed by repressive governments. There are also serious problems in many democratic countries. Corruption in relations to the judiciary can, for example, obviously lead to violations of the human right to a fair trial and be a threat to the rule of law. Political corruption is, in many cases, a serious threat to the meaningful enjoyment of political human rights and favouritism and discrimination in recruitment to the civil service usually involves some kind of discrimination and can, for example, be in contravention of the human right to access on general terms of equality to the public service.<sup>63</sup> In an environment where the government is interfering with the media in an unreasonable way journalists tend to apply self-censorship to protect their jobs. This can obviously be a threat to the freedom of expression.

If human rights are threatened and violated by corruption, respect for human rights can be a powerful tool in fighting corruption. Human rights standards, such as those requiring equal access to public service, the independence and impartiality of the judiciary and fair trial are clearly relevant to accountability and anti-corruption efforts.<sup>64</sup> It can even be argued that the mechanism that is needed to prevent and control corruption is first and foremost the realisation of a series of civil and political rights, i.e. an independent and impartial judiciary, freedom of expression and information<sup>65</sup>, freedom of association and free NGOs and public opinion and free elections. A media which is free to investigate and report on cases of corruption, not least when influential politicians are involved, is a very powerful tool to put pressure on the authorities to act and to encourage the general public to demand that the corrupt will be made accountable. An independent judiciary, where the appointments of judges are merit-based and the judges are given adequate salaries and necessary protection from interference or threats by the executive, politicians and other external parties, is also instrumental in the implementation of anti-corruption regulations and to ensure accountability.

Although corruption is not a victimless crime per se, unlike most crimes, the victim is often not easily identifiable. Usually, those involved are beneficiaries in some way and have an interest in preserving secrecy. Corruption is therefore, by its nature, secretive and responsible authorities may encounter great difficulties in obtaining the evidence required to prove

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<sup>62</sup> Buckley, M.: "Anti Corruption Initiatives and Human Rights: the Potentials" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 183.

<sup>63</sup> Buhmann, K.: "Administrative Law Reform and Increased Human Rights Observance in Public Administration and Beyond: the People's Republic of China" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 236.

<sup>64</sup> Alfredsson, G.: "The Usefulness of Human Rights for Democracy and Good Governance" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 25.

<sup>65</sup> In 1999 James Wofelsohn, the President of the World Bank, said i.a.: "Studies at the bank show that the more press freedom a country has, the more it can control corruption". See Steiner, H. J. and Alston, P., 2000, p. 1341.

their cases. The use of electronic surveillance is therefore specifically encouraged by some international instruments against corruption, such as by UN Convention against Corruption (Article 50 paragraph 1).<sup>66</sup> This can, however, be problematic because of i.a. the human right to privacy. It must also be kept in mind that if the right balance is not found anti-corruption efforts can lead to violations of certain other human rights of those suspected to be corrupt, such as the right to be presumed innocent and the right to a fair trial. Provisions of “illicit enrichment” (which involves unjustified wealth) in international conventions against corruption have, for example, been criticised for violating the principle of the presumption of innocence.<sup>67</sup> The importance of finding the right balance in the fight against corruption has been realised by Transparency International, which insists that efforts to combat corruption must always respect fundamental human rights.<sup>68</sup>

## 2.3 CORRUPTION AS AN INTERNATIONAL ISSUE

Corruption has for centuries been accepted as a seemingly inevitable fact of life or simply not taken seriously. Much of the industrialised world, however, claimed until recently that corruption was primarily a problem for developing countries and international financial institutions were unwilling to confront corruption.<sup>69</sup> United States made bribery of foreign officials a crime in 1977, but no other country took similar action.<sup>70</sup> This attitude, however, has changed dramatically over the last 15 years or so. It has even been suggested that the “most significant achievement in governance during the 1990s was the shattering of the taboo that barred discussion of corruption, particularly in diplomatic circles and intergovernmental institutions”.<sup>71</sup> In recent years international organizations, governments, the private sector and the general public have gradually come to view corruption as a serious problem with extensive negative effects. The

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<sup>66</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 399-400, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>67</sup> See e.g. Muna, A.: “The African Union Convention against Corruption” in TI: *Global Corruption Report 2004*, p. 118-119, <http://www.globalcorruptionreport.org/>.

<sup>68</sup> Pope, J. and TI 2000, p. 12.

<sup>69</sup> When the Vienna Convention on the Law of the Treaties was adopted in 1969 it was, however, agreed to have an article in the Convention providing for that corruption could be invoked as a basis to claim invalidity of international conventions. Article 50 of the Convention provides: “If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty”. The Convention entered into force in 1980 and has been ratified by the majority of states in the world.

<sup>70</sup> Heimann, F. and Hirsch, M.: “How International Business Combats Extortion and Bribery: Anti-corruption Efforts by the International Chamber of Commerce” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 170.

<sup>71</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 17, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

international community's understanding of what constitutes corruption has also gradually expanded in recent years.

Several possible explanations of this dramatic change of attitude worldwide have been put forward, such as the important transformations that have taken place in the world: the end of the Cold War, the rise of new values and realities, technology and communication advancement, and changes in the states' role and the role of civil society in issues of common interest.<sup>72</sup>

During the Cold War when the west and the east fought for the support of states corruption as well as human rights violations were frequently tolerated.<sup>73</sup> After the Cold War reformers found themselves much less constrained by the limiting debate of West-East politics and were able to raise the profile of corruption issues.<sup>74</sup>

The western countries used to regard themselves as being morally superior when it came to corruption but as business became increasingly global during the 1980s, it became more and more unrealistic to regard the corruption problem as only an issue in the developing countries.

In the late 1980s and early 1990s the World Bank began to report that there was a link between corruption and economic development and in 1996 its president committed the Bank to combat the "cancer of corruption".<sup>75</sup> This change of policy by the World Bank, which had been reluctant to deal with corruption, had much impact in the international community.

Eruption of domestic corruption scandals in virtually all industrialised states helped to sway the public opinion in favour of combating corruption. Awareness-campaigns, especially by Transparency International and their officially published ratings of countries by perceived level of corruption, and the media's appetite for disclosures about corruption also helped to put corruption on the international agenda.<sup>76</sup>

It is now widely recognised that corruption is a problem in every country of the world and developed countries have no cause to claim the moral ground. Corruption cases in international organisations, such as the World Bank and the United Nations also show that corruption can occur in any society and organisation.

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<sup>72</sup> Garcia-González, J.: "The Organisation of American States and the Fight against Corruption in the Americas" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 390.

<sup>73</sup> Muna, A.: "The African Union Convention against Corruption" in TI: *Global Corruption Report 2004*, p. 116, <http://www.globalcorruptionreport.org/> and Rose-Ackerman, S. 1999, p. 177.

<sup>74</sup> Delare, T.: "A Sea Change in Anti-corruption Efforts" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 95.

<sup>75</sup> WB: "Helping Countries Combat Corruption. The Role of the World Bank", 1997, p. 1-2, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>.

<sup>76</sup> Buckley, M.: "Anti Corruption Initiatives and Human Rights: the Potentials" in Alfredsson, G. and Sano, H.-O. (eds.), *Human Rights and Good Governance*, 2002, p. 185.

Grand corruption, very often includes international aspects. Bribes of higher-ranking foreign public officials are frequently paid from abroad to abroad, through banking channels and financial intermediaries in third countries. The bribe giver may be a foreign investor and the bribe may be transferred directly into the foreign bank account of the recipient. Corrupt officials often flee to another country to avoid detection or prosecution or try to launder the proceeds abroad.

Effective mutual international assistance is obviously fundamental to deal with this kind of corruption. The international community may not be able to prevent major corruption within a state but it can make it difficult for corrupt officials to export their proceeds or to flee to other countries.

Studies have confirmed that there is a need for international cooperation if corruption is to be fought in an effective way. Corruption in one country can affect other countries with which the problem state has significant economic, social, political, immigration or other links. Efforts by developing countries to enhance their development, for example, are impeded by corruption, as are the efforts of other countries to assist them in their efforts. As an effect of the globalisation of trade individual cases of corruption very frequently have transnational elements.<sup>77</sup>

Finally, with the globalisation of the economic and financial structures of the world market, decisions taken on capital movements or investments in one country very often have effects in others. Some countries also consider that they would penalise their national companies if they entered into international commitments against corruption without other countries having assumed similar obligations. Therefore an important reason for dealing with corruption as an international problem is that in a global economy “common rules of the game must prevail” if corruption is not to distort trade and investment.<sup>78</sup>

The international community has gradually realised that corruption is a very harmful international problem that requires international solutions. It has also gradually broadened its definition of what conduct constitutes corruption. The UN Convention against Corruption is a proof of those facts. It is wider in scope than previous international anti-corruption instruments and in its preamble it is stated that States Parties to the Convention are “convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economics, making international cooperation to prevent and control it essential”.

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<sup>77</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit”, p. 550, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>78</sup> Jones, R.: “Why Trade Unions have Mobilised Against Corruption: Views of the Trade Union Advisory Committee” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 182.

# 3 INTERNATIONAL EFFORTS AGAINST CORRUPTION

The gradual understanding of the international community of both the scope and seriousness of the problem of corruption is demonstrated by the efforts of several international organisations to address it in a coordinated manner. Global and regional organisations have developed harmonised approaches that are aimed at combating corruption. The international financial institutions have adopted their own anti-corruption and good governance policies. The private sector has developed codes of conduct for companies and international NGOs have put pressure on governments and international organisations to address corruption and raised the awareness of the general public.

A number of international instruments aimed at preventing and combating corruption have been developed from 1995 onwards. Some of them are in the form of conventions, meant to be legally binding for states, and some are “soft law” instruments, often in the form of guidelines and recommendations, attempting to put pressure on states and increase political will against corruption. Those instruments together constitute the current international legal regime to combat corruption.

The international anti-corruption instruments contain measures to encourage countries to develop and adopt domestic anti-corruption programmes. The overall effort is intended to ensure that each country has adequate anti-corruption measures in place and that all of these programmes are coherent enough to support international cooperation. These efforts deal with the prevention and control of corruption at the domestic level and cooperation in areas such as development and technical assistance at the international level.<sup>79</sup>

The perspective of this thesis is Icelandic. It is, however, necessary to put it in an international context. In this section some of the most important anti-corruption efforts of international organisations, institutions and NGOs will be described. It should, however, be stressed that this is by no means an exhaustive description of such efforts.

While corruption is dealt with directly and indirectly in many international declarations, recommendations, agreements and other instruments the focus of this thesis is on *legally binding conventions* where corruption is the main focus. The conventions which are of particular relevance to Iceland, i.e. adopted by organisations which Iceland is a member of (OECD, COE and UN), will also be dealt with in section 4.

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<sup>79</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit”, p. 550, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).



### 3.1 UNITED NATIONS (UN)

The UN drafted an anti-corruption convention in the late 1970s. This effort, however, ran into political problems and failed to gain sufficient support and corruption largely disappeared from view as an international issue during the 1980s.<sup>80</sup> Since the middle of the 1990s the UN have been active in the international anti-corruption efforts and have adopted a number of instruments and documents containing anti-corruption provisions. Among the most important of those are the UN Declaration against Corruption and Bribery in International Commercial Transactions of 1996; the UN International Code of Conduct for Public Officials of 1996; the UN Convention against Transnational Organized Crime of 2000 and the Plan of Action for the Implementation of the Vienna Declaration on Crime and Justice of 2001.

The declaration from 1996 deals with both private and public sectors and calls for the enactment and enforcement of laws prohibiting bribery in international transactions; laws criminalising the bribery of foreign public officials; and laws ensuring that bribes are not tax deductible. It also calls for international cooperation in the fight against corruption. Although the declaration is not legally binding it signifies a broad political agreement in the international community on this matter.<sup>81</sup>

The Code of Conduct from 1996 is written in general terms for the guidance of legislative and administrative measures, and is not legally binding. The Code emphasises the need for loyalty of officials to the public interest, the pursuit of efficiency, effectiveness and integrity. It calls for the avoidance of conflicts of interest and for the disclosure of assets, refusal of gifts or favours and the protection of confidential information. It also discusses issues arising from partisan political activity.

The UN Convention against Transnational Organized Crime is a binding legal instrument, which came into force in 2003. It principally focuses on the activities of organized criminal groups but does, however, recognise that, in many cases, corruption is transnational and both an instrument and an effect of organised criminal activity. The convention contains, accordingly, some provisions requiring anti-corruption offences and preventive measures.<sup>82</sup>

The Plan of Action from 2001 is not legally binding. The Declaration calls i.a. for enhanced international action against corruption and the Plan of Action calls for various efforts in support of the UN anti-corruption

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<sup>80</sup> Heimann, F. and Hirsch, M.: "How International Business Combats Extortion and Bribery: Anti-corruption Efforts by the International Chamber of Commerce" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 170.

<sup>81</sup> WB: "Helping Countries Combat Corruption. The Role of the World Bank", 1997, p. 61, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

<sup>82</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 24 and 413, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

Convention and various measures to combat domestic and transnational corruption.

Many states, however, thought that those aforementioned documents were not enough and that a comprehensive international instrument against corruption was still needed. In 2000 the support for such a convention had become so substantial that the General Assembly of the UN decided to draft a global anti-corruption convention.

### 3.1.1 THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The UN Convention against Corruption was adopted by the General Assembly in 2003. The Convention shall enter into force when 30 states have ratified it. As of 11 Mars 2005 118 states had signed the Convention and 19 states had ratified it.<sup>83</sup> It is expected to enter into force at the end of 2005, at the earliest.<sup>84</sup>

The Convention is the first global instrument embracing a comprehensive range of anti-corruption measures to be taken at the national level.<sup>85</sup> It represents a broad international consensus about values, standards and structures, taking into account national variables such as legal traditions, cultural factors and degree of economic development. It makes some fundamental elements mandatory for all states parties, other elements variable, optional or subject to the selection of options or elements of discretion, and makes it clear that it is intended to establish basic minimum standards which individual States Parties are both free to, and encouraged to, exceed.<sup>86</sup>

An entire chapter of the Convention is 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 political financing. States must also endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit.<sup>87</sup> The Convention requires countries to *criminalize* a wide range of acts of corruption. In some cases, states are legally obliged to establish offences. In other cases, in order to take into account differences in domestic law, they are required to consider doing so.

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<sup>83</sup> UNODC website, [http://www.unodc.org/unodc/en/crime\\_signatures\\_corruption.html](http://www.unodc.org/unodc/en/crime_signatures_corruption.html)

<sup>84</sup> Rooke, P.: "The UN Convention against Corruption" in TI: *Global Corruption Report 2004*, p.111, <http://www.globalcorruptionreport.org/>.

<sup>85</sup> Rooke, P.: "The UN Convention against Corruption" in TI: *Global Corruption Report 2004*, p.111, <http://www.globalcorruptionreport.org/>.

<sup>86</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit" , p. 131-132, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>87</sup> UNODC website, "United Nations Convention against Corruption", [http://www.unodc.org/unodc/en/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/en/crime_convention_corruption.html).

States parties to the convention agree to *cooperate* with one another in the fight against corruption, including prevention and investigating activities and they are also bound to render specific forms of mutual legal assistance and to extradite offenders. Countries are also required to undertake measures to support the tracing, freezing, seizure and confiscation of the *proceeds of corruption*.

*Asset recovery* is in Article 51 of the Convention stated explicitly as “a fundamental principle of the Convention”. This is a particularly important issue for many developing countries, which are seeking the return of assets that have been corruptly obtained by former leaders.

A *conference* of the states parties is established to *review implementation* of the Convention and facilitate activities required by the it.

The Convention is the first legally binding global instrument embracing a comprehensive range of anti-corruption measures and international cooperation in preventing corruption. It can therefore be argued that it is a major step forward in the international fight against corruption. Some critics have, however, claimed that the monitoring mechanism of the Convention is ineffective and that the Convention relies to heavily on non-mandatory wording. Transparency International has, for example, criticised that transparency in political funding is not mandatory under the Convention.<sup>88</sup>

## **3.2 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)**

The OECD groups 30 member countries, including United States, Japan, Germany, Australia, Canada, France and the United Kingdom. The OECD countries represent the world’s richest, with around 70% of world exports and 90% of foreign direct investment world-wide.<sup>89</sup>

The members of the organisation share a commitment to democratic government and the market economy and its work covers i.a. economic, social and governance issues. The organisation produces internationally agreed instruments, decisions and recommendations.<sup>90</sup> Its mandate includes a number of areas that may be relevant to anti-corruption strategies.

The OECD’s work on corruption reaches back more than two decades but it began seriously in 1989 at the initiative of the United States, whose

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<sup>88</sup> Rooke, P.: “The UN Convention against Corruption” in TI: *Global Corruption Report 2004*, p.112, <http://www.globalcorruptionreport.org/>.

<sup>89</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 527, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>90</sup> OECD Website, <http://www.oecd.org/home/>.

companies complained that only they faced criminal sanctions for bribes paid abroad, under national law.<sup>91</sup> The OECD established a Working Group on Bribery in International Business Transactions in 1989. The Group has developed various recommendations and documents.

In 1994 OECD produced its first policy instrument, a recommendation, concerning corruption. The Revised Recommendation on Combating Bribery in International Business Transactions of 1997 was, however, written in far more prescriptive language. It contains the entire anti-corruption programme as agreed by participant countries and invites them to “take effective measures to deter, prevent and combat” international bribery in a number of areas. The 1997 recommendation also provides for an effective follow-up procedure for monitoring progress in implementing the recommendation.<sup>92</sup>

The OECD approach is, however, rather narrow and aims to reduce the influx of corrupt payments into relevant markets. It focuses on the “supply side” of corruption, dealing exclusively with the active corruption of foreign public officials, including officials of non-participatory countries.<sup>93</sup>

In 1996 the OECD adopted a recommendation on ending tax deductibility for foreign bribery and member states have amended national legislations to reflect this recommendation.

OECD recommendations are “soft law”, not containing legally binding commitments, but the OECD has a good record in affecting policies of the member states through recommendations which are backed by an effective follow-up procedure.<sup>94</sup>

Some member countries, however, thought a legally binding convention was needed and late in 1997 the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted. The Convention entered into force in 1999 and as of 25 of January 2005, 36 countries had ratified the Convention.<sup>95</sup>

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<sup>91</sup> Sacerdoti, G.: “To Bribe or not to Bribe?” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 29-30.

<sup>92</sup> Pieth, M.: “From Ideal to Reality: Making the New Global Standard Stick” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 53-54.

<sup>93</sup> Pieth, M.: “From Ideal to Reality: Making the New Global Standard Stick” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 62.

<sup>94</sup> Sacerdoti, G.: “To Bribe or not to Bribe?” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 42.

<sup>95</sup> OECD website, “Anti-Bribery Convention”, [http://www.oecd.org/department/0,2688,en\\_2649\\_34859\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34859_1_1_1_1_1,00.html).

### 3.2.1 OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

The Convention has a global reach, with signatories representing five continents. Its main purpose is to prevent and repress bribery in international business transactions by requiring parties to the Convention to establish the criminal offence of bribing a foreign or international public official with adequate and effective sanctions against natural and legal persons involved, and to provide for co-operation among the parties in fighting such crimes.<sup>96</sup>

The Convention covers corruption of public officials of any state, not just of the states that are parties on the basis of reciprocity.<sup>97</sup> Its scope is, however, relatively narrow. The sole focus is the use of domestic law to criminalize the bribery of foreign public officials. The Convention does not apply to forms of corruption other than bribery, 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. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of undue advantage in such business.<sup>98</sup> This means, for example, that the Convention does not cover facilitation payments, i.e. payments made to induce public officials to perform their functions.

The Convention has been criticised for being too narrow, especially that it does not include a ban on bribery of officials of foreign political parties, party officials and candidates for office.<sup>99</sup>

A mechanism of constant monitoring and follow-up of the Convention is entrusted to the Working Group on Bribery in International Business Transactions. Since the Convention came into force, the group has adopted a rigorous process of assessing the status of implementation and compliance with its terms.<sup>100</sup>

The Convention's implementation and monitoring mechanism is without doubt strong compared to most other international conventions and there

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<sup>96</sup> Möhrenschrager, M.: "The Fight against Corruption: Substantive Criminal Law Issues in the Organisation for Economic Co-operation and Development Convention" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 337.

<sup>97</sup> Sacerdoti, G.: "To Bribe or not to Bribe?" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 29.

<sup>98</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit" , p. 418, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>99</sup> Heimann, F.: "Will the OECD Convention stop foreign bribery?" in TI: *Global Corruption Report 2004*, p. 132, <http://www.globalcorruptionreport.org/> and Rose-Ackerman, S. 1999, p. 186.

<sup>100</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit" , p. 419, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

was a lot of optimism surrounding the Convention. Transparency International has, however, recently criticised the slow implementation of the Convention and the lack of awareness by companies and claims that many believe that companies use middlemen to circumvent anti-corruption law.<sup>101</sup>

### 3.3 COUNCIL OF EUROPE (COE)

The Council of Europe was created in 1949. It groups together 46 European countries. It is distinct from the European Union (EU) but no country has ever joined the EU without first belonging to the COE. Therefore it has been argued that COE represents “Greater Europe”. The aim of the organisation is to achieve a unity between its members and to defend human rights, parliamentary democracy and the rule of law, develop continent-wide agreements to standardise member countries’ social and legal practices and to promote awareness of a European identity based on shared values. The organisation monitors that all its members respect the obligations and commitments they entered into when they joined.<sup>102</sup> The most prominent achievements of the COE are in the development of the human rights law system which revolves around the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.<sup>103</sup>

The COE became interested in the international fight against corruption because of the obvious threat corruption poses to the basic principles it stands for. In 1994 a conference of the European ministers of justice, launched its initiative against corruption.<sup>104</sup> The organisation has since been actively engaged in the development and adoption of anti-corruption measures, many of which are open to adoption or accession by non-European countries.

The COE takes a multidisciplinary approach to corruption, meaning that it deals with it from a criminal, civil and administrative law point of view. The activities of the COE against corruption are carried out on the basis of a Programme of Action against Corruption adopted in 1996. The programme is an ambitious document, which attempts to cover all aspects of the international fight against this phenomenon.<sup>105</sup> In the implementation of the programme the COE has adopted several instruments and documents and two legally binding conventions.

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<sup>101</sup> Bray, J.: “International business attitudes toward corruption” in TI: *Global Corruption Report 2004*, p. 317, <http://www.globalcorruptionreport.org/>.

<sup>102</sup> COE website, “About the Council of Europe”, [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/).

<sup>103</sup> Reif, L. C., 2004, p. 89-90.

<sup>104</sup> COE, “Explanatory Report to the Civil Law Convention on Corruption”, p. 1, <http://conventions.coe.int/treaty/en/Reports/Html/174.htm>.

<sup>105</sup> COE, “Explanatory Report on the Civil Law Convention on Corruption”, p. 2, <http://conventions.coe.int/treaty/en/Reports/Html/174.htm>.

In 1997 the Committee of Ministers of the COE adopted the Twenty Guiding Principles for the Fight against Corruption. The principles identify the areas in which state action is necessary for a comprehensive and efficient strategy against corruption. The principles are multidisciplinary, covering the use of criminal and civil law measures, civil prevention, administrative reforms, transparency measures and research. They are directed at encouraging individual countries to consult one another and coordinate national measures as a further precaution against transnational corruption problems. Although the principles are not a legally binding text, they carry much political weight and their application is subject to an effective monitoring mechanism.<sup>106</sup>

In 1999 the Group of States against Corruption (GRECO) was established. According to its Statute, the aim of GRECO is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, their compliance with the Twenty Guiding Principles and the implementation of international legal instruments adopted in pursuance of the Programme of Action.<sup>107</sup> In this way, GRECO is supposed to contribute to identifying deficiencies and insufficiencies of national mechanisms against corruption.<sup>108</sup> All of the COE's anti-corruption instruments are linked to the GRECO monitoring mechanism. Becoming a party to the instruments entails, automatically, the obligation to participate in GRECO, and to accept its monitoring procedures.<sup>109</sup>

A recommendation on codes of conduct for public officials which includes a Model Code of Conduct for Public Officials was adopted by the COE in 2000. The document is in the nature of a recommendation and is intended as a precedent for countries drafting their own mandatory codes of conduct.<sup>110</sup>

In 2003 the Committee of Ministers of the COE made a recommendation to member states on common rules against corruption in the funding of political parties and electoral campaigns. In the recommendation the committee considers that political parties are a "fundamental element of the democratic systems of states and are an essential tool of expression of the political will of citizens". The committee recommends i.a. that governments of member states adopt, in their national legal systems, rules against corruption in the funding of political parties and electoral

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<sup>106</sup> Csonka, P. and Vel, G. d.: "The Council of Europe Activities against Corruption" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 362-363.

<sup>107</sup> COE, "Explanatory Report on the Criminal Law Convention on Corruption", p. 25. <http://conventions.coe.int/treaty/en/Reports/Html/173.htm>.

<sup>108</sup> GRECO website, <http://www.greco.coe.int/>.

<sup>109</sup> Csonka, P. and Vel, G. d.: "The Council of Europe Activities against Corruption" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 363.

<sup>110</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 423, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

campaigns which are inspired by the common rules reproduced in an appendix to the recommendation. In the appendix to the recommendation it is i.a. provided that states should provide that donations to political parties are made public, in particular, donations exceeding a fixed ceiling.<sup>111</sup>

In addition to those aforementioned recommendations, principles and measures, the COE has adopted two legally binding conventions against corruption, i.e. the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.

### **3.3.1 THE CRIMINAL LAW CONVENTION ON CORRUPTION**

The Criminal law Convention on Corruption was adopted in 1998 and it entered into force in 2002. As of 26 February 2005 30 states had ratified the Convention.<sup>112</sup> The Convention is also open for signature and ratification by non-member states that participated in its negotiation and other states can also join by accession, provided that certain preconditions are met. As soon as states ratify the Convention, they automatically become members of the GRECO.<sup>113</sup> An additional Protocol to the Convention, that enlarges its scope of application to arbitrators and jurors, will enter into force 1 February 2005. It had been ratified by 7 states as of 26 February 2005.

The Convention is a binding legal instrument which applies to a broad range of occupations and circumstances. It is, however, relatively narrow in the range of actions or conduct that states parties are required to criminalise and it does not deal with many forms of corruption, such as extortion, embezzlement, nepotism and insider trading.<sup>114</sup>

The Convention provides for the criminalisation of active and passive corruption of national, foreign and international public officials, members of parliament or assemblies, judges, active and passive bribery in private business transactions, trading in influence, laundering of corruption proceeds and corruption in auditing.<sup>115</sup> It also has provisions concerning aiding and abetting, immunity, criteria for determining the jurisdiction of states, liability of legal persons, the setting up of specialised anti-corruption

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<sup>111</sup> Recommendation REC (2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, <https://wcd.coe.int/ViewDoc.jsp?id=2183&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

<sup>112</sup> GRECO website, <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=&CL=EN>.

<sup>113</sup> GRECO website, Summary of the Criminal Law Convention, <http://conventions.coe.int/treaty/en/Summaries/Html/173.htm>.

<sup>114</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 421, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html)

<sup>115</sup> Csonka, P. and Vel, G. d.: "The Council of Europe Activities against Corruption" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 364.



bodies, protection of persons collaborating with investigating or prosecuting authorities, gathering of evidence and confiscation of proceeds.

States parties are required to provide for effective and dissuasive sanctions and measures. Legal entities will also be liable for offences committed to benefit them, and will be subject to effective criminal or non-criminal sanctions.<sup>116</sup>

### 3.3.2 THE CIVIL LAW CONVENTION ON CORRUPTION

The possibility to tackle corruption through civil law measures is one of the characteristics of the COE's approach to the fight against corruption.<sup>117</sup> Therefore when it was realised that it was possible to conceive a number of scenarios in which the use of civil law remedies might be useful against given forms of corruption, the COE decided to draft this Convention.<sup>118</sup> It was adopted in 1999 and entered into force in 2003. As of 26 February 2005 22 states had ratified it.<sup>119</sup> As is the case with the Criminal Law Convention, this Convention is open to accession by non-member states and becoming party to it implies automatic acceptance of GRECO's monitoring system.<sup>120</sup>

The Convention is the first attempt to define common international rules for civil litigation in corruption cases.<sup>121</sup> It addresses such issues as compensation for damage for victims of corruption, liability, including state liability for acts of corruption committed by public officials; contributory negligence; validity of contracts; protection of employees who report corruption; clarity and accuracy of accounts and audits; acquisition of evidence; and international co-operation.<sup>122</sup>

The Civil Law Convention is a binding legal instrument but it is narrower than the Criminal Law Convention in the scope of the forms of corruption to which it applies, extending only to bribery and similar acts. It does, however, apply to such acts in both the private and public sector. The Criminal Law Convention seeks to control corruption by ensuring that offences and punishments are in place but the Civil Law Convention

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<sup>116</sup> GRECO website, Summary of the Criminal Law Convention, <http://conventions.coe.int/treaty/en/Summaries/Html/173.htm>.

<sup>117</sup> COE, "Explanatory Report on the Civil Law Convention on Corruption", p. 2, <http://conventions.coe.int/treaty/en/Reports/Html/174.htm>.

<sup>118</sup> Csonka, P. and Vel, G. d.: "The Council of Europe Activities against Corruption" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 364.

<sup>119</sup> GRECO website, <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=&CL=EN>.

<sup>120</sup> Csonka, P. and Vel, G. d.: "The Council of Europe Activities against Corruption" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 364-365.

<sup>121</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 422, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>122</sup> Pope, J. and TI 2000, p. 320.

requires states parties to ensure that those affected by corruption can sue the perpetrators under civil law. That has the advantage of making corruption controls partly self-enforcing by empowering victims to take action on their own initiative. The Convention also requires that the state pay compensation where persons have suffered as a consequence of officials acting corruptly in the course of their duties, thus recognising the principle that the state which fails adequately to protect those doing business with it, has responsibilities for the consequences.<sup>123</sup>

## 3.4 EUROPEAN UNION (EU)

The EU has adopted several instruments and measures to combat corruption, such as the *Joint Action on Corruption in the Private Sector* of 1998 and two legally binding conventions concerning corruption, i.e. the *Convention on the Protection of the European Communities' Financial Interests* and two *Protocols* thereto and the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the Member States of the European Union*.

### 3.4.1 CONVENTION ON THE PROTECTION OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS

The Convention was adopted in 1995 and entered into force in 2002. The Convention and its two Protocols are legally binding and address corruption and other financial or economic crimes as well as related conduct, but only insofar as the conduct involved affects the financial interests of the EU.<sup>124</sup>

The **First Protocol** was adopted in 1996 and it entered into force in 2002. The protocol provides for the criminalisation of both active and passive bribery and member states are to ensure the offences become punishable by effective, proportionate and dissuasive criminal sanctions.<sup>125</sup> It is primarily aimed at acts of corruption that damage, or are likely to damage, the European Communities' financial interests and it is applicable to community officials, national officials and officials of another member state.<sup>126</sup>

Further important anti-corruption provisions are contained in the **Second Protocol**. Those provisions make corruption of officials a predicate offence<sup>127</sup> of money laundering. They also provide for the liability of legal

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<sup>123</sup> Pope, J. and TI 2000, p. 278.

<sup>124</sup> UNODC: "The Global Programme against Corruption. UN Anti-Corruption Toolkit", p. 424, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>125</sup> Grotz, M.: "Legal Instruments of the European Union to Combat Corruption" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 382.

<sup>126</sup> UN: *United Nations Manual on Anti-Corruption Policy*, 2001, p. 68, <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

<sup>127</sup> An offence as a result of which proceeds have been generated that may become the subject of an offence as defined by money laundering provisions.

persons for active corruption of officials, sanctioned either by criminal or administrative fine, and confiscation of the proceeds of crime.<sup>128</sup>

### **3.4.2 CONVENTION ON THE FIGHT AGAINST CORRUPTION INVOLVING OFFICIALS OF THE EUROPEAN COMMUNITIES OF OFFICIALS OF MEMBER STATES OF THE EUROPEAN UNION**

This Convention was adopted in 1997 in order to help ensure that corrupt conduct involving Community officials or member states' officials is criminalized. Prior to the Convention, criminal law in most member states did not apply to officials of other member states.<sup>129</sup>

The conduct to which the Convention applies is essentially bribery and similar offences, which states parties are required to criminalise. It does not deal with fraud, money laundering or other corruption-related offences.<sup>130</sup>

This Convention has a wider scope than the *First Protocol*, which, owing to the subject matter of the parent convention, could only require member states to punish conduct damaging to the financial interests of the European Communities.<sup>131</sup>

But in spite of these conventions, Transparency International has criticised the EU for being ineffective in fighting corruption and claims it “lacks any clear framework for dealing with corruption”.<sup>132</sup>

## **3.5 ORGANIZATION OF AMERICAN STATES (OAS)**

The OAS is an international organisation which is comprised of 35 member states from the American hemisphere. The organisation works to “promote good governance, strengthen human rights, foster peace and security, expand trade, and address the complex problems caused by poverty, drugs

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<sup>128</sup> Grotz, M.: “Legal Instruments of the European Union to Combat Corruption” in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 385.

<sup>129</sup> UN: *United Nations Manual on Anti-Corruption Policy*, 2001, p. 69, <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

<sup>130</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 425, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>131</sup> Grotz, M.: “Legal Instruments of the European Union to Combat Corruption” in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 383-384.

<sup>132</sup> Reed, Q.: “Corruption and the EU accession process: who is better prepared?” in TI: *Global Corruption Report 2004*, p. 127, <http://www.globalcorruptionreport.org/>.

and corruption”.<sup>133</sup> The countries of the Americas can come together in OAS to debate issues of common interest. Many of these debates conclude in conventions or resolutions.<sup>134</sup>

The OAS has adopted several anti-corruption documents, such as the *Inter-American Program for Cooperation in the Fight against Corruption* of 1997. The *Inter-American Convention against Corruption* has, however, been the principal focus of the anti-corruption efforts of the organisation.

### 3.5.1 INTER-AMERICAN CONVENTION AGAINST CORRUPTION

In 1994 the heads of states and of governments of the OAS countries acknowledged that corruption was a problem of a multilateral nature and committed themselves to negotiate a hemispherical convention to fight it.<sup>135</sup> The Inter-American Convention against Corruption was the first multilateral anti-corruption convention negotiated in the world. It was adopted in 1996 and entered into force in 1997. It had been ratified by 33 states as of 26 February 2005.<sup>136</sup> Countries that are not OAS members may also become parties by acceding to the Convention. States parties to the Convention include developed countries, a number in the middle range, and some poor countries.

The Inter-American Convention is a binding legal instrument. Generally, the obligations to criminalize acts of corruption are mandatory, while states parties need only consider instituting others, such as the implementation of certain preventive measures. The Convention is broader in scope than the European and OECD anti-corruption conventions.<sup>137</sup>

The purpose of the Convention is to promote and strengthen the development by each of the states parties of the mechanisms needed to prevent, detect, punish and eradicate corruption as well as to promote, facilitate and regulate co-operation among states parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions. States parties have agreed to take various actions, such as the adoption of standards of conduct with mechanism for enforcement to prohibit the bribery of foreign

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<sup>133</sup> OAS website, “About the OAS”,

<http://www.oas.org/main/main.asp?sLang=E&sLink=../documents/eng/oasinbrief.asp>.

<sup>134</sup> Garcia-González, J.: “The Organisation of American States and the Fight against Corruption in the Americas” in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 390.

<sup>135</sup> Garcia-González, J.: “The Organisation of American States and the Fight against Corruption in the Americas” in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 392.

<sup>136</sup> OAS website,

<http://www.oas.org/main/main.asp?sLang=E&sLink=../documents/eng/oasinbrief.asp>.

<sup>137</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit”, p. 425-426, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

officials, to create the offence of “illicit enrichment” and to designate corruption as an extraditable offence.<sup>138</sup>

It should also be mentioned that the Convention facilitates the return of stolen moneys and declares that corruption offences shall not be regarded as “political” in character. Those charged with such offences can therefore not shelter behind the shield of “political persecution” to escape extradition to their home countries.<sup>139</sup>

In 2001 the parties to the convention approved a follow-up mechanism for its implementation.<sup>140</sup>

## 3.6 AFRICAN UNION (AU)

The AU was launched in 2002 to replace the Organisation of African Unity (OAU). The AU has 53 member states and aims to promote peace, security and solidarity on the African continent. Among the objectives of the AU is to “promote democratic principles and institutions, popular participation and good governance” and “sustainable development at the economic, social and cultural levels as well as the integration of African economies”.<sup>141</sup>

The fight against corruption was introduced at the regional level in Africa in 1998 when the assembly of heads of state and government decided to convene a meeting of experts to consider ways of removing obstacles to the enjoyment of economic, social and cultural rights, such as through the fight against corruption and impunity. This set the scene for the drafting of the *African Union Convention on Preventing and Combating Corruption*.<sup>142</sup>

### 3.6.1 THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The Convention was adopted in 2003. As of 26 February 2005 it had been signed by 35 countries and ratified by 8. The Convention needs 15 ratifications to enter into force.<sup>143</sup>

The Convention emphasises cooperation between state parties and encourages them to promote and strengthen the development of effective mechanisms to prevent, detect, punish and eradicate corruption and related

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<sup>138</sup> Pope, J. and TI 2000, p. 323.

<sup>139</sup> Pope, J. and TI 2000, p. 158.

<sup>140</sup> Garcia-González, J.: “The Organisation of American States and the Fight against Corruption in the Americas” in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 396.

<sup>141</sup> AU website, “About AU”, <http://www.africa-union.org/home/Welcome.htm>.

<sup>142</sup> Muna, A.: “The African Union Convention against Corruption” in TI: Global Corruption Report 2004, p. 117, <http://www.globalcorruptionreport.org/>.

<sup>143</sup> AU website, <http://www.africa-union.org/home/Welcome.htm>.

offences in Africa and to ensure the effectiveness of these measures. It focuses on both public and private sector corruption.<sup>144</sup> The Convention aims at strengthening laws on corruption by listing offences that should be punishable by domestic legislation and outlines measures to enable the detection and investigation of corruption offences. It also determines the jurisdiction of state parties; organises mutual assistance in relation to corruption and related offences and encourages the education and promotion of public awareness on the evils of corruption. The Convention establishes a framework for the monitoring and supervision of its enforcement. It has, however, been criticised for weak enforcement mechanism and also for a provision allowing signatories to opt out of selected issues.<sup>145</sup>

### **3.7 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)**

The SADC has been in existence since 1980. The 14 member states cover the larger part of sub-equatorial Africa. The main objectives of the SADC are of an economic nature but it is also concerned with political matters.<sup>146</sup>

In 1998 that SADC member states started to explore possibilities for greater regional co-operation to combat corruption. Those efforts culminated in a Protocol against Corruption.<sup>147</sup>

#### **3.7.1 PROTOCOL AGAINST CORRUPTION**

The Protocol was adopted in 2001. As of 12 October 2004 it had been signed by all the 14 member countries of the SADC and ratified by 8 of them.<sup>148</sup> The Protocol shall enter into force when it has been ratified by two thirds of the member states.

The main purposes of the Protocol are 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. It provides a wide set of preventive mechanisms which include the development of codes of conduct for public officials, transparency in the public procurement of goods and services, access to public information, protection of whistleblowers, establishment of

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<sup>144</sup> Muna, A.: "The African Union Convention against Corruption" in TI: Global Corruption Report 2004, p. 118, <http://www.globalcorruptionreport.org/>.

<sup>145</sup> Executive summary of the TI: Global Corruption Report 2004, p. 3, <http://www.globalcorruptionreport.org/>.

<sup>146</sup> Sands, P. and Klein P., 2001, p. 255.

<sup>147</sup> Gastrow, P.: "Combating Corruption in Southern Africa: Towards More Effective Regional and International Law Enforcement Co-operation" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 410.

<sup>148</sup> SADC website, [http://www.sadc.int/index.php?action=a1001&page\\_id=protocols\\_status](http://www.sadc.int/index.php?action=a1001&page_id=protocols_status).

anti-corruption agencies, development of systems of accountability and controls, participation of the media and civil society, and the use of public education and awareness as a way of fighting corruption. The Protocol focuses on corruption in the public and private sectors and it provides for the establishment of a committee of states parties to oversee its implementation.<sup>149</sup>

### 3.8 INTERNATIONAL FINANCIAL INSTITUTION

Previously, international financial institutions were reluctant to address corruption due to i.a. limitations in their charters and sensitivities of many member states.<sup>150</sup> In recent years the institutions have increasingly realised how harmful corruption is for economic development. The World Bank has, for example, identified corruption as the single greatest obstacle to economic and social development.<sup>151</sup>

It has become conventional wisdom that development aid can do more harm than good if aid money is channeled into societies with bad governance, because the money might be used to stabilize inefficient structures and increase corruption. This has been realised by the major international financial institutions, such as the World Bank (WB), United Development Programme (UNDP) and the International Monetary Fund (IMF) which approach the issue of corruption as a governance issue.<sup>152</sup>

As already mentioned in section 2 those institutions, and many bilateral aid agencies and regional development banks as well, have adopted guidelines on *good governance and corruption* and are increasingly basing their aid and loans on the condition that reforms ensuring good governance are undertaken.

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<sup>149</sup> Gastrow, P.: "Combating Corruption in Southern Africa: Towards More Effective Regional and International Law Enforcement Co-operation" in Fijnaut, C. and Huberts, L. (eds.), *Corruption, Integrity and Law Enforcement*, 2002, p. 415.

<sup>150</sup> UNDP: *Fighting Corruption to Improve Governance*, 1999, p. 24, [http://www.undp.org/governance/docsaccount/fighting\\_corruption\\_to\\_improve\\_governance.pdf](http://www.undp.org/governance/docsaccount/fighting_corruption_to_improve_governance.pdf).

<sup>151</sup> World Bank, "Anticorruption", <http://www1.worldbank.org/publicsector/anticorrupt/index.cfm>.

<sup>152</sup> See e.g. the websites of the WB, UNDP and IMF.

## 3.9 INTERNATIONAL INITIATIVES OF THE PRIVATE SECTOR AND NON-GOVERNMENTAL ORGANISATIONS

A number of international private sector and non-governmental organisations (NGOs) have made very important contributions to the fight against corruption. Only few such international initiatives will, however, be mentioned here, i.e. those of the International Chamber of Commerce (ICC), the UN Global Compact and last but not least the Transparency International (TI).

Corruption very often involves public officials and private sector actors. The globalisation of the world economies has made many multinational companies so powerful that often they exceed in size and influence the nations with which they deal.<sup>153</sup> Such companies are often central actors in large-scale corrupt deals. International and national anti-corruption efforts have, therefore, obviously much more chance of success if the the private sector, i.e. the companies, support them.

### 3.9.1 THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce represents more than 7000 member companies in over 130 countries. It is the world business organisation, the primary body of the international private sector and promotes a market economy and an open and international trade and investment system. The ICC has produced rules that govern the conduct of business across borders, including the ICC Rules of Conduct to Combat Extortion and Bribery in International Business Transactions.<sup>154</sup> Those rules of conduct are intended as a method of self-regulation by international business. They are of a general nature constituting what is considered good commercial practice in the matters to which they relate but are without legal effect.

Very many business people have realised that corruption has a corrosive effect on the integrity and finances of their firms and that there is a real threat of adverse publicity following exposure.<sup>155</sup> The private sector's commitment to fight corruption does, however, involve a number of difficulties. It is, for example, difficult to reject corruption when competitors continue to resort to it for market access or to gain a favour. An examination of 246 codes of corporate conduct mainly from businesses and business associations from 24 OECD countries showed that bribery and

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<sup>153</sup> Rose-Ackerman, S. 1999, p. 187.

<sup>154</sup> Heimann, F. and Hirsch, M.: "How International Business Combats Extortion and Bribery: Anti-corruption Efforts by the International Chamber of Commerce" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 169.

<sup>155</sup> Heimann, F. and Hirsch, M.: "How International Business Combats Extortion and Bribery: Anti-corruption Efforts by the International Chamber of Commerce" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 169-170.



corruption are among the most commonly cited issues.<sup>156</sup> Such codes do, without doubt, often include genuine attempts by companies to establish ethical standards for themselves and sometimes their subcontractors or suppliers. Too often, however, they simply become public relations exercises, which have little practical impact and they can never be an alternative to effective government regulations.

### 3.9.2 THE GLOBAL COMPACT

In 1999, the UN Secretary-General, Kofi Annan, challenged business leaders to join an international initiative – the Global Compact – that would bring companies together with UN agencies, labour and civil society to support nine principles in the areas of human rights, labour and the environment. In 2004 the Secretary-General announced the addition of a tenth principle, against corruption: *Businesses should work against all forms of corruption, including extortion and bribery*. Today, hundreds of companies from all regions of the world are engaged in the Global Compact.<sup>157</sup>

The Global Compact is a voluntary corporate initiative. Transparency is pursued by asking participating companies to publish annual reports on their activities in support of the principles. The principles are, however, not legally enforceable standards and there is no monitoring of their enforcement. Many NGOs are critical of the Global Compact for this reason. They argue that it allows companies to appear committed to sound corporate governance, but does nothing to ensure there are real improvements in business behaviour.<sup>158</sup>

Much of the corruption in a society involves two principal actor, the government and the private sector. The general public is typically the major victim. It has, therefore, been maintained that “corruption is controlled only when the citizens no longer tolerate it”.<sup>159</sup> Civil society as an independent actor representing the interests of the general public is uniquely positioned to investigate and bring to light cases of corruption. This has been realised in many international anti-corruption instruments, i.a. the UN Convention against Corruption which calls for the involvement of civil society for anti-corruption purposes.<sup>160</sup>

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<sup>156</sup> Gordon, K. and Miyake, M.: “Instilling an Anti-bribery Corporate Culture” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 186.

<sup>157</sup> The Global Compact, “About the GC”, <http://www.unglobalcompact.org/Portal/Default.asp?>

<sup>158</sup> Rooke, P.: “The UN Convention against Corruption” in TI: Global Corruption Report 2004, p. 115, <http://www.globalcorruptionreport.org/>.

<sup>159</sup> WB: “Helping Countries Combat Corruption. The Role of the World Bank”, 1997, p. 44-45, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

<sup>160</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit”, p. 413, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

For civil society to realize its full potential to fight corruption it requires an appropriate legal and regulatory framework, including basic human rights such as the freedom of expression, association and the freedom to establish nongovernmental entities. Civil society organisations are, however, not democratically elected and they are not immune to corruption. They should, therefore, be held to high standards of accountability, transparency and democratic management structures.<sup>161</sup>

### 3.9.3 TRANSPARENCY INTERNATIONAL

Transparency International (TI) which was founded in 1993 is, without doubt, the most important international non-governmental organisation in the field of anti-corruption. Through its international secretariat and more than 85 independent national chapters around the world it works at both the national and international level to curb both the supply and demand of corruption.<sup>162</sup> The organisation does not target individual cases, but concentrates on facilitating the construction of a dialogue between government, civil society and the private sector.<sup>163</sup> It works to raise awareness about the damaging effects of corruption, advocates policy reform, works towards the implementation of multilateral conventions and subsequently monitors compliance by governments, corporations and banks. TI is financed by donations and it has a comprehensive financing policy which provides that it does not accept funding from donors if the acceptance impairs its independence to pursue its mission or endangers its integrity and reputation.<sup>164</sup>

TI is the only international non-governmental organisation that focuses exclusively and globally on the fight against corruption. Its efforts have helped set the framework for actions by government and it has been argued that TI is largely responsible for putting corruption on the international agenda.<sup>165</sup>

Since 1995, TI has published annually its *Corruption Perception Index (CPI)*, which ranks countries in terms of the likelihood of being asked to pay bribes when doing business there. The index reflects perceptions of the degree of corruption among public officials and politicians as seen by business people, academics and risk analysts.<sup>166</sup> The CPI has become a very effective tool in the fight against corruption internationally and

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<sup>161</sup> WB “Anticorruption”,

<http://www1.worldbank.org/publicsector/anticorrupt/civilsociety.htm>.

<sup>162</sup> TI website, “About TI”, [http://www.transparency.org/about\\_ti/index.html](http://www.transparency.org/about_ti/index.html).

<sup>163</sup> UNDP: *Fighting Corruption to Improve Governance*, 1999, p. 24, [http://www.undp.org/governance/docsaccount/fighting\\_corruption\\_to\\_improve\\_governance.pdf](http://www.undp.org/governance/docsaccount/fighting_corruption_to_improve_governance.pdf).

<sup>164</sup> TI Web site, “TI Donations Policy, Procedure and Guidelines”, [http://www.transparency.org/building\\_coalitions/codes/donation\\_policy.html](http://www.transparency.org/building_coalitions/codes/donation_policy.html).

<sup>165</sup> Wiehen, M. H.: “Citizens Against Corruption: Calling Governments to Account” in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 212.

<sup>166</sup> Executive summary of the TI: *Global Corruption Report 2004*, p. 4, <http://www.globalcorruptionreport.org/>.

nationally and it is carefully read by business people, governments and even the general public.

In 1999 TI published for the first time the *Bribe Payers Index* (BPI). It ranks exporting countries in terms of the degree to which they are perceived as the homes of bribe-paying companies.<sup>167</sup>

The gradual understanding of the international community of both the scope and seriousness of the problem of corruption is demonstrated by the efforts of those aforementioned international organisations, the private sector and the civil society to address it in a coordinated manner. Those efforts have progressed from rather general considerations to the development of binding legal obligations and from regional instruments, e.g. those adopted by the COE, EU and OAS, to the globally-based United Nations Convention against corruption. The instruments and measures adopted by the international organisations have also progressed from relatively narrowly-focused measures, such as the OECD Convention, to broader definitions of corruption and more broadly-focused measures against it. This trend can i.a. be seen from the UN Convention which is very comprehensive in the sense that it deals with many different forms of corruption and multidisciplinary in the sense that it contains broad possible measures to deal with it.

The legally binding conventions which have been described in this section are very different in scope. Some of them are very narrow, only dealing with very limited kind of corruption, such as the OECD Convention, which only deals with bribery of foreign public officials. Others define corruption much broader, the youngest of them, the UN Convention having the broadest scope. The main focus of the conventions is on corruption in the public sector but some of them, such as the African Convention, the COE's Conventions and the UN Convention also have provisions dealing with private sector corruption. The conventions provide for various measures to combat corruption. *Criminalisation* of the conduct defined as corrupt and effective sanctions are the measures most often provided for but many of them also provide for *preventive measures*, such as the establishment of anti-corruption bodies, whistleblower protection, codes of conduct and even transparency in political financing. Generally the conventions contain some provisions to encourage and facilitate *international co-operation* to prevent and fight corruption.

Many states are parties to more than one of the anti-corruption conventions. This can possibly lead to some confusion. But all of the conventions are relatively new and arguably the most important of them, the UN Convention, has even not entered into force yet. The relationship between the anti-corruption conventions will no doubt become clearer with experience and hopefully they will be mutually reinforcing.

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<sup>167</sup> Wiehen, M. H.: "Citizens Against Corruption: Calling Governments to Account" in OECD: *No Longer Business as Usual. Fighting Bribery and Corruption*, p. 210.

All of the conventions, instruments and initiatives of international organisations and other international players described in this section are a part of the complex international framework of regulations concerning corruption. This framework has either direct or indirect impact on every state in one way or the other. Very many states are members of global or regional organisations which have adopted various anti-corruption instruments and many of them have ratified legally binding anti-corruption conventions as well. The pressure from NGOs and the private sector is also increasing and the globalization of international business transactions is putting pressure on every state in the world to take part in international efforts to prevent and fight corruption. Foreign firms are less interested in investing in countries which are not seriously trying to contain corruption and international financial organisations and donors are demanding that states take anti-corruption measures. However, only the international conventions are legally binding and then only for states which have become parties to them and thereby have taken on obligations according to the conventions. Iceland is a member of the OECD, COE and the UN and has already ratified two anti-corruption conventions adopted by those organizations. The decision to ratify a convention is a political one and therefore it can not be maintained that Iceland will eventually become a party to all the conventions. Despite this uncertainty, I will in the following discussion assume that this will be the case.

# 4 THE SITUATION IN ICELAND AND INTERNATIONAL OBLIGATIONS

In this section I will look at the context and propensity for corruption in Iceland, seen by external evaluations and by Icelanders themselves. This will lead to observations concerning what is, according to relevant international conventions, required of states parties, with emphasis on requirements that are of interest in relations to Icelandic conditions. I will primarily consider whether and how the conventions deal with the kind of corruption which arguably is an issue in the Icelandic society, leading to deductions about possible shortcomings in the Icelandic legislation. Finally, there will be a brief discussion on if and how corruption in Iceland might be an issue under international human rights standards and/or good governance guidelines.

Iceland has a dualistic system in relations to national law and international conventions with legal obligations. It is however recognised that national law is to be interpreted in conformity with international legal obligations that Iceland has undertaken.<sup>168</sup>

To make the link between international obligations and Icelandic laws, and practice under those laws, I will start by introducing some key characteristics of Icelandic society and what those characteristics may, a priori, say about the likelihood of corruption. I will then frame some corruption related issues raised in the national arena and political discourse in recent years.

## 4.1 ICELAND – CHARACTERISTICS AND LIKELIHOOD OF CORRUPTION

Iceland is a small island in the North Atlantic Ocean, with a population of approximately 300 000. The standard of living in Iceland ranks among the highest in the world, education levels are very high and life expectancy is approximately 80 years.

After being ruled for centuries by Norway and Denmark, Iceland gained independence and became a republic in 1944. The Icelandic legislation is inspired by Nordic principles of law. The constitution vests power in a president, whose functions are mainly ceremonial, a prime minister, a legislature, and a judiciary. The prime minister, who performs most executive functions, is responsible to the legislature.

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<sup>168</sup> See e.g. Schram, G.G., 1986, p. 16-17 and Snaevarr, Á., 1988, p. 262-272.

The constitution provides i.a. for freedoms of religion, speech, association, peaceful assembly and the independence of the judiciary. Discrimination on grounds, such as race, opinion, social class, or sex is outlawed.

Icelanders can change their government democratically and multiparty governments have been in power since independence. Five political movements are currently represented in the parliament. The largest party is the Independence Party which has formed a coalition government with the Progressive Party for ten years. The current Foreign Minister, was until recently the Prime Minister and the longest serving Prime Minister in Europe.

Fishing accounts for two-thirds of Iceland's exports and the bulk of Iceland's international trade and investment remains with European countries and to a lesser degree the United States and Japan. While Iceland has strong historical, cultural, and economic ties with Europe, Icelanders are hesitant to join the European Union.

Iceland, clearly has many characteristics that would point to an expectation of low level of corruption:

- A well educated nation, with a long tradition of literacy and judicial settlement of disputes.
- Economic affluence, combined with historically equitable distribution of income and wealth, plus absence of abject poverty.
- A Nordic country, steeped in traditions that are widely seen to have produced some of the least corrupt societies on earth.
- A small society, with a high level of transparency, which makes hiding ill gotten gains more difficult.

With an, a priori, assumption of a society unlikely to have systemic corruption problems, the following sections will look at how the Icelandic people themselves judge the corruption situation and also at specific cases that have been brought up in public, either in a judicial setting or in the public debate.

## **4.2 IS THERE A CORRUPTION PROBLEM IN ICELAND? – RELEVANT ANTI-CORRUPTION CONVENTIONS**

Corruption has not been much researched by scholars in Iceland and therefore reliable material concerning the issue is scarce. The reason for this is probably to some extent that most Icelanders have been of the opinion that the Icelandic society is mostly free of corruption.<sup>169</sup> It is also worth

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<sup>169</sup> Having argued that the common opinion in Iceland has been that corruption is not a serious problem it is worth mentioning that according to a poll involving 1261 persons

noting that research into corruption is, almost by definition, notoriously difficult. Few cases concerning corruption have been dealt with by Icelandic courts and some of them are so old that they are of little value evaluating the current situation. This lack of reliable research means that I must rely more on public debate, articles and opinion pieces in the Icelandic media and my own observations.

While there has been limited Icelandic research into corruption, some interesting external evaluations and surveys, conducted in recent years, give an insight into perceptions about corruption in the country. The surveys and institutions in question are: Transparency International Corruption Perception Index (annually, latest 2004), The Council of Europe GRECO evaluation team (GET) (2001 and 2004) and OECD evaluation team (2003).

The conclusion of TI, which looks at perceived corruption in the public sector, has in recent years placed Iceland among the countries with lowest level of corruption in the world (top 4).<sup>170</sup> In this connection it should be mentioned that an Icelandic TI chapter does not exist.

The GET evaluation was focused on only few of several principles related to corruption, endorsed by COE, of which Iceland is a member. Their overall conclusion was that the framework for combating corruption is in place and that there is a general sense of corruption not being a major societal problem.<sup>171</sup>

The OECD evaluation, focusing on bribery of foreign public officials in international business transactions, similarly concluded that the framework for avoidance was mostly in place.<sup>172</sup>

All three surveys, however, seem to suffer from a relatively narrow approach to the question of corruption.<sup>173</sup> As stated earlier in this thesis corruption can consist of a variety of actions including bribery, extortion, fraud and various acts of favoritism, such as nepotism, cronyism and trading in influence. None of the above mentioned surveys had a clear focus on favoritism, which is arguably where the risk is the greatest in Iceland.

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which was conducted in 2000, measuring the importance of nepotism, personal contacts and clientelism in Icelandic municipalities, these factors were considered to be significant by almost 80% of respondents. See Kristinsson, G. H., 2001, p. 100-101).

<sup>170</sup> See TI website "Corruption Surveys and Indices",

<http://www.transparency.org/surveys/index.html#cpi>.

<sup>171</sup> See the GET evaluations reports on Iceland, <http://www.greco.coe.int/>.

<sup>172</sup> See reports on the implementation of the OECD Convention in Iceland, [http://www.oecd.org/infobycountry/0,2646,en\\_2649\\_37447\\_1\\_70519\\_119663\\_1\\_37447,00.html](http://www.oecd.org/infobycountry/0,2646,en_2649_37447_1_70519_119663_1_37447,00.html).

<sup>173</sup> The Greco evaluation team (GET) noted: "The GET is of the opinion that the perspective of the Icelandic authorities regarding the phenomenon of corruption is somewhat narrow, focusing on bribery only and does not sufficiently take into account related problems such as trading in influence or fraud." See GRECO, "First Evaluation Round. Evaluation Report on Iceland", 2001, p. 10, <http://www.greco.coe.int/>.

Nevertheless, the surveys make several references to favoritism corruption risks. The GET 2001 survey states that “the fact that Iceland is a country with a small population on the one hand can help ensure transparency but on the other can generate conflicts of interest and compound corruption.”<sup>174</sup> In a GET report from 2004 they point to “research suggesting that nepotism, personal contacts and political patronage has a significant impact on local government, and public procurement at the local level was particularly mentioned as an area at risk.”<sup>175</sup> Finally, “the GET was particularly concerned about the absence of regulations on the financing of political parties.”<sup>176</sup> Similarly, OECD concluded that “due to the small size of the Icelandic population (less than 300,000), a certain grey area of conflicts of interest and exchange of advantages may exist in Iceland”<sup>177</sup>, and “there are no rules of conflicts of interests or on disclosure of business interest by public officials.”<sup>178</sup>

Iceland is a member of three international organisations, which have adopted anti-corruption conventions. They are the OECD, the COE and the UN. These organisations have adopted four conventions where the main focus is on corruption. Iceland has already ratified two of them and it can be reasonably assumed that the other two will be ratified. The conventions differ considerably in scope, but the overall comprehensiveness makes it impossible to examine them fully in this thesis. Going forward, I will primarily examine provisions that relate to the particular form of corruption or risk of corruption described in the following sections.

Iceland ratified the **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** in 1998, the first OECD country to do so. In 1998, it enacted implementing legislation, Act No. 147/1998, amending the General Penal Code. At the same time, the Icelandic Parliament passed Act No 144/1998 on the Criminal Liability of Legal Persons on Account of Bribery of Public Officials. This legislation entered into force on 30 December 1998.

Iceland ratified the **COE’s Criminal Law Convention on Corruption** in February 2004 and it entered into force for Iceland in June the same year 2004. Iceland has signed the Protocol to the Convention but had not ratified it as of 26 February 2005<sup>179</sup>.

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<sup>174</sup> GRECO, “First Evaluation Round. Evaluation Report on Iceland”, 2001, p. 10, <http://www.greco.coe.int/>.

<sup>175</sup> GRECO, “Second Evaluation Round. Evaluation Report on Iceland”, 2004, p. 11, <http://www.greco.coe.int/>.

<sup>176</sup> GRECO, “First Evaluation Round. Evaluation Report on Iceland”, 2001, p. 10, <http://www.greco.coe.int/>.

<sup>177</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), “Iceland: Phase 2”, 2003, p. 8, <http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

<sup>178</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), “Iceland: Phase 2”, 2003, p. 8, <http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

<sup>179</sup> GRECO website, <http://www.greco.coe.int/>.



Iceland signed the **COE's Civil Law Convention on Corruption** in 1999 but had not ratified it as of 26 February 2005<sup>180</sup>.

The **United Nations Convention against Corruption** shall enter into force when 30 states have ratified it. As of 15 Mars 2005 118 states had signed the Convention and 19 states had ratified it. Iceland had then neither signed nor ratified the Convention<sup>181</sup>.

As mentioned earlier the UN Convention is both very comprehensive and wide in scope. Many of its provisions are expressed in the form of guiding principles and encouragement rather than clear legal obligations. Therefore, in this section I will focus on those provisions that are relevant in the Icelandic context and in particular those features that address the particular corruption risks described in the following sections.

#### **4.2.1 IS "FINANCIAL CORRUPTION" AN ISSUE IN ICELAND?**

According to the aforementioned international evaluations financial corruption is not a serious problem in Iceland. It should be noted, however, that evaluators also pointed out that the definition of financial corruption seems to be perceived narrowly by the society.<sup>182</sup> Both of these assessments are accurate, in my opinion.

The assessment that financial corruption is not a serious issue in Iceland is supported by the fact that such cases rarely come to light. The reason for this might be that effort is not made to deal with such cases. But there is not much evidence of that and the reality seems to be that when cases of financial corruption do occur, they are dealt with properly and the people involved are made accountable. An example of this is a recent case where a member of the Parliament was convicted and sent to jail for i.a. passive bribery and embezzlement in relation to his duties as a chairman of a governmental committee.<sup>183</sup> He also had to resign from the Parliament.

Cases of embezzlement of public officials have occasionally occurred. In such cases the supervisory system seems to have worked quite effectively. There have been cases where directors of public institutions have lost their jobs. In these cases there was extensive coverage in the media and public uproar. It can therefore be claimed that there is little tolerance for such conduct in the Icelandic society. In a small society, like the Icelandic, this

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<sup>180</sup> GRECO website, <http://www.greco.coe.int/>.

<sup>181</sup> UNODC website, "United Nations Convention against Corruption", [http://www.unodc.org/unodc/en/crime\\_signatures\\_corruption.html](http://www.unodc.org/unodc/en/crime_signatures_corruption.html).

<sup>182</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), "Iceland: Phase 2", 2003, p. 7, <http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

<sup>183</sup> See the Supreme Court Judgement of 6 February 2003 in case no. 393/2002, the Prosecutor General against Árna Johnsen and others, <http://www.haestirettur.is/domar?nr=1221>.

public condemnation is a big part of the punishment and therefore probably plays an important role in preventing such conduct.

While financial corruption is most probably not a serious problem in Iceland there are, nevertheless, some risks and indications that suggest cause for concern. Tax fraud has been and is a problem in Iceland. It doesn't, however, seem to be considered a serious offense by the public and many are willing to participate, e.g. by buying services without paying the appropriate taxes. A recent report on tax fraud in Iceland showed i.a. that 70% of the respondents in a poll said that they found it understandable that people wanted to earn money without having to pay taxes and according to the poll a majority of those asked were willing to participate in tax evasion.<sup>184</sup> This indicates that there is considerable tolerance for tax evasion in the Icelandic society. The fact that people are willing to participate in tax evasion, i.e. a conduct acquiring private gain by sacrificing public interests, can possibly be an indication of an attitude that could be conducive to financial corruption.

Another example was discussed in the media recently, a case of doctors travelling abroad financed by pharmaceutical companies.<sup>185</sup> This can obviously lead to a conflict of interests, not the least because these doctors are at least part-time government-employed and they do recommend certain medicines to patients, the medicines being covered to a large extent by the government. It came to light in connection to this case that the government health institutions where these doctors are employed had not kept records regarding these trips and could therefore not give accurate information regarding them.

Similarly, competition authorities concluded, a few years ago, that the three oil companies, which dominate the market in Iceland and have done for decades, had been engaged in widespread price-fixing over a long period of time. The extra cost to customers was estimated in billions of Icelandic kronas (1 US \$ is approximately 60 Icelandic kronas). This would indicate that even in a small and transparent society, financial corruption can take place and continue for considerable period of time, before it is discovered. A less blatant form of price-fixing than the one in this case, might have been able to continue for much longer, in part because of lack of media scrutiny and investigative journalism.<sup>186</sup>

In March 2003 the Prime Minister stated that the Chairman of the Board of one of the biggest corporations in Iceland had made a suggestion of bribery

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<sup>184</sup> "Skýrsla starfshóps um umfang skattsvika á Íslandi", p. 15, <http://www.althingi.is/altext/131/s/0664.html>.

<sup>185</sup> See e.g. editorial in Morgunbladid 5 February 2005 and Fréttabladid 4 February 2005, p. 6.

<sup>186</sup> Here reference can be made to this comment made in the OECD report from 2003, p. 14: "Until recently in Iceland, newspapers were closely linked to political parties, and there is little tradition of investigative journalism." See OECD, The Working Group on Bribery in International Business Transactions (CIME), "Iceland: Phase 2", 2003, p. 14, <http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

in order to influence his attitude towards the operation of the corporation. In this connection the Prime Minister was quoted as saying about the chief executive of the corporation: "If the man is willing to offer the Prime Minister of a nation such an amount of money, what has he already offered people that are more feeble and might need less money".<sup>187</sup> At the same time another person stated that he had been offered high bribes by the same corporation against him revoking legal actions against the corporation.<sup>188</sup> The leaders of the corporation denied both accusations.

The Icelandic economy has been and still is going through transition which involves e.g. privatisation of functions which traditionally have been run by the government, such as the banking system and telecommunications. The competition has increased and companies have become more aggressive. This in combination with the fact that this is such a small society with close relations between the government and the private sector and very few big companies, increases the risks of enhancement of financial corruption. When the state owned banks were privatized, a few years ago, there was considerable criticism of the government's handling of the process, particularly the selection of bidders, which were seen as being linked to the two ruling parties, and the price level, which was seen as below real value. The latter criticism seems to have been borne out by developments, as the banks have seen their value multiplied in just a few years. These accusations of cronyism in privatization, were similar to those raised in privatisation processes in Eastern Europe.

Those aforementioned examples do not prove anything. They do, however, suggest that there is every reason to be aware of the dangers and use all measures to prevent and fight financial corruption.

The Icelandic legislation and implementation of the **OECD Convention** has been evaluated by the OECD's Working Group on Bribery in International Business Transactions. The Group confirmed that the Icelandic legislation conformed to the standards of the Convention.<sup>189</sup> The working Group did not point out any serious shortcomings in the implementation of the Convention<sup>190</sup>.

While there is no reason to doubt the conclusions of the Working Group, questions can be raised about the overall effectiveness of the convention and about Icelandic efforts at enforcement.

There are no known Icelandic court cases concerning violations of the law provisions passed to fulfill the obligations under the OECD Convention.

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<sup>187</sup> See e.g. Morgunbladid 4 Mars 2003, frontpage and p. 10.

<sup>188</sup> See e.g. Morgunbladid 4 Mars 2003, frontpage and p. 10.

<sup>189</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), "Iceland. Review of Implementation of the Convention and 1997 Recommendation", 1999, p. 20, <http://www.oecd.org/dataoecd/14/40/2387563.pdf>.

<sup>190</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), "Iceland: Phase 2", 2003, <http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

The explanation for this may be that Icelandic companies have fully complied with the law. There are however, no indications of any major efforts to uncover and solve possible violations.

As the Convention focuses on bribing foreign officials, it is worth noting that in recent years Icelandic companies have increasingly invested abroad, and in sectors and countries often seen as more vulnerable for corruption. This risk was pointed out by the the OECD Working Group: “Most of the corporate codes of conduct of the companies represented during the on-site visit expressly prohibit the receiving of bribes, but there is no express prohibition for giving or offering of bribes. This should be viewed against the background of an increasing trend of acquisition abroad with a corresponding increase in risks.”<sup>191</sup> This could also indicate certain level of double standards, with companies regarding passive bribery a more serious offense than active bribery. It can also be considered credible to conclude that bribing Icelandic officials is considered more serious than bribing their foreign colleagues, particularly in countries where corruption is endemic.

The scope of what the Icelandic society generally considers to be bribery was of concern to the OECD Working Group: “Overall, statements from civil society representatives indicate a general perception that only bribes in the form of monetary advantages constitute corruption. This may undermine the apparent strong rejection of bribery in Icelandic society and may raise questions about the attitude of Icelandic companies abroad”.<sup>192</sup>

Based on the above it can be argued that Icelandic authorities need to strengthen supervision of companies operating abroad, if the intention is to fulfill their obligations and honour the spirit of the Convention.

As the OECD Convention focuses on bribery of foreign public officials in international transactions it does not apply in any direct way to the type of corruption which is arguably a risk or reality in Iceland.

To the best of my judgment Iceland has substantially fulfilled its obligations under the **COE’s Criminal Law Convention** by passing Act no. 125/2003, which i.a. amended the Penal Code. Accounting rules, based on Icelandic law, also apparently fulfil the demands of the Convention. Furthermore there is a provision in article 26 of the Competition Act no. 8/1993 which prohibits bribery in the private sector.

While there is no reason to suspect that the authorities or the civil society in Iceland would have any hesitation or misgivings about fulfilling the obligations of the Convention, it can be argued that the authorities need to

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<sup>191</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), “Iceland: Phase 2”, 2003, p. 13,

<http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

<sup>192</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), “Iceland: Phase 2”, 2003, p. 7,

<http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

consider whether they have done enough to fulfill the provisions of article 22 of the Convention, which provides: “Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with investigating or prosecuting authorities. b) witnesses who give testimony concerning these offences”.

This concern was also voiced by OECD evaluation team where they pointed to the following regarding whistleblower<sup>193</sup> protection: “No directives or legislative provisions or rules exist with regard to the protection of witnesses and/or of their families in cases of bribery ... A media representative reported a case in which an employee was dismissed because he had informed a newspaper of unethical acts committed in his company instead of informing the board of directors. At that time, the question of the protection of whistleblowers was raised, but no action was taken. Indeed, the case was never brought before court, but the trade union representative did not think that the employee would have obtained more than the usual three months salary as damages for having been dismissed. Trade unions and journalists are of the opinion that hot lines and programs for protection of whistleblowers and witnesses are not urgently needed in Iceland. One of the reasons is that in view of the good economic situation, an employee dismissed for having testified against his/her company would easily find a new position. Similarly, the Icelandic authorities state that it is difficult to provide broader witness protection in a small country like Iceland, with a closely-knit community. The lead examiners are nevertheless of the opinion that the possibility to dismiss an employee because he/she reported a criminal offence represents a disincentive for reporting and, in this context, encourage Iceland to reflect further on the issue”,<sup>194</sup>.

The conclusion of the Working Group is correct, in my opinion, and the claims made by the representatives of the journalists and trade unions are highly dubious. A strong argument can be made that there is an even greater need for whistleblower protection in a small society, where a whistleblower can easily be labelled as a troublemaker throughout society.

Assuming that the **COE’s Civil Law Convention** enters into force for Iceland, current Icelandic law, such as contract legislation and general compensation rules, substantially fulfills the obligations of States Parties. There are, however, some provisions in the Convention which authorities might need to consider. For example, there might be a case for increasing the scope for the courts to award plaintiffs compensations for non-pecuniary loss, as provided for in article 3, paragraph 2. Furthermore, as pointed out earlier, Icelandic law does not provide for protection of whistleblowers.

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<sup>193</sup> A “whistleblower” is a person who suspects corruption and reports the suspicion to responsible persons or authorities.

<sup>194</sup> OECD, The Working Group on Bribery in International Business Transactions (CIME), “Iceland: Phase 2”, 2003, p. 13-14, <http://www.oecd.org/dataoecd/12/8/2498248.pdf>.

This stands in contrast to article 9 of the Convention, where it is stated that “each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities”. Even though current Icelandic law apparently substantially fulfils the requirements of the Convention, it would be recommended to pass a designated legislation to ensure that Icelandic law fulfill the obligations and encourage the civil service and the judiciary to apply the spirit of the Convention.

Finally, article 8, paragraph 4 of the **UN Convention** provides: “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”. Current Icelandic law does not provide clear rules or guidelines concerning the duty of officials to report irregularities. If the UN Convention enters into force for Iceland, it would be a good opportunity to examine the need for clearer or stronger legal provisions.

Having stated that even though there are arguably some signs of risks, as shown by the above examples, financial corruption can currently not be defined as a major problem in the Icelandic society and, with the exception of unsatisfactory protection of whistleblowers, the legislation seems to fulfil the requirements of relevant anti-corruption conventions. Corruption-related problems in Iceland, if judged by public debate, media coverage and my own opinion are more related to misuse of political power, especially recruitment in the civil service, and lack of rules and transparency regarding conflict of interests and financing of political parties, campaigns and individual candidates.

#### **4.2.2 RECRUITMENT IN THE CIVIL SERVICE**

A well known Icelandic author who has been politically active and critical of the current government has in a radio interview quoted the chairman of the biggest political party in Iceland and former Prime Minister saying in a private conversation: “Every civil servant has got his/her job through party-political connections”<sup>195</sup>. This statement has neither been confirmed nor denied by the Minister and of course it doesn’t proof anything. Many, however, not the least those opposing the government politically, believe this is the reality.

In the following section, I will provide an overview of key laws and regulations, which guide recruitment to the civil service, and link those to the current political landscape. I will then provide some cases of alleged misuse of power, to illustrate the context of possible problems and discuss their link to international legal frameworks.

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<sup>195</sup> See DV 12 May 2004, p. 31.

The thesis focuses on the current situation in the Icelandic society. The same two political parties have been in power for more than ten years. The examples of alleged abuse of public power are recent and most often concern use of political power by those two parties.<sup>196</sup> It must be emphasised that before those parties formed the current government the situation was, to my best knowledge, not different.<sup>197</sup> As this is a matter of the use of political power, opinions are often divided according to political views. Those responsible seldom admit that they have misused their power and the most forceful critics are often political opponents of those in power. This often makes it difficult to determine what is real and what is just a perception.

The Government Employees Act, no. 70/1996<sup>198</sup>, sets the legal framework for public employment. Recruitment to state administration is based on the principle that all persons fulfilling the general requirements provided by law are eligible for engagement in a position. Vacant posts must be advertised and the public is entitled to information about who has applied for a vacant post (Article 7). The person best suited, as assessed on the basis of material and pertinent considerations, will be engaged. It can therefore be argued that the necessary legal framework is in place. The question, on the other hand is, whether the responsible authorities use this tool to find and recruit the best suited applicants for non political positions in the civil service and base their decisions on merit but not on unobjective considerations, such as political, family or friendship connections.

In this connection reference should also be made to article 11, paragraph 2 in the Administration Procedure Act, no. 37/1993, where discrimination on certain grounds, e.g., political opinion, is prohibited. This provision applies to recruitment in the civil service. In preparatory notes with the provision it is clarified that it would not be a violation of the provision if political considerations would be taken into account when political positions are being filled, e.g. the position of an assistant to a minister or a position of a mayor. However, when non-political positions in the civil service are being filled, it is prohibited to take political opinions of the applicants into account.

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<sup>196</sup> The opposition parties have, however, occasionally been accused of favoritism. As a recent example a reference can be made to an article (“Traustur vinur”) in Morgunbladid 14 Mars 2005. A member of the parliament and the largest opposition party, “Samfylkingin”, was given a high position in an independent university. The author of the article pointed out that the vacant post had not been advertised and indicated that the appointment was based on cronyism and politically motivated.

<sup>197</sup> In a recent meeting of Icelandic sociologists a lecturer in public administration claimed that appointments to civil service positions, based on political considerations, have become more frequent in recent years, possibly because the two parties forming the current government have been in power for a long time. “It is possible that they have forgotten that civil service positions are “owned” by the people but not by them”, he was quoted saying. See Fréttabladid, 22 Mars, p. 12.

<sup>198</sup> Acts passed by the Icelandic Parliament and preparatory notes are available at the website of the Parliament: ”Alþingi. Lagasafn”, <http://www.althingi.is/vefur/lagasafn.html>.

It has been claimed that recruitment for the sought after positions in the Icelandic civil service is in most cases decided on basis of political or other connections but not on merit. Critics point out that the most sought after positions, such as ambassadors or directors of governmental institutions and companies, are frequently given to politicians who for one reason or the other want or have to retire from political life. To substantiate their criticism, they point out that, for example, the Director General of the National Power Company is a former Minister of Finance. The Director General of the Social Security Administration is a former Minister of Social Security. The Director General of the Housing Finance Authority is a former Minister of Agriculture. The Director of the International Development Agency is a former minister of health. A large share of the corps of ambassadors is filled by former ministers and members of parliament, with persons closely related to the most senior ministers, and party leaders, also common. Politicians from most parties have benefitted from this practice.

Critics also point out that the perception of this practice discourages qualified and able people from applying for vacant positions in the civil service and thereby make this form of corruption less visible. There are even cases where it is claimed that ministers and party leaders actively discourage qualified applicants from applying, to help avoid embarrassing criticism of appointments. Another way of making this form of corruption invisible is when the requirements for a vacant position have been adapted to a certain known applicant. In this connection it should be pointed out that a practice of recruiting and promoting people based on other considerations than merit, may eventually lead to the draining of the best qualified people from the civil service, consequently hurting the interests of the general public.

In a recent recruitment case, that has been criticised, an individual was appointed ambassador by the Minister of Foreign Affairs. The person involved had neither been working in this field nor had he any special experience or education related to it. He had, on the other hand, for a long time been active in the party of the Foreign Minister and taken on various responsibilities for the party. Critics claimed that he didn't have the adequate qualifications or education and suggested that the appointment was a reward for his services and loyalty to the party and the Minister.<sup>199</sup>

Another recent case, also criticised for blurring the line between party politics and the civil service, involved a former member of parliament and a minister who had been given the position of ambassador. In that case the ambassador was appointed by his former political party to serve on a committee whose mission is to review the Icelandic constitution.<sup>200</sup> Another recent example of such blurring of lines is the case of two former ministers and members of the largest opposition party, who have publicly

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<sup>199</sup> See e.g. Fréttabladid 28 December 2004, p. 16, 29 December 2004, p. 16 and 8 January 2005, p. 4.

<sup>200</sup> See e.g. Fréttabladid 17 February 2005, p. 8. See e.g. Fréttabladid 29 April 2005, p. 24 and 50.



supported candidates for the leadership in their old party. Currently the former ministers hold the positions of an ambassador and Director of the International Development Agency, to which they were appointed when they retired from their political careers.<sup>201</sup>

Similarly, the former member of parliament, mentioned earlier, who was sent to jail and had to resign because he accepted bribes in connection with his duties on a government committee, last year took a seat on the board of the state run power company, after he was free from jail, appointed by his political party.<sup>202</sup>

Some critics are convinced that the two parties forming the current government have informally agreed on how to split the sought after positions in the civil service between the two parties. An example of this conviction could be found in the media recently when the position of news editor for the state run radio station was vacant. A newspaper claimed that the position was “owned” by one of the parties in the government, meaning that who would get the position would be decided by that party. According to the theory, the other party in government “owns” the position of news editor at the state run TV-station.<sup>203</sup> In this connection, it is worth mentioning that according to article 3 of Act no. 122/2000 on the public radio station, the station is to be politically neutral. It is also worth mentioning that the director of the station is a former politician of one of the parties forming the current government.<sup>204</sup>

Those responsible for taking recruitment decisions always deny they are politically motivated and most often it is very hard to prove them wrong or right. But if this is the practice, i.e. basing recruitment to sought after and important non political positions on political considerations, it is obviously not in compliance with theories on democratic principles emphasising the separation of politics and the civil service, as an important part of a well functioning democracy.

Finally, two recent cases concerning the appointment of judges to the Supreme Court in Iceland will be described briefly, as perhaps of particular legal significance. In those cases there are also important Opinions of governmental bodies to refer to. Those two cases caused a lot of public debate and disputes in the Icelandic society.

According to article 4 of Act no. 15/1998 on the Judiciary, the Minister of Justice recommends an appointee to the Supreme Court to the President of Iceland. According to Icelandic law the President must act on this

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<sup>201</sup> See e.g. Fréttabladid 29 April 2005, p. 24 and 50.

<sup>202</sup> See Fréttabladid 16 May 2004, p. 4.

<sup>203</sup> Fréttabladid 26 January 2005, p. 16.

<sup>204</sup> When this is written the director has recently appointed a news editor. His decision has caused a public uproar and has been widely criticised, for being based on political considerations but not on merit. See e.g. Morgunbladid 10 Mars 2005, frontpage and p. 6 and Fréttabladid 10 Mars 2005, frontpage and p. 8.

recommendation. Before making the recommendation the Minister of Justice is, according to the law, obliged to seek the view of the Court in regards to the capacity and ability of the applicants.

In the year of 2003 a seat on the Supreme Court was vacant. The Supreme Court supplied its evaluation of the applicants as required by law. The Court found all the applicants had capacity but two of them best suited for the position. Among applicants was a District Court Judge, who is a close relative of the Prime Minister at that time. He was not one of the two applicants the judges on the Supreme Court found best suited. It should be mentioned that the Minister of Justice, who is a member of the same party as the Prime Minister, had appointed the son of the Prime Minister as his political assistant. Ignoring the recommendations of the Supreme Court, the Minister of Justice made a recommendation to the President that the District Court Judge should be appointed as a Supreme Court Judge, and he was duly appointed by the President.

The appointment was widely criticised, but the Minister of Justice defended his decision vigorously. Three of the other applicants required a formal justification for the decision and then filed a complaint to the Ombudsman of Parliament. A female applicant, a District Court Judge, complained as well to the Equal Rights Appeals Commission. (a body which deals with complaints concerning violations of Act no. 96/2000 on equal rights and status of men and women).

In his Opinion the Ombudsman pointed out that the Minister of Justice was under the general obligation to recommend to the President that the most qualified applicant for the position on the Supreme Court should be appointed. Because of the shortcomings in the preparation and decision making phase, the ombudsman concluded that the Minister of Justice had not showed that the appointment of the District Court Judge had been based on sufficient due-diligence.<sup>205</sup>

The Equal Rights Appeals Commission came to the conclusion that by appointing the District Court Judge, rather than the female District Court Judge, the Minister of Justice had violated Act. no. 96/2000.<sup>206</sup>

The Minister of Justice has defended his decision publicly and criticised the Opinions of the Ombudsman and the Equal Rights Appeals Commission. The Minister of Justice has expressed the opinion that the Supreme Court's evaluation of the applicants was unclear and that he disagreed with the Court's view on which of the applicants were best suited for the position. The Minister of Justice has maintained that the family ties between the person appointed and the Prime Minister did not influence his decision in

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<sup>205</sup> Opinions of the Ombudsman in cases no. 3882/2003, 3909/2003 and 3980/2003, <http://www.umbodsmaduralthingis.is/skyrslur/skoda.asp?Lykill=1047&Skoda=Mal>.

<sup>206</sup> Opinion of the Equal Rights Appeals Commission from 5 April 2004 in case no. 14/2003, A against the Minister of Justice, <http://www.rettarheimild.is/Felagsmala/KaerunefndJafnrettismala/2004/04/05/nr/1622>.

any way and he has emphasised that the power to appoint and the responsibility of the decision was his and not the Supreme Court's. It can however be maintained that very many Icelanders, not least the opponents of the government, do not feel that the Minister has been able to support his decision in the matter sufficiently.

In the year 2004 a another seat on the Supreme Court was vacant. There were 7 applicants and among them was a well known attorney of law. This attorney had for many years been prominent in the public debate, most of the time supporting political decisions made by the Prime Minister at that time, as well as being a close personal friend of his.

In the Supreme Court recommendation, required by law, the applicants were ranked according to whom the court deemed to be best suited for the position. The above mentioned attorney was ranked no. 4. One of the Supreme Court's Judges, that is the District Court Judge who was appointed to the Supreme Court the year before wanted to rank the attorney higher. The Minister of Justice, pro-temp, who is a member of the same political party as the Prime Minister, recommended to the President that the attorney should be appointed to the Supreme Court, and he was duly appointed. The Minister said he did not agree on how the Supreme Court evaluated the applicants.

This case caused a lot criticism as well. The critics claimed that cronyism and political considerations had been instrumental in the Minister's decision. The Minister has denied those accusations emphasising that it is his responsibility to take the decision and that he is accountable to the public.

It is obviously very hard to prove beyond doubt if nepotism, cronyism and/or political considerations influenced those two appointments of judges to the Icelandic Supreme Court. It is, however, a fact that the Minister did not follow the recommendations of the Supreme Court itself and according to two "watch-dog" bodies the appointment of the former judge did not satisfy the requirements made by law. At least it can, in my opinion, not be denied that the deep discontent and heated debate that accompanied the appointments of those two judges to the Supreme Court brings with it the risk of diminished public confidence in the courts.

Paragraph 1 (a) of article 7 of the **UN Convention** provides that: "Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants, and where appropriate, other non-elected public officials; (a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude".

In all likelihood formal Icelandic legal frameworks fulfill the requirements of the provision. It is however very questionable whether the implementation is satisfactory, as has already been described. Based on the cases described earlier, there is a reason to fear that political considerations, nepotism and cronyism do influence decisions that are supposed to be based purely on “merit, equity and aptitude”.

As I have mentioned earlier, the avoidance of favoritism, especially political considerations, in the appointment of judges, is of particular concern, as the judiciary is supposed to be the independent and impartial arbiter of law and monitor of executive conduct. The need for the process of appointing judges to be fair and transparent has been highlighted in a guidance on the provision in question: “The appointment process should, as much as possible, be isolated from partisan politics or other extrinsic factors such as ethnicity and or religion.”<sup>207</sup>

The deep discontent and heated debate that accompanied the recent appointments of judges to the Supreme Court inevitably brings with it the risk of diminished public confidence in the courts. In consequence, there are good reasons to recommend that the appointment procedures be revised. The provision above can be seen as an additional encouragement to strengthen the process.

Another provision in the UN Convention, interesting in reference to the former Member of Parliament, who was sentenced to jail for bribery, is in article 30 paragraph 7, which encourages governments to establish procedure for disqualification of person convicted of offenses related to their public office. This provision which is intended to preserve trust between the officials and the public would probably have prevented the appointment of the former Parliamentarian to the board of an important public institution.

#### **4.2.3 CONFLICT OF INTERESTS**

Several observers have noted that the small size of the Icelandic society may more frequently lead to conflict of interests situations. In a 2001 evaluation report by a COE body, GET, they made this observation: “The fact that Iceland is a country with a small population on the one hand can help ensure transparency but on the other hand can generate conflicts of interest and compound corruption”.<sup>208</sup> Much earlier, a former Icelandic Prime Minister and Professor of Law made similar remarks: “Due to the small population size, we have here a risk that is not similarly found in larger societies, and that is the risk of the favours based on friendship”.<sup>209</sup>

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<sup>207</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit” , p. 113, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>208</sup> GRECO, “First Evaluation Round. Evaluation Report on Iceland”, 2001, p. 10, <http://www.greco.coe.int/>.

<sup>209</sup> Hreinsson, P., 2005, p. 90.

Icelandic law contains a few provisions intended to minimize the danger of situations involving conflict of interests rising in public administration and influence the way public officials handle cases. These rules deal with a variety of situations, including disqualification in handling and ruling on specific cases; assets and interests; outside jobs and limits on acts of public office holders.

In article 3 of the Administrative Procedure Act no. of 37/1993, are listed rules on conflict of interests, i.e. certain grounds for disqualification from the decision making process in a certain case. These rules apply both to state and municipal administrations. The final clause of the article states that a civil servant should be disqualified if there are circumstances likely to cast doubts on the official's impartiality, which are not negligible. There are also some special provisions on disqualification in article 19 of the Municipal Act no. 45/1998.

Article 5 of Act no. 91/1991, Code of Civil Procedure, contains rules on the disqualification of judges, i.e. a general rule which reads: "A judge ... is disqualified from handling a case if: ...Other facts of conditions are at hand which are capable of casting doubt on his impartiality on reasonable grounds".

According to article 20 of the Government Employees Act no. 70/1996, a public official may not have a secondary job without a permission from the public authority.

In article 26 of the Judiciary Act no. 15/1998 it is provided that a judge is not allowed to take on a job or own a share in a company if it is not in conformity with her/his position or could lead to her/him not being able to fulfill her/his duties as a judge. According to the law a special body supervises those rules and a judge is supposed to notify the body if she/he acquires a share in a company.

All the above mentioned provisions regarding conflict of interests do only apply to public officials while they are still being employed by the government.

The aforementioned provision in the Administrative Procedures Act applies to a minister when s/he takes decisions covered by the law. Otherwise there is only one provision in the Icelandic law which applies to a conflict of interests situation concerning politicians. This provision is in article 64 of Act no. 55/1991 concerning Procedures in the Parliament. The provision says: "No Member of Parliament is allowed to vote on an appropriation to her/himself."

A part from the provisions concerning judges already mentioned there are no rules obligating public officials or politicians to declare their economic assets and interests. The same applies to economic interests and assets of

the public and elected officials' spouses, offsprings, parents or other closely related persons.

There are no general regulations on receiving gifts or other favours, such as paid trips, nor are there any rules for situations when public officials move into the private sector, where the particular information / knowledge from the former public position may be used to the disadvantage of public interest.

Regulations regarding conflict of interests situations are few and less comprehensive in Iceland than in most western democracies. There is however no indication that such regulations are less necessary there than in other countries. The above mentioned case of doctors accepting trips from pharmaceutical companies is a case in point. To my best knowledge the matter has not resulted in any form of official investigation. The reason may be that no rules have been violated, since there are no rules concerning this kind of conduct.<sup>210</sup>

This lack of regulations is causing criticism. Politicians are acting on this criticism, at least to some extent. Recently some members of the Parliament proposed that the Parliament adopted a code of conduct for members of Parliament, regarding i.a. conflict of interests situations.<sup>211</sup>

Article 7 paragraph 4 of the **UN Convention** provides: "Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest". Furthermore, article 8 paragraph 5 of the Convention provides: "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".

These provisions underline the importance assigned to conflict of interests rules as a part of anti-corruption efforts. As already described conflict of interests rules are often non-existent in Iceland and those that are in place tend to be weak and/or narrow in scope. It is noticeable that the only explicit provision regarding politicians is the one preventing them from

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<sup>210</sup> In this connection a reference can be made to an article on the frontpage of Fréttabladid 6 February 2005, concerning i.a. the lack of regulations in regard to paid trips taken by doctors, parliamentarians and journalists.

<sup>211</sup> See "Tillaga til thingsályktunar um sidareglur fyrir althingismenn", <http://www.althingi.is/altext/131/s/0789.html>, Fréttabladid 16 February 2005, p. 8 and Morgunbladid 27 April 2005, p. 11. Two political parties have also recently announced that their parliamentarians will publish information about their financial interests and properties. See e.g. Fréttabladid 21 April 2005, p. 2 and Morgunbladid 27 April 2005, p. 10.

voting for appropriations to themselves. They are under no obligation to provide information about assets, interests and connections. Judges on the other hand are subject to much more comprehensive rules about conflict of interests. Civil servants in general fall somewhere in between judges and politicians.

It should be seriously considered to revisit conflict of interests rules in Iceland, particularly to introduce provisions that obligate politicians to declare external interests, obligate certain high level civil servants and those in positions seen as particularly susceptible to corruption, to declare assets and liabilities, and put in place clear rules about the transit of civil servants to the private sector.<sup>212</sup>

While the thrust of the provisions should be to protect the common interest through transparency, human rights concerns may call for counter balancing the public interest. A guide to the UN Convention therefore points out: “To protect the privacy of public officials, disclosures may be made to auditors or other review bodies placed under a legal obligation not to disclose them publicly, except where necessary for purposes such as discipline or prosecution”.<sup>213</sup>

Finally it should be pointed out that whistleblower protection, e.g. provided for in article 33 of the UN Convention and the **COE’s anti- corruption conventions** would be applicable in a number of potential conflict of interests cases.

#### **4.2.4 REGULATIONS AND TRANSPARENCY IN THE FINANCING OF POLITICAL PARTIES, CAMPAIGNS AND CANDIDATES**

Icelandic law does not have rules on financing of political parties, political campaigns or individual candidates, with the exception that foreign donations are prohibited according to Act no. 62/1978. The aforementioned GET report of 2001 raises this as a concern.<sup>214</sup>

The lack of legally binding regulations for political finance has been the subject of increasing academic discussion in recent years. At a recent symposium, a professor of political science at the University of Iceland, emphasised that while political parties are the cornerstone of the political

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<sup>212</sup> In article 12 paragraph 2 (e) of the Convention there is a provision encouraging states parties to prevent “conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure”.

<sup>213</sup> UNODC: “The Global Programme against Corruption. UN Anti-Corruption Toolkit”, p. 393, [http://www.unodc.org/unodc/en/corruption\\_toolkit.html](http://www.unodc.org/unodc/en/corruption_toolkit.html).

<sup>214</sup> GRECO, “First Evaluation Round. Evaluation Report on Iceland”, 2001, p. 4, <http://www.greco.coe.int/>.

system, and in Iceland they receive substantial public funding, they have no obligations for transparency about their finances. He stated that setting such rules was very important.<sup>215</sup>

The media has also been vocal and critical about the lack of rules and transparency. In a GET report they stated that “The GET had the impression that journalists were highly suspicious of corruption in particular with regard to the lack of transparency and accountability in the financing of politicians and political parties”.<sup>216</sup> An op-ed in Fréttabladid had the following story of the business dealing of an Icelandic political party: “The party got a special deal on a car, the owner of the dealership refused to give the details so did the party itself, nor did it divulge how much one of the party’s rising stars paid for the car, which is not owned by the party anymore but by the rising star. Ministers from the party have bought expensive cars from the same dealership.”<sup>217</sup>

External attention to the issue is also growing. For example, in April 2003 the Committee of Ministers of the Council of Europe, where Iceland is a member, recommended that member states should set rules and install supervision concerning the financing of political parties, campaigns and candidates. They made a special reference to the need to fight corruption which “represents a serious threat to the rule of law, democracy, human rights, equity and social justice ... hinders economic development, endangers the stability of democratic institutions and undermines the moral foundations of society.”<sup>218</sup>

Paragraph 3 of article 7 of the **UN Convention** provides: “Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.”

This provision is based on the belief that in order to prevent and fight corruption among politicians, it is important to have transparency in the financing of candidates and political parties. It provides control and ensures that the voters have access to the information or know that it is available. Such rules do not exist in Iceland and there are some, including members of Parliament, who do not believe such rules are needed. In all likelihood developments will be toward enacting such rules as voters in all parties increasingly express the desire of transparency of political finance. If

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<sup>215</sup> See Viðskiptabladid 4 February 2005, p. 10.

<sup>216</sup> GRECO, “First Evaluation Round. Evaluation Report on Iceland”, 2001, p. 13, <http://www.greco.coe.int/>.

<sup>217</sup> Fréttabladid 4 February 2005.

<sup>218</sup> Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns. <https://wcd.coe.int/ViewDoc.jsp?id=2183&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.



Iceland ratifies the UN Convention it should therefore provide an additional reason to address this important issue.

It can therefore be argued that the internal and external pressure on Icelandic authorities to establish rules concerning political finance is growing. Parliament has discussed political finance on a number of occasions without any consensus on introducing legislation.<sup>219</sup> Therefore it has to be concluded that sufficient political will does not seem to be in place. In this connection it should, however, be mentioned that the Parliament is currently (April 2005) discussing a new report of the Prime Minister on the financing of politics and political parties. In the report the Prime Minister refers i.a. to international development in this field in general and in particular to the aforementioned recommendation of COE on common rules against corruption in the funding of political parties and electoral campaigns. In the report the Minister informs that he has asked the political parties to appoint representatives to sit on a new Committee which will deal with the financing of political parties and if there is a need for a new legislation concerning it. According to the report the Committee can possibly also discuss if ministers and members of parliament should be required to give information about their relations to private companies.<sup>220</sup>

**The summary** of the examination of Icelandic corruption risks and legal frameworks to prevent corruption is that by and large the necessary laws are in place. While there may be some gaps in legal coverage, especially concerning conflict of interests and political financing, the main concern relates to political attitude, and implementation and occasional lack of safeguards to ensure proper implementation of anti-corruption measures.

## **4.3 INTERNATIONAL HUMAN RIGHTS STANDARDS AND GOOD GOVERNANCE GUIDELINES**

Finally I will discuss briefly if corruption in Iceland could arguably be an issue under international human rights standards and/or good governance guidelines.

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<sup>219</sup> Several members of Parliament have argued against the need for such legislation, claiming that there is no political corruption in Iceland. In that context it may be noted that for years the Icelandic Socialist Party received secret financial support from the Soviet Union and denied its existence throughout. The lack of regulations and transparency made this possible. See e.g. Ólafsson, J., 1999, p. 175-206.

<sup>220</sup> See "Skýrsla forsætisráðherra um fjárframlog til stjórnmalastarfsemi og starfsumhverfi stjórnmalaflokka á Íslandi, samkvæmt beidni", <http://www.althingi.is/altext/131/s/1169.html>.

As already pointed out there are numerous links between corruption and human rights violations. Corruption is frequently seen as a breach of, or a threat to, human rights standards and human rights standards can, as mentioned earlier, be very useful in the fight against corruption and provide additional protection against it. Based on the previous description of alleged cases of nepotism and cronyism, particularly based on political considerations, and the lack of transparency in political finance makes it worth while to consider whether Iceland may be undermining some international human rights standards.

Iceland is a State Party to the most important human rights conventions adopted by the UN and COE, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The ECHR has been enacted into Icelandic law, as well.<sup>221</sup> Iceland has also recognised the competence of the Human Rights Committee (HRC), which supervises the ICCPR, to receive and consider communications from individuals subject to Icelandic jurisdiction and the compulsory jurisdiction of the European Court of Human Rights (ECtHR) which supervises the ECHR. Those two human rights mechanisms can therefore be of relevance in the context of corruption in Iceland.

#### **Recruitment in the civil service.**

In practically all human rights provisions prohibiting discrimination, it is stated explicitly that discrimination on the basis of political opinion is prohibited. For Iceland the most important of such provisions are contained in articles 2 (1) and 26 of the ICCPR, article 2 (2) of the ICESCR and article 14 of the ECHR. In this connection it should also be mentioned that Article 7 (c) of the ICESCR provides that States Parties to the Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, i.a. “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”.<sup>222</sup>

It is frequently claimed that it is a prevailing practice in recruitment and promotion in the Icelandic civil service to take into account the political opinions of those selected, and equally importantly those who are not. The examples I have discussed point to this being a real risk. To the degree this is the case, this practice is non-consistent with human rights provisions

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<sup>221</sup> See Act no. 62/1994.

<sup>222</sup> Reference can also be made to article 2 of the Discrimination (Employment and Occupation) Convention which provides that each States Party “undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”. According to article 1 (1) (a) of the Convention the term discrimination means i.a. discrimination on the ground of political opinion. The Convention was adopted by the International Labour Organization (ILO) in 1958 and ratified by Iceland in 1963.

prohibiting discrimination and a serious threat to the interests protected by those provisions.

But can applicants for non-political posts or promotion in the Icelandic civil service who have been excluded on grounds of their real or alleged political opinions and who have exhausted domestic remedies complain to the HRC or the ECtHR?

The relevant provisions of the ICCPR, as they have been interpreted by the HRC, provide a broader protection than the provisions of the ECHR. The HRC has stated: “In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. ... In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant”.<sup>223</sup>

Article 26 of the ICCPR provides for an independent right to equality. The requirement of equality before the law is e.g. violated when a court or administrative decision is based on manifestly arbitrary considerations. A decision is arbitrary especially when persons are discriminated against on account of political opinion or any other one of the criteria listed in the second sentence of article 26.<sup>224</sup>

Applicants for non-political civil service positions in Iceland who have been excluded on the grounds of their political opinions can therefore try to complain to the HRC. In practice, it is, however, very difficult to prove a violation in such cases, since only in the most seldom cases do unobjective considerations expressly appear in the reasoning behind a decision and the HRC is normally not empowered to review the consideration of evidence by national authorities.<sup>225</sup>

Article 14 of the ECHR does, on the other hand, not have an independent application. In other words it does not prohibit discrimination in any context, but only in the enjoyment of the rights and freedoms set forth in the Convention.<sup>226</sup> The ECHR does not cover recruitment in the civil service. Consequently it is very doubtful that applicants for non-political civil

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<sup>223</sup> HRC: General Comment no. 18 (Non-discrimination), paragraph 12.

<sup>224</sup> Nowak, 1993, p. 467.

<sup>225</sup> Nowak, 1993, p. 467.

<sup>226</sup> Protocol 12 to the ECHR adds a general prohibition of discrimination to the prohibition of discrimination in relation to rights within the ambit of the Convention. The 12<sup>th</sup> Protocol shall enter into force the 1<sup>st</sup> of April 2005 for States parties. Iceland had not ratified it as of 21 Mars 2005. (COE website, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=21/03/05&CL=ENG>)

service positions in Iceland who have been excluded on the grounds of their political opinions would be successful in complaining to the ECtHR.<sup>227</sup>

Article 25 (c) of the ICCPR provides that “every citizen shall have the right and opportunity without any of the distinctions mentioned in article 2 and without unreasonable restrictions to have access on general terms of equality to public service in his country”. The term public service is not defined in the article but it has been understood to cover in any case all government appointed positions in the executive, legislature and judiciary in which official powers are exercised.<sup>228</sup> To ensure access on general terms of equality, the criteria and processes for appointment and promotion must be objective and reasonable and it is of particular importance to ensure that persons do not suffer discrimination on the ground of political opinions or other grounds listed in article 2 of the Covenant.<sup>229</sup>

Excluding individuals on the basis of their political opinions when recruiting to non-political positions in the civil service, as arguably happens quite often in Iceland, is obviously not in conformity with this provision of article 25 of the ICCPR. Individual victims, who have exhausted domestic remedies, can therefore complain to the HRC. It is, however, usually extremely difficult to prove a violation in such cases, since states very seldom admit they have based their decisions on political considerations. Consequently chances of success in such cases are probably rather slim.

The ECHR did not originally include a provision on political participation. Article 3 of the 1<sup>st</sup> Protocol to the Convention remedied this shortcoming. It does, however, not contain a provision on equal access to public service.

### **Appointments of judges.**

Articles 14 (1) of the ICCPR and 6 (1) of the ECHR guarantee the human right to a fair trial before an independent and impartial court (tribunal).

Independence of the judiciary from the legislature but especially from the executive branch is a crucial element of the principle of a fair trial. To ensure the independence of the courts laws and practice concerning appointments of judges are crucial. This has i.a. been pointed out by the HRC.<sup>230</sup>

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<sup>227</sup> To support this conclusion reference can e.g. be made to the cases of *Spurio, Gallo, Zilaghe, Laghi, Viero, Orlandini and Ryllo v. Italy*, which concerned disputes related to recruitment, careers and termination of service of civil servants. In the cases complaints claiming that article 14 of the ECHR had been violated were found to be inadmissible (see here paragraph 14 of the judgment of 2 September 1997 in the case of *Gallo v. Italy*). It should also be mentioned, in this connection, that the ECtHR has found disputes relating to recruitment, careers and termination of service of civil servants to fall inside the scope of Article 6(1) of the ECHR only to a very limited extent. See here e.g. paragraph 19 of the case of *Gallo v. Italy and Ovey, C., White, R.C.A.*, 2002, p. 149-150.

<sup>228</sup> Nowak 1993, p. 451.

<sup>229</sup> HRC: General Comment no. 25 (Article 25), paragraph 23.

<sup>230</sup> HRC: General Comment, no 13 (Article 14), paragraph 3.

Whereas independence relates i.a. to the appointments of judges, impartiality aims at the specific holdings in a given case.<sup>231</sup> As regards impartiality, it has been recognized that the appearance of impartiality may be of great importance. In other words, there ought to be impartiality in the objective as well as in the subjective sense.<sup>232</sup> In this connection it should be noted that “justice must not only be done: it must also seem to be done”, as has i.a. been emphasised by the ECtHR.<sup>233</sup> This principle refers to the need for courts to be trusted by all, i.a. without reference to political opinions.

Appointments of judges based on reference to their political opinions are of particular concern. Where that occurs, and even more so where that is a common practice, there is a reason to fear that the right to a fair trial before an “independent and impartial court”, a cornerstone of any society built on the rule of law, is in jeopardy.

In two cases against Iceland applicants to the ECtHR have successfully complained that their rights to a fair trial by an “independent and impartial tribunal” had been violated.<sup>234</sup> In the latter case the ECtHR found that a Supreme Court Judge had lacked objective impartiality in the case in question<sup>235</sup> and consequently found a violation of article 6 (1) of the ECHR. In its Judgment the Court stated i.a.: “The existence of impartiality for the purposes of Article 6 (1) of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is, by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. ... As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary ... Under the objective test, it must be determined whether, quite apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality

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<sup>231</sup> Nowak 1993, p. 246.

<sup>232</sup> Lehtimaja, L. and Pellonpää, M.: “Article 10” in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague, 1999, p. 228.

<sup>233</sup> See e.g. paragraph 81 of the Judgment of the ECtHR in the case of *Campbell and Fell v. UK*.

<sup>234</sup> See the case of *Jón Kristinsson v. Iceland* (Iceland amended the relevant law and a friendly settlement was reached. The ECtHR decided to strike the case out of the list) and the case of *Pétur Thór Sigurdsson v. Iceland*.

<sup>235</sup> The husband of the judge had very serious financial problems and owed a lot of money to a bank which was a party to the case in question. The husband was given favourable treatment by the bank and the judge had some involvement in the debt settlement. The ECtHR thought there was at least the appearance of a link between steps the judge had taken in favour of her husband and the advantages he obtained from the bank. Consequently the applicant could entertain reasonable fears that the Supreme Court lacked requisite impartiality.

must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified”.<sup>236</sup>

In another case decided by the ECtHR, interesting in this respect, five of nine jurors who served in the trial of a defamation action were members of the political party which was the principal target of the allegedly defamatory material. The Court found that the links between the defendants and the five jurors could give rise to misgivings as to their objective independence and impartiality and found a violation of Article 6 (1).<sup>237</sup>

In a recent case, however, where the applicant referred to “popularly held suspicions about the secretive, pervasive, and corrupting nature of Freemasonry” the ECtHR did not consider that a membership of a judge in the Freemasons could itself raise doubts as to his impartiality where a witness or party in a case was also a Freemason. The applicant’s doubts as to the lack of impartiality of the judge were not found to be objectively justified.<sup>238</sup>

Recent appointments of judges to the Supreme Court in Iceland inevitably raise concerns about both the real and perceived independence and impartiality of the court. This could very possibly lead to claims of disqualifications of the judges concerned on the ground of their alleged lack of independence and/or impartiality, especially in cases which concern issues which are or have been politically disputed and/or politically active persons. If such claims are denied by the Supreme Court the applicants could try to complain to the HRC or the ECtHR. Their chances of success there can, however, only be evaluated on a case-by-case basis.

### **Lack of transparency in the financing of political parties, campaigns and candidates.**

Article 25 (b) of the ICCPR obligates States Parties to hold genuine elections “guaranteeing the free expression of the will of the electors”. This right is protected as well by article 3 of the 1<sup>st</sup> Protocol to the ECHR. The provision of the Protocol, however, has a narrower scope than the provision of the ICCPR, since it only encompasses elections to the legislature. The ICCPR, on the other hand, requires that “those State organs in which both legal and de facto power is concentrated are either directly or indirectly legitimated by elections”.<sup>239</sup>

The election clause in the ECHR is formulated as an obligation of the State Party rather than as an individual right. The Council of Europe treaty

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<sup>236</sup> The case of Pétur Thór Sigurdsson v. Iceland, paragraph 37.

<sup>237</sup> The case of Holm v. Sweden.

<sup>238</sup> Ovey, C., White, R.C.A., 2002, p. 160-161.

<sup>239</sup> Nowak, 1993, p. 443

bodies, the Commission and the Court, have, however, through a dynamic interpretation granted the individual a right of complaint.<sup>240</sup>

It is universally recognised that human rights are “indivisible, and interdependent and interrelated”.<sup>241</sup> This means that for an individual to enjoy in a meaningful way individual human rights, other related rights have to be honored. The right to vote can, for example, not be enjoyed in a meaningful way without the enjoyment of other closely related rights. This has been recognised by the HRC which has stated: “Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected”<sup>242</sup> and “In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant...”.<sup>243</sup>

The freedom of expression involves the “freedom to seek, receive and impart information”.<sup>244</sup> To meaningfully enjoy his political rights an individual needs to have access to relevant information that may inform his political decisions. It can very well be argued that information about the financing of political parties, elections campaigns and candidates, including who the main financial contributors are, constitutes exactly such relevant information. The lack of transparency in the financing of the Icelandic political system is a concern in this regard.

It will be argued here that information about how political parties, election campaigns and candidates are vital for the meaningful enjoyment of the political rights, protected by article 25 (b) of the ICCPR and article 3 the 1<sup>st</sup> Protocol to the ECHR. It must however be doubted that individuals would at the present moment be successful in complaining to the HRC or the ECtHR claiming their rights under those provisions had been violated, since states had not ensured they had access to such information. But international law concerning political participation and democracy doesn't stand still and there are important indications of an on-going development in the international community towards a recognition of a right to democracy. It must, however be admitted that there is no universal agreement what is in

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<sup>240</sup> Allan, R.: “Article 21” in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague, 1999, p. 443.

<sup>241</sup> See e.g. paragraph 5 of the Vienna Declaration and Programme of Action on Human Rights, adopted by the World Conference on Human Rights in 1993.

<sup>242</sup> HRC: General Comment no. 25 (Article 25), paragraph 12.

<sup>243</sup> HRC: General Comment no. 25 (Article 25), paragraph 25.

<sup>244</sup> See e.g. article 19 (2) of the ICCPR.

substance meant by democracy.<sup>245</sup> Hopefully this right will develop rapidly in the near future and there will be a universal agreement on that an effective political democracy<sup>246</sup> must include the right to information about the financing of political parties, campaigns and candidates.

In this connection it must, however, be noted that demands made on individuals and associations, including demands for information, may constitute some interference with certain human rights, such as the right to hold opinion without interference<sup>247</sup> and the freedom of association.<sup>248</sup> Furthermore there are those who argue that their contributions to a political cause is a matter of their privacy and to be protected as their human right.<sup>249</sup> This concern is frequently addressed by only calling for publication of contributions from individuals over a certain size and contributions from companies, thereby exempting small contributions from individuals.

Regulations on political financing therefore call for a balancing of the public interest and the rights of certain individuals. Finding this balance is not easy and it is vital not to interfere too much with those aforementioned rights. In most western democracies, the conclusion has been that the public interest of having access to information of political financing is the weightier concern and, in my opinion, there is no ground to conclude differently in the case of Iceland.

Human rights are legal rights which individuals are entitled to have. **Good governance guidelines** are, on the other hand, not legal rights. Even though they carry significant weight it can hardly be argued that states are under international obligations to practice good governance. While not legally binding, such guidelines are increasingly used to advocate and put pressure on governments to adopt good practices.

Frequently cited among these guidelines are the need for *transparency, accountability, participation* and *consensus seeking*. While Iceland would doubtlessly be rated well on good governance, there are nevertheless areas for concern. The lack of transparency in the financing of the political system is of concern, in and of itself, but also as an issue of accountability. Similarly the practice of excluding persons from appointments in the civil

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<sup>245</sup> See e.g. Allan, R.: "Article 21" in Alfredsson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement*, The Hague, 1999, p. 446-448 and Nowak, 1993, p. 454.

<sup>246</sup> The EctHR has repeatedly stated that article 3 of Protocol 1 "enshrines a characteristic of an effective political democracy". See Ovey, C., White, R.C.A., 2002, p. 331.

<sup>247</sup> Protected by article 19 (1) of the ICCPR

<sup>248</sup> Protected by article 22 of the ICCPR and article 11 of the ECHR.

<sup>249</sup> The right to privacy is protected by articles 17 of the ICCPR and article 8 of the ECHR. In this connection it should also be mentioned that the "secret ballot" provided for in article 25 of the ICCPR and article 3 of the 1<sup>st</sup> Protocol to the ECHR "relates only to the right to vote, i.e. to voting itself". See Nowak, 1993, p. 449.



service, based on political opinion, is a clear limitation from participation. And finally, recent appointments of judges to the Supreme Court and of the news editor to the state run radiostation have clearly been seen as a breach of consensus seeking.

Finally, it is worth considering whether the frequent practice of appointing former politicians and political confidantes of ministers to important non-political positions in the civil service do not constitute a blurring of lines between politics and the civil service and an undue extension of the political influence of the minister in question beyond his/her mandate and political term, hardly in conformity with democratic principles.

## 5 CONCLUSIONS

In the last decade there has been an increasing recognition in the international community of the damage corruption can cause, not only to economic development but also to human rights and governance. A vast number of corruption scandals in western democracies and in respected international organisations show conclusively that corruption knows no boundaries. Globalization and the evergrowing volume of international business transactions makes it increasingly difficult for individual countries to isolate themselves from global corruption. Therefore, there is a growing understanding of the need for international cooperation in the fight against corruption.

This international recognition has led to efforts that have resulted in various international anti-corruption instruments. Some of them are “soft law” instruments while others are legally binding for States Parties. The trend has been towards conventions that are more global in both scope and substance. The UN Convention is a prime example of this. At the same time, good governance guidelines of international financial institutions, that i.a. deal with corruption, have become more prominent and harmonized across institutions. Progress in this field has been very rapid and it can even be argued that international customary law is in the making.

There is a strong connection between corruption and human rights violations. Both flourish best under similar conditions, notably where secrecy and lack of accountability prevail. There are those who claim that human rights cannot thrive where corruption is rampant and argue that there should be a defined human right called freedom from corruption. In any case, freedom of expression and other civil and political rights, are without any doubt, extremely powerful tools to combat corruption.

Corruption cases are notoriously difficult to prove, as the victim, usually being the general public, is typically invisible. Therefore it is important to find ways to facilitate investigations, proofs and convictions. In this regard there is, however, cause for great care. There is an implicit risk that the process may lead to violations of human rights. In this, the art is to find the right balance between the public interest and the human rights of individuals.

In corruption and human rights abuses the authorities are frequently involved and even the main instigators. As a result those affected very often find it difficult and even impossible to get remedies under domestic laws and courts. Therefore it should be contemplated whether international appeals bodies need to be established as has been done under some international human rights conventions.<sup>250</sup>

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<sup>250</sup> The Inspection Panel at the World Bank may possibly indicate an eventual move in that direction. See Alfredsson, G.: “The Usefulness of Human Rights for Democracy and Good

At first glance Iceland looks like a corruption-free country and the majority of Icelanders are probably of that opinion. As my examination of recent cases shows, there are indications of possible corruption and clear lack of necessary rules, safeguards and “firewalls” to prevent and fight corruption. Therefore, any complacency concerning corruption is unwarranted.

Anti-corruption conventions which Iceland has or will adopt and law passed for that purpose are very important and a precondition for effective enforcement. But laws as such solve no problems. Here implementation and compliance is the key. The attitude of the general public and elected officials determines the outcome. It can be claimed with confidence that the general public in Iceland desires a corruption-free society. Political officials should always bear in mind with whose mandate they govern, and whose interests they should serve. Consequently, politicians carry the responsibility to show leadership in legislation and personal conduct.

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