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The Supply-side of Bribery in
International Business
Transactions:
Experiences, Criticism and
Possibilities

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20 points

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Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
2 THE OECD INSTRUMENTS	7
2.1 Historical Background	7
2.2 Monitoring	8
2.3 The Gaps of the Convention	10
2.4 International Legal Instruments	10
3 BRIBERY	12
3.1 When does corruption occur?	14
3.1.1 Public Sector Deterrence	17
3.1.2 Private Sector Deterrence	17
3.1.3 Individual Behaviour	19
4 THE HONG KONG CAMPAIGN	20
5 MORALS	27
5.1 Morals And Justice: The Contents of Morals	27
5.1.1 What is the relation between morals and justice?	27
5.1.2 Why is equal treatment important?	28
5.1.3 What qualifies for equal treatment in the distribution of burdens and benefits?	29
5.1.4 Cultural Relativity of Morals	29
5.2 Objective Moral Facts	31
5.3 Why morals?	33
5.4 What is the definition of morals?	34
5.4.1 What are the characteristics of moral obligations?	36
5.5 Group Relativity of Morals	38
5.6 How are morals sustained?	39

5.7	What is the relation between shame and guilt?	40
5.7.1	Specifics of Shame	43
5.8	Social Relations and Shame	44
5.9	Emotions, Beliefs and Rationality	46
5.9.1	Future Actions and Emotional Memory	49
5.9.2	Behaviour, Shame and Learning	48
5.9.3	Emotions, Morals and Law Obedience	50
5.10	Corporations and Shame	51
5.11	Shaming	52
5.12	Conclusion	54
6	MEDIA	55
6.1	How does media report economic crimes?	55
6.1.1	Media Attention to Economic Crimes	56
6.1.2	Why does media's crime coverage matter?	57
6.1.3	How are crimes reported?	58
6.1.4	How does media relate to the general perception of normality?	58
6.1.5	What is the role of the media?	59
6.2	What are the factors which make news?	59
6.3	Conclusion	59
7	INVESTIGATIONS	61
7.1	Reversing the Onus of Proof	61
7.1.1	Establishing a Defence	62
7.2	Conclusion	68
9	SUPPLY-SIDE PREVENTION AND CORPORATE SANCTIONS	69
9.1	Systemic Corruption	69
9.1.1	When corruption is the norm, who is to blame?	69
9.2	Business Associations	71
9.3	Sanctions	73
9.3.1	The Problems With Fines	73
9.3.2	What punishments to use?	74
9.4	Deterrence	76
9.4.1	From Deterrence to Active Prevention	77
9.5	Corporation/Employee Motivations and Compliance	79
9.6	The Benign Big Gun	81
9.7	Accountability of Legal Persons	82

9.7.1	Why Corporate Liability?	82
9.8	Conclusion	83
SUPPLEMENT A		85
	The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	85
SUPPLEMENT B		89
	Revised Recommendation of the Council on Combating Bribery in International Business Transactions	89
SUPPLEMENT C		91
	Chart of Institutional Relationships and Public Services	91
SUPPLEMENT D		92
	Desiderata for an Effective Enforcement of Responsibility for Corporate Crime	92
SUPPLEMENT E		94
	Business Associations in Endemically Corrupt Environments	94
SUPPLEMENT F		96
	Recognised and Non-recognised Problems in the International Business Environment in Relation to Bribery in International Business Transactions	96
BIBLIOGRAPHY		99
TABLE OF CASES		103

Summary

This thesis takes its starting point in the criminal offence of bribery in international business transactions. While the relating issues pertaining to the surrounding international business environment are overwhelmingly complex and numerous, the supply-side view presented focuses on questions less related to a political will to conduct massive and costly public sector reforms. In the light of one of the few successful anti-corruption campaigns in the world, the Hong Kong anti-corruption campaign, five features of that campaign relevant to the supply-side are explored concerning experiences, criticism and possibilities in relation to individual behaviour, the object of criminal law. They are **education, media, investigative instruments, business community efforts, and offences and sanctions.**

The general conclusion is that the requirements of the OECD Convention and the Revised Recommendations are this far not particularly directed towards any active preventive measures and towards adapting traditional crime prevention measures to the specifics of bribery as done in Hong Kong. Specific conclusions are, firstly, that moral as well as general anti-corruption education seems necessary as a preventive measure considering its relation to individual beliefs. “Reintegrative shame” seems a suitable preventive method in smaller moral groups. Secondly, mass media can not be expected to convey the detrimental effects of bribery in international transactions unless authorities present criminal cases to mass media with its dramatic consequences to individuals. Thirdly, reversing the onus of proof for evidential facts in corruption related offences seems a much needed measure in order to improve the efficiency of the prosecution without giving up on protected limits of human rights. Fourthly, in environments of endemic corruption, requirements on foreign corporations to organise in business associations for the purpose of improving competition and prevent corruption seems to be a solution favoured by governments, corporations and civil society. Fifthly, sanctions need to be focused on individual impact and the learning capability of corporations and individuals. Corporate fines seem particularly insufficient to elicit any betterment and efficient prevention, not least due to the simple risk preventive measure of corporate insurance. Instead, the impact need to be on managerial power, prestige and corporate reputation. However, as a prerequisite for such sanctions, corporate accountability has to be extended beyond the thresholds of directing minds or the involvement of senior management in the commission of the offence or they risk being left useless. Finally, a disciplinary/regulatory strategy which economises on motivation may hold a solution to the problem of non-compliance regardless of the motives behind it. Compliance with preventive regulations is optimised when it is contingently co-operative, tough and forgiving.

Preface

“There are usually two goals for public administration; efficiency and the rule of law. These two terms can be said to be in a contrasting relationship to each other. But, they are also dependent on each other. A precondition for the efficiency of the administration is the confidence of the public, and that, in turn, can only be won by a procedure and organisation which satisfies the fundamental requirements of the rule of law... [But] the strife for efficiency can lead to a high percentage of faulty decisions due to negligence or haste. On the other hand, the guarantees of the rule of law will be of little importance for the individual if the administrative procedure is much too slow and costly because of too much detail. A compromise must be reached.”¹

“Where rational explanations stop short of providing justification, tradition takes over. In situations where outcomes are empirically uncertain, adherence to traditional, more or less absolute, norms provide a basis for action.”²

¹ Strömberg, H., Allmän förvaltningsrätt (Malmö: Liber Ekonomi, 1998), p. 155. My translation.

² Aubert, V., Continuity and Development (Oslo: Norwegian University Press, 1989), p. 15.

Abbreviations

Ds	Departementsserien
ECtHR	European Court of Human Rights
FATF	OECD Financial Action Task Force
FCPA	U.S. Foreign Corrupt Practices Act
ICC	International Chamber of Commerce
NGO	Non Governmental Organisation
NIE	New Institutional Economics
OECD	Organisation for Economic Development and Co-operation
The Convention	The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
The Recommendations	The OECD Revised Recommendation of the Council on Combating Bribery in International Business Transactions
The Working Group	OECD Working Group on Bribery in International Business Transaction
TI	Transparency International
UN	United Nations

1 Introduction

Trying to understand corruption is an enormous task. It really does not matter where one chooses to start because any part of society is relevant in some aspect. The legal system is only one little part of a giant spider's web. When you try to isolate one question it is impossible to do so without cutting off the rest of the web. However, it is logically preferable if the answers to the isolated questions fit with the rest of the giant web. It spans over almost all social sciences, but no matter what academic field it ultimately always concerns individual behaviour.

There are in particular two models used to explain the different levels of corruption between countries, within countries and what factors which affects vulnerability to corruption. The first is the "principal agent model" in which corruption is seen as a result of various agents co-operating in a certain situation. It recognises such costs as the risk of getting caught, punished and moral blameworthiness. Where there is an estimated profit from corrupt behaviour it will occur.³ The second is the "multiple equilibrium model" in which the individual's behavioural decision is determined by what other individuals are doing. The more public officials who are corrupt, the easier it is to find someone who is willing to participate, while at the same time taking a low risk on detection and punishment.⁴ These models may be used by regulators or businesses to identify corruption ridden types of societies and to adopt measures accordingly. From an international point of view they can point out in what countries domestic corporations are more likely to be confronted with the problem of corruption in international trade. Concerning international business, the OECD Convention introduced a new criminal offence in many OECD countries by criminalising bribery of foreign public officials, the supply-side. Considering the immense different realities between many countries, the domestic circumstances in the business environment are often irrelevant. Even the domestic preconditions of rational business behaviour come in a different light and with a different definition.

This thesis aims to shed some light into these issues considering the experiences of the anti-corruption campaign in Hong Kong. Furthermore, it also attempts to put the OECD Convention and Recommendations in relation to these experiences and criticism against it from a behavioural point of view. Finally, the thesis aims to point out *some* possibilities to prevent bribery in international business transactions, which may prove useful in regard to the experiences and the criticism.

³Andersson, S., Hederlighetens pris –en ESO-rapport om korrupktion, Ds 1999:62 (Stockholm: Fakta Info Direkt, 1999), p. 54.

⁴Ibid., p. 55.

This thesis is limited to the supply-side rather than pin-pointing causes relating to the larger perspective of the civil society and the state administration. The idea is that by doing so this thesis attempts to find possibilities in relation to criticism and experiences to prevent bribery from a corporate *and* a regulatory agency point of view. Therefore, this thesis does not in detail examine any corporate specific or state administrative regulations unless needed for explanatory value.

As concerns the definition of corruption there are as many definitions of corruption as well as of its causes as there are academic writers on the subject. Concurrent with my own experience, Shihata has captured this fact in a very striking way:⁵

Some economic writings tend to define corruption as a situation where the benefit (to a corrupt agent) of acting against the expectation of a principal out weighs the cost, or where a public good, service or office is sold for personal gain. Others describe it in terms of the exploitation of economic rents which arise from the monopoly position of public officials...Political science speaks of corruption as a symptom of more deeply rooted problems in the society's structure related in particular to the means of attaining and maintaining power and the weak or non-existent safeguards against its abuse...Legal literature generally treats corruption in the context of the deviation (for private gains) from binding rules, the arbitrary exercise of discretionary powers and the illegitimate use of public resources...Sociology finds corruption a 'social relationship' represented in the violation of socially accepted norms of duty and welfare...Public administration specialists are concerned with bureaucratic corruption, even though they realize this is but one form of a more complex phenomenon...Business organizations treat corruption mostly as a trade and investment policy issue...Practically all people who publicly address corruption, condemn it, even though it would not exist at a wide scale without the participation of many...Most people recognize corruption as an additional cost, which some consider necessary to get things done (and by doing so, contribute to making it necessary). Some see corruption broadly as a violation of human rights, and, at the extreme, as a 'crime against humanity'. All agree it may increase the wealth of those practising it but almost certainly reduces the revenue of the state and the welfare of society as a whole.

One thing can be said for certain: they all involve unwanted *individual behaviour*, irrespective of what academic field one chooses to define and describe it. Obviously, all these different academic fields provide a fuller picture of the mass of circumstances surrounding corruption. It seems that any *effective* approach to combat corruption in international transactions needs a holistic perspective. It seems this type of crime is in particular need of innovative solutions outside as well as within criminal law in order to be effective. However, as mentioned, this thesis is limited to the international supply-side of corruption as it is tackled by the OECD and how the successful anti-corruption campaign in Hong Kong has fought corruption. These two perspectives are put in relation to individual behaviour in order to try to better understand the object intended to be guided and controlled by any legislative initiatives. In order to do so I draw from many areas of

⁵ Shiata, I., "Corruption –a General Review with an Emphasis on the Role of the World Bank", 15 Dickinson Journal of International Law, 1997, pp. 453-458.

research and aim to avoid too much (though some is necessary) of theoretical philosophy likely to be highly politically controversial, due to the international aspect of the Convention and the need to find a neutral theoretical basis to work from. One could say that I follow the formula of “phronesis” instead of “episteme” in Aristotelian terms: analysis of values and interests as a starting point for practical action for which contextual, pragmatic and instrumental rationality is used to reach a given end.⁶ Thus, I move from macro to micro perspective throughout the thesis but focus more detailed legal technicalities to the end as well as some suggestions for future possibilities.

⁶ Flyvberg, B., *Rationalitet og Magt*. Bind I, *Det konkrete videnskab* (Odense: Akademisk Forlag A/S, 1994), pp. 73, 82.

2 The OECD Instruments

Article 1 - The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.⁷

2.1 Historical Background

During the 80s, as business became increasingly global, US business became increasingly restive under the shadow of their country's Foreign Corrupt Practices Act (FCPA), which makes it a criminal offence to bribe foreign public officials in connection with international business transactions⁸. The US government was under pressure from its businessmen who were obliged to play by the FCPA and they asserted they were losing substantial business as a result⁹. Following the pressure, by 1990 the US government was pressing hard within the OECD for other member governments to take comparable action.¹⁰ In May 1994 the OECD governments put the subject on their agenda in the form of the non-binding OECD Recommendation on Bribery in International Business Transactions. That Recommendation asked for member states to take a series of effective measures to "deter, prevent and combat the bribery of foreign public officials in connection with international business transactions" and to report back to each other on the concrete and meaningful steps which they had taken in regard to certain specified issues.

A 1996 Recommendation of the Council called upon member states to discontinue the practice of providing tax deduction for bribes made by their companies overseas. At the same time, the ministers made a political commitment to criminalise bribery "in an effective and co-ordinated manner", and to examine the "modalities and appropriate international instruments to facilitate criminalisation and consider proposals in 1997". At its 1997 meeting the Council adopted a statement of principle to include anti-corruption provisions in bilaterally funded procurement contracts. At the G7 meeting that year there was a call to combat corruption and international transactions through supporting on-going efforts in other

⁷ The (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. See Supplement A.

⁸ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 91.

⁹ Copithorne, M., "The International Fight Against Corruption Today", paper at Corruption and Bribery in Foreign Business Transactions: Seminar on New Global and Canadian Standards, February 4 and 5, 1999 at the Sheraton Wall Centre.

¹⁰ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 91.

multinational organisations.¹¹ Developments continued very quickly; on November 21, 1997, OECD member states and five non-member countries (Argentina, Brazil, Bulgaria, Chile, and Slovakia)¹² adopted a Convention on Combating Bribery of Foreign Public Officials and International Business Transactions (The Convention).¹³ The Convention was signed less than a month later on December 17, 1997 and entered into force on 15 February 1999, and then only in those countries which had ratified the Convention. Getting 34 industrialised countries -the home bases of practically all the major international corporations- to commit to making bribery overseas a crime was a huge step forward. It opened up for the first time the prospect that the supply-side of international corruption would be severely restricted. There are official commentaries on the text of the Convention adopted at the same time.¹⁴

2.2 Monitoring

The OECD does not police companies itself, nor does the Convention give OECD any punitive powers (the point is that the parties to the Convention take care of that themselves). But the OECD does monitor the parties' legislation and how effectively it is used.¹⁵ Article 12 of the Convention provides that:

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference...

Section VIII of the 1997 Revised Recommendation on Combating Bribery in International Business Transactions states that:¹⁶

[The Council] INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate...

¹¹ Copithorne, M., "The International Fight Against Corruption Today", paper at Corruption and Bribery in Foreign Business Transactions: Seminar on New Global and Canadian Standards, February 4 and 5, 1999 at the Sheraton Wall Centre.

¹² Vogl, F., "The Supply Side of Global Corruption", in *Finance & Development*, June 1998, vol. 35, No.2.

¹³ Convention on Combating Bribery of Foreign Public Officials In International Business Transactions and related documents, DAF/IME/BR(97)20.

¹⁴ Vogl, F., "The Supply Side of Global Corruption", in *Finance & Development*, June 1998, vol. 35, No.2.

¹⁵ Article 12 of the Convention and Section VIII of The Revised Recommendation of The Council on Combating Bribery In International Business Transactions. For each country reviewed, the Working Group on Bribery has adopted a [report](#), including an evaluation, which has been made available to the public.

¹⁶ See Supplement B.

Only through this monitoring process, which started in April 1999, can governments willing to take effective action be assured that they will not be left out on a limb. While the Recommendation is non-binding, member states report back to each other on the progress they have achieved in implementing its various detailed provisions. It has proved an effective method of disseminating the adoption of various policy measures by member states over the last forty years.¹⁷ Efficiency depends on **peer pressure** from the process of **peer group review**. The monitoring is carried out by the OECD Working Group on Bribery in International Business Transaction (The Working Group) led by Professor Mark Pieth of the University of Basel¹⁸. The Working Group is responsible for implementing a programme of systematic follow-up to monitor and promote the full implementation of the Convention and its related instruments.¹⁹ However, this monitoring process is divided into two phases of which the second consists of assessing enforcement programmes. This Phase 2 has by some critics²⁰ been estimated to require almost six years to review the 34 signatories, excluding follow-up reviews where deficiencies are found, plus additional accessions.

As the legally binding Convention mainly deals with criminalising bribery of foreign officials, jurisdiction and extradition issues, the Recommendation deals with what is mentioned over and over in the anti-corruption literature: **increasing the risk and the probability of discovery**.²¹ However, these Recommendations are merely recommendations or as often mentioned "soft law."²² Particularly Section V of the Recommendation deals with **accounting requirements, external audit and company controls**, which all are directed at the private sector. According to the Recommendation these should be "fully used to prevent and detect bribery of foreign public officials in international business." Section VI deals with the issue of **public procurement** but gives no recommendation for a particular procurement method to be used in order to avoid bribery, except that anti-corruption clauses should be required regarding bilateral aid-funded procurement.

¹⁷ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 93.

¹⁸ Elshorst, H., "The OECD Convention and Beyond. The Supply Side of The Development Aid Business", contribution by Transparency International to the conference "The Role of Bilateral Donors in Fighting Corruption", Berlin, April 25th 2000.

¹⁹ <http://www.oecd.org/daf/nocorruption/aboutus.htm> (15.03.2000).

²⁰ Elshorst, H., "The OECD Convention and Beyond. The Supply Side of The Development Aid Business", contribution by Transparency International to the conference "The Role of Bilateral Donors in Fighting Corruption", Berlin, April 25th 2000.

²¹ Atkinson, M.; Manusco, M., "Edicts and Etiquette: Regulating Conflict of Interest in Congress and the House of Commons", *Corruption and Reform* 7(1) (1992), pp. 1-18.

²² Malanczuk, P., *Akehurst's Modern Introduction To International Law* (London: Routledge, 1997), p. 54-55.

2.3 The Gaps of the Convention

Two significant areas were left out of the compromise that led to the Convention. One is the so called **private to private corruption**, which, in an era of privatisation of traditional state activities, leaves a major gap in the regime.²³ According to ICC, private bribery is a serious problem and “grows progressively more important with the privatisations in central and eastern Europe, Asia and Latin America.”²⁴ The other is **political contributions** which in some contexts amounts to the corruption of legislators. A further gap is the definition in the Convention of bribery. It only addresses “active” bribery: the offence committed by the person who promises or gives the bribe. The “**passive side**” to the offence, the recipient of the bribe, has not been included in the criminalisation requirement in the Convention. According to the ICC²⁵, companies are often led to believe that without payoffs they will not win business and therefore the recipient must be equally recognised. Blatant and discrete extortion is a fact of international commerce and a stain on it.²⁶

2.4 International Legal Instruments

Major anti-corruption initiatives of recent years include the conventions against corruption developed by the OECD, the Organization of American States (OAS), the Council of Europe, and the European Union. The OECD Convention on Combating Bribery of Foreign Public Officials in

²³ Copithorne, M., “The International Fight Against Corruption Today”, paper at Corruption and Bribery in Foreign Business Transactions: Seminar on New Global and Canadian Standards, February 4 and 5, 1999 at the Sheraton Wall Centre.

²⁴ Heimann, F., 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 (Paris: OECD, 2000), p. 173.

²⁵ The international Chamber of Commerce (ICC) is the world business organisation. It represents more than 7.000 member companies in over 130 countries. The ICC produces rules that govern the conduct of business across borders, including the ICC Rules of Conduct to Combat Extortion and Bribery in International Business Transactions. The first of the ICC Rules reads: “No one may, directly or indirectly, demand or accept a bribe.” In relation to the OECD Convention, extortion and bribery are prohibited also for other purposes than for “obtaining and retaining business” as stated in the Convention. The voluntary rules actually address many issues left out in the OECD Convention and defines other means to pay bribes: not only kickbacks but also its other forms, such as subcontracts and consulting agreements that channel payments to government officials, their relatives, or their business associates. It further deals with the use of agents in that payments to them be limited to appropriate remuneration for legitimate services, and to take steps to ensure that agents do not pay bribes. It also calls for the establishment of *independent systems of auditing* to bring to light any transactions that contravene the ICC Rules, among them the prohibition of the use of “off-the-book” records or secret accounts. It also urges Boards of Directors to put in place proper control and disciplinary systems with adjacent compliance programmes, besides drawing up company codes consistent with the ICC Rules.

²⁶ Heimann, F., 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 (Paris: OECD, 2000), pp. 171-172.

International Business Transactions (1997) focuses on the supply-side of corruption, sanctioning bribers from OECD countries. It aims for *functional equivalence* rather than substantive unification of legislation across OECD countries. By contrast, the Inter-American Convention Against Corruption, adopted in 1996 by the OAS, and the Criminal Law Convention on Corruption, adopted by the Council of Europe in 1998, apply to both sides of a corrupt transaction (supply-side and demand-side) and facilitate mutual legal assistance and extradition in their regions. The Council of Europe creates a pattern for harmonising rules that address corruption - foremost, according to Pieth, "to enable more efficient mutual legal assistance within its geographic reach," which encompasses Western and Eastern Europe. The European Union (EU), meanwhile, passed in 1997 a Convention that criminalises transnational bribery.²⁷

²⁷ "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

3 Bribery

There is widespread agreement on the situations that are especially amenable to corruption.²⁸ Four categories²⁹ can be distinguished:

Category 1:

Bribes may be paid for

- a) *access to a scarce benefit, or*
- b) *avoidance of a cost (including the cost of losing a business opportunity).*

This includes any bureaucratic decision where the briber's gain is someone else's loss. There may be competition between bribers, which can be manipulated or even created by bureaucrats or politicians. If public servants have the discretion to design programmes, they may be able to create scarcity for their own pecuniary benefit or over-allocate resources (a phenomenon known as "supply stretching")³⁰ This also includes private-to-private corruption.

*Examples of situations for category 1 bribery:*³¹

Access to import or export permits, foreign exchange, a government contract or franchise, concessions to develop oil or other minerals, public land allocation, the purchase of newly privatised firms, access to scarce capital funds under state control, a license to operate a business when the total number of licenses is fixed, access to public services such as public housing, subsidised inputs, or heightened police protection for a business. A private sector agent may be paid by a competitor to "forget" or to turn a blind eye to a business opportunity or a scarce resource/benefit.

Category 2:

Bribes can be paid for receipt of a benefit (or avoidance of a cost) that is not scarce, but where discretion must be exercised by state officials.

*Examples of situations for category 2 bribery:*³²

Bribes paid in order to reduce tax bills or, waiving of customs duties and regulations, avoidance of price controls, award of a license or permit only to those who are deemed to "qualify", access to open-ended public services (entitlements), receipt of a civil service job, exemption of law enforcement (particularly for victimless and white

²⁸ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 10.

²⁹ All categories from Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), pp. 10-11.

³⁰ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 11.

³¹ *Ibid.*, pp. 10-11.

³² *Ibid.*

collar crime), zoning board approval for a building project, lax enforcement of safety and environmental standards.

Extortion of bribes: any situations where high investments have been done and continued legal business depend on the issuing of licenses by discretionary civil servants. Civil servants extorting higher payments when no fixed revenue constraint exists. The police may pay gangs to threaten businesses, while at the same time accepting bribes from these same businesses for their protection. Another version is that these gangs buy immunity against law enforcement by paying the police a share of the revenues from their Mafia-business. Similarly, politicians can threaten to support laws that will impose costs or promise to provide specialised benefits in return for payoffs.

Category 3:

Bribes can be paid, not for a specific public benefit itself, but for services connected with obtaining a benefit (or avoiding a cost), such as speedy service or inside information.

This is related to category 1 and 2 but is more directed towards getting better service than a benefit per se. Bureaucrats may create the conditions that produce such bribes by establishing rigid application requirements due to wide discretionary powers in administrative and organisational matters.

Examples of situations for category 3 bribes.³³

Inside information on contract specifications, faster service, reduced paperwork, advance notice of police raids, reduced uncertainty/improved investment-risk control, a favourable audit report that would keep taxes low.

Category 4:

Bribes can be paid

- a) to prevent others from sharing in a benefit, or*
- b) to impose a cost on someone else.*

Like category 1 this also includes winners and losers. In both these categories it might be useful to review the organisation of the potential bribers since that may give an idea of the size and prevalence of corruption. If there are only a few potential beneficiaries from giving bribes, they may simply share the market monopolistically (cartel) among themselves and present a united front against public officials and avoid the need to resort to bribery. However, privatisation has other critical consequences in other areas.³⁴ This may also include private-to-private corruption.

³³ Ibid.

³⁴ "Doubts at World Bank on infrastructure sell-off", *Financial Times*, 27 July 1999: The situation of "lifting rent" due to lack of competition means inefficiency in resource allocation. In case the profits are transferred out of the country due to foreign ownership, an even bigger drain of resources takes place. On the other hand, deregulating markets in conjunction with privatisation of national assets have proven a disaster without a proper

*Examples of situations for category 4 bribes:*³⁵

An operator of an illegal business pays law enforcement agencies to raid his competitors. Owners of legal business might seek the imposition of excessive regulatory constraints on competitors or attempt to induce officials to refuse to license a potential competitor. A private sector agent may be paid by a competitor to “forget” or to turn a blind eye to a business opportunity.

3.1 When does corruption occur?

Corruption depends on three factors:³⁶

1. The overall level of public benefits available,
2. The risks inherent in corrupt deals,
3. The relative bargaining power of the briber and the person being bribed.

As a single transaction corruption takes place where there is a combination of **opportunity**, and **inclination**. Opportunities can be minimised through systematic reform of the public sector, and inclination reduced through reversing a "high profit, low risk" scenario into a "low profit, high risk" one.³⁷

Corporations basically divide into three groups:³⁸

Group 1: These corporations suffer from corruption: they realise no benefit from it.

Corruption brings no advantage to them in terms of their competitive position. This may be because their market is not dependent on purchases by the State. Small and medium-sized enterprises (SMEs) would most likely be in this group of firms.

Group 2: These corporations are competitive when corruption does not bias the rules of competition, yet corruption plays a role in giving them access to or creating new markets.

understanding of why liberal markets function without turning nations into predatory capitalistic states and kleptocracies. According to the head of the World Bank's Asia-Pacific region, Jean-Michel Severino, many international organisation, the World Bank included, had been naive about the benefits of infrastructure privatisation. It had turned into a "horror" story in Asia in the wake of the regional economic crisis. The need to build up a proper and legal framework was overlooked in the rush to promote private financing and infrastructure earlier in the decade. In many cases there was a high level of corruption. See also Kaplan, D., "The Looting of Russia," *US News and World Report*, 3 August 1998, at <http://www.icij.org/investigate/kaplan.html>.

³⁵ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), pp. 10-11.

³⁶ *Ibid.*, p. Xv.

³⁷ *Ibid.*, pp. Viii, X, Xv.

³⁸ "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

In order for these firms to compete in a public tender, for instance, they have to abide by the rules of corruption and provide payoffs. Yet without these practices, these firms would still be competitive. According to Irène Hors of the OECD Development Center, it could be the case that "entrepreneurs who have invested in training their workers and in developing or acquiring highly competitive technologies have a strong interest in operating in an environment where they can capitalise on those investments through competition for profits."³⁹

These two groups of firms, if they refuse corrupt practices, are likely to lose business. Corruption manifests itself as *extortion*. Their moral defence is usually that **the local business culture demands bribes in order to stay in business**. That way they can claim that it *saves jobs* to remain in that environment by assuring that one stays in business, regardless of the fact that it may be costing jobs elsewhere. In certain countries, particularly in the developing world, it is very difficult for anyone to win a major government or parastatal contract without paying a large bribe. This is normally done through a representative who receives a percentage commission when the business is secured. A company may then justify its action not only on the ground of "business necessity" but also that it is merely conforming to local practice.⁴⁰ As Mabouso Thiam of the West African Enterprise Network puts it, "Corruption is the price you have to pay in order to stay in business." According to, Inna Pidluska of the Ukrainian Center for Independent Political Research: "To be able to do business, to be able to make money, businesses are pushed into bribing officials."⁴¹

The moral defence for these two groups has a sufficient element of truth in them to satisfy the conscience of the company which is hungry for business and does not consider itself legally bound to reject *grand* corruption as a tool, particularly when used indirectly through a representative. Many directors also feel entitled to shelter behind their ignorance of the company's operations, particularly its foreign operations. While this attitude has no legal validity, it is a widespread phenomenon, and can lead a director to feel no responsibility for questioning the level of an overseas representative's commission, even if it seems excessive.⁴² This moral argument conflicts with the Conventions requirement of making bribery in international transactions a criminal offence. This conflict will be explored below.

Group 3: These corporations owe their position in the market solely to privileges created by a corrupt system.

³⁹ Ibid.

⁴⁰ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), pp. 69-70.

⁴¹ "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

⁴² Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), pp. 69-70.

This group would clearly lose their competitive position should a change in the rules occur. These firms are typically run in close co-operation with actors in the public arena. In this case, corruption practices tend to be implicit arrangements among actors in the public and private sectors to exploit an economic opportunity.⁴³ For this group **bribes are paid due to a lack of market demand**: companies which are short of demand seek to create it by offering very attractive bribes to decision-makers to approve unneeded purchases or projects.⁴⁴ But that is not a suitable moral defence: although any form of bribery may be thought to be morally wrong, offshore bribery is generally condoned "*because everybody does it.*"⁴⁵

Corruption represents costs in terms of time and money, but it also creates an environment of uncertainty in the operations of firms. According to Daniel Kaufmann of the World Bank, the probability of losing one's investment to corruption within five years is as high as 80 percent in some countries. John Bray of Control Risks Group: "If companies pay once, they will receive more demands. If they do not get what they pay for, they are in no position to complain; there is no source of legal redress because they have themselves broken the law. Having broken the law, they are vulnerable to various forms of blackmail. And, if they enter into a corrupt relationship and then try to suspend outstanding payments, they may face a variety of different threats - including the threat of violence."⁴⁶

Clearly, firms from Groups I and II will be those most ready to mobilise against corruption practices that influence the rules of competition, since corruption is a liability for them. Even those firms whose competitive position is partly acquired through corruption may join the anti-corruption movement because of the uncertainty involved in a situation where competitive position is influenced by corruption practices. According to Gregory Simpkins of the Corporate Council on Africa: "If I maintain a situation in which I have an advantage through corruption, tomorrow my competitor will have an advantage because he pays more or because he's closer to the new faction in charge. Only in a situation where everyone is competing equally can one be reasonably assured of having a good chance of competing and getting business."⁴⁷ Even those businesses that occasionally benefit from corruption may come to deplore it. Anda Djoehana of the Indonesian group Medco: "Private businesses resented the "Suharto system" [the ex-dictator] because lucrative businesses and projects were systematically closed to them."⁴⁸

⁴³ "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

⁴⁴ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), pp. 69-70.

⁴⁵ *Ibid.*, pp. 69-70.

⁴⁶ "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

All of these facts are important to understand what approach to tackling bribery in international transactions may be effective. Any preventive approach would have to address these facts.

3.1.1 Public Sector Deterrence

For the state, opportunity and inclination can be minimised through reforms. The **elements of a serious and concerted reform** effort must therefore include:⁴⁹

1. A clear commitment by political leaders to combat corruption wherever it occurs and to submit themselves to scrutiny.
2. Primary emphasis on prevention of future corruption and on changing systems (rather than indulging in witch-hunts).
3. The adoption of comprehensive anti-corruption legislation implemented by agencies of manifest integrity (including investigators, prosecutors, and adjudicators).
4. The identification of those government activities most prone to corruption and a review of both substantive law and administrative procedures.
5. A program to ensure that salaries of civil servants and political leaders adequately reflect the responsibilities of their posts and are as comparable as possible with those in the private sector.
6. A study of legal and administrative remedies to be sure that they provide adequate deterrence.
7. The creation of a partnership between government and civil society (including the private sector, professions, religious organisations).
8. Making corruption a "high risk" and "low profit" undertaking.

The idea is to introduce a proper system of checks and balances which reduces opportunity and inclination. Where these preventive checks and balances fail, there are “deterrent accountability mechanisms” in place with appropriate sanctions. All of which aims at guiding and controlling individual behaviour.

Due to the limited space in this thesis and the immense web of relations connected to corruption, the circumstances pertaining to the public sector will only be summarily condensed into the chart in Supplement C.

3.1.2 Private Sector Deterrence

In the private sector the instruments to minimise opportunity, reduce profits and increase risks are:⁵⁰

- a) Prevention

⁴⁹ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. viii.

⁵⁰ *Ibid.*, pp. Viii, X, Xv.

- b) Law Enforcement, and
- c) Deterrent accountability mechanisms.

However, one may argue whether it would make more sense to consider an anti-corruption law as enforced by the authorities in the area of prevention and deterrent accountability mechanisms respectively. The preventive measures may include organisational requirements, education to raise awareness, internal control/compliance regulations included in corporate policies to enforce the ethical standards in the policy, accountancy regulations, insurance requirements (auto-control function), etc. As regards the “deterrent accountability mechanisms” they concern the sanctions and their contents. As Braithwaite and Fisse suggest (see chapter 9.3.2 below), internal company controls may be part of such sanctions, as well as individual sanctions. Deterrence may be more or less likely depending on the contents of the sanctions. The enforcement of these mechanisms concerns investigative weapons, which may, in order to be efficient and increase the risk, need to be of a particular kind due to the particular difficulties concerning corruption. Just as in the public sector, these legal instruments all aim at guiding and controlling individual behaviour.

A major research project carried out in New South Wales, Australia, in 1994, by the state’s Independent Commission Against Corruption⁵¹, sought to determine the kinds of conduct public sector employees would judge as corrupt and identify those factors which might hinder employees from taking action against it. The survey showed that a willingness to take action depends on a number of factors, including the relationship between taking action and how harmful, undesirable or unjustified each scenario was considered to be. Factors which reduced the willingness to take action included:

- A belief that the behaviour was justified in the circumstances;
- The attitude that there is no point in reporting corruption as nothing useful will be done about it;
- A belief that the behaviour was not corrupt;
- A fear of both personal and professional retaliation;
- A relatively low position within the organisation;
- The employees’ perception of their relationships with the perpetrator and the supervisor, and;
- Concerns about insufficient evidence.

Thus, the individual aspect seems to be a logical starting point if the business of criminal law is to regulate individual conduct.

⁵¹Independent Commission Against Corruption, *Unravelling Corruption: A Public Sector Perspective: Survey of NSW Public Sector Employees’ Understanding of Corruption and their Willingness to Take Action*, ICAC Research Report Number 1, April 1994, referred to in. Pope, J. (ed.), *The TI Source Book* (Berlin: Transparency International, 1999), p. 9

3.1.3 Individual Behaviour

It seems the common aim both in the public and in the private sector is to prevent and punish corrupt behaviour of individuals.⁵² For this reason it may be interesting to see how individual behaviour has been affected by successful anti-corruption strategies. What are the experiences of how to efficiently improve a situation of widely spread corruption in the business environment into one where the reverse is true? What lessons could be learnt from the contents of such strategies? Why was it successful? Can it be applied to prevent bribery in international business transactions?

⁵² Hart, H. L. A., *The Concept of Law*, Second Edition (Oxford: Oxford University Press, 1997), p. 40: The principal functions of law as a means of social control are not to be seen in private litigation or prosecutions. It is to be seen in the diverse ways in which the law is used to a) control; b) guide; c) plan life out of Court.

4 The Hong Kong Campaign

The Hong Kong model has been widely cited as one of the rare success stories in the campaign against corruption. Its legislative framework has served as a model in many other countries, including Botswana, Malawi and New South Wales, Australia. Following the Hong Kong model, many countries in Africa and elsewhere have enacted new laws, established new specialised corruption investigative agencies, and defined new corruption related offences. To date, however, there is no hard evidence to suggest that the Hong Kong success story has been widely replicated abroad.⁵³

At least three elements account for the successful enforcement of corruption laws. First, an enforcement agency must have available adequate human, physical, and intellectual **resources** to be effective. Second, it has to be **independent** of the political leadership. Third, its actions can succeed only to the extent that they are matched by the requisite measure of **political will** to combat corruption.⁵⁴ The Independent Anti-Corruption Commission (ICAC) seems to have had all these factors in place. The political will not only strengthened this enforcement agency but made political decisions possible to provide sufficient funds for required resources. A bi-product of the campaign in Hong Kong is the commitment of the people of Hong Kong to the rule of law.⁵⁵ Often, anti-corruption campaigns stop short of paying lip service to the need to eradicate corruption and engaging in a handful of mostly politically motivated anti-corruption crusades by subservient watchdog agencies under political control. There is a strong connection to political leaders' and public officials' wielding of power and their ready access to public funds. To vest the same political leaders and their acolytes with day-to-day control over the investigation of corruption offences is by some called to "subvert a quasi-investigative process and undermine its credibility, reducing at best to a preferred instrument of political vendetta."⁵⁶

The ICAC has a particularly interesting history. It was established in 1974 following a Commission of Enquiry initiated after the escape from Hong Kong of a Chief Superintendent of Police who had been arrested on

⁵³ Ofusu-Amaah, W., et. al., *Combating Corruption: A comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* (Washington, D.C.: IBRD/The World Bank, 1999), p. 46.

⁵⁴ Ibid.

⁵⁵ "Hong Kong's Tung Tied", in 39 *The Economist*, March 28, 1998: In many countries the refusal of the political leadership to prosecute an individual who has been investigated for fraud and found amenable to prosecution hardly causes a stir. In Hong Kong, according to news media, such an episode caused an uproar. According to Professor Yash Ghai of the University of Hong Kong, the commitment of the people of Hong Kong to the law may be greater than their commitment to democracy.

⁵⁶ Ofusu-Amaah, W., et. al., *Combating Corruption: A comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* (Washington, D.C.: IBRD/The World Bank, 1999), p. 47.

corruption charges. There was intense public reaction to this. The Police Officer was eventually extradited back to Hong Kong and served a term of imprisonment. The main outcome of the inquiry was to establish the ICAC.⁵⁷

The ICAC has three Departments. The Operations Department (in 1997) had a staff of about 800, indicating the labour-intensive nature of investigation work. The second is the Corruption Prevention Department, which examines procedures and gives advice about corruption opportunities to government departments, and at their request, to the private sector. It has about 60 employees, most of whom are senior practitioners in their chosen professions, such as accountancy, engineering and management. Since 1975 when it started work until mid-1996, the Corruption Prevention Department has completed some 1.830 corruption prevention studies for government bodies and public bodies. In addition, some 1.400 private sector companies and organisations have sought and been given corruption prevention advice.⁵⁸ The third area is the Community Relations Department, which spreads the word about the evils of corruption. It has a staff about 200 including the officers manning the regional offices throughout Hong Kong. They comprise media production specialists, journalists, teachers, social workers and designers. The balance of ICAC personnel consists of administrative, training and support staff. The ICAC staff of about 1060 should be put in relation to the population of 6.2 million and a police force of 35.000.⁵⁹

This approach to fighting corruption is known as “The Three Pronged Attack.”⁶⁰ Hong Kong was the first anti-corruption agency in the world to adopt a strategy that embraced not only investigation but also methodical, systemic prevention and community-wide education. The Commission is widely acknowledged to have succeeded in bringing a serious, deeply rooted corruption problem under control.⁶¹

In devising Hong Kong’s corruption **prevention strategies** to bring about changes, three key initiatives appeared relevant:⁶²

- The creation of a strong deterrent through vigorous enforcement

⁵⁷ Maloney, N., “Corruption and the Private Sector”, paper presented at the Annual Conference of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific, December 11-13, 2000, Manila, Philippines.

⁵⁸ de Speville, B., Hong Kong: Policy Initiatives Against Corruption (Paris: OECD, 1997), pp. 49-50.

⁵⁹ Ibid., p. 41.

⁶⁰ Maloney, N., “Corruption and the Private Sector”, paper presented at the Annual Conference of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific, December 11-13, 2000, Manila, Philippines.

⁶¹ de Speville, B., Hong Kong: Policy Initiatives Against Corruption (Paris: OECD, 1997), p. 59.

⁶² Catherine Chui, C., “Tackling Corruption: School Education and Public Awareness”, paper presented at the Annual Conference of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific, December 11-13, 2000, Manila, Philippines.

- activities to demonstrate that corruption is a *high-risk* crime;
- The implementation of system changes at the institutional and organisational level to ensure that corruption *opportunities are minimised*, and;
- The transformation of *social values and behavioural patterns* to reinforce the principles of justice, fairness and transparency, which thereby reduces the motivations for corruption.

In the following I have organised five areas which have been employed as means for a common ultimate aim: prevention of unwanted behaviour.

1. Education

In schools, colleges and universities the aim is to help students acquire the knowledge and values that contribute to the fight against corruption. The Community Relations Department has a dual role of assisting teachers to promote *moral education* in primary and secondary schools of making direct contact with secondary school leavers and final year students of tertiary institutes. Every year the department gives about 1 900 talks for 70 000 students and 420 presentations for 9 300 teachers.⁶³ The general aim of educating the public about the evils of corruption necessitated a more specific approach to particular target audiences. The community was segmented into specific groups in order to tailor an appropriate information presentation to school children and heads of department.⁶⁴

2. Media

A community-wide change of attitude to corruption and a willingness to actively help in the fight are essential ingredients for success. It is therefore incumbent on the state executive to ensure that the means of mass communication are accessible to the anti-corruption agency so that it can convey the anti-corruption message to the community.⁶⁵ The Commission made active and constant use of the media to convey the anti-corruption message, to publicise corruption prosecutions, convictions and sentences and to maintain in the community a high level of corruption awareness.⁶⁶

3. Investigative Instruments

Bargain immunity:

It was recognised that prosecution evidence of a corrupt transaction often could only be given by one of the parties to the transaction. The legislature of Hong Kong enabled a court to inform any person accused or suspected of a corruption offence that, if he gave “full and true evidence” he would not be prosecuted for any offence disclosed in his evidence. Upon giving evidence

⁶³ de Speville, B., *Hong Kong: Policy Initiatives Against Corruption* (Paris: OECD, 1997), p. 52.

⁶⁴ *Ibid.*, p. 30.

⁶⁵ *Ibid.*, p. 72.

⁶⁶ *Ibid.*, p. 25.

he could only be prosecuted if the court considered that he had withheld evidence or given false testimony.⁶⁷

Witness protection:

Witnesses were protected by the prohibition on disclosure during court proceedings of the information so provided, or of the identity of the person who had provided the information to the Commission.⁶⁸

Information requisition:

The Commissioner was given the power to obtain from any person accused of a corruption offence a statement in writing enumerating the property acquired by him in the past 3 years, all expenditure and liabilities incurred by him in that period and all assets sent by him out of Hong Kong.⁶⁹ He was also able to obtain information from any person, if he thought it would assist his investigation, as to when and from whom any property held by that person was acquired and as to any matter relating to the investigation with which he might be acquainted.⁷⁰ Failure to comply with a notice requiring such information or the provision of false information was made an offence.⁷¹

Confidentiality:

Complainants or informants had to be sure that if they came to the ICAC they would not risk exposure. Investigations in their early stages had to be kept confidential if they were not to be compromised. Concerning preventive advice, government departments or private sector enterprises requiring corruption prevention advice had to be able to choose *whether* or *when* to disclose any anti-corruption advice obtained. This need for confidentiality in some of the affairs of the Commission required the operation of a “need-to-know” policy within the Commission.⁷²

Concerning investigations it was made a criminal offence for anyone to disclose without lawful authority or reasonable excuse to a person under investigation for a corruption offence the fact that he was under investigation for a corruption offence, the fact that he was under investigation, or any details of the investigation.⁷³ It was also made an offence to disclose to anyone the identity of a person under investigation.⁷⁴ The prohibition of disclosure lasts until such time as the person under investigation is arrested in connection with a corruption offence.⁷⁵ It is further prohibited to disclose any information, even within the agency,

⁶⁷ Ibid., p. 28; Hong Kong, Prevention of Bribery Ordinance, section 23.

⁶⁸ Hong Kong, Prevention of Bribery Ordinance, section 30A.

⁶⁹ Ibid., section 14(1)(a) and (b).

⁷⁰ Ibid., section 14(1)(c) and (d).

⁷¹ Ibid., section 14(1)(4) and (5).

⁷² de Speville, B., Hong Kong: Policy Initiatives Against Corruption (Paris: OECD, 1997), p. 25.

⁷³ Hong Kong, Prevention of Bribery Ordinance, section 30 (1).

⁷⁴ Ibid.

⁷⁵ Ibid., section 30 (1A).

unless that person “needed to know” the information in order to do his job as an officer of the Commission. However, disclosure is allowed by anyone where an *overt* action has been taken in respect of the suspect, for instance the issue of a warrant for his arrest, the service on him of a notice requiring him to surrender his travel documents. Finally, any disclosure is permissible if it reveals serious misconduct by the Commissioner or his staff.⁷⁶

4. Business Community Efforts

The change from outright hostility to total support cannot be attributed to a fear of the enforcement of the prohibition of secret commissions. Rather it is the realisation that clean business on a “level playing field” is more profitable than corrupt business. For a Hong Kong businessman there can be no stronger proof than better profits.⁷⁷

The Corruption Prevention Department was given the job of eliminating the opportunities for corruption existing in the systems and processes of both the public sector and private sector organisations. They offered confidential anti-corruption advice to the private sector when such advice was sought. The department had to encourage private enterprises to seek such advice. These services were provided discreetly under a name not readily associated with the ICAC, the Corruption Prevention Advisory Service, and were free of charge.⁷⁸ In the private sector, preventive *education* is a priority area of work. There is an increasing demand among business organisations for advice and assistance from the Commission in designing and implementing preventive mechanisms. Each year the department helps hundreds of large and medium-size business corporations and provides anti-corruption training for thousands of managers and supervisors.⁷⁹

5. Offences and Sanctions

Private corruption:

It is certainly not possible, and certainly not desirable, to have a rule which states that it is legally wrong to bribe a government servant, but perfectly legitimate to give and receive bribes in the private sector: there is no room for such double standards in Hong Kong today.⁸⁰

In the private sector the conduct proscribed by section 9 of the Prevention of Bribery Ordinance was the soliciting, offering or acceptance of any advantage by or to an agent without the approval of his principal. This was initially a highly sensitive issue. In 1976 two prominent Hong Kong companies were prosecuted and convicted of offering secret commissions. Some senior employees were convicted of soliciting advantages from their

⁷⁶ Ibid., section 30(2) as amended by the Prevention of Bribery (Miscellaneous Provisions) Ordinance 1996, section 16.

⁷⁷ de Speville, B., Hong Kong: Policy Initiatives Against Corruption (Paris: OECD, 1997), p. 60.

⁷⁸ Ibid., p. 31.

⁷⁹ Ibid., p. 51.

⁸⁰ Ibid., p. 42.

company's advertising salesmen. There was a strong reaction from the Chinese business community and the Chinese Manufacturers Association (CMA):

In general, the CMA argued that in most cases commissions (advantages) aided the Hong Kong economy; and, moreover, that the practice was a hallowed Chinese custom, and in no way immoral or criminal. As a pressure group, CMA spokesmen implied that Western legal notions did not accord with the reality of local conditions and beliefs. There was, in their eyes, a real clash between cultures, and the colonial administration should defer to the views of the great majority, to the dominant Chinese segment of the population, on which Hong Kong's stability and prosperity depended.⁸¹

Other offences included *Unexplained wealth of public servants (see below)* and *Reversed onus of proof of certain elements of an offense (see below)*.

Sanctions:

The court was given the power to prohibit for up to 7 years, on pain of criminal sanction, the convicted person from taking or continuing in any position as director or manager of a corporation or public body, from practising his profession, or from acting as partner or manager in a partnership.⁸²

Some of the **results** from the campaign against corruption in Hong Kong, which began in February 1974, are:

- Bribery and extortion have become crimes that carries as *high risk of detection and prosecution*;
- The business sector is perceived to be much less infected by corruption than it once was;
- The community evinces a high level of intolerance of corruption;
- There is throughout the community a much greater understanding of the dangers of corruption.⁸³

Of the lessons learnt, de Speville claims that a successful recipe against corruption requires:⁸⁴

1. A political decision and determination to fight;
2. A strong framework of anti-corruption laws comprising simple and clear offences, supportive evidentiary provisions, comprehensive investigatory powers and protective provisions for informants;
3. A coherent and complete strategy that includes investigation, prevention, and education: a "three pronged attack";
4. Active community involvement;
5. Adequate and sustained funding;

⁸¹ Lethbridge, H.J., *Hard Graft in Hong Kong* (Oxford: Oxford University Press, 1985), p. 75.

⁸² Hong Kong, Prevention of Bribery Ordinance, section 33A.

⁸³ de Speville, B., *Hong Kong: Policy Initiatives Against Corruption* (Paris: OECD, 1997), p. 55

⁸⁴ *Ibid.*, p. 63

6. A willingness by government to keep on fighting.

In general, the Hong Kong experience is that keeping corruption at bay is a constant effort and not a limited time project, and a strategy that only comprises investigation and prosecution alone will never overcome the problem of corruption.⁸⁵

The above mentioned five areas will function as a structure for the further examination of what the approach to the supply-side of bribery in international transactions looks like in relation to individual behaviour and the criticism of existing, traditional solutions to combating corruption.

⁸⁵ Ibid., pp. 63-64.

5 Morals

Over and over, corruption is constantly connected to morals, or rather the lack of morals, as if there was a globally accepted moral standard. In Hong Kong, the Community Relations Department has a role of assisting teachers to promote *moral education* as well as to promote moral values in direct contacts with students in various educational levels. In the business community, the Corruption Prevention Advisory Service provides advice on ethical codes as part of an active preventive method to combat bribes. Although the traditional discourse has been superseded in academia by perspectives on politics which model all action as self-interested, some analysts are once again acknowledging the need to attend to the role of moral values underpinning the integrity of public office, and contributing to a robust, open civil society.⁸⁶ Scholarly focus on trust and social capital reinforces this trend.⁸⁷ Some research even argues that morality is essential to the smooth functioning of a market economy.⁸⁸ And as can be argued in the cases where systemic corruption exists, corruption is the norm and not an anomaly.⁸⁹ But if morals is key to fight corruption in Hong Kong, why is it so? How does it relate to individuals? And how may moral rules be defined while at the same time taking into account the reality of shifting moral contents in various cultures? Are there any common features in all morals which may be useful in the fight against corruption?

5.1 Morals And Justice: The Contents of Morals

5.1.1 What is the relation between morals and justice?

There is a specific idea of justice *within* the general sphere of morality according to Hart.⁹⁰ Why? Hart exemplifies: "A man guilty of gross cruelty to his child would often be judged to have done something wrong, bad, or even wicked or to have disregarded his moral obligation or duty to his child. But it would be strange to criticize his conduct as unjust. This is not because the word 'unjust' is too weak in condemnatory force, but because the point of moral criticism in terms of justice or injustice is usually different from, and more specific than, the other types of general moral criticism which are

⁸⁶ Bukovansky, M., "Moral dimensions of the Global Anti-Corruption Regime", Individual Project Fellowship Project Proposal, Open Society Institute (February, 2000).

⁸⁷ See for instance, Fukuyama, F. Social Capital and Civil Society, IMF Working Paper (WP/00/74), 2000.

⁸⁸ Platteau, Jean -Philippe, "Behind the Market Stage Where Real Societies Exist-Part II: The Role of Moral Norms", 30 *Journal of Development Studies*, No. 3, 1994.

⁸⁹ "Corruption Seen As The 'Norm'", *RFE/RL*, 10 May, 2001.

<http://www.rferl.org/nca/features/2001/05/10052001115630.asp>.

⁹⁰ Hart, H.L.A., *The Concept of Law* (Oxford: Oxford University Press, 1997), p. 157.

appropriate in this particular case and are expressed by words like ‘wrong’, ‘bad’, or ‘wicked’. ‘Unjust’ would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault, or if he had punished the child for some offence without taking steps to see that he really was the wrongdoer.”⁹¹

The following explains that there *is* a difference.⁹²

Why is “just” and “unjust” more specific forms of moral criticism than “good” and “bad” or “right” and “wrong”?	
A just law may be a good law.	An unjust law may be a bad law.
A good law is not necessarily just .	A bad law is not necessarily unjust .

According to Hart, justice and fairness concern:⁹³

<p>JUSTICE CONCERNS:</p> <ol style="list-style-type: none"> Distribution of burdens and benefits among <i>individuals</i>. Examples: a) Inequality in treatment in spite of the same blameworthy behaviour; of unjust distribution b) Undeserved punishment; c) Inequality in rights and obligations due to a factor beyond human control. Compensation for injury done by <i>one person to another</i>. Just compensation provides for the restoration, after disturbance, of the moral status quo. <p>FAIRNESS CONCERNS:</p> <ol style="list-style-type: none"> Distribution of burdens and benefits among <i>classes of people</i>. (Typically a ‘share’.) Compensation for injury done by <i>one class of people to another</i>.
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5.1.2 Why is equal treatment important?

A general principle in the *idea* of justice is that individuals are entitled in respect of each other to *a certain* relative position of equality or inequality. Put this way, justice can be seen as something which *maintains* or *restores* a balance or proportion.⁹⁵ According to Hart, the general principle in the idea of justice may be formulated as “Treat like cases alike and different cases differently.” However, with such a definition it is necessary to define what is “like” and what is “different”. Hart: “...any set of human beings will resemble each other in some respects and differ in...others and, until it is established what resemblance and difference are relevant...we cannot proceed to criticize laws or other social arrangements as unjust.”⁹⁶

⁹¹ Ibid., p. 158.

⁹² Ibid.

⁹³ Ibid., pp. 158-165.

⁹⁴ Ibid., p. 158.

⁹⁵ Ibid., p. 159.

⁹⁶ Ibid.

5.1.3 What qualifies for equal treatment in the distribution of burdens and benefits?

According to Hart, *equal human capacities* for a specific function with which the exercise of a law may be concerned (for instance the capacity for rational thought and decision) are the qualifiers. That is why the insane and children are excluded from making use of the same legal rights as sane adults, for instance making a will.⁹⁷ In other cases the qualifier may be the *need* for relief. The burden of taxation as well as social benefits for the poor have in common a definition of how to qualify for these needs.⁹⁸ This may very well be a monetary measure but it is still referred to human resemblances: a will to survive and the needs for that, thus a biological resemblance.

By these qualifiers it is possible to consider the justice of laws. Hart: "...it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice."⁹⁹ But the justice of a law is not the same as justice in the application of the law, that is procedural or administrative law.¹⁰⁰ Since the object of law and administration is humans and the origin of both is a policy goal, relevant resemblances and differences in humans in relation to the policy goal at hand seem to have a common definition. However, there is an explanation to cultural relativity of what resemblances and differences to include in the general principle of the idea of justice.

5.1.4 Cultural Relativity of Morals

As soon as the world can be seen through a language (a creation of conceptions) a structural system of relations has been verbalised. It seems it is a human characteristic to try to create order, to simplify, and to find theories of causal chains in the chaos of stimuli that reaches our five senses.¹⁰¹ Supposedly, this also has a reason based on a human need of intellectual and emotional safety.¹⁰² From this structuring of the world, what is considered as true depends on the already assumed systems of conceptions and theories.¹⁰³ Human reality is partly created by humans themselves. Pictures of reality are sometimes emotionally charged and these are internalised. This means that a culture or a cultural segment at one point in

⁹⁷ Ibid., p. 163.

⁹⁸ Ibid.

⁹⁹ Ibid., p. 161.

¹⁰⁰ Ibid.

¹⁰¹ Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), pp. 19-20; Snaprud, P., "Phineas Gage överlevde! –Men efteråt svek känslorna och förnuftet gick vilse" in *Forskning och Framsteg*, no 7, 1996, 12-17, at 16.

¹⁰² Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), pp. 19-20.

¹⁰³ Ibid., p. 20.

time is characterised by a prevailing common view on nature, humanity, the order of society and other issues.¹⁰⁴ As concerns corruption, attitudes to it varies not only between cultures we consider very different but also between countries in Western Europe relatively similar.¹⁰⁵ According to Jareborg, **relativity of conception** makes us unable to distinguish between rational and irrational beliefs.¹⁰⁶ Our perceptions of what is *sufficient* and *relevant* evidence/proof differ depending on our conceptions of the world. Rationality, truth, knowledge and validity and justification are either illusions or ideals since in the end these conceptions will differ depending on religious explanations of the world or some other system of *beliefs*.

However, Jareborg offers an explanation to **beliefs in relation to truth**. He contends that the human reflection is fundamentally transparent: the answers to the questions “Do I think that p?” and “Is it true that p?” can not be separated from each other.¹⁰⁷ **“There is no other way to find the truth but to find out what reasons one has to believe.”**¹⁰⁸ The possibility that some or many of our beliefs have been caused the *wrong way* (wished something to be true or (self-deception) / manipulation of nerve-system –not caused by rational thinking: the *right way*) only means that there is a possibility that many of our beliefs are irrational (according to a relative definition of what is rational, which depends on a certain goal existing for some reason). But it does not mean that the irrational way of causing that belief gives a *reason* to abandon that belief.¹⁰⁹

If each action is individually determined due to certain individual reasons we can only find an explanation for the action. There is no way we can justify it. And since the object of penal law is control of human behaviour, this must be kept in mind. To explain different conceptions of justice this is fundamental. Hart: “...human beings might be thought of as falling naturally and unalterably into certain classes, so that some were naturally fitted to be free and others to be their slaves or, as Aristotle expressed it, the living instruments of others. Here the sense of prima-facie equality among men would be absent...It is therefore clear that the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society.”¹¹⁰ The historical developments of prevailing societal beliefs of the world and subsequent political developments seem inseparable.

¹⁰⁴ Ibid.

¹⁰⁵ Mény, Y., “‘Fin de siècle’ corruption: change crisis and shifting values”, in 149 *International social science Journal* 1996, p. 310. Alatas, et.al., *Corruption: Its nature, Causes and Functions* (Aldershot: Avebury, 1990), pp. 92-97.

¹⁰⁶ Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 224.

¹⁰⁷ Ibid., p. 224-225.

¹⁰⁸ Ibid., p. 225.

¹⁰⁹ Ibid.

¹¹⁰ Hart, H.L.A., *The Concept of Law* (Oxford: Oxford University Press, 1997), pp. 162-163.

5.2 Objective Moral Facts

That there are objective moral facts is a controversial philosophical theory.¹¹¹ Justice is one part of morality primarily concerned with the ways in which classes of individuals are treated.¹¹² But principles of justice do not exhaust the idea of morality; and not all criticism of law made on moral grounds is made in the name of justice. Laws may be condemned as morally bad simply because they require men to do particular actions which morality forbids individuals to do, or because they require men to abstain from doing those which are morally obligatory.¹¹³

From this follows that a definition of morality is needed which in general terms characterise those principles, rules, and standards relating to the conduct of individuals which belong to morality and make conduct morally obligatory.¹¹⁴ The controversy is what forms of principle or rule are to define as moral and not. And even where there is agreement on this point and certain rules or principles are accepted as belonging to morality, there may still be great philosophical disagreement as to their *status* or relation to the rest of human knowledge.¹¹⁵ Hart tries to escape these philosophical controversies by defining the characteristic elements of moral rules under the heads of “*importance*”; “*immunity from deliberate change*”; “*voluntary character of moral offences*”; “*the form of moral pressure*”.¹¹⁶ According to Hart, these features are constantly found together in those principles, rules, and standards of conduct which are most commonly accounted as “moral”.¹¹⁷ They reflect different aspects of a characteristic and important function which such standards perform in social life or in the life of individuals. This definition of moral rules is neutral between rival philosophical theories as to its *status* or fundamental character.¹¹⁸

According to Hart, it cannot be disputed that the development of law, at all times and places, has been profoundly influenced both by the *conventional morality* and ideals of particular social groups, and also by forms of *enlightened moral criticism* urged by individuals, whose moral horizon has transcended the morality currently accepted.¹¹⁹ Thus, morals is also divided along the lines of conventional and enlightened.

According to Jareborg, there are two sources of moral rules: social custom and rational argumentation and he therefore makes a distinction between

¹¹¹ Ibid., p. 253.

¹¹² Ibid., p. 167.

¹¹³ Ibid., pp. 167-168.

¹¹⁴ Ibid., p. 168.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid., pp. 168-169.

¹¹⁹ Ibid., p. 185.

“conventional morals” and “constructive morals”.¹²⁰ **Conventional morals** are unreflected in the same way as an institution, a tradition, a language or a certain culture is unreflected. It represents solutions to moral problems, but these problems are not always conscious.¹²¹ **Constructive morals**, on the other hand, origins from open, but not unconditional, argumentation on moral questions. It strives for logic consistency and value coherence.¹²² There is no definite, or “complete” constructive morals thus it is impossible to compare it to a moral system or moral code comparable to a legal system.¹²³ The contents of constructive morals largely depends on societal power relations and interests represented in these relations. Thus they have a connection to social institutions in society, which in turn depend on political institutions exposed to human agency in the form of policy. However, even these depend on existing **power relations**:

Power is an effect of the operation of social relationships, between groups and between individuals. It is not unitary: it has no essence. There are as many forms of power as there are types of relationship...Power is not, therefore, to be identified with the state, a central apparatus that can be seized. The state is rather an overall strategy and effect, a composite result made up of a multiplicity of centres and mechanisms, so many states within states with complex networks of common citizenship. Factories, housing estates, hospitals, schools, families, are among the more evident, more formalised of such ‘micro-powers’.¹²⁴

Power has no finality: political transformations are not the result of some necessity, some immanent rationality, but *responses to particular problems*, by using the knowledge of chains of repercussions. It is not a totalised, centralised response since relations are not finite.¹²⁵ Knowledge derives not from some subject of knowledge, but from the power relations that invest it. Knowledge does not reflect power relations; it is not a distorted expression of them; it is immanent in them. Power produces knowledge. Power and knowledge directly imply one another. There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.¹²⁶

In short, power and knowledge are two sides of the same process. Knowledge cannot be neutral, pure. All knowledge is political not because it may have political consequences or be politically useful, but because knowledge has its conditions of possibility. Knowledge is not so much true or false as legitimate or illegitimate for a particular set of power relations.¹²⁷

¹²⁰ Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 45.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Sheridan, A., *Michel Foucault: The Will To Truth* (London: Routledge, 1997), pp. 218-219.

¹²⁵ *Ibid.*, p. 219.

¹²⁶ *Ibid.*, p. 220.

¹²⁷ *Ibid.*

The two forms of morals have **reciprocal interactive influence** on each other, a process heavily influenced by power relations. Convincing moral argumentation often leads to a renewal of the conventional moral. As a conventional moral rule is highlighted by constructive morals, the rule becomes conscious and visible. It may then be found to be outdated in some sense, that it is based on false or irrational beliefs, for instance concerning the causal relations or changed societal circumstances due to technological developments, or that there are other equal alternatives preferred out of a need for change.¹²⁸ In the other direction, constructive morals can not remain uninfluenced by existing conventional morals and its connected traditions, institutions and cultural patterns. As Hampshire contends:

'...[That] men are only half-rational carries the implication that our desires and purposes are always permeated by memories and by local attachments and by historical associations, just as they are always permeated by traditional calculation; and that will always be true.'¹²⁹

5.3 Why morals?

The "half-rationality" Hampshire mentions above, refers to a rational justification of keeping conventional morals provided by the *paradox of rationality*: it is seldom rational to be completely rational since there would be no time left to do anything but contemplating the rationality of alternative decisions. All social rules, even rules of etiquette or moral rules have the function to co-ordinate behaviour and to *remove the need to make assessments and make decisions*.¹³⁰ But conformity to conventional morals also gives regularity in social life, which facilitates the possibility to reach individual goals.¹³¹ And the importance of a moral system can from an "individual goal perspective" be explained by "**the human predicament**": available resources are insufficient to satisfy all in their pursuit of the "good life".¹³²

Moral reasons can be defined as reasons which relate to someone else's welfare/well-being. They concern others. Non-moral reasons are self-concerned, which can relate to an individual or a collective of individuals. The basis for welfare/well-being can be found in that some elementary needs must be fulfilled. However, the definition of a "good life" is something relative to culture and individual.¹³³

¹²⁸ Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 46.

¹²⁹ Hampshire, S., *Morality and Conflict* (Oxford: Oxford University Press, 1983), p. 137 in Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 46.

¹³⁰ Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 46.

¹³¹ *Ibid.*, p. 47; and Mackie, J.L., *Ethics: Inventing Right and Wrong* (London: Penguin Books Ltd., 1990), p.156.

¹³² Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), pp. 51, 104.

¹³³ *Ibid.*, pp. 36-37.

According to Hampshire, morals can be defined in relation to its central topics: ‘concerning justice in social relations, the control of violence and of killings of all kinds, about war and peace, the regulation of kinship, the customs of friendship and family.’¹³⁴ He suggests that there is a culturally neutral definition of “good” and “bad”: ‘Physical suffering, starvation, imprisonment, the destruction of one’s family or home, are *felt as great evils by anyone in virtue of being a living creature with all the needs that are common to living creatures.*’¹³⁵ And that does not land too far from Schopenhauer’s idea of the autonomous will to life as an underlying explanation.¹³⁶ Hart means that “a structure of reciprocal rights and obligations proscribing at least to the grosser sorts of harm, constitutes the basis, though not the whole, of the morality of every social group. Its effect is to create among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature.”¹³⁷ From this perspective, self-interest both in terms of survival, as well as having a possibility to reach the “good life” function not only as incentives to keep a moral, they add the importance to them.¹³⁸ In addition, the need for a self-consciousness and identity make us part of groups sharing a certain moral.¹³⁹

5.4 What is the definition of morals?

There is one point of similarity between social rules and habits: in both cases the behaviour in question must be general though not necessarily invariable; this means that it is repeated when occasion arises by most of the group: so much is implied in the phrase “They do it as a rule”.¹⁴⁰ There is a commonality in the externally observable behaviour of most in the group.¹⁴¹ The statement that a group has a certain rule is compatible with the existence of a minority who not only breaks the rule but refuse to look upon it as a standard either for themselves or others.¹⁴²

¹³⁴ Hampshire, S., *Morality and Conflict* (Oxford: Oxford University Press, 1983), p. 169, quoted in Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 39.

¹³⁵ Hampshire, S., *Innocence and Experience* (Cambridge MA.: Harvard University Press, 1989), p.106, quoted in Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), note 15, p. 38. Emphasis added.

¹³⁶ Fredriksson, G., *Schopenhauer* (Stockholm: Albert Bonniers Förlag, 1996), pp. 78-81: The will strives blindly without cause or any other purpose but to sustain itself. The will to life in nature and in humans is the same will: the will of the world. It is not perceived by thinking; it exists outside understanding and reason. The body is the manifestation of the will to life. The will is the substance of human nature, the intellect merely secondary, something which serves the will to life.

¹³⁷ Hart, H.L.A., *The Concept of Law* (Oxford: Oxford University Press, 1997), p. 164-165.

¹³⁸ Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 37.

¹³⁹ *Ibid.*, p. 41.

¹⁴⁰ Hart, H. L. A., *The Concept of Law, Second Edition* (Oxford: Oxford University Press, 1997), p. 55.

¹⁴¹ *Ibid.*, p. 56.

¹⁴² *Ibid.*

In the following list I have arranged the three salient differences between social rules and habits according to Hart.¹⁴³

<u>Hart's Three Differences Between Social Rules and Habits</u>		
	Habits	Social Rules
Deviations	Need not be a matter for Criticism.	Generally open to criticism, <i>pressure for conformity</i> .
	No good reason for criticism.	Generally accepted as a <i>good reason for criticism</i> .
Internal Aspect	Not considered as a general standard of behaviour.	Considered as a general standard of behaviour for the group as a whole.

The internal view is manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened and in the acknowledgement of the legitimacy of such criticism and demands when received from others.¹⁴⁴ This is the *critical reflective attitude* to certain patterns of behaviour as a common standard.¹⁴⁵ The characteristic expressions of the critical reflective attitude is the normative terminology of “ought”, “must”, and “should”, “right” and “wrong”.¹⁴⁶ This internal aspect does not transcribe into a matter of feelings, like psychological experiences analogous to those of restriction or compulsion. Such feelings are neither necessary nor sufficient for the existence of binding rules.¹⁴⁷

¹⁴³ Ibid., pp. 55-56.

¹⁴⁴ Ibid., p. 57; Tyler, T.R., et.al, *Social Justice in a Diverse Society* (Boulder: Westview Press, 1997), p. 200: This is confirmed by social psychology studies, which favours a theory of relational retributive justice, which puts self-esteem and esteem at the centre of motivations: “Rule breaking is viewed as a threat to the status of social rules. An offence has symbolic consequences for the individual and the social group because rule breaking is an affront to the victim’s values and status. Restoring the victim’s status requires punishing the rule breaker. Other research suggest that rule breaking also threatens the status of group rules...This group-rule-perspective stresses the importance of punishment as a symbol to restore the structure of society embedded in social rules and the positive social characteristics of the group.” This view seems to be culturally constant: “Studies demonstrate that the desire to punish rule breaking is prevalent across cultures...[There is] considerable agreement among cultures about which offences warrant punishment and how serious these offences are.” (p. 239)

¹⁴⁵ Hart, H. L. A., *The Concept of Law, Second Edition* (Oxford: Oxford University Press, 1997), p. 57.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

5.4.1 What are the characteristics of moral obligations?

1. They concern recurring situations in a moral group.
2. They are within the capacity of any normal adult. This feature makes excuses possible.
3. Some belong to specific enduring roles.
4. Some are fundamental obligations which all normal adults have throughout life. These are rules necessary for the survival of society and regulate social life:
 - a) Rules restricting the free use of violence;
 - b) Rules requiring certain forms of honesty and truthfulness in dealings with others, and;
 - c) Rules forbidding the destruction of tangible things or their seizure from others.¹⁴⁸

There are four defining criteria which allow for distinguishing moral rules from legal rules as well as from other forms of social rules.¹⁴⁹

Hart's Criteria of Moral Rules

1. Importance;
2. Immunity from deliberate change;
3. Moral offences are committed voluntarily;
4. Moral pressure relies on shame, guilt and remorse.

1. Importance

This feature is manifested in four ways¹⁵⁰:

- a) Moral rules restrict passions at the cost of sacrificing considerable personal interest.
- b) Moral rules are taught to all in society as a standard of conduct. This teaching is put in place by social pressure.
- c) There is social pressure exerted in individual cases to obtain conformity to moral rules.
- d) There is a general recognition that without moral rules there would be far-reaching negative consequences for individual's lives.

Other rules do not fulfil a) to d). Importance is not essential to the status of *all* legal rules as it is to that of morals. As the importance of a rule dwindles, moral contents will change.¹⁵¹

2. Immunity from Deliberate Change

Hart contends that "though a moral rule or tradition cannot be repealed or changed by deliberate choice or enactment, the enactment or repeal of laws may well be among the causes of a change or decay of some moral standard

¹⁴⁸ Ibid., pp. 171-172.

¹⁴⁹ Ibid., p. 173.

¹⁵⁰ Ibid., p. 174.

¹⁵¹ Ibid., p. 175.

or some tradition.”¹⁵² For instance “legal enactments may set standards of honesty and humanity, which ultimately alter and raise the current morality”.¹⁵³

3. Moral Offences are Committed Voluntarily

Moral blame is only appropriate when there is no excuse for the morally objectionable behaviour. To blame somebody in spite of the existence of a valid excuse is in itself morally objectionable.¹⁵⁴

*Qualifications for excuses:*¹⁵⁵

- a) individual tests of capacities, mental states, or;
- b) objective test: “reasonable man” standard (“has done all that can be required to avoid the behaviour in question”), or;
- c) no intention (an accident), or;
- d) no knowledge.

All of these excuses have one common denominator: “can”. The moral “ought” implies “can”.¹⁵⁶ In law d) is not an exculpatory circumstance. The other three may be exculpatory in various circumstances. “Strict liability” in law rules out all of them with the exception of a) either as a qualifier for accountability or as a qualifier for certain punishment options. The “internality” of morals does not mean that morals do not require control of external behaviour.¹⁵⁷ The difference between an excuse and a justification is:¹⁵⁸

Excuse - “He could not help it!”

An excuse is concerned with the normal capacity to conform to the rules’ requirements. This is so because a necessary condition for moral responsibility is that the individual has a certain type of control over his conduct.

Justification - “He did not do anything wrong!”

While moral rules refer to constantly recurring situations in life, the law may prescribe a certain behaviour for exceptional circumstances. Killing in self-defence is a kind of conduct which the law does not prohibit and may even encourage.

Since moral blame only occurs whenever there is no valid excuse, a moral offence is committed voluntarily: there is a will to break the rule.

¹⁵² Ibid., p. 176.

¹⁵³ Ibid., p. 177.

¹⁵⁴ Ibid., p. 178.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid., p. 179.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

4. Moral Pressure Rely on Shame, Guilt and Remorse

If the *only* form of pressure to dissuade someone about to break a rule of conduct were threats of physical punishment or unpleasant consequences, then such a rule is not part of the moral rules.¹⁵⁹ With moral rules it is typically *presumed* that they are shared with others. What is presumed is thus *knowledge* about their contents as well as their *importance*: “[D]eviations from the moral code meet with many different forms of hostile reaction, ranging from relatively informal expressions of contempt to severance of social relations or ostracism. But emphatic reminders of what the rules demand appeals to conscience, and reliance on the operation of [**shame,**] **guilt** and **remorse**, are the characteristic and most prominent forms of pressure used for the support of social morality.”¹⁶⁰

5.5 Group Relativity of Morals

The creation of groups is a necessity to provide humans with a self-consciousness and they help create identity.¹⁶¹ Jareborg claims that all morals are group related.¹⁶² But there is also room for *private morals* in the sense that an individual may stand outside all communities and reflect over *if* and *how* he should consider others’ interests/welfare/well-being. However, very few people would find it rational to more than marginally stand outside a moral community due to social pressure. And if morals was generally a private matter, detached from a group morality, social uncertainty would be a disaster to the possible range of personal choices.¹⁶³

The social phenomenon referred to as “the morality” of a given society, may also be called the “accepted”, or “conventional” morality of an actual social group.¹⁶⁴ All these words refer to standards of conduct which are widely shared in a particular society, and are to be contrasted with the moral principles or moral ideals which may govern an individual’s life, but which he does not share with any considerable number of those with whom he lives.¹⁶⁵ There is a difference between a consensus of *convention* manifested in a group’s conventional rules and consensus of independent *conviction* manifested in the concurrent practices of a group. **Conventional rules** (the manifestation of a consensus of convention) exist if *the individuals who accept them, as a reason for this acceptance, refer to the general conformity of a group to these rules*. By contrast merely **concurrent practices** (the manifestation of a consensus of independent conviction) such as the shared morality of a group are constituted by the fact that members of the group

¹⁵⁹ Ibid., pp. 179-180.

¹⁶⁰ Ibid., p.180. Shame is mentioned on page 86 as also being one feeling upon which this social pressure relies. Emphasis added.

¹⁶¹ Jareborg, N., Straffrättsideologiska fragment (Uppsala: Iustus Förlag AB, 1992), p. 41.

¹⁶² Ibid., p. 47.

¹⁶³ Ibid., pp. 46, 48.

¹⁶⁴ Hart, H.L.A., The Concept of Law (Oxford: Oxford Univeristy Press, 1997), p. 169.

¹⁶⁵ Ibid.

*have and generally act on the same but independent reasons for behaving in specific ways.*¹⁶⁶

The reason for why one has accepted conventional rules can not be explained by that there *must* be good moral grounds or justification for conforming to the rules. Even the requirement of a *belief* that such good moral grounds exist for the existence of social rules is too strong. If it was a necessary requirement, other explanations for acceptance of social rules like tradition, role identity, belief in that society knows best, believes that social rules are morally sound, and believes that they are morally justified, would all be ignored.¹⁶⁷ All these attitudes may coexist with a realisation that the rules are morally objectionable. A society may have rules accepted by its members which are morally iniquitous, such as rules forbidding women the same freedom of choice as men.¹⁶⁸

Hart's account of social rules is only applicable to rules which are conventional.¹⁶⁹ He contends that "the theory remains a faithful account of conventional social rules which include, besides ordinary social customs...certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts."¹⁷⁰

5.6 How are morals sustained?

When a social group has a certain set of rules of conduct it is possible to distinguish between two aspects: One may be concerned with the rules merely as an observer who does not himself accept them, or one may accept them and use them as a guides to conduct. These two aspects may be called the "external view" and "internal view" respectively.¹⁷¹ The importance comes with that they are believed to be necessary to the maintenance of social life or some highly prized feature. This concerns not only rules limiting violence but also rules which require honesty or truth or require the keeping of promises, or which specify the function of a certain role in the group.¹⁷² There may be no centrally organised system of punishments for breach of the rules but rather it can take the form of various sorts of hostile or critical reactions, which may stop short of physical sanctions.¹⁷³ If only threats of physical punishment or unpleasant consequences were used to dissuade from rule-breaking, then the rule defended can not be said to be

¹⁶⁶Ibid., pp. 255-256.

¹⁶⁷Ibid., p. 257.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid., p. 256.

¹⁷⁰ Ibid.

¹⁷¹ Ibid., p. 89.

¹⁷² Ibid., p. 87.

¹⁷³ Ibid., p. 86.

part of the morality of the society.¹⁷⁴ Instead, what is typical for the social pressure of moral rules is that *it appeals to the rules themselves*.¹⁷⁵ Therefore, when someone make emphatic reminders of what the rules demand (they are obligation rules), appeals to conscience, or when one express contempt, cut social relations and ostracise a deviator, there is some already existing character one is referring to. As Hart says: “it may depend heavily on the operation of feelings of **shame, remorse, and guilt**.”¹⁷⁶ So, what are these and are they relevant for anti-corruption efforts?

5.7 What is the relation between shame and guilt?

In the following compilation of the features of shame and guilt it is possible to see the relationship between them. Thus, shame may be the causing feeling of guilt in that there in guilt is a correlation between what the agent feels and what others *would have felt had they known what he did*. Subsequently, guilt presupposes **knowledge** of what that reaction would be if they knew what he did. Someone who does not know or understand that his behaviour would have caused such a response will feel no guilt and thus no remorse. However, the described elicited reactions of contempt, derision and avoidance may not be necessary for this knowledge but various other hostile reactions manifested in expressions of various kinds. Thus, with the given description of elicited reactions provided by Elster for shame to be actualised, shame may not be the mother of guilt. Rather, it seems that there is a negative emotion connected with a morally disapproved behaviour and the resulting betterment achieved from learnt appropriate behaviour repairs the damage caused by the action/omission morally disapproved. It is a reasonable explanation since all humans make mistakes and have the ability to learn from them. In a society where learning is not held important, there would be serious consequences for the possibilities of human agency, improvement, hope, change and science.

But what about the relation between the different objects of these feelings? Perhaps one explanation, considering that the presence of others is not necessary for guilt, is that while certain acts/omissions are temporary, a repeated behaviour of these actions/omissions is ascribed the character of the agent responsible. As Hart described the moral rules, the third criteria explains that each breach of moral rules, which is not excused, is voluntary. There must be a want/will to break a moral rule when an action/omission is controlled. But when there is no betterment, the socially “important” rules are at least continuously ignored.

¹⁷⁴ Ibid., p. 180.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid., p. 86.

What does this mean? As continuous breaches are voluntary, is it possible to say that the acts together constitute hostility towards society or simply indifference? Voluntary breaches are those which cannot be excused by a certain state of mind (they are excused), like a flaming passion. Instead, what is left is interest and reason. Since it is a voluntary breach against those interests and reasons which the majority of society holds important as reasons for action/omission, there must at least be an indifference towards the majority's opinion and will. But hostility seem to contain an element of aggression in addition, some kind of deliberate want to cause a detrimental effect. The indifferent individual does not care whether the effect of his behaviour causes harm, but in both cases there is a common denominator in that there is an indifference towards the fact that they do breach the moral rule since they do it voluntarily. Subsequently, it seems plausible that *by repeated breaches against moral rules, the result is that the indifference against the society's well fare and well being ads up to proof of a shameful character.* This is related to human capacities (i.e., the learning capacity) which is a normal capacity for humans and thus moral rules presuppose that capacity.¹⁷⁷

According to Jareborg, indifference may be episodic or dispositional and since guilt in the legal sphere is supposed to be related to a certain act, episodic indifference is the relevant type. However, in morals, *if* it is dispositional indifference in relation to learning experiences from broken moral rules, then blameworthiness is attached to indifference towards a certain type of facts: moral rules. Thus, moral blameworthiness is attached to the disrespect for others' well fare/well being and that has a logical relevance if one considers that all human inventions has a function serving a purpose.¹⁷⁸ With the definition of morals provided by Hart, the "importance" criteria may explain that purpose.

Looking upon the relation this way there is a **temporal difference** between these negative beliefs: while an action/omission is limited in time, an individual's character is not. The following list is a

¹⁷⁷ Henrich, J., "Cultural Group Selection and Coevolutionary Processes Explain Human Prosociality and Large-Scale Cooperation", Working Paper 01-001 (Ann Arbor: University of Michigan Business School, 2001), p. 26.

¹⁷⁸ Jareborg, N., Straffrättsideologiska fragment (Uppsala: Iustus Förlag AB, 1992), p. 195.

compilation of the features of shame and guilt distinguished by Elster:¹⁷⁹

	SHAME	GUILT
Valence:	A negative belief	A negative belief
Subject:	of one's own	of one's own
Object:	character.	action/omission.
Reactions elicited from others:	contempt, derision, avoidance	anger, resentment, indignation
Necessary presence of others:	Needed: What they actually think.	Not needed: A correlation between what the agent feels and what others would have felt <i>had they known what he did</i> .
Action tendencies:	<u>First impulse:</u> To hide, run away, shrink, avoid being seen. <u>Other tendencies:</u> If one cannot run away: suicide. A want to reconstruct or improve. Aggression: - response to intentional shaming - strategy to level the playing field Expressions to repair and raise up one's shattered sense of self-worth.	<u>First impulse:</u> To make repairs, to undo the bad. <u>Other tendencies:</u> An urge to confess. An impulse to harm oneself by seeking punishment. Expressions of a general tendency to restore an equilibrium that has been upset.

Shame and guilt can be further understood in the following matrix. The questions should be asked in the numbered order to find the resulting emotion. No doubt, Elster has provided a mechanism description, not a law:¹⁸⁰

Beliefs Triggering the Social Emotions				
1. Object of emotion?	Action		Character	
2. Valence of emotion?	Positive	Negative	Positive	Negative
3. Target subject of beliefs?:				
one's own	PRIDE	GUILT	PRIDEFULNESS	SHAME
other's	ADMIRATION	ANGER	LIKING	CONTEMPT

¹⁷⁹ Elster, J., *Alchemies of the Mind* (Cambridge: Cambridge University Press, 1999), pp. 149-164.

¹⁸⁰ *Ibid.*, pp. 143-144.

These social emotions are *evaluative* in that they evaluate the object of the emotion: negative or positive evaluations of oneself or others. Thus they belong to “self-conscious emotions”.¹⁸¹ They are also dyadic, which means that they are triggered by beliefs that make reference to two other persons. However, the emotions triggered in the actors depend both on the presence of an audience and on what kind of audience it is.¹⁸²

There is another important difference between shame and guilt and that is the **behaviour modifying capacity**. Guilt can easily be avoided by self-deceptive manoeuvres. Misdeeds are easily forgotten when they are known only to ourselves. And since guilt is triggered by both the antecedents as well as the consequences of behaviour self-deception is possible about one’s mental state (the antecedent) and about the causal process (the consequences of behaviour).¹⁸³ Shame, on the other hand, cannot easily be avoided by self-deceptive manoeuvres. The accusing stare of others cannot be wished away. Shame is typically triggered by behaviour, independently of the mental states that produced it and of the outcome it produces. This means that avoidance of shame cannot take the easy option of self-deception, but has to use the hard option of behaviour modification.¹⁸⁴

5.7.1 Specifics of Shame

1. What is the definition of shame?

Aristotle defines shame in Rhetoric as pain or disturbance in regard to bad things, whether present, past or future, which seems likely to involve us in discredit.¹⁸⁵

2. What are the functions of shame?¹⁸⁶

- a) Among the young and immature, shame may act as a useful passion that counteracts other actions.
- b) Shame may serve the role of stopping action rather than shaping each and every action.
- c) Shame may be a stage in moral learning.
- d) Shame supports social norms.

3. What triggers shame?

A certain behaviour causes (independently of the mental states that produced it and of the outcome it produces) the contemptuous or disgusted disapproval by others of something one has done. This triggers shame, which is an internal interaction-based emotion: I feel shame in your presence because I know you disapprove of me.¹⁸⁷

¹⁸¹ Ibid., p. 149.

¹⁸² Ibid., pp. 143-144.

¹⁸³ Ibid., p. 154.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid., p. 72.

¹⁸⁶ Ibid., pp. 71, 145.

¹⁸⁷ Ibid., p. 149.

4. How is disapproval conveyed?

The conveying emotions of disapproval can be purely external. It may be an involuntary grimace of disgust, and no thought to the shame thereby induced is given.¹⁸⁸

5. What emotion does shame cause?

Shame causes intense pain, more painful than the pain caused by guilt. In shame, both the need for self-esteem and the need for esteem are frustrated. To think of oneself as a bad person is bad enough; the additional thought that others view one in the same light is nearly intolerable, and sometimes is (suicide).¹⁸⁹

6. What behaviour may shame cause?

Shame has several consequences for behaviour. It may cause irrational behaviour in relation to self-interest,¹⁹⁰ "blind" the reflective capability, numbing perceptive capabilities,¹⁹¹ shape the assessment of other rewards (negative or positive)¹⁹², behavioural changes¹⁹³, "hiding" and "run-away" action tendencies, aggression¹⁹⁴ and suicide.¹⁹⁵ The given examples are not pre-emptive.

5.8 Social Relations and Shame

In all societies there are groupings to which individuals feel bound. One way of describing an individual in society is to put the individual at the centre of an onion. Each layer of the onion represents a group to which the individual can attach a "we", symbolising belonging.¹⁹⁶ Each layer has its own system of social control of which the outmost layer consists of the political system's created legal system. This is followed by the various layers of moral groups one belongs to. They can consist of organisations, profession/employment, social class, the family and various roles.¹⁹⁷

In all these different roles there is a commonality of hostile expressions as moral rules are broken. Ostracism, disapproval, contempt, ridicule and loss of prestige are all expressed in various ways with the same intention,

¹⁸⁸ Ibid., p. 149.

¹⁸⁹ Ibid., pp. 154, 279.

¹⁹⁰ Ibid., p. 148.

¹⁹¹ Ibid., p. 304.

¹⁹² Ibid., p. 156.

¹⁹³ Ibid., pp. 152, 154.

¹⁹⁴ Ibid., pp. 149-164.

¹⁹⁵ Ibid., pp. 149-164, 279, 140: "...the American admiral who committed suicide when it was shown that he was not entitled to the decorations he was wearing, or the six Frenchmen who killed themselves in 1997 after they were caught in a crackdown on pedophilia, can be understood in light of the social emotions of shame and contempt."

¹⁹⁶ Berger, P. L., *Invitation till sociologi* (Stockholm: Rabén Prisma, 1994), pp. 69-74.

¹⁹⁷ Ibid.

reflected or not, of inflicting an emotional response in the rule breaker.¹⁹⁸ The consequences for such behaviour are far reaching with loss of employment, possibilities of getting a new employment, being ignored by certain groups for certain ritual festivities etc.¹⁹⁹ Hostile expressions emanating from a close layer is more sensitive than a distant layer, even though a more distant layer may induce hostile expressions from a closer layer in the onion of moral groups. What is hurt is the **self-esteem** and **esteem**, two central motivations in human behaviour.²⁰⁰

Another important aspect of these layers of group moral is how they affect the self-esteem as well as esteem by creating identity. Identities only exist in societies and can only be sustained in societies. As soon as my perception of my identity is denied by the surrounding society, that identity can no longer be sustained and thereby, self-esteem is affected.²⁰¹ And since society can be seen as a mirror for my identity, it is shaped by my behaviour in certain social situations.²⁰² This is the connection between individual behaviour and shame *within* corporations. But blameworthiness can also be attached to corporations as social entities. If moral blame is to converge with law for efficiency reasons, Braithwaite and Fisse contend that:²⁰³

The task is to explore how wholes are created out of purposive individual action, and how individual action is constituted and constrained by the structural realities of wholes...[I]f responsibility is taken to be a functional concept of social action, then nothing necessarily hinges on the intrinsic characteristics of different social entities: the question is the extent to which holding them responsible will prevent corporate crime or otherwise achieve desired effects.

Corporations are often regarded as blameworthy by the public.²⁰⁴ Reactions to corporate offenders are not merely as *impersonal* harm-producing forces but as *responsible, blameworthy entities*. When people blame corporations they are not merely expressing hostility towards the corporation as a whole for being responsible for harm. Nor are they pointing the finger only at individuals behind the corporate mantle.²⁰⁵ Instead, they are more specific

¹⁹⁸ Ibid., pp. 70, 74.

¹⁹⁹ Ibid., p. 71.

²⁰⁰ Tyler, T.R., et.al, *Social Justice in a Diverse Society* (Boulder: Westview Press, 1997), pp. 50, 145, 184-187; Berger, P. L., *Invitation till sociologi* (Stockholm: Rabén Prisma, 1994), p. 74; Elster, J., *Alchemies of The Mind* (Cambridge: Cambridge University Press, 1999), p. 143: "Beyond a certain level of satisfaction of material needs, our need for the esteem of others is more important than anything else, except perhaps our need for self-esteem, and their withholding of esteem can be intensely painful."

²⁰¹ Berger, P. L., *Invitation till sociologi* (Stockholm: Rabén Prisma, 1994), p. 93.

²⁰² Ibid., p. 94.

²⁰³ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 24.

²⁰⁴ For the philosophical backdrop, see French, P.A. (ed.), *Individual and Collective Responsibility: The Massacre at My Lai* (Cambridge, Mass.: Schenkman Publishing, 1972), referred to in Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 47.

²⁰⁵ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 27: Corporate actions originating in a decision, is

than that. What they condemn is the fact that the organisation either implemented a policy of non-compliance or failed to exercise its *collective capacity* to avoid the offence for which blame attaches.²⁰⁶ And corporations naturally have learning and information handling capacities vastly superseding an individual. Since the corporate decision-making procedures consist of individuals, all capable of learning, the corporations have the capability to change their policies and the procedures serving these policies.²⁰⁷ The outcomes of these policies and procedures are the results of this learning and are also what blame is directed at. Since moral reasons can be given for the policies, so can moral blame.²⁰⁸

5.9 Emotions, Beliefs and Rationality

If morals plays an important role of understanding the prevalence of corruption then what is it that makes moral rules work? By what means do they interact and affect human behaviour? Are there any policy-input conclusions to draw from this? Since shame is a social emotion it seems that emotions cannot be overlooked.

Psychologists use “valence” to refer to the fact that emotions are experienced as pleasant or painful, desirable or undesirable, making for happiness or unhappiness.²⁰⁹ Not all emotions have positive or negative valence. Some emotional experiences may be neutral and leave us indifferent between having them and not having them. For instance the composite emotional experience of bittersweet nostalgia –reflecting an endowment effect and a contrast effect that exactly offset each other.²¹⁰ However, elementary emotions may always have a certain valence and not as composite emotions have zero valence.²¹¹

The role of emotions cannot be reduced to that of shaping the reward parameters for rational choice. It seems very likely that they also affect the ability to make rational choices within those parameters. This dual role of emotions –shaping choices as well as rewards- has analogues in pain, addictive cravings, and other visceral factors.²¹² Choice can affect emotional experiences but more relevantly, people sometimes make choices with their *expected future impact on emotions* firmly in mind (see 5.9.2 below). Given that one cannot choose which emotions to have, the direct strategy amounts to acting on the situations that tend to induce positive and negative

more than the sum of individual intentions. Instead, it may have little to do with individual intention altogether.

²⁰⁶ Ibid., p. 25.

²⁰⁷ Ibid., p. 29.

²⁰⁸ Ibid.

²⁰⁹ Elster, J., *Alchemies of the Mind* (Cambridge: Cambridge University Press, 1999), p. 279.

²¹⁰ Ibid., p. 281.

²¹¹ Ibid.

²¹² Ibid., pp. 413-414.

emotions.²¹³ But what seems rational in order to attain an image of a good future seems to depend on individual experiences (some call it path-dependence²¹⁴). Concerning rationality and its role in individual decision-making, the place of emotions seems to be central: “‘High-reason’ [which] refers to that the best decisions are made when formal logic alone solves a problem. To obtain the best results, emotions must be kept out of the process. Plato, Descartes and Kant hailed this view.”²¹⁵ Damasio’s somatic-marker hypothesis has a better explanatory value: “[B]efore you apply any kind of cost/benefit analysis to the premises, and before you reason toward the solution of the problem, something quite important happens: When the bad outcome connected with a given response option comes into mind, however fleetingly, you experience an unpleasant gut feeling. Because the feeling is about the body, I gave the phenomenon the technical term *somatic state* (“soma” is Greek for body); and because it “marks” an image, I call it a *marker*.”²¹⁶ And depending on what these somatic markers look like, willpower and behaviour is affected:

[The] positive somatic marker which is triggered by the image of a good future outcome must be the base for the enduring of unpleasantness as a preface to potentially better things...Willpower is just another name for the idea of choosing according to long-term outcomes rather than short-term ones.²¹⁷

Damasio claims that “the *absence* of emotion and feeling is no less damaging, no less capable of compromising the rationality that makes us distinctively human and allows us to decide in consonance with a sense of personal future, social convention, and moral principle...[C]ertain aspects of the process of emotion and feeling are indispensable for rationality. At their best, feelings point us in the proper direction, take us to the appropriate place in decision-making space, where we may put the instruments of logic to good use.”²¹⁸

Since beliefs vary between individuals and emotions guide much of our behaviour, it may be enlightening to see the relationship between them.

²¹³ Ibid., p. 414.

²¹⁴ Clague, C., “Economics, Institutions, and Economic Development” in Soltan, K. et al, *Institutions and Social Order* (Ann Arbor: The University of Michigan Press, 2001), p. 222: A number of theoretical models have shown how societies starting from similar situations may wind up with very different levels of corruption. In NIE (a section of academic focus in economics concerned with the institutional environment in economies as determining factors, pioneered by the Nobel Laureate Douglas North) different developments can be explained by different levels of equilibria: with high and low levels of obedience. The modification of attitudes along with behaviour tends to reinforce the conclusion that societies evolve along different paths and that in particular it is very difficult to escape from a bad equilibrium where there is pervasive corruption.

²¹⁵ Damasio, A., *Descartes’ Error* (New York: Bard/Avon Books, 1998), p. 171. In the following I deliberately make extensive use of quotations since I consider professor Damasio better apt to formulate his findings.

²¹⁶ Ibid., p. 173.

²¹⁷ Ibid., p. 175.

²¹⁸ Ibid., pp. xii-xiii.

According to Elster, there are seven types of beliefs with the following relations to emotions, motivations and beliefs:²¹⁹

1. Beliefs (including mistaken beliefs) about one's own emotions;
2. Beliefs about other people's emotions;
3. Beliefs about other people's motivations;
4. Beliefs about other people's beliefs;
5. Probabilistic beliefs;
6. Counterfactual and subjunctive beliefs, and;
7. "As-if" beliefs.

5.9.1 Behaviour, Shame and Learning

A further exploration of how social rules function in relation to the individual may explain the preventive success of ICAC Hong Kong's educational approach. To understand this, the relation between learning and the emotions needs some further scrutiny. Altruistic behaviour provides a clue:

Altruistic behaviors benefit their practitioners in yet another way that is relevant here: they save altruists from the future pain and suffering that would have been caused by loss or shame upon *not* behaving altruistically. It is not only the idea of risking your life to save your child [which] makes you feel good, but that the idea of not saving your child and losing her makes you feel far worse than the immediate risk does. In other words, the evaluation takes place between immediate pain and future reward, *and* between immediate pain and even worse future pain.²²⁰

Needless to say, this requires the capability of compassion, something which is lacking among psychopaths and individuals with brain-damage involving the amygdala (see below). These individuals also lack the capability of experiencing guilt, remorse and fear. As a consequence they do not worry about the consequences of their actions, thus any existing punishments are useless as a preventive measure. Behavioural therapy is also useless since guilt and remorse presuppose that the individual realises that he has done something wrong.²²¹ **Learning social rules** are connected to making social errors, which must be understood as errors. The way to make somebody understand the social error points to hostile expressions in words and facial expressions. Furthermore, Elster's claim that shame upholds important social rules seems to be empirically supported. The amygdala is part of the limbic system in the brain and its function is to be a link between areas of the brain in charge of the physical expressions of emotions and the conscious perception of emotions. Scans of the brain have shown that the recognition of –particularly negative- facial expressions requires the participation of the amygdala.²²² As a consequence, the means of upholding important social rules by social pressure in the form of various hostile

²¹⁹ Elster, J., *Alchemies of the Mind* (Cambridge: Cambridge University Press, 1999), pp. 254-5.

²²⁰ Damasio, A., *Descartes' Error* (New York: Bard/Avon Books, 1998), p. 176.

²²¹ Anderson, M. B., Baekgaard, C., "Därför föds man som psykopat", in *Illustrerad Vetenskap*, 13, 2001, pp. 45-46.

²²² *Ibid.*

expressions, short of physical violence, fail in psychopaths as well as in people diagnosed with “antisocial personality disorder” (APD), which also is related to malfunctions in the amygdala.²²³

“When the choice of option X, which leads to bad outcome Y, is followed by punishment and thus painful body states, the somatic-marker system acquires the hidden, dispositional representation of this experience-driven, noninherited, arbitrary connection. Re-exposure of the organism to option X, or thoughts about outcome Y, will now have the power to reenact the painful body state and thus serve as an automated reminder of bad consequences to come.”²²⁴ In short, pain is “a lever for the proper deployment of drives and instincts, and for the development of related decision-making strategies... Individuals born with a bizarre condition known as congenital absence of pain do not acquire normal behavior strategies.”²²⁵ “Pain and pleasure occur when we become conscious of body-state profiles that clearly deviate from the base range.”²²⁶ And as concerns pain “[t]here seem to be far more varieties of negative than positive emotions, and it is apparent that the brain handles positive and negative varieties of emotions with different systems.”²²⁷ Damasio explains why they exist: “We came to life with a preorganized mechanism to give us the experiences of pain and of pleasure... Suffering offers us the best protection for survival, since it increases the probability that individuals will heed pain signals and act to avert their source or correct their consequences.”²²⁸ As concerns the relationship between social learning and pain and pleasure Damasio claims: “Early in development, punishment and reward are delivered not only by the entities themselves, but by parents and other elders and peers, who usually embody the social conventions and ethics of the culture to which the organism belongs. The interaction between an internal preference system and sets of external circumstances extends the repertory of stimuli that will become automatically marked [as positive, negative or neutral]”.²²⁹

5.9.2 Future Actions and Emotional Memory

Experience can connect an accident in a possible future with a feeling, a reaction in the body.²³⁰ “In order for us to feel a certain way about a person

²²³ Ibid.

²²⁴ Damasio, A., *Descartes' Error* (New York: Bard/Avon Books, 1998), p. 180.

²²⁵ Ibid., p. 264.

²²⁶ Ibid., p. 262.

²²⁷ Ibid., p. 267.

²²⁸ Ibid., p. 264.

²²⁹ Ibid., p. 179.

²³⁰ Snaprud, P., “Phineas Gage överlevde! –Men efteråt svek känslorna och förnuftet gick vilse” in *Forskning och Framsteg*, no 7, 1996, 12-17, at 16. Why is this a reaction in the body? Because it causes physical changes in the body like the changes in metabolism as a response to feelings of stress and peacefulness. At the same time, nerve-receptors cause a reaction in the brain, which responds with nerve-signals to adjust to the situation. There is just no way of parting these. It seems Jareborg's monism of body and mind is supported by

or an event, the brain must have a means to represent the causal link between the person or event and the body state, preferably in an unequivocal manner. In other words, you do not want to connect an emotion, positive or negative, to the wrong person or thing.”²³¹ The result is a feeling of discomfort when confronted with a certain possible future action, which may have negative consequences. This feeling of discomfort arises without any detailed analysis of the situation.²³² Feelings of discomfort and fear are triggered by the brain when *a possible future brings up memories of mistakes* in the past. Bad alternatives are those corresponding to the emotional warning-signals. Those alternatives are rejected without reflection. With a simple card game Damasio has shown that subconscious feelings caused by a certain definition of “good” (here: to win as much money as possible) make way for conscious choices.²³³ This implies that the subconscious feelings are secondary to an existing perception of good. Their function may then be explained as a means to choose alternative future action, which may result in the realisation of a perceived good. The policy input relevance is obvious: a “social marketing” possibility.

5.9.3 Emotions, Morals and Law Obedience

How do various constellations of social convention and moral contents affect corrupt behaviour? As concerns the probability of getting caught and punished for breaking the rules, it declines as the number of violators increases. In the good equilibrium, an individual who contemplates rule violation faces a high probability of getting caught and punished. The rational choice is to obey the rules. In the bad equilibrium, like in endemically corrupt environments, the probability of getting caught is low, so people rationally choose to violate the rules.²³⁴ It is also plausible that living in a rule-obedient and alternatively rule-disobedient environment is reinforcing since cognitive dissonance come into play to rationalise one’s behaviour.²³⁵ But obedience also depends on notions of fairness, which in themselves seem to be path-dependent. If people feel that others are generally obeying the rules and that violators will be pursued and punished, they seem to be more willing to obey the rules despite personal gains from breaking them.²³⁶ But there is evidence that obedience depends on fairness opinions in relation to the regulators as well.²³⁷

this study (see Jareborg, N., *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag AB, 1992), p. 220.)

²³¹ Damasio, A., *Descartes’ Error* (New York: Bard/Avon Books, 1998), p. 161.

²³² Snaprud, P., “Phineas Gage överlevde! –Men efteråt svek känslorna och förnuftet gick vilse” in *Forskning och Framsteg*, no 7, 1996, 12-17, at 16.

²³³ Snaprud, P., “Phineas Gage överlevde! –Men efteråt svek känslorna och förnuftet gick vilse” in *Forskning och Framsteg*, no 7, 1996, 12-17, at 16.

²³⁴ Clague, C., “Economics, Institutions, and Economic Development” in Soltan, K. et al, *Institutions and Social Order* (Ann Arbor: The University of Michigan Press, 2001), p. 222.

²³⁵ Ibid.

²³⁶ Ibid. This concurs with the New South Wales study.

²³⁷ Tyler, T.R., et.al, *Social Justice in a Diverse Society* (Boulder: Westview Press, 1997), p. 176: “[S]tudies suggest that people who experience procedural justice when they deal

5.10 Corporations and Shame

With the background of the study above of the elements and functions of moral rules and their effects on human behaviour, the focus will now turn to corporations. Interviews with executives of large corporations that had been through adverse publicity crises concerning allegations of corporate wrongdoing showed that both individual executives and the corporation collectively generally valued a good reputation for its own sake. There was some concern that adverse corporate publicity might do serious damage to profits, but neither this subjective concern nor the objective fact of economic damage to the corporation from adverse publicity was widespread. Nevertheless, the informants cared deeply about the adverse publicity; *they viewed both their personal reputation in the community and their corporate reputation as priceless assets.*²³⁸ This implies that if individual and corporate actors are deterred not only by economic losses but also by reputational losses, then consideration can be given to adverse publicity sanctions for regulatory offenders. Strategic publicising of punishments in a sophisticated punishment strategy may be one way of using such shame.²³⁹ And there are persuasive reasons for using shame:

Breaches of company rules may jeopardise opportunities for promotion or even retention of one's job. Being upbraided by a superior may be a trying experience. Discomfort may result from being made to feel disloyal or untrustworthy. Above all, there is the risk of being shamed before one's peers. Shaming has a personalised conscience-building and educative role that is lacking in purely legalistic regimes of punishment. Furthermore, shaming within corporations may involve the repeated day-to-day attentions of a group of associates...[A] financial disincentive is imposed on the enterprise and the loss is passed on to shareholders and any other persons to whom the cost may be transmitted without anyone necessarily experiencing a sense of personal responsibility.²⁴⁰

Within an organisation with certain expectations, there are individuals with positions of power who do not personally feel any deterrent effects of shaming directed at their organisation. However, they may still find be

with authorities are more likely to view those authorities as legitimate, to accept their decisions, and to obey social rules." The kind of procedural justice seem to be connected to the adversarial principle (which is lacking in countries like France and Germany). In comparison to an inquisitorial trial system, "the adversary system can deliver negative and in this case, undeserved outcomes with less dissatisfaction. Conversely, people who were innocent and who were vindicated were more satisfied if they had been vindicated via the adversary system" (pp. 79-80). "Empirical findings of procedural justice research in management settings, confirm the insights of legal scholars...People's evaluations of group authorities, institutions, and rules have been found to be influenced primarily by procedural-justice judgements. This is found in studies of legal, political and managerial authorities." (p.83).

²³⁸ Ayres, I., Braithwaite, J., *Responsive Regulation* (Oxford: Oxford University Press, 1995), p. 22.

²³⁹ *Ibid.*, p. 43.

²⁴⁰ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 79.

motivated by role expectations to protect and enhance the organisation's reputation. Thus, deterrence can still work if those in power have an explicit job-responsibility to preserve the reputation of the organisation or to protect it from any threats of collective adversity.²⁴¹

5.11 Shaming

According to Elster, deliberate induction of shame, involves internal emotions, in which disapproval is mingled with the pleasure of making the subject aware of it. Because it is a form of humiliation, shaming can easily misfire, by making the target feel anger rather than shame. Shaming rests on an "incoherent intention", by which is meant the intention to induce emotion X by behaviour that would induce X if it was *spontaneous* but that induces emotion Y if believed to be motivated by the intention to induce X.²⁴² But since we know that beliefs may trigger emotions, the policy input question is what beliefs trigger contempt?

In Hong Kong, moral education was used as a preventive measure against corrupt behaviour. But how could the deterrent of shame be used and the wrong response and dangerous ostracism be avoided? A suggestion is offered by Braithwaite: "Under conditions of communitarianism, shaming becomes part of the ongoing dialogue with others with whom one maintains bonds of respect."²⁴³ Braithwaite calls this "**reintegrative shaming**", meaning shaming without outcasting, shaming while sustaining the bonds of respect. Reintegrative shaming rather than punishment or stigma is the key to effective social control. It is the best way to induce guilt and responsiveness in the wrongdoer, while "stigmatization is most likely to induce anger and resistance. The denial of respect involved in stigma motivates the accused to preserve her self-respect by rejecting her rejectors."²⁴⁴ Regulatory culture can be defined as 'a set of solutions devised by a group of people to meet specific problems posed by the situations they face in common'.²⁴⁵ Norms may be largely specific to the context of the community that constitutes each culture; but equally they may have influence beyond their normal institutional terrain. While market institutions leave the psychology of individuals untouched, socialising institutions are designed to affect citizens in such a way that they behave as if they were primarily concerned with the public benefit.²⁴⁶

²⁴¹ Ibid., p. 34.

²⁴² Elster, J., *Alchemies of The Mind* (Cambridge: Cambridge University Press, 1999), pp. 149-150.

²⁴³ Ayres, I., Braithwaite, J., *Responsive Regulation* (Oxford: Oxford University Press, 1995), p. 92. Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989).

²⁴⁴ Ibid.

²⁴⁵ Ibid., p. 93, quoting van Maanen, J. and Barley, S.R., "Cultural organization: Fragments of a theory" in Frost, P.J. et al (eds.), *Organizational Culture* (Beverly Hills: Sage, 1985), p. 33.

²⁴⁶ Ibid.

If one accepts that most citizens comply with the law most of the time because it seems wrong to them to break the law, one can claim that they do not solely refrain from crime due to a negative result of a monetary cost/benefit calculation. They may very well have an estimation of the probability of detection and sentence in order to assess the likely utility, but still, the wrongness of law breaking stops such action. This is why shame matters since it is a simple deterrent. According to Ayres and Braithwaite, social disapproval is more potent when extended by someone whose opinion we respect.²⁴⁷ But the *participation* in the shaming process is also valuable: “The more important effect of shaming is in constituting conscience, in fostering the internalization of norms... The most important effect is the internalization of a sense of right and wrong among those who observe and participate in the shaming; such internalization... can be constituted by the pride when an actor is praised for reasonableness, provocability, or for obeying the law even when it is costly to do so.”²⁴⁸ The point of using the social process of shaming is that it reinforces the unthinkableness of committing a crime, not that rule-breakers be ousted and thereby deterred.²⁴⁹

The connection between corruption and shame is that according to experiences from anti-corruption measures all over the world,²⁵⁰ transparency, publicity and the feeling of shame are effective in many societies. Shame, being a feeling, pertains to an individual level and according to Braithwaite and Fisse it seems to be effective on corporations as well by affecting employees. The dangers of shame are of course what is legislated against in such criminal offences like defamation. Unjust allegations are dangerous as well as immensely painful, particularly where it results in ostracism. This is why in some countries (U.K.) media is prohibited to speculate in the question of guilt before there is a sentence.²⁵¹

²⁴⁷ Ibid., p. 94.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ For this I rely heavily on the TI experiences I received while being an intern. Furthermore, the articles here are simply a few of all those concerning anti-corruption efforts which have involved publicity causing the feeling of shame. An excellent collection of news from all over the world is continuously published on <http://www.respondanet.com>. The extracted impression from these concurs with the TI-officers conclusion on transparency, publicity and shame. See “The Sting That Has India Writhing: The Great Graft Exposé”, *The New York Times*, 16 March 2001; “Ski industry takes a closer look at the environment”, *Environmental News Network*, 15 June 2000, at http://www.enn.com/news/enn-stories/2000/06/06152000/charter_13895.asp; “Shame, the Virtual Weapon”, *Newsweek* 21 February 2000; “Vi är alltför givmilda”, *Illustrerad Vetenskap*, No. 14, 2001, p. 39.

²⁵¹ Guillou, J., “Skärp etiska reglerna”, *Dagens Nyheter* 14.02.01: In Sweden, in the name and protection of freedom of the press and free speech, police and prosecutors may provide media with various theories on attempts, or attempts to cast guilt on suspects due to weak material evidence. Even misleading information may be advanced to further investigative work; Bertel Rennerfelt, consumer rights lawyer at Konsumentverket Stockholm, Sweden, 01.11.01: Considering the contents of the ideology of the rule of law, private enforcement of ethical rules for the press with a maximum sanction amounting to 22.800 SEK, plus

5.12 Conclusion

This study on morals has explained the relevance of morals and its specifics to individual behaviour. It seems moral contents vary widely with the culture even though its function may be rather constant. The prevailing conventional morals may also be important to understand different outcomes of similar anti-corruption levels in different countries. By defining the functions and elements of moral rules, policy input possibilities may be identified irrespective of cultural differences due to common human features. From studying the way images are coloured with valence, it may provide a policy input for how to shape beliefs in a way favourable to controlling behaviour. That could be called attacking the problem at the root, the causes, instead of engaging solely in treating the symptoms. It seems that is what ICAC Hong Kong does by using moral education to influence future behaviour as a preventive measure. However, I have a notion that morals in general are thought to interfere with religious beliefs why some will understand moral education as a threat to freedom of religion. From this examination of morals, it seems that shame is attached to normal learning capacity. There may be an advantage of using shame by first instilling, through moral education, negatively evaluated behaviour (to form beliefs) and then to publicise rule breakers' acts to the *close* group to which they belong without trying to directly –by intentional shaming- emotionally induce shame, which may backfire. This type of preventive measure seems to be particularly useful in smaller moral groups like in corporations, or in a particular corporate division, school classes etc. Such methods may be found in internal controls and its disciplinary programmes. Braithwaite and Fisse suggest that there is a point of using extensive publicity of sentenced rule-breaking corporations as part of a sanction. The risk of adverse publicity would have positive repercussions on internal controls and its risk management: active prevention as a result of organisational learning.

V.A.T., seems more than insufficient. Particularly as such sensational writing improves the sales and provides an incentive to engage in it.

6 Media

In Hong Kong, mass media was used as a means to spread the knowledge of the evils of corruption. Beliefs were partly formed through media coverage.²⁵² The Commission made active and constant use of the media to convey the anti-corruption message, to publicise corruption prosecutions, convictions and sentences and to maintain in the community a high level of corruption awareness.²⁵³ The Convention and Recommendation, on the other hand, makes no use of it. So how does media report on economic crimes today? What is the main source of crime reporting? How does media relate to crimes and morals? What is the role of the media today?

6.1 How does media report economic crimes?

According to Pollack, political, economic, social and cultural changes are partly created by journalism. The contents of media can become reality:

Via media, political and other interests communicate with the citizens and with each other. The pictures and understandings of reality which the media distribute are in some way transformed into various actions - with real consequences for real people.²⁵⁴

An interesting perspective is the insurance situation against economic crimes since insurance affect incentives relating to economic motives. The reason is that it may give a hint of the perceived risk of economic crimes. The obvious connection being that bribes in international business transactions may be performed without acceptance and control by the board as well as by the highest management levels.

In Denmark most cases of economic crimes are not reported to the police. The risk of bad publicity and lengthy legal processes make many companies abstain from reporting criminal acts. Denmark has seen an increase in insurance policies covering economic criminality of 30% in year 2000, predominantly in the financial sector. In neighbouring Sweden, this type of insurance policies is already widely held by companies; nine out of ten businesses are insured against economic crimes. According to Chubb Insurance in Denmark, only a very small part of the economic crimes are being reported to the police. In 80% of the cases, the criminal acts have been committed by employees and of those only 5% are reported. Neither of the insurance companies Chubb Insurance and AIG Europe in Denmark have a policy requiring their clients to report the incidents to the police. The

²⁵² de Speville, B., Hong Kong: Policy Initiatives Against Corruption (Paris: OECD, 1997), p. 72.

²⁵³ Ibid., p. 25.

²⁵⁴ Pollack, E., En studie i medier och brott (Stockholm: JMK, Stockholms Universitet, 2001), p. 67. My translation.

Managing Director of Chubb Insurance refers to changed organisational structures in companies towards a more horizontal structure with increased responsibilities for employees, as well as the abundance of foreign subsidiaries as an explanation to the increased demand of insurance.²⁵⁵

Concerning bribery in international transactions, the assumption is that the profitability of the employee is included in the definition of skills in performance, which in turn is a decisive factor for promotion and improved economic benefits (be it a fixed salary or a mix of fixed and individual/unit result-based salary, and other benefits measurable in monetary terms). This assumption provides an incentive for bribery in international transactions. But does this hurt the company like the economic crime of fraudulent behaviour by an employee? If the employee commits corrupt acts it may be because he calculates an economic benefit which will further his career. Thus, the board and management can assume that the corrupt behaviour pays off since they count on that the career incentives guide the employees' behaviour. Therefore, there is no need to insure against such behaviour, but rather against fraudulent behaviour and other economic crimes: corruption is not a "high-cost" crime. So what does this insurance against economic crimes tell us? Perhaps that not only is such an insurance a risk management technique but it also tells us that economic crimes are a source of adverse publicity imposing a cost on the company. There seems to be a problem of internal company controls able to prevent these crimes given organisational modernisation but also a large number of unreported economic crimes committed in the private sector.

6.1.1 Media Attention to Economic Crimes

In general, media attention to crimes which fall under the head of "economic crimes"²⁵⁶ compared to crimes containing an element of physical violence is very low.²⁵⁷ Articles concerning economic crimes are predominantly found in quality press and their economic sections.²⁵⁸ According to Pollack there is a substantial amount of surveys from various parts of the world pointing in the same direction concerning the patterns of crime reporting in media. These patterns are also stable over time.²⁵⁹ One fact which stands out is the lack of conformity between crime statistics and crime reporting. A result is that crimes containing an element of violence and physical crimes against

²⁵⁵ "Firmer skjuler kriminalitet" and "Flere forsikrer sig mod kriminalitet", *Berlingske Tidende*, 21 February 2001.

²⁵⁶ For a definition of this Pollack refers to Reiner, R., Livingstone, S., *Discipline or Desubordination? Changing Representations of Crime in the Media since World War II. Full report of Activities and Research Results to the ESCR (1997)*, p.196 and Lindgren, S. Å., *Ekonomisk brottslighet. Ett samhällsproblem med förhinder* (Lund: Studentlitteratur, 2000), pp. 97-112.

²⁵⁷ Pollack, E., *En studie i medier och brott* (Stockholm: JMK, Stockholms Universitet, 2001), p. 70.

²⁵⁸ *Ibid.*, p. 71.

²⁵⁹ *Ibid.*, p. 75.

individuals are over-represented while property crimes are under-represented.²⁶⁰ In Swedish TV-media, the police has been found to be *the prime source of information on crimes*. The same holds true for Swedish news papers.²⁶¹ Of the news papers' crime reporting, the "violent crime" category represents 30% of the all crime reporting. Only 6% pertain to narcotics crimes while economic crimes hardly exist at all.²⁶²

6.1.2 Why does media's crime coverage matter?

Journalism creates a sort of social "parallel world" just as real as any other world. This contributes '... to organising both social and knowledge-related relations in society, to churn out human and social relations, and to define groups and categories.'²⁶³ Following the "Cultivation Theory" introduced by Georg Gerbner²⁶⁴, there is a complex interplay between various societal institutions, TV being one of them, which all exert influence over people's perception of reality. The idea is that this has long-term effects in changes of people's representations of the world, their social realities. Media has fundamentally changed cultural representations of the world and these are not possible to measure on an individual level (which makes it difficult to corroborate).²⁶⁵ In the symbolic environment produced by media there is a manifestation of the societal agenda as well as the power to define knowledge.²⁶⁶ Media has a central role in many of the conflicts in modern society. The outcome of these conflicts has a big impact on in what direction the society develops. Media has the possibility of taking sides in these conflicts and further a certain party's point of view as well as media itself. The way to do this is to focus on some events and ignore others, which affects public opinion. There is evidence showing that journalists use their possibilities to support the type of opinions which correspond to the journalist's own opinions and those opinions which strengthen media's position in society.²⁶⁷ This "Agenda-setting-model" provides answers to media's role in forming and changing public opinion in various questions.

²⁶⁰ Ibid., p. 75. For a survey of 36 US studies and 20 studies from 14 other countries, Pollack refers to Marsh, H. L., "A Comparative Analysis of Crime Coverage in News Papers in the United States and other Countries. From 1960-1989: a review of the literature" in *Journal of Criminal Justice*, 19, 1, pp. 67-80.

²⁶¹ Ibid., p. 76.

²⁶² Ibid. Pollack refers to the study Dahlgren, P., *Pressens bild av brottsligheten*. BRÅ: information 1987:1.

²⁶³ Ekecrantz, J., "Mediernas Demimond" in Becker, K. et al (eds.), *Medierummet* (Stockholm: Carlssons, 1996), p. 297, quoted in Pollack, E., *En studie i medier och brott* (Stockholm: JMK, Stockholms Universitet, 2001), p. 67. My translation.

²⁶⁴ Pollack, E., *En studie i medier och brott* (Stockholm: JMK, Stockholms Universitet, 2001), pp. 50, 53, 55.

²⁶⁵ Ibid., p. 53.

²⁶⁶ Ibid., p. 55.

²⁶⁷ Ibid. Pollack refers to Kepplinger, M. et al, "Instrumental Actualization: A Theory of Mediated Conflicts" in *European Journal of Communication*, vol. 6, pp. 263-290, and Kepplinger, M., Habermeier, J., "The impact of Key Events on the Presentation of Reality" in *European Journal of Communication*, vol. 10, pp.371-390.

Studies have found that media's choice of priority to certain questions has also become the priority and agenda of the public opinion. The power of the media does not consist of *what* people think but *about what* they think. Thus the media is involved in creating consensus on *what questions that are interesting*.²⁶⁸

6.1.3 How are crimes reported?

It is extremely unusual with attempts to discuss the reasons for criminality or to put descriptions of crimes in a larger societal perspective: “/.../mass media provide citizens with a public awareness of crime/.../based upon an information-rich and knowledge-poor foundation. /.../ Anyone interested in learning about crime from the mass media is treated to examples, incidents, and scandals, but at such a level of description that it is impossible for them to develop an analytical comprehension of crime.”²⁶⁹

6.1.4 How does media relate to the general perception of normality?

Media regulate and control the access to the space in its arenas where economic, political, social and cultural powers are at stake.²⁷⁰ Media's obsession with reporting crimes can be understood from the point of view that law is the primary cultural device for defining acceptable behaviour, identity and reality.²⁷¹ News about deviations fills a need for entertainment and sells well on the market. These news elucidate the conflict between good and bad, something which various societal organisations have an interest in. But the journalists are at the centre of the production and distribution of the modern society's understanding of the socially deviant and conversely of *normality*.²⁷²

One may ask why there is entertainment value and a fascination of the process of drawing the lines between civilisation and its opposite, between order and chaos, and between rationality and irrationality. One explanation may be the need for intellectual safety, which makes us avoid insecurities of all kinds. One cause of insecurity is the paradox of modernity: modernity hails individuality as a social norm. Being different is valued but at the same time we are taught into conformity of the collective's social norms. Toppling this paradox is frustrating and gives rise to insecurity.²⁷³

²⁶⁸ Ibid., p. 56.

²⁶⁹ Ibid., p. 78, quoted from Reiner, R., Livingstone, S., *Discipline or Desubordination? Changing Representations of Crime in the Media since World War II*. Full report of Activities and Research Results to the ESCR (1997), pp. 201-202.

²⁷⁰ Ibid., p. 79.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid., pp. 92-95.

6.1.5 What is the role of the media?

Pollack sums up the development of the institutional role of journalism in a modern democratic country like Sweden:

A brief, exaggerated, and perhaps somewhat unjust summary would describe journalism as being in the service of the nation in 1955, in the service of democracy and free speech in 1975, and in the service of the market (and itself) in 1995.²⁷⁴

6.2 What are the factors which make news?

How come that only a few types of societal problems emerge and attract attention and often in many different arenas? According to Hilgartner and Bosks' "arena model"²⁷⁵ there are five principles guiding the filtering process of what problems get attention in media:

The following principles are applied *between* various categories of problems as well as *within* the categories of problems. Each principle makes a problem more likely to attract media attention.

- 1. Drama** -A problem which is presented dramatically and can be sustained by continued drama.
- 2. Culture** -A problem which appeals to the prevailing cultural beliefs where the problem originates.
- 3. Politics** -A problem which is adjusted to the politics which decides what problems are possible to handle.
- 4. Arena Capacity** -A problem which is adapted to the various arenas' capacity of space.
- 5. Institutional Rhythms** -A problem which arises at a certain favourable phase of an organisation's 'life'.

Those agents able to meet the demands of the various arenas will determine what societal problems which will dominate at a certain time.

6.3 Conclusion

It is unclear what effect media has on crime but it seems clear that media affects cognition and thereby the perception of the world. And if beliefs are shaped through media, it will also affect emotions and behaviour. ICAC Hong Kong used mass media as a tool among the preventive measures aimed at achieving a policy goal of reducing corruption. It is questionable whether such an approach would be possible in a country like Sweden in order to prevent bribery in international transactions. It seems it falls out of

²⁷⁴ Ibid., p. 335.

²⁷⁵ Ibid., pp. 64-65.

range of their interests. And even if it was within their interest, they may not be able to convey the true damage and costs pertaining to economic crimes since there is a large number of economic crimes never reported and the main source, at least in Sweden, is the public authorities. Considering the difficulties pertaining to bribery in international business transactions, the prospects of media attention are indeed gloomy. On the other hand, if authorities had the same media competence as in Hong Kong, it would be easy to adapt the presentation of certain crime-types in a way suitable for the media arenas. The dramatic consequences of bribery and corruption is not difficult to find, but as Pollack suggests, mass media does not make any attempts to explain crimes by referring to knowledge of circumstances surrounding crimes. As a consequence, bribery and corruption are not on the political agenda.

7 Investigations

As a result of pursuing individual liability alone (allocating the *mens rea* with some individual at some organisational level) there are big difficulties with enforcement overload; problems of deciding internal lines of corporate accountability; expendability of individuals within organisations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harbours of individual suspects.²⁷⁶ The investigation itself is often very time-consuming and extremely expensive due to the circumstances in which economic crimes are committed.²⁷⁷ Organisations have a well-developed capacity for obscuring internal accountability if confronted by outsiders. Regulatory agencies, prosecutors and courts find it difficult or even impossible to unravel lines of accountability after the event because of the incentives personnel have to protect each other with a cover-up.²⁷⁸

As Braithwaite and Fisse have shown,²⁷⁹ conducting investigations into individual responsibilities within a corporation is extremely difficult. Internal investigations are much more likely to discover the necessary evidence to discipline. They know their employer's product lines, they have social relationships within the company, which enhances technical capacity to spot problems. An internal investigator may also possess knowledge of previously related problems, so called "weak spots" and what possibilities there exist for cover-ups.²⁸⁰ But in the case of corruption there are even further investigative complications. In order to overcome these, reversing the onus of proof for some elements of a criminal offence have proven useful.

7.1 Reversing the Onus of Proof

[C]orruption is a secret and conspiratorial offence with no readily identifiable victim nor one who is willing to come forward to point a finger at the perpetrators of the crime.²⁸¹

It is perhaps not too much to say that bribery and corruption cases differ from every other class of case in the criminal calendar in that the Crown seldom, if ever, is in a position to call direct evidence of the other party to the corrupt transaction is

²⁷⁶ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 37.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*, p. 38.

²⁷⁹ *Ibid.*, pp. 36-41.

²⁸⁰ *Ibid.*, pp. 38-39.

²⁸¹ Hong Kong, ICAC Review Committee Report 1994.

satisfied and unwilling to testify –perhaps also frightened of the consequences of his so doing.²⁸²

In criminal proceedings the international and regional declarations of human rights and fundamental freedoms all protect the right of the individual to be presumed innocent until proved guilty. Most add the words “according to law” and one the words “by a competent court or tribunal”. Article 11 of the Universal Declaration of Human Rights: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law...”. Likewise Article 14, Paragraph 2 of the International Covenant on Civil and Political Rights: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” In Europe, Article 6, Paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms is almost identical: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” In the Americas, the first sentence of Article 26 of the American Declaration of the Rights and Duties of Man provides: “Every accused person is presumed to be innocent until proved guilty.” The American Convention on Human Rights in Article 8 provides: “Every person accused of a serious crime has the right to be presumed innocent so long as his guilt has not been proven according to law.” In the region of Africa, Article 7, Paragraph 1 of the African Charter on Human and Peoples’ Rights provides: “Every individual shall have the right to have his cause heard. This comprises:...the right to be presumed innocent until proved guilty by a competent court or tribunal...”. In Europe, the right to be presumed innocent also applies in professional disciplinary hearings.²⁸³

7.1.1 Establishing a Defence

Normally the onus of proving the charge against a defendant rests on the prosecution, and failing to prove any single element of the charge means the acquittal of the defendant. However, it is noteworthy that none of these international legal documents, reflecting as they do the norms accepted by the signatory states, prohibits placing the burden of establishing a defence on the defendant. Is it acceptable and if so, to what extent may a state create a criminal or penal offence aimed at conduct that is devoid of moral content, public mischief or even social necessity? In the European Court of Human Rights, the *Salabiaku* case provides some answers to this question.

The *Salabiaku* case:²⁸⁴

What elements of culpability should constitute the minimum requirements of a criminal offence?

²⁸² Second Report of the Commission of Enquiry under Sir Alastair Blair-Kerr, September 1973.

²⁸³ *Albert and Le Compte* E.Crt.H.R. Judgement of 10.2.83 Series A No. 58.

²⁸⁴ *Salabiaku v. France* E.Crt.H.R. Judgment of 07.10.88 Series A 141-A.

1. States are free to “apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention.” States may “define the constituent elements of the resulting offence.” (para. 27)
2. “...States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.” (para. 27)
3. Presumptions of fact or of law are not prohibited in principle. However, states do have to “remain within certain limits in this respect as regards criminal law.” (para.28)
4. In the phrase “proved guilty according to law” the words “according to law” are not to be construed exclusively with reference to national law, otherwise states would be free to deprive the presumption of innocence in Article 6 of its substance. The right to be presumed innocent is intended to enshrine the fundamental “principle of the rule of law”. (para. 28)

The limits to presumptions in criminal law?

The presumption of innocence does not merely guarantee a certain conduct in legal proceedings to be followed by the courts. If it did, it “would in practice overlap with the duty of impartiality imposed in Paragraph 1, but “[a]bove all, the national legislature would be free to strip the trial court of any genuine *power of assessment* and deprive the presumption of innocence of its substance” since the legislature could create any offences with guilt proven by presumption. Therefore, the words “according to law” in Article 6 Paragraph 2 are not construed exclusively with reference to domestic law. The “object and purpose of Article 6...is...to enshrine the fundamental principle of the rule of law.”²⁸⁵ Article 6 Paragraph 2 requires that States confine presumptions of fact or of law in criminal law “within reasonable limits which take into account the [a)] *importance of what is at stake* and [b)] *maintain the rights of the defence.*”²⁸⁶ The former indicates an importance placed on the social danger of the conduct which is criminalised.

The next question is to apply this to the bribery offence. To what extent is it necessary that such offences should seek to place upon the defendant the onus of proof, whether **legal** or **evidential**, of any element of the offence or of any defence?

A) Example: Bribery

The crime is variously defined, but its universal elements seem to comprise the accepting or offering, without lawful authority or reasonable excuse, of an advantage by or to the servant or agent of another in connection with the

²⁸⁵Salabiaku v. France E.Crt.H.R. Judgment of 07.10.88 Series A 141-A, para. 28, my emphasis.

²⁸⁶Salabiaku v. France E.Crt.H.R. Judgment of 07.10.88 Series A 141-A, para. 28, my emphasis.

performance of that servant or agents duty to his principal without the permission of the principal.²⁸⁷

The existence of lawful authority or reasonable excuse to act as he did will be in the knowledge of the defendant, probably *within his exclusive knowledge*. It would not be unreasonable to require him to bear the onus, at least the **evidential** onus, of showing that he had lawful authority or reasonable excuse for doing what he did. On the other hand it would place a wholly disproportionate burden on the prosecution to try to disprove a defence which may not even be raised.²⁸⁸ However, as regards **lawful authority**, there is a case for saying that the prosecution should discharge both the evidential and legal onus of proof since the evidence of lack of lawful authority can be proved simply by the prosecution producing evidence from the accused's principal that the accused had no authority to accept the advantage.²⁸⁹

A **reasonable excuse** presents a much wider range of possibilities. The excuse would be *exclusively within the knowledge of the accused*, and it would therefore not be unreasonable to expect him to bear at least the *evidential* burden. But why so?

It is difficult enough to prove the passing of a gift to a public servant from an interested party but, when it occurs, it is normally strong prima facie evidence of corruption. If there is an innocent explanation it should be easy for the giver and the recipient of the gift to furnish it; the facts relating to the gift are peculiarly within their own special knowledge... We are satisfied that the burden of proof on the defence is in the public interest and causes no injustice.²⁹⁰

[I]n circumstances where a person is expected to exercise impartial judgment, it is arguable that that person should order his or her private affairs in such a way as to avoid any impression of corrupt activity. It may be reasonable therefore to expect a person in these circumstances to justify any questionable payments made to them. The Government therefore believes that it is right to consider carefully an extension of the presumption of corruption.²⁹¹

In short, it is easy to produce, it is within the defendants exclusive knowledge and in the case of a public servant it can be required due to his impartial role in his duties.

B) Example: Possession of unexplained wealth

[T]here are exceptional situations in which it is possible compatibly with human rights to justify a degree of deviation from the normal principle that the prosecution

²⁸⁷ de Speville, B., "Reversing the Onus of Proof: Is it compatible with Respect for Human Rights?", paper presented at the 8th International Anti-Corruption Conference, September 7-11, 1997, Lima, Peru.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ The Royal Commission of Conduct in Public Life (1976) Cmnd 6524.

²⁹¹ United Kingdom: "Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889-1916: A Government Statement", 9 June 1997.

must prove the accused's guilt beyond reasonable doubt...The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the *essential* ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable...If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v. United States* (1969) 23 L. Ed. 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend'.²⁹²

A presumption quite often found in anti-corruption legislation concerns the very essence of the offence. It goes something like this: where in a bribery case it is proved that the accused gave or accepted an advantage, the advantage shall be presumed to have been given or accepted as an inducement or reward, unless the contrary is proved. In the experience of professional investigators it is hardly ever relied upon and is therefore not needed.²⁹³ A stronger objection for not using such an element as a presumption is that in order to not make a mockery out of the rule of law, it must rest with the prosecution to establish the very essence: the corrupt purpose. Finally, the mere fact of a gift does not make it more likely than not that the gift was corrupt. It may give rise to suspicion but that is all.

From this, the following **recommendations** can be distinguished:

1. The prosecution should retain the burden of proof for the *essential* elements of the offence.
2. The elements of fact for which the prosecution bear the onus, should, when they are proven, provide substantial assurance that the element of fact for which the defendant bears the burden, is more likely than not.
3. The presumed element should be an evidential one, which is within the exclusive knowledge of the accused (and the other party to the offence).

The Hong Kong Court of Appeal supports these recommendations:

Before the prosecution can rely on the presumption that pecuniary resources or property were in the accused's control, it has of course to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held...on behalf of the accused or were acquired as a gift from him. And construed restrictively in that way, the presumption is consistent with the accused's fundamental right, being a measured response to devices by which the unscrupulous could all too easily make a mockery of the offences.²⁹⁴

The offence of **unexplained wealth** is in itself an offence built on the particular difficulties of investigation and the importance of safeguarding public trust towards public officials. But also in other cases it provides an important complement to tax laws requiring a full account of all incomes. The arguments in favour is that it is an important weapon against top public

²⁹² *Attorney General v. Hui Kin Hong*. Court of Appeal No. 52 of 1995 at pp. 7-8.

²⁹³ de Speville, B., "Reversing the Onus of Proof: Is it compatible with Respect for Human Rights?", paper presented at the 8th International Anti-Corruption Conference, September 7-11, 1997, Lima, Peru.

²⁹⁴ *Attorney General v. Hui Kin Hong*. Court of appeal No. 52 of 1995 at p. 16.

servants and that there is “notorious evidential difficulty” in proving that a civil servant has solicited or accepted a bribe.²⁹⁵ The offence of possessing excessive unexplained wealth was “manifestly designed to meet cases where, while it might be difficult or even impossible for the prosecution to establish that a particular public servant had received any bribe or bribes, nevertheless his material possessions were of an amount or value so disproportionate to his official salary as to create a prima facie case that he had been corrupted.”²⁹⁶

Is requiring an explanation for the possessions of wealth an interference with the right to peaceful enjoyment of possessions contained in Article 1 of Protocol No. 1 of the European Convention on Human Rights? Or does it contravene the right to the use and enjoyment of property in Article 21 of the American convention on Human Rights, or the right to property guaranteed in Article 14 of the African Charter of Human and People’s Rights? In Europe, the European Court of Human Rights has found that the Convention as a whole demands that a balance is struck between the interests of the community and the fundamental rights of the individual. A shift of equilibrium must be based on facts supporting a policy goal embedded in such a new equilibrium:²⁹⁷ “The notion of ‘public interest’ is necessarily extensive...The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.”²⁹⁸

According to the former head of ICAC Hong Kong, the arguments for the legislature’s right to assess the necessary means are:

In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature’s attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime...It is for the legislature to gauge the seriousness of the problem of corruption and to devise the appropriate and proportionate response. It is our legislators who maintain the balance between the rights of the individual and the rights of society.²⁹⁹

The introduction of new rules of evidence is not just a recognition of the sheer impossibility of establishing one or more of the elements of corruption charges; it also signals society’s growing frustration with corruption, as well as its determination to develop appropriate legal techniques to stop it. New rules of evidence have been introduced in relation to possession of

²⁹⁵ Mok Wei Tak v. The Queen [1990] 2 AC 333 at p. 343E-F.

²⁹⁶ Cheung Chee-kwong v. The Queen [1971] 1 WLR 1454 at p. 1457 A-C.

²⁹⁷ James and Others v. United Kingdom, E.Crt.H.R. Judgment of 21.02.86 Series A98, para. 46: “...an inquiry into the facts with reference to which the national authorities acted.”

²⁹⁸ James and Others v. United Kingdom, E.Crt.H.R. Judgment of 21.02.86 Series A98

²⁹⁹ de Speville, B., “Reversing the Onus of Proof: Is it compatible with Respect for Human Rights?”, paper presented at the 8th International Anti-Corruption Conference, September 7-11, 1997, Lima, Peru.

unexplained wealth or property, bribery, and possession or control of property by close relatives or associates of accused parties.³⁰⁰ The introduction of legal presumptions relieves the prosecution from having to adduce factual evidence that is largely, if not exclusively, within the knowledge of accused parties without necessarily infringing the rights of the accused to be presumed innocent until proven guilty.³⁰¹

Presumptions in anti-corruption legislation have been made in regard to:

1. Establish the **element of fraud** in bribery cases, provided, of course, that all the other elements of the offence have been established.³⁰²
2. The element that the **property is in the possession of an accused party or under his control**, *if* the property is in the possession or under the control of a close friend or associate of the accused, and the court is satisfied that such property is held on trust on behalf of the accused party or was received as a gift or loan and without sufficient consideration from the latter.³⁰³
3. The element to give a **satisfactory account of pecuniary resources or property**.³⁰⁴
4. When a *commission* is paid to obtain or keep a public contract in another country it will be **presumed to have a corrupt purpose**.³⁰⁵

Even though the accused party bears the burden of proof to account satisfactorily for his standard of living or pecuniary resources or property, the standard of proof that applies in the case of the accused is merely an evidential burden of adducing sufficient evidence to displace the legal presumption created in the law.³⁰⁶ In most cases, the tax authorities still require that all incomes are accounted for in order to establish due taxes. If the accused fails to discharge the presumed fulfilled element of the crime, the prosecution still bears the burden of establishing *mens rea (guilt)*.³⁰⁷ Naturally, the prosecution must establish all the other elements of the offence as well.

Ultimately, the constitutional issue that arises is whether it is reasonable to expect an accused party to adduce enough evidence of the source and origin

³⁰⁰ Ofusu-Amaah, W., et. al., *Combating Corruption: A comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* (Washington, D.C.: IBRD/The World Bank, 1999), p. 57.

³⁰¹ *Ibid.*, p. 63.

³⁰² *Ibid.*, p. 62.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ Cockcroft, L., "Implementation of the OECD Convention: The Conditions for Success", paper by TI presented at the Seminar on Corruption and Bribery in Foreign Business Transactions: New Global and Canadian Standards, at the *International Centre for Criminal Law and Criminal Justice Policy, Vancouver, Canada, 4-5 Feb. 1999*. Belgian legislation passed in July 1998 consequent to the Convention.

³⁰⁶ Ofusu-Amaah, W., et. al., *Combating Corruption: A comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* (Washington, D.C.: IBRD/The World Bank, 1999), p. 57.

³⁰⁷ *Ibid.*, p. 58.

of his wealth to rebut the presumption created by law, or whether such a requirement is so unbearable as to infringe the constitutional right to be presumed innocent until proven guilty. ICAC Hong Kong found it to be one of the ultimate tools in the combat against corruption, and one that can hardly amount to an undue imposition –except precisely in those cases in which the accused parties have something to hide.³⁰⁸ Even where the accused party is a corporation, it is normally required that a corporation keeps clear records of all its business transactions. In this case it comes down to the evaluation of verifications, which opens the door for another interesting question: the role of accountants.

7.2 Conclusion

The legislative body in Hong Kong realised the seriousness of corruption as a threat to their society in the mid-70s. They investigated the specific characteristics of bribery and subsequently pragmatically adjusted their legal instruments to improve the possibilities of goal efficiency while sustaining the requirement to be presumed innocent until proven guilty. Reversing the onus of proof seems not only reasonable considering the recommended limitations, but it seems even more urgent considering the situation of other white collar crimes where the “get away car” has become faster since the new technical developments in information technology. It may prove to increase the risks for bribe-payers and thereby also decrease corporate risks associated with exposed corrupt behaviour attributed to the corporation.

³⁰⁸ Ibid.

8 Supply-side Prevention and Corporate Sanctions

In this chapter questions and opinions posed will be examined in relation to the supply-side of bribery in international transactions. Furthermore, some innovative legal instruments suitable as solutions to the criticism will be explored. The innovative instruments pertaining to public procurement and accounting will be left out due to limitations in space and since they do not directly concern prevention related to *individual and organisational learning*. Instead, accounting pertains to validation of facts and conveying findings to management and the board of directors as a cause for preventive measures and disciplinary action. The procurement methods available are a corruption prevention mechanism, which could be included in a corporate policy as part of a preventive strategy: risk management.

8.1 Systemic Corruption

Systemic corruption occurs where corruption has become a part of the system -in many instances, such an integral part that the system cannot function without it. Systemic corruption is the Achilles' Heel of anti-corruption reformers, as a new government committed to tackling corruption finds itself impotent in reforming the system it must rely on to govern. Developing countries often experience more systemic corruption than their developed counterparts. In a developed country, corruption often infests a single component of the body politic -a major union, perhaps, or a political party. A developing country is less well-protected by institutional systems and "watch-dog" organisations, allowing the majority of civil servants to make irregular arrangements simply to survive.³⁰⁹ These people do not see themselves as corrupt individuals; rather, they are victims of a systemically corrupt system. In order to bring about change and alter the public acceptance of corruption as an inevitable evil, substantial salary raises are usually needed, within the context of wholesale public sector reform.³¹⁰ However, before any such reform is started, as with any revolution, a determination to change must already exist.

8.1.1 When corruption is the norm, who is to blame?

According to a study in Georgia presented in May 2001, the existence of systemic corruption was confirmed. The general conclusion of the study was that corruption was not merely a violation of the law, it was not an anomaly. On the contrary, in Georgia corruption is the norm. The authors concluded

³⁰⁹ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), pp. 33-34.

³¹⁰ *Ibid.*, p. 34.

that *corruption was the foundation on which public management and economic relations are built*.³¹¹ And this is the situation which many multinational corporations are referring to when they present the moral defences to corrupt behaviour in the shape of commissions, direct bribery, and political party donations. If corruption is the norm in society, then behaving corruptly cannot be considered as breaking a moral rule from within that group. With the excuses provided by Hart (see above), it can impossibly be implied in the “reasonable man” standard that this standard includes a standard based on a minority and a non-existing reality. A common argument among multinational corporations is that changing the attitude of public officials or competitors that do not follow their legal and ethical duties falls beyond the reach of individual efforts. And the common response to this dilemma is to say that a firm should either impose its ethical standard or exit the market. Some firms appear to be doing just that and others stay and play by the local rules.³¹² The fairness conflict seems to be that it is unreasonable from a moral position to require of foreign corporate entities to follow and demand a behaviour out of pace with local business culture: the “level playing field” argument. And even if they stay and ignore externally required legal standards, the likelihood of getting caught in such an environment is minimal (in a situation of endemic corruption, a locally required legal anti-corruption behaviour is in practice not an option). If they withdraw from that market, the possibility offered by business associations to improve the situation may be lost.

It has been argued that there is a logical mistake to make a norm out of a fact, the so called “Hume’s Law”: An “ought” needs a reason and an empirical fact can not give rise to a normative statement.³¹³ Something that “is” can not become an “ought”. Mackie has shown that it is not always the case:

From sets of ‘is’-statements which are purely factual, which conceal no value terms, we can derive not only hypothetically impertative³¹⁴ ‘ought’-statements but also moral ones. Admittedly we do so only by speaking from *within* some institution, but this can itself be part of ordinary language [author’s italics and footnote].³¹⁵

In the case of endemic corruption it is not a question of holding up a fact as an intended norm for behaviour, that is a question of politics which may result in a law.³¹⁶ If it is a part of morals it is felt important for social relations in some aspect. There is nothing preventing fear (survival) and

³¹¹ “Corruption Seen As The ‘Norm’”, *RFE/RL*, May 10, 2001

<http://www.rferl.org/nca/features/2001/05/10052001115630.asp>

³¹² “Corruption is bad for business. But is it also true that business is bad for corruption?”, Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

³¹³ Mackie, J. L., *Ethics -Inventing Right and Wrong* (London: Penguin Books, 1977), p. 64.

³¹⁴ Hypothetical imperative: ‘if you want X you ought to do Y’.

³¹⁵ Mackie, J. L., *Ethics -Inventing Right and Wrong* (London: Penguin Books, 1977), pp. 71-72.

³¹⁶ Larsson, R., *Politiska ideologier I vår tid* (Lund: Studentlitteratur, 1994), p. 15.

other emotions giving rise to this “importance”, which Hart claims must exist. And if there are social relations which are felt deeply unjust but still considered important, it may be enlightening to review the prevailing power relations in that society (see above) in order to tackle the problem.³¹⁷

8.2 Business Associations

In TI’s experience, there is a triangular relationship between **government, capital and civil society**. Corruption can take root in all three parties to the relationship. It is thus both theoretically and in practice impossible for one of the parties to address the issue of corruption in isolation from the other two -and arguably impossible to tackle the issue *effectively* without the participation of all three.³¹⁸ In the business community, one way of looking at power relations can be explained by the “free rider” and the “prisoner’s dilemma” problems. For companies willing to change their behaviour there is the “**free rider**” problem: As businesses begin speaking out against corruption and refusing to participate in corrupt practices, some entrepreneurs will be tempted to remain passive while profiting from reforms actively supported by others. At the same time, it is difficult for a company to try to change the rules of competition and refrain from participating in corruption when its competitors are free to continue to engage in it. This is known as the “**prisoner's dilemma**.” It seems there is an agreed understanding that the way to surmount these two co-ordination problems is for businesses to form organised groups to push for a transition to an environment where corruption is reduced.³¹⁹

As a corporation, even small or medium-sized enterprises, it is easy to become the target of a variety of administrations, starting with the tax administration. For businesses in endemically corrupt environments, it is safer to participate and support initiatives through intermediaries, such as business associations.³²⁰ There are also lessons to learn from the experiences of countries where anti-corruption movements, with strong support from civil society, have tried repeatedly to effect change. Corrupt leaders were replaced, but no lasting changes in *social organisations emerged*, and within weeks of the change in regime, charges of corruption began to emerge against the new leadership.³²¹

In short, experience has shown that it is essential to **build alliances** among the different groups who also suffer from, and want to reduce corruption. The private sector's participation can be instrumental in ensuring that the

³¹⁷ Pope, J., The TI Source Book (Berlin: Transparency International, 1999), p. 36.

³¹⁸ Ibid., p. 30.

³¹⁹ “Corruption is bad for business. But is it also true that business is bad for corruption?”, Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

³²⁰ Ibid.

³²¹ Pope, J., The TI Source Book (Berlin: Transparency International, 1999), p. 36.

fight against corruption is rooted in the building of state and market institutions that will work together to create healthy price competition in the local economy and conditions favourable to further development of the private sector (see Supplement E for suggested activities).³²²

An interesting inventive preventive sanction approach can be found in the US legislation. It consists of a model for other countries to consider following the Federal Sentencing Guidelines of 1991. The Commission which rendered these guidelines was originally established to examine the sentencing of individuals, but its greatest contribution to criminal jurisprudence likely came when it examined the position of corporations. Responding to research that showed that the median fine for a corporation averaged only about 20 percent of the losses that the offences had caused, the Commission decided that sentences should be governed by the kind of company that was involved; in other words, the "good corporate citizenship" of the company should be assessed. This decision is not intended to penalise companies for bad corporate behaviour, but rather to reward the good. If a company is convicted of an offence, a fine would normally be about three times the size of the loss caused. However, where a company can prove that it has an effective ethics program in place, the fine can be reduced by as much as 95 percent.³²³ By doing so, it rewards corporations with sufficient internal control systems in place, which are appropriately applied.

The Federal Sentencing Guidelines of 1991 state that the hallmark of an effective program to prevent and detect violations of law is that the organisation exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. The concept of “**due diligence**” for corporations comprises seven steps:³²⁴

1. There must be compliance standards and procedures to be followed by employees, etc. that are reasonably capable of reducing the prospect of criminal conduct;
2. There must be a specific individual or individuals assigned with overall responsibility to ensure compliance with (1);
3. The corporation must have taken due care in not delegating substantial discretionary authority to individuals known (or who should have been known) to have a propensity to engage in illicit activities;
4. The corporation must have communications and training programs in place;
5. It must also have taken reasonable steps to achieve compliance with its standards (perhaps including advice lines and protection for whistle-blowers);
6. The standards must have been enforced consistently through appropriate disciplinary mechanisms, including instances where individuals are responsible for a failure to detect an offence; and

³²² Ibid., pp. 30-31.; "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

³²³ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 71. For a discussion on the guidelines, see Carmichael, S., *Business Ethics: The New Bottom Line* (London: Demos, 1995).

³²⁴ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 71.

7. After an offence has been detected, the corporation must have taken all reasonable steps to modify its systems to obviate repetition [learning].

This type of sanction reduction could be used in combination with controlled business associations in endemically corrupt environments. It may provide an incentive for corporations sensitive to risks, even though not all will bother. But as concerns the sanctions there are perhaps better solutions in relation to behavioural betterment and subsequent prevention.

8.3 Sanctions

The Working Group, in its Phase 1 review, recommended a review of the effectiveness of the level of sanctions for natural persons (imprisonment and monetary fines) and monetary fines for legal persons which need to be evaluated on a horizontal basis³²⁵ It would also entail assessing whether the sanctions are sufficient for the effective implementation of the requirements under the Convention in respect of money laundering, mutual legal assistance and extradition.³²⁶ In Phase 2, the Working Group will assess each country's structures to enforce the laws implementing the Convention and its application of the laws and rules in practice. It will also monitor more fully implementation of the non-criminal aspects of the 1997 Revised Recommendation.³²⁷

8.3.1 The Problems With Fines

The individualist belief that it is impossible to punish corporations effectively rests on the ground that corporations can only be punished by means of a fine or monetary penalty. It is then pointed out that monetary sanctions are unlikely to make a deterrent impact on managers unless imposed at so high a level as to have unacceptable spillover effects on shareholders, workers, consumers and perhaps even the general economy.³²⁸ Fines, monetary penalties and taxes are functionally the same because they all express the *price* to be paid for non-compliance. If a serious offence is punished merely by means of a fine, Braithwaite and Fisse claim that the connotation is not so much disapproval as crime for sale.³²⁹ And if that price is set in relation to "the average" offender, it will under-deter the "above-average" offender. Similarly, it will not deter the less risk averse or the more optimistic offender. The fine must be set at a price which exceeds the price

³²⁵ Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendation, C/MIN(2000)8, 26-27 June 2000, para. 2.

³²⁶ Ibid., para. 4 (iii).

³²⁷ Ibid., para. 5.

³²⁸ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 41.

³²⁹ Ibid., p. 84.

detering the “average” potential offender.³³⁰ Furthermore, criminal law as a means of social control is not to be seen in prosecutions. It is to be seen in the diverse ways in which the law is used to control, guide, and plan life out of court.³³¹ This presupposes holding individuals responsible for their actions, that they can control them by normal human capacities. A corporate fine seems inadequate in this regard, considering that corporations (directly or indirectly) all consist of individuals holding normal human capacities.

From a regulatory point of view, **rules of action** make it possible to reduce the uncertainty of the impact of sanctions against corporations and their personnel by tailoring sanctions on probabilistic calculations about the effects of financial disincentives as well as how financial incentives affect agents.³³² Courts are well capable of following rules of action about assessing responsibility, in contrast to assessing financial costs and benefits made by others or themselves.³³³ And in particular, the costs of corruption are almost impossible to establish.³³⁴ The action rules consist of two parts. Firstly, certain types of actions are disapproved, and, secondly, those who are wrongdoers are blameworthy and should be held responsible and be sentenced one or several of a fixed set of sanctions (see “enforcement pyramid” below). A further benefit from this is that simple action rules have lower transaction costs since they reduce uncertainty in many aspects: the difficult calculations of cost/benefit and the search for necessary information to improve the certainty of such calculations in regard to a given goal. Consequently, the time-transaction cost is also reduced.³³⁵

8.3.2 What punishments to use?

A creative way of looking at corporate fault would be to incorporate the way moral blame functions in morals. It aims at correcting behaviour for the future through the normal human capacity of learning, while at the same time inflicting emotional pain in the agent for faulty behaviour. As Elster and Damasio have shown, memories of pain are a crucial part of human

³³⁰ Ibid., p. 87.

³³¹ Hart, H. L. A., *The Concept of Law*, Second Edition (Oxford: Oxford University Press, 1997), p. 40.

³³² Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 92.

³³³ Ibid.

³³⁴ Dieter Frisch in "The Effects of Corruption on Development," a paper presented to the Africa Leadership Forum on "Corruption, Democracy and Human Rights in Africa," Cotonou, Benin, 21 September 1994; Vogl, F., "The Supply Side of Global Corruption", in *Finance & Development*, June 1998, vol. 35, No.2; "MoD arms chief's greed cost £130 m," *Observer* (UK), 16 October 1994.

³³⁵ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 92. Rules of action are used in the context of insurance risk adjustment: Heimer, C.A., *Reactive Risk and Rational Action: Managing Moral Hazard in Insurance Contracts* (Berkeley: University of California Press, 1985), and in organisation to handle information overload: Reiss, A. "The Institutionalization of Risk", in 11 *Law & Society Review*, 1989, pp. 392-402.

learning. However, it may be difficult to construct sanctions that are able to cause emotional pain in an organisation. What remains as a possibility to mimic moral blaming is to trust internal disciplinary procedures to create the emotional sting and the organisation itself to adjust its internal control systems to prevent future mistakes, the result of corporate learning.³³⁶

According to Fisse and Braithwaite, there are possibilities of stock dilution, probation and punitive injunctions, adverse publicity, and community service.³³⁷ Particularly the corporate probation and the punitive injunction are two punishments geared towards learning from mistakes. The dominant impact of these two sanctions would be interference with managerial power and prestige, not exaction of cash or dilution of the value of shares. The loss inflicted would flow mainly to managers rather than to shareholders, workers and consumers.³³⁸ A further strong novelty of such sanctions is that they provide for feedback on the direct effects and thereby the possibility of fine-tuning for the regulators and courts.³³⁹ In the Standards for Criminal Justice, the American Bar Association states:³⁴⁰

The preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record keeping, and auditing controls designed to increase internal accountability –for example, audit committees, improved staff systems for the board of directors, or the use of special counsel –but it should not extend to judicial review of the legitimate ‘business judgment’ decisions [it would interfere with the freedom of contract] of the organization’s management or its stockholders or delay such decisions.

The main burden of a corporate probation as well as other non-financial sanctions is borne by management, depending on their design.³⁴¹ It also introduces different forms of risk into decision-making and thereby speaks well-known management language.³⁴² The punitive injunction is a penal variant of the civil mandatory injunction. It can require a corporate defendant to revamp its internal controls but also to do so in some punitively demanding way. It would not only be possible to require the defendant to introduce state-of-the-art preventive equipment or procedures, but also to insist on the development of innovative techniques.³⁴³ ‘[I]t could ...be a

³³⁶ Pope, J., *The TI Source Book* (Berlin: Transparency International, 1999), p. 69: The top four problems of unethical behaviour (comprising more than 80%) among top management are conflict of interest, illegal kickbacks, misuse of company proprietary information and inequitable treatment of suppliers and contractors.

³³⁷ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 42.

³³⁸ *Ibid.*, p. 43.

³³⁹ *Ibid.*, p. 92.

³⁴⁰ ABA, *3 Standards for Criminal Justice* (Boston: Little, Brown, 1980), pp. 18.162-163 quoted in Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 42.

³⁴¹ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 82.

³⁴² *Ibid.*

³⁴³ *Ibid.*, p. 43.

mandatory condition of a punitive injunction that the defendant undertake a program with three punitive essences: first, a task force involving a range of senior and middle managers; secondly, an intensive internal disciplinary program; and thirdly, a comprehensive and rigorous review and revision of accountability mechanisms and compliance precautions relating to the type of offence for which the defendant has been convicted.³⁴⁴ This has a clear connection to the “reasonable man” excuse in morals. The higher the risk of criminal behaviour resulting from the business activities, the higher the requirements for caution incorporated in corporate decision-making procedures. It is a demand relative to the capacity of the corporation, which of course is of another magnitude than a single individual’s. This sanction further avoids the “deterrence trap” consisting of the inability to fine corporations a fine in proportion to the severity of their offences.³⁴⁵ As concerns the Convention, there is plenty of scope for it to fail to meet its objectives, particularly if governmental will is lacking. The outcome will therefore be considerably influenced by the extent to which companies seek to ensure that the spirit of the Convention is indeed observed. This will in turn be largely dependant not only on the extent to which companies in OECD countries introduce codes of ethics but, more importantly, on their internal compliance procedures.³⁴⁶

8.4 Deterrence

The following five conditions are required for a crime to be committed according to Reiner:³⁴⁷

1. Labelling of a certain behaviour as criminal;
2. Motive;
3. Means;
4. Opportunity, and;
5. Absence of control.

³⁴⁴ Fisse, B., The Punitive Injunction as a Sanction against Corporations, cited as forthcoming and quoted in Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 83.

³⁴⁵ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 83: “The more serious the offence and the less the ability of the company to pay a high fine, then the greater the justification for imposing stringent monitoring of the company’s future activities. The more serious the offence and the less adequate the financial sanction that can be exacted from the company, then the greater the justification for imposing intrusive monitoring controls on the company.”

³⁴⁶ Cockcroft, L., “Implementation of the OECD Convention: The Conditions for Success”, paper by TI presented at the Seminar on Corruption and Bribery in Foreign Business Transactions: New Global and Canadian Standards, at the *International Centre for Criminal Law and Criminal Justice Policy, Vancouver, Canada, 4-5 Feb. 1999.*

³⁴⁷ Reiner, R., Livingstone, S., *Discipline or Desubordination? Changing Representations of Crime in the Media since World War II. Full report of Activities and Research Results to the ESCR*, cited in Pollack, E., *En studie i medier och brott* (Stockholm: JMK, Stockholms Universitet, 2001), p. 34.

In corporations, particularly means, opportunity and the absence of control are different from those outside the corporate environment. Corporate internal controls mainly concern opportunity and control. Traditional deterrence focuses on the motive, just as internal corporate disciplinary programmes do. Regarding the former, the U.S. Sentencing Commission has conducted a limited review of scholarship on the subject of general deterrence and the factors that specifically deter “white collar” criminals from repeating their offences. In this context “white collar” crime means the aggregate number of federal convictions from 1988 through 1995 for the following types of offences: fraud, embezzlement, forgery, counterfeiting, bribery, tax offences and money laundering. The conclusion based on facts collected from the world’s largest economy is that “it appears generally that researchers who have studied general deterrence have found that it is very difficult to say with certainty the extent to which a given criminal sanction discourage criminal conduct. However, some researchers who have studied deterrence believe that:

- (1) there is inherent deterrent effect in criminalizing a behavior, and
- (2) that the deterrent effect increases where the perception exists that punishment will be certain, swift and severe. Conversely, to the extent that any of these perceptions is lacking, deterrent effect diminishes.”³⁴⁸

In another study, the major trends in nine West European countries since 1950 in regard to the number of reported crimes and the development of a number of indicators of penal law policy have been examined. The indicators included the percentage of solved cases, the risk of detection (being brought to justice), the risk of receiving a jail sentence, and the median rate of occupancy in prisons. Two conclusions are made. Firstly, the study contends that there is a clear similarity in development between all nine countries irrespective of adopted criminal law policies. Secondly, the development of the various indicators in the nine countries does not seem to have any important explanatory value in regard to the development of crimes since 1950 (including the harshness of punishments).³⁴⁹

8.4.1 From Deterrence to Active Prevention

A simple, traditional **deterrence** approach to binding law is based on the following assumptions:³⁵⁰

1. Legal statutes can unambiguously define misbehaviour;
2. All actors are fully informed utility maximisers (homo economicus);
3. Legal punishment provides the primary incentive for compliance;

³⁴⁸ United States Sentencing Commission, "Report to the Congress: Adequacy of Federal Sentencing Guideline Penalties for Computer Fraud and Vandalism Offenses", June 1996, p.9. (<http://www.ussc.gov>)

³⁴⁹ These conclusions were conveyed to me in a letter from Westfelt on May 4th, 2001, and in "Hårda straff minskar inte brottsligheten", *Dagens Nyheter* 27.04.2001.

³⁵⁰ Gordon, K., "Rules for the Global Economy: Synergies between Voluntary and Binding Approaches", OECD Working Paper on International Investment, No. 1999/3 (revised October 2000).

4. Enforcement agencies optimally detect and punish misbehaviour, given available resources.

These assumptions have been shown to be remote from providing a full explanation of real-world compliance. For instance, in the U.S. people pay far more in income taxes than can be explained by a rational calculation balancing the monetary benefits of evasion against its expected monetary costs based on reasonable guesses of the amounts of possible fines and of the probability of getting caught.³⁵¹ A more realistic and stronger academically supported approach is to account for *the risk and uncertainties inherent in most human activities*, since it recognises that corporate actors have only limited amounts of information, knowledge and resources to control outcomes.³⁵² Misconduct can occur even when the parties to the misconduct face major financial penalties in the event of for instance an accident, and when they all share a strong personal conviction that misconduct should be avoided. In occupational safety, for example, the level of fines have been found to have no influence on safety outcomes (because employees are already fully convinced of the need to avoid accidents). On the other hand, the level and the type of inspection is known to be highly influential on outcomes.³⁵³ What is argued is a shift of regulative method by focusing on the known characteristics of the object which the law is aiming to control and guide. From this perspective of “**bounded rationality**”,³⁵⁴ rules are attempts by societies to keep “within reasonable bounds the risk of social harms arising from inevitable corporate mistakes”.³⁵⁵ This means that focus is moved from deterrence as a result from accountability for misconduct to active prevention in a context of *risk and uncertainty*. The enforcement strategy is also somewhat different to the pure deterrence model. The monitoring agency will share the same prevention goal as the organisation being monitored. The focus will be to identify compliance problems, which creates a need for external specialised monitoring services, whose main role is to enlist or reinvigorate support among the regulated, to heighten awareness of problems and to supply expertise and advice. According to Ayres and Braithwaite, today most regulators are in the

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid. Reference is made to Gunnigham, N., Rees, J., “Self-regulation”, *Law and Policy*, Vol. 19, No.4, 1997.

³⁵⁴ Ibid.: The concept of bounded rationality recognises that human beings have finite cognitive capacities. As a result, they can only receive, process and react to finite amounts of information. Often workplace situations require that employees process a large amount of information of various types and urgencies (e.i., about commercial activities, workplace safety, process and quality control). Bounded rationality says that, faced with such situations, they adopt “satisfying” strategies like rules of thumb and the like, enabling fast decisions without searching for information in order to make a decision. These strategies may be necessary from a cognitive point of view, but are not necessarily optimal when judged according to other objectives like profit maximisation, public or occupational safety.

³⁵⁵ Ibid.

compliance camp whereas most regulation scholars are in the deterrence camp.³⁵⁶

8.5 Corporation/Employee Motivations and Compliance

Business actors exploit a strategy of persuasion and self-regulation when they are motivated by economic rationality. But a strategy based mostly on punishment will undermine the good will of actors when they are motivated by a sense of responsibility. This will be true of any version of responsibility that is construed by actors with a more noble calling than making money.³⁵⁷ Thus, the problems with punish or persuade can be described as that the punishment model presupposes human beings as essentially bad and dissipate the will of well-intentioned actors to comply when they treat them as if they have bad intentions. On the other extreme, the persuasion model is based on the idea that people are basically good, reasonable, of good faith and motivated to abide by the law. This opens up for the “free rider” problem: some are not.³⁵⁸ Ayres and Braithwaite suggest a better approach: Persuasion is preferable to punishment as a strategy of first choice. To adopt punishment as a strategy of first choice is unaffordable, unworkable, and counterproductive in that it undermines the good will of those with a commitment to compliance. **Tit-For-Tat** (TFT) means that the regulator refrains from a deterrent response as long as a firm is co-operating, but when the firm yields to the temptation to exploit the co-operative posture of the regulator and cheats on compliance, then the regulator shifts from a co-operative to a deterrent response.³⁵⁹ A TFT³⁶⁰ strategy is the best choice since in maximising the difference between the punishment payoff and the co-operation payoff, it makes co-operation the most economically rational response. But it also holds the out the best hope of nurturing the non-economic motivations of firms to be responsible and law abiding. The

³⁵⁶ Ayres, I., Braithwaite, J., *Responsive Regulation* (Oxford: Oxford University Press, 1995), p. 92. Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 20.

³⁵⁷ *Ibid.*, p. 92. Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 24.

³⁵⁸ *Ibid.* Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 25.

³⁵⁹ *Ibid.* Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 21.

³⁶⁰ *Ibid.* Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 21: ‘As a “nice” strategy (one that does not use deterrence until after the firm defects), TFT gains the full advantage of mutual cooperation with all firms pursuing nice strategies. As a vengeful strategy which retaliates immediately, it gets stuck with the sucker payoff only once against firms that evade in every round. Yet as a forgiving strategy it responds almost immediately if a previous evader begins to comply, thereby restoring the benefit of mutual cooperation rather than the lower payoffs of mutual defection. Furthermore, the simplicity of TFT makes it easily recognized by an opponent’, which quotes Scholz, J.T., “Deterrence, cooperation and the ecology of regulatory enforcement”, 18 *Law and Society Review*, 1984, p.192.

paradox is that diametrically opposed motivational accounts of business can converge on the same enforcement prescription.³⁶¹

If an actor is motivated by social responsibility goals, for instance resident care goals in a hospital, then persuasion rather than punishment is the best strategy to further cultivate that motivation. This will be true irrespective of whether the caring motivation itself is motivated by profit seeking, nursing professionalism pride, love, religion, unreflected habit etc. But what about other motivations? There are six different types of motivations which the TFT strategy covers in order to effectively respond to the plurality of human characters:³⁶²

1. Those who are exclusively motivated by money.
 - Commitment to socially responsible goals depends on rewards.
2. Those who are exclusively motivated by socially responsible goals.
 - Commitment to socially responsible goals is at a maximum.
3. Those who are exclusively *oriented* to socially responsible goals because they think it is the best way to make money.
 - Commitment to socially responsible goals depends on the rewards: social responsibility is a means to maximise profits.
4. Those who are motivated both by minimum socially responsible goals and profit maximisation.
 - They have a trade-off function for choosing between being responsible and making money: when the money involved passes a certain treshhold, responsibility is sacrificed.
5. Those who are motivated both by maximum socially responsible goals and minimum money constraint.
 - They have a trade-off function for choosing between satisfying a minimum level of profits and then being maximally socially responsible.
6. The pathologically irrational: neither concerned by being socially responsible, nor about behaving in an economically rational way.
 - These unresponsive agents can only be responded to in an incapacitative way³⁶³ (i.e., license or professional qualification revocation, corporate liquidation, prison, etc.).

However, there is one situation not covered: the example of a customs offender in a foreign country. It includes a profit-maximising actor in a regulatory context in a “one-off” encounter. Within the nation state, continuity of relation is the norm.³⁶⁴

³⁶¹ Ibid. Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 26.

³⁶² Ibid. Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), pp. 29-30.

³⁶³ However, self-esteem and esteem may also fit into this point.

³⁶⁴ Ibid. Reference is made to Braithwaite, J., *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989), p. 30.

8.6 The Benign Big Gun

The optimal strategy across a range of plausible pay-offs in the regulatory game is TFT, with punishment being held back so long as the corporation co-operates with the enforcement agency in working towards compliance. Attached to this, Ayres and Braithwaite have constructed a *punishment strategy* resembling international politics strategies. They call it an “enforcement pyramid” and it provides the enforcement agency with sanctions in ascending order of escalation.³⁶⁵ (In Hong Kong, there are “professional capital punishment” sanctions for corruption related offences. See Chapter 4 above.) This pyramid is to be filled with a redundancy of various sanctions in case one type of sanction fails to work as hoped but does not in itself provide the feedback that lawmakers require if they are to fine-tune the law in light of experience.³⁶⁶ By merging these two strategies, regulators are provided with an image of invincibility in the background, but reluctant to push punishment to the foreground of day-to-day regulatory encounters: regulators do best as “benign big guns”.³⁶⁷ For a regulator, long-term internalisation is important in almost any domain of social control because it is usually impossible for society to organise its resources so that rewards and punishments await every act of compliance or non-compliance.³⁶⁸ A minimal-sufficiency principle means that the less salient and powerful the control technique used to secure compliance, the more likely that internalisation will result. Long-term internalisation of values like altruism and resistance to temptation is inhibited when they view their actions as caused by a reward or punishment.³⁶⁹ Experimental evidence also shows that the positive attribution principle works, which means that one attributes positive intrinsic motivations to encourage a desired behaviour.³⁷⁰ These two principles support the benefits of the “Benign Big Gun Strategy”. It escalates to punishment as a last resort, and this only to a point up the enforcement pyramid that is minimally sufficient to secure compliance.³⁷¹ This way, social control may be effective:

Effective regulation is about finesse in manipulating the salience of sanctions and the attribution of responsibility so that regulatory goals are maximally internalized, and so that deterrence and incapacitation works when internalization fails.³⁷²

As an institution which economises on motivation, it holds a solution to the problem of non-compliance regardless of the motives behind non-compliance. It avoids the danger of institutions that economise only on

³⁶⁵ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 85.

³⁶⁶ *Ibid.*, p. 92.

³⁶⁷ Ayres, I., Braithwaite, J., *Responsive Regulation* (Oxford: Oxford University Press, 1995), pp. 48-49.

³⁶⁸ *Ibid.*, p. 49.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*, p. 50.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

virtue and the danger that they will not only fail to nurture virtue but also actively crush it.³⁷³ According to Ayres and Braithwaite, compliance is optimised by regulation when it is contingently co-operative, tough and forgiving.³⁷⁴ Furthermore, when analyses grounded in very different accounts of human motivation can converge on the virtue of the same policy idea, then there is some hope that it may be a robust idea. This “Benign Big Gun”-strategy merges analyses based on *Homo economicus* with those based on *Homo sociologicus*.³⁷⁵

8.7 Accountability of Legal Persons

The Working Group expressed serious concern that some countries did not adequately provide for either criminal or non-criminal responsibility of legal persons. While the absence of criminal liability of legal persons, per se, is not an issue of non-compliance, the Working Group noted that the non-criminal sanctions in some countries that do not recognise corporate criminal liability were either lacking or very limited. The Group doubted whether those countries had met the standards of the Convention that obliges Parties to ensure that legal persons are subject to effective, proportionate, and *dissuasive* non-criminal sanctions.³⁷⁶ In most countries the responsibility of a legal person for the foreign bribery offence depends on some threshold having been met, such as the involvement of senior management or a directing mind in the commission of the offence. The Group was of the view that the comparative effectiveness of non-criminal liability should be assessed, and that the different thresholds for criminal and non-criminal liability should also be assessed horizontally.³⁷⁷

8.7.1 Why corporate liability?

Corporate liability provides an incentive for the management of the day to undertake responsive organisational change irrespective of the proximity of that management’s connection with the events giving rise to prosecution.³⁷⁸ Furthermore, in cases of international corruption, suspected personnel may lie beyond the reach of extraterritorial process, or, where within reach, may still be hard to bring to justice. By holding the local corporation liable, internal discipline may be stimulated abroad as well as locally; in effect, the corporation can be used as a medium for the international administration of

³⁷³ Ibid., pp. 51-55.

³⁷⁴ Ibid., p. 51.

³⁷⁵ Ibid.

³⁷⁶ Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendation, C/MIN(2000)8, 26-27 June 2000, para. 3.

³⁷⁷ Ibid., para. 4 (ii).

³⁷⁸ Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), p. 40.

the criminal law.³⁷⁹ Seen that way, the corporate criminal liability may transcend enforcement difficulties and the opacity of organisational lines of accountability within companies. The idea being that companies undertake internal disciplinary action such as dismissal, shame, relocation, delay in promotion and other sanctions and thereby impose individual accountability as a matter of private policing.³⁸⁰ That amounts to learning from mistakes with the purpose of betterment. However, that requires that the threshold of involvement of senior management or a directing mind is recognised as insufficient (see Supplement D for necessary desiderata addressed by Fisse and Braithwaite). As Wells puts it: “The idea that some people within a corporation act as that corporation while others do not is fundamentally flawed.”³⁸¹ Concurrent with Braithwaite and Fisse, the Law Reform Commission of Canada has observed that corporate liability is potentially an efficient dispenser of individual accountability:

In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.³⁸²

8.8 Conclusion

Following the previous insights in the role of morals, its relativity to groups, the role of learning and shame, the investigative difficulties of bribery cases, the mass of problems in the international business environment (see Supplement F), the dubious deterring effects of traditional punishments and the even more questionable effect of economic fines, it is suggested that as an efficient preventive measure to bribery in international business transactions, internal control systems are applied incorporating anti-bribery clauses. The US Sentencing Commission applies a sanction-reducing provision for corporations applying proper internal control systems along the argument that “they have done what they can”, similar to a moral excuse. However, this still does not address the conflict between prevailing business environments and the question of staying or withdrawing from business all together in an endemically corrupt environment. As it seems that the business world, civil society and governments represented in inter-governmental organisations all agree that the way to go in endemically corrupt environments is to form business associations, there may be room for another type of sanction taking into account ameliorating circumstances

³⁷⁹ Ibid., pp. 40-41.

³⁸⁰ Ibid., p. 39.

³⁸¹ Wells, C., *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993), pp. 109-110.

³⁸² Canada, Law Reform Commission, Working Paper 16, *Criminal Responsibility for Group Action* (Ottawa: Information Canada, 1976), p. 31.

like the US Sentencing Guidelines. The choice seems to be between facing reality and realising the possibility of change by using the globalisation of markets, or to leave things as they are and keep imposing legislation without encouraging any efforts for change from the business community. Such a sanction would provide an incentive for improving a bad business environment, which may otherwise not come into place. Control of the business associations could easily be provided by existing inter-governmental agencies.

With the same considerations as above, the sanctions described by Braithwaite and Fisse seem ideal to improve efficiency. The desiderata covered in their accountability model and the sanction and regulatory agency strategy in the “Benign Big Gun” seem ideal, modern and better supported by evidence in various academic fields but also from anti-corruption experiences. Accountants, management consultants and insurance corporations are likely to have the advantage in spotting best practices sufficient to provide satisfactory internal control systems in an ever changing business environment. ICAC Hong Kong has more than 25 years of experience of what points of vulnerability exist for corporations and corrupt practices. While changing the international business environment with all its possibilities to hide may consume considerable time (if ever achieved), other mechanisms and techniques may be used to provide a favourable environment where corporations and individuals alike may keep themselves out of court. Unfortunately, conservative forces seem willing to pay a very high price in order to maintain legal tradition in some countries.

Supplement A

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1 - The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".
4. For the purpose of this Convention:

- a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
- b. "foreign country" includes all levels and subdivisions of government, from national to local;
- c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2 - Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3 - Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4 - Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5 - Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6 - Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7 - Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8 - Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9 - Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10 - Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11 - Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12 - Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13 - Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14 - Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15 - Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares, and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16 - Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17 - Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Supplement B

Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

.../Accounting Requirements, External Audit and Internal Company Controls

V. **RECOMMENDS** that Member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A. Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C. Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public procurement

VI. RECOMMENDS:

- i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;
- ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.[\(1\)](#)
- iii) In accordance with the Recommendation of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.[\(2\)](#) /.../

Follow-up and institutional arrangements

VIII. **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

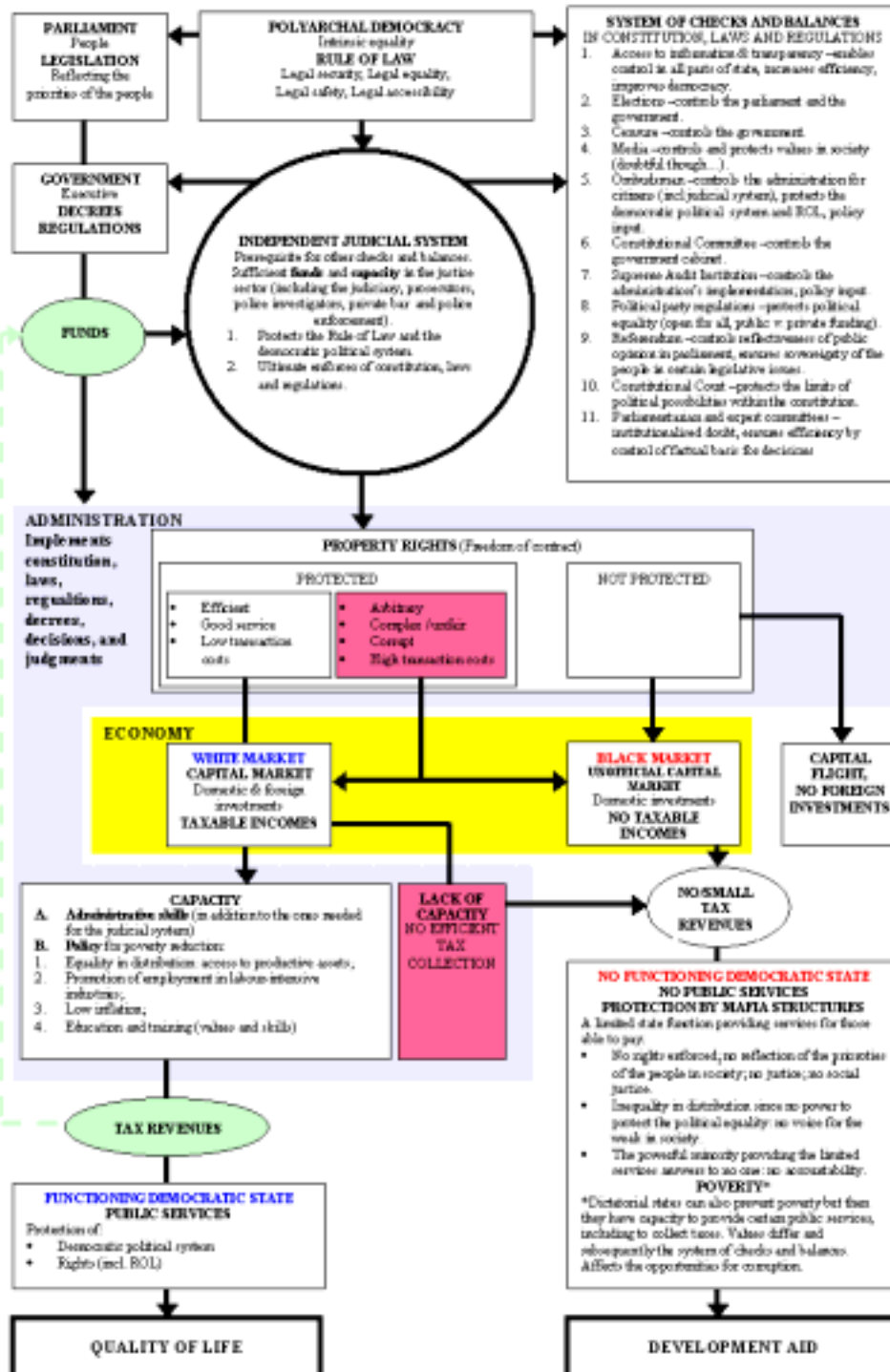
- i) receipt of notifications and other information submitted to it by the Member countries;
- ii) regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self-evaluation, where Member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
 - a system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

<http://www.oecd.org/daf/nocorruption/revrece.htm>

Supplement C

Chart of Institutional Relationships and Public Services



Supplement D

Desiderata for an Effective Enforcement of Responsibility for Corporate Crime³⁸³

1. A strategy for allocating responsibility for corporate crime should reflect the received wisdom that individual responsibility is a pillar of social control in Western societies. The slide away from individual responsibility in our corporate law enforcement must be remedied.
2. A strategy to for allocating responsibility for corporate crime should also accept that corporate action is not merely the sum of individual actions and that it can be just and effective to hold corporations responsible as corporations.
3. A strategy for allocating responsibility for corporate crime should seek to maximise the allocation of responsibility to all who are responsible, be they individuals, subunits of corporations, corporations, parent corporations, industry associations, gatekeepers such as accountants and indeed regulatory agencies themselves.
4. The maximisation of the allocation of responsibility to all who are responsible should be pursued cost-efficiently, and in a way that does not place unrealistic burdens either on corporations or on the state budget.
5. The maximisation of the allocation of responsibility should be pursued justly in such a way as to safeguard the interests of individuals. Rights of suspects must be respected. Procedural justice must not be sacrificed on the altar of substantive justice. (Reversing the onus of proof for one of the constituting elements of the actus reus of a crime is accepted in this respect.)
6. Those who are responsible for equal wrongs should be treated equally.
7. A strategy for allocating individual responsibility should remedy the scapegoating that has been endemic when individual accountability for corporate wrongdoing has been pursued.
8. A strategy for sanctioning the responsible should minimise spillovers of the effects of sanctions onto innocent actors.
9. A means must be devised to escape the deterrence trap: the situation where the only way to make it rational to comply with the law is to set penalties so high as to jeopardise the economic viability of corporations that are the lifeblood of the economy.
10. A strategy for sanctioning the responsible must recognise that actors are motivationally complex. Profit maximisation is an important motivation for many private corporate actors, but the maintenance of individual and corporate repute, dignity, self-image and the desire to be responsible citizens are also important in many contexts, as are various more idiosyncratic motivations. A good strategy will not be motivationally myopic.
11. A strategy for sanctioning the responsible should avoid myopia about which agents will dispense sanctions against those responsible with the greatest justice and effectiveness. Often, it will be enforcement agents of the state who will do the best job. Yet we should privilege the state as the only law-enforcer that matters. In particular, corporate internal disciplinary systems must be taken seriously as legal orders with realised and unrealised potential for justice and effectiveness.
12. Special care must be taken to ensure that the state does not cause private justice systems to become organised against the state justice system. The state should have enforcement policies that avert the formation of organised business cultures of resistance to regulatory law.

³⁸³Braithwaite, J., Fisse, B., *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), pp. 135-138.

13. A strategy for sanctioning the responsible should also avoid myopia about the aims of the criminal justice system. Narrowly focused utilitarianism or retributivism are prescriptions for disastrous corporate criminal enforcement policies. Criminal liability is not merely a matter of paying a price for a crime, but has a prohibitory function which is reflected by the denunciatory emphasis of the criminal process. Nor should criminal liability be viewed simply as a matter of retribution. The harms protected against by corporate criminal law are too serious for us to indulge in retribution at the cost of increasing corporate harm-doing.
14. A strategy for allocating responsibility should be in harmony with the varieties of structures, cultures, decisionmaking and accountability principles in large and small organisations.
15. A strategy for allocating responsibility should be capable of nuanced response to the likelihood that the same corporate action can be usefully understood in many different ways. Our mechanisms for allocating responsibility should not be so calibrated that the ambiguous and paradoxical nature of corporate action eludes us. In other words, we should be able to avoid the traps of narrowness of vision through institutions that are able to imagine corporate action in multiple ways. Our methodology for allocating responsibility should foster a dialogue that brings these multiple interpretations of responsibility into the open.
16. A strategy for allocating responsibility in a complex corporate world where the motivations of actors are multiple and where no single model of corporate action grasps the whole story should be based on redundancy. If the intervention fails for one reason, there should be other features of the intervention that might enable it to succeed. Redundancy should be built into interventions, while the inefficiencies of costly redundancies are avoided.
17. A strategy for allocating responsibility should ensure that the law does not straightjacket management systems into conformity with legal principles.
18. A strategy for allocating responsibility should operate with a conception of fault that is not time-bound, but copes with the dynamic nature of corporate action.
19. A strategy for allocating responsibility should not be bound by a national jurisdiction; it should be capable of responding to the increasingly international nature of corporate action.
20. A strategy for allocating responsibility should be workable with public as well as private organisations.

Supplement E

Business Associations in Endemically Corrupt Environments

1. **Arguments for business associations against corruption:**³⁸⁴
 - A poorly organised private sector has relatively little bargaining power against the government, but an organised private sector can negotiate from a position of strength.
 - Business associations also provide a structure that enables firms to co-ordinate their positions, thereby by-passing the so-called "prisoner's dilemma", especially when these associations are organised by corporations. All competitors can commit simultaneously to refuse to give bribes, thereby levelling the playing field and imposing a no-bribe standard on public officials.
 - Associations can provide an important function by assisting members or clients on compliance with anti-bribery rules and new procurement rules.
2. **Requirements on the association:**
 - It must have as one of their founding principles the establishment and maintenance of conditions for healthy price competition;
 - It must act as a transparent and capable mediator to establish rules, and provide a credible enforcement mechanism that will favour such competition (to overcome the "free rider" problem).
3. **Organisational strategy:**
 - Ensure preserving independence while working closely with the government by involving the opposition parties. Further, a cross-border structure strengthens the independence and improves the available experiences for improving governance of the business environment.
 - Where the private business sector is not well organised: existing NGOs can play a role in bringing together business-people to share information and help them speak with one voice.
4. **Activities:**
 - Raise awareness**
 - Organise public discussions on the role of the public and private sectors in combating corruption.
 - Disseminate ethics standards providing clear definitions by sponsoring publications, programs, institutes or conferences.
 - Provide financial support to non-governmental organisations (NGOs) involved in the fight against corruption.
 - Assist professional schools with the development of ethics curricula.
 - Organise or support a social marketing campaign by joining corporate marketing resources.
 - Advise governments on measures to be taken in a constructive dialogue**
 - Articulate and advocate anti-corruption reform strategies.
 - Raise issues for debate and provide input into government efforts to combat corruption.
 - Promote and adopt ethical business standards**
 - Develop, instill, and enforce corporate codes of ethics.
 - Set up and participate in integrity pacts.
 - Assist with monitoring and act as a watchdog**
 - Nurture good relations with the press. Where whistleblowers are not protected by local press, turn to international press.

³⁸⁴ "Corruption is bad for business. But is it also true that business is bad for corruption?", Final report presented of The Washington Conference on Corruption, February 22-23, 1999.

- Provide information on corruption to NGOs, the media, regional organisations, governments, and donor organisations.
- Play an active role in the monitoring of international conventions.

Supplement F

Recognised and Non-recognised Problems in the International Business Environment in Relation to Bribery in International Business Transactions

In the April, 1998 Communiqué of the OECD Council,³⁸⁵ under the heading of “Strengthening the Multilateral System”, the Council asked for a report in 1999 on the implementation of the Convention, and on the progress made in the work planned³⁸⁶ on a number of issues:

1. bribery in relation to foreign political parties;
2. advantages, promised or given to any person in anticipation of that person becoming a foreign public official,
3. bribery of foreign public officials as a predicate offence for money laundering legislation,
4. the role of foreign subsidiaries and,
5. offshore centres in bribery transactions.³⁸⁷

The Council also noted the OECD Recommendation on Improving Ethical Conduct in the Public Service in Member Countries, and the activity of the Financial Action Task Force (FATF) as an important G-8 officials committee. Among other things, this task force monitors the implementation of the money laundering laws of 26 countries. Following the report to Ministers in 1999 on the analytical work by the Working Group on these issues [C/MIN(99)5, Annex 2], Ministers requested the OECD to continue its work to strengthen the fight against corruption, including the examination of the five related issues.³⁸⁸ The Working Group has identified the following key areas as most relevant for ensuring the effectiveness of the OECD anti-bribery instruments:³⁸⁹

- **Criminal Law**

The Working Group recognises the efforts made by such bodies as the FATF and the UN to expand the list of serious crimes that would trigger application of money laundering legislation. It invites such bodies to note the view of the Group that bribery, as defined in the OECD Convention, should be a predicate offence for money laundering. [Thus, it concerns no implementation details but the criminalisation of certain acts.]

- **Regulatory Issues**

The three main areas involving due diligence of corporations were identified as increasing transparency through stronger “know your customer”-banking rules,³⁹⁰ which address the

³⁸⁵ See the annex to the April 28, 1998 press release of the U.S. Department of Foreign Affairs and International Trade, No. 104.

³⁸⁶ In December, 1997, the OECD Council decided [C(97)240/FINAL] that the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, should examine on a priority basis these five issues.

³⁸⁷ These five issues were reiterated in Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendation, C/MIN(2000)8, 26-27 June 2000, para. 31.

³⁸⁸ Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendation, C/MIN(2000)8, 26-27 June 2000, para. 3.

³⁸⁹ *Ibid.*, para. 35.

³⁹⁰ See an initiative called the Wolfsberg AML Principles: Global Anti-Money-Laundering Guidelines for Private Banking, adopted in Zurich, October 30, 2000 by international private banks ABN AMRO Bank N.V., Banco Santander Central Hispano, S.A., Barclays Bank, The Chase Manhattan Private Bank, Citibank, N.A., Credit Suisse Group, Deutsche Bank AG, HSBC, J.P. Morgan, Société Générale, UBS AG. O. Banca Del Gottardo signed on December 22, 2000, and Banca Commerciale Italiana signed on January 19, 2001.

true beneficial owner of the assets, increasing diligence in cases of sensitive transactions (red flags), and developing clear rules on notification of transactions that are sensitive or suspicious. The Group recognised that the FATF and national regulatory bodies have primary responsibility for developing and enforcing implementation of due diligence rules. However, the Group expressed concern that the existing standards may not go far enough to adequately deal with corrupt transactions. It will recommend that FATF consider how to make existing due diligence standards more effective in the fight against corruption.

- **Corporate Vehicles**

The Group agreed that more work is needed as concerns the use of corporate vehicles to facilitate corrupt transactions. Together with the OECD Steering Committee on Corporate Governance, the Working Group should explore the issue of developing mechanisms to prevent the misuse of corporate vehicles by ensuring that supervisors, law enforcement authorities and financial institutions are able to obtain, on a timely basis, information on beneficial ownership of corporate vehicles and share such information with foreign authorities.

- **Mutual Legal Assistance, Bank, and Relevant Professional Secrecy**

This is a complex area because mutual legal assistance required through the OECD Convention is not based on regional harmonisation such as those underpinning the EU or other regional mutual legal assistance arrangements. The Group was of the opinion that further work is needed which may result in elaborating norms beyond the minimum standard in the Convention. The Group recommended that a country that is a Party to the Convention should seek to apply the Convention in its off-shore dependencies and to ensure mutual legal assistance in respect of them. The Group will need to address the issue of off-shore centres that are not dependencies of countries Parties to the Convention.

Non-recognised Problems

- **The Definition of “National Security”**

In the corruption scandal of Elf Aquitaine/Leuna, the former CEO Loïk Le Floch-Prigent has revealed that the national security services were involved by having employed French national security officers within but also outside Elf Aquitaine to protect national business interests in the oil business. The officers were responsible for the “lobbying” consisting of secret commissions paid in order to secure contracts. Le Floch-Prigent claims that after the entry into force of the OECD Convention there are no more tax deductions as previously for “grease-money” or kickbacks. However, the first priority remains: results.³⁹¹ If these can only be obtained by playing dirty, then nothing has changed. By using the national security services, acts which are otherwise criminalised and rules which are to be followed in legal procedures can be *legally* set aside since a referral is made to “national security”. Another business area where any change is unlikely is the weapons industry. It would be naïve to expect corruption ever to be eradicated from that business due to its very nature. As a rule, corrupt practices could be assumed. This means that businesses under the heading of “national interest” will be immune to prosecution.³⁹² The implication of this is that the Government by employing national security services for national corporations,³⁹³ creates immunity to these companies. Equality before the law is undermined and as an effect also the independence of the judiciary. Due to the principle of national sovereignty and the possibility to claim “national security” reasons for immunity or refusing to give evidence, the situation looks negative considering:

-the US backing out from co-operation with FATF on criticism on tax havens and bank-secrecy laws (it remains unclear what the effects will be from the anti-terrorism work after the World Trade Centre terrorist attacks in the US, September 11th, 2001);

http://www.wolfsberg-principles.com/wolfsberg_principles.html. Interestingly, there is no enforcement mechanism included whatsoever in this environment of bank secrecy.

³⁹¹ Kläsger, M, Schirra, B., “Es ist Geld geflossen”, in *Die Zeit*, No. 24, 2001.

³⁹² See for instance section 1 of the British Security Act 1989 on protection of the economic interests of the nation.

³⁹³ Observe the complexity of private multinational corporations and their international character. What is a “national” economic interest?

- the existence of Echelon functioning as a means to further profits for Commonwealth and US companies by intercepting communications (industrial espionage);
- the general global move towards industrial espionage after the cold war;
- the up-coming demographic crisis and subsequent dwindling tax revenues contemporary with an upsurge in public spending on retirement schemes, the fight for profitable and taxable companies deepens, even to a point where it may become a “national security” issue.

According to the Commission in the ECtHR “national security” cannot be defined exhaustively.³⁹⁴ It has also expressed the view that in the first place it is for member states to decide whether it is necessary to criminalise particular conduct deemed to be damaging to national security.³⁹⁵ Useful statutory definitions of what is meant by the term “national security” often do not exist in domestic legal systems which makes it very difficult for the judiciary to rule that an exercise of power fell outside the scope of “national security”.³⁹⁶ Unlike other government authorisation to limit human rights, powers granted governments in this area are often wholly discretionary. If a government minister, or security officer assures a court that the revealing of an official secret would cause “unquantifiable” damage to national security, the court will most likely find it difficult to disagree.

In general, the nature of threats to the state is changing with the changes in the nature of the state itself.³⁹⁷ For example, espionage damaging to national security is no longer simply the theft of military secrets or technology, or important diplomatic material but encompasses theft of state economic information and public and privately owned industrial and technological concerns and processes.

³⁹⁴ *Esbester v. UK*, No. 18601/91, 18 EHRR CD 72 (1993).

³⁹⁵ “As far as the legal definition of criminal offences against national security, territorial integrity and public safety are concerned, the authorities of the particular State are best placed to decide whether a restriction designed to prevent such offences is necessary.” *M. V. France*, No. 10078/82, 41 D.R. 103, 117 (1985).

³⁹⁶ E.g. the term is referred to but not defined in the statutory mandates of the British Security Service (Security Service Act 1989, section 2) and the Swedish security police (Police Act (1984:387), section 7 in conjunction with the Security Protection Act (1996:627) section 6). There is an attempt to define “threat to the security of Canada” in section 2 of the Canadian Security Intelligence Act 1984.

³⁹⁷ Cameron, I.T., *National Security and the European Convention on Human Rights* (Uppsala: Iustus förlag AB, 2000), p. 70.

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