11

The United Nations Convention against Corruption and its Criminal Law Provisions

*Michael Kubiciel and Anna Cornelia Rink**

11.1 Origins of the UNCAC

'It has been suggested that as far as transnational financial crime is concerned, national legislation will never be sufficient [and] that some form of multinational securities and exchange commission may well be required. But the prospects for this kind of regulation do not seem good, at least in the near future,' the United Nations found in its Fifth Congress on the prevention of crime in 1975.[1] The changes leading from this set in quicker than could have been predicted: only two years later, investigations following the Watergate Affair disclosed that more than 400 companies had paid bribes of some US$300 billion to foreign public officials.[2] In the course of this, politicians and the wider public became aware of the extent of transnational corruption for the first time. It was conceived as another symptom of the moral decay that was supposed to be widespread among society and its elite. After the first shock had worn off a reaction began, starting with legislation known as the US Foreign Corrupt Practices Act (FCPA) of 1977.[3] This was not the end of the anti-corruption response; in fact, the FCPA was not even the beginning of the end but turned out to be the end of

* Central parts of the text are based on a previously unpublished study that Michael Kubiciel conducted for the United Nations Office on Drugs and Crime (UNODC) in 2005/2006. The text, however, does not reflect the position of the UNODC.

[1] See Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Toronto, Canada, 1–12 September 1975: report prepared by the Secretariat, UN Pub. A/CONF.56/3, Ch. I, para. 31; on the UN's way to its convention in depth: United Nations, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption*, New York, UN, 2010, p. xiiff.

[2] On the Watergate affair: Lewis Chester, Cal McCrystal, Stephen Aris, and William Shawcross, *Watergate. The Full Inside Story*, 1973; President Richard Nixon's speech of 30 April 1973 dealing with the scandal, 'The Watergate affair. The integrity of the White House', in *Vital Speeches of the Day*, 1973, p. 450. House of Representatives Report No. 95-640, p. 1, available at: http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf, accessed 28 September 1977. On this see also 'Report of the Securities and Exchange Commission (SEC) on questionable and illegal corporate payments and practices', 1976, available at: http://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf, accessed 18 September 2015.

[3] Hartmut Berghoff, 'From the Watergate scandal to the compliance revolution. The fight against corporate corruption in the United States and Germany, 1972–2012', (2013) 53 *Bulletin German Historical Institute*, 6; Mark Pieth, 'Introduction', in Mark Pieth, Lucinda Low, and Nicola Bonucci (eds), *The OECD Convention on Bribery—A Commentary*, 2nd edn, Cambridge, CUP, 2014, p. 8.

the beginning of a development that finally led to the adoption of the United Nations Convention against Corruption (UNCAC).

In the late 1970s there was still a great deal to be achieved. The United States did not enforce the FCPA, while most of the other developed countries simply ignored the problem of transnational corruption. None of them wanted to imperil the business opportunities of its enterprises abroad; and all of them had a strong interest in maintaining their good relations with developing regimes that, to a great extent, gained and sustained their power bases on corrupt practices.[4] Thus, the FCPA remained the only significant legal innovation in the combat against corruption for almost twenty years.[5] The end of the Cold War and the increasing globalization altered the economic and political framework in which corruption could be ignored or tolerated for so long.[6] Economically, the true costs of corruption became apparent as the growth of global competitors drove up bribe levels in international procurement.[7] More and more economic leaders agreed that the costs of corruption had become unacceptably high.[8] The change in economic perception met a changed political situation. The 'post-Cold War' world made Western politics accessible for complaints.[9] Many governments found themselves unable to explain why the interest in stabilizing a political status quo in a country outweighed the support of corruption. Political allies hence became 'corrupt regimes' and corruption was no longer part of an admissible political strategy but became apparent as a crucial cause of global poverty.[10] These alterations were complemented by a significant change in criminal politics: many Western governments came to regard transnational corruption as a danger to their own societies because increased global trade and more frequent international mergers facilitated infection with the virus of corruption.[11] In particular, the eastern expansion of the EU is feared to bear the risk of infecting the western parts of the Union with corruption.[12]

[4] Michael Kubiciel, 'International legal development and national legal change in the fight against corruption', in David Linnan (ed.), *Legitimacy, Legal Development and Change*, Farnham, Ashgate, 2012, p. 419, p. 421; see also Jan Wouters, Cedric Ryngart, and Ann Sofie Cloots, 'The international legal framework against corruption: achievements and challenges', (2013) 14 *Melbourne Journal of International Law*, 1, p. 4.

[5] Kubiciel, 'International legal development and national legal change', cited in note 4 above.

[6] On this, in depth, Michael Kubiciel, 'Core criminal law provisions in the United Nations Convention Against Corruption', (2009) 9 *International Criminal Law Review*, 139, p. 140; the following remarks are partly based on this text.

[7] See Alan Doig and Robin Theobald, *Corruption and Democratization*, Abingdon, Psychology Press, 2000, p. 7; Carolyn Hotchkiss, 'The sleeping dog stirs: new signs of life in efforts to end corruption in international business', (1998) 17 *Journal of Public Policy & Marketing*, 108, p. 110.

[8] See, for example, the International Chamber of Commerce Rules of Conduct to Combat Extortion and Bribery in International Business Transactions from 1996; open letter from European business leaders to OECD Economic ministers from 1997, which is available at: https://www.transparency.org/news/pressrelease/business_leaders_call_on_oecd_ministers_to_act_against_international_corrup, accessed 18 September 2015.

[9] Hotchkiss, 'The sleeping dog stirs', cited in note 7 above, p. 109; Mark Turner and David Hulme, *Governance, Administration & Development: Making the State Work*, Basingstoke, Palgrave Macmillan, 1997, pp. 222–4.

[10] Doig and Theobald, *Corruption and Democratization*, cited in note 7 above, p. 8ff.

[11] Rajib Sanyal, 'Determinants of bribery in international business: the cultural and economic factors', (2005) *Journal of Business Ethics* 59, 139.

[12] Cf. Barbara Crutchfield George, Kathleen A. Lacey, and Jutta Birmele, 'On the threshold of the adoption of global antibribery legislation: a critical analysis of current domestic and international efforts toward the reduction of business corruption', (1999) 32 *Vanderbilt Journal of Transnational Law*, 24.

In this new light, anti-corruption initiatives met an auspicious international policy climate.[13] Transparency International was an early advocate of putting global focus on (foreign) bribery. Founded in 1993, the non-governmental organisation published its Corruption Perceptions' Index and supported the United States in its attempt to convince other states of the necessity to take action against foreign bribery. This work had a first success in 1996 when twenty-three member states of the Organization of American States (OAS)[14] signed the Inter-American Convention against Corruption.[15] This organisation paved the way for gaining the necessary global support for the fight against foreign bribery. Only one year later, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions became the supra-regional instrument in the fight against corruption.[16] Once the international awareness of foreign bribery had been raised, various international anti-corruption initiatives were launched,[17] e.g. the Council of Europe's (CoE) Criminal Law Convention on Corruption in 1998.[18] In 2003, three decades after the UN published its first rather reserved statement, quoted at the start of this chapter, the international development reached its peak with the adoption of the UNCAC.

11.2 Significance and Scope

Between 2003 and 2015, 140 countries signed the Convention and 176 became states parties.[19] Even the European Union signed (2005) and ratified (2008) the UNCAC. Only six states (Belize, Chad, Eritrea, Equatorial Guninea, North Korea, and Suriname) neither signed nor ratified the UNCAC. Still, two industrialized nations (Japan and New Zealand) have not yet ratified the Convention, lumping them in the same category as Barbados, Bhutan, and Syria. Nevertheless the UNCAC must be called the first truly global anti-corruption treaty.[20]

In contrast to other conventions, the UNCAC is not, and not even foremost, a criminal law convention. Rather, it goes further than the criminalization of corrupt acts and law enforcement (Articles 15 to 42), and includes substantive chapters on prevention,

[13] Cf. for the campaign of the US administration under President Bill Clinton, see Steven Salbu, 'Bribery in the global market: a critical analysis of the Foreign Corrupt Practices Act', (1997) 54 *Washington and Lee Law Review*, 230; Hotchkiss, 'The sleeping dog stirs', cited in note 7 above, p. 111.

[14] See http://www.oas.org/en/default.asp, accessed 18 September 2015.

[15] The OAS Convention is available at: http://www.oas.org/juridico/english/treaties/b-58.html, accessed 18 September 2015.

[16] On this, Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 140.

[17] For an overview of twenty-one anti-corruption legal instruments, see United Nations Office on Drugs and Crime (UNODC), *The Compendium of International Legal Instruments of Corruption*, 2nd edn, Vienna, 2005.

[18] Criminal Law Convention on Corruption, CM (98) 181/ETS No. 173, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm, accessed 18 September 2015.

[19] Text of Convention available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed 22 March 2016. UNCAC Signature and Ratification Status as of 1 April 2015, available at: https://www.unodc.org/unodc/en/treaties/CAC/signatories.html, accessed 18 September 2015.

[20] Antonio Argandoña, 'The United Nations Convention against Corruption and its impact on international companies', (2007) 74 *Journal of Business Ethics*, 481, p. 485; Wouters, Ryngaert, and Cloots, 'The international legal framework', cited in note 4 above, p. 216.

international cooperation, asset recovery, technical support, and exchange of information. Thus, the UNCAC is uniquely comprehensive.

This also holds to be true for the scope of criminalization. Since the UNCAC was drafted at a relatively late stage of the international development, its drafters could draw on the approaches of several other international conventions and enhance them.[21] As far as the chapter on criminalization is concerned, the UNCAC carries forward an international tendency of expanding the understanding of corrupt practices to be criminalized. While the OECD Convention had only focused on the active bribery of foreign public officials in international business transactions, the CoE Convention already included a wide range of criminal law provisions: active and passive bribery of domestic and foreign public officials, active and passive bribery of elected public officials, as well as bribery in the private sector, trading in influence, and money laundering. The UNCAC goes even further, as it also includes rather extraordinary provisions such as illicit enrichment, which was first to be found in Article IX OAS Convention and Article 8 African Union Convention on Preventing and Combating Corruption. As the UNCAC covers the broadest range of corruption offences, including obstruction of justice and embezzlement, it is the most comprehensive international anti-corruption convention to date.[22]

The Legislative Guide to the UNCAC points out that the causes of corruption are many and varied. For that reason 'preventive, enforcement and prosecutorial measures that work in some States may not work in others'.[23] Accordingly, the UNCAC includes both mandatory and non-mandatory provisions in order to grant states a margin of appreciation in implementing the UNCAC and adjusting its content to the domestic situation. More importantly, the distinction between mandatory and non-mandatory provisions reflects where a conceded international standard regarding culpability of behaviour exists and where it does not. Even in areas in which such consent does not exist among states the UNCAC does not abstain from submitting a legislative proposal, but rather includes non-mandatory provisions. Therefore, the Convention does not reflect the lowest common denominator but invites states parties to consider the criminalization of certain behaviours.[24]

In contrast to the chapter on preventive measures, which is predominantly phrased in non-mandatory terms, Chapter III includes several mandatory provisions on criminalization and law enforcement. They are 'the most urgent and basic part of a global and coordinated effort to counter corrupt practices'.[25] Of particular importance are the provisions on bribery of national public officials and active bribery of foreign

[21] Cf. Wouters, Ryngaert, and Cloots, 'The international legal framework', cited in note 4 above, p. 218, who refer to Art. 12 UNCAC, which requires tax deductibility of bribes to be prohibited; the OECD Convention on Bribery merely recommends prohibiting such deduction.

[22] OECD, *Corruption—A Glossary of International Standards in Criminal Law*, Paris, OECD Publishing, 2008, p. 14; Wouters, Ryngaert, and Cloots, 'The international legal framework', cited in note 4 above, p. 247: 'most elaborate and most detailed international anti-corruption instrument'.

[23] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd rev. edn, Vienna, UNODC, 2012, p. V.

[24] Mark Pieth, 'Der Beitrag der UN Konvention zur Bekämpfung der transnationalen Korruption', in Tiziano Balmelli and Bernard Jaggy (eds), *Les traités internationaux contre la corruption*, 2004, p. 7, p. 8.

[25] UNODC, *Legislative Guide*, cited in note 23 above, p. 77, para. 178.

public officials.[26] Apart from them, the other mandatory criminal provisions cover embezzlement of property by a public official, money laundering, and obstruction of justice. Beside these, the UNCAC requires state parties to criminalize participation in corruption offences (Article 27). We also want to shine light on three especially interesting non-mandatory criminal measures, namely trading in influence (Article 18), abuse of functions (Article 19), and bribery in the private sector (Article 21).

11.3 Mandatory Criminal Law Provisions

11.3.1 Bribery of national public officials (Article 15)

11.3.1.1 Background

Article 15 relates to the classic form of corruption: the bribery of national public officials. The statute is no innovation in international law, since several previous regional anti-corruption conventions include equivalents,[27] as does the UN Convention Against Organized Transnational Crime. The criminalization of bribery of national public officials is of paramount importance as bribery in the public sector is limited neither to perverting a single decision nor to causing financial damage to public assets. In fact, bribery in the public sector can wreak havoc on the political architecture as such because it endangers the trust of people in the functioning of proceedings. Consequently, Article 15 includes a mandatory criminal provision, which refers both to the active and passive side of bribery. Article 15(a) refers to active bribery when it criminalizes the promising, offering, or giving of an undue advantage to a public official. Article 15(b) covers passive bribery in making the public official him- or herself who solicits or accepts the undue advantage a criminal. The extent of criminalization for which Article 15 provides can be demonstrated by the following, non-conclusive list of typical phenotypes of bribery of national public officials: facilitating advantages, payments to expedite processes ('speed money'), preventive bribes, procurement fraud, embezzling bribery, nepotism, and political corruption. Compared with several national criminal laws, which opt for a more narrow approach, Article 15 UNCAC facilitates the investigation, the adjudication, and the proof of corrupt behaviour substantially by using relatively wide terms.

11.3.1.2 Scope

Article 2 defines 'public official' as the central term of the statute. According to Article 2(a), a 'public official' encompasses any person holding a legislative, executive, administrative, or judicial office, whether appointed or elected, and—even wider—any person performing a public function. Thus, the Article covers people appointed to public office such as policemen, customs officers, members of the armed forces, judges, public prosecutors, and any other public servant. Moreover, where elected, persons

[26] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 141.
[27] Cf. Arts 2 and 3 of the CoE Criminal Law Convention on Corruption.

such as members of parliaments, mayors, public prosecutors, or judges are subject to Article 15. Consequently, party states and their judiciaries have to ensure that the standard of Article 15 applies equally to 'ordinary' public officials and elected persons. Except where granted immunities (cf. Article 30 UNCAC), legal or judicial privileges for elected persons, for example special defences or restrictive interpretations of anti-bribery norms, are thus a violation of the UNCAC. The scope of Article 2(a), however, is even wider. It includes any person who performs a public function, e.g. persons working for a public agency or enterprise, or providing a public service. These people are public officials irrespective of their formal status. With this broad definition of the term 'public official' the UNCAC exceeds the scope of many national criminal codes,[28] as well as that of most of the other international anti-corruption conventions.[29] It reflects the fact that it is the actual power and influence, and not the formal status of an official, that enable corruption.[30]

The second term of central importance—'undue advantage'—is not defined in the UNCAC. Advantage is anything of value to the specific recipient, be it tangible or intangible. This includes, for example, the granting of a post, a career prospect, or a political position. Whether this advantage exceeds propriety and hence has to be called 'undue' depends, primarily, on the national laws. Consequently, every benefit, acceptance of which is allowed by national law, is not 'undue'.[31] In contrast, a benefit must be conceived as undue when the public official obtains a personal benefit. In between these two extreme positions, factors like value, frequency, and (lack of) transparency can serve as indicators for the question whether an advantage is 'undue' or not.[32]

The prohibited behaviour on the active side of bribery encompasses all stages from promising to giving. This comprehensive coverage of possible bribing actions includes unilateral announcement of or bilateral agreement on a future undue advantage (promise), the briber's signal of his or her willingness to grant an undue advantage at any time (offering), and the actual transfer of this benefit (giving). On the passive side, the prohibition covers the solicitation and acceptance of an undue advantage. Thus, a public official is not allowed to, explicitly or implicitly, give it to be understood that their official acts (or refraining from acting) are dependent on the conferment of an undue advantage. Requesting a bribe (solicitation) is an early stage of a corrupt behaviour and, thus, might be difficult to prove. In contrast, it is a lot

[28] For a comparative overview cf. Albin Eser and Michael Kubiciel, *Institutions Against Corruption*, Baden-Baden, Nomos, 2005, pp. 22–5.

[29] See Art. 1(a) CoE Convention on Corruption; Art. 1(c) CoE Convention on the Fight against Corruption; comparable to the scope of Art. 2 UNCAC are Art. 1(1) AU Convention on Preventing and Combating Corruption; Art. 1 OAS Inter-American Convention Against Corruption, and—concerning foreign public officials—Art. 1(4 a) OECD Convention on Combating Bribery.

[30] Eser and Kubiciel, *Institutions Against Corruption*, cited in note 28 above, p. 39; Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 143.

[31] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 145.

[32] However, it is not clear from the wording whether advantages of very low value and socially accepted gifts should be criminalized. Both the EU and the OECD Convention strictly prohibit any advantage whatsoever. In contrast, the CoE Convention excludes 'minimum gifts, gifts of very low value and socially accepted gifts' from criminalization: see Explanatory Report to the Council of Europe's Criminal Law Convention on Corruption (ETS No. 173). Cf Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 145.

easier to establish the fact that the beneficiary entered into the possession of a bribe (acceptance). It is only necessary to prove that the bribe was related to performance within the beneficiary's sphere of action.[33] The public official's consent to this passing of the bribe might have been at any time. Therefore, if the public official subsequently failed to perform what had been agreed, this will not affect his or her criminal liability.[34]

Whether the briber or the bribed took action themself (directly) or through the use of an intermediary (indirectly), is of no significance for the criminal liability. In order to avoid any legal loopholes, the requirements regarding any intermediary have to be modest: The intermediary might be a natural person or a legal entity, and act in good or in bad faith. The main reason for Article 15 is to criminalize the abuse of public power for private interests; the question whose private interests are served is not of legal significance. Accordingly, any person or legal entity might be the beneficiary. However, the public official must be aware of the fact that the third person is given an advantage.

Article 15 uses the term 'in order that' to refer to an intention rather than to a completion. In other words, it criminalizes the promising, giving, soliciting, or accepting of a bribe with the specific intention that a public official will act or refrain from acting. Accordingly, the Convention does not require it to be proved if or when the act or omission of the public official took place. The mere intention to purchase an official behaviour is criminalized. Therefore, it is irrelevant whether the public official is actually able, competent, or at least willing to perform the official act or to refrain from acting.[35] This covers, for example, off-duty policemen soliciting bribes from speeders for refraining from further action against them.[36] The wording 'in order that' points towards a future act or omission by the official, and hence the Article does not encompass the situation in which an undue advantage is given or accepted after an act or omission by a public official has occurred without a previous offer or solicitation.

Finally, 'in the exercise of his or her official duties' does not require a breach of duty. In order to assure compliance with Article 15, states parties having bribery provisions that require a breach of duty could consider—in lieu of changing their laws—interpreting those clauses in such a way that the connection between an undue advantage and the public act or omission as such constitutes a breach of duty.

Both active and passive bribery require intention, which has to cover all other substantive elements of crime under Article 15. It is important to note that a fraudulent intention is not required. Article 28 specifies that the intent to commit an offence 'may be inferred from objective factual circumstances'. Thus, a perpetrator need not necessarily have knowledge of the specific legal designation as long as he or she has knowledge of the relevant facts and the general meaning of the legal term.

[33] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 145.
[34] Ibid, p. 147. [35] Ibid, p. 149. [36] Ibid, p. 150.

11.3.2 Bribery of foreign public officials and officials of public international organisations (Article 16)

11.3.2.1 Background

As the UN had predicted as early as 1975, globalization of the economy in fact led to a globalization of white-collar crime.[37] Several scandals starting in the 1970s (e.g. Lockheed) and continuing to the present (e.g. Siemens) have shown that bribery of foreign public official has been—and remains—a widespread phenomenon, especially in international business transactions.[38] While some politicial scientists and economists argue that certain forms of corruption at least (e.g. facilitation payments) can be a 'not undue' instrument for opening closed markets and accelerating proceedings in slow bureaucracies,[39] international organisations regard transnational bribery as an obstacle to fair international competition and the economic and social development of the southern hemisphere.[40] Therefore, several precursors of the UNCAC included articles on bribery of foreign public officials. Most prominently, Article 1 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions asks states to criminalize active bribery of foreign public officials, when committed 'in order to obtain or retain business or other improper advantage in the conduct of international business'. According to that approach, states should tackle the 'supply side' of corruption, thereby reducing the influx of bribe money and benefiting international competition by 'levelling the playing field' for those enterprises competing on the world market.[41]

Article 6 CoE Criminal Law Convention opted for a wider approach. It prescribes that each party shall establish as criminal offences both active and passive bribery, when involving any person who is a member of any public assembly exercising legislative or administrative powers in any other state. Under that Article, states parties must criminalize any form of bribery of a public official, whether it has a connection to transnational business or not. The reason for that wide wording lies in the understanding of corruption as an obstacle to economic *and* social development. Accordingly, the CoE aims at safeguarding 'the confidence of citizens in the fairness of Public Administration which would be severely undermined, even if the official would have acted in the same way without the bribe'.[42]

Roughly speaking, the UNCAC follows the OECD approach, leaving the adoption of the wider CoE model to the discretion of states. Article 16 paragraph 1 is a mandatory provision opposing the active bribery of a foreign public official and of officials of public international organisations, done in order to obtain or retain business or

[37] Fifth UN Congress on the Prevention of Crime, cited in note 1 above.

[38] Cf. Pieth, 'Introduction', cited in note 3 above, pp. 8–16.

[39] Samuel Huntington, 'Modernization and corruption', in Arnold J. Heidenheimer and Michael Johnston (eds), *Political Corruption*, 3rd edn, New York, Transaction, 2009, p. 253. Also see Mushfiq Swaleheen and Dean Stansel, 'Economic freedom, corruption and growth', (2007) 27 *Cato Journal*, 343.

[40] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 150; Pieth, 'Der Beitrag der UN Konvention', cited in note 24 above. Also see the preambles of both the OCED Convention and the UNCAC.

[41] Pieth, 'Introduction', cited in note 3 above, pp. 30–31.

[42] Explanatory Report, cited in note 32 above, para. 39.

any undue advantage in relation to the conduct of international business. For good reasons, Article 16 paragraph 2, which attacks the passive side of corruption, is non-mandatory.[43] First of all, criminalizing and penalizing a corrupt public official makes this a unique provision, since states used to impose duties solely on their own public officials. Consequently, no international standard or consents govern whether or not foreign public officials may be criminalized, and, if so, to what extent. Second, criminalizing and penalizing foreign public officials may interfere with the principle of sovereign equality of states and the principle of non-intervention, both provided for by Article 4. In fact, the protection of its institutions and proceedings falls within the *domaine réservé* of each state.

As long as a state can claim jurisdiction on the basis of international law, neither criminalizing its officials nor the enforcement of transnational bribery legislation violates the principles of sovereign equality and non-intervention. Under Article 42(1)(a), a state party has jurisdiction when the offence established in accordance with Article 16 was committed within its territory. Moreover, Article 42(2)(b) provides jurisdiction on the basis of the principle of nationality. Article 42(3) grants jurisdiction where an alleged offender is present within the state party's territory and the state party does not extradite solely on the ground that the offender in question is one of its own nationals.

11.3.2.2 Scope

Unlike other conventions, which leave the definition of foreign public officials to the states concerned, Article 2 describes a foreign public official as any 'person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected', or a 'person exercising a public function for a foreign country, including for a public agency or public enterprise'. Hence, Article 2 provides an autonomous definition of the foreign public official.[44] Therefore, criminalizing foreign bribery does not depend on the classification of the accused by the employing state.

As the importance of international organisations increases constantly, the proceedings within these structures have to be safeguarded against corruption too, in particular when it comes to the funding of major development projects.[45] Article 2(c) defines an official of a public international organisation 'an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation'. An employment relationship with the organisation is not necessary.[46] 'Public international organisations' are international organisations established by states, governments, or other public international organisations, regardless of their legal form and remit.[47] The term encompasses both classic international organisation and supra-national organisations like the European Union.[48] Whether the state party

[43] Argandoña, 'UNCAC and its impact on international companies', cited in note 20 above, p. 490, criticizes this, seeing a limitation of the UNCAC's effectiveness.
[44] Pieth, 'Der Beitrag der UN Konvention', cited in note 24 above.
[45] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 151.
[46] Ibid, p. 152. [47] Ibid, p. 152. [48] Ibid, p. 152.

is a member of the relevant international organisation or not, is not relevant;[49] therefore, a state may even criminalize active or passive bribery within international organisations that it has not joined so far.

Deciding whether an advantage is 'undue' can already be difficult within one jurisdiction. The task becomes even more difficult when the advantage was granted or accepted abroad and hence within different legal and socio-cultural scaffolding. The UNCAC reflects that concern, as it does not specify what has to be considered corrupt, and hence leaves space for interpretation.[50] These judgements must be made by national courts applying criminal law statutes on bribery of foreign public officials, which means that they are not bound by foreign laws and social customs.[51] The mere reference to a 'tradition of gift' does not constitute a defence per se. Instead, courts have to evaluate carefully whether an alleged tradition exists and whether the behaviour matches the tradition. With regard to this, it has to be stressed that one cannot call any widespread behaviour a tradition, since the latter implies the notion of social acceptance. For example, requesting 'commissions' may be widespread in many African countries; behaviour of that kind, however, is not part of any country's 'tradition'. But even if the granting of an advantage is in line with an existing tradition, social contingencies of this kind can be subject to the evaluation whether they are capable of damaging public confidence in the functioning of public services and state proceedings. Aspects like value, frequency, temporal closeness to an official act, lack of transparency, failure to disclose or register can serve as evidence of 'undue' character. Against this background, only the granting or accepting of advantages having a very low value may be exempted from criminalization or adjudication, if such small donations are socially accepted.

Article 16 relates solely to bribes that are granted or accepted in order to obtain or retain business or any other undue advantage in relation to the conduct of international business. This requirement excludes bribery committed for mere private purposes and hence limits the scope of criminalization significantly,[52] although the term 'business' can be understood in a broad sense, covering all commercial activities regardless of their nature.[53] The limitation does not correspond well to the purpose of the UNCAC, which addresses the 'threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law'.[54] As corruption undermines institutions irrespective of their (commercial) context, the wider approach of the CoE Criminal Law Convention would have been preferable, given the ambitions of the UNCAC. For this reason, facilitation payments,[55] which can affect the stability

[49] Ibid, p. 152.
[50] Wouters, Ryngaert, and Cloots, 'The international legal framework', cited in note 4 above, p. 241.
[51] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 153.
[52] Ibid, p. 153. [53] Ibid, p. 153. [54] UNCAC, Preamble.
[55] On this term Antonio Argandoña, 'Corruption and companies: the use of facilitating payments', (2005) 60 *Journal of Business Ethics*, 251; Robert Bailes, 'Facilitation payments: culturally acceptable or unacceptably corrupt?', (2006) 15 *Business Ethics: A European Review*, 293; Stuart Deming, *The Foreign Corrupt Practices Act And the New International Norms*, Washington DC, American Bar Association, 2005, p. 15ff.

and integrity of institutions, should not be exempted from criminalization, even if they do not have the potential to hamper competition and hence provide an undue advantage related to business transactions in the circumstances of a concrete case.[56]

11.3.3 Embezzlement of property by a public official (Article 17)

11.3.3.1 Background

The UNCAC does not define the blurry term 'corruption', nor do other conventions explicate their underlying conception of corrupt behaviour.[57] The criminalization of embezzlement, however, suggests that the UNCAC presupposes a broad definition that is not limited to offering or soliciting an undue advantage to improperly influence the actions of a public official, but also encompasses any abuse of public office for private benefit. As the embezzlement or the misappropriation of public assets themselves can threaten the stability of societies by undermining the institutions and the values of democracy, the criminalization of embezzlement is in line with the general aims of the UNCAC mentioned in its Preamble. Accordingly, Article 17 aims at creating, enhancing, and maintaining good governance among public officials. In contrast, Article 22 targets embezzlement in the private sector as a non-mandatory provision. Notwithstanding, states should implement Article 22, since the border between the private and public sectors can sometimes be winding and unclear, especially after a phase of privatization and outsourcing. Not implementing comprehensive legislation that tackles embezzlement in all sectors could prove to be an obstacle to an effective fight against corruption.[58]

Article 17 does not have an exact equivalent in other anti-corruption conventions.[59] Article 4(d) African Union Convention on Preventing and Combating Corruption is comparable, since it tackles 'the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the state or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position'. In comparison, Article 17 UNCAC is broader in scope,[60] making it one of the Convention's legal innovations. The provision requires states to criminalize the embezzlement, misappropriation, or other diversion, by a public official for his or her own benefit or for the benefit of another person or entity, of any property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of his or her position. Even though Article 17 is a mandatory provision,

[56] Michael Kubiciel, 'Facilitation payments: a crime?', Cologne Papers on Criminal Law Policy 2/2015, Cologne, Institute for Criminal Law and Criminal Procedure, 3, pp. 7–8. Also see Wouters, Ryngaert, and Cloots, 'The international legal framework', cited in note 4 above, p. 240.

[57] For the breadth of the term cf. Wouters, Ryngaert, and Cloots, 'The international legal framework', cited in note 4 above, p. 238. Also see Eser and Kubiciel, *Institutions Against Corruption*, cited in note 28 above, pp. 20–21.

[58] Argandoña, 'UNCAC and its impact on international companies', cited in note 20 above, p. 490.

[59] *Ibid*, p. 489.

[60] Cf. Rajesh Babu, *The United Nations Convention Against Corruption*, 2006, pp. 1 and 11, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891898, accessed 2 March 2016.

most states parties do not require new legislation, as functionally equivalent offences are widespread. These norms either explicitly designate the offence as embezzlement or include the conduct in the offences of theft, fraudulent conversion, or fraudulent misappropriation.

11.3.3.2 Scope

The scope of Article 17 is wide. It covers the public official who diverts public assets by allowing a contractor to charge an excessive price to the account of his public enterprise, in order to obtain or retain (parts of) the overcharge. The shift of values might benefit public officials themselves, any another person, or an entity. The latter term is to be understood widely, covering private companies and political parties, since the Article does not speak, for example, of 'legal person' or 'private legal entity'. Thus, a public official who unlawfully grants state subsidies to a political party has to be penalized in accordance with the UNCAC. States must provide for criminal law statutes to be applicable to an elected public official, e.g. a city mayor, who has misused tax funds by investing in a project that was doubtful from its beginning. Thus, Article 17 does not allow for political decisions to be generally exempted from criminal sanction.

The Article highlights the examples of funds and securities, thereby reflecting the fact that public officials might not just work in traditional areas of the public service, but perform public functions within institutions administering, for example, public health-care, pension funds, or securities markets. Article 17 does not cover solely the embezzlement of public property, even though this is its main field of application, but also the embezzlement of property, belonging to a private person. The Article 17 requires only that this public official has access to the embezzled property by virtue of their position. So, police officers who divert assets they have seized in the flat of a suspect must be held liable.

The central element of the provision is not the embezzlement, misappropriation, or other diversion, since the Article applies no matter how the public official has diverted alien property; nor is it the property, since under Article 2(d) assets of every kind can be the object of the offence. The crucial element is the normative link between the public official and the property: it must have been entrusted to the public official by virtue of their position. These duties may arise from statutory or case law, legal agreement between the owner and the public official or his/her employing institution, or internal regulations or instructions.

11.3.4 Laundering of the proceeds of crime (Article 23)

11.3.4.1 Background

The UNCAC tackles various forms of laundering (Article 23) and concealing (Article 24) of property that has been derived from acts of corruption.[61] This is of particular importance, since money laundering and concealment are typical by-products of

[61] Babu, *The UNCAC*, cited in note 60 above, p. 13.

corruption, especially as the globalized financial system facilitates capital movements all over the world. Thus, legal disparities between various countries can be exploited in order to hide and legitimize the proceeds of crime.[62] The UN stated in 1975 that 'it can be taken [as] axiomatic that until the regulation of business and financial activities is reasonabl[y] uniform, crime will flow to those countries having the least effective regulation'.[63] Not just crime but also illegal property will flow to such safe havens. To prevent transnational money laundering, international cooperation is crucial. Article 24 deals with the 'concealment or continued retention' of property derived from corrupt activities. States are required to consider criminalizing concealment, when the person involved knows that such property is the result of any of the offences established under the Convention. While Article 24 is non-mandatory, states are obliged to implement the provision on money laundering (Article 23). Both Articles form part of a group of provisions aiming at a similar objective, which includes Article 31 (freezing, seizure, and confiscation of proceeds) and Chapter V (asset recovery).[64]

11.3.4.2 Scope

In order to criminalize money laundering comprehensively, Article 23 provides for a large variety of predicate offences.[65] Moreover, states are obliged to establish four offences as crimes: conversion or transfer of proceeds of crime (Article 23(1)(a)(i)), concealment or disguise of proceeds of crime (Article 23(1)(a)(ii)), acquisition, possession, or use of proceeds of crime (Article 23(1)(b)(i)), and participation in, association with, or conspiracy to commit, attempt to commit, or aid, abet, facilitate, or counsel the commission of, any of the foregoing offences (Article 23(1)(b)(ii)). While states must establish the first two offences as a crime under any circumstances, the establishment of the last two offences is subject to the basic concepts of their legal systems.

11.3.5 Obstruction of justice (Article 25)

11.3.5.1 Background

Simply criminalizing corruption offences in accordance with the UNCAC is insufficient if states parties do not safeguard those persons who obtain crucial roles within proceedings related to the commission of these offences. A consequent enforcement of the anti-corruption norms of the Convention requires the protection of witnesses, victims, and justice and law enforcement officials. Criminalizing the obstruction of justice supports the judicial enforcement of other corruption offences by flanking Article 32, which deals with the protection of witnesses, experts, and victims. In fact, Article 25 itself lays down an offence relating to corruptive behaviour, as it covers the exertion of undue influence on proceedings by means of undue advantages as well as

[62] UNODC, *Legislative Guide*, cited in note 23 above, p. 69, para. 221.
[63] Fifth UN Congress on the Prevention of Crime, cited in note 1 above, p. 15, para. 31.
[64] UNODC, *Legislative Guide*, cited in note 23 above, p. 70ff., para. 228.
[65] This—according to Article 2(h)—means 'any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention'.

physical force, threats, or intimidation. In both dimensions the Article serves the purposes of the Convention as expressed in the Preamble: the protection of the institutions, ethical values, justice, and the rule of law.[66]

Article 25 is a mandatory provision encompassing two types of obstruction of justice. Paragraph 1 relates to efforts to influence potential witnesses, victims, and other persons who can produce testimony in order to provide the authorities with relevant evidence. It encompasses the use of both corrupt means (bribery) and coercive means, such as the use or threat of violence. In contrast, the second offence stated in paragraph 2 only addresses justice and law enforcement officials and it refers solely to the use of physical force, threats, or intimidation. The bribery element is not included in paragraph 2 because this behaviour is already covered by Article 15(1), since justice and law enforcement officials are considered to be public officials (cf. Article 2(a)).

11.3.5.2 Scope

The 'use of physical force, threats, or intimidation' can be understood in its broadest sense. Even the use of a legal instrument such as filing a lawsuit can create a threat or intimidation and has to be penalized if it is used to induce false testimony. Hence, the focus of Article 25(1) lies on the purpose of the act, not on the act itself. Comparably, paragraph 2 primarily tackles a mere intention. Consequently, the intended outcome—the false testimony or the interference—must not be achieved. Rather, the offence is completed simply by the use of a threat or intimidation as long as this has been done with the purpose of inducing false testimony, or interfering with the giving of testimony or the production of evidence in a proceeding.

For the purpose of ensuring substantial protection of proceedings relevant to corruption crimes, states parties must consider interpreting the term 'proceeding' in a broad sense covering all official governmental proceedings, including non-criminal proceedings such as administrative or civil activity, for example extradition proceedings, the recovery of assets, and compensation for damage. In order to protect proceedings comprehensively, it also makes sense to have a broad understanding of the term 'evidence'. For the same reason, it is preferable to interpret the phrase 'interfere with the exercise of official duties' in its widest sense, generally covering any interference whatsoever. The fundamental goals of the Convention are to enhance an impartial and law-abiding exercise of the duties of public officials. This, of course, is of particular importance in the most sensitive context of the judicial enforcement of corruption offences.

[66] UNCAC, Preamble; also see UN GA Res. 58/4 of 31 October 2003, para. 9; criminalizing obstruction of justice is an important tool in the fight against organised crime as a form of crime that is often linked to corruption. For this reason, the offence is also included in the UN's Covention Against Transnational Organized Crime, Art. 23.

11.4 Non-Mandatory Criminal Law Provisions

11.4.1 Trading in influence (Article 18)

11.4.1.1 Background

Article 18 introduces, albeit as a non-mandatory provision, a remedy for a major corruption evil: trading in influence. Generally speaking, trading in influence is the purchase of any influence that a public official or any other person claims to have with a view to obtaining an undue advantage over an administrative or public authority. It can be described as 'background corruption'. Many national criminal law codes do not treat trading in influence as an offence; rather, they try to tackle that sort of behaviour through statutes prohibiting participation in core corruption offences like bribery. The typical constellation for this offence is a trilateral relationship, in which A offers an undue advantage to B (a public official or other person), so that B will abuse his or her real or supposed influence on another person, C, with a view to obtaining from an administration or public authority of the state party an undue advantage for A or for another person. Disrupting these unfair 'client–patron networks', which regularly interlace high-ranking officials and politicians, is the aim of Article 18. This being said, the reason for criminalizing this behaviour is similar to that for establishing other corruption offences such as bribery: to guarantee transparent and impartial decision-making processes in order to provide for the necessary reliance of the public on proceedings as a foundation of societies. In fact, it could be argued that without remedies for trading in influence it is unlikely that a jurisdiction will be able to effectively combat high-level corruption.

11.4.1.2 Scope

Article 18 covers both forms of trading in influence: Article 18(a) requires 'active' trading in influence to be criminalized, while Article 18(b) covers 'passive' trading in influence. Article 18 adopts several terms from other articles, such as 'public official', 'promise, offering, giving', 'solicitation or acceptance', 'directly or indirectly', and 'undue advantage' (although this term is not defined here, either).

The Article's phrase 'in order that the public official or the person abuse his or her real or supposed influence' covers the essence of trading in influence. In the 'triangle' that we described in 11.4.1.1 above, a second person, B, whether public official or not, has to claim influence over an administration, or a public official in the administration, C. It is not necessary to prove that the person in fact possesses the claimed influence because Article 18 covers fraudulent claims of influence, too. Neither do the law enforcement agencies have to give evidence that the influence actually has been exerted as the phrase 'in order to' reveals that a mere proposal to abuse the influence is sufficient. The phrase, therefore, already covers the intent and does not require the desired result to be achieved.

The word 'abuse' introduces a normative element. Thereby, the Article reveals that 'not undue' forms of influence, such as political lobbying or orders within an organisational hierarchy, are generally not covered by the offence of trading in influence. States parties may regard it as an 'abuse' for a person to use their influence in a way that is legal per se, but with a view to an undue advantage.

'With a view to obtaining an undue advantage from an administration or public authority' also points towards an intention rather than to an outcome. Whether the undue advantage has in fact been obtained or not, is irrelevant; in this respect, Article 18 differs from Articles 15 and 16. Second, the phrase does not refer to the 'undue advantage' of the person claiming to have influence, but to the advantage that the instigator wants to obtain. In this regard, the offence parallels the behaviour of the public official described in the bribery offences.[67]

11.4.2 Abuse of functions (Article 19)

11.4.2.1 Background

In order to protect the stability of society by safeguarding its institutions, its values, and the rule of law, special attention has to be paid to public officials who have particular duties in relation to the general public. Accordingly, nations throughout the world have implemented legislation regulating the duties of their public officials. These efforts have been motivated and enhanced by international model codes such as the United Nations International Code of Conduct for Public Officials (see Article 8 UNCAC). These means help to enhance the ethical climate in the public sector and to inform the public about what to expect of public servants.

The abuse of functions is an offence that comprises public officials' most essential breaches of duty. The non-mandatory Article 19 complements the core corruption offences, such as bribery, with the overall objective of providing a comprehensive criminalization of corrupt behaviour.

11.4.2.2 Scope

Article 19 criminalizes an abuse by a public official in the discharge of his or her functions for the purpose of obtaining an undue advantage for themself or for another person or entity. Again, the Article uses several terms from Article 15.

Unlike Article 18, Article 19 specifies 'abuse of functions or position' as 'the performance of or failure to perform an act, in violation of laws'. This means that a mere breach of an employment contract, or of an informal code of ethics, which has not been enacted as law, falls outside the scope of Article 19. In this respect, Article 19 differs from 'breach of duties' in the private sector as described in Article 21. Various ways in which a public official might violate the laws exist: Article 19 covers cases in which the public official is not entitled to act or refrain from acting (at all or in a specific manner) as well as cases in which an illegal outcome is produced.

[67] 'Undue advantage' has already been described in this context; see section 11.3.1.2 of this chapter.

States parties may consider clarifying that the abuse of functions and the violation of laws have to be committed in the discharge of the public official's functions. Thus, a violation of a law that does not have any connection with the position or the function of the public official falls outside of the scope of Article 19.

The phrase 'for the purpose of obtaining an undue advantage' indicates that Article 19 applies to cases in which the public official performs, or fails to perform, in violation of the laws *before* obtaining an undue advantage. This means that the phrase covers an intention rather than an outcome. Moreover, it reveals that Article 19 is intended to close a legal loophole in Article 15, since the latter does not prescribe the penalizing of situations in which an undue advantage is obtained *after* the official's act unless the undue advantage has been offered, promised, or solicited. Comprehensive legislation, however, requires the prohibition of misconduct by a public official that occurs for the purpose of obtaining an undue advantage. Proactive behaviour of public officials for the purpose of obtaining advantages has the potential to endanger the impartiality of proceedings and undermine public trust in the lawful exercise of duties.

11.4.3 Article 21: bribery in the private sector

11.4.3.1 Background

Article 21 is based on the insight that corruption in the private sector is not simply a matter of interpersonal relationships and therefore suitable for regulation by civil or commercial law, but endangers society as a whole: it undermines fair competition and hence is an obstacle to the economic development of a society. Corruption cannot be limited to particular sectors of a given society. In fact, flourishing corruption within the private sector will pervert the public sector as well. In addition, since business and competition are to be understood as processes of coordinating private, economic, and financial interests, corruption in the private sector harms the reliance of market participants on the functioning of these processes. Finally, corruption in the private sector is a threat to a law-abiding society since it undermines common values and standards of 'due' behaviour. In short, since corruption in the public and private sectors evinces similar elements and causes comparable results, criminalization of bribery in the private sector is an essential tool in the fight against corruption. This makes Article 21 one of the most important non-mandatory criminal provisions of the UNCAC.

11.4.3.2 Scope

The Article mirrors both active and passive bribery as described in Article 15 with regard to the public sector. Thus, the conditions for penalty are largely identical to those in Article 15. Attention has to be paid to two differences: Article 21 clarifies that the criminalized conduct has to take place 'in the course of economic, financial or commercial activities', and moreover, that the person has to act or refrain from acting 'in breach of his or her duties'.

The key issue in making bribery in the private sector a crime is the demarcation of delicate advantages in a business context and harmless presents in a personal

context. In this regard it is necessary for the behaviour to be embedded 'in the course of economic, financial, or commercial activities', even if a personal component existed. Thus, only the sphere of purely personal and private relations is excluded from criminalization.

The Article addresses any 'person who directs or works, in any capacity, for a private sector entity'. Hence it implies a functional, not a formalistic, status-oriented understanding: it indicates that employment at or another form of contract with the private sector entity is not essential. Even external personnel, such as lawyers and consultants, can be subject to any legislation based on Article 21. The 'private sector entity' need not take any specific legal form. Thus, a one-person business can be regarded as an 'entity'. The term 'private' is the most important word in this phrase as it excludes entities under public law.

The act of the decision maker must breach their duties. These duties might arise from a variety of legal sources: first, statutory law sets a framework for private business and imposes general obligations on the actors. Second, these general statutory obligations are accompanied by specific duties and particular business goals constituted by contracts, instructions, or internal regulatory frameworks such as private codes of ethics. Finally, where no written norms exist, law enforcement bodies and courts have to evaluate whether the conduct complies with good faith as practised within the entity.

11.5 Review Mechanism and Implementation

Implementation always marks a Convention's actual trial by fire. This also holds true for the UNCAC. Thus, it is of value to have a look at the way the Convention aims to assist its own implementation as well as the actual results achieved. Chapter VI deals with 'Technical assistance and information exchange'. According to its Article 60, states parties shall initiate, develop, or improve specific training programmes for personnel responsible for preventing and combating corruption. Article 62 places the states parties under the obligation to collect, exchange, and analyse information on corruption within their territory. In particular, they must consider monitoring their policies and actual measures to combat corruption and making assessments of the effectiveness and efficiency of these (paragraph 3).

Article 63 in Chapter VII 'Mechanisms for implementation' goes beyond this self-assessment by changing the perspective. Paragraph 1 established the UNCAC's Conference of the States Parties especially for the purpose of promoting and reviewing implementation of the Convention. Paragraph 7 puts this in concrete terms by allowing the Conference to establish a mechanism or body to assist in the effective implementation of the UNCAC. The regulation in Article 63 was peculiar because earlier experiences (with the CoE, the EU, OECD) showed that a strict monitoring procedure would be crucial for ratification and enforcement.[68] Only in 2009 did the

[68] Pieth, 'Der Beitrag der UN Konvention', cited in note 24 above, p. 18.

Conference finally instal a review mechanism.[69] By then, some regimes had already misused the Convention rhetorically in favour of their corrupt elites.[70] Studies point to the 'weaknesses of the UNCAC' and reveal that the political will to fully implement the UNCAC is still lacking in those countries with a long history of political and grand corruption.[71] These countries ratified the UNCAC and had a sufficient legal and institutional framework—but they failed to enforce the Convention's rules properly.[72] The corrupt regimes are unlikely to turn in their leaders.[73] Also, some internal reviews made recommendations not specifically tailored to the political realities but remained vague regarding difficult topics.[74] All these circumstances give cause to fear that the UNCAC runs the risk of remaining in a vacuum.

These observations show again that legal norms have to grow alongside social moral standards,[75] and must keep in touch with social realities.[76] The decision to establish the UNCAC was, indeed, a major step in the fight against corruption. So far, it remains the peak of global anti-corruption development. It is now necessary to climb the next, and even higher, mountain: the thorough, successful implementation of these laws. In this context, a great deal of work remains to be done.

[69] Resolution 3/1, available at: https://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V1051985e.pdf, accessed 18 September 2015, printed version: UNODC (ed.), 'Mechanism for the review of implementation of the United Nations Convention against Corruption—basic documents', Vienna, UNODC, 2011, p. iiiff.; on the development of the review mechanism, see 'Report of the Secretary, Work of the Open-ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption', UN Doc. CAC/COSP/2009/2, available at: https://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0986556e.pdf, accessed 18 September 2015.

[70] Just as Pieth had feared in 2004, 'Der Beitrag der UN Konvention', cited in note 24 above, p. 18.

[71] Hannes Hechler, Gretta Zinkernagel, Lucy Koechlin, and Dominic Morris, *Can UNCAC address grand corruption?—A political analysis of the UN Convention against Corruption and its implementation in three countries*, U4-Report, Bergen, Norway, U4 Anti-Corruption Resource Centre, 2011, p. 2, available at: http://www.u4.no/publications/can-uncac-address-grand-corruption, accessed 18 September 2015/; Tim Daniel and James Maton, 'Is the UNCAC an effective deterrent to grand corruption?', in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law—Comparative Perspectives*, 2013, p. 293, p. 305.

[72] Hechler *et al.*, ibid, p. 20.

[73] Daniel and Maton, 'Is the UNCAC effective?', cited in note 71 above, pp. 316ff and 322.

[74] Hechler *et al.*, *Can UNCAC address grand corruption?*, cited in note 71 above, p. 20: 'for example, while the Indonesia and Bangladesh gap analyses acknowledge the problem of enforcement caused by weak judiciaries, they make vague recommendations or none at all about how to remedy this'.

[75] Cornelia Rink, '*Leges sine moribus vanae*', (2016) 17 *German Law Journal* 19.

[76] Kubiciel, 'Core criminal law provisions in UNCAC', cited in note 6 above, p. 155.