International Efforts to Combat Corruption

Prof. Dr. Mark Pieth

Law Faculty, Basel University,Maiengasse 51, CH-4056 Basel, Switzerland: Email: pieth@ubaclu.unibas.ch

Contents

I. Introduction 3
1. The perspective of the industrialised world 3
2. The perspective of the developing world 5
II. Overview over new instruments 6
1. OECD 6
2. European Union 8
3. Council of Europe 9
4. Other initiatives 11
a. OAS 11
b. UN 12
III. Specific Issues relating to the criminalisation of transnational bribery 12
1. Methodology 12
2. Definition of public official 13
3. Definition of the offence 14
4. Responsibility of legal persons and sanctions against companies 14
5. Jurisdiction 15
6. Enforcement 16
7. Money Laundering and accounting offences 16
IV. Conclusion 17

I. Introduction*

For centuries corruption has been accepted as a seemingly inevitable fact of life. Even in recent times people living and working under conditions of endemic corruption have tended to adopt a fatalistic view. At the same time there has never been any serious doubt that corruption is one of the major impediments to development, that it endangers the rule of law, human rights and democracy as well as economic prospects of a society. Therefore the dramatic change of attitude world-wide over the last ten and especially five years needs an explanation. In the context of this paper I can, of course, merely sketch a few ideas.

In my view, a combination of very different factors have made it possible to move the issue to the top of the international agenda. One has to distinguish between essential economic and political conditions and catalysts allowing a world-wide movement against corruption to develop in just a few years.

1. The perspective of the industrialised world

In the North the US had in the aftermath of the Watergate and the Lockheed scandals given itself a strict legislation to combat „illicit payments in international business transactions".[1] At that time neither its major trading partners in the West, nor the countries of the East and of the South were ready to adopt a similar approach; efforts to draft a corresponding convention in the UN failed in 1979. The other industrialised states questioned the rational of the unilateral move by the US. It was either perceived as an act of expansive moralism

* The author would like to thank his colleague *Mrs. Claire Daams*, researcher at the Law Faculty of Basle University, for her collaboration on this paper.

or they suspected a hidden hegemonial trade-agenda. US business in turn demanded internationalisation of the FCPA since it saw itself in a comparative disadvantage on world markets.

The end of the Cold War offered the chance for change from the perspective of the North; with the opening of the East, new markets became accessible. With the new technological revolution and the rapidly growing globalisation a political swing around was possible: now corrupt officials abroad and the payment of bribes by competitors where considered impediments to market access. At the same time it became evident to the industrialised nations that they were not making best use of their development co-operation in some highly corrupt environments. Finally, the eruption of domestic corruption scandals in virtually all industrialised states helped to sway the public opinion in favour of combating corruption; The new awareness was additionally supported by a change of paradigm in criminal policy; since the late 1980‘s the focus was placed increasingly on economic and organised crime. Grand corruption is a variation of macrocrime, sometimes addressed as „fraud“. With other forms of economic crime it has in common that it leads to massive losses to taxpayers. The rapprochement of corruption to economic and organised crime allowed to make use of newly developed methods of international law in creating common standards: The Financial Action Task Force (FATF)[2] had only just demonstrated that it was possible to develop a standard by means of „soft law“ and implement it across the world in less then ten years.

Talking about catalysts: In the industrialised world a combination of harsh political pressure by the US and a gradual realisation by major trading partners that collective action against corruption was in their common- and in fact

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1 Foreign Corrupt Practices Act 1977, as amended in 1988.

2 Financial Action Task Force (FATF) on Money Laundering, „The 40 recommendations of the Finan

in a world-wide- interest, made it possible to adopt two major instruments against corruption in the OECD context.
The process took many years to gather momentum[3], but since 1994 events have followed in a rapid sequence; the 1997 Recommendation contains the general programme of preventive and repressive measures, the 1997 Convention focuses on criminalisation of active bribery of foreign public officials. This process has had direct catalystic effects on regional initiatives with a different mandate and function.

In 1994 the Council of Europe initiated very thorough analytical legal work on a series of instruments detailed in the "Programme of Action" of 1996 and implemented in its „Guiding Principles" of 1997 and the "Criminal Law" and "Civil Law" conventions of 1998 respectively 1999.[4]

Equally relevant is the work done in the European Union, even if the context is again quite different. Especially the First Protocol of 1996, the Second Protocol of 1997 and the Convention of 1997[5] need to be mentioned.

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cial Action Task Force on Money Laundering, 1990, revised June 28, 1996.

3 Starting from an initiative in 1989 cf. the Recommendation of the Council on Bribery in International Business Transactions, adopted on May 27, 1994 (C(94) 75 FINAL), the Revised Recommendation, adopted by the OECD Council on May 23, 1997 and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Confer ence on November 21, 1997.

4 The Programme of Action against Corruption (PAC, 1996) was prepared by the Multidisciplinary Group on Corruption (GMC) in 1995 and adopted by the Committee of Ministers at the end of 1996. Resolution (97) 24 on the „20 Guiding principles for the fight against Corruption" were adopted by the Committee of Ministers at its 101st session at Ministerial level on November 6, 1997. The Criminal Law Convention on Corruption (CM (98) 181) was adopted by the Committee of Ministers in its 103rd session on November 5, 1998. This convention is open for signature from January 27, 1999. The Civil Law Convention on Corruption was adopted by the Committee of Ministers on September 9, 1999. This convention will be open for signature from November 4, 1999.

5 The First Protocol to the Treaty on the Protection of Financial Interests of the Communities, was adopted by the Council on September 27, 1996 (96/C 313/01). The Second Protocol was adopted by the Council on June 19, 1997 and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, was adopted by the Council on May 26, 1997 (97/C 95/01).

2. The perspective of the developing world

For the public discourse in the South, corruption was certainly not a new topic. However, the readiness of industrialised nations to take action on the „supply side“ encouraged new approaches in the South. NGO's and members of the civil society in general became even more outspoken, sometimes at high risk to their personal security. It was therefore crucial that a globally active NGO, like Transparency International (TI) was created just as the world-wide change was about to take off: it supported not only activities by critical opposition, but also encouraged governments, international organisations like UNDP and especially the World Bank, the IMF as well as regional Development Banks to use their potential in an unambiguous anti-corruption policy.

The new policy of the Multilateral Money Lenders will have crucial impact on the situation in countries in development. The real challenge, however, is to bring action on the so called „supply“ and the „demand“ side of corruption together and again here both the UN and regional organisations covering areas in the North and the South (e.g. the Organisation of American States (OAS)) have an eminent role to play.

This paper concentrates on the contribution of international organisations in developing common legal standards. More specifically the new criminal law conventions of the OECD, CoE, the EU and the OAS will be discussed in greater detail, first by describing the particular approach of each organisation (II) and second by raising some key issues of criminal law in a horizontal analysis (III).

II. Overview over new Instruments

Starting my overview with the earliest of the three initiatives, with the OECD-instruments, I will concentrate on the fundamentals in this first round.

1. OECD

a. The OECD (as the economic organisation of developed states representing over 70% of exports and 90 % of direct foreign investments world-wide) has a **narrow remit** and only limited ambitions in this area: The approach is basically **supply-side oriented** – intending to reduce the influx of corrupt payments into relevant markets by sanctioning the **active** bribers and their accomplices as well as by providing for a preventive framework. This approach depends upon other action being taken from the „demand-side“ and it is in a sense unilateral, **even if collectively unilateral**: The concepts apply also to the bribery of officials of **non-participant** countries. On the other hand the OECD takes care not to intrude into other countries sovereignty, so the behaviour of foreign officials itself is not a topic for the OECD.

The OECD concept is clearly influenced by the fair trade-approach taken by the US since 1977. It does, however, not merely replicate the FCPA – this has become evident during the US-ratification procedure of the OECD criminalisation Convention which did lead to significant adaptations of the FCPA: More essential, however, is the fact that the OECD-instruments create an international process, with follow-up mechanisms and outreach capability, a dimension reaching far beyond the traditional one nation-unilateralism.

Consistent with the principle rationale of creating a level playing field of commerce, it, attempts a homogenous, **autonomous** definition of the public official. Having said this, it becomes evident that the OECD so far is limiting

its scope to active corruption of foreign **public** officials. Private to private corruption is under examination for a further stage of its work, but it is perceived as quite a different problem. Finally, the concepts concern themselves only with „**grand**" or at least straightforward corruption (in the sense of furthering illegal behaviour), excluding mere facilitation or grease payments. The OECD limits itself to **economically** relevant corruption.

b. Institutionally the OECD-Initiative is based on two main documents: The „**Revised Recommendation of May 1997.**[6] On the one hand – the mother-document containing a list of agreed preventive and repressive measures, both criminal and non-criminal in nature. On the other hand the „**Convention of November 1997**"[7] picks up the **criminalisation** issue and puts it into a legally binding form.

The entire system depends on a strict political framework, a **timeschedule**, a systematic and serious **evaluation** both of implementation-legislation and practice as well as an **outreach** and networking procedure, integrating further States into the no-corruption pact.

Turning briefly to the approaches by the EU and the Council of Europe, in order to highlight the main differences, I will start with the efforts of the EU:

2. European Union

a. One has to consider, that the Community itself has no powers to directly enact criminal law. According to the Maastricht Treaty it is developing its co-ordinated legislation in „justice and home affairs" in a system of international treaties, which, however, have to be adopted and then ratified and

6 See *supra* note 3 on the Revised Recommendation.

implemented nationally (third pillar). The issue of corruption was first approached by the EU so to say through the „backdoor“ in the context of the Protection of the EU budget on the one hand and the fight against organised crime on the other hand.

b. The Treaty on the Protection of Financial Interests of the Community of 1995[8] is the basis for a **First Protocol of 1996**[9] focussing for the first time in Europe on criminalisation of transnational bribery. It is, however, limited to the bribery endangering the community‘s economic interests and to the geographical area of the Union.

c. This Protocol has in turn been used as a stepping stone in order to drop the requirement of endangering the community’s interests in the **1997 Convention on Bribery.**[10] These instruments are currently being ratified and implemented.

d. Meanwhile the Commission is developing supranational law against corruption in the context of the actual community law (First pillar). You will in its program find topics addressed already in the Foreign Corrupt Practices Act and in the OECD context, like the tax treatment of bribes and rules on accounting and auditing. Most significant, however, are new moves in the European Union to regulate **private to private corruption** in a commercial context with its **“Joint Action”** of December 22, 1998.[11] It defines commercial bribery, requires as a minimum “effective, proportionate and dissuasive criminal penalties”. It also deals with the liability of legal persons and asks for criminal or administrative sanctions. The rules of jurisdiction are in line with

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7 See *supra* note 3 on the convention.

8 Treaty of the European Union on the Protection of Financial Interests of the Communities of July 26, 1995 (95/C 316/03).

9 See *supra* note 5 on the First Protocol.

10 See *supra* note 5 on the EU convention.

11 Joint Action of December 22, 1998. L 358/2, 31-12-1998.

the other instruments developed. Most significantly it sets a deadline for implementation and introduces a monitoring procedure by the Council.

e. Finally, reverting to the protection of the EU-budget for a moment, initiatives to actually **unify criminal law,** including transnational and supranational bribery in the context of the EU are well under way with the draft of a „**corpus iuris**", which has met great interest in the European Parliament. It could eventually develop into a unified core-criminal code for the European Union; however, it is early for any reliable prediction.[12]

Summing up, interesting developments may be identified in the context of the European Union; they are, however, limited in geographic scope and may be seen as steps on the way to supranationality.

3. Council of Europe

The approach of the **Council of Europe** follows yet a different pattern: The current role of this organisation in Europe in the area of law is to act as a "think tank" for legal harmonisation, the protection of Human Rights and to foster the legal integration of Eastern Europe. Following up on an initiative by Ministers of Justice of 1994 Heads of Sate have adopted **twenty "Guiding Principles**"[13] at their Strasbourg Summit in October 1997. As part of the implementation of its programme the Council of Europe has also prepared a **criminalisation convention.**[14] Different from the criminalisation initiatives discussed so far, it uses a very **broad notion of corruption**, including active and passive domestic bribery of all sorts of officials, transnational bribes and the bribery of private persons in a commercial context as well as "trading in

12 Delmas-Marty, Vers un espace judiciaire européenne. Corpus Iuris, portant dispositions pénales pour la protection d'intérêts financiers de l'Union Européenne, Paris 1996; Delmas-Marty, The European Union and Penal Law, European Law Journal, March 1998, p. 87 Ss.

13 See *supra* note 4 on Resolution (97) 24.

influence". It links up with previous work of the Council of Europe on mutual legal assistance and extradition as well as more recent work on money laundering and confiscation of assets. Apart from this broad notion of corruption a striking difference to the OECD approach to transnational bribery is its reference back to the law of the victim country for definitions of officials and duty. Here the Council of Europe echoes the approach chosen in the quite different setting of the EU. Another feature of the Council of Europe's text is its far-reaching formulations combined with just a set of opt-out-clauses (reservations), even if last minute efforts have achieved a limitation of the number of reservations. Instead of adopting the focussed and collective unilateralism of OECD, the Council of Europe creates a **pattern for legal harmonisation** of rules addressing both domestic and transnational corruption, foremost in order to enable **more efficient mutual legal assistance** within its geographical reach. More recently the Council of Europe has adopted a Civil Law Convention on Corruption.[15]

It deals with such issues as the compensation of damage, liability, the validity of contracts and protection of "whistle blowers".

Furthermore, the Council of Europe has developed an elaborate follow-up mechanism under the name "GRECO".[16] It is construed as a separate agreement, open also to non-member states. It will conduct evaluations focussing on specific issues, involving all Members using teams of experts. GRECO is about to start its work in October 1999.

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14 See *supra* note 4 on the Criminal Law Convention.

15 See *supra* note 4 on the Civil Law Convention. This Convention will be open for signature from November 4, 1999.

16 Agreement Establishing the Group of States Against Corruption –GRECO-, Resolution (98)7.

4. Other Initiatives

Briefly I will mention two further essential international initiatives establishing minimal standards for its Member States:

a. OAS

The aims of the **OAS**-Convention come rather close to those of the Council of Europe, even if the method applied is somewhat different. The "**Inter-American Convention Against Corruption**" of 1996 also applies a broad concept of bribery, it goes beyond traditional approaches by including "illicit enrichment", a kind of criminally sanctioned reversal of the responsibility of explanation for sudden increases in the officials assets. The background of the OAS Treaty is somewhat different from the initiatives mentioned so far: This instrument is a compromise between Latin-American interests in mutual legal assistance and extradition and the North-American agenda in criminalising active transnational commercial bribery. So far it does not have a follow-up mechanism attached, but OAS is currently developing a more comprehensive action against corruption, including non-criminal measures.[17]

b. UN

Finally, within the broadest geographic scope, the initiatives of the **United Nations** need to be mentioned. The UN have resumed work[18] on corruption with two General Assembly-Resolutions in 1996.[19] They basically pick up the items of other instruments and welcome the efforts without, however, wanting to interfere with this work. These policy statements, however, serve as a basis

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17 Cf. Symposium on the strengthening of probity in the Hemisphere, November 4, 1998, Documentation and Annexes.

18 An earlier draft anti-corruption convention in the United Nations failed 1979.

19 General Assembly Resolution 51/59 and 51/191.

for further work in integrating the corruption-issue into programs against organised crime.[20] Currently ECOSOC is targeting the abuse of offshore resorts for purposes including the preparation and aftertreatment of bribery. The General Assembly has recently taken note of a study by the United Nations Office for Drug Control and Crime Prevention on financial havens.[21]

III. Specific Issues Relating to the criminalisation of Transnational Bribery

In a third section of this paper I will focus on some of the key issues of criminal law as addressed in the Conventions mentioned above:

1. Methodology

First I have to indicate that the wording of the criminalisation Convention of the OECD is not necessarily precise enough to meet the standards required for a self-executory international text. The aim has been from the outset – and this is highlighted in Commentary 2 of the OECD-Convention to establish „**functional equivalency**". The Convention does not attempt substantive unification, countries have the choice of means, the results have to be comparable. The respective texts of the Council of Europe and the EU are far more oriented towards actual harmonisation or even **unification** of criminal law amongst countries with similar legal systems and standards.

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20 Cf. Article 4ter of the Revised Draft UN Convention Against Transnational Organised Crime, GA, July 9, 1999. A/AC.254/4/Rev.4.

21 Financial Havens, Banking Secrecy and Money Laundering, UNDCP, Study prepared by Bloom ed. Al., Bloom, New York, 1998.

2. Definition of the Public Official

The differences may be less apparent in the definition of the offence, where a certain uniformity will be necessary, especially when defining the foreign public official. Whereas the Convention of the EU and the Council of Europe **refer back** to the "victim-country" for the definition of public official[22], it is in the logic of the OECD's unilateralism and its aim to create a level playing field of commerce to attempt an **autonomous** definition of public official, potentially using the same criteria on a world-wide basis. So even where different rules would apply locally not only persons holding a legislative, administrative or judicial office, whether appointed or elected, but also persons exercising a public function are included in this definition, no matter if state employees or privately contracted. Even if the "**functional official**" is a category known to many OECD-countries domestically, the OECD gives it its own meaning, explained in art. 1 section 4 and Commentary 12 to 19. On the other hand, where public ownership overreaches the public function, where for instance a car-manufacturing plant is state owned merely for historical or fiscal reasons, but is in full competition with private enterprise without preferential treatment by state, its officials would be considered private operators.[23] This is just one example how the OECD tries to bring light into the grey area between public and private. The instruments, however, still limit themselves to the corruption of public officials.

3. Definition of the Offence

A wider spectrum of differences in implementation is to be expected regarding the definition of the actual offence: Whether a country chooses to define the "quid pro quo" as an illegal bribe contract, as an exchange of a promise of

22 Cf. EU 1997 Article 1c and CoE 1998 Article 1a.

undue advantage against – first alternative – the envisaged breach of duty or – second alternative – simply for acting or refraining from acting in the performance of official duties is in the OECD-context left to the domestic legislator of Party States. The first option might have the advantage that it filters out all kinds of grease payments without further ado, there will be no need for an exclusionary rule on facilitation payments and similar, the second option is less demanding in terms of proof. The bottom line is signalled in OECD Commentary No. 3: To prevent lengthy arguments about domestic definitions of duty of officials the autonomous definition of the Convention states that the partial use of discretion is regarded universally as a breach of duty (e.g. auctions of contracts amongst valid bidders for private benefit). The CoE and EU texts are far more prescriptive in this respect.

4. Responsibility of Legal Persons and Sanctions Against Companies

A brief look at all Conventions shows that they contain the principle of **corporate liability**. However, as for instance OECD 1997, art. 2 and 3 and Commentary 20 indicate, the sanctions could also be **administrative** in nature, the minimum requirement, however, is a **monetary** sanction meeting the standard of „effective, proportionate and dissuasive“ penalty.

You will find a similar approach both in the Council of Europe and the EU instruments; For the protection of financial interests the EU has in 1997 enacted a **Second Protocol**[24] to the Convention of Protection of Financial Interests of 1995 also applicable to corruption endangering the EU-budget. This instrument introduces a vicarious responsibility and measures, however, evades direct reference to criminal responsibility or sanctions.[25]

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23 OECD 1997, Commentary No. 17.

24 See *supra* note 5.

25 EU protocol II 1997, articles 3 and 4.

The detailed texts on responsibility of legal persons in the Convention of the Council of Europe[26] explicitly allow for non-penal sanctions.

Reverting to the OECD-context: The concept of "functional equivalence" even allows to fulfil the further requirement of **confiscation** of both, **bribes** and **benefits,** by way of "monetary sanctions of comparable effect". This might for some jurisdictions be a way out of the technical difficulty of calculating the proceeds of bribery, since a penalty would rather be governed by culpability than by provenance of crime and would allow for a wide discretion in fixing the amount of penalty.

You will easily detect what formidable difficulties the OECD-Working Group is facing in its follow-up process when having to evaluate the equivalence of such diverging concepts as fine and confiscation; confiscatable are all values derived from crime, the fine in turn is dependant upon culpability. To a lesser extent also the Council of Europe - and the EU-bodies will be faced with such problems of applied comparison of law.

5. Jurisdiction

One of the main concerns has been to reduce the loopholes between country jurisdictions in transnational corruption. **Territoriality** is to be interpreted broadly and additionally the Conventions advocate the **nationality** principle. They all, however, allow to opt out of the nationality principle. The OECD as a minimum requires extradition of nationals as a -maybe imperfect- substitute.

Difficulties are to be expected where **foreign subsidiaries** through foreign operators engage in bribery. The parent company and its officials can be held responsible where they are in any way linked to the crime as accomplices[27],

[26] CoE 1998, articles 18 and 19.
[27] OECD 1997, article 1 section 2.

including through authorisation. Where they have been caught unawares, the host-state of the parent company may have jurisdiction on the basis of nationality or depending upon the case and specific legislation based on a special corporate liability for negligent lack of control[28]. But here national law diverges considerably.

6. Enforcement

Picking up a seemingly very technical point: The OECD-Convention respects the established domestic rules of prosecution (including traditional rules on prosecutorial discretion). It rules out, however, that decisions are 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.[29] If you are in doubt how relevant this point is – you will maybe want to consider the arms-trade for a moment, where frequently we are faced with government to government interaction where preferential treatment is likely.

7. Money Laundering and Accounting Offences

The Conventions primarily deal with criminalisation of the bribery of foreign public officials. However, they also contain ancillary provisions on money laundering and falsified accounts. Frequently the significance of these rules is underestimated[30].

Especially large scale and continuous corruption depends on long term money management. Slush funds have to be built up well beforehand. The payments have to be engineered in a way not to attract too much attention, both on the

28 Cf. EU Protocol II 1997 article 3 p. 2 CoE 1998 article 18 p. 2.

29 OECD 1997 article 5.

payment and the recipient side. The bribe and the newly forfeitable profits of transnational bribery will need to be hidden.

This issue has been acknowledged in all three fora, I am discussing here. The Council of Europe has enacted its Convention 141, the EU its Protocol II to the Convention on Protection of Financial Interests and the Convention of the OECD asks for criminalisation of corruption-money laundering and forged, falsified and incomplete bookkeeping. However, the OECD-text on money laundering is less than satisfactory since it refers to the national treatment of bribery and proceeds. Here loopholes in the implementation are to be expected, especially in south-east Asia. However, other fora have developed rules going beyond this text and they have been accepted virtually by the same countries as the OECD-Convention (cf. the Revised Recommendation of the FATF of 1996). The OECD Working Group on Bribery has the mandate to explore whether further steps need to be taken against money laundering and the misuse of offshore-financial resorts.

The most difficult problem relating to money laundering is in my view – just as in the parallel topic of confiscation – the issue of **laundering of proceeds**: Are gains generated through corruption-affected contracts proceeds of crime? Can they be object of money laundering? Some will argue that these gains are the results of legitimate business, even if obtained through illegal means. Others will hold that the bribe was not really causal for the awarding of the contract/for the gain. Yet others will want to deduct investments from the confiscated gains. And, the link between confiscation and money laundering is only really established where countries define money laundering as the obscuring of forfeitable funds.

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30 Cf. Paolo Bernasconi, Off-Shore Domizilgesellschaften als Instrument der Bestechung und der Geldwäscherei – Zehn Empfehlungen gegen den Missbrauch von Off-Shore Domizilgesellschaften, in: *Pieth/Eigen*: „Korruption im internationalen Geschaeftsverkehr“, Frankfurt/Basel, 1998.

IV. Conclusion

If in all fora discussed the anti-corruption-programme heavily relies on criminal law, the aim is not really to send as many managers to prison as possible: The aim is to **motivate** namely corporations **to a change of attitude** and to introduce sound internal rules and controls, applied down to the operational level.[31] Criminal law mainly has the function of clarifying what is forbidden. Some of the non-criminal sanctions might be far more effective, they, however, depend on a clear definition of the illegal. Overall the instruments discussed will change everyday practice substantially and have a strong influence not only on life in the industrialised states but world wide.

[31] Cf. John Brademas and Fritz Heimann, Tackling International Corruption, Foreign Affairs, September/October 1998 p. 22.