

# Corruption as an International Crime and Crime against Humanity

An Outline of Supplementary  
Criminal Justice Policies

Ilias Bantekas\*

## Abstract

*Transnational corruption has in recent years been elevated to an international offence but in practical terms it is not considered serious enough in order for heads of state or cabinet members to be prosecuted in foreign jurisdictions. There is evidence to suggest that, in certain cases, corruption may take the form of a crime against humanity. This possibility extends significantly the jurisdictional ambit of national courts and empowers the International Criminal Court to consider a case. Moreover, the restorative component of such criminal prosecutions should aim at restoring, through civil mechanisms, the funds illegally appropriated to their rightful recipients, the defrauded local populations, under the principle of self-determination.*

## 1. Introduction

Corruption in international law has a relatively short history. It exists in very diverse forms and predicate offences in all countries, but the criminalization of transnational corrupt practices is a recent phenomenon. For this lack of action, a number of reasons are attributable to the international level, the primary being the hypocrisy and greed of developed nations. Let us examine an example referring to a common scenario. From a strictly legal point of view, where bribery and other corrupt practices have taken place abroad, although perpetrated by the parent company's employees, no offence was ever

\* Professor of International Law and Head of Law Department, Brunel University. This article is based on a lecture presented at Oslo University on 30 September 2004.  
[ilias.bantekas@yahoo.co.uk]

committed in the parent company's home state. The company, or its subsidiary, would commit the corrupt act in another country, most typically a developing state, by bribing among others a public official of this host country. The (developing) host state would either permit such practices under its own law or declare that the illicit act never took place. In this case, even if the parent state or a third state wished to prosecute the company, it would have to resolve the following problems:

- (a) challenge the sovereignty of the host nation or interfere in its domestic affairs in cases where the host country dismissed claims that the illicit act had taken place and;
- (b) in the case of subsidiaries of a parent company incorporated in the prosecuting state, the prosecuting state would also have to establish a significant jurisdictional link, particularly where the subsidiary was an independent branch wholly incorporated in the host state.

So, for a long time it was a common secret that, if one wanted to conduct business in the developing world, one had to employ corrupt practices. So long as corruption enriched domestic industries and gave rise to employment, Western governments turned a blind eye. At some point, however, public opinion and civil society in the developed world began to have a strong impact on consumerism, particularly in relation to the environmental and social practices of multinational and other corporations; ultimately, corruption itself became a civic concern. This led to the realization that corruption in the developing world was not only draining its people of their valuable resources to the benefit of the few and thus kindling poverty and in many cases famine, but that corrupt behaviour also fuelled and continues to fuel civil wars in many parts of the world. Moreover, besides the humanitarian dimension of corruption, one should not forget its indirect commercial distortions. Companies employing corrupt practices abroad can thereafter indirectly violate the anti-competition laws existing in western markets through those companies' access to cheap raw materials to the exclusion of others. Thus, although most developing nations are not parties to international anti-trust treaties, corruption culminates in an unavoidable adverse effect on the level of competition in the developed world.

This article has a threefold focus, *all of which provide glimpses and not concrete analyses of the particular problems raised*. Firstly, it looks at the inter-state responses to transnational corruption since the adoption of the 1977 US Foreign Corrupt Practices Act with a view to determine the scope of corruption per se as an international offence. Secondly, we offer a glimpse into the potentiality of corruption as a crime against humanity, which encompasses the criminal liability not only of government members but also of multinational corporations. Finally, *we briefly* look at possible supplementary to criminal prosecution measures from a criminal justice policy point of view, although these are not strictly endowed with a penal nature.

## 2. The Criminalization of Bribery at the International Level

At the international level, the criminalization of corruptive practices has increased since the first cautious steps to curb transnational corruption. Throughout the years, international law has experienced a rising number of offences related to corruption and saw them being extended from public officials to private corporations. As we now stand, these offences are no more limited to business transactions, as they no more require a transnational dimension. The 1977 US Foreign Corrupt Practices Act (FCPA),<sup>1</sup> adopted during the Carter administration, was, in the opinion of this author, an honest attempt by the then US President to level the international commercial playing field and isolate pariah regimes. There was certainly a strong sense of democratic entitlement to this initiative, alongside a commercial dimension. The FCPA encompassed a particularly intrusive extraterritorial element. While not criminalizing foreign companies or their subsidiaries for corrupt practices abroad, it did and still nonetheless does place restrictions on trading in the USA, imposing sanctions on those already incorporated therein.<sup>2</sup> In this respect, the FCPA is the forerunner to the contemporary anti-corruption treaties.

More importantly, it is the driving force behind many developments. One easily discerns the disadvantages befalling US corporations as a result of the FCPA. Non-US companies can continue to bribe officials in developing countries in order to secure valuable contracts, while US companies playing by the rules are excluded from any business arrangements.<sup>3</sup> Thus, in order to make the FCPA a viable instrument both in terms of curbing corruption and to avoid suffocating the US industries, successive US governments

- 1 15 USC §§ 78dd-1, as amended in part by 1988 Omnibus Trade and Competition Act and 1998 International Anti-Bribery and Fair Competition Act. Following the 1988 Amendment, the FCPA now provides an explicit exception to the bribery prohibition for 'facilitating payments' for 'routine governmental action' and provides affirmative defences which can be used to defend against alleged violations of the FCPA, §§ 78dd-1(b) and (c). See L.H. Brown, 'The Extra-Territorial Reach of the US Government's Campaign Against International Bribery', 22 *Hastings International & Comparative Law Review* (1999) 407.
- 2 The FCPA provides for criminal penalties in the form of fines for the legal person, as well as fines and imprisonment for officers, directors and shareholders, employees and agents. Moreover, the Securities and Exchange Commission (SEC) may bring a civil action against any of the above, §§ 78dd-2(g), 78dd-3(e) and 78ff(c). Finally, the Federal Office for Management and Budget has adopted Guidelines, approved by the US President, which bars firms from doing business with the federal government.
- 3 US Department of Trade, Sixth Annual Report under Section 6 of the 1998 International Anti-Bribery and Fair Competition Act (July 2004), at 36–38, available at: <http://www.tcc.mac.doc.gov/pdf/2004bribery.pdf> (visited 11 May 2005), which states that since 1977 the Department of Justice has brought 39 criminal prosecutions, 7 civil enforcement actions and 19 foreign bribery criminal cases. See also, A.T. Martin, 'International Arbitration and Corruption: An Evolving Standard', 1 *Transnational Dispute Management* (2004), available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm> (visited 11 May 2005).

pushed hard at the international level and particularly through the Organisation for Economic Cooperation and Development (OECD) to secure agreement between developed states that it would be a criminal offence for their companies and their subsidiaries abroad to employ corrupt practices anywhere in the world.

Undoubtedly, developments did not occur overnight, and in light of the trading battles between the US and the European Communities (EC), a then-emerging trading giant, the fact that something significant started to take place in the early 1990s was an important step forward. In 1994, the OECD adopted a significant non-binding Recommendation on Bribery in International Business Transactions,<sup>4</sup> followed thereafter by another equally important non-binding instrument, its 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.<sup>5</sup> Astonishingly, the accounting practices of most companies involved, and in many cases still do, the inclusion of the amount of bribe paid as a legitimate business expense, thus rendering it susceptible to tax relief. If this practice is viewed as being endemic at the time the 1996 Recommendation was adopted, it is then not surprising that a year later, in 1997 the OECD adopted the first ever global treaty on corruption, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>6</sup> Although the 1997 Convention constitutes a significant breakthrough, it is limited in a number of respects. Firstly, it is limited to public officials and thus excludes private corporations. Secondly, it is similarly limited to business transactions,<sup>7</sup> and thirdly, it criminalizes only active bribery, that is, the promise or the giving of the bribe — as opposed to passive bribery which involves its receipt.<sup>8</sup> This means, unfortunately, that the criminal liability of corrupt public officials rests with their country of nationality and not international law, as does their liability in tort. It should be noted here that the 1997 Convention as well as all the succeeding anti-corruption treaties do not encompass inter-state bribery, that is, where both the active and passive corruption are committed by public officials of different states.<sup>9</sup> Member states to the 1997 OECD Convention are obliged to criminalize only one act, that of bribery.

4 OECD Doc. C(94)75/FINAL (27 May 1994), 33 *ILM* (1994), 1389. This Recommendation called on member states to deter bribery through national legislation, particularly through abolition of tax laws that favour or tolerate it and urged facilitation of cooperation.

5 OECD Doc. C(96)27/FINAL (17 April 1996), 35 *ILM* (1996), 1311; see O. Dietrich, 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', 3 *Austrian Review of International & European Law* (1998) 159.

6 37 *ILM* (1998), 1. The Convention entered into force in 1999.

7 Art. 1, OECD Convention.

8 Commentary to the OECD Convention, OECD Doc. DAF/IME/BR(97) 20 (18 March 1999), at 12.

9 Such cases could very well fall within the rubric of state responsibility or domestic criminal law — in the case of the latter, however, one would have to take cognizance of the applicable immunities. The treaties analysed in this article are inapplicable where both the briber and the recipient are public officials.

Its particular characteristics involve the illicit receipt of payment by a foreign public official with his or her intent to refrain from exercising an official duty by providing an undue advantage to a third party, provided that the whole affair encompasses a transnational element, i.e. that it is not limited to one country.<sup>10</sup> This definition does not include the so-called 'facilitation payments', which is payment to expedite a contract that is already in the pipeline, since they do not generally fall within the purview of bribery or 'other improper advantage'.<sup>11</sup>

Significantly, the offence described in the 1997 OECD Convention is an international offence, subject to regular extradition procedures. States are free to employ their regular extraterritorial jurisdictional ambit in prosecuting offenders (all forms of territorial and nationality jurisdiction),<sup>12</sup> but where conflicts do arise they must cooperate among themselves in distinguishing the most appropriate criminal forum.<sup>13</sup> Since the offence, as described above, is committed by individuals on behalf of corporate entities, the Convention obliges member states to provide sanctions against legal persons irrespective of how these may be defined under domestic law (e.g. criminal, administrative or civil), as long as the penalties involved are equivalent to the offences committed.<sup>14</sup> From an international law point of view it is important to comprehend that the recognition by the 1997 Convention of bribery as a transnational offence means that the offender incurs criminal responsibility not only under national law but also under international law. The practical significance of this observation is that the corrupt act is a criminal offence in more than one jurisdiction and even if an offender is not prosecuted in one country, his or her criminal liability remains alive in others.

Following the precedent of the OECD, the European Union (EU) adopted, in 1997, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States.<sup>15</sup> This builds upon the EU's 1996 Protocol I<sup>16</sup> to the 1995 Convention on the Protection of its Financial Interests,<sup>17</sup> but it is different in two respects. Firstly, it criminalizes relevant corrupt practices, whereas its predecessor did not. Secondly, the element of harm caused to the EU's financial interests is no longer a criterion for the application of the Convention; rather, the objective commission of the act itself is merely sufficient. However, it should be noted that the Convention

10 Art. 1, OECD Convention.

11 Commentary, *supra* note 8, p. 13.

12 Art. 4(1)(2), OECD Convention.

13 Art. 4(3), *ibid.*

14 Arts 2 and 3(2), OECD Convention.

15 OJ C 195 (25 June 1997).

16 OJ C 313 (23 October 1996). Protocol I deals with passive and active corruption, consisting in bribery and other similar conduct, defined in the same terms as the other international instruments examined in this section.

17 OJ C 316 (27 November 1995).

is quite narrow, encompassing only EU member states and a limited number of officials from member states. It is noteworthy that, following the footsteps of its 1995 predecessor, it calls for the criminal responsibility for heads of businesses.<sup>18</sup>

In 2000, the culmination of a long and arduous struggle, a convention with a truly global perspective made its appearance in Sicily, under the aegis of the United Nations (UN). The Transnational Organised Crime Convention (CATOC)<sup>19</sup> and its three Protocols oblige member states from across the world to criminalize four particular offences connected to organized criminal activity, one of these being corruption (both active and passive).<sup>20</sup> The Convention applies where:

- (a) an organized criminal group, as defined by CATOC, is involved;
- (b) a transnational element exists and
- (c) a corrupt act takes place under such circumstances.<sup>21</sup>

Criminal liability may be sought against physical as well as legal persons.<sup>22</sup> Significantly, CATOC is not limited to business transactions, but any transaction, thus providing the member states with a wide measure of extraterritorial jurisdiction subject, of course, to the existence of a link with the offence or offender or failing that to the *aut dedere aut judicare* rule.

In 1999, the Council of Europe, an organisation that had long been concerned with the issue of corruption,<sup>23</sup> adopted the Criminal Law Convention against Corruption.<sup>24</sup> Like its predecessors, it criminalizes active and passive bribery of foreign public officials,<sup>25</sup> but makes a marked contribution and innovation by criminalizing corruption in the private sector.<sup>26</sup> Unlike the 1997 OECD Convention and CATOC, this instrument encompasses also corruption offences taking place solely on that country's territory, thus not requiring a transnational element.<sup>27</sup> No doubt, therefore, the 1999 Council of Europe Convention was intended to strengthen and reinforce the criminal legislation of its member states. The innovative concept,

18 Art. 3; see also, EU Joint Action of 22 December 1998 on Corruption in the Private Sector, criminalizing corruption in the course of business activities both in the private or public sector because it distorts free competition.

19 40 *ILM* (2001), 334.

20 Art. 8, CATOC.

21 Art. 3(1), *ibid.*

22 Art. 10, *ibid.*

23 19th Conference of European Ministers of Justice, Res. 1 on Civil, Administrative and Criminal Law Aspects of Corruption (14 June 1994); Program of Action against Corruption, Doc. GMC(196) 95 (21 Nov. 1996); Council of Ministers Res. 24 (1997) on the Twenty Guiding Principles for the Fight against Corruption.

24 ETS No. 173.

25 Arts 2 and 3.

26 Arts 7 and 8, *ibid.*

27 Art. 17(1)(a), *ibid.*

at least for international standards, of criminalizing corruption in the private sector includes the following offences:

- (a) trading in influence;
- (b) money laundering of proceeds from corruption offences and
- (c) concealment of corrupt practices through accounting and book-keeping offences.<sup>28</sup>

The Convention, moreover, establishes the liability of legal persons and demands that bank secrecy not be an obstacle to the investigation of corrupt practices.<sup>29</sup> It provides for both territorial and nationality jurisdiction, both of which, however, may be limited by lodging a Declaration to the Council of Europe. Other forms of jurisdiction are not excluded.<sup>30</sup> More significantly, however, the Council of Europe has set up the Group of States against Corruption (GRECO) programme,<sup>31</sup> which was conceived as a flexible and efficient follow-up mechanism, called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Program of Action against Corruption.<sup>32</sup> Full membership to the GRECO is reserved to those who participate fully in the mutual evaluation process and accept to be evaluated and is not reserved to Council of Europe member states.<sup>33</sup>

The most ambitious binding international legal instrument is the recently adopted 2003 UN Convention against Corruption. Although the UN had long been involved in dealing with the issue of corruption<sup>34</sup> and set up, among others, its Global Program against Corruption, there was for a long time not enough impetus in reaching agreement on a multilateral and truly global instrument. Certainly, the adoption of local anti-corruption treaties, as well as the OECD Convention, paved the way for the 2003 UN Convention. The stated primary purpose of the UN Convention is to prevent corruption from taking place and to facilitate cooperation among states. In this respect, it obliges member states to adopt anti-corruption legislation, as well as investigative and police enforcement measures, including particular legislation requiring high standards of book-keeping of public bodies, adoption of a code of conduct for public officials, scrutiny of public procurement and setting up of

28 Arts 12–15, *ibid.*

29 Art. 18, *ibid.*

30 Art. 17, *ibid.*

31 1999 Agreement Establishing the Group of States Against Corruption (GRECO), Res. 95(5) (1 May 1999).

32 Arts 1 and 2, *ibid.*

33 Art. 4(2), *ibid.* Members include the USA, Mexico and Belarus.

34 See GA Res. 3514 (XXX) (15 December 1975); UN Declaration against Corruption and Bribery in International Commercial Transactions, GA Res. 51/91 (16 December 1996); UN International Code of Conduct for Public Officials, GA Res. 51/59 Annex (12 December 1996); UN Manual on Anti-Corruption Policy (1992); Plan of Action for the Implementation of the Vienna Declaration on Crime and Justice (§ 16 of the Vienna Declaration).

anti-corruption units. All these requirements form part and parcel of earlier UN soft law, clad as recommendations to UN member states. Besides its preventative dimension, the 2003 UN Convention obliges states to criminalize corruption in the public sector. The list of offences is wider than all previous treaties and includes the following:

- (a) bribery of national public officials;<sup>35</sup>
- (b) bribery of foreign public officials and officials of international organisations;<sup>36</sup>
- (c) embezzlement and misappropriation by a public official;<sup>37</sup>
- (d) trading in influence, whether true or false;<sup>38</sup>
- (e) abuse of functions;<sup>39</sup>
- (f) illicit enrichment<sup>40</sup> and
- (g) concealment and obstruction of justice.<sup>41</sup>

Unlike the OECD Convention, the UN Convention criminalizes both active and passive corruption.<sup>42</sup> Following the pattern encountered in earlier treaties, the UN Convention criminalizes particular acts of corruption in the private sector,<sup>43</sup> namely bribery, embezzlement and concealment and establishes the liability of legal persons.<sup>44</sup> Furthermore, it provides for the lifting of bank secrecy in relevant cases<sup>45</sup> and establishes a rather extensive jurisdictional basis, and in addition to previous treaties it specifically includes passive personality jurisdiction.<sup>46</sup> Finally, brief mention should be made to two other regional instruments, the 1997 Inter-American Convention against Corruption and the 2003 African Union (AU) Convention on Preventing and Combating Corruption. They criminalize both active and passive corruption and encompass a strong cooperation and harmonization dimension.

From a criminal policy perspective, prosecutors, judges and academic commentators in the West are accustomed to exorcizing international crimes that involve the spilling of blood. To these, post-Pinochet jurisprudence instructs us that immunity may not readily be available. But what of silent crimes against humanity in the form of corrupt regimes that allow their people to starve and strip future generations of their national mineral wealth? This concept will *be examined in brief* in the following section. The purpose of

35 Art. 15, 2003 UN Convention.

36 Art. 16, *ibid.*

37 Art. 17, *ibid.*

38 Art. 18, *ibid.*

39 Art. 19, *ibid.*

40 Art. 20, *ibid.*

41 Arts 24 and 25, *ibid.*, respectively. These two offences arise after the act of corruption has taken place.

42 Arts 15(2), 16(2), 17, 18(2), 19, *ibid.*

43 Arts 21 and 22, *ibid.*

44 Art. 26, *ibid.*

45 Art. 40, *ibid.*

46 Art. 42, *ibid.*



the next section is not to offer an exhaustive analysis, but rather to give rise to an academic debate by sketching out the parameters of corruption as a possible crime against humanity.

### 3. Corrupt Practices as a Crime against Humanity

The generic definition of crimes against humanity under customary international law suggests an attack against any civilian population, where the attack is widespread or part of a systematic policy.<sup>47</sup> The recent practice of states and international criminal tribunals evinces that no nexus is required between crimes against humanity and armed conflicts.<sup>48</sup> Therefore, such crimes may be committed in the legal sense during relative peacetime. Moreover, such practice has augmented the range of acts that qualify as attacks, to include for our purposes deportation and forcible transfer of populations as well as extermination. The latter is elaborated in Article 7(2)(b) of the ICC Statute to encompass the intentional deprivation of access to food and medicine that is calculated to bring about the destruction of part of a population. The press and juristic opinion has, to a very large degree, discerned crimes against humanity through the prism of armed conflicts and thus as primarily an oppression by one group against another, whether for ethnic, racial, religious or other reasons. This is amplified by the fact that despite the non-requirement of armed conflict in the definition of crimes against humanity, all existing definitions of this international crime stress that the *actus reus* is consummated where the attack is directed against any 'civilian population'. Such 'civilian population' phraseology possesses an extremely limited, if at all, value during peacetime, since the entire population is civilian.

Let us suppose a corruption scenario in a developing country, as a result of which the corrupted government forcibly displaced a local community without measures for their subsequent welfare in order to bestow land and mining rights to a foreign investor. In the process, many of those unwilling to leave were murdered by security forces, while the underlying contract between the investor and the government rendered access to food and medicine for the civilian population for the next 10 years almost impossible. One could counter that while the *actus reus* of crimes against humanity may be substantiated, direct intent to eventually destroy part of a population is missing. Article 30(2)(b) ICC Statute, however, states that a person has intent 'in relation to a consequence, [where] that person means to cause that consequence or is aware that it will occur in the ordinary course of events'. Such *dolus eventualis* suffices to hold the members of government responsible for crimes against humanity perpetrated against their own people in peacetime by placing them

47 Art. 7(1) ICCSt.; Art. 5 ICTYSt.; Art. 3 ICTRSt.

48 Interlocutory Appeals Decision on Jurisdiction, *Tadić* (IT-94-1), 2 October 1995, §§ 140–141.

in conditions of life, which in the ordinary course of events would deprive them of access to sufficient food and medical care.<sup>49</sup> The characterization of such acts as crimes against humanity has the following advantages over their criminal classification as corrupt in anti-bribery treaties:

- (a) it also encompasses situations where the deprivation of food and medical care has not been caused by a corrupt transaction with a private party, particularly where the government is misappropriating foreign aid and the country's resources for the purposes of illicit enrichment;
- (b) crimes against humanity are subject to universal jurisdiction and
- (c) criminal sanctions for crimes against humanity are more severe, not to mention that it better depicts the heinous nature of the crime.

Where corrupt practices in the sense described substantiate a crime against humanity, criminal liability should be extended to both the active and passive perpetrators. In the case of legal persons, of all the international criminal treaties that oblige member states to impose criminal liability, none actually renders the imposition of criminal liability in the domestic legal order imperative and the concept, moreover, is to be decided and elaborated on the basis of domestic criminal law.<sup>50</sup> When we are trying to ascertain the criminal liability of legal persons in international law for crimes against humanity we should not limit our focus to the relevant jurisprudence pertaining only to these crimes. Indeed, the liability of legal persons, as a particular form of criminal liability in international law, is not crime-dependent. Our sources of this type of liability are derived from treaty law and general principles of criminal law, which has found its way in the jurisprudence of international criminal tribunals and is twofold:

- (a) personal criminal liability of the chairman and members of the legal person's executive board<sup>51</sup> and
- (b) criminal liability of the legal person in the form of monetary sanctions and compensation or restitution to injured parties.<sup>52</sup>

49 See T.M. Meron, 'The Year Nobody Will Survive', available at <http://www.worldpress.org/Africa/703.cfm> (5 September 2002) (visited 11 May 2005), describing the 2002 famine that swept Malawi, clearly pointing out that one of its most significant causes was widespread corruption.

50 E.g. Arts 2 and 3(2), 1997 OECD Convention; Arts 18 and 19(2), 1999 Criminal Law Convention on Corruption (Criminal LCC); Art. 26, 2003 UN Convention.

51 Art. 18(1), Criminal LCC; Arts 9 and 10 of the 1945 London Agreement establishing the International Military Tribunal (IMT) at Nuremberg, contained the criminal offence of participation in illegal Nazi organizations on account of each member's knowledge of the aim of the organization and intentional participation therein. See also, 'common purpose' liability in accordance with Art. 25(3)(d) ICCSt., as well as the 'joint common enterprise' liability developed by the ICTY as stemming from existing customary international law (Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 196–220). For an example of domestic legislation, see Sarbanes–Oxley Act, 15 USC §§ 7201–7266 (2004).

52 Art. 19(2), Criminal LCC; Arts 3 and 4, Civil LCC; Art. 3, OECD Convention.

International law has already responded in the affirmative on whether non-state actors are capable of committing crimes against humanity.<sup>53</sup> Although these entities were not legal persons incorporated under the law of a particular country, they did in fact enjoy international legitimacy (before being outlawed) and as such do not differ in personality from legal persons in the form of corporations. There is no reason, therefore, why corporations cannot be held criminally liable for their role in a corrupt act that culminated into the deprivation of food and medical care for a particular population. This liability would involve the lifting of the corporate veil to encompass personal liability and would also include compensation and monetary sanctions. Recently, the Security Council appointed a Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo to assess the level of exploitation and possible liability. The Panel duly completed its task and made its Report available to the Council.<sup>54</sup> The Report underlined the direct or indirect implication of 157 corporations, the operations of which fueled the purchase of arms, the perpetration of war crimes and crimes against humanity and the exploitation of Congo's natural resources to the detriment of its people.<sup>55</sup> Moreover, the Prosecutor of the ICC, in his Report to the Assembly of States Parties on 8 September 2003, emphasized that 'those who direct mining operations, sell diamonds or extract gold [as a result of the resource exploitation and general violence taking place in the Congo], launder the dirty money or provide weapons could also be the authors of the crimes, even if they are based in other countries'.<sup>56</sup> While the ICC does not enjoy jurisdiction *ratione personae* over legal persons, it may nonetheless pierce the corporate veil and apportion personal criminal liability to those members of the corporation as suggested above.

#### 4. Suppressing the Effects of Ongoing Crime through Civil Mechanisms

Corruption, as a crime against humanity in the sense described in the previous section, is a continuous crime. Indeed, its effects on the population (famine, etc.) may, and do persist, well after the deposition of a corrupt regime.

53 As regards guerrilla groups, see ILC Report, Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/51/10/Supp. No. 10 (1996), at 94, and Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Karadžić and Mladić* (IT-95-5-R61/IT-95-18-R61), Trial Chamber, 11 July 1996.

54 *Letter dated 23 October 2003 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2003/1027 (2003), available at <http://www.un.org/Docs/sc/unscc.presandsg.letters03.html> (visited 11 May 2005).

55 *Ibid.*, §§ 10–13.

56 L. Moreno-Ocampo, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court: Report of the Prosecutor of the ICC 4* (2003), available at <http://www.icc-cpi.int/library/organs/otp/030909.prosecutor.speech.pdf> (visited 11 May 2005).

In the case of regular international ongoing crimes against a person, any sensible international criminal justice policy would have a twofold objective: to punish the perpetrators, and to put an end to the crime and its effects. In a situation of famine resulting from corruption, the latter component is crucial. In the present section, we explore some possible mechanisms for alleviating the effects of this ongoing crime through otherwise civil mechanisms.

Potential civil claims arising out of corrupt practices are by no means a straightforward exercise. Let us imagine a scenario where a senior government official (including members of the Cabinet and the President) in country A is bribed in order to offer company X, which is registered in country A but is a subsidiary of company Y, which is registered in country B, a concession contract. The bribe money moves within an initial period of six months into various bank accounts in offshore tax havens until they finally settle in a bank account in country C. Three major questions emerge in this instance, namely:

- (a) identification of the persons that have a legal standing to bring the claim;
- (b) ascertaining the appropriate forum and
- (c) the involvement of immunities, if any, or the existence of legal barriers similar to the act of state doctrine that preclude the courts of a particular country from scrutinizing the internal affairs of other states without express authorization of the government by the forum.

None of these potentially impending questions are clearly settled in international law, particularly the first two, which in any event are premised on a factual capacity to bring a claim. This holds true notwithstanding the existence of an international instrument, albeit regional, on the matter, namely the 1999 Council of Europe Civil Law Convention against Corruption,<sup>57</sup> which entered into force in November 2003. Article 4 of this Convention sets out the criteria for *locus standi* before member state national courts. These are:

- (a) that the plaintiff has suffered some form of damage as a result of the corruption;
- (b) that the defendant has committed or authorized the act to take place, or has failed to take reasonable steps to prevent it and
- (c) there is a causal link between the act of corruption and the damage.

Where the corrupt act originates from a public official, the state concerned is liable to the plaintiff, in accordance with Article 5. Of course, the Convention covers the simple case where an entity, physical or legal, can prove that it did in fact suffer damage as a result of corruption and that the defendant has a sufficiently strong link to the forum. In the example above, the links

57 ETS No. 174.

with countries outside the state where the bribing was committed are tenuous, and the judge in the forum or state where a claim was brought might well consider that his or her court is an inappropriate forum to adjudicate the case (i.e. *forum non conveniens*).

Moreover, in relation to all those cases of corruption involving senior government officials in developing countries, it is unlikely that any one person can prove direct harm or damage. The argument could, of course, go something like this: it is a constitutional principle found in the vast majority of nations — being part also of customary international law — that peoples may freely dispose their mineral and other wealth.<sup>58</sup> It necessarily follows from this that the peoples of a nation in which this principle has normative constitutional value have an interest to claim that wealth in the form of a collective claim and make a case for it before the courts. The enforcement of a right, in this case a collective one, constitutes the logical and necessary corollary of the legal nature of the right itself.<sup>59</sup> This collective right has been given normative entitlement in concrete terms in Article 1(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>60</sup>

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Where a court of a third nation is to be seized of a such a claim and assuming that it could do away with the question of immunity with or without the consultation of its government, that court would not only have to determine whether the plaintiffs had legal standing but would also have to decide a very practical matter. If the money was eventually retrieved, should it really be given to the plaintiffs as representatives of the people, or should the government retain the money and somehow return it to its rightful owners, i.e. the people as a whole of the deprived nation? These are indeed very serious questions and as far as the present author is aware, no such claim has been brought before the courts of any country. Yet the questions set above are more than mere theory. For, although it is unlikely that domestic courts would be considered the most appropriate institutions through which to bring claims of this sort and judicial precedent is far from settled regarding the appropriateness of adjudication before a neutral third forum, nonetheless, in such situations a viable solution may well-entail the conclusion of an agreement between the government of the forum and the UN, entrusting the distribution of attached assets to the latter. In recent years there have

58 E.g. Art. 55, Uzbek Constitution and preamble to Cameroonian Constitution; see also GA Res. 1803 (XVII) (14 December 1962), Declaration on Permanent Sovereignty over Natural Resources, operative § 1.

59 We are not prepared to take this argument beyond assets that are not constitutionally defined, or those pertaining to the state in the ordinary course of affairs.

60 999 UNTS 171.

been judgements rejecting *forum non conveniens* invocations with regard to the actions of subsidiary companies abroad,<sup>61</sup> as well as court decisions in the USA that bypass this hurdle by making use of human rights statutes.<sup>62</sup>

This collective compensation entitlement does not, unfortunately, exist clearly in treaty law — apart from the ICCPR and even there no mechanism is sufficiently described. It differs from all other forms of criminal reparation since, with regard to crimes such as corruption that culminate in extreme poverty and famine, it is not possible to determine the cause and harm on the basis of ordinary tort law. The violation is usually a continuous one, the effects of which are not immediately obvious and the proof of a link is difficult to establish for each and every dispersed victim. For semantic purposes, we shall define the ordinary reparation stemming from criminal activity as civil reparation, while the collective one as criminal reparation. Its existence may be established on a combination of two elements: firstly, on the notion of justice and secondly, on the obligation and capacity of the states under treaty law to freeze, seize and confiscate all assets originating or derived from corrupt practices,<sup>63</sup> or in the case of the ICC, from the perpetration of crimes against humanity.<sup>64</sup> It would offend the notion of international justice if one or more countries were to seize the assets of the corrupt legal person and the government members arising out of a crime against humanity, and then go through a process where they would have to distinguish each and every individual victim under the normal rules of tortious liability — particularly since direct harm would be almost impossible to prove. It was exactly in order to avoid such injustices that Article 75(1) of the ICC Statute empowers the Court ‘in exceptional circumstances to determine the scope and extent of any damage, loss and injury to, or in respect of, victims and state the principles on which it is acting’. The Court, thus, has the capacity to provide *locus standi* for a collectivity of victims to bring a claim, if it so decides. Its advantage over other domestic tribunals is obvious; whereas domestic courts cannot order the seizure or confiscation of assets in other countries, the ICC may direct such a binding order to all ICC member states and it may, moreover, exert significant influence and persuasion vis-à-vis non-members. Furthermore, the trust fund mechanism of the ICC<sup>65</sup> is ideal in distributing

61 See *Connelly v. RTZ Corporation* [1997] 3 WLR 373; *Lubbe and Others v. Cape Plc* [2000] 1 WLR 1604, involving compensation claims brought in the UK against multinationals operating abroad for labour law violations committed in those countries. These claims were not dismissed in UK courts under the guise of the *forum non conveniens* principle.

62 See *Piper Aircraft Co. v. Reyno*, 454 US 235 (1981) and *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F. Supp. 842 (SDNY 1986), where US courts refused to pass judgment on US subsidiaries acting abroad. Plaintiffs have become more inventive, and have succeeded, in recent years through the use of domestic human rights statutes. *Doe v. Unocal Corp.* 963 F. Supp. 880 (CD Cal. 1997) and *Nike v. Kasky*, 539 US 654 (2003).

63 Art. 31, 2003 UN Convention; Art. 12, Civil LCC.

64 Arts 77 and 109 ICCSt.

65 Art. 79, *ibid.*

the money in such a way that life threatening conditions in the country concerned cease.

A truly innovative mechanism that could potentially resolve some of the problems identified in this section is provided by the 'asset recovery' obligations imposed in chapter V of the 2003 UN Convention.<sup>66</sup> Reaching agreement on this chapter involved intensive negotiations, as the needs of countries seeking to recover the illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought. Cooperation and assistance will be rendered in a number of ways. In particular, in the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it; in the case of proceeds of any other offence covered by the Convention, the property would be returned provided the proof of ownership or recognition of the damage caused to a requesting state is amply demonstrated; in all other cases, priority consideration would be given to the return of confiscated property to the requesting state, to return such property to prior legitimate owners, or as compensation to the victims. While Article 51 provides for the return of assets to countries of origin as a fundamental principle of this Convention it does not address, let alone solve, the problem of reigning corrupt regimes which are abound in the developing world. Does one really want to recover assets corruptly seized by a henchman in order to give them back to another member of the same corrupt group? Despite the practical shortcomings that remain unresolved, the asset recovery portion of the UN Convention will provide a useful tool in all cases where a legitimate regime has been installed, replacing a corrupt one and it thereafter seeks the assets appropriated by its predecessor.

The 1999 Civil Law Convention against Corruption and the UN Convention oblige member states to annul or consider annulled all contracts predicated on corrupt acts.<sup>67</sup> This is especially welcome since some UK courts enforcing foreign arbitral awards have claimed that a contract premised on corruption that was committed abroad did not offend the UK's public order where the plaintiff was seeking to enforce in the UK a foreign arbitral award based on such a contract.<sup>68</sup> Where the case is pending before an international arbitral tribunal, the arbiter is precluded by the doctrine of separability to dismiss the case as a whole, since this cardinal doctrine upholds the separate and distinct legal existence of the arbitration clause from the contract within which it is framed. Thus, even if the contract is premised on fraud or

66 Art. 19(3) of the Criminal LCC requires a criminal law confiscation or a civil law forfeiture of assets gained by corruption.

67 Art. 8, 1999 Civil Law Convention; Art. 34, 2003 UN Convention.

68 *Westacre Investments Inc. v. Jugoinport-SPDR Holding Co. Ltd. and Others*, [1999] 3 WLR 811; *Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd.*, [1988] QB 448. In these cases English courts took the view that a foreign arbitral award may be enforced in the UK, even where the performance of the underlying contract was based on a corrupt act, so long as that corrupt act did not offend the public order of the country wherein it was perpetrated.

corruption, the arbitration clause is still valid and any disputes arising from the contract may be brought before an arbitral tribunal.<sup>69</sup>

So far in this section we have glanced at particular civil redress mechanism for suppressing and alleviating the effects of corruption as an ongoing crime against humanity. In the following two subsections we shall briefly examine private mechanisms that have the potential to prevent or significantly mitigate the effects of this crime. Since corruption has not in the past been considered as a crime against humanity, similarly these mechanisms have never been conceived as playing a role within the framework of a wider criminal justice policy. As our brief analysis will demonstrate, their preventive capacity, whether primary or supplementary, should not be underestimated.

### *A. Preventing Ongoing Crime: The Potentially Significant Role of the World Bank Group*

The World Bank Group is important to both investors interested in investing in the developing world as well as to the governments of these countries. The Bank itself provides a fraction of the funds needed and mediates in order to secure funds from private financial institutions. It moreover insures investors against political dangers through its Multilateral Investment Guarantee Agency (MIGA). Whereas the Bank imposes rigid requirements on investors in relation to the environment and the financial portion of the investment, the Bank's disclosure requirements are almost completely non-existent. Only 15% of the Bank's extractive projects demand full disclosure, while the majority do not, and thus it is of little surprise that corruption is particularly rife in the extractive industries, especially because the rich oil-producing states in the developing world are governed by dictatorial or authoritarian regimes. A requirement of full disclosure by the Bank vis-à-vis its investors would go a long way in eradicating this scourge.<sup>70</sup>

Yet, despite the still intransparent structure of the Bank, fortunately, in 1993, following significant pressure, the Bank established its independent Inspection Panel, whose duty was to investigate claims brought by affected community members of a Bank-funded project and ascertain whether the Bank's regulations had been breached by the investor. Although the Panel's recommendations and findings are not mandatory on the Bank, they are persuasive and attract wide media attention. Thus, it is a significant forum for bringing corruption cases against corrupt regimes, even though no criminal

69 In one striking case the arbitrator declared his lack of jurisdiction over the case when confronted with corruption related to the contractual obligations under dispute. This case is however distinguished and not viewed as constituting any type of precedent. Award in Case No. 1110 of 1963, 21 *Yearbook Commercial Arbitration* (1996), 47.

70 The Bank's anti-corruption policies as posted on its website do not even mention disclosure requirements where the relevant section concerns corporate governance. Available at <http://www.worldbank.org/publicsector/anticorrupt/privatesector.htm> (visited 11 May 2005).



sanctions may be brought against the corrupt regime. Nonetheless, based on the Panel's recommendations the Bank may find fertile ground for rescinding the contract or require the investor to pay damages. The Bank's practice, however, indicates a favouritism towards investors over and above the concerns of local communities.<sup>71</sup>

In a bold move early this century, the Bank agreed to finance the Chad portion of the Chad–Cameroon Pipeline project, but conditioned its assistance to the government of Chad on the creation of an Oil Revenue Management Plan whereby proceeds from the project would not end up in the pockets of the Chadian dictatorial circle, but would instead be used for pre-specified projects such as schools, hospitals, fresh water and others.<sup>72</sup> Although the idea was good, and an independent mechanism was established to monitor it, the Plan was scheduled to have a life span of 5 years and the Chadian government has already admitted of spending a part of the oil revenues stipulated in the Plan to buy arms. It is evident that, although the Bank can yield significant influence vis-à-vis poor authoritarian regimes, it does not make a serious effort to place tougher and more permanent limitations on greedy governments.

Moreover, the World Bank's anti-corruption mechanism includes a Department of Institutional Integrity and a Sanctions Committee that investigate allegations of fraud and corruption in Bank-related projects. The Bank's Guidelines<sup>73</sup> require high standards of ethical behaviour to cancel the portion of the loan allocated to a contract if the Bank determines at any time that representatives of the borrower are engaged in corruption.<sup>74</sup> Furthermore, the Guidelines give the Bank the right to insert a provision in the contract with the borrower that requires inspections of accounts, records and other documents.<sup>75</sup> In 2002, the Court of Appeals of Lesotho decided to uphold the conviction of Lahmeyer International GmbH — and a number of other companies making up a consortium — on several counts of bribery in connection with the Highlands Water Project that was financed by the Bank. In a Statement released on 12 April 2004, the Bank noted that its Sanctions Committee would take note of the judgment and following its own internal investigation would determine what measures might be taken against its client.<sup>76</sup> In July 2004, the Sanctions Committee decided to render one of the

71 See Memorandum submitted to the House of Commons by the International Rivers Network on 'The World Bank and Corruption', available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/256/256ap10.htm> (visited 11 May 2005).

72 WB Credit No. 3373-CD and Credit No. 3316-CD. This prompted the adoption by Chad of Law No. 001/PR/99 (30 December 1998) ('Revenue Management Law').

73 Guidelines: Selection and Employment of Consultants by World Bank Borrowers (May 2004), s. 1.22, available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Consultant-May-2004.pdf> (visited 11 May 2005).

74 Guidelines, *ibid.*, s. 1.22(c).

75 *Ibid.*, s. 1.22(e).

76 News Release 2004/311/S (12 April 2004), available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/LESOTHOEXTN/0,,contentMDK:20191132~menuPK:356035~pagePK:141137~piPK:141127~theSitePK:356029,00.html> (visited 11 May 2005).

consortium partners ineligible to receive Bank loans for a period of 3 years, but imposed no fine, deeming that the criminal sanctions imposed by the Lesotho court was sufficient.<sup>77</sup> Finally, it is significant that although the Bank cannot impose criminal sanctions on defaulting companies, it can, as in the *Lesotho Highlands Water Project* case, assist the local prosecuting authorities in their own criminal investigations.

***B. The Preventive Role of Multinational Corporations:  
Corporate Social Responsibility or Regulation?***

As we have already observed, the regulation of multinational corporations and their subsidiaries by their home state is an extremely difficult exercise that has the potential of encroaching in the domestic affairs of other states. Until the emergence of a strong civil society in the West in the mid-1980s, multinationals (MNC) acted with almost complete immunity, and whether by polluting, bribing or engaging in other activities that would have been illegal in their home state, seemed to care only about maximizing their profits. When these acts eventually surfaced, the legal lacuna became apparent, but there was little chance of international agreement on regulating MNC.<sup>78</sup> Since the 1970s, the OECD adopted its own Guidelines for Multinational Corporations — the latest ones issued in 2000<sup>79</sup> — with the avoidance of corruption featuring prominently, as did the 2000 UN Global Compact,<sup>80</sup> another non-binding instrument. Similar corporate social responsibility (CSR) instruments abound today, and MNC most commonly pledge their adherence to these on their websites and in their codes of corporate conduct. Nonetheless, not all make the same pledge and moreover it is not certain how many keep their word in relation to corruption.

During the 2002 Johannesburg World Summit on Sustainable Development, the British Prime Minister, Tony Blair, launched the Extractive Industries Transparency Initiative (EITI), another non-binding accord by which extractive industries would publicize what they pay in relation to their operations. A similar initiative, this time launched by the private banking sector, culminated in the formulation of the Equator Principles, by which the participating banks pledge to provide loans only to those projects that are environmentally and socially sound.<sup>81</sup> Widespread employment of such mechanisms would certainly facilitate the impact of corruption in the

77 Available at <http://www.ciobinternational.org/openArticle.asp?ArticleID=4524> (visited 11 May 2005).

78 See I. Bantekas, 'Corporate Social Responsibility in International Law', 23 *Boston University Journal of International Law* (2005) 1.

79 Guideline VI. See Commentary, OECD Doc. DAF/FE/IME/WP G (2000) 15 FINAL (31 Oct. 2001).

80 Principle 10.

81 See <http://www.equator-principles.com/> (visited 11 May 2005).

developing world, since it is the big investments that attract the largest levels of corruption because they are autocratically awarded and managed.

## 5. Conclusion

The situation with corruption, particularly in the developing world, is frightening, especially since it is a driving force of civil conflict, poverty and famine. The plethora of international legal instruments adopted and rapidly ratified since 1995 are encouraging, but we are still at the surface of the problem. Apart from the anti-corruption treaties where the underlying act has attained the status of an international crime, corruption has not been described as entailing the potentiality of a crime against humanity, particularly where it culminates in famine, disease and lack of medical care that leads to death. It is no longer necessary to establish a nexus between crimes against humanity and armed conflict and so there is no reason why a crime against humanity cannot be perpetrated against a civilian population by means of corruption as described above. Such an approach does away with the jurisdictional limitations encountered in anti-corruption treaties, thus paving the way for universal jurisdiction, as well as access to the International Criminal Court (ICC).

In this light, we should also seek supplementary criminal justice objectives besides the criminal liability of the active and passive corruptors. We have identified the potential for the recovery of funds misappropriated in the form of a collective entitlement — premised particularly in its collective dimension on Article 1(2) ICCPR — whether through the ICC or domestic courts. The objective here is to put an end to life-threatening situations and alleviate the suffering in what appears to be an ongoing crime. In this sense, corruption as a crime against humanity leading to suffering is an ongoing crime, even if a corrupt regime has been deposed, and it is a matter of criminal justice policy to curtail its effects. The role of the World Bank and multinational corporations is crucial as preventive mechanisms, whereas the function of collective entitlement has a suppressive role.