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CRIME PREVENTION AND CRIMINAL JUSTICE IN THE CONTEXT OF DEVELOPMENT:  
REALITIES AND PERSPECTIVES OF INTERNATIONAL CO-OPERATION

Practical measures against corruption

Manual prepared by the Secretariat

U.S. Department of Justice  
National Institute of Justice

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## INTRODUCTION

1. The Economic and Social Council, on the recommendation of the Committee on Crime Prevention and Control, by resolution 1990/23 transmitted to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders a draft resolution on international co-operation for crime prevention and criminal justice in the context of development, to which were annexed a series of recommendations on the subject. Recommendation 8 read as follows:

"Because the corrupt activities of public officials can destroy the potential effectiveness of all types of governmental programmes, hinder development, and victimize individuals and groups, it is of crucial importance that all nations should: (a) review the adequacy of their criminal laws, including procedural legislation, in order to respond to all forms of corruption and related actions designed to assist or to facilitate corrupt activities, and should have recourse to sanctions that will ensure an adequate deterrence; (b) devise administrative and regulatory mechanisms for the prevention of corrupt practices or the abuse of power; (c) adopt procedures for the detection, investigation and conviction of corrupt officials; (d) create legal provisions for the forfeiture of funds and property from corrupt practices; and (e) adopt economic sanctions against enterprises involved in corruption. The Crime Prevention and Criminal Justice Branch should co-ordinate the elaboration of materials to assist countries in these efforts, including the development of a manual to combat corruption, and should provide specialized training to judges and prosecutors that would qualify them to deal with the technical aspects of corruption, as well as with the experience derived from specialized tribunals handling such matters." 1/

2. The Crime Prevention and Criminal Justice Branch has accordingly arranged for the preparation of the present manual, the format of which parallels that of the recommendation. Its purpose is to review the most common problems encountered by policy-makers and practitioners in their efforts to deal with corruption. It includes possible measures that could be taken and procedures for devising anti-corruption programmes. In suggesting possible courses of action, the manual touches on legal issues whose degree of relevance and difficulty may vary depending on the legal system of each country. As far as possible, such issues have been taken into account, in order to facilitate the adaptability of the manual to as many contexts as possible.

3. The manual could not have been drawn up without the invaluable support of the United States Department of Justice and in particular Mr. Michael A. DeFeo, Deputy Chief, Organized Crime and Racketeering Section. A first draft was presented at the Interregional Seminar on Corruption in Government, held at The Hague from 11 to 15 December 1989. The participants fully endorsed both its approach and content. Their comments were taken into account and reflected in the text of a revised version presented to the Committee on Crime Prevention and Control at its eleventh session, where it was welcomed as a valuable step in the right direction. The text has been further streamlined, taking into account all the different comments received from Governments and experts involved in its drafting.

## I. PENAL LAWS

4. A requisite of any campaign to combat corruption effectively is an adequate body of law prohibiting those forms of official misconduct most harmful to honest government and to the citizenry. Common experience identifies a number of crimes customarily subject to near-universal denunciation, as illustrated in the following sections.

### A. Theft offences

5. Theft, conversion, and other forms of appropriating State property for private use are dealt with in most penal codes. The drafting challenge is to define the prohibition broadly enough to include every dishonest method of diverting public resources that criminal ingenuity can devise. Not merely physical theft should be punished but also unauthorized use of the time and labour of public employees and of government facilities and equipment, such as computers.

### B. Abuses of position

6. Abuses of position to secure unjust advantage may include any planned, attempted, requested or successful transfer of a benefit as a result of unjust exploitation of official status. Little benefit is gained by undue focus on whether the initiative for the prohibited transfer or gratuity originates with the person seeking official action (bribery) or with the official (extortion). Indeed, the more widespread and institutionalized corruption becomes, the more impossible and irrelevant it is to determine which party took the first step in the customary exchange of favours to encourage or discourage the performance of a public duty. Consideration should therefore be given to criminalizing any diversion of public resources in violation of established norms, even without personal benefit to the official responsible. This would meet the situation in which an office holder violates administrative procedures to reward fellow members of the clan, tribe, or political party without regard to merit. Unjust enrichment of an official should also be subject to sanction, even though there may be no direct loss to the State or an individual. The reason for this is that the State's integrity and its citizens' confidence in government are damaged by any unjust advantage taken by an official for his or her own profit. The knowledge, or even an indication, of such practices breeds the suspicion that any public project or contract may exist primarily to enrich public officials.

### C. Conflict of interest

7. Conflicts between official duty and private self-interest should be properly dealt with, although defining what conflicts should be made criminal is very culture-bound. Every society would expect a legislator to advance the interests of his particular constituency. It is only at the point that an official's self-interest is so strong or expressed in a way so indicative of a wrongful purpose, in a manner to be presumed to threaten the public good, that criminalization should be considered. If the legislator supports a project that benefits only his private economic interest, or when the legislator's opportunity to profit from legislation is concealed by hidden ownership through a nominee, then society should consider whether penal sanctions are appropriate.

8. Conflicts that threaten the public good are also common for officials who find themselves in a necessarily co-operative, even symbiotic relationship with the private sector. An authority setting the rates for public utilities,

approving the sale of pharmaceuticals, or negotiating contracts between a State agency and private entrepreneurs will strive for an arms-length but not hostile relationship with the persons with whom business must be done. The danger always exists that the official may form personal relationships jeopardizing the welfare of the citizens, which should be paramount. That danger becomes acute when the regulated industry being dealt with has a natural monopoly of employment or business opportunities in the government official's professional speciality. These are unavoidable occasions for temptation, creating conflict of interests between the obligations of the often underpaid public servant and the attraction of highly lucrative private business opportunities, which become available only if the government regulator finds favour with the industry. When the citizenry's well-being is subordinated to such favour-seeking, penal sanctions would seem to be appropriate.

9. The criterion for criminalization of conflicts of interest cannot be whether the public interest is served by a particular decision, or whether there is a loss of public financial advantage, because there are almost always multiple financial and non-financial public interests affected by a single decision, and only a few of them are objectively and immediately measurable. Rather, the criterion is better defined as the purity or transparency of the decision process, that is to say, a public official should either not be allowed to act in any matter affecting his or her financial or personal interest, broadly defined to include whatever circle of kinsmen and acquaintances seem necessary in the context of that society, or not be allowed to act without making certain specified disclosures, while an independent decision-maker would rule upon the appropriateness of the official's continued participation.

#### D. Disclosure statutes

10. It is not realistic to expect that any law requiring the reporting of illegal acts by public officials will result in voluntary confessions. Nevertheless, laws or regulations requiring comprehensive disclosure (all of a person's financial assets, obligations and relationships upon entering a government position), a periodic summary (all income or business activity on a yearly basis), or disclosure of a reportable event (receipt of outside income, sale or purchase of any asset exceeding a certain value) can be invaluable anti-corruption tools. Their value is two-fold. They function as an early-warning device, an indicator that a person whose financial picture and life-style are inconsistent with the salary of a public official should be required to explain the situation, or should be watched carefully. A second useful function is as a separate vehicle of prosecution, when the underlying corruption that generated the illegal income or assets may not be provable. Each country could impose disclosure requirements appropriate to the practices of beneficial ownership and societal group interests that are of concern to that society.

#### E. Sanctions against failure to report

11. To be effective, sanctions against non-disclosure or false reporting must be approximately as severe as those against the underlying corruption. Purely civil sanctions, or those that treat reporting violations as infractions or minor offences, are frequently ineffectual because they can be exploited as the lesser of two evils. An official who has enriched himself unjustly will be motivated to conceal the criminal proceeds in any reporting document because the consequences of non-disclosure would be significantly less painful than those of disclosure, involving discovery of the illegal payment and the

resulting greater criminal sanction for that offence. Lesser penalties for failure to report allow a similar option. A failure to report, however, will be noticed fairly promptly if the disclosure is required to be periodic, instead of being triggered by an event that is known only to the corrupt participants.

#### F. Political contributions

12. A further refinement of disclosure statutes relates to the support of political activities. The expenditure of huge sums of money to influence elections by very calculating enterprises, including multinational corporations and special interest groups, cannot all be motivated by ideology or the charisma of a candidate. It is a reality of life that significant financial or personal advantages are expected by major political contributors. Most legal systems leave space to accommodate this reality in personnel appointments at policy-making levels and in other discretionary areas consistent with that society's traditions. All, however, have limits beyond which the distribution of government benefits and advantages should be legally required to be impartial or governed by objective standards designed to secure a decision on the merits of the case. When political favouritism becomes so pervasive as to threaten professionalism in the operation of government programmes, mechanisms must be found to limit its influence. Laws covering non-partisan bases for government action as a means of encouraging integrity and professionalism in government are discussed in chapter II. Disclosure laws governing political financing can be useful for compelling candidates or political parties to disclose any contributions they have received, thereby permitting the voting public and the news media to react to those contributions not only when they are made before an election but also afterwards, when the contributors receive unwarranted consideration.

#### G. Organizational structures

13. Legislation may be required to organize the structures that put anti-corruption measures into effect. In reply to the question whether a specialized anti-corruption unit is necessary or whether the function can be handled within existing organizations, it may be said that for police, prosecutors and investigating magistrates alike, there are both advantages and disadvantages to separate units. Among the disadvantages are rivalries and barriers to communication between a new authority and existing organizations, greater administrative costs, and diminution in the prestige and morale of the general organization. It is also necessary to follow some workable principle with respect to the creation of new entities and to ask, for example, whether an investigative unit is necessary not only for corruption offences but also for drugs, theft of cultural patrimony, environmental crimes or whatever other phenomenon may receive political and public attention at any particular moment. Among the advantages of a separate unit are specialization, greater security and accountability. The latter may well be the greatest virtue, as it allows the political authority to measure what success is being achieved with given resources and assigns anti-corruption responsibility to identifiable persons. This ability to measure results is important because of corruption's nature as a covert activity, which may never be detected without aggressive law-enforcement efforts.

14. Sometimes, radical structural changes may be legislatively imposed as a result of scandals that have created a perception of corrupt activity and concealment by the very same authorities charged with exposure and suppression of such wrongdoing. Once public opinion becomes outraged, the only means of satisfying it may be the creation of entities considered to be impervious to the corrupting influences that gave rise to the scandal, and independent of

the traditional authorities believed to have been corrupted. A police scandal in Hong Kong in the 1970s led to an erosion of public confidence, as a result of which a new entity was created, the Independent Commission against Corruption. This Commission is an example of a single-purpose anti-corruption entity independent of any other authority save judicial review and necessary budgetary support. An independent counsel mechanism has existed in the United States of America since shortly after the Watergate scandal. In any case involving certain legislatively enumerated positions of the executive branch and of the presidential election campaign, it is required that the Attorney General notify a special court, which then appoints a special prosecutor to investigate the matter and to prosecute if necessary. This independent counsel must be chosen from outside the Government and operates without supervision by the Attorney General, but may call upon an unlimited budget and any desired resources of the Government, including the investigative agencies normally under the Attorney General's control.

15. These entities are rather rare creatures, anti-corruption elements created to be independent of the existing power structure and enjoying operational autonomy, even to the extent of self-determining a budget. They do entail substantial costs, both financially and in loss of prestige by existing law-enforcement units, and can be controversial. Such extreme measures may be necessary to preserve public confidence that even the highest levels of government can be held accountable. Whether or not a society needs an independent authority capable of action against its leading political authorities, outside of regular channels, seems to be a question answerable only within the context of that Government's level of, and vulnerability to, corruption, degree of law-enforcement professionalism, independence and impartiality of the judiciary and responsiveness to public opinion.

#### H. Exclusivity of anti-corruption jurisdiction

16. Regardless of whether anti-corruption responsibility is assigned to an independent agency or remains with a branch or division of an existing structure, exclusivity of jurisdiction needs to be considered. When a certain sum is dedicated exclusively to corruption matters, it is tempting, as a matter of managerial clarity, to give the entity that operates those assets a monopoly over all corruption investigations. In addition, endemic delays in the administration of justice due to overloaded dockets of Courts argue in favour of exclusive anti-corruption jurisdiction, even at the judicial level. The demonstrated susceptibility of human nature to the corrupting influence of power and to the temptations and wrongful opportunities that come with authority argues, however, against the orderly logic of exclusive competence. The Latin maxim of quis custodiet ipsos custodes? is a reminder that one must question who will guard the guards themselves. A little redundancy and even competition can be a healthy antidote to corruption, because no single person or entity has the power to license illegal activities. An obligation of other entities to report all corruption investigations to the primary anti-corruption authority seems appropriate, the only real question being the timing of such obligation. The legislative and managerial challenge in this area is to allow just enough redundancy, and even rivalry, to expose corruption if the primary anti-corruption authority fails to do so, but not to permit so much duplication that the flow of intelligence, or of investigative and prosecutive opportunities, available to the primary authority is disproportionately reduced.



## II. ADMINISTRATIVE AND REGULATORY MECHANISMS FOR THE PREVENTION OF CORRUPT PRACTICES AND THE ABUSE OF POWER

### A. Limits of penal action

17. The deterrent effects of investigation and prosecution and the direct incapacitation of wrongdoers by their removal from office and incarceration can reduce corruption in government. Yet virtually all practitioners involved in anti-corruption efforts would concede that, no matter how draconian or rigorously enforced the penal measures may be, no society can realistically punish more than a small proportion of the officials who abuse their positions. If the level of integrity in government is to be improved, it will be by managerial, administrative, regulatory and reporting mechanisms. No matter how frequently imposed or how personally gratifying they are to anti-corruption authorities, penal sanctions can help to achieve honesty in government only in a well-administered and well-motivated organization. This has been recognized in the configuration of one of the best organized anti-corruption entities, the Hong Kong Independent Commission against Corruption. The Commission has three departments with separate functions. The Operations Department does criminal investigative work, the Corruption Prevention Department attempts to eliminate vulnerability to corruption in systems or procedures, and the Community Relations Department educates the public about the evils of corruption.

### B. Information on corruption

18. One function that may be thought of as being on the borderline between a criminal investigative authority and a non-penally-oriented audit group is the encouragement and channelling of a flow of information so that the inherent secrecy of corruption offences can be overcome. Means attuned to their intended audiences must be developed to encourage the reporting of corruption by the public in general, particularly by its most frightened and victimized members, and by agency work-forces, among whom there is likely to be considerable awareness or informed suspicion of any wrongdoing within their sphere of experience and observation. Supervisors in the chain of command, and auditors charged with an advisory and evaluatory function, should identify and report specific misconduct, as would be the duty of any public employee, but their responsibilities should also include helping to correct situations that invite, or are characterized by, dishonesty. Most citizens may be exposed to low-level corruption, for example "speed money" to expedite action, a gratuity to overlook an infraction, a conspicuous display of wealth by a low-salaried official. This type of corruption is not as dangerous as institutionalized kickbacks on public contracts. Nevertheless, although individual citizens may be exposed only to amateurish forms of dishonesty, highly visible and effectively functioning mechanisms must exist to encourage and communicate reports of corruption from ordinary citizens to administrative or investigative authorities with sufficient independence and motivation to initiate corrective action or impose accountability for management failures. The true significance of encouraging and processing citizen complaints, and of widely publicizing any corrective action taken as a result, is not the inherent importance of the dishonesty exposed and corrected but the central issue of public confidence in government and its integrity. As a consequence, the same standards of efficiency, productivity and cost-benefit ratios should not be applicable to telephone registers or other means set up to receive public complaints of official misconduct and corruption. The availability of such mechanisms is an

end in itself, and they should be maintained if used, even if the rate of return may be less than from other anti-corruption measures.\*

#### C. Other sources

19. Particular attention needs to be paid to persons who know about cases of official abuse or misconduct but are reluctant to submit a complaint that would reveal their identity. Because of its susceptibility to abuse, being sometimes used as an almost routine weapon against personal, bureaucratic or political adversaries, the anonymous complaint can never form the basis for administrative or personnel action and should only be considered as investigative intelligence of unknown reliability, unless investigation produces evidence that has its own probative value independent of the anonymous allegation. Dubious reliability and vulnerability to abuse might seem to suggest the desirability of a policy that would assign no significance to an allegation unless the complainant was willing to bear responsibility for the truth or falsity of the allegation. Nevertheless, while there may be societies in which no citizen need fear retaliation for exposing misconduct, and where the sources of intelligence on corruption are so plentiful that revelations from anonymous sources can be ignored, for most people, dwelling in less fortunate circumstances, anonymous complaints may still have a value.

#### D. Witnesses

20. Different considerations prevail when the goal is to bring forward persons who will actually bear witness and provide evidence upon which administrative and penal action can be taken. Because potential witnesses have to be identified, fear of reprisal is likely to be a serious deterrent if they do not perceive that the allegation is pursued with the full weight of governmental authority. There are two drawbacks to channelling complaints to the operational programme. First, responsibility for deciding which allegations are to be pursued further is given to those who are managerially, if not personally, responsible for the wrongdoing of subordinates; such persons have a natural incentive to minimize wrongdoing rather than to seek its exposure. Secondly, nothing is done to alleviate public concern or frustration about corruption, as the complainant has no separate entity with which to identify and is left at the mercy of the organization that perpetrated the alleged injustice. This argues in favour of excluding programme authorities from the control of corruption complaints in favour of agencies with at least as much independence as an internal auditor, if not more (for example, an administratively created internal auditor, a statutorily created internal auditor with legislative or public reporting powers, a government-wide auditor, an ombudsman, an independent corruption authority with law-enforcement powers or an investigating magistrate).

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\*The Civil Service Commission of the Philippines launched in 1988 a programme called "Do Away with Red Tape" (DART) in an effort to put public pressure on the bureaucracy to streamline procedures and improve services. Action centres were established in all Civil Service Commission offices throughout the country that received complaints by the public through the post and telephone or in person. Complaints were verified and, if found true, the office or official responsible was exposed in news releases to the press or in a weekly DART radio broadcast. The DART programme proved very effective and is still in operation.

#### E. Rewards

21. Strong stimuli may be necessary to provoke the disclosure of corruption, because so many people believe that a corrupt system can be used to their own advantage. Probably the most historically reliable means of eliciting information is the offer of a reward, payable after confirmation of the accuracy and utility of the intelligence furnished. Such payments are often considered as solely criminal justice mechanisms, but customs and revenue services have used rewards for centuries to aid in revenue collection. Anti-corruption authorities can also make good use of rewards, subject to proper precautions, as a powerful incentive for co-operation by both anonymous informers and witnesses. This reference to payments of rewards to persons who wish to remain anonymous may seem internally contradictory. One means of accomplishing this seemingly impossible task has been developed by some police authorities and citizen's anti-crime associations. Often given neutral names ("Fight Crime Direct Line", or "Secret Witness", for example), to lessen the social stigma attached to the anonymous informant, the programmes are easily implemented at little cost. One or more discreet officers, preferably with sufficient law-enforcement experience to instil confidence in the persons with whom they deal, a secure office, telephone system and post-office box are normally sufficient, together with a means of publicizing the campaign. For corruption offences, it would seem easy to target the intended audience through television advertisements or the posting of notices in or near government offices. At a minimum, such notices need only use some attention-getting graphic device to capture interest, supply the reader with a telephone number or mailing address where information on corruption will be received, and explain that information found to result in criminal convictions or financial recoveries will be compensated while confidentiality will be maintained.

22. When a caller or correspondent inquires how this is done, the simple procedure can be explained. A code symbol or number is assigned to the caller and the information is furnished in writing or by telephone. If by telephone, the experienced desk officer will reduce it to an intelligible allegation and then forward it to the appropriate investigative or audit authority. To express a sense of priority and urgency, such call-in systems are often called "hot lines", whether or not they involve the concepts of reward or anonymity. When an arrest or seizure is made on the basis of the information, the promised sum will be paid in cash or other discreet fashion, subject of course to stringent integrity safeguards to prevent any suspicion of embezzlement within the programme. Because of the hope of reward, the source of information has a continuing interest in the success of the inquiry. This incentive for continued contact makes it possible to explore the original information and request additional detail and observations. Both from original and follow-up contacts, an originally anonymous source may be willing to meet investigators on a confidential basis, and even, ultimately, to become a publicly identified witness, once confidence is developed and fears of reprisal are overcome. Indeed, the requirement that intelligence on corruption should not only be accurate but should also lead to convictions or tangible recoveries in order to merit a reward may motivate the originally anonymous source to become a public witness if that is the only way sufficient evidence can be made available to justify a reward.

#### F. Screening allegations

23. An agency with its roots in law enforcement, if chosen as the recipient of a stream of complaints that contain accusatory words such as "corrupt" or "crooked" but in substance allege inefficiency, will pay little attention to

them. Such complaints are far more likely to interest persons performing an auditory function. They have an interest in inefficiency, waste and incompetence, as well as in criminal wrongdoing, because their task is to measure performance effectiveness and the maintenance of certain standards in an agency's programme.

#### G. Auditing authorities

24. Auditing functions may have various configurations. One government-wide office may exist to monitor the effectiveness and efficiency of governmental programmes, and it may have an executive, legislative or conceivably judicial function. It could theoretically have direct operational responsibility for management audit and integrity inspections of every government activity. Perhaps more frequently, an office of government-wide competence will function primarily in a policy-making and supervisory role, as does the Secretaría de la Controloría General de la Federación, in Mexico. Then separate audit or inspection staffs may exist in each government agency (as do the "controlorías internas" in the Mexican Government). Sometimes the power to make legislative or public reports is vested in government auditors and occasionally they have statutory guarantees of operational authority, budgetary independence or other incentives to objectivity.

25. In addition to serving as a logical contact and screening point for both anonymous and attributed citizen complaints, an internal auditor can perform other valuable functions by stimulating and making use of the flow of information that is essential to identifying and combating dishonesty in government. An audit staff works throughout an agency and should enjoy a reputation for objectivity, because its organizational loyalty is normally owed only to the chief executive. With mobility and prestige, an audit staff is an obvious point of contact for the reporting of wrongdoing by government employees. To preserve employee confidence, a tradition of discretion may need to be established, but that should always be the standard in corruption inquiries. Audit staffs are also more likely to be technically knowledgeable than are members of a general law-enforcement authority. This means that auditors can perform necessary functions not only by screening complaints but also by interpreting them for less technically sophisticated criminal justice authorities, both at the time of initial referral and as a continuous resource throughout an inquiry requiring specialized knowledge.

26. The identification of areas of excessive cost and of inferior management controls also serves to detect and deter corruption in ways in which a criminal justice anti-corruption authority cannot. Penal jurisdiction is normally triggered only by a complaint or observation of conduct, which, if proved true, would constitute a crime. A criminal justice agency, even if it legally had discretion to do so, could ill afford to devote its resources to examining bid approval procedures for which no specific allegation of criminality had been received. A vigilant audit staff would perform just such an examination, recommend preventive and corrective measures, and also refer any evidence of wrongdoing to the penal authorities. A separate authority, which has not only criminal justice but also anti-corruption audit responsibilities can provide a public image of independence, and can identify, expose and lead to the correction of situations where the vulnerability to corruption is unacceptably high.

#### H. Employee motivation

27. Not only the public but also government employees need to be educated in ethics. Employees must be instructed, with periodic retraining, on what the ethical obligations of government service require. In this area, precision

and subtlety may have to be sacrificed to clarity and enforceability. It may be better to allow an employee to accept any type of hospitality in the form of food or drink, or to flatly prohibit acceptance of any hospitality at all, rather than to promulgate tortuous rules based upon the value, intent and nature of the acquaintance, which allow very compromising relationships so long as they are carried out artfully. Employees should receive the same message from government deeds as they do from ethical exhortations by their superiors.

28. Adequate resources should be expended to employ a competent work-force and managerial staff at a living wage. When government salary levels beget the question of how a person with a family can live on that income, a society is inviting corruption. When a clerk in a public office does not earn a subsistence salary, he will leave, cheat on his hours of work, steal, extort or take bribes. When an agency head making governmental decisions comparable to those of a corporate executive receives a salary comparable to that of a corporate clerk or manual labourer, the occasion for corruption is there, simply awaiting the right temptation. When a Government fails to pay salaries roughly commensurate with responsibility, it admits that governmental functions are not worthy of respect or professionalism and can be performed by anyone, no matter how poorly paid. If that attitude is communicated, the elements of altruism and idealism that bring some employees into government service are rejected, and the moral tone of the work-force is thereby lowered, while at the same time a certain moral reward is eliminated that could otherwise partly compensate for any disparity in pay.

#### I. Internal reporting procedures

29. A well-motivated civil service with strong standards of professional integrity can do much to resist abuse of office so long as its code of professionalism is not warped by a mistaken sense of solidarity or a defensiveness against acknowledgement of occasional wrongdoing. Institutions with effective integrity programmes generally have well-developed procedures to deal with potential dishonesty and the complicating factors of supervisory and personal relationships.

30. Procedures should be developed that impose on every member of the government establishment clear obligations and criteria as to what constitutes a reportable incident or allegation and to whom and how the report must be made. Such rules have the effect, when observed and enforced by management, of protecting employees from allegations of disloyalty, breach of friendship, self-promotion or bad judgement. Each organization can develop rules suitable to its own culture and counterpart organizations. Employees may be required to report to a supervisor at a certain level unless that supervisor is alleged to be involved in wrongdoing. One central point of report, an ethics officer for the entire organization may be designated as the primary point of referral or as an alternate contact when the allegation touches the supervisor who would normally be the primary recipient. The rules should require the creation of a permanent record by the maker or recipient of the allegation to permit subsequent accountability. The channel of transmittal to the appropriate investigating authority should be clear, with time-limits and explicit standards governing which allegations must be referred for review by a criminal justice authority. The primary goal is either for allegations to be brought promptly and accurately to the notice of someone at a responsible level of management, who then has the responsibility of following specific standards to decide whether to involve a criminal investigating authority, or for them to be submitted directly to such an authority by the employee.

31. A secondary goal is for the witness-employee who receives a citizen's complaint or even submits personal observations to remain as neutral as possible, acting as a messenger motivated by duty and not as an accuser. In this way, tension between the employee and the subject of the allegation is reduced to a minimum. To accomplish this, a corollary rule is necessary: the initiator of the report should not attempt to corroborate or disprove the allegation or suspicious circumstances. Any investigation to corroborate an observation destroys the neutrality of the reporter, who is no longer performing a reluctant duty but is doing the work of other authorities out of personal interest. An inquiry to rebut an allegation of apparent criminal conduct is also to be avoided, because the discretion to decide whether an investigation is warranted and whether an allegation has been disproved or satisfactorily explained lies with higher management or the criminal justice authorities and not with the employee making the report. If an anti-corruption authority to which the matter is referred decides to seek the employee's co-operation to secure additional evidence, then the desirability of doing so can be discussed by the employee, a supervisor and the investigating authority. If action is then taken by the employee, it will be obvious that it is at the direction of the investigating authority and agency management, and not on the employee's own initiative.

32. Somewhat more latitude should be accorded to supervisors or management officials in the reporting chain. Their broader perspective and objectivity may permit the initial allegation to be amplified by relevant data reflecting prior complaints or disciplinary actions against the employee for similar misconduct, or a history of animosity between the complainant and the target of the allegation. These facts may be necessary to a fully informed decision whether or not to conduct a criminal inquiry. Even action at the supervisory level should be limited to a discreet accumulation and transmittal of existing data, so that investigative options are not foreclosed for the criminal justice authority. What is almost always to be avoided before transmittal to the investigating authority is a confrontation of the suspected party with the substance of the allegation. The question of what constitutes an allegation or an observation that must be reported should be dealt with in employee manuals and training sessions. Different formulations are possible, and the standard may be difficult to put into words, but it might focus upon whether: (a) an observation has been made or an allegation received; (b) whether it has been made by a person in a position to have reliable knowledge; (c) whether it involves conduct that would constitute wrongdoing meriting investigation; and (d) whether it occurred as the reporting party understood it or as it would appear to an impartial observer.

#### J. Disqualification

33. As an administrative precaution in sensitive situations, as a preventive measure against corruption and as a means of protecting the reputation of employees and of government operations in general, disqualification has much to recommend it. The motivations and merits of a decision are not relevant, only whether impartiality has been preserved by the withdrawal of any officials who have any personal or financial interest in the issue. The rule of disqualification is easy to administer and can easily become a moral imperative: when in doubt, disqualify! If vigorously applied by policy-makers who set an example for subordinates, one of the principal causes of public distrust of government might be reduced. Such public distrust arises from the conspicuous concentration at the seat of government, within easy view of the news media, of political parasites, so called influence-peddlars. Often trading on a personal, political or business acquaintance with officials in power, these persons earn fees through express and implied representation that they can

secure access to decision-makers and exert influence in favour of their hopeful, sometimes gullible, and always advantage-seeking clients. In a governmental culture where disqualification for personal or financial interest has become the norm, such tactics are not only an embarrassment, they become unproductive. The influence-pedlar who continues to boast of his or her ability to influence an office-holder because of personal, official or political familiarity virtually accuses the office-holder of a criminal offence or administrative violation by failing to withdraw from a matter in which the asserted personal friendship would be grounds for disqualification. Moreover, disqualification regulations provide a useful defence mechanism for the honest official, who can invoke them against those attempting to influence his or her decisions.

#### K. Consequences of pending allegations for personnel

34. Some would say that even anonymous allegations may properly be taken into account in personnel decisions and that one should not risk promoting a person under suspicious circumstances or while an inquiry is under way. The obvious inequity of such an approach is that a disgruntled individual legitimately compelled to abide by certain regulations or standards may be responsible for false accusations, or a rival for a supervisory position may know the personnel system well enough to manipulate it so as to exclude the honest official from a promotion opportunity by making or provoking a disqualifying allegation.

35. A preferable approach may be to treat anti-corruption inquiries as having no effect on personnel matters unless and until concluded adversely for the employee. A compromise position might temporarily bar consideration of a person under inquiry from promotion, but would permit only temporary personnel assignments until the inquiry was completed. It is frequently impossible to impose arbitrary time-limits on any inquiry, even if important personnel actions are thereby delayed. However, some reasonable outside limit may be fixed after which the employee would again be eligible for favourable personnel action, subject to removal if the continuing investigation proved well-founded. What should be avoided is the susceptibility of a personnel and internal inspection system to manipulation by allegations or continued investigations when no productive investigative results are reasonably anticipated.

#### L. Means of countering intimidation

36. Sometimes physical threats may be made, the severity of which depends upon the personalities involved, how accustomed they are to the use of violence, the scope and profitability of the suspected corruption, and the probability of sanctions. When the threat of violence is severe, all of the countermeasures available to deal with threats from terrorists, organized criminals and narcotics-traffickers may have to be considered. A programme may be necessary that would allow witnesses to be protected or relocated. The investigating authorities and their families may need to be housed for months or even years in secure military installations. Both office and home telephone calls may have to be received over a recorded police line. A pool of prosecutors and investigating magistrates may be developed, as in the "Palermo anti-mafia pool", to diffuse responsibility and to prevent one person from becoming the sole institutional memory and solitary target. A special centralized and easily defended court, whose members are chosen for their invulnerability to intimidation, may be created. Diplomatic or academic assignments abroad may and are being used as a combination of reward and cooling-off period after a particularly sensitive and dangerous investigation.

37. Other threats may be more subtle: suggestions of a diminution of career opportunities, of bad results in future matters before a certain court, or of unfortunate budget consequences for the investigating unit. These are easy to convey in terms that make criminal prosecution difficult, but are clearly understood by civil servants. A way must be found to deal with these subtler forms of intimidation, the thinly veiled suggestions that if an employee were to pursue certain serious allegations, his or her reputation would suffer and professional advancement would be impeded. In a society in which anti-corruption authorities are vulnerable to retaliation, citizens rely almost exclusively upon individual courage. Clearly, it would be far preferable to develop and nourish an institutional culture of independence and professionalism in criminal justice authorities, which would reinforce the strong and compel the weak to rise to the group norms of honesty and integrity. Such a culture requires independence. If anti-corruption inquiries are carried out by an investigating magistrate, then the principles of an independent judiciary can help to insulate the magistrate from unwanted contacts and undesirable pressures.\* If the anti-corruption authority is a police or prosecuting body, ways must be found to ensure independence from improper influences within the executive branch of government.\*\* In special cases, the legislative branches may create their own anti-corruption committees or staffs. Periodic and public reports to the legislature summarizing the activities of anti-corruption entities and emphasizing difficulties encountered or efforts to obstruct its inquiries should be mandatory.

38. In all of these cases the sine qua non is a power figure dedicated to independent investigation of an allegation on its merits, who will protect the anti-corruption authority from improper pressures or will allow it space to develop sufficient organizational strength, and institutional and public support, to resist and ignore threats of career retaliation. This strength may be enhanced by a career service. A well-educated, well-trained civil service, which provides a ladder of advancement sufficient to attract and keep first-rate people and to give them authority and responsibility, can obviously do much to develop internal resistance to outside influences, including corruption. What is essential is the development of a tradition of professionalism in government, in the sense of an organized body of knowledge on the conduct of government, whether imparted academically or acquired by experience, together with a set of ethics recognizing that because of its power, the profession of public administrator has special responsibilities to the citizenry, including an obligation to resist intimidation.

#### M. Codes of ethics

39. Additional obligations of the government administrator can be derived from sources such as the Principles of Public Service Ethics of the International Institute of Administrative Sciences, which coincide with the

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\*See the Code for Conduct for Law Enforcement Officials (General Assembly resolution 34/169). See also the draft Guidelines on the Role of Prosecutors, which will be before the Congress (Official Records of the ECOSOC, 1990, Supplement No. 10 (E/1990/31)), chap. I, sect. C, decision 11/116, annex.

\*\*See the Basic Principles on the Independence of the Judiciary (Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985 (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2).



lessons of practical experience. Chief among these is the duty to perform a full day's work for a full day's pay. This means that employees must serve the public and not resort to or profit from interminable delays that provoke people into offering gratuities merely to encourage the performance of what should be a duty. Any special fees paid for services should go to the State, not to employees. Any additional compensation paid to the employee should be based upon his or her productivity and not upon the willingness of citizens to pay for services, as such a standard invites extortionate practices. Ultimately, professionalism in government may mean no more than simply justifying public trust by putting the interests of the citizens and the government above private interests.\* Fidelity to that principle would limit the conflicts of interest, favouritism, gift-taking and nepotism that make government distrusted in so many nations.

### III. PROCEDURES FOR THE DETECTION, INVESTIGATION AND CONVICTION OF CORRUPT OFFICIALS

#### A. Defining tasks and resources

40. When an investigating authority has to deal with a case of suspected corruption, certain fundamental management questions may need to be resolved. If the investigator's jurisdiction has been previously defined, and the matter arises within it in a routine manner, for example through a police or citizen report to an investigating magistrate, then little discretion or room for manoeuvre is left. In cases of corruption, however, the need is often felt at the policy level to make new or special arrangements, as mentioned earlier (chap. I. sect. G, above).

41. The investigator brought into a corruption investigation with a new or extraordinary responsibility will often find the situation very fluid. Occasionally a timetable will have been announced for the investigation by a policy-maker with little conception of investigative realities. More frequently, the policy-maker will be happy to transfer not only the investigative responsibility but also the responsibility for placating news media and public interest to the new anti-corruption authority or supervisor. Policy-makers may be unaware of the way in which a corruption inquiry is to be conducted and, being perhaps relatively uninterested in the matter, they may be willing to agree to any reasonable-sounding terms so long as the problems of the moment, the media or legislative inquiries, disappear. Consequently, a new or specially appointed anti-corruption authority may have the unaccustomed bureaucratic luxury of negotiating or defining the scope, resources and configuration of the unit.

42. The investigator who promptly analyses the anticipated needs of the inquiry to be conducted may have an unprecedented ability to secure them in the midst of a public clamour that effective action be taken. This is when it is necessary to strike while the iron is hot. During the appointment process or in a subsequent inquiry, most policy-makers are loath to let it seem that they have refused to grant the new authority the resources that it insists are necessary to the investigation. Even more damaging would be a situation in

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\*In accordance with the recommendations of the Interregional Seminar on Corruption in Government, held at The Hague from 11 to 15 December 1989, a draft model international code of conduct for public officials is now being prepared.

which the policy-maker risked the embarrassment and suspicion that would result from it becoming publicly known that the designee had declined to serve because he or she had been denied adequate resources to do an effective job. But once the attention span of the media or legislature has lapsed and new crises have claimed public attention, there is little reason to re-evaluate or enlarge the resources or power previously given to the anti-corruption unit or investigator, and even a resignation or request for transfer by the supervisor is unlikely to be as feared as it would have been initially. If decrees must be issued to create the authority, they should be reviewed with the designee to ensure that all necessary provisions are included. Special attention should be paid to any potential overlap and conflict with other agencies.

43. The experienced investigator will also foresee areas of conflict with the targets of the inquiry and with the appointing authority itself, and will attempt to secure binding commitments in all problem areas. If it can be foreseen that an intelligence agency will be reluctant to produce information in an inquiry into financial misconduct, it would be wise to secure a binding commitment, from a policy-maker with power to enforce it, that necessary dossiers and witnesses will be provided. A request to investigate alleged bribery in one small aspect of a massive and highly suspicious contract might deal only with the tip of the iceberg, while a mass of other corrupt practices lurk just beneath the surface. The investigator must then make a value judgement concerning the scope of the authority's mission: for example, whether it should be narrowly confined, that is to say, to the initial corrupt act of bribery or embezzlement, which may be proved without obstacles because only persons at a low level are involved, or whether, in recognition of the probable breadth and volume of corruption in the programme, a broad mandate should be sought. If the latter, riskier, course is chosen, and it develops from the inquiry that the initial allegation was representative of systemic corruption at high levels, initially supportive policy-makers may become less enthusiastic. This may not in itself be an indication of corruption. Rather, it may simply reflect the fact that an anti-corruption authority may be created or designated as much to reduce a public relations problem as to secure punishment for wrongdoers. The unpleasant consequence of investigative results that promise even more adverse publicity may simply not have been seriously thought through and cannot be expected to be welcome. In certain societies, accusations of misconduct by the investigating authority are routinely used to derail corruption inquiries, particularly if the practice is to suspend personnel or assign them to other duties while such an allegation is being investigated. When such a counter-attack is probable, it may be necessary to seek an agreement that there will be no suspension or transfer during the corruption inquiry or that it will occur only under rigid guarantees.

44. In addition, if requests for foreign evidence, tax or personnel records, or other official documents present thorny legal issues or could be subject to obstructive delays, expeditious and guaranteed procedures should initially be demanded as essential. If high-ranking officials are potential witnesses but can be expected to evade testifying or producing records, the appointing decree should order the co-operation of all public employees under penalty of forfeiture of office and benefits. Many other realities of legal competence and organizational and supervisory relationships will dictate what powers and resources an anti-corruption authority will need to ensure at the time of its establishment.

45. Diplomacy may dictate that more can be gained by candid exposition and polite requests than by demands and conditions. It would, however, normally seem highly desirable that there should be a written record, documented in correspondence and aide-mémoire, to demonstrate that the powers in charge were

put on notice as to what resources were necessary. Such a record would weigh upon policy-makers' decisions. Subsequent inquests and attempts to impose accountability are common consequences of corruption scandals. A written record will protect the personal and professional reputation of the anti-corruption supervisor or authority, who asked for but was denied adequate tools to do a professional and successful job, and will not enhance that of the policy-maker who denied the requests. This question of protecting the investigator and the investigating unit's professional reputation looms particularly large when the probabilities of an unsuccessful outcome and accusations of a cover-up or of incompetence are greater than the probabilities of success.

46. The most difficult tasks are likely to be inquiries into internationally funded programmes or foreign conduct in which illegality is feared or suspected, or attempts to trace international bribe payments to determine who the recipients were, whether the funds have been dissipated, or whether property remains to be confiscated and forfeited. An anti-corruption authority may anticipate an inability to uncover the true facts owing to the consensual nature of bribery situations, the passage of time, the subtle ways in which bribed influence is exerted, and the sophistication and resources available to shield the criminals. In such situations the appearance of impropriety is proverbially as damaging to public confidence as is the impropriety itself. Duty may require that a sensational inquiry be conducted, such as exploration of probable bribery of high government officials or a search for the missing wealth of a looted country, even though a realistic prognosis is unfavourable. When such a high-profile inquiry is unproductive, the believers in grand conspiracies and those who can profit in a political or journalistic way by alleging a cover-up can be relied upon to do so. Consequently, precautions are necessary when venturing into any high-risk corruption inquiry or pursuit of forfeiture. The written record should document the fact that the powers and resources sought are essential and have been granted. The inquiry or search for assets may need to be conducted even more exhaustively than would be normal to preclude allegations of laxity. If forfeiture and tracing efforts require discretionary action, any compromise or decision not to seize must be decided by the highest possible authority on the basis of fully documented justifications.

#### B. Covert and consensual nature of corruption

47. The difficulty of securing useful information about official corruption is a basic problem. Complaints are often scarce because of the inherently covert and consensual nature of most corruption offences. Bribery excites no complaint, as both guilty parties profit from their illegal arrangement. Extortion may involve an unwilling victim but produce no complainant because of the citizenry's lack of confidence in the anti-corruption process. A further difficulty is the reality that concentrations of wealth and corruptible influence are likely to occur in highly complex and specialized government activities. As a consequence, fraud can be easily camouflaged so that it will be invisible to the non-expert, including the average investigating authority.

48. Two consequences arise from the consensual and covert qualities of corruption and its often highly technical and specialized nature. First, a means must be found to make technical expertise and usable information available to the anti-corruption agency. Secondly, that authority must consider seriously what type of targeting strategy is appropriate to the kind of corruption being confronted, subject to the constant reminder that, by its very nature, information is likely to be difficult to obtain. The question of securing technical

expertise is intertwined with the entire subject of guaranteeing the essential flow of information about corruption from within agencies and from the public at large.

### C. Selection strategies

49. Exposure of corruption must be both publicly and governmentally generated, and both from within programme agencies and by the criminal justice authorities. In responding to referrals from programme agency auditors or to complaints, anonymous allegations and news media exposés, or in pursuing its own initiatives, a law-enforcement authority must, consciously or subconsciously, follow some strategy. The degree to which a strategy can be applied must take into account the principle of mandatory prosecution where that principle prevails. However, in any system, selections must be made as to which matters can be sent to the archives without action because there is no identifiable suspect, or in which cases a lack of grounds to proceed can be resolved through investigation. Among the investigative targeting approaches that may be considered are purely reactive strategies, described here as either a default strategy or one using standards to achieve priority setting; intelligence-based targeting; and a decoy and integrity-testing approach.

#### 1. Default strategy

50. Probably the least defensible approach is a response to the stimulus of a complaint or a news media story based upon the whim of the moment, without any governing standards or master plan. Such responses allow investigative resources to be applied in an uncontrolled fashion to what seems like the most vulnerable or newsworthy target of the moment. This approach, here termed a "default strategy", risks the absorption of substantial resources in cases that are simple to solve or interesting to investigate but have little programmatic impact. For instance, if the level of inventory leakage due to employee theft is 5 per cent, whereas the typical kickback on the purchased materials is 10 per cent, the distortion of priorities is evident, without even mentioning the level of persons likely to be involved in each case.

#### 2. Priority-setting

51. A more defensible and efficient strategy based upon reaction to externally presented referrals and complaints would involve some form of priority-setting according to conscious criteria laid down in advance and consistently applied. For obvious reasons, inquiries and complaints from the legislative branch or arising out of sensational mass media exposés may be accorded immediate attention rather than inquiries not yet in the public domain. Some inquiries can be declined immediately or with minimal action if the offender cannot be identified without disproportionate expenditure of resources. Others may demand immediate action while the offence is still being committed or before crucial evidence is lost. Wrongdoing that is on the borderline between administrative and criminal misconduct can be subject to guidelines, if local law permits, providing for exclusively administrative handling, or summary referral by a criminal justice authority to administrative authorities, if the offence is minor and the sanction is adequate, for example discharge from government service and a bar on re-employment. Establishing and enforcing such guidelines can at least permit the allocation of resources in a consistent and accountable pattern, which can then be adjusted by a process of programme evaluation to meet changing goals or priorities.

### 3. Advantages and disadvantages of reactive strategies

52. Both the above targeting approaches are reactions to external stimuli. There is no expectation that the law-enforcement authority will create its own investigative opportunities and thereby make the allocation of its efforts independent of complaints and referrals. Such reactive strategies have the negative virtue of being non-controversial. The investigating authority is less likely to be accused of partisanship and to be the target of institutional hostility from an entity under investigation when it is apparent that the inquiry was dictated by a complaint or outside pressure and was not the product of the authority's whim or improperly motivated desire to impair organizational or personal reputations. Nevertheless, purely reactive strategies are subject to criticism because of the inherently covert and consensual nature of most corruption. Exposure and prosecution of only the most blatant and unsophisticated offences may simply perpetuate the status quo, placating public opinion without really exposing or threatening large-scale corruption. Reactive strategies provide no mechanism for exposing the far more costly effects of sophisticated corruption, inviting the cynical conclusion that the system protects the corrupt but powerful official by sacrificing the clumsy petty thief. These anti-egalitarian consequences of reactive strategies and their obvious inability to reach corrupt practices that are well hidden or difficult to comprehend, provide the impetus for developing alternative strategies for target selection.

### 4. Intelligence-based strategies

53. One alternative strategy, based on intelligence received, may permit some fixed percentage of resources to be applied in a reactive fashion against easily detectable or sensational cases. Its principal focus, however, is on the application of a relatively small percentage of investigative resources to the collection, analysis and generation of criminal intelligence to identify targets with a substantial programmatic impact. Most of the resources are then applied to the development of cases targeted as a result of this intelligence-gathering and evaluation process. Anticipating, or having experienced, frustration and a lack of worthwhile intelligence data as a result of typically reactive strategies, anti-corruption authorities may elect to use traditional investigative and intelligence gathering techniques not merely to investigate reported cases, but also to identify cases to be investigated. The law-enforcement authorities may gather intelligence on the connections of public officials to known criminal elements or may ask that travel and immigration records be provided so that they can select for investigation frequent travelers to particular destinations. Of course, any targeting of individuals can be controversial because of the danger of damage to individual reputations and the possibility of abuse to further a personal, organizational or partisan vendetta. An approach that somewhat reduces those dangers is the risk assessment of a unit or programme rather than of individuals. In the last analysis, the suspects being individuals, their reputations may be hurt by the suspicions that accompany a corruption investigation, and the person responsible for a targeted programme or office can always be blamed for personal or political bias in selecting a target for investigation. This is, however, an unavoidable risk, which can be reduced to a minimum by maintaining the highest possible standards of professionalism, objectivity, discretion and integrity in the investigation authority.

### 5. Integrity-testing

54. A far more controversial targeting strategy is one that employs decoys and integrity-testing tactics. Examples may include members of a police

integrity unit dressed in civilian clothes, driving rented cars in an apparently drunken manner to ascertain if police officers will stop them and solicit a bribe in lieu of an intoxication test, or the willingness of an investigator posing as a foreign investor to pay bribes to legislators to secure favourable treatment for a proposed investment. The criticisms of these devices are substantial. They arguably express an intolerably cynical view of how law enforcement should operate, which can damage public respect for the law; a decoy may be seen as manufacturing simulated crime when no real crime is provable; and it could also be argued that the weakness of human nature may permit law enforcement to target, trap and destroy almost any opponent, political, personal or ideological, that it chooses.

55. As a response to these criticisms, the analytical observation may be made that hidden corruption can continue indefinitely until exposed, and that no other technique has the capability to penetrate the secrecy of bribery and other abuses of office. The pragmatic argument that accompanies the theoretical analysis is that decoys and integrity-testing have proved effective and have on occasion revealed depths, and heights, of corruption never previously exposed. Proponents of these tactics generally concede that limitations must be placed on the types of subterfuges and inducements used. While there is little agreement on how these limits should be enforced procedurally or even how they should be defined, there is also strong agreement that such tactics should be regulated by clear guidelines.

#### D. Plan of action

56. Regardless of what targeting strategy it follows, a law-enforcement or criminal justice unit must, at some point, decide how to pursue a particular investigative opportunity, and how to deal with the government entity in which corrupt activity is suspected. In corruption investigations, it is unfortunately common for a polarized atmosphere to prevail, the law-enforcement authority adopting a righteous attitude that dishonesty is the norm outside of that authority, and the target entity complaining that its many honest employees are being unfairly criticized in the news media for the suspected misdeeds of a few. In view of the infinite variety of situations that can arise, it would be helpful to attempt to identify some general principles that a corruption-investigating authority should consider in organizing and pursuing an inquiry and in dealing with a suspect entity.

#### E. Publicity and the news media

57. All investigations of corruption should be conducted in a discreet and professionally responsible manner, although what constitutes a discreet and responsible inquiry will vary. It will never include those occasions in which detailed or sensational descriptions appear in the news media of allegations being investigated, based upon anonymous sources who are obviously knowledgeable. Such leaks are sometimes defended as a means of bringing forward additional witnesses and evidence, or of exposing and deterring wrongdoing when the corrupt officials may escape criminal prosecution because of the inability to assemble prosecutable evidence. The goal of securing additional evidence may be legitimate but must be pursued in conformity with the laws of investigative and judicial secrecy. The goal of exposing wrongdoing is only rarely permitted by laws that allow investigative findings not constituting a chargeable offence to be publicly reported, almost always under judicial or legislative supervision. In the absence of such laws and without rigorous compliance with their procedures, the disclosure of information capable of damaging reputations through unofficial channels seems tantamount to an abuse of authority, to an infliction of summary punishment by the investigating authority where no guilt has been proved.

58. The media play a potentially useful role in enlisting public and ultimately political support for necessary anti-corruption resources and legislation. They also have a legitimate role, as surrogates for the public, in guaranteeing transparency and accountability in government and particularly in the criminal justice system. Yet they are not an element of law enforcement and their interests are not congruent with those of responsible investigators, prosecutors and judges. When the laws and procedures of a culture dictate disclosure of investigative action, and the resulting publicity inhibits criminal conduct or increases the available fund of intelligence and evidence, justice is being served. When an investigation or a suspect is still protected by judicial secrecy but is disclosed because someone within the investigating authority is impatient with the delays and restrictions imposed by secrecy laws and implements a personal judgment that exposure is warranted, justice is not served. Such situations provoke the understandable suspicion that personal or institutional favour is being sought with the media. Since they may result in illegal damage to reputation, they should be avoided and discouraged by effective administrative or penal sanctions.

#### F. Dealing with the subject of investigation

59. When an anti-corruption authority receives information warranting inquiry, it must be determined which investigative options have been foreclosed. Thus, from the investigative point of view, a dominant consideration is that disclosure of law-enforcement interest should be avoided while there is any possibility of productive covert action. Occasions may arise when evidence of admissions, acts of concealment or further criminal conduct may be secured by combining covert surveillance with overt but partial disclosure of investigative interest. Those situations may be infrequent but, like a completely covert investigation, they require that the investigating authority should control the extent and timing of any disclosure. Even when investigative action becomes overt, secrecy is advantageous because it minimizes the likelihood of destruction of evidence, intimidation of witnesses and fabrication of defences.

60. Given the advantages of secrecy, it is a great temptation for an anti-corruption authority to adopt a garrison mentality, assuming that integrity exists only within its ranks and that anyone affiliated with a unit or activity under inquiry must be viewed as under suspicion. Such an attitude is tolerable, though not necessarily healthy, so long as it is not manifested in counter-productive fashions, the most common of which is the failure to inform the persons responsible for a programme being investigated, even if they are not under suspicion. During a stage of covert inquiry, notification may be possible only in generalities and only to a person who will not permit the information to reach the targets. Since the purpose of the contact is to give notice but control its dissemination, the notification must be to a person who is under no obligation to inform others and is thus able to undertake a commitment of secrecy. Clearly, personal acquaintance, a good reputation for discretion or comparable guarantees of reliability are necessary before such a confidence can be imposed. Once overt investigation commences, the notification becomes less a matter of reposing a confidence than an essential bureaucratic courtesy. It is a self-serving means for the inquiring authority to discharge its function and simplify its task.

61. The limits of any notice or explanation to persons responsible for the activity under inquiry must always be limited, on a "need-to-know" basis. Courtesy may dictate that initial contact be made by a law-enforcement authority of rank comparable to the executive being informed. The explanation proffered may detail how non-disclosure of investigative direction and findings is compelled by judicial secrecy and the need to protect members of the recipient

organization from any suspicion that they might transmit investigative information to the suspects. It may convey little real factual data, other than what co-operation the investigating authority wants to assist it in its inquiries, but it aligns the programme agency leadership with the anti-corruption authority and permits it to preserve its authority and self-respect vis-à-vis the public and within the agency.

62. Given the risks involved, it may be difficult to understand why an investigatory authority should notify those responsible for a suspect organization or activity of the existence of an inquiry. In the overt stage, the availability of resources and increased investigative efficiency that comes from enlisting the assistance of the target organization can be substantial. Such an organization has little choice in terms of public relations save to co-operate. The suspects may be removed from positions where they can obstruct the investigation and assigned to temporary duty elsewhere. Resources of the programme agency can be levied upon to assemble and screen documents or other evidence, even though the criminal investigators make the final examination. Moreover, honest persons with pertinent knowledge or evidence may be found in almost any organization, no matter how corrupt, and it is poor practice to denigrate the institution and provoke a hostile and defensive reaction by even its honest employees, who may already be facing substantial disincentives to candid co-operation.

63. Bureaucratic self-defence can also dictate that those responsible for a suspect activity or unit be notified, even in the covert stage. No investigation is guaranteed success. If a covert operation has a substantial risk of being disclosed in an embarrassing manner, if the motives of the investigating authority can be made to appear suspect, or simply if the investigation will be controversial, the investigating authority must consider notifying the person responsible for the target agency. Such notification benefits the target agency by demonstrating, when events later become known, that the agency itself, or at least the policy-maker responsible for its operation, is a trustworthy element of government, that only some individuals or activities are under inquiry, or at least that the policy-maker is co-operating in improving a corrupt situation. Indeed, an anti-corruption authority that acts without regard for such considerations may ultimately find itself at odds with political authorities who see it as an unrestrained and irresponsible destroyer of organizational or personal reputations. Moreover, consultation in which an agency head is briefed on the general premises and thrust of an inquiry and no objection or constructive suggestions are voiced precludes later criticism that the investigation was ill-founded, incompetently planned, or would have been successful if only more consultation and co-operation had been sought. Finally, there is a legitimate public interest in ensuring that corruption is not permitted to continue any longer or any more extensively than is necessary to permit the development of a sound prosecution. Indeed in some situations, (for example corrupt tolerance of the disposal of hazardous wastes, of transportation safety violations, of drug importation and distribution), immediate termination of the practice, whether accomplished administratively or by criminal justice measures, may be as important as any ultimate conviction.

#### IV. LEGAL PROVISIONS FOR THE FORFEITURE OF FUNDS AND PROPERTY DERIVED FROM CORRUPT PRACTICES

##### A. Concept of forfeiture

64. In recent years, a number of legal systems have come to attach new significance to procedures to confiscate and forfeit property associated with



and derived from illegal activity.\* The need to combat organized criminal activity, especially narcotics trafficking, more effectively has caused confiscation and forfeiture to be regarded with new respect as a strategic weapon, as a total economic disincentive to organized criminality for profit, and as a means of identifying and taking away the financial advantages, and the resulting power, of anti-social conduct. In some legal systems, the new concept has necessitated a reformulation of forfeiture from a legal mechanism focused on an identified object to a punishment imposed on a person but measured in terms of identified objects or a fungible amount of money. More frequently, the forfeiture concept was already broad enough to reach beyond seized objects to a wrongdoer's other assets. What was crucial in both situations was a result that permitted the State to take away all economic advantages gained through crime, not just the direct physical product of one offence and not just a fixed fine that might be wholly disproportionate to the much larger profit derived from criminal activity. In this manner the fruits of and incentives for crime were both removed.

B. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as it relates to forfeiture for non-drug offences

65. The value in narcotics law reinforcement of the forfeiture strategy set out in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (E/CONF.82/15 and Corr.1 and 2) has been broadly accepted. The Convention, using the term "confiscation" in the broad sense of both seizure and transfer of ownership to a Government, includes comprehensive provisions to ensure that proceeds derived from drug-related crime and assets illicitly acquired are confiscated. The Convention also includes provisions in article 5 regarding international co-operation on these issues.

66. The relevant provisions of the Convention represent the latest development in the forfeiture or confiscation strategy. Although limited to offences related to drugs, such provisions are under consideration in numerous other draft documents of the United Nations and in multilateral and bilateral treaties not restricted to drug offences. National legislatures are increasingly enacting forfeiture legislation aimed at both domestic and international situations, and not necessarily limited to drug offences. Any economically motivated form of criminality is vulnerable to the forfeiture remedy, and corruption is a quintessential economic crime, against which domestic and foreign forfeitures would have great effect. Moreover, because of the potentially vast amounts involved, there is a strong economic argument for ensuring that national wealth diverted by corrupt rulers can be traced, seized and forfeited.

1. Problem areas

67. The provisions of the Convention are a useful means of identifying some problem areas likely to be encountered in establishing and implementing protocols that are broad enough to apply forfeiture effectively against corruption and its proceeds. The first is that of banking secrecy, which is precluded as a grounds for refusal to act by article 5, paragraph 3, of the Vienna

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\*The term "confiscation" is often used interchangeably to mean either the seizure of property or the transfer of its ownership to the Government. In some societies, it has a negative connotation. Forfeiture is used less to denote the physical seizure of property and more to signify the process of transferring legal title to or declaring ownership in the government.

Convention. There seems to be a global ambivalence on this issue, some traditional tax havens having adjusted their procedures to allow more access to accounts and greater possibility of confiscation, while other jurisdictions have attempted to capture a greater share of the international market for confidential banking and financial services. There are obviously more factors at play in such decisions than purely criminal justice considerations. Once properly defined, however, it would certainly seem that corruption offences are no more deserving of banking secrecy protection than are offences involving narcotics drugs or psychotropic substances.

68. In article 3, paragraph 10, the Convention addresses itself to several thorny issues on which it may be easier to reach a consensus with respect to crimes involving narcotics than would be the case for those involving corruption. There are few maxims more likely to generate disagreement in discussions on international penal law than the political offence exception. Its existence is a universally accepted precept of customary international law; its contours are a welter of confusion among the domestic statutes, treaty provisions and customary law of individual States. It is variously defined by the nature of the offence, for example, violence committed in furtherance of and in proportion to the political aims of an organized armed revolt, or by the motive of the requesting State, namely, punishment in a politically discriminatory manner. One of its common uses is to protect former rulers from being extradited to be prosecuted for offences that are not crimes against humanity and for motivations relating to political partisanship. It can readily be imagined that a new régime desiring to secure the return and punishment of former officials could request extradition based upon alleged corruption offences, which might be accurately alleged or fabricated or might constitute legally dubious attempts to hold an official responsible for some dereliction of a subordinate or for some imprudent but not technically criminal expenditure. Fortunately, however, forfeiture is not as sensitive an issue as extradition. Property values, and not human liberty, are at stake. The mere existence of immense amounts of forfeitable wealth under the refugee official's control permits some preliminary judgement on the probability that wrongdoing was committed in its acquisition. Finally, as provided in the Convention, a country may subject international agreements to the interpretation of its domestic law. Thus, a corruption offence might not be categorized as a political offence excluded per se in a treaty or convention, but domestic courts could decline to order forfeiture based upon the finding in an individual case that the paucity of evidence and surrounding facts call for the conclusion that the particular request for forfeiture is politically motivated.

69. The related fiscal offence exception dealt with in the Convention is conceptually more of an obstacle. It frequently operates to shield the filing of false tax returns or the failure to report tax liabilities truthfully, which some countries regard as regulatory infractions rather than penal violations. Corrupt diversion of government resources may be as prevalent in some situations as tax evasion by businessmen, and may be expressed in analogous false declarations, filings and reports. It is to be hoped that States granting a fiscal offence exception to extradition and mutual legal assistance measures such as forfeiture will recognize the special threat posed by corruption to other governments and will treat it as an aggravated offence for which the fiscal offence exception would not apply. Unfortunately, given the conceptual basis of the fiscal offence exception and the fact that it is often found in the law of nations seeking to attract capital by offering banking secrecy, that exception may create problems for corruption forfeitures unless concentrated international disapproval succeeds in limiting its prevalence and scope.

## 2. Onus of proof

70. The Convention also provides a useful model with respect to reversal of the onus of proof,\* a procedural mechanism that can be of immense domestic significance in anti-corruption efforts. This approach has both tactical and strategic appeal. As a tactical weapon it offers a means of forfeiture which requires relatively few resources and involves little risk of unfairness or error. Strategically, placing the burden of identification and explanation of assets on the possessing official is tantamount to conducting psychological and tactical warfare against corruption. The constant fear of being required to account for ill-gotten possessions should either give rise to a state of anxiety, which would have a deterrent effect, or it should leave the corrupt office-holder with the dilemma of whether or not to report the matter. If the official wishes to have a plausibly legitimate explanation for all assets when called to account, a cover must be fabricated and he or she may have to submit a report at or about the time the bribe or extortion occurs, in order to provide a consistent historical explanation for possession of the camouflaged asset. This way, however, precipitate an unwanted inquiry into corrupt relationships and activities, thus demonstrating the utility and desirability of a burden-shifting rule in conjunction with reporting requirements. Careful consideration must nevertheless be given to the principles of due process, which in many jurisdictions are an integral part of the constitutional protection of human rights. Reversal of the onus of proof may, therefore, have to be restricted to the evidence and be made rebuttable in order to withstand any possible challenge on a matter of constitutionality.

## 3. Currency control and money-laundering

71. The Convention requires money-laundering or recycling transactions in drug-related funds to be criminalized. Such measures would be particularly valuable to anti-corruption programmes, because in major frauds upon the public treasury the offending officials are often eager to insulate their ill-gotten gains from discovery or from a change in political climate that might increase its vulnerability to seizure. Laundering of money within a country to disguise its origin and transfers to foreign accounts and investments have now become routine. Effective currency control measures can help to identify and repress any form of economic crime, including corruption, and it is to be hoped that such measures will not be limited, either domestically or internationally, to the drug trafficking.

# V. ECONOMIC SANCTIONS AGAINST ENTERPRISES INVOLVED IN CORRUPTION

## A. Corporate reporting and sanctions

72. Reporting mechanisms should be developed to impose upon persons doing business with the Government, or licensed by it, an obligation to disclose information, generally of a financial or business nature, which would help to warn of dishonest official activity. In this area, sanctions by administrative authorities may not merely reinforce the threat of criminal prosecution but may constitute an even more credible threat. When criminal sanctions are the only deterrent, experience leaves little hope that competitive corporations will fear bribery prosecutions sufficiently to forgo the desired commercial advantage.

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\*See article 5, section 7.

73. The addition of a bribery-reporting requirement does not change the equation when only the criminal justice authorities have the competence or motivation to expose and act upon the bribery or its non-disclosure. The simple reason is that the degree of secrecy necessary to make a bribe succeed, protecting it from the knowledge of competitors or of the contracting official's co-workers, guarantees that an outside criminal justice agency is unlikely ever to suspect the bribe, let alone be able to prove its existence. The picture changes when regulatory or taxing agencies, with access to the corporation's inner financial world and with substantial regulatory power, have an administrative interest in identifying and imposing sanctions for bribery or other corrupt conduct, or for failure to disclose such misdeeds.

74. An obvious example involves taxing authorities who routinely audit business financial records and expenditure. They have an incentive to uncover bribes, disguised as fictitious expenses, which will then be disallowed as tax deductions, increasing corporate tax liability, and perhaps tracing taxable income to a recipient. A corporation licensing authority, which also has the power to decide whether the corporation continues to do business and to issue stocks, bonds and other securities, on the basis of access to corporate financial data, may have a regulatory stranglehold. When periodic reporting to such authorities is required, or questions must be answered about suspect transactions or activities, there is a decidedly increased probability that wrongdoing will be discovered. That probability, and the relative likelihood of administrative sanctions compared with the improbability of criminal sanctions, can deter bribery as too risky a marketing strategy. It can also play upon the divergence of interests within a corporate structure and allow the conscientious, reform-minded or simply self-protective auditor or board member to insist upon accurate reporting on the required forms. Once that result is accomplished, the corrupted official would obviously be vulnerable, with few defences.

75. Obligations similar to the reporting requirements imposed upon government employees as a condition of employment should also be imposed by administrative or regulatory agencies on all persons and entities seeking public contracts or public licences or concessions, to reduce corruption substantially. Depending on the needs of the situation, a vendor can be required to make all premises and records available for government audit, or to report any fees paid in connection with a public contract or near to the period of holding such a contract. Anyone doing business with the Government can be required to reveal any involvement with public officials or employees, or persons related to or associated with them.

76. The list of useful informational requirements is endless, but should be limited to those that do not impose so many transaction costs as to be uneconomical, thereby discouraging otherwise qualified and honest bidders or vendors. At the same time, enforceability should be a prime consideration. As reporting requirements are spread outward from a core group of government decision-makers to reach private persons and entities doing business with the Government or with the public under government license, the increased size of the reporting environment decreases the probability that the reports will be rigorously reviewed and irregularities vigorously pursued. Accordingly, sanctions for violation should be as self-executing as possible so that lack of enforcement resources will not render the reporting requirements illusory. A government contractor or licensee who has ignored or falsified reports is not likely to represent a large but docile establishment, which meekly accepts heavy financial penalties and debarment from future government contracts. Much more probably, the violators will be a bankrupt entity, against which administrative and regulatory measures are useless, or a major and predatory

corporate enterprise, which will employ every political, financial and legal advantage to obstruct and resist sanctions. The auditing or contract compliance authorities, which must respond to reported violations, should recognize these dangers, as should contract negotiation or licence-issuing authorities. Also, initial governmental action should be clearly made conditional upon acceptance of built-in, self-executing sanction mechanisms. Payment schedules on contracts can provide for a hold-back, a reserve payment to be released only after a final audit and certification not only of contract performance but also of compliance with all anti-corruption clauses. A licensee can be required to post a bond or supply sureties to permit financial recovery in the event of a breach of integrity provisions in the licence. These remedies should be characterized by the simplest procedural steps consistent with administrative fairness, so that the cause and effect relationship of non-compliance and sanction is apparent and its deterrent effect is not diluted by delay. Conversely, cumbersome procedures that make administrative sanctions a prerequisite to judicial action may need to be replaced by a simple judicial finding of prima facie liability. Such a change would speed up prosecution and reduce the potential for the judicial process to be frustrated by corrupt influence at the administrative stage.

77. Since much of the corruption and diversion of resources in developing economies is focused upon the concentrations of foreign development capital or assistance funds entering the economy, special precautions are necessary for those funds. The controls that donor entities or organizations may attempt to impose in practice have irritating aspects, but the underlying desirability of anti-corruption controls enforced by the source and receiving nations, entities or organizations are apparent. In contractual situations, certain notorious instances of bribery in mammoth technology and weapons procurements suggest that the ethical standards of multinational and giant national corporations are constantly in need of administrative and regulatory reinforcement. Owing to the vital national interests involved in defence, technology and development contracts, the play of political interests in both the contracting process and in any controversy over sanctions is unavoidable. Given that reality, bonds or escrow deposits that are readily forfeitable for integrity lapses and are of a sufficient magnitude to have a realistic deterrent effect, or reasonable debarment procedures are particularly desirable measures.

#### B. Corporate forfeitures

78. Forfeiture, enhanced by modification of the onus of proof regarding the origin of suspect property, can be a powerful deterrent to misconduct by government officials. Confining that remedy to public employees, however, would ignore much of its potential. It is true that payments exacted by a public official from unwilling citizens, directly or through a network of subordinates, can yield substantial proceeds and forfeiture possibilities. Yet consensual relationships are the rule in most cases of major corruption, whether involving deposit of State funds, sale of governmental assets or execution of supply contracts. Clearly, the anti-corruption investigator should seek to trace, seize and forfeit the fee paid to persons for no reason other than their service as intermediaries for the deciding government official. The paying entrepreneurs should also be held criminally responsible for their willingness to engage in corrupt practices.

79. These measures have, however, been demonstrably inadequate. Corporations, trusts and the myriad of modern business structures exist for the very purpose of avoiding personal liability. They have been used to avoid criminal and civil liability by diffusion and deliberate obfuscation of responsibility,

compartmentalization of knowledge, ambiguous or inadequate documentation, and all the other devices that enable heads of corporations to make a plausible disavowal of involvement. Moreover, the probability of extended incarceration for an executive involved in non-violent, non-life-threatening bribery is very unlikely. Also, the chance to skim off a substantial portion of the allocated payoff money is sufficient inducement to secure a "willing" executive. Payoff transactions are often deliberately allowed to be structured so that an aggressive project manager can set a sales and promotion budget and spend it without accounting to higher authority. In this way, whatever means are necessary, no matter how unsavoury (bribery, the use of prostitutes or cocaine, the hiring of private detectives or the discrediting of a competitor's product) can be taken without "corporate" knowledge. If exposed, the executive responsible can resign, or even be publicly disgraced and dismissed, although probably without interrupting the highly favourable pension benefits or severance payments that insure the corporation or its other knowledgeable executives and board members against blackmail. All this provides the necessary incentive for the project manager to continue to accept complete responsibility for the conduct that earned so much profit for the corporation.

80. To gain maximum effect from the use of forfeiture to deter and punish corruption, the remedy must be applied against the economic entities that have most at stake. Executives of a corporation or other business entity are under constant pressure to earn a competitive rate of return without unduly jeopardizing the corporate assets. If the sanction against bribery in connection with a contract or other form of corruption is a fixed civil or criminal fine, the improbability of being discovered or, if discovered, of being convicted, results in the amount of the potential corporate fine being discounted by the various improbabilities until its financial deterrence becomes illusory. When participation in a corrupt activity is formally declared to go to the essence of a contract or other governmental relationship, and the consequences become potentially catastrophic not only for the subsidiary created to shield the corporate parent from full liability but also for that parent multinational corporation, true economic deterrence may begin to be felt. If loss of all of the funds paid under a contract secured by bribery, or all the corporate assets used under such a contract, plus a multiple of several times the amount of the bribe, as well as the corporate charter and ability to do business in the State, or some other doomsday consequence, is feared as a result of bribery, the corporate calculus of whether a sales contract is worth a bribe may be performed with different results.

81. It should also be noted that the individual instigator of a case of bribery cannot be allowed to escape forfeiture. Bonuses or funds directly taken for or from the corrupt activity or arrangement should be forfeited. In addition, consideration should be given to the necessity for punitive deterrence, for a sanction that will discourage an executive from taking the responsibility for acts resulting in profits to a corporate principal. One way to accomplish that goal is to make an executive responsible jointly and severally, that is, equally and independently liable for whatever forfeiture is imposed upon the corporation for which the executive acted. When participation in bribery means that a forfeiture will be ordered that will be large enough to take away not only all direct proceeds of the corrupt transaction but also the retirement, severance and accumulated benefits of company employment, the number of persons willing to risk what will no longer be merely a ritual sacrifice is likely to decrease.

## VI. TRAINING AND EXCHANGE OF INTERNATIONAL EXPERIENCE

82. Since corruption appears to be a phenomenon to which no society, developing or developed, is immune, there is a common interest in curtailing and - if possible - preventing it. The funds at the disposal of corrupting forces (especially when they originate from organized or drug-related criminal activities), as well as the power that they generate, are often beyond the capacity of many countries, particularly developing ones. Technical co-operation to countries that lack the resources and infrastructure to combat corruption is, therefore essential.

83. Multidisciplinary training and educational programmes could be developed at the international and regional or subregional levels, in order to pool expertise and resources that are often inadequate at the national level. Technical co-operation, to be provided from the start, could include model courses for universities, business and public administration schools, where available, training seminars for educational staff, and special scholarships or fellowships. Shared standards can form the basis of these programmes and help to find solutions to problems of common concern. International co-operation can also take the form of exchange of data and clearing house facilities, as well as the elaboration of comparative studies, which would assist countries in designing, formulating and implementing joint strategies and collaborative arrangements to prevent and control corruption.

84. The application of the measures outlined in this manual may require specific legislative or administrative reforms not always feasible under the present circumstances or legal structures of a number of countries. In this connection, assistance would be needed to review existing legislation and effect such reforms. In addition, training courses should be devised for judges, prosecutors and law-enforcement officials in order to enable them to deal with new, camouflaged forms of corruption and other economic crimes. The creation of special anti-corruption entities would also entail the availability of expertise and equipment to combine methods already applied successfully with the constant need for the collection and analysis of relevant data, as well as for the exchange of information and experience. The need for a multidisciplinary approach in the creation of these entities has become more and more evident in recent years, owing to the difficulties that investigative authorities are increasingly facing in corruption cases. Especially in the case of transnational bribery and corruption, the sensitive nature of the transactions and the usually high level of the officials involved, coupled with a variety of sophisticated techniques for the transfer and concealment of funds, makes detection of corrupt activities extremely difficult, if not impossible.

85. International co-operation therefore seems very important for securing substantive and admissible evidence and overcoming obstacles created by the differences in legal systems and the existence of banking secrecy laws. Bilateral investigative and judicial assistance treaties are needed to improve the situation and to avoid delays due to the lack of co-ordination in the investigative and prosecutorial efforts of competent authorities, resulting often in impunity of corrupt officials because of the fact that statutes of limitation have run out. Another aspect of international co-operation that deserves attention involves the implementation of model instruments, such as the new model treaties on mutual assistance in criminal matters, transfer of criminal proceedings and extradition, to be discussed under item 5 of the provisional agenda, for which enabling model legislation may be useful, as well as the setting-up of concrete arrangements for their practical application.