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Panel Three – Accountability and Immunity in IOs

Challenges posed by the UN Convention against Corruption for international organizations

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1. *Legal framework*

a. The United Nations Convention against Corruption

The entry into force on 14 Dec. 2005 of the United Nations Convention against Corruption (UNCAC) marked a milestone in efforts to combat bribery. By early March 2009, 131States had ratified it, suggesting wide acceptance in the world community.

The purposes of the Convention are:

> "(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
>
> (b)To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
>
> (c)To promote integrity, accountability and proper management of public affairs and public property." (Art. 1).

While public international organizations of course share the aspirations and values behind this instrument, the way in which the Convention is being followed up may involve some practical challenges. Thus although "The Convention…does not apply to intergovernmental

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bodies like the United Nations,"[1] it is having an impact on them all the same. More importantly, it may offer them some opportunities.

The Convention contains a package of measures to prevent corruption in the public and private sectors. Aimed at States, it calls for criminalizing a wide range of offences and provides an international cooperation framework directed towards improving mutual law enforcement assistance among them. These provisions are complemented by others on technical cooperation and information exchange. For the first time on a global basis, the instrument sets out elements for pursuing assets recovery. Moreover, the Convention has an implementation mechanism under the auspices of the Conference of States Parties. Although not free from criticism,[2] the instrument has been hailed as "a major breakthrough, creating a truly global framework for combating corruption."[3]

Based on the relatively high number of ratifications over a short period, the Convention has been termed "popular." To explain this view, Carr has cited these features:

"It is comprehensive, since it includes corruption in private to public sector and public to public sector contexts. Its comprehensiveness reaches beyond the creation of offences to cover aspects of investigation….

It is flexible, since the adoption of mandatory and discretionary language in respect of offences means that countries have the option to tailor their legislation according to their legal principles.…

It is innovative, since it includes a chapter on 'Asset Recovery'…. (F)ollow-up mechanisms of help and cooperation with investigation and legal assistance may have singularly contributed to its popularity….

It has the potential to satisfy donor demands. …

It is also progressive… (I)t has given thought to putting in place measures that enhance transparency and integrity.

It sees a greater role for citizen participation not only in the decision making processes within a State but also in adopting a non-tolerant attitude towards corrupt behavior."[4]

A further factor could be mentioned: inclusion of the Convention on the list of instruments whose ratification is required for countries to qualify for the Generalized Tariff Preferences under the European Union's "special incentive arrangement for sustainable development and

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[1]CAC/COSP/2008/7, para. 10.

[2]See e.g. P. Webb, "The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?" in *Journal of International Economic Law* (Oxford), Vol. 8, No. 1, 2005, pp. 191-229.

[3]F. Heimann and G. Dell, TI Recommendations for UNCAC Review Mechanism, Transparency International, 23 June 2008, p. 1.

[4]I. Carr, „The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?" in *Publications of the School of Law*, Surrey, University of Surrey, 2006, pp. 38-40, available at http://epubs.surrey.ac.uk/lawpubs/2, downloaded on 7 Mar. 2009.

good governance."[5] The OECD has described the ratification and implementation of international agreements like UNCAC as "part of coherent donor approaches."[6]

Some governments have thus placed the elimination of corruption at the heart of their anti-poverty strategies.[7] This human-focused approach makes a compelling argument for eliminating corruption that goes beyond the more traditional expectations for public international officials to meet the highest standards of conduct. All the more reason, then, to arrive at an interpretation and use of the Convention that serves the aims of development.

b. *UNCAC and officials and agents of public international organizations*

The Convention is not open to accession by international organizations.[8] The dispute resolution provision of the Convention (Art. 66) does not apply to such institutions or its officials. Yet the definitions include one of "official of a public international organization" (Art. 2(c)), and Art. 16 addresses bribery of both foreign public officials and officials of public international organizations. This provision addresses both active (offer) and passive (acceptance) acts by such officials:

"1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organizations, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."

From the viewpoint of combating corruption, the Convention requires criminalization only of offering or giving a bribe to an official of a public international organization or a foreign public official. This leaves it up to States Parties to decide whether or not to criminalize the solicitation or acceptance of a bribe by an official of a public international organization (Art. 16, para. 2).

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[5]Council Regulation (EC) No. 732/2008 of 22 July 2008, para. 8 and Annex III, in *Official Journal of the European Union,* L 211/1, 6 Aug. 2008.

[6]Development Co-operation Directorate, Organisation for Economic Co-operation and Development, "Fight against corruption," at www.oecd.org/document/34/9,3343,en_2649_34565_19392866_1_1_1_1,00.html.

[7]See e.g. the UK Department for International Development. Its approach is summarized in P. Tamesis, *Corruption and Integrity Improvement Iniatives in Developing Countries* (New York, UNDP, 1998(?), pp. 137-139.

[8]It is open to ratification by States and regional economic integration organizations; see Art. 67.

During the negotiation of the Convention, several delegations pointed out that including a mandatory provision on the so-called "passive" bribery of officials of public international organizations could create "unintended and unwanted conflicts with existing international legal instruments governing privileges and immunities."[9]

All the same, the inclusion of officials of public international organizations reads as an "add on" introduced without much thought givento their particular circumstances. Implicitly recognizing this, the General Assembly resolution proposing the Convention for adoption requested the Conference of the States Parties to address the criminalization of bribery of officials of public international organizations, taking into account questions of privileges and immunities as well as of jurisdiction and the role of international organizations.[10]

Officials of public international organizations could of course also fall under "other persons" to which provisions such as those on "Trading in influence" (Art. 18), "Laundering of proceeds of crime" (Art. 23) and so forth could apply. Similarly, protections foreseen by the Convention for whistleblowers, witnesses and victims (see Arts. 32 and 33), as well as immunity from prosecution (Art. 37, para. 3), could also extend to officials of public international organizations, when subject to national jurisdiction.

2. *Potential problems*

In practical terms, developments under UNCAC pose some potential problems for international organizations. The challenges are of three types:

(a) managerial issues, primarily in relation to alignment of responsibility, authority and accountability ;
(b) some confusion between administrative justice and criminal jurisdiction;
(c) potential difficulties for application of the privileges and immunities régime.

The Secretariat of the Conference of the States Parties (the United Nations Office of Drugs and Crime) has suggested that this instrument "represents a yardstick against which internal regulations and rules of international organizations could be reviewed and compared."[11] This statement is more controversial than it looks at first glance.

In April 2007, the United Nations System Chief Executives Board for Coordination endorsed a UNODC proposal to undertake a review of internal rules and procedures of the various organizations against the standards of the Convention.[12]

Since then, the Conference of the Parties has invited the Secretariat "to continue the dialogue initiated with relevant public international organizations in order to gather concrete information concerning the manner in which they ensure prevention of corruption and

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[9]CAC/COSP/2008/7, para. 2, citing Document A/58/422/Add.2, para. 23. Some also expressed concern about possible extraterritorial jurisdiction. See A/AC.261/3/Rev.2, footnote 114, cited in ibid, para. 6.

[10]UNGA Res. 58/4 of 31 Oct. 2003, para. 6.

[11]CAC/COSP/2008/7, para. 13.

[12] CAC/COSP/2008/7, para. 16.

manage corruption cases that may involve their agents…" [13] As the list of participants from the discussions held in Vienna (September 2007) and Nusa Dua (Indonesia, Jan. 2008) shows,[14] not all UN programmes or Specialized Agencies are able to participate in this dialogue. Nor are the representatives necessarily knowledgeable about public international law. This may explain the suggestion made at the second meeting to involve the existing network of legal advisers (para. 136).

At its third session (2009), the Conference of the Parties is to examine a report "on the efforts undertaken to align the financial and other public integrity rules of public international organizations to the principles set forth in the Convention". [15] By then, an open-ended workshop of practitioners and experts should have been held to exchange best practice and address the technical issues highlighted by the secretariat.

At the same time, the UN System High-Level Committee on Management is pursuing harmonization of business practices. The UN networks of financial and legal advisers are also involved in looking at how to address issues related to tackling corruption. Internal and external auditors also have roles to play.

Under UNCAC implementation, the Secretariat of the Conference of States Parties has also been asked to coordinate its work with the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission (UNGA Res. 61/29 of 4 Dec. 2006).[16] Both the consultative process and the alignment exercisescould be useful opportunities for international organizations to learn from each other and to improve their effectiveness. As the analysis below suggests, however, this potential is not being fully realized.

3. *Analysis*

a. *Managerial challenges*

The many managerial challenges faced by international organizations -- which are characterized by ambitious mandates and limited resources -- go well beyond the scope of this paper. All the same, some of the issues that were pointed out by the Volcker Commission in the unique circumstances of the Oil-for-Food Programme are relevant for more typical operations. These essentially concern:

- A tension between complicated procedures and pressure to act swiftly to deliver results,[17]

- An imperfect alignment of responsibility, authority and accountability.

[13] CAC/COSP 2 Resolutions and Decisions , Decision 2/5, Consideration of the issue of bribery of officials of public international organizations, , para. 2.

[14] CAC/COSP/2008/15, Paras. 18 and 136.

[15] Resolution 2/5, para. 2, in CAC/COSP/2008/15.

[16] Resolution 2/5, para. 5, in CAC/COSP/2008/15.

[17] Commissioner Volcker himself commented that the Commission did not follow UN financial rules because they would have prevented it from delivering on time. Interview in "Pain, Pétrol et Corruption" (film by Denis Poncet, Maha, 2008, broadcast on Arte, March 2009).

Staff of international organizations

Recently, the UN reported difficulties in finding enough qualified candidates for the newly reconfigured resident coordinator posts in countries. It explained that, "the complexity and responsibilities for resident coordinator positions had increased, particularly in terms of the new security environment, without being matched by a corresponding growth in the authority and supporting resources…."[18]

Despite these realities, corruption fortunately remains the exception in the UN system. Where it occurs, it is most likely in field operations. Extra-budgetary donor-funded technical cooperation programmes, for instance, will usually call for delivery of substantial outcomes within a two- orthree-year period. In that time, any new staff will need training on procedures, ethics, and so forth. The project may be carried out in a country that has a serious corruption problem, perhaps in a location far removed from the international organization's nearest administrative office. If an official does engage in misconduct involving bribery, he or she may be able to resign more quickly than the organization's disciplinary procedures take to run their course. Recovery of any lost assets is very difficult, even after the organization has alerted the national authorities. These are the type of problems on which international organizations would probably welcome help in resolving.

When corruption does arise, who may be held accountable and how? For the purposes of the UNCAC, « official of a public international organization » means « an international civil servant or any person who is authorized by such an organization to act on behalf of that organization » (Art.2(c)). Identifying who is an "official of a public international organization" usually can be done easily using the organization's own governance documents. These should in turn set out such persons' responsibilities to the organization, and the procedures applicable in case of analleged breach. Administrative tribunals available to international civil servants offer the possibility for a relatively predictable jurisprudence reviewing the organization's handling of corruption allegations.

In relation to the definitional question, however, the meeting to review internal regulations convened by the UNODC highlighted significant differences in policies and practices of various organizations regarding staff functions and the related contractual status of individuals.[19] It has been suggested that a continuing review is likely to lead to "increased consistency and greater convergence of regulations and rules of international organizations,"[20] although there are "some significant differences between the United Nations and the practice of some specialized agencies."[21]

The Standards of Conduct of the International Civil Service, updated in 2001, provide system-wide guidance to personnel. Each organization has its own staff rules, ethical guidance and financial regulations that serve as tools to fight corruption. They are most effective when

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[18]United Nations System, Chief Executives Board for Coordination, First regular session of 2008, CEB/2008/1 (20 May 2008), para. 17.

[19]CAC/COSP/2008/7, paras.40- 41.

[20]CAC/COSP/2008/7, para. 64.

[21] CAC/COSP/2008/7, para. 56.

kept relatively simple and set out in plain language.[22] Alongside training, streamlined procedures and systemic checks and balances in handling finances are among the organization's best ways to prevent corruption. However, in relation to prevention measures envisaged by the Convention, more modestly resourced organizations have expressed concerns about being able to take certain steps. For instance, the UN procedures for financial disclosure are considered cumbersome, especially for smaller entities.[23] The bar for what will be considered due diligence among small organizations should not be set unrealistically high.

Special procedures have of course also been set up in an international setting, as illustrated by the inquiries into the Oil-for-Food Programmeand UN peace-keeping operations. Better coordination between the recommendations of such initiatives and follow-up by the Conference of States Parties to UNCAC would be helpful particularly in regard to conclusions relevant to management issues. The existence of multiple networks, ad hoc and standing bodies relevant to combating corruption can lead to duplicative and resource-consuming reporting exercises. This is an area where transparency and effectiveness may be working at cross-purposes.

"Any other person"?

Much more problematic for the organizations, however, is the second part of clause 2(c) of UNCAC ("or any other person who is authorized … to act on behalf of " the organization) The wordingis very broad, potentially extending to many people who have nothing akin to an employment relationship with the organization. Taking "person" to include legal persons, the term could theoretically extend to, for example:

-the official of another organization which has been asked to perform services for the authorizing organization (such as in arrangements under the "Delivering as One"[24] approach);

-a member of an independent commission of inquiry or other ad hoc body asked to carry out specified tasks;

-a member of a delegation to a national or international meeting, authorized to do so on behalf of an organization (e.g. a tripartite ILO delegation to a world summit);

-an outside lawyer or law firm asked to represent the organization in a national court;

-a consultant providing support for information technology functions for data platforms located outside the organization;

-a travel agency issuing tickets for official travel;

-a bank employee carrying out an instruction to make a payment for the organization.

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[22]For a deeper understanding of what "plain language" and the movement behind it means, see e.g.M. Adler, *Clarity for Lawyers: Effective Legal Writing,* 2nd ed. (London: The Law Society, 2007). Unfortunately, the movement has not made many in-roads in international organizations.

[23] CAC/COSP/2008/7, para. 46.

[24]"Delivering as One" is the UN's shorthand for a set of recommendations to improve system-wide coherence and effectiveness. See e.g. UNGA A/61/583 of 20 Nov. 2006.

In some cases, the organization will have very little control over such persons. The recourse itwould have against such “others” may be quite limited indeed, depending upon the wording of the contract or other arrangement under which their services were engaged. Moreover, the clause can give rise to disputes about whether and the extent to which a person was so authorized by an organization.

And in contrast to the existence of unitary administrative tribunals for international civil servants and their employing organizations, disputes with these “others” may end up in a variety of forums (arbitration, administrative tribunals, and in rare cases national courts). The situation could produce differing results in the face of similar factual situations. Altogether, the wording of the second part of clause (c) of Art. 2 is not an optimal way to achieve the purposes of the Convention.

Reference to the International Law Commission’s draft articles on responsibility of international organizations may be useful here.[25] Compare, for example, their definition of “agent” as including officials “and other persons or entities through whom the organization acts” –“whatever position the organ or agent holds in respect of the organization.” (Draft Art. 4, paras. 1 and 2). Note use of the word “position.” Furthermore, para. 3 limits this by adding, “ Rules of the organization shall apply to the determination of the functions of its organs and agents.” This last element has so far been not sufficiently present in the discussion under UNCAC. While a similar appraoch may be implicit, making it explicit would avoid ambiguity. In the meantime, international organizations would be well advised to check the terms of their standard contracts and agreements reinforcing them when needed.

Other aspects of the Convention may be useful to international organizations, especially regarding international cooperation and asset recovery.[26] Once an official has left the employment of an international organization, and been convicted of a corruption offence, the organization could request a member State in which the former official resides to pursue asset recovery. While of course it could do even without the Convention, a ratifying State may have undertaken more practical steps to act on such requests.

Thus Arts. 26 and 35 of the Convention, on liability of legal persons and compensation for damage, deserve mention. The first provision calls for each State Party to adopt “such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention” (Art. 26, para. 1). Such liability may be criminal, civil or administrative (Art. 26, para. 2). Similarly, the measures to ensure “that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation” (Art. 35) could potentially be relied upon by an international organization, of course taking into account agreements it may have with the State(s) concerned.

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[25]International Law Commission, Report of the Sixtieth Session (2008), A/63/10, Chap. VII, pp. 263-264.Further examination may be in order in relation to draft articles on responsibility of international organizations, which also state: “There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributable to the international organization under international law; and (b) Constitutes a breach of an international obligation of that international organization.”

[26]See esp. para. 64 of CAC/COSP/2008/7.

Overall, while the Convention offers something to international organization in terms of cooperation, it also reminds them of the importance of aligning responsibility, authority and accountability.

And what about culture?

One other important aspect for managerial issues remains to be mentioned. The importance of different national cultures has been acknowledged for the elaboration of effective anti-corruption efforts in States. [27] Recent development theory has highlighted multi-layeredness, participation and indigenous knowledge in relation to anti-corruption practice. [28] These insights would appear similarly applicable to international organizations, which to some extent have evolved different institutional cultures and encompass officials from many national backgrounds. While the content of anti-corruption messages should reflect universal standards, the means of transmission and follow-up should fit the culture of the organization.

b. *Some confusion between administrative and criminal jurisdiction*

In the follow-up to UNCAC, some confusion can be seen between administrative and criminal justice. The records of discussions reveal several statements that mix concepts from these quite different fields of law:

- "Participants discussed challenges related to criminal investigations faced by investigative bodies of international organizations"[29];
- "Several delegations stressed the importance of protecting the rights of the staff, such as the right to remain silent"[30];
- "(C)onsideration was given to the opportunity to establish the Convention offences as violations of international rules and regulations;"[31]
- "In addition, the issue of the rights of the accused as opposed to the interests of the organization was raised and discussed." [32]

Such blurring of notions applicable to criminal law with procedures in internal administrative justice systems is not helpful to international organizations or to accomplishing the purposes of UNCAC.

The Convention is primarily directed towards States, which can bring criminal justice systems as well as administrative remedies into play. International organizations have only the latter,

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[27]See e.g. I. Carr, "The Principal-Agent-Client Model and the Southern African Development Community Anti-Corruption Protocol," Working Paper (undated), available at www.works.bepress.com/cgi/viewcontent.cgi?article=1000&content=indira_carr, consulted on 7 Mar. 2009.

[28]B. Michael, "Explaining organizational change in international development: the role of complexity in anti-corruption work" in *Journal of International Development*, vol. 16, issue 8 (2004), pp. 1067-1088.

[29]CAC/COSP/2008/7, para. 32.

[30]Ibid., para. 33.

[31]CAC/COSP/2008/7, para. 50.

[32]Ibid., para. 51.

and depend upon cooperation with member States to see alledgedly corrupt officials brought to justice.

The confusion that can occur at the international level mirrors the national situation. Referring to bodies in two Australian states, for instance, one writer noted, "It appears there is an expectation that a finding of corrupt conduct ((by an independent commission against corruption)) should automatically convert into a criminal conviction. This perception highlights a lack of understanding of the two processes. … ((The commission)) is responsible for exposing unconscionable conduct and encouraging high standards of behavior in public officials, even if that conduct cannot be proven to be criminal. The compilation of admissible evidence for prosecutions…is a secondary function."[33]

In a national context, Michael and Varanese have identified four possible "jurisdictions" for "corruption offences"[34]: managerial, administrative, civil and criminal. In the setting of international organizations, the "managerial" would in the first instance be the official's responsible chief. The "administrative" would include an internal review or disciplinary committee, as well as an administrative tribunal to which the official could appeal. The civil and criminal jurisdictions would of course lie outside the international organization.

Is the emphasis on criminalization justified?

States Parties that have not yet established as criminal offences the acts covered by art. 16(1) of the Convention have been asked to adapt their legislation and regulations accordingly.[35] This is simply a reminder of their obligation as States for which the instrument is in force. The 2006 Conference of States Parties went beyond this to call upon States to criminalize (all of) the offences in Art. 16 (i.e. both the mandatory "active" and the optional "passive" forms of bribery of public international officials), when appropriate and consistent with their principles of jurisdiction[36].

Based on a comparative study of sanctions used in response to the various forms of corruption in a national setting, Huber found a considerable spread. She has therefore expressed skepticism about the effectiveness of prosecuting corruption offences.[37] While the study pre-dated the UNCAC and did not focus on international officials, it is unlikely that the gaps or variation in legislation would be less than in the case of national public officials.

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[33]M.D. Symons, "Catch me if you can! A comparison between the Law Enforcement and Commission approach to corruption investigation," prepared for the Conference "Empowering Anti-Corruption Agencies: Defying Institutional Failure and Strengthening Preventive and Repressive Capacities" (Lisbon, 14-16 May 2008), downloaded 7 Mar. 2009, p. 19.

[34]B. Michael and M. Varanese, "Basic Legal Concepts in Anti-Corruption: Defining Jurisdiction, Civil Remedies, and Damages in the Case of Albania," in *Polis – The Albanian Journal of Public Policy* (date unknown), consulted on 7 Mar. 2009, p. 8.

[35]CAC/COSP 1,2006, Resolutions and Decisions, Resolution 1/3, para. 1 and CAC/COSP 2, 2008, Resolutions and Decisions, Resolution 2.2, para. 1.

[36]CAC/COSP, 2006, Resolutions and Decisions, Resolution 1/7, para. 2.

[37]B. Huber, "Sanctions against Bribery Offences in Criminal Law," in C. Fijnaut and L. Huberts (eds.), *Corruption, Integrity and Law Enforcement*, Kluwer (The Hague), 2002.

Criminalizing an act can certainly have a deterrent effect. Handing officials over to the local authorities is of course an option. In practice, however, few cases involving alleged corruption of international officials go to prosecution (from limited data available, between 5% and 12%). [38] In terms of achieving the goal – eliminating corruption in international organizations – the emphasis placed on criminal statistics may bedisproportionate. In terms of effectiveness, strengthening internal personnel, financial and disciplinary procedures may have greater impact on behavior.

Yet States appear anxious to have data on referral to authorities with a view to prosecution, information which an international organization should be able to provide. However, how much will this really tell about a situation? If compared to other organizations, will the data be placed in context, to take into account the number of staff, amount of funds allocated to field operations, percentage of funds representing non-staff costs, etc.? Especially when multiple bodies across the UN system request such information, one wondersabout the cost-benefit relationship of such exercises. What really matters is ensuring that good systems are in place to prevent corruption and address misconduct of staff and abuses by other persons. Regular reporting is part of sound management, but duplicative reporting is not.

Don't forget due process

In addressing alleged corruption by an official, an international organization needs to act in line with its rules and regulations and in accordance with due process.[39] Indeed, the apparent partial tension between transparency and accountability in relation to alleged corruption on the part of officials of public international organizations may be resolved through attention to due process.

The UN has been requested, when its investigations into allegations suggest that crimes of a serious nature may have been committed by UN officials or experts on mission, to consider any appropriate measures that may facilitate the possible use of information and material for purposes of criminal proceedings initiated by States, bearing in mind due process considerations .[40]

Moreover, the UN General Assembly recently urged States to "take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process."[41] The concern for due process is further reflected in a paragraph that encourages the UN to take appropriate measures to restore the credibility and reputation of

[38]Of 350 cases of alleged misconduct reported per year to the Office of Internal Oversight Services of the UN, 30% (105) related to corruption, of which 5 to 10 cases went to prosecution (around 4 to 10%); for the European Commission, 43 cases of corruption were opened in relation to 200 allegations; of those cases, 5 were handed over to national authorities for criminal prosecution (around 12%). See CAC/COSP/2008/7, paras. 25 and 26. .

[39]The due process rights of staff should be respected in the conduct of investigations (cf. UNGA Resolution on Report of the Office of Internal Oversight Services on its Activities, A/RES/63/265 (2 March 2009), para. 17).

[40]UNGA, A/RES/63/119, 15 Jan. 2009, para. 10.

[41]UNGA A/RES/63/119, 15 Jan. 2009), para. 2.

officials or experts on mission when allegations are determined by a UN administrative investigation to be unfounded.[42] These requests reflect an understanding of the role of international organizations.

But to apply the criminal standards of the Convention on the rights of the accused (Art. 30, para. 4 and Art. 44, para. 14) to internal or administrative procedures would be wholly inappropriate. This is not to imply that improvement is unnecessary. Efforts to strengthen the protection of whistleblowers should continue, for instance. At the same time, there is need for protection against false and malicious reports against innocent persons in relation to corruption. [43] One measure that might be helpful would be a consolidation of rules and procedures applicable to investigations. An organization that has followed best practice will have a better chance of successfully responding to possible claims by staff members against whom action has been taken.

(c) Privileges and immunities issues

In a series of explanatory notes included in the *travaux préparatoires*, it was agreed that what became Art. 16 of UNCAC "was not intended to affect any immunities that …. officials of public international organizations might enjoy in accordance with international law. The States parties noted the relevance of immunities in that context and encouraged public international organizations to waive such immunities in appropriate cases."[44]

This approach is consistent with the views of such organizations. In the UNODC consultation, the organizations' representatives "underscored that privileges and immunities were granted to organizations and not to individuals, and that international organizations were empowered to waive such immunities when the organization was of the opinion that doing so would not impair the independence of its functions and it would be in the interest of the organization. Several organizations stressed that decisions on waivers should be made by the head of the organization; this was considered crucial for the independence of the organization. …. In appropriate cases, the host country agreement between the organization and the host State needed to be taken into account."[45].

Yet changes to the existing regime are being proposed in the UNCAC context. For instance, an idea put forward at the Second Conference of the Parties proposed establishing an "independent mechanism" to handle requests for waiver of immunities. The mechanism would have brought together representatives of the organization concerned, the national prosecution authorities of the host country and the UN Office on Drugs and Crime to serve as an advisory body. While two speakers favoured this idea, most were opposed because of the adequacy of the existing legal regime governing privileges and immunities.[46]

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[42]Ibid., para. 11.

[43]UNCAC is silent on this point. However, the African Union Convention on Preventing and Combating Corruption, 11 July 2003, 43 I.L.M. 5, contains such a provision (Art. 5(7)).

[44]This aspect of the *travaux* is summarized in Note by the Secretariat, The question of bribery of officials of public international organizations, Conference of the States Parties to the United Nations Convention against Corruption, CAC/COSP/2006/8, para. 7.

[45]CAC/COSP/2008/7, paras. 30 and 31.

[46]CAC/COSP/2008/15, para. 68 and 69.

In 2008, the COP commended the two-pronged approach of the UNODC (an open-ended dialogue involving States and international organizations and a system-wide integrity initiative that would extend the principles and standards of the Convention to the organizations of the United Nations system).[47] The discussion identified two required steps: the criminalization of corruption by officials of public international organizations and "the establishment of procedures for lifting privileges and immunities."[48] Speakers noted that this "should be done in accordance with applicable international legal instruments" (id.). Although the resolution adopted did not directly address such procedures, the issue could come back onto the table. "Some speakers expressed the view that public international organizations should lead by example and adopt internal standards and policies that were fully compliant with the provisions of the Convention." [49] "Fully compliant" is a phrase that could spell trouble if language designed for one context is extrapolated to a quite different one.

The Convention directly addresses immunities only in relation to national public officials. In Art. 30 on prosecution, adjudication and sanctions, the instrument suggests a balancing approach:

> "Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention." (Art. 30, para. 2)

While such an approach may indeed be useful in a domestic setting, its application to the international plane would be totally inappropriate. Indeed, it could endanger the independence of international organizations in exercising their judgment about the best interests of the organization overall.

Using Art. 30 of the Convention as a standard for international organizations would be inappropriate, and not only because of a confusion betweencriminal and administrative sanctions and procedures. Art. 30 contains a principle of balancing privileges and immunities of a nation's public officials against effective criminal prosecution that can apply only within an internal legal system which offers options under both civil and criminal law as well as administrative avenues. Generally speaking, international organizations have only administrative jurisdiction.

In the consultation with international organizations, the general view on privileges and immunities was that "this complex issue was addressed in a satisfactory manner by existing international legal instruments…."[50]. "Participants agreed that the United Nations Convention against Corruption did not amend or otherwise affect the validity of the system established by the Convention on the Privileges and Immunities of the United Nations and

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[47]CAC/COSP/2008/15, para. 116.

[48]CAC/COSP/2008/15, para. 116..

[49]CAC/COSP/2008/15, para. 116.

[50]CAC/COSP/2008/7, para. 62.

the Convention on the Privileges and Immunities of the specialized agencies."[51] The existing regime is "not a source of insurmountable difficulties when it comes to addressing bribery of officials of public international organizations."[52] Unless there are compelling reasons for an organization to consider its interests best served by not lifting immunity, it will waive it so that a prosecution can go forward. In the vast majority of cases, the international organization and the state in question will work the matter out in a mutually satisfactory way. The reality on the ground would suggest that a shift in focus to issues of more importance may be in order.

4. Conclusion

Although not addressed directly to international organizations, UNCAC both affects and has something to offer them. Unfortunately, this potential has not yet been realized. Rather, disproportionate focus has been placed on issues of criminalization and privileges and immunities. Much more important are the managerial challenges that need to be addressed for the purposes of UNCAC to be achieved, and the opportunities offered by the Convention to international organizations in combating corruption more effectively.

In the governing organs of international organizations, States parties to the Convention could take a system-wide coordinated approach to improve coherence in the fight against corruption. The harmonization of business practices offers potential. Any such approach, however, should recognize the differing capabilities of organizations of varying sizes and budgets.

According to one commentator, the UNCITRAL Model Procurement Law provides precisely the sort of structured system of rules called for by the UNCAC.[53] Changes could also be made along the lines recommended by the Volcker Commission. Contracts would stipulate mandatory cooperation with investigations, including where possible "unlimited access to all relevant financial records and staff of the contractor."[54] Organizations could include language referring to the Convention in their contracts and other arrangements with non-staff. They couldspecify an obligation to return funds, etc, etc. in case of an administrative determination of bribery or corruption and/or a related criminal conviction.

Moreover, UNCAC is replete with language on cooperation, not only among States but also with "relevant international organizations" (e.g. Art. 63, para. 4(c); see also Art. 48, para. 2). Sharing of information and experience is foreseen, inter alia, "with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption" (Art. 71, para. 2).

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[51]CAC/COSP/2008/7, para. 54.

[52]CAC/COSP/2008/7, para. 62.

[53]C. R. Yukins, „Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNICTRAL Model Procurement Law," in *Public Contract Law Journal,* vol 36, No. 3, 2007, also published as GWU Legal Studies Research Paper No. 282 (Washington, DC: George Washington University, 2007).

[54]Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Management of the Oil-for-Food Programme, Vol. IV, Chapter 6, Major Recommendations with Proposals for Implementation (5 Sept. 2005), p. 186, consulted at www.iic-offp.org/Mgmt_Report.htm, 8 Mar. 2009. See also p. 183 for a similar recommendation. However, what will an international agency do when a potential contractor refuses to sign such a provision? In specialized fields, an alternative provider is not always available.

Technical assistance contemplated by the Convention presents a further opportunity to reinforce anti-corruption measures in the delivery of such support   Art. 62 refers to “the negative effects of corruption on society in general, in particular on sustainable development.” (para. 1). States Parties are thus to make concrete efforts and in coordination with each other and with international and regional organizations to strengthen the capacity of developing countries to prevent and combat corruption (Art. 62, para. 2(a)) and to provide them and countries with economies in transition with technical assistance for the implementation of the Convention (para. 2(c).). Although this provision primarily targets direct assistance in fighting corruption and neglects the “supply side” of corruption, there is nothing to prevent internationalorganizations with operations in such countries from building into their assistance stronger anti-corruption measures. Indeed, they could weave “corruption-awareness” into the training and other programmes they provide on a wide range of substantive issues, from designing health care or education systems to strengthening democratic trade unions and employers’ associations.

The Conference of the Parties may make recommendations to improve the Convention and its implementation (Art. 63, para. 4(f)). States Parties can propose amendments to the Convention once it has been in force for five years, i.e. as from 14 December 2010 (as provided in Art. 69, para. 1). This could be an opportunity to fill gaps, and “connect the dots” between efforts under UNCAC and other processes, such as the investigation into UN peacekeeping operations. While the focus of the latter is of course different, elements of corruption have been involved.

It is in the interests of both international organizations and the wider community to root out corruption and hold accountable corrupt persons wherever they operate. This can be done in an orderly way that isrespectful of existing legal frameworks.   These include privileges and immunities of public international organizations, and notions of due process.   Improvements are needed for a better alignment of responsibility, authority and accountability, as well as in relation to recovery of assets. Cooperation between international organizations and Member States will be required to accomplish both. These are the areas that should be the focus of stepped up effort under the UNCAC.