

# Section 9: Corruption Offenses

## General Commentary

Corruption has proven a major challenge in many post-conflict states. In many such states, corruption was an endemic practice before and during the conflict and persists when hostilities have officially ended. It often has links with trafficking, smuggling in persons, and organized crime. Corruption frequently involves criminals seeking to ensure impunity from prosecution by bribing criminal justice actors. Other acts of corruption by government officials divert public funds or foreign aid intended to benefit the local population, and thus help to undermine public confidence in state institutions. Corruption in procurement of government contracts for post-conflict reconstruction is also a serious issue. In a statement to the General Assembly on the adoption of the United Nations Convention against Corruption (the statement was subsequently included as the foreword to the convention), the United Nations secretary-general highlighted the hugely destabilizing effects of corruption in a society: “Corruption hurts the poor disproportionately—by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign investment and aid.” The secretary-general added that “corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.”

A significant number of international conventions deal with corruption. These include the following regional conventions: the European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union; the South African Development Community Protocol against Corruption; the African Union Convention on Preventing and Combating Corruption; the Council of Europe Criminal Law Convention on Corruption; the Council of Europe Civil Law Convention on Corruption; the Inter-American Convention against Corruption; and the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Two United Nations conventions, the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, also deal with corruption.

A stand-alone criminal law provision is insufficient to tackle this mammoth problem, although it is a valuable starting point and one that is required by both the United Nations Convention against Corruption (chapter 3) and the United Nations Convention against Transnational Organized Crime (Article 8). Both conventions, the former in particular, contain a comprehensive range of measures and strategies aimed at preventing and criminalizing corruption. A full discussion of these prevention strategies is beyond the scope of the MCC, but such strategies are integral to the successful combating of corruption and should be addressed as a matter of urgency in a post-conflict state, simultaneously with criminal law reform. A short synopsis of these prevention strategies, in addition to some useful reference materials, is provided below.

Chapter 1 of the United Nations Convention against Corruption addresses measures to prevent corruption. It requires that states develop preventive anticorruption policies and practices (Article 5) and that preventive, independent anticorruption bodies be set up to implement and oversee anticorruption policies and to increase and disseminate knowledge about anticorruption measures (Article 6). Furthermore, states are urged to strengthen systems for recruitment, hiring, retention, promotion, and retirement of civil servants and other nonelected public officials (Article 7) and to introduce codes of conduct for public officials with reference to the United Nations International Code of Conduct for Public Officials (Article 8). States parties are also obliged to establish transparent and competitive public procurement systems (Article 9) and to take measures to enhance transparency in public administration (Article 10). In the judiciary and the prosecutorial sphere, states are obliged to take measures to strengthen judicial integrity and to prevent opportunities for corruption (Article 11). With regard to the private sector, Article 12 of the convention contains numerous other preventive measures. Chapter 4 of the convention concerns international cooperation. Reference should be made to Chapter 14, Part 1, of the MCCP and its accompanying commentaries. Chapter 4 also contains provisions on the need for special techniques to investigate corruption. Reference should be made to Chapter 8, Part 3, Section 5, of the MCCP and its accompanying commentaries. Meanwhile, Chapter 5 deals with asset recovery, an issue addressed previously in the MCC under Articles 70–73. Chapter 6 contains provisions on training (Article 60) and the collection of information on corruption (Article 61). Article 60 also deals with technical assistance and mentions the role of the United Nations Office on Drugs and Crime (UNODC) in this respect. Because of its obligations under the convention, UNODC operates numerous technical assistance projects in developing countries. It also has created a number of useful tools, including the *Anti-Corruption Toolkit*, the *Anti-Corruption Resource Guide*, the *Compendium of International Legal Instruments on Corruption*, and the *United Nations Guide for Anti-Corruption Policies*. *Legislative Guides for the Implementation of the United Nations Convention against Corruption* was published in 2006, and (as of April 2007) the *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* is forthcoming. Corruption, as it relates to organized crime, is also discussed in the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* and its *Anti-Corruption Resource Guide*. Another useful resource is the World Bank Web site ([www1.worldbank.org](http://www1.worldbank.org)), which contains, for example, diagnostic tool kits on corruption and other valuable publications.

The Council of Europe Octopus Programme has published *Anti-corruption Services: Good Practice in Europe*, which provides a conceptual framework for setting up anticorruption services, an assessment of Council of Europe experience to date, and profiles of anticorruption services in Europe. Recourse may also be had to the Council of Europe's Resolution (97)24 on the Twenty Guiding Principles for the Fight against Corruption. General reference should also be made to the Web sites of the anticorruption division of the Organization for Economic Cooperation and Development ([www.anticorruptionnet.org](http://www.anticorruptionnet.org)) and Transparency International ([www.transparency.org](http://www.transparency.org)). Transparency International, which produces annual global corruption reports, has produced a useful publication entitled *The Corruption Fighter's Toolkit* and has developed International Minimum Standards for Public Procurement.

The MCC deals exclusively with the criminalization of corruption, as opposed to the other measures discussed above. Chapter 3 of the United Nations Convention against Corruption requires states parties to implement a number of corruption offenses: bribery of national public officials (Article 15); bribery of foreign public officials and officials of public international organizations (Article 16); embezzlement, misappropriation, and other diversion of property by a public official (Article 17); trading in influence (Article 18); abuse of function (Article 19); illicit enrichment (Article 20); bribery in the private sector (Article 21); and embezzlement of property in the private sector (Article 22). The convention also contains a number of related offenses, namely, laundering of proceeds of crime (Article 23); concealment (Article 24); and obstruction of justice (Article 25). All the corruption offenses are contained in the Special Part of the MCC, although not all are in Section 9. The MCC or the MCCP deal with many other obligations in chapter 3, such as the need for witness protection measures, an issue dealt with under Chapter 8, Part 4, Section 1, of the MCCP, and the requirement that states parties assert liability of legal persons, addressed in Article 19 of the MCC.

It is noteworthy that the offenses contained in the United Nations Convention against Corruption all involve discrete acts of corruption. The *Draft United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* states that "there is no comprehensive, universally accepted definition of corruption. . . . Attempts to develop a more precise definition invariably encounter legal, criminological and in many countries, political problems. When the negotiation of the United Nations Convention against Corruption began in 2002, one option under consideration was to avoid the problem of defining corruption by simply listing a whole series of specific types or acts of corruption. After much discussion, 'corruption' was not defined at all, but repeated examples of what is covered by the expression appear throughout the text [of the convention]" (page 23). The same approach has been adopted in the MCC.

## Article 138: Corruption Involving a Public Official

---

### *Article 138.1: Definition of Offense*

1. A person commits the criminal offense of corruption involving a public official when he or she:
  - (a) promises, offers, or gives to a public official, directly or indirectly, an undue benefit, for the public official himself or herself or another person or entity, in order that the public official act or refrain from acting in the exercise of his or her official duties; or
  - (b) being a public official, solicits or accepts, directly or indirectly, an undue advantage, for 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.
2. It is no defense to prosecution under Article 138 that a person whom the perpetrator sought to influence was not qualified to act in the desired way, because he or she had not yet assumed office or lacked jurisdiction, or for any other reason.

### Commentary

**Paragraph 1(a):** The offense contained in Article 138.1(1)(a) covers acts that are ordinarily labeled corruption or bribery. The wording is taken from Article 15(a) of the United Nations Convention against Corruption, which requires states to implement the criminal offense of bribery of national public officials into domestic law. Article 15(a) replicates the wording contained in Article 8(1)(a) of the United Nations Convention against Transnational Organized Crime. Similar wording is found in Article 2 of the Council of Europe Criminal Law Convention on Corruption.

The offense covers “active corruption,” meaning giving an undue advantage to public officials. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* states, at page 83, that

the required elements of this offense are those of promising, offering or actually giving something to a public official. The offense must cover instances where it is not a gift of something tangible that is offered . . . . The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other

person, such as a relative or political organization. The undue advantage or bribe must be linked to the official's duties. The required mental element for this offense is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties.

As mentioned in the legislative guide, the undue advantage given to a public official can be many things, such as cash, shares, sexual favors, or employment. The explanatory report to the Council of Europe Criminal Law Convention on Corruption (paragraph 37) states that “the undue advantages given are usually of an economic nature but may also be of a non-material nature. What is important is that the perpetrator (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offense and that he is not entitled to the benefit.” The explanatory report (paragraph 36) also provides that “‘promising’ may, for example, cover situations where the briber commits himself to give an undue advantage later. ... ‘Offering’ may cover situations where the briber shows his readiness to give the undue advantage at any moment. ... Finally, ‘giving’ may cover situations where the briber transfers the undue advantage.”

Reference should be made to Article 1(9) of the MCC, for the definition of public official, and its accompanying commentary.

**Paragraph 1(b):** This paragraph covers “passive corruption,” meaning the acceptance of any undue advantage by a public official. The wording is taken from Article 15(b) of the United Nations Convention against Corruption, which replicates the wording contained in Article 8(1)(b) of the United Nations Convention against Transnational Organized Crime. Similar wording is found in Article 3 of the Council of Europe Criminal Law Convention on Corruption.

The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, at page 83, states that “the required elements are soliciting or accepting the bribe. The link with the influence of official conduct must also be established. As with [active corruption] the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly. The mental element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.” Many issues discussed in the commentary to Paragraph 1(a) also relate to Paragraph 1(b). The explanatory report to the Council of Europe Criminal Law Convention on Corruption (paragraphs 41–42) states that “‘requesting’ may for example refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to ‘pay’ to have some official act done or abstained from. ... ‘Receiving’ may for example mean the actual taking the benefit, whether by the public official himself or by someone else ... for himself or for someone else.” The explanatory report (paragraph 43) further highlights the fact that “if there is a unilateral request or a corrupt pact, it is essential that the act or omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offense ... to receive a

benefit after the act has been performed by the public official, without prior offer, request or acceptance.”

**Paragraph 2:** This paragraph is not contained in the United Nations Convention against Corruption but is included in the MCC to underscore that the important element of corruption is that the public official acted or refrained from acting in the manner that the person offering the undue advantage wished.

## *Article 138.2: Penalty*

The applicable penalty range for the criminal offense of corruption involving a public official is three to fifteen years’ imprisonment.

# **Article 139: Corruption Involving a Foreign Public Official or an Official of a Public International Organization**

---

## *Article 139.1: Definition of Offense*

1. A person commits the criminal offense of corruption involving a foreign public official or an official of a public international organization when he or she:
  - (a) promises, offers, or gives to a foreign public official or an official of a public international organization, directly or indirectly, an undue benefit, 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; or
  - (b) being a foreign public official or an official of a public international organization, solicits or accepts, directly or indirectly, an undue advantage, for 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.
2. It is no defense to prosecution under Article 139 that a person whom the perpetrator sought to influence was not qualified to act in the desired way, because he or she had not yet assumed office or lacked jurisdiction, or for any other reason.

3. For the purposes of Article 139:

- (a) *foreign public official* means a person who holds a legislative, executive, administrative, or judicial office of a foreign state, whether appointed or elected, and any person exercising a public function for a foreign state, including for a public agency or public enterprise; and
- (b) *official of a public international organization* means an international civil servant or any other person who is authorized by such an organization to act on behalf of that organization.

## Commentary

The recent trend in international conventions on corruption is to apply laws on corruption not only to domestic officials but also to foreign public officials. On the offense of corruption involving foreign public officials, the explanatory report to the Council of Europe Criminal Law Convention on Corruption (paragraphs 47–48) states that

corruption not only undermines good governance and destroys public trust in the fairness and impartiality of public administrations but it may also seriously distort competition and endanger economic development when foreign public officials are bribed, e.g., by corporations to obtain business. ... The protected legal interest is twofold in the case of this offense: transparency and fairness of the decision-making process of foreign public administrations—this was traditionally considered a domestic affair but the globalization has made this consideration obsolete—and the protection of fair competition in businesses. The criminalization of corrupt behavior occurring outside national territories finds its justification in the common interests of States to protect these interests.

In relation to bribery of officials of a public international organization, the explanatory report at paragraph 57 states that “the need to criminalize bribery is even greater in the case of officials of a public international organization than in the case of foreign public officials. ... The protected legal interest in general is the transparency and impartiality of the decision-making process of public international organizations, which, according to their specific mandate, carry out activities on behalf or in the interest of their member States. Some of these organizations do handle large quantities of goods and services.”

**Paragraph 1(a):** The wording of Paragraph 1(a) is taken from Article 16(1) of the United Nations Convention against Corruption, which requires states to implement the criminal offense of bribery of foreign public officials and officials of public international organizations into domestic law. Similar wording is found in Article 5 of the Council of Europe Criminal Law Convention on Corruption and Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This paragraph involves active bribery or active corruption,

meaning the promising, offering, or giving of undue advantage to a foreign public official. It is important to note that this offense applies only to the conduct of international business and would not, for example, apply to purely domestic business. Reference should be made to the commentary to Article 138, above, which discusses the meaning of *promise*, *offer*, and *give* in more detail, in addition to other elements of the criminal offense of active corruption.

**Paragraph 1(b):** The wording of Article 139.1(1)(b) is taken from Article 16(2) of the United Nations Convention against Corruption. Similar wording is found in Article 5 of the Council of Europe Criminal Law Convention on Corruption. In contrast to Paragraph 1(a), this paragraph involves passive bribery or passive corruption, meaning the solicitation of an undue advantage by a public official. As with active bribery, this article applies only to the conduct of international business and would not, for example, apply to purely domestic business. Reference should be made to the commentary to Article 138.1, above, which discusses the meaning of *solicit* and *accept* in more detail, in addition to other elements of the criminal offense of passive corruption.

**Paragraph 3(a):** The definition of foreign public official is taken from Article 2(b) of the United Nations Convention against Corruption.

**Paragraph 3(b):** The definition of official of a public international organization is taken from Article 2(c) of the United Nations Convention against Corruption.

## Article 139.2: Penalty

The applicable penalty range for the criminal offense of corruption involving a foreign public official or an official of a public international organization is three to fifteen years' imprisonment.

# Article 140: Corruption in the Private Sector

---

## Article 140.1: Definition of Offense

1. A person commits the criminal offense of corruption in the private sector when he or she, in the course of economic, financial, or commercial activities:



- (a) promises, offers, or gives, directly or indirectly, an undue advantage to any person who directs or works, in any capacity, for a private-sector entity, for that person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; or
- (b) being a person who directs or works, in any capacity, for a private-sector entity, solicits or accepts, directly or indirectly, an undue advantage, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

## Commentary

The wording of Article 140 is taken from Article 21 of the United Nations Convention against Corruption. Similar wording is found in Articles 7 and 8 of the Council of Europe Criminal Law Convention on Corruption. The United Nations Convention against Corruption covers acts of corruption not only in the public sector but also in the private sector. The explanatory report to the Council of Europe Criminal Law Convention on Corruption (paragraph 52) provides that

corruption in the private sector has, over the last century, been dealt with by civil (e.g., competition) or labor laws or general criminal provisions. Criminalizing private corruption appeared as a pioneering but necessary effort to avoid gaps in a comprehensive strategy to combat corruption. The reasons for introducing criminal law sanctions for corruption in the private sphere are manifold. First of all, because corruption in the private sphere undermines values like trust, confidence or loyalty, which are necessary for the maintenance and development of social and economic relations. . . . Secondly, criminalization of private sector corruption was necessary to ensure respect for fair competition. Thirdly, it also has to do with the privatization process. Over the years important public functions have been privatized (education, health, transport, telecommunications, etc.). The transfer of such public functions to the private sector . . . entails transfers of substantial budgetary allocations and of regulatory powers. It is therefore logical to protect the public from the damaging effects of corruption in businesses as well, particularly since the financial or other powers concentrated in the private sector, necessary for their new functions, are of great social importance.

It is worth noting that nonprofit activities are not included under private corruption, by use of the phrase “economic, financial, or commercial activities.”

**Paragraph 1(a):** The wording of Article 140.1(1)(a) is taken from Article 21(a) of the United Nations Convention against Corruption. The convention requires states to consider implementing the criminal offense of bribery in the private sector. This paragraph involves active bribery or active corruption, meaning the promising, offering, or giving of undue advantage to a person who directs or works, in any capacity, for a

private-sector entity. The explanatory report to the Council of Europe Criminal Law Convention on Corruption (paragraph 54) states that the phrase “person who ‘directs or works in any capacity’” should be interpreted widely as “it covers the employer-employee relationship but also other types of relationships such as partners, lawyer and client and others in which there is no contract of employment. Within private enterprises it should cover not only employees but also the management from top to the bottom, including members of the board, but not the shareholders.” The explanatory report also explains that “private-sector entities” refers to “companies, enterprises, trusts and other entities which are entirely or to a determining extent owned by private persons. ... They can be corporations but also entities with no legal personality.” Finally, at paragraph 55, the report provides that “‘in breach of his duties’ does not aim only at ensuring respect for specific contractual obligations but rather to guarantee that there will be no breach of the general duty of loyalty in relation to the principal’s affair or business. ... The notion of ‘breach of duty’ can also be linked to that of ‘secrecy,’ that is the acceptance of the gift to the detriment of the employer or principal and without obtaining his authorization or approval. It is the secrecy of the benefit rather than the benefit itself that is the essence of the offense. Such secret behavior threatens the interests of the private-sector entity and makes it dangerous.” Reference should be made to the commentary to Article 138, above, which discusses the meaning of *promise*, *offer*, and *give* in more detail, in addition to other elements of the criminal offense of active corruption.

**Paragraph 1(b):** The wording of Article 140.1(1)(b) is taken from Article 21(b) of the United Nations Convention against Corruption. This paragraph involves passive bribery or passive corruption, meaning the solicitation or acceptance of an undue advantage by a person who directs or works, in any capacity, for a private-sector entity. Reference should be made to the commentary to Article 138, above, which discusses the meaning of *solicit* and *accept* in more detail, in addition to other elements of the criminal offense of passive corruption. Reference should also be made to the commentary to Paragraph 1(a), as it is relevant to the meaning of the terms *private-sector entity*, *breach of duty*, and *directs or works, in any capacity*, also used in Paragraph 1(b).

## Article 140.2: Penalty

The applicable penalty range for the criminal offense of corruption in the private sector is two to ten years’ imprisonment.