Building Integrity and Reducing Corruption in Defence

A Compendium of Best Practices

CONTENTS

Chapter 15

Regulatory Frameworks

There are a number of regulatory and legal mechanisms to tackle corruption at both the state and international levels. Although such frameworks are not in themselves solutions to corruption, they are nonetheless a pre-requisite to fighting it. This chapter outlines both coercive mechanisms, including examples of enforcing such mechanisms, and voluntary guidelines, such as Defence Integrity Pacts, arms control codes of conduct, etc. "Best practice" in this regard comes from both national and international regulations. The final section of the chapter presents examples of regulations that facilitate transparency and accountability, and thus the enhancement of integrity in defence.

The first type of these regulations—coercive measures based on law—are not specific to defence nor should they be: corruption is or has to be made illegal no matter in what sector of society it takes place, while the penalty has to be commensurate to the damages incurred from the corrupt activity. Voluntary guidelines, on the other hand, may account for the specifics of the corporate culture of the defence establishment and build on the esprit and the honour of military and defence civilians alike. The regulations to provide transparency and accountability take into account the sensitivities of some of the information on security and defence, and the specific activities of the security and defence sectors.

Coercive Measures

Corruption harms societal development, infringes on moral norms and impairs social cohesion. There seems to be an agreement that certain political, social or commercial practices are corrupt and in most countries in the world these are considered illegal. But even though the phenomenon of corruption is widely spread in modern society and has a long history, the challenge to provide a common definition, equally accepted in every nation, seems insurmountable. In different frameworks, the international community has preferred to concentrate on the definition of certain forms of corruption, e.g. "illicit payments" (UN), "bribery of foreign public officials in international business transactions" (OECD), or "corruption involving officials of the European Communities or officials of Member States of the European Union" (EU).[1]

[1] Council of Europe, *Explanatory Report*, Criminal Law Convention on Corruption, ETS No. 173, http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm.

Transparency International defines corruption simply as "the misuse of entrusted power for private benefit." Although short, this definition contains three essential elements: first, a misuse of power; second, a power that is entrusted, both in the private and in the public sectors; and third, the misuse is for private benefit, i.e. not only to the benefit of the person misusing the power but also to the benefit of members of his or her immediate family and friends.[2]

Definitions, used in the discussion in international fora, are also quite broad. Box 15.1 provides the text of the provisional definition used by the Multidisciplinary Group on Corruption (GMC), established in the framework of the Council of Europe in September 1994, and the rationale for choosing such a broad definition.

Not surprisingly, national definitions of corruption also differ. Box 15.2 presents definitions and approaches to defining corruption offenses in criminal laws of three countries.

Box 15.1. A Starting Point for Defining Corruption

The GMC started its work on the basis of the following provisional definition: "Corruption as dealt with by the Council of Europe's GMC is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others."

The purpose of this definition was to ensure that no matter would be excluded from its work. While such a definition would not necessarily match the legal definition of corruption in most member states, particularly not the definition given by the criminal law, its advantage was that it would not restrict the discussion to excessively narrow confines. As the drafting of the convention's text progressed, that general definition translated into several common operational definitions of corruption which could be transposed into national laws, albeit, in certain cases, with some amendment to those laws. It is worth underlining, in this respect, that the present convention not only contains a commonly agreed definition of bribery, both from the passive and active side, which serves as the basis of various forms of criminalisation, but also defines other forms of corrupt behaviour such as private sector corruption and trading in influence, closely linked to bribery and commonly understood as specific forms of corruption. Thus, the present convention has, as one of its main characteristics, a wide scope, which reflects the Council of Europe's comprehensive approach to the fight against corruption as a threat to democratic values, the rule of law, human rights and social and economic progress.

Source: Council of Europe, *Explanatory Report*, Criminal Law Convention on Corruption, ETS No. 173, Items #24 and #25.

[2] Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System* (Berlin: Transparency International, 2000), 1, footnote 2.

Box 15.2. National Legal Definitions of Corruption Offences

France

Offences of corruption are treated by the Criminal Code of France. It distinguishes passive and active corruption. Passive corruption is defined as "direct or indirect request or acceptance, without right, of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate." According to Article 432-11, such an offence is punished by ten years imprisonment and a fine of €150,000 where it is committed:

1. To carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate; or
2. To abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision.

Active corruption is defined in Article 433-1 as "direct or indirect proposal, without right, at any time, of offers, promises, donations, gifts or advantages to obtain from a person holding public authority or discharging a public service mission or holding a public electoral mandate that he: carry out or abstain from carrying out an act relating to his office, duty or mandate or facilitated by his office, duty or mandate; abuse his real or alleged public influence with a view to obtaining from a public body any distinction, contract…."

Federal Republic of Germany

German criminal law criminalises the acceptance of a benefit or a bribe, as well as the act of granting a benefit or a bribe. It explicitly refers to military personnel, e.g. Section 333 of the Criminal Law (Strafgesetzbuch) states that "(1) Whoever offers, promises or grants a benefit to a public official, a person with specific public service obligations or a soldier in the Federal Armed Forces, for that person or a third person, for the discharge of a duty…."

The United States

It is a crime under US law to bribe both domestic and non-US government officials, and to engage in private commercial bribery. Bribery, however, falls under several distinct federal and state criminal statutes. In general, the prohibited conduct involves paying, offering, attempting or promising to pay public officials improperly to influence their official acts, or, in the private context, causing an employee or agent to act in a way contrary to the interests of their employer. US law also generally recognizes the concept of aiding and abetting a violation and conspiring to engage in violative conduct as separate criminal offences.

Source: Roger Best and Patricia Barratt, *Anti-Corruption Legislation – an International Perspective* (London: Clifford Chance, 2005).

Actors in Corruption

Criminal law prosecutes offenders, regardless of whether they are on the originating or on the receiving end of corruption, or facilitate corruption and the distribution of its rewards. The Council of Europe's Criminal Law Convention on Corruption, for example, covers both active and passive bribery of domestic and foreign public officials, of national and foreign parliamentarians and members of international parliamentary assemblies, of international civil servants, as well as of domestic, foreign and international judges and officials of international courts. In 2003, domestic and foreign arbitrators and jurors were added to the list of potential actors in corruption offenses.[3]

Trading in Influence

The Criminal Law Convention covers both the public and the private sector. In addition to the more immediate rewards, it requires that criminal law prosecutes trading in influence. According to Article 12 of the convention, its parties "shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making" of the officials defined above "in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."[4]

Corporate Liability

Companies are also liable according to criminal law in cases where the briber acts for their account or on their behalf and the bribed person is a public official, irrespective of whether the undue advantage is actually for himself or for someone else. The corporate liability does not exclude in any manner criminal proceedings against the individual involved in corruption.

Sanctions

International conventions require that the sanctions for corruption offenses are effective, proportionate and dissuasive. That may include penalties involving deprivation of liberty of natural persons, which can further give rise to extradition.

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3 Council of Europe, *The Additional Protocol to the Criminal Law Convention on Corruption* (Strasbourg, 15 May 2003).

4 Council of Europe, *Criminal Law Convention on Corruption*, ETS No. 173, Article 12.

Sanctions should be seen as fair and have a preventive effect. Box 15.3 identifies a set of general principles in criminalising corruption.

Box 15.3. General Principles in Criminalising Corruption

The TI Source Book 2000 identifies the following eight principles that have to be followed in criminalising corruption:

1. Laws against corruption should comply with international human rights standards and afford a fair trial to those accused. It is crucial that criminal laws against corruption respect human rights guarantees, under a Constitutional Bill of Rights or an international code, to ensure specific procedures are not struck down by the courts as being unconstitutional.
2. Laws should not be seen as being unduly repressive. They should enjoy popular public support. If not, they risk a lack of enforcement.
3. There should be clear guidelines on sentencing so that sentences are consistent between one offender and another, and fair, but not outrageously punitive.
4. Combining the various criminal laws dealing with corruption and secret commissions together in a single law has much merit. It reduces the possibility of loopholes and can demonstrate the seriousness with which the law treats this form of behaviour by making it plain that anti-corruption offences apply to the public and private sectors alike. Whichever course is chosen, the offence of giving and receiving "secret commissions" should be provided for.
5. Regular reviews of the criminal law framework (including laws of evidence and of the adequacy of existing penalties) are essential.... For example, the criminal law should be able to redress corrupt corporate practices such as "bidding rings" for public contracts, in which apparent competitors collude among themselves to decide who will get a particular contract and at what price.
6. Special provisions may be necessary in corruption cases which require individuals, once they are shown to be wealthy beyond the capacity of known sources of income, to establish the origins of that wealth to the satisfaction of the court.
7. Special provisions will be needed to ensure that the proceeds of corruption can be recaptured by the state as they will often be in the hands of third parties or even located out of the country. The criminal law should provide for the tracing, seizure, freezing and forfeiture of illicit earnings from corruption.
8. Provisions will also be needed to ensure that the crime of corruption is seen to include both the payment as well as the receipt of bribes.

Source: Pope, *Confronting Corruption* (2000), 270–72.

Freezing, Seizure and Confiscation

The sanctions may be monetary or include deprivation of liberty, or both. But the punitive measure alone may not suffice unless the gains from the corrupt activities are recovered by the state. Therefore, the legislation shall provide for depriving the individual from the rewards of the corruption offense.

Law shall enable the confiscation of proceeds of the corruption offence or property, the value of which corresponds to that of such proceeds, as well as property, equipment or other instrumentalities used in or destined for use in corruption offences.[5] The UN Convention Against Corruption further stipulates that if the proceeds "have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds."[6] The same applies for income or other benefits derived from such proceeds or property.

Money Laundering of Proceeds from Corruption Offences

The success of a criminal enterprise, such as corruption, depends on its ability to sanitize its ill-gotten gains by moving them through lax or corrupt national financial systems, or to evade national restrictions through offshore banking, secret financial havens and the like. Box 15.4 describes the threat of allowing culprits to evade national legal regulations. The threat of laundering multiplies when it "allows criminals and terrorists to operate freely, using their financial gains to expand their criminal pursuits and fostering illegal activities such as corruption, drug trafficking, arms trafficking, smuggling, and financing of terrorism."[7]

Therefore, the laundering of proceeds deriving from corruption offences, including bribery and trading in influence, shall also be criminalised. The Council of Europe's *Criminal Law Convention on Corruption* refers in that regard to the *Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime*,[8] also adopted in the framework of the Council of Europe.

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5 United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption* (New York: United Nations, 2004), Article 31 (1), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

6 Ibid., Article 31 (5).

7 The World Bank Institute "Governance & Anti-Corruption" Learning Program: Money Laundering.

8 Council of Europe, *Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime*, ETS No. 141 (1990). See also: Council of Europe, *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (Warsaw: 16 May 2005), http://conventions.coe.int/Treaty/EN/Treaties/HTML/198.htm.

Box 15.4. Evading National Legal Regulations

Offshore banking, secret financial havens, money laundering and corruption steadily corrode the foundations of the nation-state. Offshore tax havens, spread by new computing and telecommunications, provide an unprecedented tax shelter, enabling rich citizens and corporations to escape the national tax system – eroding the tax base, weakening state finance and undermining the legitimacy of the tax system in the eyes of ordinary citizens. Offshore havens also promote money laundering, aiding criminal antisocial activities of all kinds, beyond the detection of national authorities. Corruption of public officials flourishes under such conditions, further eroding the capacity of the state to operate "legally" and to command the loyalty of its ordinary citizens.

Source: Global Policy Forum website, "State Sovereignty and Corruption," www.globalpolicy.org/nations-a-states/ state-sovereignty-and-corruption.html.

The same applies to accounting offences, including acts or omissions, when committed intentionally, in order to commit, conceal or disguise corruption offences. Such account offences may involve the creation or the use of an invoice or any other accounting document or record containing false or incomplete information, as well unlawful omission to make a record of a payment.

Special Powers

There is wide international agreement that the effective prevention and prosecution of corruption offenses may require some special powers, such as utilising specialized authorities, the use of special investigative techniques and the admission of the evidence from the application of such techniques in court proceedings.

The Council of Europe Criminal Law Convention calls for introduction of measures as necessary to ensure that persons or entities are specialised in the fight against corruption through law enforcement (Article 20). These persons or entities shall have the necessary independence in accordance with the fundamental principles of the country's legal system in order to be able to carry out their functions effectively and free from any undue pressure. It has to be assured also that the staff of such entities has adequate training and financial resources in line with the tasks assigned.

It should be further noted that the independence of specialised authorities for the fight against corruption cannot be absolute. Their activities should be integrated and coordinated to the maximum extent possible with more traditional law enforcement work. They are independent only as much as is necessary to properly perform their functions.[9]

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[9] Council of Europe, *Explanatory Report*, Criminal Law Convention on Corruption, ETS No. 173, item 99.

South Africa's jurisdiction on such specialised authorities is presented in Box 15.5.

Box 15.5. Statute of a Special Investigating Unit

In conditions specified by law, the president of South Africa may establish a Special Investigating Unit in order to investigate matters of corruption, to refer such matters to an existing Special Investigating Unit for investigation, and to establish one or more Special Tribunals to adjudicate upon justifiable civil disputes emanating from any investigation of any particular Special Investigating Unit (SIU).

The SIU jurisdiction is to investigate alleged cases of:

a) Serious maladministration in connection with the affairs of any state institution;

b) Improper or unlawful conduct by employees of any state institution;

c) Unlawful appropriation or expenditure of public money or property;

d) Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon state property;

e) Intentional or negligent loss of public money or damage to public property;

f) Corruption offences committed in connection with the affairs of any state institution; or

g) Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

The functions of a Special Investigating Unit are:

a) To investigate all allegations regarding the matter concerned;

b) To collect evidence regarding acts or omissions which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned;

c) To present evidence in proceedings brought before a Special Tribunal;

d) To refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority;

e) To perform such functions which are not in conflict with the provisions of this act, as the president may from time to time request;

f) From time-to-time, as directed by the president, to report on the progress made in the investigation and matters brought before the Special Tribunal concerned;

g) Upon the conclusion of the investigation, to submit a final report to the president; and

h) To at least twice a year submit a report to parliament on the investigations by and the activities, composition and expenditure of such a unit.

Source: Special Investigating Units and Special Tribunals Act No. 74 of 1996, *Government Gazette* 26311 (South Africa: 28 April 2004), www.siu.org.za/legislation/act2005.pdf.

Article 50 of the UN Convention Against Corruption calls for authorising the use of special investigative techniques, as well as to admit the evidence from the application of such techniques in court proceedings (see Box 15.6 for details). The area of defence is not excluded from the use of special powers and techniques.

Box 15.6. Special Investigative Techniques

In order to combat corruption effectively, a country—to the extent permitted by the basic principles of its legal system and in accordance with the conditions prescribed by law—shall take such measures as may be necessary to allow for the appropriate use by its competent authorities of controlled delivery and, where appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

States Parties to the Convention are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level.

In the absence of such an agreement or arrangement, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Source: United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption* (New York: United Nations, 2004), Article 50, 41.

Protection of Witnesses, Experts, Victims and Reporting Persons

In order to fight corruption effectively, countries need to introduce an appropriate system of protection for witnesses and other persons cooperating with the judicial authorities. That includes appropriate legal frameworks, as well as financial resources. Moreover, "provisions should be made for the granting of immunity or the adequate reduction of penalties in respect of persons charged with corruption offences who contribute to the investigation, disclosure or prevention of crime."[10]

The level of protection should be "effective" and "appropriate" vis-à-vis the risks that exist for collaborators of justice, witnesses or whistleblowers. In some cases it

[10] Conclusions and Recommendations of the 2nd European Conference of Specialised Services in the Fight Against Corruption (Tallinn, October 1997), as quoted in Council of Europe, *Explanatory Report*, Criminal Law Convention on Corruption, ETS No. 173, item 108.

could be sufficient, for instance, to maintain their name undisclosed during the proceedings, in other cases they would need bodyguards, in extreme cases more far-reaching witness protection measures such as change of identity, work, domicile, etc. might be necessary.[11]

Countries are expected to incorporate into their domestic legal systems appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning corruption offences.[12]

The US extends that concept to persons involved in the corruption offence, encouraging them to come forward and offer evidence. The first person "involved in a Securities And Exchange Commission offence who 'blows the whistle' is granted automatic immunity."[13] A simple measure like this can break the silence over an otherwise seen as mutually beneficial and highly secretive act.

International Cooperation in Enforcing Anti-corruption Legislation

The international community has invested considerable efforts in devising and implementing a body of legal regulations and requirements aimed to curb corruption. The enforcement of the respective body of legislation, which is predominantly national, requires extensive international cooperation. Towards this purpose, the UN Convention Against Corruption, for example, thoroughly treats the issues of extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, law enforcement cooperation and the conduct of joint investigations.

Other conventions, such as the Criminal Law Convention of the Council of Europe, elaborate the further organizational and information exchange aspects of international cooperation in the fight against corruption. The intention is to provide means and channels of international cooperation, where procedural and sometimes political obstacles delay or prevent the prosecution of the offenders in cross-border cases of corruption.

International conventions also introduce monitoring mechanisms and usually envision programmes for assisting individual countries in combating corruption.

International criminal anti-corruption regulations often include provisions aimed to facilitate both the preventive and the punitive effects, such as provisions for access to information. These aspects will be treated later in the chapter, following the examination of civil law and administrative measures against corruption.

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11 Council of Europe, *Explanatory Report*, Criminal Law Convention on Corruption, ETS No. 173, item 113.

12 United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption* (New York: United Nations, 2004), Article 33.

13 Pope, *Confronting Corruption* (2000), 273.

Finally, Article 61 of the UN Convention Against Corruption envisions international exchange of information and best practice. It requires participating to "consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information 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."

Civil Law

Civil law enables persons who have suffered damage as a result of corruption to defend their rights and interests or may empower citizens to enforce anti-corruption laws where public authorities fail to do so. The reasons to go beyond criminal law in persecuting corruption offences are summarised in Box 15.7.

The Civil Law Convention on Corruption of the Council of Europe in Article 2 defines corruption as "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof."

Box 15.7. Criminal Law does not Suffice to Counter Corruption Offences

The first line of attack in combating corruption is the criminal justice system and a successful prosecution is certainly first prize. It not only leaves society with a sense of vindication but is also a strong deterrent against would-be perpetrators. Practice has shown, however, that the criminal justice system alone does not contain sufficient weaponry to ensure victory over the perpetrators of corruption. Corruption is normally committed in a clandestine manner to ensure that it is as difficult as possible to discover. Even if it is discovered, complex schemes are used to unsure that it is difficult to prove.

The result is that it is often extremely difficult to obtain sufficient evidence to secure a conviction. This problem is compounded by the scarcity of eyewitnesses, the need to rely on admissible documentary evidence, the shortage of skilled prosecutors in this field and the burden of having to prove your case beyond a reasonable doubt. The confidence of society is often decreased further because courts often do not impose very serious sentences for economic crime, despite legislation that prescribes a 15 year sentence for economic crime involving more than R500 000. Finally, perpetrators are often released from prison long before they have served the sentences imposed by the courts. The result is that the public is left with the perception that the bad guys outgun the authorities and that crime pays. Thus it became clear that society needs more weapons in its arsenal to fight corruption.

Source: Willie Hofmeyr, *The Use of Civil Law in Combating Corruption*, Head of Special Investigating Unit, South Africa, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Hofmeyr.pdf.

International conventions treat comprehensively the use of civil law remedies against any form of corruption, addressing topics such as:

- Determination of the main potential victims of corrupt behaviours;
- Problems of evidence and of proof of the causal link between acts and damage;
- The fiscal aspects of illicit payments and their relation to the distortion of competition;
- Validity of contracts;
- Role of auditors;
- Protection of employees;
- Procedures, including litigation costs, and international cooperation.[14]

A key difference with the application of civil law comes with the reversal of the burden of proof and requesting the provision of "credible evidence." For example, when a person in a position of trust has accumulated considerable wealth that could not have come from his or her official salary, the investigating agency makes a formal request and then it is up to the person to provide an explanation. When the individual fails to give a likely explanation, the matter may go to a court hearing.[15]

The Inter-American Convention Against Corruption, for instance, expresses this concept in the following terms:

> Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.[16]

One potentially powerful approach, known as "Qui tam," is ingrained in US legislation and may be worthy of consideration by others. It is briefly presented in Box 15.8.

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[14] For details, the reader may refer to Council of Europe, *Explanatory Report*, Civil Law Convention on Corruption, ETS No. 174, http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm.

[15] Pope, *Confronting Corruption* (2000), 275.

[16] *Inter-American Convention Against Corruption*, adopted by the Organization of American States (March 1996), Article IX, www.oas.org/juridico/english/Treaties/b-58.html.

Box 15.8. *Qui tam*, or "who brings the action for the king also does so for himself"

The roots of this approach lie in mediaeval England as early as 1424, where someone who uncovered evidence of illegal conduct was rewarded with a share of the penalties paid by the wrongdoer. Early in its own life, the US Congress imported the notion into almost all of the first 14 American statutes which imposed penalties. The present-day US False Claims Act had its origins in the American Civil War, where the large-scale fraud of government contractors cheated the Union out of resources it could ill afford to lose. Congress and the president sought to enlist the support of private individuals in the struggle to root out fraud and swell the state's coffers.

Quite simply, the government had neither the time nor the resources to address the issue effectively and by empowering members of the public to act in its name (and share in the proceeds recovered), they increased the risk factor, unlocked private enthusiasm and, ultimately, recovered billions of dollars which would otherwise have been lost to the state. This would seem to be an attractive position for governments who find themselves in the same position today.

The approach has been strengthened over the years and in 1986 Congress described it as the government's "primary litigative tool for combating fraud." Similar provisions also apply in other federal statutes, such as the area of patent infringement.

The US False Claims Act creates a civil liability where false transactions have taken place (which capture deliberate ignorance and reckless disregard of truth or falsity as well as actual knowledge), and there is no requirement of a specific intent to defraud. As the court actions are civil in nature—not criminal—the facts do not have to be established "beyond reasonable doubt" but to the slightly lower standard applicable in civil cases.

Defendants face a minimum penalty of $5000 for every separate false claim, plus three times the amount of damage caused to the government by the defendant's acts.

"Qui tam" actions can be started by individuals (they do not have to wait for the government to take action) and there are protections for whistleblowers to safeguard them against reprisals. The government is served with copies of the proceedings and has 60 days in which to decide whether the Department of Justice will intervene and take over primary responsibility for conducting the action. Even where it does, the original claimant has a right to remain as a party to the action, so it cannot be settled without the originator being heard on the issue. At the end of the day, a successful private claimant receives either 10 percent of the sum recovered (where the government takes the action over), or 25 percent (where it has not).

There are safeguards against frivolous claims. The government can intervene and settle the claim, or else can ask the court to strike it out. The court can also restrict the originator's part in the litigation where unrestricted participation would be for the purposes of harassment. And where the claim fails because the claim was frivolous or vexatious, the court may award reasonable legal fees and expenses against the claimant. Some claimants have received million dollar awards and the resulting publicity may encourage others to come forward.

Source: Pope, *Confronting Corruption* (2000), 280–81.

Voluntary Guidelines

Codes of Conduct for Public Officials

Voluntary guidelines have an impact on individual and corporate behaviour that complements the preventive power of potential coercive measures against corruption offences established by law. In the area of defence, such guidelines, most often in the form of "codes of ethics" or "codes of conduct," build on the specific corporate culture of the military and other defence personnel. The overwhelming majority of people in defence take pride in serving the nation and its people and strongly resent any act that puts a stain on the establishment. In such an environment, voluntary regulations of both individual and organisational behaviour can make a real change.

The main requirements to the conduct of individuals in public service are outlined in Article 8 of the UN Convention Against Corruption. Furthermore, both the United Nations and the Council of Europe have adopted model codes of conduct for public officials. These codes identify general principles of integrity for public officials and address specific issues such as conflicts of interest, the misuse of confidential information and the acceptance of gifts and hospitality.

The International Code of Conduct for Public Officials assumes a public office is a position of trust and hence the ultimate loyalty of public officials shall be to the public interests of their country as expressed through its democratic institutions.[17] It further stipulates that public officials shall perform their duties and functions efficiently, effectively and with integrity, and shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner.

Conflict of Interest. A public official should not allow his or her private interest to conflict with his or her public position. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It is his or her responsibility to avoid such conflicts of interest, whether real, potential or apparent. The public official should never take undue advantage of his or her position for his or her private interest both during office and after leaving their official positions.[18]

Disclosure of Assets. According to their position and as permitted or required by law and administrative policies, public officials shall comply with requirements to de-

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[17] *International Code of Conduct for Public Officials*, adopted by the UN General Assembly in resolution 51/59 (12 December 1996), www.un.org/documents/ga/res/51/a51r059.htm.

[18] Ibid. See also: Council of Europe, *Codes of Conduct for Public Officials*, Recommendation Rec(2000)10 and explanatory memorandum (Strasbourg: Council of Europe Publishing, January 2001).

clare or to disclose personal assets and liabilities, as well as those of their spouses and/or dependants, if possible.

Acceptance of Gifts or Other Favours. Public officials should not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties or their judgement. Usually, officials are allowed to receive some symbolic gifts, when the monetary value of such token gifts combined, per year, is under a certain threshold.

Confidential Information. The public official has a duty to treat appropriately, with all necessary confidentiality, all information and documents acquired by him or her in the course of, or as a result of, his or her employment. Such restrictions also apply after leaving public office. Confidentiality can be broken only when national legislation, the performance of duty or the needs of justice strictly require otherwise.

In addition, codes of conduct of public officials often include, *inter alia*, clauses defining:

- Conditions under which they need to report to the competent authorities actual, intended, or requested breaches of the code, the law and administrative procedures;
- Requirements for regular declaration of interests;
- Requirements not to engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his or her duties;
- Rules on how to react to improper offers; and/or
- A requirement not to give preferential treatment or privileged access to the public service to former public officials.[19]

Observance of the code. Such codes of conduct are issued under the authority of the respective minister or the head of the public service. The public official has a duty to conduct himself or herself in accordance with this code and therefore to keep himself or herself informed of its provisions and any amendments. He or she should seek advice from an appropriate source when unsure of how to proceed. The provisions of the code form part of the terms of employment of the public official. Breach of them may result in disciplinary action. The public official who negotiates terms of employment should include in them a provision to the effect that this code is to be observed and forms part of the employment contract. Subsequently, the official who supervises or manages other public officials has the responsibility to see that they observe the code and to take or propose appropriate disciplinary action for breaches of it.

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[19] For details on these and other clauses see *Codes of Conduct for Public Officials.*

And finally, the public administration regularly reviews the provisions of the code of conduct and amends it as appropriate.[20]

Codes of Conduct in the Private Sector

Just like in the public sector, companies also have codes of conducts that treat corrupt behaviour of their employees among other unacceptable conduct. Chapter 20 provides examples of codes of conduct of major defence suppliers.

On the international stage, the Organization for Economic Co-operation and Development gave momentum to the inclusion of corruption and its cross-border manifestations with the 1999 Convention on Combating Bribery of Foreign Officials in International Business Transactions.[21] The stipulations of the convention are fully applicable to arms trade.

Bribery and conflict of interest are among the most commonly addressed behaviours in codes of conduct. Academic analysis even concludes that the presence or absence of a bribery policy is a key indicator of the overall ethicalness of a company.[22]

On the other hand, empirical research leads to the conclusion that various types of corporate behaviour are generally unaffected by international codes and more closely affected by other factors. Nevertheless, research establishes that codes of conduct may have a positive impact. For example, corruption is not directly decreased by codes but codes open a more formal and constructive dialogue and thus contrast positively.[23]

In combination with government regulation and codes of conduct of professional associations, corporate codes of conduct are suggested as effective ways of implementing industry wide change in conflict of interest and bribery policy.[24]

There are a number of defence-related professional associations with codes of ethics. In the US, for example, most of the major defence contractors belong to the Defense Industry Initiative (see Box 20.1). In Europe, similar activities are conducted in the framework of the Aerospace and Defence Industries Association of Europe (ASD),

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20 Ibid., 14, Article 28.

21 Organization for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Officials in International Business Transactions* (February 1999), www.oecd.org/document/21/0,3343,en_2649_34859_2017813 _1_1_1_1,00.html.

22 Bert Scholtens and Lammertjan Dam, "Cultural Values and International Differences in Business Ethics," *Journal of Business Ethics* 75:3 (2007): 273–84, as quoted in A. Scott Carson, Mark Baetz, Shelley McGill, *Codes of Conduct in the Private Sector* (Toronto: EthicsCentre CA, April 2008), 16, www.ethicscentre.ca/EN/resources/ethicscentre_codes_april08.pdf.

23 Carson, Baetz and McGill, *Codes of Conduct* (2008), 13.

24 Ibid., 19.

and they resulted in "Common Industry Standards for European Aerospace and Defence." Box 20.2 provides a brief description of the ASD ethics and anti-corruption activities.

Integrity Pacts

Transparency International came forward with an innovative form of integrity building and promoting proper conduct on the side of both public officials and defence suppliers. The so-called "Defence Integrity Pacts" are designated to curb corruption in defence contracting. The idea, briefly presented in Box 15.9, has been implemented in Poland. Other NATO and partner countries are making the first steps in introducing Defence Integrity Pacts. The Ministry of Defence of Bulgaria, for one, considers making such pacts obligatory for high value defence procurements.

As in the examination of corruption risks and codes of conduct of public officials and defence suppliers, such voluntary frameworks are strengthened by governmental regulations. Box 7.7 provides an example of US federal regulations, requiring that defence contractors have ethics programmes and subjecting contractors to suspension

Box 15.9. Defence Integrity Pacts

Integrity Pacts are tools developed by Transparency International to tackle corruption in public contracting. These have since been developed for application to defence procurement.

A Defence Integrity Pact usually contains three main features:

- A short contract in which all bidders and the procuring organisation agree to certain specified no-bribery pledges and the bidders agree to enhanced disclosure rules. Bidders also agree to sanctions, including withdrawal from the tender, in the event they are found in violation of the agreed pledges.
- An Independent Monitor who ensures that all the parties abide by their commitments under the pact. This usually includes the use of an independent technical expert who reviews the tender documents for undue or corrupt influence and who is available to bidders in case of concern or complaint.
- More public transparency of documents and processes. This also allows greater scope for input from the public and civil society, and enhances confidence in the process through increased transparency.

A sample Defence Integrity Pact is available on Transparency International's Defence Against Corruption website, at: www.defenceagainstcorruption.org/index.php?option=com_docman&task=doc_download&gid=37.

Source: Mark Pyman, *Building Integrity and Reducing Corruption Risk in Defence Establishments: Ten Practical Reforms* (London: Transparency International – UK, April 2009), 36.

and debarment from government contracting for failing to abide by such programmes.[25]

The cross-border application of this principle, i.e. introducing internationally valid debarment[26] for corruption offenses, might turn into an even more powerful instrument in curbing corruption related to the procurement of defence products and services.

Access to Information, Transparency and Governance

Most of the regulations discussed so far could not be effectively enforced unless the activities of public officials are transparent and the government is accountable to the people. The UN Convention Against Corruption sets explicit requirements for transparency and accountability (Article 10). It requests that countries take such measures as may be necessary to enhance transparency in their public administration. Among the measures prescribed by the UN convention in order to enhance transparency and accountability are:

- Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
- Publishing information, which may include periodic reports on the risks of corruption in its public administration.

A relatively simple measure with a solid preventive effect is to make publically available the information on the assets of public officials once they come into office and to update that information on a regular basis.

Transparency may be considerably enhanced by introduction of a law on the freedom of information. Thus, by law, members of society will have guaranteed access to information. National experience in that regard differs. Some laws limit access by applying only to information related to public functions or information of public importance, or by requiring requesters to give reasons why he or she needs the information. As a rule, however, access to information should apply to “all information held, re-

[25] In this particular case, for knowingly failing to disclose violations of the False Claims Act in connection with the award or performance of government contracts and subcontracts and failing to disclose receipt of overpayments on government contracts in a timely manner.

[26] Just like debarment of a company by one US department bars it from getting contracts from any federal department.

gardless of form, source, date of creation, official status, whether it was created by the body that holds it, and whether it is classified."[27]

In terms of ways of facilitating access, a freedom of information law should meet several international standards providing for:

- The right to make oral requests;
- An obligation for public bodies to appoint information officers to assist requesters;
- An obligation to provide information as soon as possible and, in any case, within a set time limit;
- The right to specify the form of access preferred, such as inspection of the document requested, an electronic copy, or a photocopy; and
- The right to written notice, with reasons, for any refusal of access.[28]

Recent work by the World Bank calls for promoting the access to information and transparency in the judicial branch, making it more democratic and open to citizens. That issue has two dimensions – providing access to information and transparency regarding the administrative functioning of the judiciary, as well as its jurisdictional functions. The first dimension covers budget issues, assets and income disclosure statements, and court statistics, transparency and citizen participation in the process to appoint judges, while the second treats the publication of court sentences, access to case files in corruption cases and disciplinary procedures of judicial officials.[29]

Good governance is the basis of the strategic approach to reducing defence corruption risks, adopted in this compendium. Much in that regard can be accomplished administratively and without any need to reform the law at all. That includes measures to abolish unnecessary licences, streamline procedures, limit areas of discretion (and defining criteria where they are necessary), creating avenues for citizens to complain effectively, and many others.[30]

Both part II and part III of the compendium provide examples in enhancing good governance in defence, and the impact respective practices have on curbing defence corruption.

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27 Toby Mendel, "Legislation on Freedom of Information: Trends and Standards," *PREMNotes*, No. 93 (World Bank, October 2004), http://siteresources.worldbank.org/PSGLP/Resources/premnote93.pdf.

28 Ibid., 2.

29 Alvaro Herrero and Gaspar Lopez, *Access to Information and Transparency in the Judiciary*, WBI Working Paper (Buenos Aires, Asociación por los Derechos Civiles, April 2009), http://go.worldbank.org/IIB514XG10.

30 Pope, *Confronting Corruption* (2000), 270.

In that respect, the 1993 US Government Performance and Results Act provides an example of a comprehensive framework for limiting waste and inefficiency of government, addressing adequately vital public needs and maintaining public confidence. The act is intended to:

1) Improve the confidence of the American people in the capability of the Federal Government by systematically holding federal agencies accountable for achieving program results;
2) Initiate program performance reform with a series of pilot projects in setting program goals, measuring program performance against those goals and reporting publicly on their progress;
3) Improve federal program effectiveness and public accountability by promoting a new focus on results, service quality and customer satisfaction;
4) Help federal managers improve service delivery, by requiring that they plan for meeting program objectives and by providing them with information about program results and service quality;
5) Improve congressional decision making by providing more objective information on achieving statutory objectives, and on the relative effectiveness and efficiency of federal programs and spending; and
6) Improve internal management of the federal government.[31]

In sum, the act requires introduction in all governmental agencies of strategic planning, annual performance plans and reports, and performance budgeting, while providing for managerial accountability and flexibility. Box 15.10 presents an example of educational support to the implementation of the US Government Performance and Results Act throughout the defence establishment.

Conclusion: On the Importance of Legal Regulations

It is beyond doubt that the efforts to curb corruption in defence, as in most sectors of public activity, have to be based on an adequate legal framework. That framework should provide for prevention of corruption, prosecution of offenders and confiscation of the rewards from corruption offences, while protecting victims, witnesses and whistleblowers. The enforcement of such coercive mechanisms requires a level of access to information and international cooperation, adequate to the realities of the globalised world.

[31] The White House, Office of Management and Budget, *Government Performance Results Act of 1993*, www.whitehouse.gov/omb/mgmt-gpra_gplaw2m.

Box 15.10. Educational Support to Performance Management

The Information Resource Management College—part of the US National Defense University in Washington—provides education to mid-career and senior defence officials, both military and civilian, in performance management and related disciplines.

The Advanced Management Program is a 14-week resident graduate program. Three of its core courses directly support the increase of performance in defence:

- The course "Policy Foundations of Information Resources Management" presents public sector resource management concepts, policies and policy constituencies, focusing on the application of these concepts and policies as mechanisms of modern governance. It focuses on the application and interaction of financial, information and human resources to achieve legislative and policy goals and accomplish agency missions.
- The course "Measuring Results of Organizational Performance" provides strategies and techniques for assessing an organization's performance results as part of strategic planning or budgeting processes. It leverages lessons learned from inter-agency experience concerning approaches and resources required to establish and validate performance measurement instrumentation, collect and organize performance data, and analyze and report results.
- The course "Strategies for Process Improvement" focuses on strategies, methods and resources for improving, managing and controlling processes within and across federal agencies.

Source: National Defense University, Information Resources Management College website, "Advanced Management Program (AMP)," www.ndu.edu/irmc/pcs/pcs_amp.html.

In the review of criminal and civil anti-corruption legislation we need to recognise the interconnections between different strategies. For example, removing the controls on press freedom will be of little consequence if reporters do not have adequate access to government data. Likewise, efforts to enhance anti-corruption laws would not bring expected results if law enforcement is weak and corrupt.

When legislation is enforced effectively, regular reviews and updates will allow for changing corrupt practices and evolving technological means to exchange benefits and launder money. On the other hand, when legislation is fairly good but the enforcement is weak, we should not concentrate excessively on the legal framework but focus instead on improving the institutional mechanisms and drawing civil society and the private sector into the integrity building reform.

Voluntary guidelines, streamlined administrative procedures, increase of transparency and enhancement of management mechanisms, parliamentarian oversight and societal involvement—treated in the remaining chapters of this compendium—contribute to the institutional capacity to counter defence corruption.