Access to Information and International Norms

Jorge Santistevan de Noriega*

Access to public information (API) in international instruments

1. The right to seek and receive information is clearly established as a human Right. It has been recognized as such from to the Constitutions of modern democratic States the Universal Declaration of Human rights (Article 19). It has been included in all treaties that conform the International Law of Human Rights (Article 19 of the International Pact of Civil and Political Rights; Article 13 of the American Convention; Article 9 of the Charter of the African Union of Human and People's Rights; and Article 10(d) of the African Charter of the Youth).

2. In addition to international instruments, legislation has expanded to promote and protect API in different parts of the world. Mention should be made, in the Anglo-

From the liberty of expression, to the right of citizen, and the guarantee of the democratic governing.

4. Any review of API as a human right and its evolution in the international arena shows the substantive displacement of its focus. Rooted at the beginning in the right to "*seek and receive information,"* in the freedom of expression framework, throughout a significant part of the 20

- will it be necessary to create specialized institutions and distinguish the existing ones that deal with the matter as a subsidiary of the freedom of expression?
- Should *Rapporteurs* be created exclusively for API and the existence of national agencies that autonomously watch over the development of this right be promoted, like in the cases of Mexico and that which is proposed in Chile?
- How can the Conference make a creative contribution by proposing a system on international sanctions for States that do not comply with the standards of API ? Is this possible in the actual situation of foreign relations in our countries?

The boundaries of API: how public must the accessible information be?

9. Another aspect that shall be debated in this Conference has to do with the boundaries of API. On the one hand, clarifying that the exceptions and the limits of this right should be restrictively interpreted; that is, if there is doubt that the information should be generally known, one must give priority to the public interest and the contribution of the information to the practices of good, democratic governance. Without this principle, all the efforts that are accomplished through the international norms or domestic legislation will appear unsuccessful by the ability of the legislators, administrators, judges, and lawyers to decrease API in specific cases.

10. But we also see the other extreme:

- What qualifies as accessible “public information”? Is it only that which is in the hands of State institutions? Or is it also the information of the “public interest,” even if found under private control?
- What happens with international organizations, including those with financial character that may lack of policies to access its information and maintain proceedings under discretion and secrecy?
- And what, –to go further - deals with semi-public or simply private institutions, including businesses of economic activity that for the services they provide or because the activity they develop fall into the sphere of public interest, and should be subject to policies of information transparency that open the access to individually owned data and documentation?

11. There are no international norms that approach these topics in its full extent.

12. A debate about API cannot ignore the importance of protecting personal privacy. This limit –that is not unique but that in line with democratic perspectives and human rights- also is rooted in article 19 of the Universal Declaration of Human Rights. But measures must be taken to ensure that the right to privacy and the right to information are compatible. Their instrument is known as the Convention for the Protection of individuals with regard to Automatic Processing of Personal Data. The law prohibits the transfer or commercialization of information that contains sensitive data that concern the privacy of the citizens and their families. It attempts to go further: it may prohibit the accumulation of sensitive personal data by the institutions or businesses that store them and can surmise a good portion of our private lives. By negotiating with them, the destiny of thousands of people that are unaware of how much their lives are recorded by the institutions and businesses with which they interact can indeed be effected.

14. Another challenge that this Conference probably will have to consider, reflect upon, and propose is how indispensable it is to make the wide scope of the right to information of public interest compatible with the best protection to all information that affects the private lives of people, without any distinction, in the modern world. Perhaps in this ar

1. Is there a recognized international norm for the right to implementation of API? Where do privacy issues fit in? Does it extend far enough?
2. Is there a need for supra-national conventions or treaties to establish new norms? Perhaps new legislation to be promoted? If so, how would they be implemented and monitored?
3. Would these serve to promote a broad right to information or endorse the lowest common denominator?
4. What is necessary to monitor international, regional and national API mechanisms and progress toward transparency?
5. What mechanisms may be brought to bear on those nations that do not comply with the international instruments?
6. What is the role of international institutions to encourage/make conditional the furtherance of national API laws, or signing of international treaties?
7. What would be the role for an international global transparency community, who would be in it, how accountable it should be? and how would it be fostered?

Atlanta, February 28, 2008

THE CARTER CENTER

Group Four

International Norms: considering standards and a global community

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United Nations

1. Article 19 of the UN Declaration of Human Rights
2. Convention Against Corruption includes call for access to information for all signatory states
3. UN Resolutions since 1997
4. UNDP supports adoption of ATI in member states
5. Special Rapporteur
6. Internal UN information policies

European Union

1. Mention of ATI included in Treaty on Europea Union and Fundamental Rights
2. Research on ATI legislation in member countries
3. European Transparency Initiative

OECD

1. Internal Disclosure Policy
2. Supporting member states through Department of Government-Citizen Relations

Council of Europe

1. Recommendation Rec (2002)2 "Access to Official Documents"
2. Ad hoc advisory group, "Group of Specialists on Access to Official Documents"
3. Working on Convention for Access to Information (legally binding for member states)
4. Internal rules on access to documents

OAS

1. Article 19, Universal Declaration of Human Rights
2. Article 19, International Covenant on Civil and Political Rights
3. Article 13, Inter-American Human Rights Convention
4. Articles 4 and 6, Inter-American Democratic Charter
5. Declaration at the Special Summit of the Americas, Nuevo Leon (2004)
6. General Assembly Res 2252 "Access to Public Information: Strengthening Democracy", Santo Domingo (2006)
7. General Assembly Res 2121 "Access to Public Information: Strengthening Democracy", Ft. Lauderdale (2005)
8. Office of the Special Rapporteur for Freedom of Expression

African Union

1. Included in Charter on Human and People's Rights
2. Part of African Union Convention on Preventing and Combating Corruption
3. Part of African Youth Charter

Development Banks

1. Internal policies
2. Encourage states that receive funding
3. Provide funding specifically for ATI

Do International Human Rights Treaties Improve Respect for Human Rights?

Eric Neumayer

Journal of Conflict Resolution 2005; 49; 925
DOI: 10.1177/0022002705281667

Do International Human Rights Treaties Improve Respect for Human Rights?

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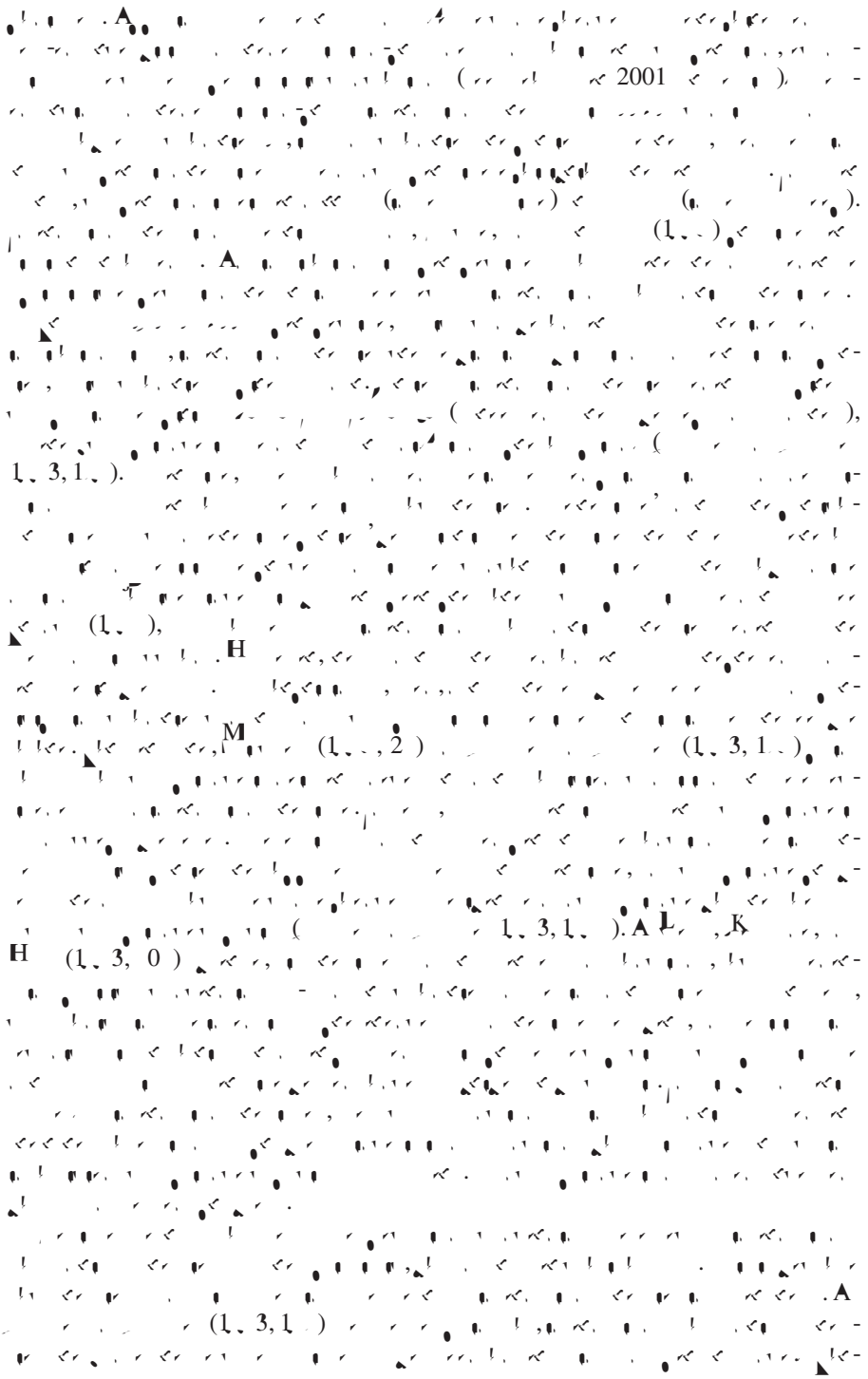

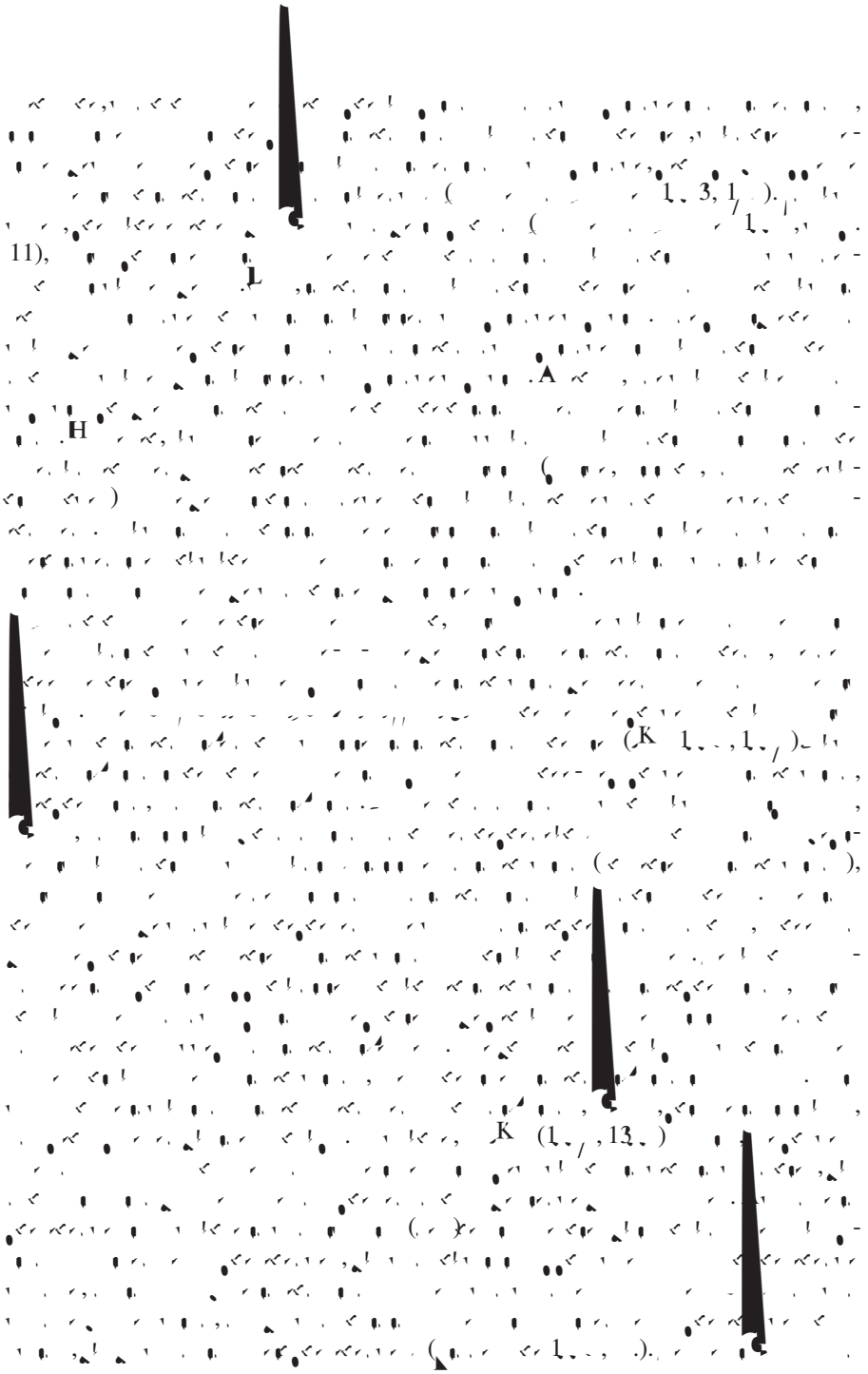

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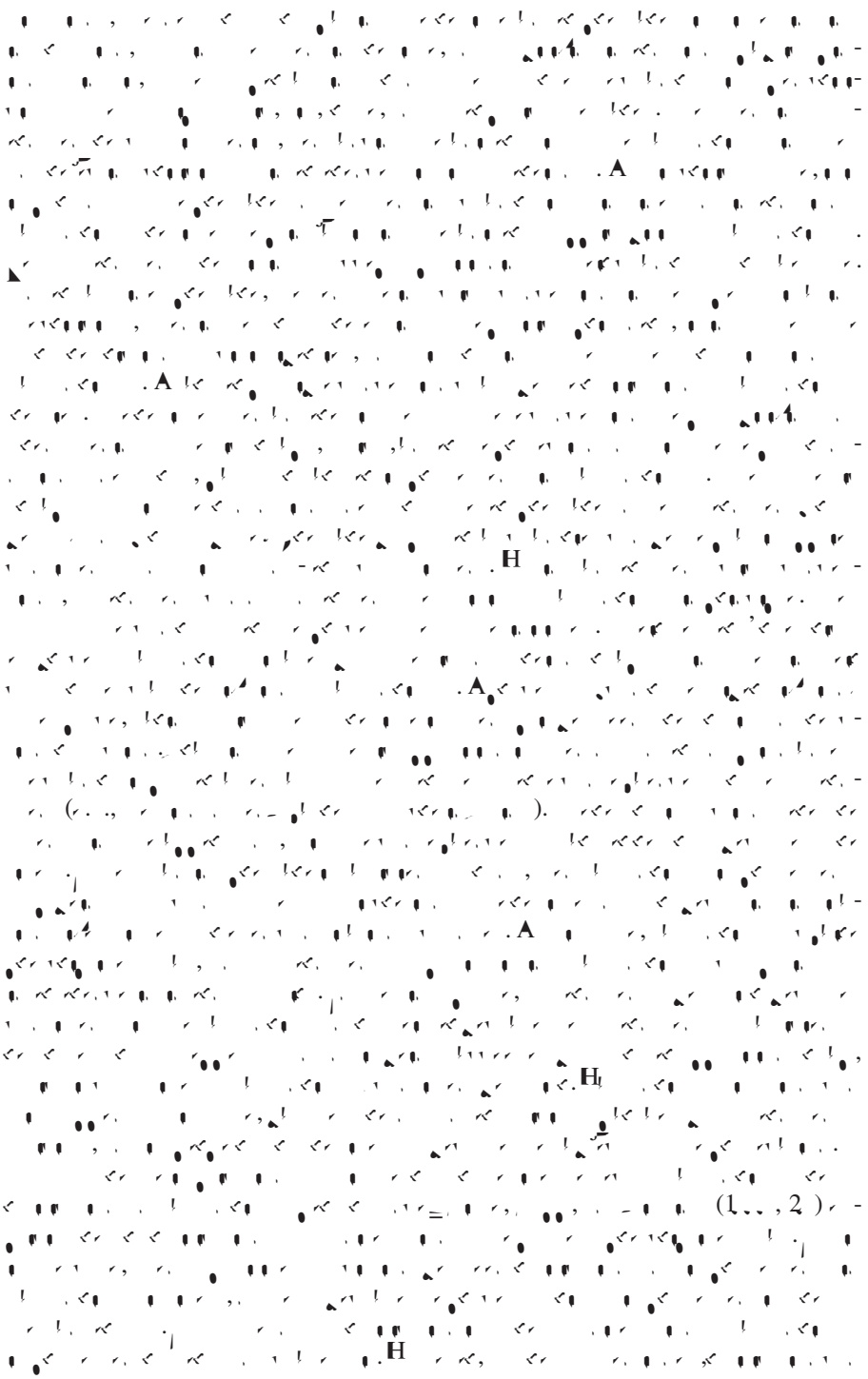

REVIEW OF EXISTING STUDIES

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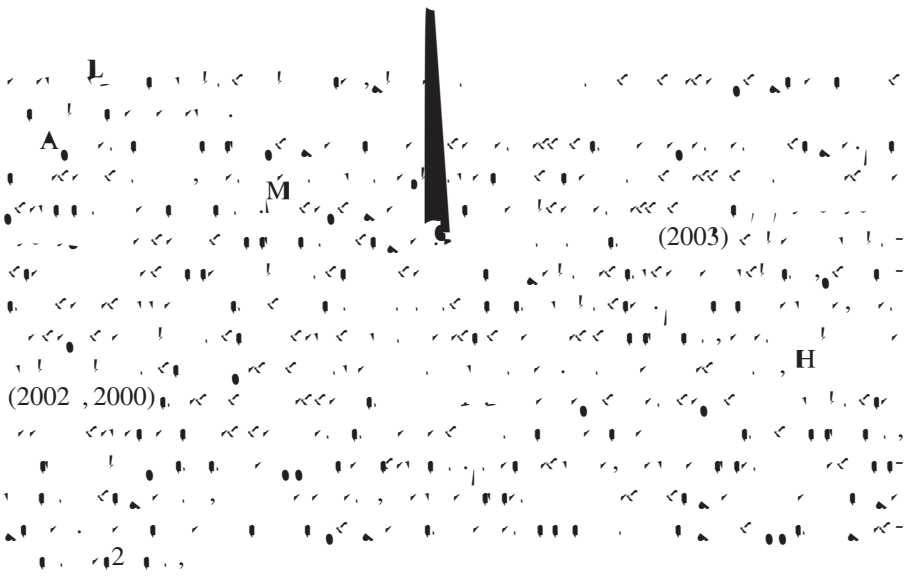

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RESULTS

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	C.		A 21 22		ICCP		ICCP O P	
	F. E. (1)	O P (2)	F. E. (3)	O P (4)	F. E. (5)	O P (6)	F. E. (7)	O P (8)
(1)	0.2 (11.3)***	1.0 1 (23,)***	0.2 (11.)***	1.0 (23. 1)***	0.3 ( )***	1.12 (2 .31)***	0.3 (1)***	1.133 (2 . 3)***
	0.1 (2.1)**	0.2 (2.1)**	0. 0 (2.3)**	0. 3 (2.)**	0.2 0 (3.2)***	0.2 (3.Q)***	0.1 (1,)*	0.1 (1. 1)
×	0.001 (2, 2)***	0.001 (1.00)	0.002 (3.)***	0.000 (0.13)	0.001 (1.23)	0.001 (1. 1)*	0.000 (0.)	0.001 (1. 0)*
×	0.01 (2.)***	0.01 (1,)*	0.02 (2,)***	0.0 3 (3.12)***	0.01 (2.)***	0.02 (3.1)***	0.023 (3.3)***	0.013 (1.)
	0.001 (1.3)	0.000 (0.3)	0.001 (1.)	0.000 (0.)	0.000 (0.0)	0.000 (0.23)	0.001 (0, 0)	0.000 (0.00)
	0.010 (1,)*	0.00 (1. 2)	0.013 (2. 0)***	0.010 (2.1)**	0.00 (1.02)	0.001 (0.10)	0.00 (1.)*	0.011 (2.21)**
	0.0 (1.)*	0.0 (0. 2)	0.0 2 (1.)	0.0 (0.)	0.02 (0.)	0.003 (0.03)	0.031 (0.)	0.001 (0.01)
	0.2 0 (. 0)***	0.3 (10.2)***	0.2 1 (.)***	0.3 (10.22)***	0.231 (. 2)***	0.33 (10.)***	0.23 ( )***	0.330 (10.3)***
( )	0. 1 (.)***	0.1 0 (.02)***	0. (.0)***	0.1 0 (.)***	0. 1 ( )***	0.1 (.22)***	0. 0 (.)***	0.1 (.1)***
( )	0.2 2 (0,)	0.0 (2.1)**	0. 0 (1.)	0.0 (2.3)**	0. 0 (2. 2)**	0.0 (2.20)**	0. (2.2)**	0.0 3 (2. 3)**
2	1 0.	1 0.3	1 0.	1 0.3	2,1 3 0. 6	2,1 3 0.3	2,1 3 0. 3	2,1 3 0.3

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[illegible]	ICCP F. . E. (1)	ICCP O . P . (2)	ICCP O. P. F. . E. (3)	ICCP O. P. O . P . (4)
[illegible] (1)	0. 2	1. 33	0. 3	1. 31
	(31. 3)***	(21.)***	(30)***	(21.)***
[illegible]	0.0	0.1	0.1	0.03
	(0. 2)	(2.31)**	(3.2)***	(0.3)
[illegible] × [illegible]	0.000	0.001	0.000	0.001
	(1.2)	(2.3)**	(0.1)	(2.)***
[illegible] × [illegible]	0.001	0.011	0.00	0.003
	(0.3)	(1.)*	(2.3)**	(0. 3)
[illegible]	0.000	0.001	0.001	0.001
	(0. 0)	(1. 1)*	(2. 1)**	(3.1)***
[illegible]	0.0 3	0.0	0.0	0.103
	(12.)***	(12.)***	(13.)***	(13. 3)***
[illegible]	0.03	0.00	0.03	0.00
	(1.30)	(0.0)	(1.33)	(0.0)
[illegible]	0.0 3	0.1	0.0	0.1 2
	(.20)***	(.3)***	(.)***	(.30)***
[illegible] ( )	0.0	0.1	0.0	0.1
	(1.)*	(.3)***	(1. 3)*	(1)***
[illegible] ( )	0.00	0.0	0.023	0.0
	(0.10)	(2.2)**	(0.2)	(2.1)**
[illegible]	3, 3	3, 3	3, 3	3, 3
R^2	0.	0.	0.	0.

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	Economic Conditions Predict Intentions		Economic Hardship Conditions Predict Intentions		Economic Hardship Conditions Predict Loans	
	Family Economy (1)	Own Personal Finances (2)	Family Economy (3)	Own Personal Finances (4)	Family Economy (5)	Own Personal Finances (6)
	0.01	0.	0.031	1.0	0.	2.3
	(0.20)	(. 0)***	(0. 3)	(.0)***	(1 .31)***	(13. 0)***
	0.	1. 3	0. 1	1. 2	0.21	1. 1
	(0.)	(3.0)***	(1.)*	(.10)***	(0. 3)	(2. 3)***
×	0.002	0.000	0.002	0.002	0.001	0.00
	(1.)	(0.12)	(2.3)**	(0.)	(1.3)	(2. 0)**
×	0.00	0.0 2	0.01	0.0	0.001	0.0
	(0.23)	(1. 3)*	(0. 3)	(2. 1)***	(0.0)	(1.)
	0.001	0.001	0.001	0.003	0.000	0.003
	(0.3)	(0.2)	(0.)	(1. 1)	(0.)	(1. 3)
	0.0 1	0.0	0.03	0.0 3	0.0 2	0.13
	(2.1)**	(1.)**	(2. 1)**	(1. 2)*	(.01)***	(.3)***
	0. 10	0. 1	0.3	0. 1	0.1	0.2
	( )***	(3.)***	(.00)***	(3. 3)***	(3. 3)***	(2.)***
( )	0. 23	0. 3	0. 2	0. 3	0.21	0.
	(1. 2)	(1)***	(1.30)	(.2)***	(1.1)	( )***
( )	0.0	0.210	0. 1	.2	0.3	0.112
	(0.0)	(1. 0)*	(1.2)	(0)***	(1.00)	(1.)
	30	30	3	3		
2	0. 0	0. 3	0. 0		0.	0.

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	Age at Child's Primary Injury		*Age at Household Child's Primary Injury*		*Age at Household Child's Child Labor*	
	Fixed Effects (1)	*Other Panel* (2)	*Fixed Effects* (3)	*Other Panel* (4)	*Fixed Effects* (5)	*Other Panel* (6)
(1)	0.1 3	0	0.33	1.000	0.	1.2
	(2.2)**	(.0)***	(,)***	(,)***	(.00)***	(.10)***
	0. 0	1.112	0.1	0.	0.0	0.223
	(1. 3)*	(1.)*	(0. 0)	(1.3)	(0.31)	(0,)
×	0.00	0.00	0.000	0.001	0.002	0.00
	(2.20)**	(2.1.)**	(0.1)	(0, 1)	(2. 1)**	(3.0)***
×	0.0	0.10	0.010	0.0	0.022	0.0 2
	(2.2)**	(2.)***	(0.)	(2, 2)***	(2.03)**	(2,)***
	0.001	0.002	0.00	0.002	0.001	0.000
	(0.2)	(1.3)	(1.)	(1.1)	(0.)	(0.0)
	0.01	0.010	0.011	0.0	0.0	0.1
	(1. 0)	(0. 2)	(0.)	(3.)***	(.)***	(.)***
	0.0 1	0. 10	0.1	0.	0.0	0.1 0
	(0.3)	(1,)*	(1.3)	(2.2)**	(0.1)	(0.33)
	0.310	0. 1	0.2	0. 0	0.1	0.2
	(.)***	(.)***	(.2)***	(.)***	(.3)***	(, 3)***
( )	0. 0	0. 2	0. 32	0.3 2	0.31	0.303
	(2.3)**	(. 3)***	(2.)***	(.0)***	(1.)*	(3.22)***
( )	3. 2	0. 2	3.	.332	1.311	0.01
	(3. 0)***	(3.33)***	(3.)***	(.03)***	(3.)***	(0.1)
	3. 2	3. 2	2	2	2	2
	0.	0. 0	0.	1	0	0.

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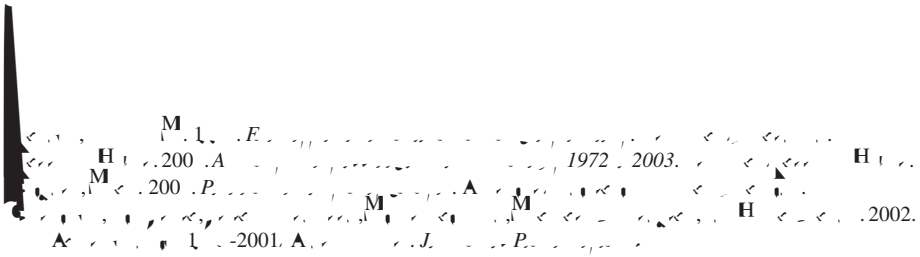
DISCUSSION AND CONCLUSION



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THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

GLOBAL ACHIEVEMENT OR MISSED OPPORTUNITY?

*Philippa Webb**

ABSTRACT

The United Nations Convention Against Corruption represents the first binding global agreement on corruption. It has elevated anticorruption action to the international stage. This article sets the context for the Convention by con-

The earliest action against the international dimensions of corruption was when the United States (US) outlawed transnational bribery in 1977.[3] At the time, the US urged the United Nations Economic and Social Council to consider an international convention, but due to North–South divisions, the talks were abandoned in 1981.[4] This article explores what changed in the intervening two decades and whether the UNCAC represents a global achievement in the fight against corruption.

There is an increasing awareness that corruption causes enormous harm and respects no borders. It impoverishes national economies, threatens democratic institutions, undermines the rule of law, and facilitates other threats to human security such as organized crime and terrorism.[5] The UNCAC arose in the context of this heightened consciousness of corruption as a problem of transnational significance. The existing multilateral anticorruption initiatives not only indicated key areas of concern, but also helped build the necessary consensus to commence negotiations on an international instrument. Moreover, the fact that the Convention was being negotiated under the auspices of the United Nations – the most representative international organization with 191 member states – meant that it was going to be truly global. The question is whether the UNCAC has fulfilled the world's weighty expectations.

This article takes two approaches to this question. First, it takes a political science approach that looks at the negotiating process, the strategic positions of different countries, and how this impacted on the outcomes. Second, it analyzes specific aspects of the Convention from a legal perspective to assess whether or not the UNCAC really has 'teeth'.[6] To put the UNCAC in context, Part I surveys the major multilateral initiatives against corruption. Part II then examines the four areas of the UNCAC that generated that most controversy during the negotiations: asset recoveruG nC rel-vtivuri.3(i

Argentina – was adopted.[20] However, the pace has im

Practices Act (FCPA) in 1977.[28] The US private sector felt that it was at a trade disadvantage due to this legislation and was pressing the US government to level the playing field.[29] Consequently, the US used the forum of the

and other legal persons.[36] Sanctions must be 'effective, proportionate and dissuasive' and of sufficient gravity to trigger the application of domestic laws on mutual legal assistance and extradition.[37] There are provisions on seizure and forfeiture of proceeds, but not their return.[38]

Unlike the OAS Convention, the implementation of the OECD Convention is monitored by an apparently rigorous system. The terms of the Convention are vague, simply stating that the OECD Working Group is to be the framework for 'a programme of systematic follow-up to monitor and promote the full implementation of this Convention.'[39] The OECD Working Group has therefore been free to develop a peer review system, drawing on experiences gained through OECD accession procedures, UN human rights audits, and the mutual evaluation procedures of the OECD's Financial Action Task Force.[40] A team of experts from two countries monitors implementation of the OECD Convention in essentially two phases. Phase 1 evaluates whether the country has implemented the Convention in its national laws based on answers to questionnaires and the submission of legal materials.[41] The reports of phase 1 are published on the internet after discussion between the experts and the country under review and a hearing by the OECD Working Group.[42] In 'phase 1 bis', the team evaluates the adaptation of laws based on the critique made in phase 1, and the phase 1 reports are accordingly supplemented.[43] Phase 2 concentrates on the enforcement of the implementing legislation *in practice* by examining the structures in place for dealing with foreign bribery cases, the level of resources deployed, and personnel training.[44] The team uses questionnaires and conducts an on-site visit. Civil society groups are permitted to provide information or opinions, but the nature of their involvement is subject to consultation with the country being examined.[45]

The OECD Convention's two-stage monitoring process has had mixed

late 2002 and to date 10 countries have been reviewed instead of the 14–16 originally planned.[47] Transparency International (TI) suggests that this slow start is a result of inadequate funding; additional funding has been provided for 2003–2004, but only partial funding is in place for the following years.[48] In addition, a survey by Control Risks Group of companies in the US and Europe found that only 56 percent of British companies, 38 percent of German companies and 30 percent of Dutch companies were familiar with the OECD Convention.[49] Moreover, the new domestic laws based on the OECD Convention have not resulted in a single conviction.[50] In the case of the United Kingdom (UK), although it has introduced legislation in compliance with the OECD Convention and has even updated it under the Anti-Terrorism Act of 2001, there have been no prosecutions for corruption.[51] This is unlikely to be due to an absence of corrupt activity; a TI opinion poll found 52 percent of people thought UK businesses may still be affected by corruption.[52] The OECD Convention demonstrates the challenges of reducing corruption in practice. Despite its focused scope, widespread ratification, and well-developed monitoring system, it is yet to produce significant changes on the ground.

C. Council of Europe's Criminal Law Convention on Corruption and Civil Law Convention on Corruption

The Council of Europe (COE) has actively developed two significant anti-corruption instruments that are also open to adoption by non-European countries. The COE is Europe's oldest political organization, founded in 1949, and groups together 45 countries, including 21 countries from Central and Eastern Europe. Its original aim was to defend human rights, parliamentary democracy and the rule of law, but since the fall of the Berlin Wall, it has started 'acting as a political anchor and human rights watchdog for Europe's post-communist democracies' by assisting the countries of central and eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform.[53] Its anticorruption

[47] Ibid.

[48] Transparency International, 'Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials', Report on Paris Meeting of 2–3 October 2003, at 3. Transparency International is an international non-governmental organization devoted to combating corruption. It is made up of a coalition of representatives from civil society, business, and government.

[49] 'Laws Fail to Halt International Business Bribery', *USAID Democracy and Governance Anti-Corruption News*, 23 August 2003, available at http://www

conventions reflect this impulse through their active monitoring and evaluation mechanisms.

The Criminal Law Convention on Corruption (COE Criminal Convention) was adopted in 1999 and is open for ratification by non-European countries that participated in its drafting.[54] It entered into force in 2002 and currently has 30 ratifications.[55] It has a broad scope because it applies to public and private sectors as well as transnational cases involving bribery of foreign public officials, members of foreign public assemblies, officials of international organizations, and judges and officials of international courts.[56] However, the range of conduct that states are required to criminalize is fairly narrow; the majority of offences are limited to active and passive bribery.[57] Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, nepotism and insider trading are not.[58] The Convention does provide for some support mechanisms such as requiring states parties to protect informants and to have specialized authorities dedicated to the fight against corruption.[59] The tracing, seizure and freezing of property is provided for, but the text is phrased in terms of 'facilitating' such actions and does not deal with the return of assets.[60] Mutual legal assistance may be refused if it undermines the 'fundamental interests, national sovereignty, national security or *ordre public*' of the requested state.[61]

The Civil Law Convention on Corruption (COE Civil Convention) was adopted in 1999 and entered into force in 2003.[62] It currently has 21 ratifications and non-European countries may join.[63] It represents the first attempt to define common international rules for civil litigation in corruption cases.[64] It requires states parties to provide in their internal law for 'effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of

[54] Council of Europe Criminal Law Convention on Corruption (COE Criminal Convention), done at Strasbourg, 27 January 1999, (entered into force 1 July 2002), E.T.S. 173, available at http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm. Other states can also join by accession after entry into force subject to the consent of all the contracting states which sit in the COE's Council of Ministers.

[55] COE, 'Treaty Office', http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (visited 1 October 2004).

[56] Articles 5, 6, 9 and 11 of the COE Criminal Convention.

[57] Criminalization requirements are in articles 2–14 of COE Criminal Convention.

[58] Articles 12 and 13 of COE Criminal Convention.

[59] Article 22 and 20 of COE Criminal Convention.

[60] Article 23 of COE Criminal Convention.

[61] Article 26(2) of COE Criminal Convention.

[62] Council of Europe Civil Law Convention on Corruption (COE Civil Convention), done at Strasbourg, 4 November 1999, (entered into force 1 November 2003), E.T.S. 174, available at http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm.

[63] COE, 'Treaty Office', http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (visited 1 October 2004).

[64] Global Programme Against Corruption, above n 16, at 100.

D. Convention of the European Union on the Fight Against Corruption involving officials of the European Communities or officials of member states

The European Union (EU) has addressed some forms of corruption in legally

text is drafted in legally binding terms and member states were required to make proposals for implementation by 2000. It is not clear if such proposals have been made, but in July 2002 Denmark presented an initiative aimed at

'undertake to' adopt legislative and other measures to establish the Convention's offences, strengthen national control measures to ensure the setting up and operations of foreign companies in their territory are subject to the national legislation, establish independent national anticorruption authorities, pass laws to protect informants and witnesses, and punish those who make false and malicious corruption reports.[89] States parties must adopt legislation to give effect to the right of access to any information that is required to assist in the fight against corruption.[90] The African Union Convention will be monitored by an Advisory Board on Corruption made up of 11 members elected by the Executive Council.[91] States Parties have to report on their implementation progression to the Board on an annual basis and the Board will then report to the Executive Council. The Board will adopt its own rules of procedure, but as of yet it is not obliged to verify the country reports in any way.

As of November 2004, only 4 of the 53 states had ratified the Convention; it requires 15 ratifications to come into force.[92] The African Union Convention is comprehensive on paper and is largely phrased in mandatory terms. However, its expansiveness may actually deter countries from ratifying it and the lack of a follow-up mechanism enables countries to delay or avoid implementation.

F. United Nations Convention Against Transnational Organized Crime

The United Nations Convention Against Transnational Organized Crime (UNCTOC) is the organization's first foray into creating a legally binding instrument that addresses corruption.[93] It also signals the transition from regional to global initiatives in this field. A committee of 127 member states drafted the Convention in 18 months from 1999 to 2000. It entered into force on 19 September 2003 with the deposit of the fortieth instrument of ratification. To date, 147 nations have signed and 93 have ratified it.[94]

The UNCTOC arose in response to international calls to address global organized crime by closing major loopholes that hinder international enforcement efforts and allow organized crime to flourish.[95] It focuses on the activities of 'organized criminal groups', but recognizes that corruption is often an instrument

[89] Article 5 of the African Union Convention.

[90] Article 9 of the African Union Convention.

[91] Article 22 of the African Union Convention.

[92] African Union, 'List of Countries which have Signed, Ratified/Acceded', http://www.africa-union.org/home/Welcome.htm (visited 4 November 2004).

[93] United Nations Convention Against Transnational Organized Crime (UNCTOC), done at Palermo, 12–15 December 2000, (entered into force 19 September 2003) 40 I.L.M. 353; G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex, Agenda Item 105, U.N. Doc A/RES/55/25 (2000), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf

[94] United Nations Office on Drugs and Crime, 'Signatories to the UN Convention against Transnational Crime and its Protocols', http://www.unodc.org/unodc/en/crime_cicp_signatures.html (visited 4 November 2004).

[95] Luz Estella Nagle, 'The Challenges of Fighting Global Organized Crime in Latin America', 26 Fordham Int'l L.J. (2003) 1649, at 1665.

or effect of organized crime and includes several provisions to address this.[96] The main one is the requirement that each party adopt laws and other necessary measures to criminalize active and passive bribery in connection with the exercise of the duties of government officials.[97] It also provides that each party 'shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions'.[98] This provision is important because it focuses on successful law *enforcement*, not just simple law enactment.[99] However, the provision also provides an escape hatch by stating that each party shall take measures that are 'appropriate and consistent with

for International Crime Prevention, UN Office on Drug and Crime (UNODC).[107] As a first step, an Intergovernmental Open-Ended Expert Group was asked to prepare draft terms of reference for the negotiation of the Convention. These terms of reference were set out in a further General Assembly resolution which requested the Ad Hoc Committee to 'adopt a comprehensive and multidisciplinary approach' and to consider the specific elements.[108]

The text of the United Nations Convention against Corruption (UNCAC) was negotiated during seven sessions of the Ad Hoc Committee held between 21 January 2002 and 1 October 2003. The draft Convention was adopted by the General Assembly in October 2003.[109] At the High-Level Political Signing Conference at Merida, Mexico from 9–11 December 2003, high expectations and intense optimism surrounded this latest addition to the multilateral initiatives against corruption.[110] The UN Secretary-General asserted that the Convention 'can make a real difference to the quality of life of millions of people around the world'.[111] However, the experiences of regional organizations suggest that creating meaningful anticorruption instruments is a difficult task.

II. ANALYSIS OF THE CONVENTION AND ITS NEGOTIATING HISTORY

The Ad Hoc Committee certainly met the request of a 'comprehensive and multidisciplinary approach' by drafting a Convention that runs to 71 articles.[112] The UNCAC is the most wide-ranging instrument to date, covering three major aspects of fighting corruption:[113]

- *Prevention*: An entire chapter of the UNCAC is devoted to preventive measures addressed to both the public and private sectors.[114] Provisions relate to the prevention of corruption in the judiciary and public

[107] Ibid.

[108] These were: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation: G.A. Res. 56/260, U.N. GAOR, 56th Sess., Agenda Item 110, at 2, U.N. Doc. A/RES/56/260 (2002).

[109] G.A. Res. 58/4, U.N. GAOR, 58th Sess,, Agenda Item 108, U.N. Doc. A/RES/58/4 (2003).

[110] See 'UN Anti-corruption Treaty off to Flying Start at Signing Conference', *UN News Center*, 10 December 2003; Adriana Barrera, 'New UN Pact Aims to Stop Leaders Looting Coffers', *Reuters*, 10 December 2003.

[111] 'Secretary-General Congratulates Ad Hoc Committee on Successful Conclusion of Negotiations on UN Convention against Corruption', *M2 Presswire*, 2 October 2003.

[112] See the UNCAC.

[113] See generally, 'Highlights of the United Nations Convention Against Corruption', *UNODC Update*,

to facilitate the safe return to Iraqi institutions of Iraqi cultural property that had been illegally removed.[136] The African representative, in particular, believed that the words and spirit of this resolution should be incorporated into the UNCAC.[137]

In the end, provisions on asset recovery formed an entire chapter of the UNCAC.[138] The provisions have been hailed as 'ground-breaking',[139] but this overstates their true impact. The Convention says the return of assets pursuant to this chapter is a new 'fundamental principle' of international law.[140] However, the *travaux preparatoires* indicate that the expression 'fundamental principle' has no legal consequences on the other provisions of the chapter.[141] The article on prevention and detection of transfers of the proceeds of crime sets out useful provisions on 'know-your-customer' requirements for financial institutions and the prevention of 'phantom banks' that have no physical presence and are not affiliated with a regulated financial group.[142] However, states parties need only 'consider' establishing effective financial disclosure systems for public officials.[143] There are mandatory provisions on establishing measures to allow states parties to recover property through civil actions or via international cooperation in confiscation.[144] Although the seizure and freezing of property is compulsory for states parties, they need only 'consider' preserving property for confiscation.[145] The Convention recognizes the complexity of many asset recovery cases by drawing distinctions between how assets will be returned in response to different crimes. In the case of embezzlement or laundering of public funds, the confiscated property is returned to the requesting state party.[146] In the case of proceeds from any other offence under the Convention, the property is returned as long as there is proof of ownership or recognition of the damage caused to the requesting state party.[147] In all other cases, priority consideration is given to returning the property to the requesting state party, returning property to

[136] S.C. Res. 1483 (2003), U.N. SCOR, 4761 mtg., at paras 23 and 7, U.N. Doc. S/RES/1483 (2003).

[137] *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its sixth session, held in Vienna from 21 July to 8 August 2003*, at 5, U.N. Doc. A/AC.261/22 (2003).

[138] Ch V of the UNCAC.

[139] Mark Turner, 'Step Forward for Fight Against Global Corruption', *Financial Times*, 1 October 2003.

[140] Article 51 of the UNCAC.

[141] *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux preparatoires) of the negotiation of the United Nations Convention against Corruption*, at 8, U.N. Doc. A/58/422/Add.1, (2003).

[142]

its prior legitimate owners, or compensating the victims of the crime.[148] States parties are also to consider setting up a financial intelligence unit to keep track of suspicious financial transactions.[149]

need to retain experts, transport evidence and witnesses, translate testimony, and carry out investigations and prosecutions in a number of countries.[158] The Convention's mutual technical and legal assistance provisions may mitigate some of these costs. Third, a common legal complication in recovery actions is straddling the boundary between civil and criminal proceedings because each type involves different procedural safeguards, burdens of proof and remedies.[159] In this regard, the mechanisms for recovery directly, or through international cooperation, help harmonize procedures.[160] If the Convention is implemented by enough state parties, the civil/criminal dilemma will be alleviated. Fourth, asset recovery actions raise complicated political considerations. The requesting state party may face internal political obstacles from supporters of the former leader or senior officials who allegedly transferred the assets. On the other hand, the requested state party may have concerns about the political legitimacy of the requesting state's government, the motivations behind the recovery efforts, or the fate of the returned assets if corruption is still ongoing.[161] The Convention does not directly address these concerns, but the very process of negotiating the asset recovery provisions helped generate a high level of political will about the importance of this issue. This consensus may encourage states parties to better address the political obstacles to asset recovery.

The asset recovery chapter has been greeted with delight by many countries that have been cheated by their leaders. For example, the Philippines, which has been trying to recover billions of dollars transferred overseas by former President Ferdinand Marcos for 17 years, has warmly welcomed the asset recovery provisions.[162] Rose-Ackerman argues that national criminal prosecutions of former officials of the previous regime are likely to absorb resources that could be put to better use elsewhere, but she makes an exception for allegations of corruption: 'Such prosecutions can be part of an effort to locate and repatriate corrupt proceeds deposited abroad . . . [and] can b09 Tc00.0008.253 TI

retrieve looted funds should be combined with affirmative programs of reform.'[164] The impact of the asset recovery provisions should therefore not be exaggerated; they focus attention on a certain aspect of corruption that afflicts developing countries, but do not supply a panacea to their problems.

B. Private sector

The recognition that private sector corruption is a problem has been intensifying in developing and developed countries for three reasons. First, the private sector is larger than the public sector in many countries.[165]

being conducted in the private sector, but also creates opportunities for corruption through the very process of transferring assets of large state enterprises. There could be insider dealing, assurances of lenient regulatory oversight, and retention of monopoly rents.[172]

Third, the huge economic influence of multinational corporations (MNCs) and the consequent leverage they have in relation to states, means that they are an actor that cannot be excluded from an international anticorruption strategy. If the size of countries and MNCs are measured by value added, the world's largest MNC, ExxonMobil, with an estimated $63 billion value added in 2000, ranked 45th in a combined list of countries and non-financial companies; this is equivalent to the size of the economy of Chile or Pakistan.[173] In the top 100 combined country-company list for 2000, there were 29 MNCs. These powerful non-state actors can make deals with developing country governments that represent a sizable share of a state's national income or resource endowments; they often negotiate with top public officials and, if it is a corrupt environment, the MNC must decide whether to participate actively, quietly refuse to deal, or report the corruption.[174]

Extending the Convention to cover the private sector was one of the most contentious issues during the negotiations. The EU spearheaded the drive to criminalize bribery in the private sector.[175] It was supported by the Latin American and Caribbean States whose representative argued that in view of the linkage between the two sectors, adopting a 'limited' approach that only targeted the public sector 'would adversely affect the implementation of the future convention'.[176] However, the US resisted intrusions on 'purely private sector conduct'; a US official explained, 'Private sector bribery is not a crime in the United States. We get at it in other ways'.[177]

private-to-private transactions, but the legislation gave US firms a head start in developing corporate codes of conduct[178] and many such codes cover purely private sector bribery.[179]

The US views prevailed in the final version of the Convention which only has a non-mandatory framework for criminalizing bribery and embezzlement in the private sector.[180] The Convention takes a slightly stronger stance on prevention by requiring each state party, 'in accordance with the fundamental principles of its domestic law', to take measures to prevent corruption in the private sector, enhance accounting and auditing standards, and 'where appropriate' provide effective civil, administrative or criminal penalties for failure to comply with such measures.[181]

indicate that this provision does not rest

government 'generates an insatiable appetite for campaign funds'.[194] Moreover, the costs of this competition are increasing in a 'media democracy' where opportunities for communicating must be purchased.[195] Yet, this flow of campaign finance generates two problems. First, when large amounts of money reach a politician, there is a temptation to divert the funds for personal use.[196] Second, even if the donations are not diverted, they can be used, in effect, to 'purchase' an elected official's support or vote on legislation.[197] Democracies have sought to reduce corruption in campaign finance in a variety of ways, but each has proved unsatisfactory. The US requires disclosure of donors and imposes limitations on the total amount that individuals can directly contribute to a candidate.[198] However, third-party organizations can legally collect unlimited contributions.[199] Germany has very stringent laws,[200] but in the 1980s, contributions requiring *quid pro quos* were disguised as charitable contributions.[201] There have also been allegations that former Chancellor Kohl maintained a secret campaign contribution fund.[202]

The negotiations in the Ad Hoc Committee centered around Article 10 on the funding of political parties proposed by Austria, France and the Netherlands.[203] At the fourth session of the negotiations, the article read:

> 1. Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
>   (a) To prevent conflicts of interest;
>   (b) To preserve the integrity of democratic political structures and processes;
>   (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

[194] Claus Offe, 'Political Corruption: Conceptual and Practical Issues', in Janos Kornai and Susan Rose-Ackerman (eds), *Problems of Post Socialist Transition: Building a Trustworthy State*, vol 1, (New York: Palgrave Macmillan, 2004) 290 at 308.

[195] Ibid at 309.

[196] Henning, above n 14, at 842–43.

[197] Ibid.

[198] 2 United States Code (USC) § 434(b) (2000).

[199] The US Supreme Court affirmed the ban on the 'soft money' that national political parties collected from corporations, labor unions and wealthy patrons. However, some believe major donors will now direct that money to third-party organizations: Glen Justice, 'Court Ruling Affirms New Landscape of Campaign Finance', *N.Y. Times*, 11 December 2003.

[200] It requires detailed information on donors of more than DM20,000 (US$10,000), anonymous

(d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.

2. Each State Party shall take measures to avoid as far as possible conflicts of interest owing to simultaneous holding of elective office and responsibilities in the private sector.[204]

The article's legally binding language and broad scope elicited a negative reaction from several delegations. The US refused to endorse the Convention if it included that article and called for its deletion.[205] It is ironic that the US was such a strong opponent of this aspect of the UNCAC. Two decades ago, during the negotiations for the OECD Convention, the US was very concerned about corruption in political parties. In fact, it was a 'major disappointment' to the US that the definition of 'foreign public official' in the OECD Convention excluded political party officials.[206] The US delegates believed that excluding political party officials 'would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials'.[207]

The US ultimately triumphed in the negotiations and Article 10 was deleted during the penultimate session of the Ad Hoc Committee, as the deadline for completion quickly approached. Following the decision, the representatives of Benin, Burkina Faso, Cameroon and Senegal expressed their wish that the report of the Ad Hoc Committee 'reflect their preference for a separate binding article on the financing of political parties; however, because of their willingness to accommodate the concerns of other delegations and to ensure the successful finalization of the draft convention, they felt compelled to join the consensus on the deletion of article 10 and the incorporation of a new paragraph in article 6'.[208]

Article 6 represented a substantial compromise. The strong language of Article 10 was watered down to two non-mandatory clauses asking states to 'consider' adopting measures to 'prescribe candidature for and election to public office' and to 'enhance transparency in the funding of candidatures . . . and, where applicable, the funding of political parties'.[209]

[204] *Revised Draft United Nations Convention Against Corruption*, at 18, U.N. Doc. A/AC.261/3/Rev. 2 (2002).

[205] 'Transparency International Zambia President Dr. Chanda Criticizes US' Unilateralism', *Africa News*, 15 August 2003. See also, Transparency International Press Release, 'US Weakens UN Convention by Blocking Measures Tackling Political Corruption', 11 August 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.08.11.us_blocking_measures.html.

[206] Gantz, above n 10, at 486.

[207] Ibid.

[208] *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its sixth session, held in Vienna from 21 July to 8 August 2003*, U.N. Doc. A/AC.261/22, Aug 22, 2003, 10.

[209] Article 6(2) and (3) of the UNCAC.

Although the US already has strong domestic laws on transparency in political funding, it was only willing to support a discretionary paragraph on this issue.[210]

The outcome of the negotiations acknowledged that the relationship between money and politics is complex and hard to constrain without creat-

compliance.[216] The work by Thomas and Grindle puts forward an 'interactive' model of reform[217] that requires states parties to follow through on their decision to sign and ratify the Convention; the UNCAC must be translated into visible, meaningful, and sustainable changes on the ground.

The survey of multilateral initiatives in Part I demonstrated how implementation, monitoring and enforcement are the areas where most conventions fall down. In the case of the OAS Convention, the monitoring mechanism did not produce any results until 2003. The mechanism's questionnaire methodology is also open to criticism because it will:

> have little bearing or weight or force on whether the States Parties actually benefit from or adhere to the intent of the [OAS Convention] . . . The [Convention] and any other anticorruption instrument can only be successful if the officials responsible for implementation are themselves held accountable for their own conduct. It is one thing to tell the world that one's Nation is participating in an international convention, and another matter altogether to actually live up to the convention itself.[218]

The OECD Convention has a more robust monitoring mechanism with on-site visits and a focus on practical changes in institutional structures. However, significant problems still exist. Phase 1 reviews have found that domestic laws are being implemented in compliance with the Convention, but the content of these laws may not be conducive to practical change. Australia's Criminal Code Amendment (Bribery of Foreign Officials) Act 1999 (Cth) has many provisions that are either undefined or 'so broad that companiesec0oco(i)-2wr1(s)1.8('D0.0as are)2ei on(aepuntablcnfo)-4.conduws mabthe a m

reviews, including more experienced prosecutors on country review teams, and encouraging civil society participation.[221]

The COE Civil and Criminal Conventions have a similar peer review and mutual evaluation system to the OECD Convention. The COE mechanism also supplements questionnaires with on-site visits. It has proceeded at a good pace and completed first round evaluations of all states parties in 2002.[222] It is now engaged in second round evaluations arranged around three themes: proceeds of corruption, public administration and corruption, and legal persons and corruption.[223] The COE system appears to be faring slightly better than the OECD mechanism because it includes training for evaluators, appears to have a consistent level of funding, and is flexible enough to make adjustments to its rules and procedures as it goes.[224] Most importantly, the formation of GRECO – a group of member states, non-member states, and organizations – puts the COE Conventions in a broader context. Nonetheless, there does not appear to have been any empirical work on whether the COE Conventions are actually being enforced so it is quite possible that they suffer similar problems to the OECD Convention.

Perhaps conscious of the failings of previous instruments, the negotiations over the UNCAC's monitoring mechanism started off strongly. At the second session, Austria and The Netherlands submitted a proposal for a monitoring mechanism.[225] They suggested the establishment of a Conference of States Parties with the objectives of facilitating training and technical assistance, exchanging information, cooperating with regional organizations and NGOs, reviewing implementation 'periodically', and making recommendations to improve the Convention.[226] They also called for a Subsidiary Body of ten experts elected by the states parties which would assess reports submitted by states parties on their implementation of the Convention.[227] The weakness of this proposal was that reports need only be submitted every five years and even though the Subsidiary Body could request further information, there was no mention of on-site visits or other means of verifying the accuracy of the

Oceania appoint a Bureau to assist the Subsidiary Body.[229] It also set out a two-phase evaluation process, based on the OECD Convention: Phase 1 would focus on whether the domestic laws of each state party fulfil the requirements of the Convention; Phase 2 would study the structures put in place to enforce the laws, with provision for on-site visits.[230] Norway's proposal also set out innovative methods for addressing non-compliance with the Convention, including positive (targeted technical assistance) and negative (suspension of the state party from the Convention) measures. This goes a step further than any previous multilateral initiative against corruption.

However, neither of these proposals secured enough support. The Austrian and Dutch proposal for establishing a Conference of States Parties to facilitate activities and information exchange was retained.[231] However, the proposals on the Subsidiary Body and the regional evaluation process did not make it into the final Convention. Instead, each state party is to provide information on its implementation measures 'as required by the Conference of States Parties'.[232] The role of civil society is weak: the UNCAC may consider inputs from NGOs 'duly accredited' in accordance with procedures that are yet to be decided, with no time limit specified for such a decision.[233] The Conference of States Parties may

of several years. In the meantime, governments have little incentive to pass implementing laws. As imperfect as they are, the monitoring mechanisms of the OECD and COE demonstrate that peer review and mutual evaluation can produce some results such as raising public awareness and encouraging the passage of implementing laws. Moreover, the UNCAC could have taken this opportunity to propose the creation of a new international institution for review and adjudication. Rose-Ackerman suggests that tribunals in the fields of human rights, international labor standards and nuclear energy might be models.[238] She says another option may be to use the leverage of the World Trade Organization to give victims of corruption a means of lodging a complaint.[239]

III. PROSPECTS FOR THE CONVENTION: THEORIES OF COMPLIANCE

When a treaty comes into force, ratifying states are legally obliged to comply with it according to the principle of *pacta sunt servanda*.[240] However, the international legal environment is very different to domestic legal systems. The International Court of Justice (ICJ) is not equivalent to a domestic court because it cannot enforce its judgments.[241] The General Assembly is not equivalent of a domestic legislature because its resolutions are not binding.

for doing so, but also because of their commitment to the ideas embodied in the treaties.[244] This normative approach to analyzing state behavior has given rise to a number of different, yet related, views. For Brierly, state consent is the critical factor: nations obey international law because they have consented to it.[245] Franck, on the other hand, places emphasis on process, arguing that states comply with international law because it comes into existence through a legitimate (i.e. transparent, fair, inclusive) process.[246] The Chayes also examine the treaty-

transnational legal process through the requirement that states parties translate many of its provisions into domestic law. However, the lack of a robust monitoring mechanism for the UNCAC means that the domestic and transnational legal incentives for enforcement are low.

B. Compliance as a cooperation problem: competition or coordination?

The second theoretical approach views compliance in international law as

Second, the UNCAC can also be seen as the culmination of a 'ratcheting up' that began with the US unilateral action with the FCPA and progressed to soft law and then finally binding agreements by regional organizations. Even if the states parties to the UNCAC have mixed motives, it is likely that they still have some interest in coordinating their actions in the 'anarchic'[267] environment of international relations. However, the question is how far will this

normative consensus that has been building up around corruption. It has helped elevate anticorruption action to the international stage. However, finalizing the text is only the beginning of the long journey to having an impact on corrupt behavior. The Convention must now be ratified by at least 30 states, domestic legislation must be reworked, and, most importantly, its provisions must be enforced.

As with every international legal agreement, the UNCAC struggles with the tension between domestic sovereignty and international obligations. During the third session of the negotiations, the Chairman of the Ad Hoc Committee expressed his concern about the repeated references in the text of the Convention to its conformity with domestic law:

> Such references should be the exception rather than the norm, because international law was not meant to be a mere reflection of national laws. [These] [n]egotiations . . . [offer] an opportunity to codify innovative approaches to common problems, to which national laws [can] aspire. Such an opportunity should not be missed.[282]

Was an opportunity missed? In some ways, it was. Purely private sector corruption is only subject to a non-mandatory framework which fails to recognize the large size of this sector in many countries and its increasing linkages with the public sector. However, the most disappointing aspect of the UNCAC was its failure to incorporate a robust monitoring mechanism even though the proposals of Austria, The Netherlands and Norway were on the table. The experience of the OAS Convention suggests that a vague provision for monitoring will result in a long delay before even the most rudimentary action is taken to hold states parties accountable. It is undeniably challenging to design a monitoring mechanism that does not encroach too far on state sovereignty, especially on a subject as contentious as corruption. Yet, the OECD and COE models prove that monitoring mechanisms can achieve some results, especially in the area of domestic implementation of laws. Instead of improving on such models, the UNCAC retreated back to the safety of noncommittal legal language and deferral of the hard decisions to another day.

However, there *are* some aspects of the UNCAC that are innovative or build on the strengths of previous initiatives. Its provisions on asset recovery go a long way to addressing the major obstacles to retrieving assets derived from grand corruption. If ratified widely, the asset recovery provisions provide a solid foundation for international cooperation in this area. Moreover, the Convention's provisions on private-to-public bribery strengthen the standards set by the OECD Convention, and its creation of a private right of action internationalizes the impact of the COE Civil Convention. In the case

[282] *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on its third session, held in Vienna from 30 September to 11 October 2002*, at 7, U.N. Doc. A/AC.261/9 (2002).

of the financing of political parties, the UNCAC did as best it could given that this is a difficult problem that probably requires creative solutions outside of formal legal controls.

It is too early to accurately predict the tangible contribution that the UNCAC will make to the fight against corruption. Writing about international bribery 25 years ago, Reisman observed, 'To date, the international efforts that have been mounted seem more on the order of a crusade than reform. Their major contribution appears to be a feeling that something laudable is being done.'[283] It would be a great shame if the Convention became

International Environmental Agreements: Politics, Law and Economics 4: 22 2 1, 200 .

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Abstract. 1

Key words:

Introduction

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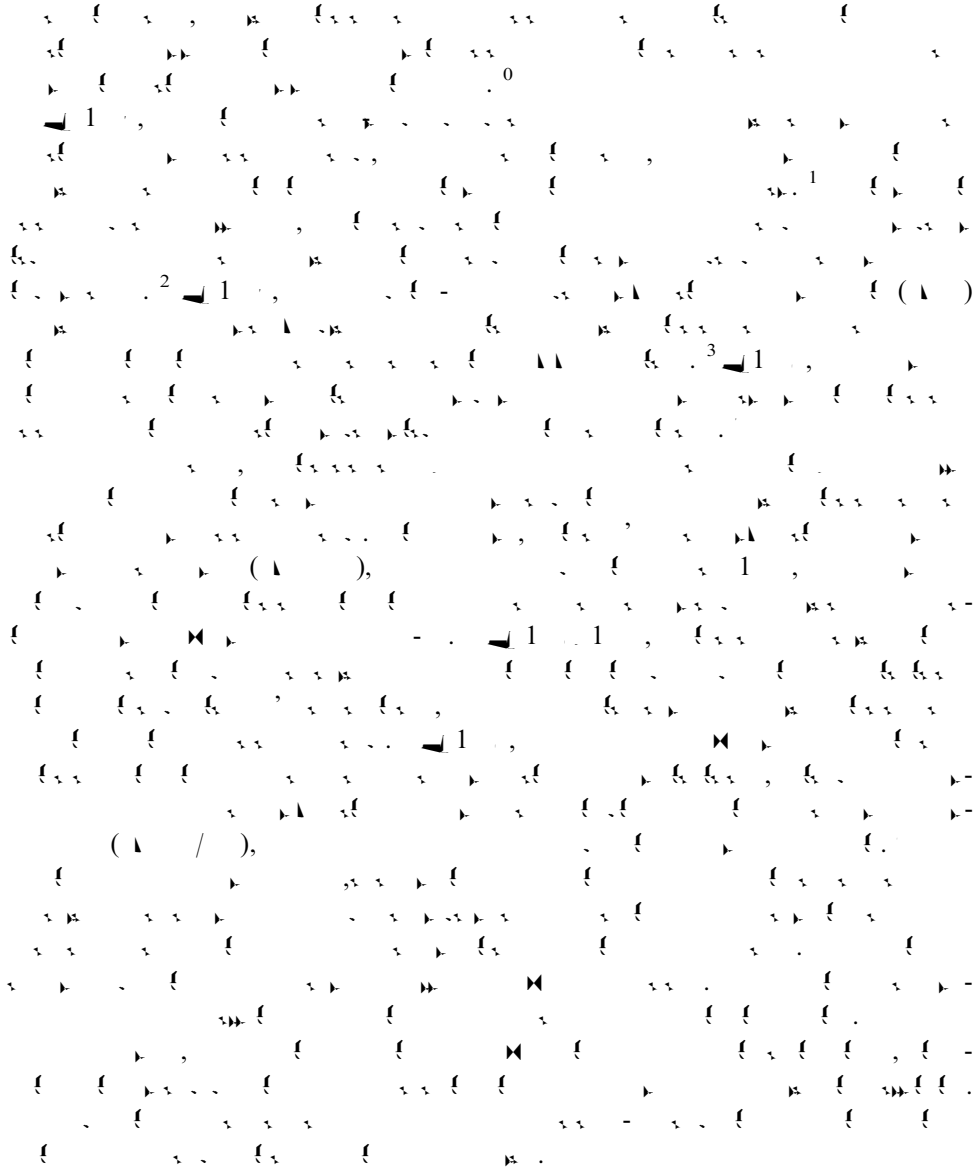
1 2002,

Reflections on Implementing the First Pillar of Access to Information

Complexity of Implementing the Second Pillar of Public Participation



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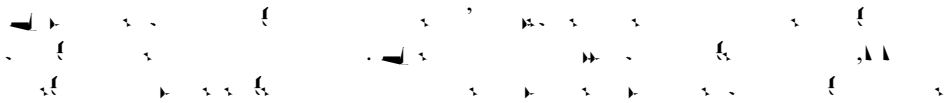

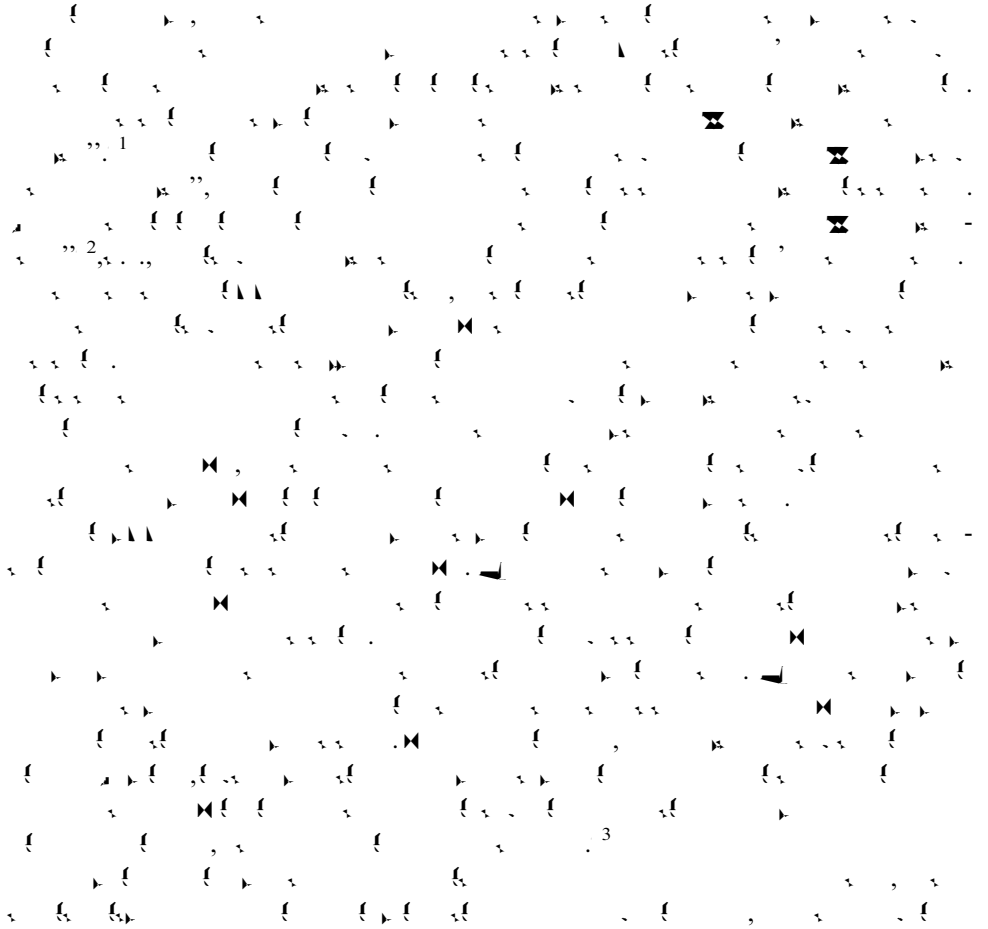

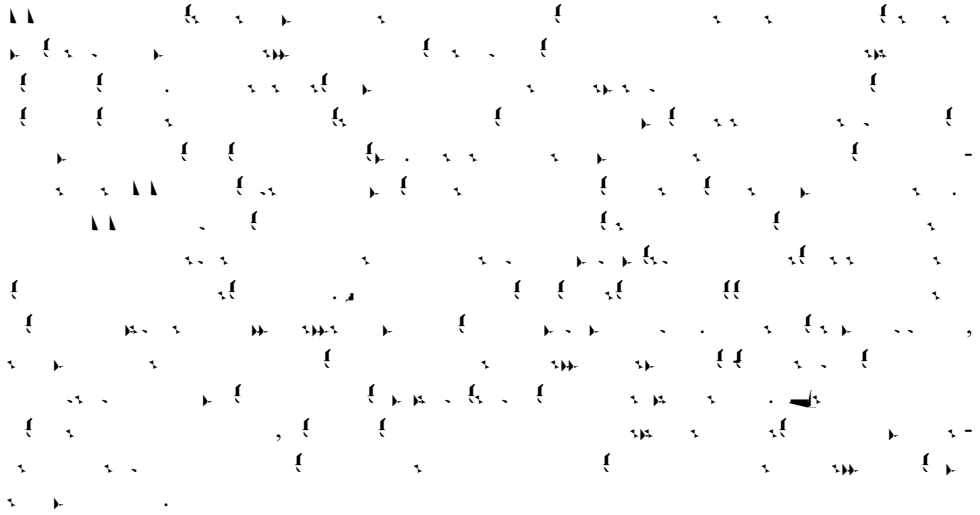

Acknowledgement

Notes

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