

THE UNITED NATIONS CONVENTION AGAINST DOING ANYTHING SERIOUS ABOUT CORRUPTION

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I. TERMITES IN THE HOUSE: A POLEMIC

Yet they railed against us. We spoke of the rule of law and human rights; they would ask why the United States would not join the International Criminal Court or the Land Mines Treaty, why we sought always to make rules that would apply to everyone except Americans.

Anne-Marie Slaughter¹

Perhaps the greatest political achievement of human civilizations is the practical entrenchment of fundamental rights and freedoms, which are characteristically for the long term, in the context of functional democracy, which is characteristically for the short term. This combination may be called constitutionalism. Once it is established, the protected rights and freedoms add strength to democracy, but democracy does not reciprocate by strengthening the rights; on the contrary, democracy's tendency is to burst out of its constraints in pursuit of immediate objectives.²

A central obstacle to constitutionalism is the asynchrony of political developments. In the United States, for example, immediate objectives include prevention of terrorist acts and furthering the war in Iraq (which may or may not be related). Some of the relevant fundamental rights and freedoms were entrenched long ago: freedom of speech and press, security from unreasonable searches and seizures, the privilege against self-incrimination, due process of law and others by the Bill of Rights in 1791; equal protection by the fourteenth amendment in 1868. Constitutional courts, among which the Supreme Court of the United States was the pioneer but is no longer always the leader, have been the most effective guardians of this constitutionalism and the extent to which they exist and maintain constitutionalism over time is a key measure of human progress on this dimension.

Constitutionalism, however, is never perfect, never finished, never safely taken for granted as we pursue new goals. An important part of current history in the United States is the manner in which the Supreme Court and other

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¹ Anne-Marie Slaughter, *Hubris and Hypocrisy: America is Failing to Honor Its Own Codes*, INT'L HERALD TRIB. 22 May 2004.

² Although the credo set forth in this paragraph has already been published in Peter W. Schroth & Ana Daniela Bostan (2004), *International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 514 (2004), it appeared first in one of the conference papers on which the present article is based.

courts respond to such aggressive pursuit of immediate objectives as the USA PATRIOT Act³ and the detention of “enemy combatants” at Guantanamo Bay. The contrast between long-term and short-term perspectives is stark in *Hamdi v. Rumsfeld** and *Rasul v. Bush*,⁵ both just decided as this was written. Eight of the nine Justices agreed that the due process clause protects even “enemy combatants” and that the writ of the federal courts runs even to a naval base leased from Cuba. This is so plainly correct that some found it surprising that the politicians currently in power had not even considered the long term, Constitutional perspective. The *Los Angeles Times* reported that

senior administration officials acknowledged that they were unprepared for a rebuke in two landmark Supreme Court decisions that rejected the military’s treatment of prisoners in the war on terrorism.

Now, the administration has been left to scramble to develop a strategy for granting hearings to detainees without having to cope with an unwieldy series of lawsuits throughout the nation.

“They didn’t really have a specific plan for what to do, case-by-case, if we lost,” a senior defense official said on condition of anonymity. “The Justice Department didn’t have a plan. State didn’t have a plan. This wasn’t a unilateral mistake on DOD’s part.

It’s astounding to me that these cases have been pending for so long and nobody came up with a contingency plan.”⁶

Another interface of long-term rights and freedoms and short-term objectives is efforts to reduce corruption through penal law.⁷ In this area, there is no set order in which long-term and short-term matters are addressed and the extent of asynchrony is very different in various parts of the world. In no other country is it so extreme as in the United States, but a majority of the countries of Western Europe have successfully combined functioning democracy, entrenched rights and freedoms and judicial review for at least some decades. In contrast, several countries of the European “Enlargement” Class of 2004 dealt with constitutionalization and reduction of corruption simultaneously, in the context of the accession negotiations, and this is especially true of the two candidates of the Class of 2007, Bulgaria and Romania.⁸ At the other extreme, most African

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁴ 542 U.S. 507 (2004).

⁵ 542 U.S. 466 (2004).

⁶ John Hendren, *Bush Administration May Move Detainees From Cuba*, L.A. TIMES, 29 June 2004.

⁷ There are other, perhaps more effective, ways of reducing corruption than further elaboration of the penal laws (*see, e.g.,* James Stodder & Peter W. Schroth, *Criminalizing Bribery Is Only a Small First Step: Transparency, Education and Health as Complementary Public Goods*, Eastern Economic Association, Washington, D.C. (Feb. 2004)), but there is no strong reason not to do both.

⁸ *See* Schroth & Bostan, *supra* note 2.

countries are attacking, or thinking of attacking, corruption long before establishing constitutionalism.⁹ A notable exception seems to be South Africa, where constitutionalism may be said to have been established for about a decade; after what seemed to be glacial progress, the new Prevention and Combating of Corrupt Activities Act was signed on 27 April 2004 and took effect in part on that date and in part on 31 July 2004.¹⁰

It might well be supposed that a responsibility of countries whose civilizations are more advanced, by some measures, is to provide support of some kind to the aspirations of the less advanced. Short of that, it would seem to be a moral obligation at least not to impede their progress, or to aid others in impeding it. We may consider the new United Nations Convention against Corruption” in that context.

The most important principles guiding the work of the Ad Hoc Committee for the Negotiation of a Convention against Corruption appear to have been achieving consensus and finishing on time. The Ad Hoc Committee received its mandate in General Assembly Resolution 55/61 of 4 December 2000 and General Assembly Resolution 56/260 of 31 January 2002, with the latter Resolution suggesting that the conference for signing the new Convention be convened before the end of 2003. The Ad Hoc Committee’s final report¹² is dated 7 October 2003 and the Convention was opened for signature on schedule, on 9 December 2003. Like the USA PATRIOT Act, but without the anthrax, the United Nations Convention against Corruption is a document no one dared be seen to oppose. Unlike the USA PATRIOT Act, however, the Convention against Corruption will bring only quite limited change in the law, because so

⁹ See Southern African Development Community, Protocol against Corruption, opened for signature 14 Aug. 2001; African Union Convention on Preventing and Combating Corruption, opened for signature 11 July 2003; Peter W. Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws against Corruption*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.* 83 (2003); Peter W. Schroth, *The African Union Convention on Preventing and Combating Corruption*, 49 *J. APR. L.* 24 (2005).

¹⁰ On paper, the new South African law (Prevention and Combating of Corrupt Activities Act 12 of 2004, Republic of South Africa, Government Gazette No. 26311, 28 April 2004) is probably the strictest and most comprehensive anti-corruption law in the world. On one hand, the very broad investigative powers it grants to prosecutors (*e.g.*, s. 23) and the extensive reporting duties of persons who hold any public or private “position of authority” (s. 34) appear to be open to abuse. On the other hand, the inadequacy of the criminal justice system’s resources to prosecute white-collar crime before the addition of these new crimes leaves room for uncertainty about the practical impact of the new statute. See Robin W. Palmer, *Fighting International and National Corruption by Means of Criminal Law*, South African national report to the XVI International Congress of Comparative Law (2002); Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws against Corruption*, *supra* note 9; Brig Dirk Lambrechts, *Bribery & Corruption: A Legal Perspective*, 2004, available at http://www.servamus.co.za/july_04/bribery1.htm.

¹¹ United Nations Convention against Corruption, G.A. Res. A/RES/58/4, 31 Oct. 2003, opened for signature 9 Dec. 2003, available at http://www.unodc.org/pdf/crime/convention_corruption/-session_7/422e.pdf (with the full report of the Ad Hoc Committee) or http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf (Convention text only).

¹² Cited *supra* note 11.

many of its provisions are optional, either explicitly (Table 1) or not (Table 2), while others mainly restate existing obligations of many countries.

Table 1: Expressly optional provisions of the UN Convention against Corruption

Wording	Clauses in which wording appears
may ¹³	5.4, 7.1(d), 10 (2nd sentence), 11.1 (2nd sentence), 11.2, 12.2, 27.2, 27.3, 32.2, 34, 38 (2nd sentence), 42.2, 60.5, 62.4
should ¹⁴	6.2, 13.1, 36 (last sentence)
could	60
[Each State Party] [States Parties] shall [also] consider	7.2, 7.3, 8.4, 8.6, 14.1(b), 14.2, 14.3, 16.2, 18, 19, 20, 21, 22, 24, 30.6, 30.7, 32.3, 33, 37.2, 37.3, 39.2, 43.1, 48.2, 49, 52.5, 52.6, 54.1(c), 54.2(c), 59, 60.2, 60.4, 60.6, 60.7, 60.8, 61.1, 61.2, 61.3
each State Party shall take note of	8.3
States Parties may consider the possibility of	31.8, 46.30
States Parties shall consider the possibility of	47
States Parties may consider	37.5, 45, 46.9(c), 52.4
States Parties are encouraged to conclude, when necessary,	50.2

The United States has an embarrassing tradition of delaying its entry into the world's consensus against evils, such as genocide and racial discrimination, then adding a long list of reservations and "understandings" to its

13. Because different considerations apply to extradition, I have not included in Table 1 the uses of "may" in Article 44.

¹⁴ In paragraphs 102-109 of the LaGrand Case (Germany v. United States of America), No. 104, Judgment, 27 June 2001, 2001 I.C.J. 104, 40 ILM 1069 (2001), the International Court of Justice strongly rejected the assertion of the United States that its use of the word "should" in a preliminary order did not create binding legal obligations. See Houston Putnam Lowry & Peter W. Schroth, *Survey of 2000-2001 Developments in International Law in Connecticut*, 76 CONN. B. J. 217, 230 (2002.) However, that was not an analysis of a treaty provision using the word "should." As wrong as one may consider the argument in the Counter-Memorial for the United States to have been, the fact that it was offered in this context strongly suggests that it may be offered in another.

ratifications.¹⁵ The Inter-American Convention Against Corruption¹⁶ provided the opportunity for a new approach to the problem of joining a treaty without changing U.S. law, in this novel provision:

Article IX. Illicit Enrichment: 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.

The first twelve words were a brilliant innovation: the United States was protected from the article's direct attack on the presumption of innocence without the need of a reservation! Canada seized the opportunity, ratifying the Inter-American Convention with only this "Statement of Understanding":

Article IX provides that the obligation of a State Party to establish the offence of illicit enrichment shall be "Subject to its Constitution and the fundamental principles of its legal system". As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed by Canada's Constitution, Canada will not implement Article IX, as provided for by this provision.

Although much less gracefully, the United States did the same.¹⁷

The technique was developed in the UN Convention against Transnational Organized Crime,¹⁸ which six times uses variations on the words "fundamental principles of its domestic law." Although the Convention against Transnational Organized Crime never quite goes so far as to make a State Party's obligation subject, as in the Inter-American Convention, to those "fundamental principles," their recurring rhythm lets them begin to blend into the background of the standard and innocuous. The corruption convention commit

¹⁵ See Nathaniel L. Nathanson & Egon Schwelb, *The United States and the United Nations Treaty on Racial Discrimination: A Report for the Panel on International Human Rights Law and Its Implementation* (West Pub. Co. 1975); Peter W. Schroth & Virginia S. Mueller (1975), *Racial Discrimination: The United States and the International Convention*, 4 HUMAN RIGHTS. 171 (1975); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 616-619(2002).

¹⁶ Organization of American States, Inter-American Convention against Corruption, 29 Mar. 1996, entered into force 6 Mar. 1997, OEA/Ser. K/XXXIV.I. CICOR/doc. 14/96 rev. 2, 35 ILM 724 (1996).

¹⁷ See Schroth, *The United States and the International Bribery Conventions*, *supra* note 15, at 615- 619.

¹⁸ 15 Nov. 2000, entered into force 29 Sept. 2003, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

tee - also under the auspices of the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention (which is now called the Office on Drugs and Crime) - could see the eggs as its own. In this friendly environment, they could hatch and the termites could spread.

Table 2: Termites in the UN Convention against Corruption

Wording^{19,20}	Clauses in which wording appears
in accordance with the fundamental principles of its legal system	5.1, 6.1, 6.2, 8.1, 9.1, 9.2, 11.1, 36
as appropriate and in accordance with the fundamental principles of their legal system	5.4
where appropriate and in accordance with the fundamental principles of its legal system	7.1, 8.3

¹⁹ This is not a complete taxonomy of qualifying clauses in the UN Convention. There is a bewildering variety of such clauses, with dozens of possibly significant differences in wording, placement within the sentence, etc. Many provisions of the UN Convention are explicitly optional, as shown in Table 1. Many others are qualified by “where appropriate,” leaving at least the impression that each State Party is free to judge appropriateness for itself. The table does not attempt to collect these clauses, which are usually more direct in their approach than the termites; but in saying even this much, I do not mean to imply that there is a clear, principled distinction between the clauses listed in the table and others not so listed.

²⁰ Clause 12.3 is not included in Table 2, because it appears to define a manner rather than a limit:

In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention....

Clauses 27.1, 27.2, 27.3, 31.3, 35, 38, 52.1, 53, 54.1, 54.2 and 57.2 are structured similarly. A related case is clause 26.1, which also seems not to establish a limit on the obligation:

Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

Clauses 32.1, 48.1 and 52.2 are less clear, but probably in the same spirit.

None of the clauses mentioned in this note is included in Table 2. It is possible to argue that some of the clauses that are included in this table are not really termites, but merely statements of the manner in which an obligation is to be fulfilled. It is not possible to argue that this explains all of them, or even very many of them. It is important to keep in mind, however, that the frequency of clauses in which variations on the termite language are used for non-termite purposes helps the termites avoid notice, by camouflaging them among other insects regarded as innocuous, or even as beneficial.

in accordance with the fundamental principles of its domestic law	7.3, 7.4, 8.4, 8.6, 9.3, 10, 12.1, 13.1, 23.1, 34, 37.3
where appropriate and in accordance with the fundamental principles of its domestic law	8.5
Subject to its constitution and the fundamental principles of its legal system	20
If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.	23.2(e)
Subject to the legal principles of the State Party	26.2
in accordance with its legal system and constitutional principles	30.2
in accordance with its domestic law and with due regard to the rights of the defence	30.4
to the extent consistent with the fundamental principles of its legal system	30.6, 30.7
to the greatest extent possible within its domestic legal system	31.1
to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings	31.8
Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.	31.10
in accordance with the fundamental principles of the legal system of the State Party	36
Wherever possible and consistent with fundamental principles of domestic law	46.18
to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law	50.1
to the greatest extent possible within its domestic legal system	55.1

The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.	55.4
Without prejudice to its domestic law	56
Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.	65.1

By “termites,” I mean the words that eat away the substance of treaty clauses by making apparent obligations no obligations at all. There are at least three categories of termites in the UN Convention against Corruption, namely ordinary workers; venomous warriors; and a (seemingly weak) queen. Each is described below, but the starting point is the inventory set forth in Table 2, which identifies 40 termites, taking 21 different forms.

Ordinary worker termites eat away the substance of a treaty provision, leaving a hollow shell. It will be easy for any lawyer to construct an argument that “in accordance with the fundamental principles of its domestic law” or “to the extent consistent with the fundamental principles of its legal system” or any of the other formulations reported in Table 2 gives priority over the Convention’s provision to a competing provision of domestic law. Even if, for a particular country, a particular termite is exterminated (perhaps by expensive and time-consuming litigation), the many varieties of protective coloration of the worker termites in the UN Convention assure that the procedures will have to be repeated over and over again.

Venomous warrior termites damage the legal systems of susceptible States Parties. It was the illicit enrichment provision of the Inter-American Convention that first harbored a venomous warrior termite: the effect is to protect the constitutionalism of countries with an entrenched presumption of innocence, while allowing countries that fail to recognize the presumption of innocence to base their denial of this human right²¹ on a treaty obligation. The

²¹The presumption of innocence is required by Article 11(1) of the Universal Declaration of Human Rights, 10 Dec. 1948, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, and Article 14(2) of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), adopted & opened for signature 16 Dec. 1966, entered into force 23 Mar. 1976, as well as by various regional human rights treaties; it therefore does not depend, for its existence in a particular

venom is insidiously subtle; for instance, Ecuador and Peru implemented the illicit enrichment article of the Inter-American Convention in their penal codes despite - and, apparently, without even considering - their constitutional provisions protecting the presumption of innocence.²²

The illicit enrichment article was controversial in the Ad Hoc Committee's deliberations; for instance, in the May 2003 draft of the UN Convention, that article is accompanied by this note:

110. The delegations of the Russian Federation, the member States of the European Union and others expressed their strong wish to delete this article.²³

In this Committee, however, all disagreements could be resolved simply by making controversial provisions optional. In the final version of Article 20, countries that recognize the presumption of innocence are protected not only by the Convention's most powerful termite — "Subject to its constitution and the fundamental principles of its legal system," a formulation used nowhere else in the Convention - but also by making that article entirely optional: "each State Party shall consider adopting..."²⁴ Still, any country that chooses to deny the human right of the presumption of innocence, in order to advance the short-term objective of anti-corruption measures, can claim the high ground of a United Nations Convention mandating that it "shall" consider doing so. Even that is not the end of this warrior termite's attack on the presumption of innocence in vulnerable countries, for clause 31.8 provides:

States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged pro

country, on that country's constitution. In short, Article IX of the Inter-American Convention and Article 20 of the UN Convention are nullities in every country, because they violate the fundamental principles of every country's legal system. (Schroth, 2003, pp. 105-107; Schroth, 2004, pp. 9-10.)

Note also that clause 30.6 of the UN Convention against Corruption itself refers to the presumption of innocence in a way that implies it is a universal principle:

Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

²² See Schroth, *The United States and the International Bribery Conventions*, *supra* note 15, at 615- 616.

²³ See Schroth, *National International Constitutional Law Aspects*, *supra* note 9, at 106; Schroth & Bostan, *International Constitutional Law and Anti-Corruption Measures*, *supra* note 2, at 689-690.

²⁴ Clauses 30.6 and 30.7 combine the "fundamental principles" termite and the optionality marker "shall consider." Article 56 combines "Without prejudice to its domestic law" and "endeavour." However, few other clauses mention constitutions at all, and only Article 20 combines the constitution, the fundamental law and "consider."

ceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

Another possibly venomous termite lurks in clause 31.1, which can be read as authorizing pre-emptive confiscation of the property of one who has not yet committed, much less been convicted of, any crime, if the property is “destined for use in offences established in accordance with this Convention,” but only “to the greatest extent possible within its domestic legal system.”²⁵ Another is in clause 50.1, which seems to allow any “appropriate” use of “special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory,” but only “to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law” (if any).

The *queen termite* appears to rule the entire structure of the Convention’s provisions. Article 65 provides:

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.
2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

It is difficult to be confident, without a decision on the point by the International Court of Justice, whether clause 65.1 is to be understood as:

- (a) each State Party must do everything necessary to carry out its obligations set forth in the rest of the Convention, and the “in accordance” wording is merely about the manner in which it is to be done; or
- (b) each obligation of a State Party set forth anywhere in this Convention is qualified by the limitation that it need comply only to the extent that doing so is in accordance with fundamental principles of its domestic law.

However, if the United States is charged with failure to implement one of the few non-optional provisions of the Convention and the State Department can find an argument - such as powers reserved to the states in our federal system,

²⁵ This clause is discussed further *infra* at 19-20.

which the United States tried to use in the *LaGrand* case - for attributing that failure to a fundamental principle of domestic law, then we may expect to see its Counter Memorial advocate the latter position. This argument will be equally available to any other country.

One can only imagine what “strict or severe measures” might be said to be justified by clause 65.2, although there can be no doubt that its drafters meant only that the Convention sets minimum standards.

Provisions that are explicitly optional and termite provisions do not exhaust the consensus-building, obligation-prevention features of the UN Convention. For example, Table 3 collects clauses imposing only the obligation to make an effort, not the obligation to accomplish anything, and Table 4 collects clauses that limit the obligations of less wealthy countries. Both of these latter categories, however, stand on principled grounds, rather than serving merely to mask disagreement by allowing each country to do as it likes.

Table 3: Obligation only to try in the UN Convention against Corruption

Wording	Clauses in which wording appears
Each State Party shall endeavour to ²⁶	5.2, 5.3, 7.1, 7.4, 8.2, 8.5, 14.5, 30.3, 30.10, 44.9, 48.3, 56, 62.2(c)
each State Party shall take appropriate measures... to seek to ensure	30.4
States Parties shall make concrete efforts to the extent possible	62.2

Table 4: Obligation limited by means in the UN Convention against Corruption

Wording	Clauses in which wording appears
taking into account the level of economic development of the State Party	7.1(c)
within [its] [their] means	13.1, 32.1, 48.3, 50.1
according to their capacity	60.2

²⁶ Despite its use of similar words, clause 66.1 does not belong in this category: “States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.”

The remarks of the late Ambassador Dr. Héctor Charry Samper at the Third Session of the Ad Hoc Committee are particularly relevant:

The Chairman also expressed his concern at the repeated reference in the draft text of the convention to the conformity of its provisions with domestic law. In his view, such references should be the exception rather than the norm, because international law was not meant to be a mere reflection of national law. Further, the Chairman expressed the view that the Ad Hoc Committee had to work earnestly to avoid the perception that some proposals might create of reducing the scope of the new convention. In that connection, the Chairman recalled General Assembly resolution 56/260, in which the Assembly had requested the Ad Hoc Committee to develop a broad and effective convention, following a comprehensive and multidisciplinary approach.²⁷

II. ASSET RECOVERY: TEN RIGHTEOUS CLAUSES

*And [Abraham] said, Oh let not the Lord be angry, and I will speak yet but this once: Peradventure ten shall be found there. And [the Lord] said, I will not destroy it for ten's sake.*²⁹

A. The Problem and Its Contexts

“Power tends to corrupt and absolute power corrupts absolutely.”²⁹ It is important to begin with American examples, to emphasize that both types of corruption central to this discussion are not limited to less developed countries. The first type is abuse of the institutions of the state by criminal prosecutions, tax investigations and the like of targeted groups, such as political rivals and disfavored ethnic groups. It should be enough to cite FBI Director J. Edgar Hoover and his enemies list.³⁰ The second type is personal enrichment: those who hold public power too often take for themselves what belongs to the state and the line between taking from the state and accepting bribes is often blurred. In the leading case of *United States v. Isaacs*,³¹ former Illinois Governor Otto Kemer had been allowed to buy stock in racing operations at a below-market price in exchange for supporting a bill to increase the number of days racing was permitted in the state. A result of this corruption was increased tax revenues and

²⁷ Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, *supra* note 11, at 9, para. 49.

²⁸ Genesis 18:32.

²⁹ SIR JOHN EMERICH EDWARD DALBERG-ACTON, 1 *THE LIFE OF MANDELL CREIGHTON* 372 (1904).

³⁰ Vitriolically - which is to say, fairly - described in CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* (1991).

³¹ 493 F.2d 1124 (7th Cir. 1974).

it was not proved that the state or any of its citizens (presumably excluding bettors) had suffered a financial loss, but the Court of Appeals affirmed his conviction of the federal crime of mail fraud, on the ground that the public was deprived of his faithful service as a public official. Since then, governors of at least Alabama, Arizona, Arkansas, Louisiana, Maryland, Oklahoma, Rhode Island, Tennessee, West Virginia and, in December 2004, Connecticut have been convicted of crimes of corruption, often on the explicit rationale that the state has been deprived of its "property," namely faithful service.

Quite often, though - especially, but not exclusively, in less developed countries - no such subtle reasoning is required, because public officials simply take state property. However they may rationalize their entitlement to take, they often try to hide what they have taken, frequently by transferring it to some other country. It is easy to find examples in every part of the world; in a few minutes on Google in early 2005,¹ I found them in Angola, China, Croatia, D.R. Congo, Dominican Republic, France, Gambia, Germany, Indonesia, Italy, Japan, South Korea, Mexico, Nicaragua, Nigeria, the Philippines, Ukraine, the United Kingdom and the United States of America.

The traditional safeguard against abusive property actions is the requirement that plaintiffs title be proved to strict standards. When tools somewhat similar to property actions have been developed as an adjunct to penal law, such as asset seizure and measures against money laundering, usually the safeguards of penal law have been maintained, but in a few instances they have been relaxed. These tools were designed for use against drug traffickers, a context in which it is ordinarily reasonable to assume that the prosecutors are much less likely to be guilty of the crimes in question than those they attack. In the context of official corruption, however, there is no basis for that assumption: a priori, it is just as likely that the current regime is corrupt as that the prior regime it seeks to prosecute was corrupt.

Consider in this light section 2 of the United Kingdom's Proceeds of Crime Act 2002,³² which allows civil proceedings for asset recovery only if the evidence of crime is *insufficient* to support criminal prosecution. Anthony Kennedy says, "This hierarchy avoids the possibility of a respondent claiming that he has been deprived of the protections which would have been afforded to him in a criminal trial,"³³ a conclusion possible only for one so insulated as to be able to cling to the charming view that harm to one's reputation is far more serious than confiscation of one's property. First, the UK law includes a panoply of safeguards that are not found in all such legislation; some are missing, for example, in the unfortunate Criminal Assets Recovery Act 1990 of New South Wales (Australia). Second, and to the particular point of this section of the article, the UK legislation tacitly relies on the British courts and other constitutional institutions to prevent abusive, discriminatory or otherwise corrupt prosecutions, a reliance that would be misplaced in many countries.

³² Proceeds of Crime Act 2002, c. 29.

³³ Anthony Kennedy, *Justifying the Civil Recovery of Criminal Proceeds*, 12 J. FIN. CRIME 8 (2004).

B. *The Anti-Corruption Treaties and Asset Recovery*

“When the only tool you have is a hammer, every problem looks like a nail.”³⁴ For many years, there were no international efforts against corruption, although the legislation of the United States against foreign bribery dates to 1977.³⁵ In the 1990s, a weak international consensus, barely cohering even at the level of press releases, formed around the hammer of penal law, especially criminalization of active and passive bribery.³⁶ Several Western European countries joined the consensus subject to the explicit condition that their companies’ freedom would be limited only when competitors in other countries were similarly handicapped. The consensus held together well enough to forbid tax deduction of foreign bribes,³⁷ although this is not penal law and, perhaps for that reason, did not make it into the text of the conventions. There was no real consensus on accounting and internal controls, so, although this is in the conventions, it is mostly either optional or so ambiguously expressed that it is generally ignored.³⁸

Seven international bodies have adopted treaties against corruption: the European Union;³⁹ the Organization of American States;⁴⁰ the Organization for Economic Cooperation and Development;⁴¹ the Council of Europe;⁴² the Southern African Development Community;⁴³ the African Union;⁴⁴ and the United Nations.⁴⁵ All provide in some way for asset recovery, although the EU did so

³⁴ Attributed to Abraham H. Maslow.

³⁵ See Schroth, *The United States and the International Bribery Conventions*, *supra* note 15.

³⁶ Inter-American Convention against Corruption, *supra* note 16; Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 Dec. 1997, entered into force 15 Feb. 1999, OECD/DAFFE/IME/BR(97)16/FINAL (18 Dec. 1997), 37 I.L.M. 1 (1998).

³⁷ Organization for Economic Cooperation and Development, Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, 11 April 1996, DAFFE/IME/BR(97)20.

³⁸ See Peter W. Schroth, *Fostering Informed and Responsible Management: The Failure of the Corruption Treaties’ Provisions on Accounting and Controls*, 17 RES. INT’L Bus. & FIN. 313 (2003).

³⁹ European Union, Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests, 27 Nov. 1995, OJ C 316 at 49-57; Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities’ financial interests, 23 Oct. 1996, OJ C 313 at 2-10; Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities’ financial interests, 19 July 1997, OJ C 221 at 12-22.

⁴⁰ Inter-American Convention against Corruption, *supra* note 16.

⁴¹ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 36.

⁴² Council of Europe, Criminal Convention on Corruption, 27 Jan. 1999, ETS No. 173; Civil Law Convention on Corruption, 4 Nov. 1999, ETS No. 174; Additional Protocol to the Criminal Law Convention on Corruption, 15 May 2003, ETS No. 191.

⁴³ Southern African Development Community, Protocol against Corruption, *supra* note 9.

⁴⁴ African Union Convention on Preventing and Combating Corruption, *supra* note 9.

⁴⁵ United Nations Convention against Corruption, *supra* note 11.

only in its third document,⁴⁶ but some require only assistance to other parties. All apply the hammer of penal law, rather than the tools of property law (although there is a hint of the latter in the EU's documents, noted below). In particular, their provisions are framed in terms of confiscation of the proceeds of crimes of corruption, rather than of restitution (common law) or vindication (civil law) of state property. The historical basis of this approach is efforts against drug dealers, some of whom have amassed enormous profits from their illegal businesses. The analogy is not exact, however, because the businesses of drug dealers may be quite successful without any theft and theft of state property may be accomplished by dishonest officials without any business. That is, the "proceeds" of crime can have two quite different senses, with possibly quite different consequences: one is the property of another that is taken unlawfully and therefore should be restored to its owner; the other is the profits of a forbidden business, such as trafficking in unlawful drugs. That said, it is difficult to find any support for the proposition that the drafters of any of the pre-2003 conventions meant to include stolen property in the concept of "proceeds."

Neither the original EU Convention⁴⁷ nor its first Protocol⁴⁸ dealt with asset recovery, so the first treatment of the subject in a treaty is Article XV of the Inter-American Convention, which provides for assistance by other States Parties "in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses" defined in that Convention. This formulation seems aimed at the proceeds of criminal business, but, unlike the later EU, COE and OECD conventions, may possibly be read as explicitly including stolen property. It does not require that States Parties enact laws permitting seizure and forfeiture, however, but only that they assist one another in enforcing any such laws. The SADC Protocol reproduces this provision almost word-for-word, with no substantive change.

The EU reached asset recovery in its controversial Second Protocol, which, in 2004, still had not been ratified by Austria, Italy or Luxembourg (Finland and Germany having waited until 2003). The focus of the Second Protocol is money laundering, not corruption, but Article 5 requires each Member State to "take the necessary measures to enable the seizure, without prejudice to the rights of bona fide third parties, the confiscation or removal of the instruments and proceeds of fraud, active and passive corruption and money laundering, or property the value of which corresponds to such proceeds." The context - as evidenced, for example, in the Explanatory Report on the Second Protocol⁴⁹ - was organized crime, rather than abusive prosecution by corrupt officials, so the requirement of proof that third parties are bona fide could be seen only as a reaction to concern that criminals might hide illicit assets with

⁴⁶ Second Protocol, *supra* note 39.

⁴⁷ Convention drawn up on the basis of Article K.3, *supra* note 39.

⁴⁸ First Protocol, *supra* note 39.

⁴⁹ European Union, Explanatory Report on the Second Protocol to the Convention on the protection of the European Communities' financial interests, 12 March 1999, OJ C 91, 31 March 1999, at 8-19.

third parties they controlled. However, the only fair reading of the Second Protocol is that definitive confiscation is a consequence of proof of the underlying crime, not (a) an easier path for frustrated prosecutors who are unable to obtain convictions or (b) an uncontrolled weapon available for use by the current regime against those it dislikes. Note that the Explanatory Report mentions “civil law cases for the purpose of. . . restitution of the property concerned to its rightful owner,”⁵⁰ which must be understood as requiring proof of rightful ownership as a condition to confiscation on that ground.

Like the Second Protocol, the OECD Convention requires, in Article 3(3), that Parties make “the bribe and the proceeds of the bribery of a foreign public official” subject to seizure and confiscation (or comparable monetary sanctions), but the OECD Convention does not speak to recovery of stolen property. Article 9(1) also requires assistance to other Parties “for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person”; in case anyone might doubt that the latter term excludes human individuals, Article 5 refers to “natural or legal persons.”

A striking aspect of the Council of Europe Conventions is the complete silence regarding restitution of the Civil Law Convention on Corruption, which refers, in Article 3(2), only to “material damage, loss of profits and non-pecuniary loss.” An American trial lawyer might argue that one who is deprived of his property suffers material damage, but the entire text of the Civil Law Convention, including Article 6 on contributory negligence, makes it clear that the drafters were thinking of tort or civil delict. In contrast, Article 19(3) of the Criminal Law Convention on Corruption requires each Party to adopt the measures necessary to enable it “to confiscate or otherwise deprive [sic] the instrumentalities and proceeds of criminal offenses established in accordance with this Convention, or property the value of which corresponds to such proceeds” and Article 23 requires assistance to other Parties in the enforcement of such measures. Paragraph 93 of the Explanatory Report attached to the Criminal Law Convention ties Article 19(3) to the COE’s Convention on Laundering, Search Seizure and Confiscation of the Proceeds of Crime (COE 1990),⁵¹ which, it says, “is based on the idea that confiscation of the proceeds is one of the effective methods in combating crime.”

In summary, then, before 2003 all of the anti-corruption conventions that required their parties to establish measures for confiscation of assets - viz. those of the EU, COE and OECD - were centered in the part of the world where constitutional and international protection of human rights is most strongly established and were focused on confiscation of the proceeds of crime. Fairly read, all of these provisions assume conviction of the predicate crime or, according to one Explanatory Report, proof of rightful ownership; I have found no support in any of them for lowered standards of protection of property rights.

⁵⁰ *Id.* at 12.

⁵¹ Council of Europe, Convention on Laundering, Search Seizure and Confiscation of the Proceeds of Crime, 8 Nov. 1990, ETS No. 141.

C. Asset Recovery in the AU and UN Conventions

The AU Convention is still the only anti-corruption convention that directly requires measures for the recovery of stolen property. It does so very poorly and - as I have argued elsewhere⁵² - this is one of several reasons for revising this convention, rather than ratifying it in its current form.

The AU Convention suffers from numerous inconsistencies as a result of unconformed amendments to the draft in 2002 and serious errors of translation in the English, Arabic and Portuguese texts.⁵³ A point I mentioned but did not analyze in a previous article⁵⁴ can be clarified on the basis of what has been said so far in this article, namely the AU Convention's bizarre designation of mere theft, by any person and of property owned by anyone, as a crime of corruption. Recovery of stolen property has traditionally been dealt with in the law of property, which ordinarily requires strict proof of title. Although this subject is mentioned in the Explanatory Report to the EU's Second Protocol,⁵⁵ and the wording of the Inter-American Convention and the SADC Protocol might be read as including it, no prior anti-corruption convention directly addressed recovery of stolen property and all provisions in the prior anticorruption conventions directly requiring confiscation are addressed to the proceeds of crime. An additional aspect of the context is the inclusion in Article 8 of the AU Convention of the very controversial⁵⁶ South American reversal of the burden of proof in criminal "illicit enrichment" cases.

Article 16(1) of the AU Convention uses language similar to that of prior conventions in requiring that each State Party adopt the necessary measures to enable seizure and confiscation of the proceeds of corruption. When the Ministers decided to add recovery of stolen property to the topics covered in the AU Convention, they had no precedent from prior conventions and obviously did not turn to their legal advisors for an appropriate text. From the perspective of persons without legal training, perhaps they acted logically to include among the "acts of corruption and related offenses" defined in Article 4(1) "the diversion . . . for purposes unrelated to those for which they were intended ... of any property belonging to the State or its agencies, to an independent agency, or to an individual," *i.e.*, theft of any kind, without so much as requiring that the theft have any other connection with corruption. A further muddle was added by applying this to such diversion not only by a public official, but also "by any other person," then by mistranslating the change, so that in French only the

⁵² Schroth, *The African Union Convention*, *supra* note 9.

⁵³ *Id.*

⁵⁴ *Id.* at 31.

⁵⁵ *Supra* note 39.

⁵⁶ See Schroth, *The United States and the International Bribery Conventions*, *supra* note 15, at 615- 618; Schroth, *National and International Constitutional Law Aspects*, *supra* note 9, at 103-107; Schroth & Bostan, *International Constitutional Law and Anti-Corruption Measures*, *supra* note 2, at 687-701 ; Schroth, *The African Union Convention*, *supra* note 9, at 27-30.

person to whom the property was entrusted can commit the crime, while in English, Arabic and Portuguese it appears that anyone can commit the crime once the property has been entrusted to an official.⁵⁷ This is surely broad enough to include stolen property in the provision on seizure and confiscation, and, in combination with the illicit enrichment provision, almost anything else a vindictive or merely greedy regime may wish to take. It is not possible to imagine that the Ministers had thought through the consequences of their text, nor to reconcile the results with any standard of human rights. In the revision and correction of this part of the AU Convention, consideration should be given to Article 53 of the UN Convention.

The web site of the UN Office on Drugs and Crime devotes more space, in its page on the UN Convention against Corruption,⁵⁸ to asset recovery than to any other topic and staff members have made clear they consider this the particular advance of the UN Convention over earlier anti-corruption conventions. The ten articles on this subject are too long to be covered in detail in an article of this length, so this discussion is limited to an overview.

In Article 31, the UN Convention covers seizure and confiscation of the proceeds of crime, but in much more detail than any previous anti-corruption convention. There is an unfortunate choice of words in the reference to property “destined for use in offenses,” discussed below, and a reprehensible provision offering the UN’s blessing to countries that may wish to violate the human right to be presumed innocent, “to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.”⁵⁹

Chapter V, comprising Articles 51-59, is entitled “Asset recovery.” These articles distinguish, but not consistently, between “direct recovery of property” and confiscation of “property acquired through or involved in the commission of an offense.” Under Article 53(a), the former requires an action in court “to establish [a State Party’s] title to or ownership of property acquired through the commission of an offense established in accordance with this Convention,” and Article 53(c) adds a reference to “another State Party’s claim as a legitimate owner.” As a result, it appears the safeguards of both property law and penal law are required, because the State’s title must be established and it must be proved that an offense was committed. The point that a criminal conviction is always a normal precondition to confiscation is underlined in Article 54(l)(c), which allows State Party’s to *consider* allowing confiscation of proceeds or instrumentalities “without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.”⁶⁰

⁵⁷ Schroth, *The African Union Convention*, *supra* note 9, at 31.

⁵⁸ www.unodc.org/unodc/en/crime_convention_corruption.html.

⁵⁹ Art. 31 (8). The argument that this sort of provision is reprehensible is rehearsed in part I of this article.

⁶⁰ However, I can find no support at all for Mr. Kennedy’s arguments (*loc. cit.* *supra* note 33) in the words “or in other appropriate cases”!

Article 52 brings to bear on corruption the international tools developed for use against money laundering specifically and financial crimes generally, such as Know Your Customer (Art. 52(1)). The attack on offshore banks, which elsewhere is also about competition by low tax countries and the “evil” of bank secrecy,⁶¹ is here limited to “banks that have no physical presence and that are not affiliated with a regulated financial group” (Art. 52(4)). “Effective financial disclosure systems for appropriate public officials” are, unfortunately, entirely optional (Art. 52(5)). Articles 54-59 add numerous details to the general idea of international assistance and cooperation, to the extent of listing the documents required.

D. Confiscation without Crime?

It should go without saying that the owner’s claim for return of his property need not be based on proof that any crime was committed. On the other hand, if the basis for confiscation is that the property is the proceeds of a crime, then just as obviously it must be necessary to prove that the crime was committed. All of the treaties considered in this paper support the principles just stated, with the possible exceptions of Article 4(1)(d) of the AU Convention and Article 31 of the UN Convention.

In Philip K. Dick’s 1956 story “The Minority Report”⁶² (and the 2002 Steven Spielberg/Tom Cruise film), “precogs” see the future, so those who will become criminals can be arrested before their crimes are committed. In the English version of the UN Convention, each State Party is to enable confiscation of:

Property, equipment or other instrumentalities used in *or destined for* use in offences established in accordance with this Convention.⁶³

“Destined” is a poor choice, suggesting conditions beyond human control. *Webster’s Second*,⁶⁴ for example, associates the word with “divine will or superhuman causes.” It is not a legal term of art; for example, it is not defined at all in *Black’s Law Dictionary*.⁶⁵

The proposal of the American Bar Association Task Force, to the State Department negotiators, that a provision be added making conviction of a crime an explicit condition to final confiscation of property under Article 31(1) did not result in the inclusion of such a requirement in the final text. I take the ground to have been that this was already implicit, in that an offense is a condition to the

⁶¹ See Peter W. Schroth, *Bank Confidentiality and the War on Money Laundering in the United States*, 42 AM. J. COMP. L. 369 (supp.) (1994).

⁶² Originally published in FANTASTIC UNIVERSE (Jan. 1956).

⁶³ Art. 31(1)(b) (emphasis added).

⁶⁴ WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1934).

⁶⁵ BLACK’S LAW DICTIONARY (8th ed. 2004).

confiscation and there is no offense until a conviction has been obtained. This is the only reading of the Chinese text;⁶⁶ a reading supported as possible by almost all the dictionaries consulted for the other five languages;⁶⁷ the only reading consistent with the provisions of Articles 53 and 54; and the only reading consistent with the acknowledgment, in the Preamble to the UN Convention, of “the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights.”

CONCLUSION

The provisions of the UN Convention on asset recovery are close enough to what they should be that it may be sufficient merely to insist that all ambiguities be resolved in favor of protection of the human rights identified in other UN conventions. The remainder of the United Nations Convention against Corruption, however, is a great disappointment. It will occupy the field, preventing a better convention from doing greater good; in particular, countries that were considering accession to the OECD Convention⁶⁸ can now get at least as much public relations benefit from assuming the much lighter obligations of the UN Convention.

In most of its articles, the UN Convention does not provide international standards, but only a vague breadth of mentioned topics, bought at the expense of any depth of coverage. Many of the mandatory clauses will have little impact either; consensus was achieved to make them mandatory in the UN Convention because they only reiterate obligations already existing in other international agreements. To a very large extent, parties to this Convention will be able to respond in their reviews - as parties to the Inter-American and OECD Conventions have already responded, with regard to such matters as corporate

⁶⁶用于或者拟用于 yòng yú huó zhē ni means simply “uses or plans to use,” with no hint of predetermination.

⁶⁷ The faithful French and Spanish translations are “destines” and “destinados,” respectively, words that share with the English their derivation from Latin *destinare* and their association with predetermination. Most leading dictionaries of all three languages give that meaning first, but also a secondary meaning in which human intention, rather than fate or God, “destines” a thing for its use, although REAL ACADEMIA ESPAÑOLA, *DICCIONARIO DE LA LENGUA ESPAÑOLA* (22d ed. 2001) gives “predestinado” as its only definition of “destinado.”

The Russian *назначенный* is not from *destinare*, but faithfully translates “destined” by literally and historically indicating predestination or fate; that appears to have been its primary meaning in earlier centuries, although KENNETH KATZNER, *ENGLISH-RUSSIAN RUSSIAN- ENGLISH DICTIONARY* (1984) lists that sense as obsolete.

The Arabic *مُسَمَّيْنًا* means “destined, intended,” according to HANS WEHR & J. MILTON

COWAN, a *DICTIONARY OF MODERN WRITTEN ARABIC* (3d ed. 1971), although the root and its other derivatives suggest calculation or planning, rather than fate.

⁶⁸ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 36.

governance provisions⁶⁹ - that they are in compliance by doing nothing. “International Anti-Corruption Day” would be better celebrated on almost any other day than the 9th of December.

⁶⁹ See Schroth, *Fostering Informed and Responsible Management*, *supra* note 38.