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### **Ad Hoc Committee for the Negotiation of a Convention against Corruption**

First session

Vienna, 21 January-1 February 2002

Agenda item 4

### **Consideration of the draft United Nations Convention against Corruption**

## **Revised draft United Nations Convention against Corruption**

### **Addendum**

### **III. Criminalization, sanctions and remedies, confiscation and seizure, jurisdiction, liability of legal persons, protection of witnesses and victims and law enforcement<sup>1</sup>**

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<sup>1</sup> South Africa submitted a proposal that was intended to consolidate in a single article a number of criminalization provisions (A/AC.261/L.11). During the discussion at the first session of the Ad Hoc Committee, many delegations expressed the wish to consider this chapter in its present form, without precluding reverting to the approach of the proposal of South Africa after completing such consideration.

*Article 19*  
*Criminalization of corruption involving a public official*<sup>2</sup>

Option 1<sup>3</sup>

Each State Party shall adopt<sup>4</sup> such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:<sup>5</sup>

(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

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<sup>2</sup> At the first session of the Ad Hoc Committee, several delegations proposed to replace the words “corruption involving a public official” with the words “bribery of public officials”. Other delegations wished to retain the current formulation of the title, as it was derived from article 8 of the United Nations Convention against Transnational Organized Crime (the “Organized Crime Convention”). One delegation suggested the inclusion of the word “domestic” or “national” to qualify “public official”. It was suggested that that title would need to be finalized after determination of the contents of this and other articles in this chapter.

<sup>3</sup> Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and France (A/AC.261/IPM/10). At the first session of the Ad Hoc Committee, Colombia indicated that it was ready to withdraw its proposal (which appeared as option 3 in the previous version of the draft text), as its original intention was to follow the formulation of the Organized Crime Convention, to which this option was closest. Many delegations expressed their preference for this option, in view of the fact that it was derived from the Transnational Organized Crime Convention and not only represented recent consensus, but was also a text of high quality. Other delegations stated that consensus language from the Transnational Organized Crime Convention should not act as a bar to improving international law and meeting the challenges posed by the new convention.

<sup>4</sup> Some delegations proposed the inclusion of the clause “in accordance with fundamental principles of its domestic law”. Many other delegations opposed the inclusion of such a clause in criminalization articles of the draft convention and indicated that a provision similar to that of article 34, paragraph 1, of the Organized Crime Convention, which was included in article 68 of the present draft text, would be sufficient to meet concerns of delegations.

<sup>5</sup> Several delegations suggested that intent was implied in the types of criminal conduct covered by this and other articles in this chapter and should not be made a constituent element of the offence. Other delegations recalled the lengthy debates on this subject during the negotiations of the Organized Crime Convention, emphasizing the need for the inclusion of this element for many legal systems. Those delegations also recalled the solution found in the Organized Crime Convention, with the inclusion of language such as that contained in paragraph 2 of article 5 of the Convention, and suggested that a similar course of action be followed also in respect of the criminalization provisions in the present draft convention.

Option 2<sup>6</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following acts of corruption:

(a) The solicitation or acceptance, directly or indirectly, by a public official or a person who performs public functions, of any article of monetary value or other undue benefit, such as a gift, favour or advantage<sup>7</sup> for himself or herself or for another person or entity, or the promise to grant them, in exchange for any act or omission in the performance of his or her public functions;

(b) The promising, offering or granting, directly or indirectly, to a public official or a person who performs public functions, of any article of monetary value or other undue benefit, such as a gift, favour or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.

*Article 19 bis*

*Criminalization of corruption involving a foreign public official<sup>8</sup>*

## Option 1

1. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in article [...] [Criminalization of corruption involving a public official] of this Convention involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.<sup>9</sup>

2. Intent may reasonably be deduced from the circumstances.<sup>10</sup>

<sup>6</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13). Many delegations expressed their preference for this option, in view of the broader approach it took to the question of public officials, especially through the inclusion of persons performing public functions. Several delegations pointed out that this was a matter pertaining to a decision on the definition of “public official”, which was still outstanding. Several delegations suggested that options 1 and 2 could be merged. Other delegations, while positively disposed to such a merger, suggested that this possibility should be explored after discussion of the chapter on criminalization.

<sup>7</sup> Some delegations were in favour of the specificity contained in this paragraph on the matter of undue benefit. Other delegations were of the view that attempts to compile lists in legal texts often resulted in omissions and preferred a more general formulation, as the one contained in option 1.

<sup>8</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, several delegations drew attention to potential difficulties that any formulation of this article might entail in relation to jurisdictional matters and conflict with other international legal instruments concerning privileges and immunities. Other delegations stated that jurisdictional matters could be dealt with in article 50 (Jurisdiction), while privileges and immunities should not pose insurmountable problems, since they were subject to waivers under appropriate circumstances.

<sup>9</sup> Text taken from the proposal submitted by Austria and the Netherlands (A/AC.261/IPM/4). During the first reading of the draft text at the first session of the Ad Hoc Committee, several delegations welcomed the opportunity and stressed the advisability of drawing inspiration from the Organized Crime Convention and striving to find common ground on improved language.

<sup>10</sup> Text taken from the proposal submitted by Pakistan (A/AC.261/IPM/23).

Option 2<sup>11</sup>

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in article [...] [Active corruption of a national public official] of this Convention, involving an international civil servant, a member of a parliamentary assembly of an international organization or holders of judicial office or officials of an international court.

2. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in article [...] [Passive corruption of a national public official]<sup>12</sup> of this Convention involving an international civil servant, a member of a parliamentary assembly of an international organization of which the State Party is a member or holders of judicial office or officials of an international court whose jurisdiction is accepted by the State Party.

Option 3<sup>13</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the intentional promising, offering or granting to a foreign public official, directly or indirectly, by its nationals or natural or legal persons who have habitual residence in its territory or are domiciled therein, of any article of monetary value or other undue benefit that are to his or her own advantage or to the advantage of another person or entity, such as a gift, favour or advantage, in exchange for which that official, in the performance of his or her public functions, performs or fails to perform any act in relation to an economic, financial or commercial transaction.

Option 4<sup>14</sup>

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the offering by a citizen of a State Party to a public official of another State Party of money, articles of monetary value, favours or any other advantage in order that the official act or refrain from acting in the exercise of his or her duties in respect of a financial or commercial transaction.

2. States Parties shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct

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<sup>11</sup> Text taken from the proposal submitted by France (A/AC.261/IPM/10).

<sup>12</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, several delegations expressed concern about whether it would be appropriate or feasible to envisage criminalization of passive corruption of foreign public officials. Other delegations were of the view that criminalization of passive corruption of foreign public officials was feasible, but required careful consideration and drafting.

<sup>13</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13). During the first reading of the draft text at the first session of the Ad Hoc Committee, Mexico and other delegations expressed concern that the other proposed options, as drafted, might be understood or interpreted to permit extraterritorial jurisdiction. Several other delegations pointed out that this was not the intention of this article and that this article should be considered in conjunction with and in the light of article 50 (Jurisdiction).

<sup>14</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

referred to in paragraph 1 of this article involving a foreign public official or international civil servant; [national or foreign] parliamentarians and other members of [international] parliamentary assemblies; judges and officials of [international] courts; trading in influence whether as the source of influence or beneficiary of the advantage obtained [active or passive trading in influence]; laundering of proceeds from corruption offences; accounting offences related to corruption offences.<sup>15</sup>

3. Each State Party shall adopt all legislative and administrative measures necessary in order to criminalize the behaviours listed in paragraph 1 of this article when committed against a foreign public official or when such action involves an international public official.<sup>16</sup>

*Article 20*  
*Complicity, instigation or attempt*<sup>17</sup>

Option 1<sup>18</sup>

Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

Option 2<sup>19</sup>

1. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation as an accomplice or instigator in an offence established in accordance with articles [...] of this Convention.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with articles [...] of this Convention.

<sup>15</sup> See the Criminal Law Convention on Corruption of the Council of Europe (Council of Europe, *European Treaty Series*, No. 173, the "Criminal Law Convention").

<sup>16</sup> Text taken from the proposal submitted by Turkey (A/AC.261/IPM/22).

<sup>17</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, it was pointed out by some delegations that attempt was an intrinsic element of the offences under consideration and, consequently, should not be included in this article.

<sup>18</sup> Text taken from the proposal submitted by Austria and the Netherlands (A/AC.261/IPM/4). During the first reading of the draft text at the first session of the Ad Hoc Committee, several delegations expressed their support for this option, because of its brevity and origin from the Organized Crime Convention. It was pointed out, however, that whichever option was chosen by the Ad Hoc Committee after further consideration, this article should be placed after all other criminalization articles and be made applicable to all those articles.

<sup>19</sup> Text taken from the proposal submitted by France (A/AC.261/IPM/10).

Option 3<sup>20</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences participation as the perpetrator, co-perpetrator, instigator, accomplice, abettor or in any other capacity in the commission, attempted commission, association with or conspiracy to commit any of the acts referred to in article [...] [Criminalization of corruption of public officials] of this Convention, as well as conduct by any person who, with knowledge of the aim of an act of corruption, takes an active part in organizing, managing, aiding, abetting, facilitating, authorizing or counselling such acts.

Option 4<sup>21</sup>

Each State Party shall adopt the necessary measures to establish as a criminal offence participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of or in any collaboration or conspiracy to commit any of the offences established in accordance with article [...] [Criminalization of corruption of public officials] of this Convention.

Option 5<sup>22</sup>

Each State Party shall introduce all legislative and administrative measures necessary in order to consider any contribution to the commitment of a crime set forth in article [...] [Criminalization of corruption of public officials] as taking part in the crime.

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<sup>20</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13). During the first reading of the draft text at the first session of the Ad Hoc Committee, one delegation expressed concern regarding the inclusion of the concept of conspiracy in this option and in option 4, since it was a concept that remained alien to some legal systems for economic crimes. Other delegations disagreed and pointed out that the Organized Crime Convention contained solutions to the problem of bridging the gap on this issue between different legal systems.

<sup>21</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

<sup>22</sup> Text taken from the proposal submitted by Turkey (A/AC.261/IPM/22).

*Article 21*  
*Trading in influence*<sup>23</sup>

Option 1<sup>24</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promising, offering or granting, directly or indirectly, of any undue advantage in order to induce a public official or any other person to abuse his or her real or supposed influence with a view to obtaining from an administration or a public authority of the State Party any undue advantage or any favourable decision for the original instigator of the act or for any other person;<sup>25</sup>

(b) For a public official or any other person, the soliciting or accepting, directly or indirectly, of any undue advantage for himself or herself or for another person, through the abuse<sup>26</sup> of his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party any undue advantage or any favourable decision for himself or herself or for any other person,<sup>27</sup> whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.<sup>28, 29</sup>

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<sup>23</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, several delegations raised the issue of whether the title was appropriate and suggested that it should read “Misuse of influence”. Other delegations stated that that was a term of art and should not be changed.

<sup>24</sup> Text taken from the proposal submitted by France (A/AC.261/IPM/10). During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations expressed preference for this option as the basis for further work. Several delegations highlighted the subtleness of the concept and the subsequent need for careful consideration in order to arrive at the required clarity in the final formulation, which would make this article viable. Some delegations expressed serious misgivings about the inclusion of this article. Still others expressed their preference for not including such a provision, but indicated that if there was consensus for inclusion, care should be taken to avoid inadvertent interference with legitimate political activity.

<sup>25</sup> One delegation suggested the insertion of the words “or entity” after the words “any other person”.

<sup>26</sup> Some delegations suggested the replacement of the word “abuse” with the words “misuse” or “improper use”.

<sup>27</sup> One delegation suggested the insertion of the words “or entity” after the words “any other person”.

<sup>28</sup> Some delegations suggested deletion of the last part of this sentence. Other delegations advocated its retention, as it contained an important element of the provision.

<sup>29</sup> This provision is based on article 12 of the Criminal Law Convention, with considerable changes. Criminalization, which deals both with trading in active influence and trading in passive influence, is deliberately confined to actions committed against or for an administration or a public authority of the State Party. At the present stage, trading in influence (active and passive) for a foreign public authority has not been taken into account.

Option 2<sup>30</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence trading in influence, which shall be understood as:

(a) Any act by a public official performed by that person personally or through a third party with a view to assisting or procuring the illicit negotiation or conclusion of public administration transactions inconsistent with the responsibilities inherent in his or her public office; and

(b) Any act by any person designed to bring about the illicit conduct of a public official or serving to assist or procure the conduct referred to in subparagraph (a) of this article.

Option 3<sup>31</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the improper use by a public official, for his or her own benefit or for that of a third party, of influence derived from the discharge of office or performance of functions with a view to obtaining an advantage from another public official in a matter with which the latter is dealing or has to deal.

Option 4<sup>32</sup>

Each State Party shall take the necessary legislative and other administrative measures in order to criminalize, in accordance with basic principles of its domestic law the promising, giving or offering, when committed intentionally, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert improper influence over the decision-making of any person, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

Option 5<sup>33</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, directly or indirectly offering, giving or promising any undue advantage to any person who declares or confirms that he or she can exercise some influence on decisions or actions of persons occupying positions in the public or private sector, whether the undue advantage is for himself or herself or for another person; also soliciting or receiving an offer or a promise in exchange for such influence.

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<sup>30</sup> Revised text submitted by Mexico at the first session of the Ad Hoc Committee (A/AC.261/L.39).

<sup>31</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

<sup>32</sup> Text taken from the proposal submitted by Turkey (A/AC.261/IPM/22).

<sup>33</sup> Text taken from the proposal submitted by the Philippines (A/AC.261/IPM/24).



*Article 22*  
*Misappropriation of property by a public official*

Option 1<sup>34</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the misappropriation or removal of any movable or immovable property, public or private funds or securities or any other object entrusted to a public official by virtue of his or her position or mission.

Option 2<sup>35</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence the improper use by a public official or a person who performs public functions, for his or her own benefit or for that of a third party, of any kind of property belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person who performs public functions has access because of or in the performance of his or her functions.

Option 3<sup>36</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the exploitation, misuse, misappropriation, diversion and embezzlement or fraudulent or negligent loss of state property by public officials or individuals.

*Article 23*  
*Concealment*<sup>37</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the concealment, [retention,]<sup>38</sup> possession or transmission of movable property or funds or the serving as an intermediary in the transmission [or retention] of such property

<sup>34</sup> Text taken from the proposal submitted by France (A/AC.261/IPM/10). During the first reading of the draft text at the first session of the Ad Hoc Committee, most delegations expressed their preference for this option to become the basis for further work and for combining the concepts contained in article 27. In particular, the need for clarifications in terminology were highlighted. One delegation expressed misgivings with the inclusion of such an article, but indicated that if there was consensus for inclusion, this option could form the basis for further work, with the insertion of a clause indicating that the criminalization should be in accordance with basic principles of domestic law. Other delegations indicated that option 2 contained many useful elements that should be incorporated into the final formulation.

<sup>35</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

<sup>36</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

<sup>37</sup> Text taken from the proposal submitted by France (A/AC.261/IPM/10). Colombia withdrew its previous option 2 of this article. During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations were of the view that this article should be deleted, as the matter was covered by or the concept should be treated in conjunction with article 33. Other delegations were of the view that the concept expressed in this article was fundamentally different from money-laundering and there was need to have a separate article in the convention.

<sup>38</sup> Pakistan withdrew its previous option 3 of this article, on condition that the word "retention" be added in this draft text.

or funds, when the person involved is aware that such movable property or funds are the result of one of the offences established in accordance with this Convention.<sup>39</sup>

*Article 24*  
*Abuse of functions*<sup>40, 41</sup>

Option 1<sup>42</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish [in accordance with basic principles of its domestic law] as criminal offences the abuse of his or her functions or any act or omission in the discharge of those functions by a public official, international civil servant or a person who performs public functions, for the purpose of obtaining illicit benefits for himself or herself or for a third party.

Option 2<sup>43</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the following acts of corruption:

(a) The issuance of a decision, resolution, ruling or judgement by a public official, in manifest violation of the law, and the failure or refusal to perform, or delay in performing, an act incumbent upon an official by virtue of his or her functions;

(b) The abuse of office or functions by a public official through the performance of public functions other than those incumbent upon him or her by law.

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<sup>39</sup> Some delegations proposed the deletion of the last part of this sentence concerning awareness. Other delegations advocated its retention, as it formed a constituent part of the concept.

<sup>40</sup> At the first session of the Ad Hoc Committee, Malaysia proposed that this article read as follows (A/AC.261/L.42):

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with basic principles of its domestic law, the use by a public official of his or her office or position for corruption when he or she takes any decision or action in relation to any matter in which such official or any relative or associate has an interest, whether direct or indirect, in order to obtain an undue advantage.”

<sup>41</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations expressed doubt about the advisability or feasibility of including this article in the convention. Others were of the view that the convention should include an article criminalizing this type of conduct. However, several delegations indicated that for this to succeed careful consideration and formulation would be necessary. The concept existed in several legal systems, but further consideration was necessary to determine whether it commanded sufficient common understanding at the international level, which would be a requisite for inclusion in the Convention. Several delegations suggested amending the title to read “Abuse of authority”, “Abuse of power”, “Abuse of trust” or “Abuse of position”.

<sup>42</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13). During the first reading of the draft text at the first session of the Ad Hoc Committee, Turkey indicated that it considered option 1 sufficient and withdrew its previous option 3 of this article, on condition that the clause of criminalization in accordance with basic principles of domestic law be included.

<sup>43</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

*Article 25*  
*Unlawful enrichment*<sup>44, 45, 46</sup>

Option 1<sup>47</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the illicit enrichment or the increase in the assets of a public official that significantly exceeds his or her legitimate income during the performance of his or her functions and that he or she cannot reasonably justify.

Option 2<sup>48</sup>

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the unjustified increase in the wealth of a public official during his or her service with the State or within two years following separation from such service.

2. Subject to their constitutions and fundamental principles of their domestic law, States Parties that have not yet done so shall adopt such measures as may be necessary to establish as criminal offences transnational bribery and illicit enrichment, which shall be considered acts of corruption for the purposes of this Convention.

<sup>44</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations indicated that they faced serious difficulties, often of a constitutional nature, with the inclusion of the concept of the reversal of the burden of proof. Some delegations expressed understanding for the desire to include the concept in the array of measures against corruption, but, in view of the difficulties related to the reversal of the burden of proof in criminal law, suggested that the article be modified, made less binding and moved to the chapter on preventive measures in order to allow States to adopt administrative measures embodying the concept contained in the article. Another possible solution offered was to base such an article on the comparable article of the Inter-American Convention against Corruption of the Organization of American States (see E/1996/99). Many other delegations wished to retain this article in this chapter, in view of the potential efficiency of criminal measures in this area. The Vice-Chairman with responsibility on this chapter encouraged delegations to conduct informal consultations in order to find appropriate and acceptable solutions to this problem.

<sup>45</sup> At the first session of the Ad Hoc Committee, South Africa proposed that this article read as follows (A/AC.261/L.43):

*“Unexplained wealth*

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence the increase in wealth of a public official that significantly exceeds his or her present or past legitimate income, unless he or she gives a satisfactory explanation as to how such wealth was acquired.”

<sup>46</sup> At the first session of the Ad Hoc Committee, Malaysia proposed that this article read as follows (A/AC.261/L.44):

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with basic principles of its domestic law, the illicit enrichment or unjustified increase in the assets of a public official that is manifestly out of proportion to his or her legitimate income during his or her tenure as a public official that he or she cannot reasonably justify.”

<sup>47</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

<sup>48</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

Option 3<sup>49</sup>

Each State Party shall adopt all legal and administrative measures necessary in its domestic legislation to regard as illicit enrichment, and thereby to criminalize, any significant increase in the assets and income of any public official that is not in conformity with his or her legitimate earnings derived from his or her duties and that has no other reasonable explanation as to its source.

Option 4<sup>50</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Systematic or methodical illicit enrichment of a public official of unlawful financial proceeds obtained through a series or combination of corrupt acts as defined in articles [...] of this Convention, penalties for which may vary according to the gravity of the offence, and as may be determined by the participating States;

(b) Failure of a public officer to explain the acquisition, during his or her incumbency, of an amount of property that is manifestly out of proportion to his or her salary as a public official and his or her other lawful sources of income, in which case such property shall be presumed to have been acquired unlawfully.

*Article 26**Use of classified or confidential information*<sup>51</sup>Option 1<sup>52</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence the improper<sup>53</sup> use by a public official or a person who performs public functions,<sup>54</sup> for his or her own benefit or for that of a third party, of any kind of classified or confidential information that that official or person who performs public functions has obtained because of or in the performance of his or her functions.

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<sup>49</sup> Text taken from the proposal submitted by Turkey (A/AC.261/IPM/22).

<sup>50</sup> Text taken from the proposal submitted by the Philippines (A/AC.261/IPM/24).

<sup>51</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations expressed their wish to retain the concept contained in this article in the convention. Many of them, however, expressed their preference for reflecting that concept in a revised version of article 29 and not in a separate article. Some delegations were of the view that there was no need for the establishment of a separate offence on the issue. According to those delegations, other articles (such as article 22 (Misappropriation of property by a public official)) and other national penal laws would be sufficient to cover the conduct targeted in this article.

<sup>52</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13). During the first reading of the draft text at the first session of the Ad Hoc Committee, some delegations expressed preference for this option as the basis for further work, expressing the view that some elements of option 2, such as the identification of a period of time after separation from service, could be usefully incorporated into a subsequent revised formulation.

<sup>53</sup> Several delegations were of the view that a more appropriate word was needed.

<sup>54</sup> One delegation proposed amending this phrase to read "or any other person, as defined in article 3 of this Convention".

Option 2<sup>55</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the following acts of corruption:

(a) The improper disclosure by a public official of confidential information or documents and the use for his or her own benefit or for that of a third party of a scientific discovery or other classified or confidential information or data of which he or she has become aware by virtue of his or her functions;

(b) The improper use, for his or her own benefit or for that of a third party, by a public official who is an employee or executive or a member of a board or governing body of any public institution of information not intended for public knowledge that he or she has obtained by virtue of or in connection with his or her functions during his or her service as a public official or within two years following separation from such service.

*Article 27*  
*Diversion of property*<sup>56</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or for that of a third party, of any movable or immovable property, monies or securities belonging to the State or to an individual, that such official has received by virtue of his or her position for purposes of administration or custody or for other reasons.<sup>57</sup>

*Article 28*  
*Improper benefits*<sup>58, 59</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence the soliciting, directly or indirectly, by a public official or a person who performs public functions, of any article of monetary

<sup>55</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

<sup>56</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, this article was considered together with article 22. It was suggested that an effort should be made to combine this article with that article. Option 2 of this article, which had been submitted by Colombia (A/AC.261/IPM/14), was deleted, as it was identical to option 3 of article 22.

<sup>57</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

<sup>58</sup> At the first session of the Ad Hoc Committee, Colombia and the Philippines withdrew previous options 2 and 3, respectively.

<sup>59</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, it was pointed out that the title was not appropriate to reflect the offence proposed to be established by this article. While most countries were familiar with the offence, it was pointed out that in recent evolution and subsequent revisions of criminal laws the concept was considered to be covered by other offences. As a result, some delegations questioned the need to have a separate article on this subject. The Vice-Chairman with responsibility on this chapter suggested that if the Ad Hoc Committee decided to retain this article, the formulation could be improved through consultations.

value or other improper benefits or in quantities exceeding those established by law, as a tax or contribution, surcharge, revenue, interest, salary or remuneration.

*Article 29*  
*Other criminal offences*<sup>60</sup>

Option 1<sup>61</sup>

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the following acts of corruption:

(a) The violation of disqualification and conflict-of-interest rules for state recruitment as laid down in the internal employment regulations of the State Party;

(b) The holding of an interest by a public official, to his or her own advantage or to that of a third party, in any type of contract or transaction in which the official is called upon to act by virtue of his or her position or functions;

(c) The failure by a public official to report to the competent authority facts of which he or she has become aware and which he or she is officially responsible for investigating;

(d) Unlawful judicial representation, action or advice in a judicial or administrative matter undertaken by a public official;

(e) The use by a public official who exercises jurisdiction or civil or political authority or holds an executive administrative position or position in a judicial body of the authority or power conferred by public office or functions in favour of or against the electoral chances of a political candidate, party or movement;

(f) The action taken by a public official of facilitating the escape of a detainee or prisoner entrusted to his or her surveillance, custody or conveyance.

Option 2<sup>62</sup>

Each State Party shall take the necessary legislative and other administrative measures to criminalize the following actions, in accordance with basic principles of its domestic law:

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<sup>60</sup> At the first session of the Ad Hoc Committee, most delegations proposed the deletion of this article, as all matters it contained had been covered elsewhere. Other delegations suggested that the Ad Hoc Committee defer its decision on this matter until the completion of the consideration of the articles on criminalization of the convention. The Vice-Chairman with responsibility on this chapter encouraged the authors of the various options to consult with each other in order to produce a single text, eliminating duplication with other articles, and thus to facilitate the work of the Ad Hoc Committee.

<sup>61</sup> Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

<sup>62</sup> Text taken from the proposal submitted by Turkey (A/AC.261/IPM/22).

(a) Consciously acting as a mediator for the promising, offering, giving, requesting or accepting of the unlawful benefit listed in articles [...] [articles on criminalization] of this Convention;

(b) Providing benefit to oneself or others in public works by deceiving a person through tricks and intrigue, or causing harm to that person or to others;

(c) Providing a credit that shall not be assigned by banks and other financing institutions or stopping a loan that needs to be assigned or to attempt such behaviour consciously.

*[Subparagraph (d) was deleted.]*

### Option 3<sup>63</sup>

The following shall be considered corrupt acts subject to sanctions provided for in the domestic legislation of each State Party:

(a) Non-disclosure: failure of a public official, either wilfully or through gross negligence, to disclose accurately on an annual basis his or her assets, liabilities and net worth in order to defraud the Government of obligations such as taxes and/or to deceive the proper authorities of his or her unlawful activities and proceeds;

(b) Non-divestment: failure of a public official to divest applicable assets to avoid conflicts of interest to a person or persons other than his or her spouse or relatives within the fourth civil degree of consanguinity or affinity.

### *Article 30<sup>64</sup>*

#### *Equivalence of sanctions*

1. The attempted commission or complicity in the commission of the offence referred to in article [...] [Criminalization of corruption of public officials] of this Convention shall constitute an offence of the same degree, whether an attempt or complicity is involved in the bribing of a public official of a State Party.<sup>65</sup>

2. Each State Party shall establish custodial sanctions for acts of corruption established in accordance with this article, which shall take account of the seriousness of such acts.<sup>66</sup>

<sup>63</sup> Text taken from the proposal submitted by the Philippines (A/AC.261/IPM/24). At the first session of the Ad Hoc Committee, the Philippines stated that it had submitted its proposal under the title "Other prohibited acts". The Philippines also revised this option.

<sup>64</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13). During the first reading of the draft text at the first session of the Ad Hoc Committee, many delegations expressed understanding of and support for the concept of equivalence of sanctions. However, most delegations suggested that this article could be merged into articles 20 (Complicity, instigation or attempt) and 40 (Prosecution, adjudication and sanctions).

<sup>65</sup> Many delegations suggested a reformulation of this paragraph drawing on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development.

<sup>66</sup> Many delegations suggested deletion of this paragraph.

3. When the commission of any of the offences referred to in articles [...] [articles on criminalization] of this Convention requires proof of the knowledge, intent, aim, purpose or agreement for the commission of such offences, these may be inferred from objective factual circumstances.<sup>67</sup>

*Article 31*<sup>68</sup>

*Enhancement of sanctions*

1. Each State Party shall adopt all legislative and administrative measures necessary in order to make possible more severe punishment and to apply effective methods against corruption whenever the crimes listed in articles [...] [articles on criminalization] of this Convention are committed in an organized manner.<sup>69</sup>

2. Each State Party, in accordance with its domestic law, shall adopt all the legislative and administrative measures necessary to prosecute and punish persons who take part in the commission of the crimes covered by this Convention and to extend the application of the relevant provisions of this Convention to such persons, irrespective of the status of a public official, whenever the economic activities or transactions involved include or result in the use of public resources or produce results that affect the public or aim at the provision of public services.<sup>70</sup>

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<sup>67</sup> Some delegations proposed deletion of this paragraph. However, others proposed that this paragraph be reformulated along the lines of paragraph 2 (f) of article 6 of the Organized Crime Convention.

<sup>68</sup> Text taken from the proposal submitted by Turkey (A/AC.261/IPM/22). During the first reading of the draft text at the first session of the Ad Hoc Committee, Turkey amended its proposal. Also at the first reading, it was suggested that the concept of paragraph 1 should be merged into article 40.

<sup>69</sup> Some delegations proposed to replace the words “in an organized manner” with the words “by an organized criminal group”.

<sup>70</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, Turkey indicated its intention to consider withdrawing this paragraph after completion of the discussion on article 32.



*Article 32*<sup>71</sup>*Criminalization of corruption in the private sector*<sup>72</sup>Option 1<sup>73</sup>

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of business activity:

(a) The promising, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works for, in any capacity, a private sector entity, for the person himself or herself or for another person or entity, in order that he or she act or refrain from acting, in breach of his or her duties;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works for, in any capacity, a private sector entity, for the person himself or herself or for another person or entity, in order that he or she act or refrain from acting, in breach of his or her duties.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with paragraph 1 of this article.

Option 2<sup>74</sup>

Each State Party shall take such measures as may be appropriate to deter and combat corruption in the private sector. To that end, each State Party shall, inter alia, establish as criminal offences the following conduct:

<sup>71</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, most delegations indicated that the Convention would be incomplete without a provision addressing private sector corruption and advocated inclusion of this article, as it addressed a crucial matter of special relevance in the era of globalization, with ramifications for an increasing number of spheres of economic and social activity. All those in favour of inclusion expressed their preference for option 1, enhanced however with some elements from option 2, such as the concept of harm. Some delegations expressed serious misgivings about the feasibility of efforts to introduce an international obligation for criminalization in this area. While recognizing the importance of the issue of private sector corruption, those delegations expressed concern about the potential of a provision such as this to interfere with normal economic activity through the application of criminal law. Some delegations suggested that efforts to arrive at common ground might be based on the introduction of the concept of protection of the public interest. In any event, further deliberations were deemed necessary on the concept of private sector corruption, as well as on the meaning of the term "private sector" and the shifting relationships between the private and the public sectors. It was also pointed out that this discussion would be related to the discussion on the definition of the term "public official".

<sup>72</sup> During the first reading of the draft text at the first session of the Ad Hoc Committee, one delegation suggested that the title should read "Criminalization of corruption by the private sector".

<sup>73</sup> Text taken from the proposal submitted by Austria and the Netherlands (A/AC.261/IPM/4). At the first session of the Ad Hoc Committee, the authors revised their proposal and indicated that this article should be placed after article 19 bis, while paragraph 2 should be considered in conjunction with the article on complicity.

<sup>74</sup> Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

(a) The solicitation or acceptance by any natural person who works or provides services in entities of the private sector, directly or indirectly, of an undue advantage, for himself or herself or for another person, in order that such person act or refrain from acting in the exercise of his or her obligations in relation to an economic, financial or commercial transaction, which results in harm to that entity of the private sector; and

(b) The intentional promise, offering or giving to a natural person who works or provides services in entities of the private sector, directly or indirectly, of any article of monetary value or other undue advantage, for himself or herself or for another person or entity, as a gift, favour, promise or advantage, in exchange for which that person performs or fails to perform any act in relation to an economic, financial or commercial transaction, which results in harm to that entity of the private sector.

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