

**The best place for prosecution of
international corruption cases.
Avoiding and solving conflicts of
jurisdiction**

**The Third Global Forum on Fighting Corruption and
Safeguarding Integrity**

**Workshop I – Legal Instruments
Bribery**

Seoul – 29 May 2003

Prof. dr. Tom Vander Beken

Institute for International Research on Criminal Policy (IRCP)

Ghent University (Belgium)
Universiteitstraat 4 – 9000 Gent
Tom.vanderbeken@rug.ac.be

www.ircp.org

I. INTRODUCTION

During the last decades, the international dimension of crime and criminal justice has grown systematically. It is believed that the globalisation of society and crime has induced new challenges to law enforcement. Nowadays, crime is considered to be more international than ever before, which forces States and organisations to react accordingly.

Even though the internationalisation of the phenomenon of corruption has been visible for a long time - internationalisation of the economy, increased demand by governments for services and goods provided by the private sector, the secrecy provided by offshore jurisdictions (Stessens 2001, 894-895, Pieth 1999, 2-5) - it is only since the second half of the 90s that the international community has succeeded in adopting international instruments to fight corruption (OAS 1996, OECD 1997, EU 1997, COE 1999, ...)

Although these instruments are “international” by origin, they do not all aim at fighting “international” corruption cases. On the one hand, conventions like the COE 1999 are focused on the development of common standards concerning corruption offences (Council of Europe 1998), including many aspects related to “national” corruption cases. On the other hand, many national legislations address “international” corruption issues as they provide tools for international co-operation or bases for jurisdictional claims.

In this paper only the prosecution of “international” corruption cases is addressed, i.e. the prosecution of corruption crimes with links to different States, a link being “ *a circumstance of the commission of a crime, giving rise to questions concerning the applicability of national law*” (Feller, 1973, 5 and Vander Beken et. al. 2002, 9).

For the prosecution of crimes, the most influential foreign element is *the place where the crime has been committed*. Indeed, territorial jurisdiction is the basic jurisdictional rule for all States nowadays, which implies that every State can prosecute crimes committed on their territory, irrespective of the nationality of the offender or the seriousness of the offence. Only if the offence is committed outside the State’s territory, questions arise on the applicability of the national law.

However, for international corruption cases another foreign element can influence the prosecution of corruption offences as well. For such offences the *nationality of the offender* can hamper prosecution even in case the crime has been committed on the territory of the prosecuting State. The reason for this is that most legislations traditionally did not criminalise corruption involving foreign public officials – i.e. officials whose nationality is different from the nationality of the bribers and/or from the State where the corruption takes place. Originally, only the State that had nominated the officials was considered to have a legal interest in the repression of corruptive behaviour of its officials. Corruption by “foreign officials” was therefore not included in the national criminal law. In practice, this created a loophole in the prosecution of international corruption cases as the State where the crime was committed (foreign officials are no officials) nor the State of which the offender is a national (the condition of double criminality, usually required for the prosecution of crimes committed abroad and for international co-operation, is not fulfilled) could prosecute. This explains why international conventions demand at present that corruption involving foreign public officials is to be criminalised as well. Not all international instruments introduced this rule in the same way or to the same extent. Unlike the Conventions drafted by the Council of Europe, the Organisation of American States or the Organisation for Economic Development and Cooperation (COE 1999, OAS 1996, OECD 1997), the EU Convention (EU 1997) confines the scope of “foreign public officials” to officials of other EU Member States). Additionally, and contrary to the other Conventions mentioned, the OECD Convention contains an autonomous definition of public official that is not dependant on the legislation of the State concerned which demands the State parties to draft their law in such a way that the corruption of foreign public officials is punishable irrespective of the question whether that person would be considered an official under the corruption legislation of that country. Such an approach,

only applicable in cases of active corruption, can only be successful in international corruption cases if the condition of double criminality is not posed (Stessens 2001, 910-912).

Until now, the reaction to the internationalisation of corruption offences and the problems posed by the foreign elements of the crime, has been focused on “filling the gaps” by extending the scope of the national legislation (extending jurisdiction to corruption crimes committed outside the territory and criminalisation of corruption by foreign and international officials).

In this paper it is argued that this approach does not provide a complete answer to the internationalisation of corruption cases since the extension of the scope of criminal law as such does not solve all problems related to the prosecution of (corruption) crimes with links to several States. It is stated that stimulating the multiplication of national jurisdictional claims without defining how these national claims interact, can be counterproductive for prosecution (double prosecution, no prosecution, ...) and violate fundamental rights of the persons (perpetrators and victims involved, feeling the consequences of the choice of a particular forum).

The paper consist of three parts. The first part describes and comments on the extension of jurisdictional claims over corruption crimes with an international element based on the analysis of six international conventions relevant for the fight against corruption and some national legislations. The second and the third part respectively analyse the possible ways to prevent and solve the conflicts of jurisdiction that arise from this extension of jurisdiction.

II. MORE CONFLICTS OF JURISDICTION IN CORRUPTION CASES

A. Unlimited possibilities for States to prescribe jurisdiction over corruption offences?

Prescribing jurisdiction over offences is a derivative from the sovereignty of States. If States have the right to criminalise certain behaviour, they have the right to define the territorial scope of that right. However, this jurisdictional claim is not unlimited as it may affect the sovereignty of other States. In this discussion about the so-called *Kompetenz-Kompetenz* three different approaches are developed in the legal doctrine concerning the limits of national jurisdictional claims. The State's view on sovereignty influences which of these three views is dominant.

A first vision, becoming less popular, states that every State is completely free to determine the extent of its criminal law. This thesis, based on the sovereignty of the States, is inspired by the fear of a '*vacuum iuris*', the situation where no State can claim jurisdiction for a particular crime (Feller 1981, 41) . A current example of the decline of this theory is the *Yerodia*-case (International Court of Justice, case concerning the arrest warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium, 14 February 2002, N° 121): while the Republic of Congo stated that the jurisdiction of Belgium was excessive, Belgium answered it was entitled to assert jurisdiction because international law does not prohibit and even permits States to exercise extraterritorial jurisdiction for war crimes and crimes against humanity. The judgment denies this and excludes the vision that every State is completely free to determine the extent of its criminal law. According to a second theory, a State has only limited power to prescribe jurisdiction. Here the line is drawn by an international prohibitive regulation. As a consequence, jurisdiction cannot be claimed if prohibited by an international rule, which is rarely the case. A final position is the converse of the latter: a State can only claim jurisdiction for crimes committed in a foreign country if an international rule explicitly provides for this.

This *Kompetenz-Kompetenz* discussion has also important consequences for individuals. If the applicability of a particular criminal law is not reasonably predictable for the offender (because of extensive extra-territorial jurisdictional claims) at the moment the act in question is committed, questions can arise related to the compatibility of the claim with the principle of legality (Vander Beken et. al. 2002, 9-10).

The international conventions relevant for the fight against corruption do not provide additional guidance on this issue. Only the UN Conventions explicitly refer to the protection of sovereignty of other States:

“States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States...” (Article 4 UN 2000 and UN 2003).

Other conventions do not make reference to this issue (OECD 1997, EU 1997) or tolerate the extension of jurisdictional claims:

“This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with national law.” (Article 17.4 COE 1999)

“This Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law.” (Article 5.4 OAS 1996)

B. Corruption and jurisdiction to prescribe

Two types of jurisdiction can be distinguished: primary jurisdiction and jurisdiction by representation. The first one is based directly on a traditional contact point with the crime (principle of territoriality, active and passive personality, protection and universality), while the latter occurs when no strong contact point exists but jurisdiction is exercised to represent the interests of another State having such contact point.

1. Primary jurisdiction

a. Territorial jurisdiction

Territory is accepted everywhere as the first and most important contact point as the authority of a State to establish jurisdiction over acts that take place on its own territory is uncontested (Council of Europe 1990, 8).

At first sight, there are no conflicts of competence if all States prescribe jurisdiction only on the basis of their own national territory. However, this is a rather simplified reflection of reality as in practice it is not always clear to determine where an offence has been committed. This determination is important and depends on the appreciation by a State. States are to a large extent free to make a choice between a broad localisation theory and a more restricted localisation theory, as this decision cannot be justified on the basis of legal arguments, but forms part of the criminal politics of a country (Vander Beken 1999). The broad theory gives rise to a quasi-unlimited possibility to enforce jurisdiction, the more restricted theory reduces the possibilities to enforce jurisdiction on the basis of the territory of the State. States that choose a broad localisation theory do not take into account the fact that certain crimes can also be prosecuted in other States on the basis of the same principle and give rise to many conflicts of jurisdiction. An example of a broad application of the territoriality principle can be found in the American concept of the “objective territoriality” under which offences only intended to have an effect on US territory are considered to be territorial crimes. However, the impact of this (criticized: Blakesley 1982, 1118-1132; Bassiouni 1987, 262-268 and Wolswijk 1998, 50-56) extensive theory on international corruption cases is believed to be limited. An “attempt” to commit corruption will normally already constitute a corruption offence itself as the mere offering of an undue advantage already constitutes an offence of active corruption (Stessens 2001, 919).

The Conventions relevant for the fight against corruption do not take position in this discussion and only refer to the territory where the crime is committed (OAS 1996, UN 2000), be it “*in whole or in part*” (OECD 1997, EU 1997, COE 1999). Some conventions extend the application of the territoriality principle to a “*vessel that is flying the flag of that State Party or an aircraft registered under the laws of that State Party at the time that the offence is committed*” (UN 2000, UN 2003).

Given this general approach to territorial jurisdiction which does not exclude any localisation theory explicitly, it can be stated that claims based on the principle of territoriality can result in positive conflicts of jurisdiction in international corruption cases.

b. Extraterritorial jurisdiction

Besides the *locus delicti*, States can also apply one of the principles of extraterritorial jurisdiction to start prosecution. In other words: States can prescribe jurisdiction for offences, which cannot be located on their own territory. This form of prosecution is mostly subsidiary to the *locus delicti*. States can prescribe extraterritorial jurisdiction if the offender is one of their nationals (active personality principle, statute of perpetrator) and also in situations where certain acts are committed against their nationals (passive personality principle, statute of victim). In addition, States can also start prosecution on the basis of the protection principle and the universality principle.

b.1. Active personality principle

In practice, most States only prescribe jurisdiction on the basis of the active personality principle if the State where the offence has been committed does not prosecute or is unable to start prosecution (Vander Beken 1999, 106-108). Under international law, the admissibility of the *limited* active personality principle is not debated, because there is hardly any interference with the internal matters of another State and because there is a requirement of double incrimination which is important for the legal status of the suspect (Oehler 1983, 445). States sometimes impose additional conditions on the applicability of this principle (e.g. presence of the offender, official notification by the State in which the offence has been committed or an instruction to prosecute from the Minister of Justice) (Council of Europe 1990, 11). The relevant anti-corruption conventions, however, allow jurisdictional claims based on the status (nationality, residence, official) of the offender, without defining any specific limits. Some conventions even require the establishment of a jurisdictional claim based on the active personality principle as a rule, with only an opt-out clause for those States not wanting to apply it (EU 1997 and COE 1999).

“Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory.”
(Article V.2. OAS 1996)

“1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4 where ...

(a) [...];

(b) the offender is one of its nationals or one of his officials;

[...]

(d) the offender is a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State in question.

2. Each Member State may declare [...] that it will not apply or will only apply in specific cases or conditions one or more jurisdiction rules laid down in paragraph 1 (b) [...] and (d).”
(Article 7 EU 1997)

“Each Party which has jurisdiction to prosecute nationals for offences committed abroad shall take such measures, as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles” (Article 4.2 OECD 1997)

“1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with Articles 2 to 14 of this Convention where:

(a) [...];

(b) the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies;

[...]

2. Each State may [...] declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 b [...] c of this article or any part thereof” (Article 17 COE 1999)

“2. Subject to Article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) [...]

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory;” (Article 15 UN 2000 and Article 50 UN 2003)

Research (Vander Beken and Siron 2001, 23) has shown that most European States have established jurisdiction based on the active nationality principle for corruption offences. Even common law States like the UK and the US, having a tradition of mainly territorial jurisdiction claims, have extended their jurisdiction over corruption offences committed by nationals abroad (UK Anti-Terrorism, Crime and Security Act of 2001 and US Foreign Corrupt Practices Act of 1977. On the latter see Chaikin 1997, 294 and Colton 2001, 900).

Although not always considered in that way, some *aut dedere, aut judicare* provisions are closely connected with the active personality principle when prosecution is dependant on the non-extradition (not necessarily following an extradition request) of own nationals (Vander Beken 1999, 80). In the analysed anti-corruption conventions this is reflected in the following provisions:

“3. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the alleged criminal is present in its territory and it does not extradite such person to another country on the ground of the nationality of the alleged criminal.” (Article V OAS 1996)

“3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its officials for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.” (Article 10 OECD 1997)

“1. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4, when committed by its own nationals outside its territory.

2. Each Member State shall, when one of its nationals is alleged to have committed in another Member State an offence established in accordance with the obligations arising out of Articles 2, 3 and 4 and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. [...]” (Article 8 EU 1997)

“4. If extradition for a criminal offence established in accordance with the Convention is refused solely on the basis of the nationality of the person sought [...], the requested Party shall submit the case to its competent authorities for the purpose of prosecution [...]” (Article 27 COE 1999)

“[...] each State shall adopt such measures as may be necessary to establish its jurisdiction over offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.” (Article 15.3 UN 2000 and Article 50.3 UN 2003)

b.2. Passive personality principle

States can prescribe jurisdiction on the basis of the *passive personality principle*, inspired by the idea that a State must protect its own nationals, even when they are abroad. Although this reasoning seems acceptable and related to the protection principle (*infra*), it has been called “*das schlechteste aller Prinzipien*“ (Oehler 1983, 116, see also Mann 1964, 91; Brownlie 1990, 303, Henrich 1994, 188; Jennings and Watts 1996, 472) as it could create many conflicts of jurisdiction. However, there is an international trend towards the inclusion of provisions in treaties encouraging the contracting States to prescribe jurisdiction on the basis of the passive personality principle (Council of Europe 1990, 12, Vander Beken 1999, 124-125). This trend is visible in the EU 1997 and both UN instruments:

“1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4 where ...

(a) [...];

(b) [...];

(c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the European Community institutions referred to in Article 4 (1) who is at the same time one of its nationals;

(d) [...]

2. Each Member State may declare [...] that it will not apply or will only apply in specific cases or conditions one or more jurisdiction rules laid down in paragraph 1 [...] (c) [...].” (Article 7 EU 1997)

“2. Subject to Article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party [...]” (Article 15 UN 2000 and Article 50 UN 2003)

b.3. Protection principle

States can assume the right to prescribe jurisdiction for crimes committed outside their territory with the intention of damaging their national interests. The main justification for this protection principle is that the protection of these fundamental interests cannot be left to other States or that other States do not consider that such interests require the protection of the criminal law. In some countries it is applicable to an extremely limited number of offences, in other countries to a very large number of crimes. Jurisdiction conflicts are possible, as the principle of protection is a powerful contact point (the requirement of double incrimination or other prosecution conditions are not imposed). Many States make use of the protection principle to combat international crime on the basis that all States should be in the position to prosecute all crimes and to avoid impunity, thereby sometimes stretching the concept of ‘fundamental interests’ to include other interests as the capital market and certain industrial interests and creating conflicts of jurisdiction (Council of Europe 1990, 13-14, Cameron 1994, 243-292, Vander Beken 1999, 130-153). In the anti-corruption conventions analysed in this paper, jurisdiction based on the protection principle is, although still discussed, only explicitly mentioned in the present version of the draft UN Convention:

“2. Subject to Article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party, as established in the Convention; or

(e) *The offence is committed against the affected State Party, as established in this Convention.*” (Article 50 UN 2003)

In the COE Convention the jurisdictional claim based on the protection principle can be found in the provisions referring to corruption offences “involving” public officials. This is to avoid a *vacuum juris* in case the offender of an active corruption offence has a foreign nationality – in that case the State whose official has been the “victim” of an (attempted) bribery will not have jurisdiction over the briber (Stessens 2001, 923):

“1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with Articles 2 to 14 of this Convention where:

(c) the offence involves one of its public officials or members of its domestic public assemblies or any person referred to in Articles 9 to 11 who is at the same time one of its nationals”

[...]

2. Each State may [...] declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs [...] 1 c of this article or any part thereof” (Article 17 COE 1999)

b.4. Universality principle

Finally, States can start prosecution of very serious offences where the perpetrator is considered to be a danger to the world (*hostis generis humani*), although there is no direct contact point with the crime. They can thus establish jurisdiction on the basis of the universality principle without taking into account the *locus delicti*, the offenders or the victims. The list of crimes suitable for universal jurisdiction is limited and must find a basis in international law. However, there is no consensus as to which crimes the universality principle could be applied. There is no doubt that war crimes and crimes against peace and mankind (cf. Conventions of Geneva), counterfeiting, criminal offences against international protected people and terrorism appear on this list (Vander Beken 1999, 154-156). An extensive use of this principle can be an important source of conflict of jurisdiction. None of the anti-corruption conventions analysed for this paper explicitly refers to the universality principle as a basis for jurisdiction over corruption offences. However, the use of this principle is not excluded either and even mentioned in the Explanatory Report of the COE 1999 as a possible additional jurisdictional claim (Article 17.4 Council of Europe 1998). National legislations that allow for prosecution of corruption offences based on the universality principle are rare (for an example see Article 10^{quater} of the Preliminary Title of the Belgian Code of Criminal Procedure – Van Heers 2001, 57-59)

2. Jurisdiction by representation

The abovementioned principles are based on contact points which are considered to be strong enough to allow States to establish and enforce jurisdiction unilaterally. However, sometimes it is possible to establish jurisdiction in situations where the criminal offence has no direct contact point with the State or where the State only has a contact point that is too minor to justify a jurisdictional claim. In these cases the State can enforce jurisdiction, derived from a State that has one of the recognised contact points with the offence. Therefore, jurisdiction by representation can only be enforced “on behalf” of a State that has a primary jurisdictional claim. Two forms of jurisdiction by representation can be identified: *aut dedere, aut judicare* and jurisdiction as a result of transfer of proceedings (Vander Beken 1999, 184).

a. *Aut dedere, aut judicare*

Jurisdiction based on the *aut dedere aut judicare* principle, as used in this paper, is inextricably linked to extradition. On the basis of this concept a State can start prosecution in situations when foreigners are not extradited. At first sight there are some similarities with the active personality principle as the main function of this principle is to make prosecution possible if the State where the crime has been committed (or another State) does not start prosecution. *Aut dedere, aut judicare* jurisdiction has the same purpose. In other words, it is possible to consider both concepts as complementary. States that apply the active personality principle, enforce jurisdiction on the basis of the nationality of the perpetrator (*supra*). Such a strong contact point is absent in *aut dedere, aut judicare* situations. The latter can cause problems to suspects and victims of criminal offences, as prosecution could completely come as a surprise for them, although there are some guarantees (e.g. the requirement of double incrimination). The suspect may be tried in a country, by which he did not expect prosecution at the moment he has committed its actions. *Aut dedere, aut judicare* jurisdiction can also create confusion for the victim because his case could be dealt with in an 'unknown' State (Pappas 1996, 183-188 and Vander Beken 1999, 192).

Provisions on *aut dedere, aut judicare* jurisdiction as defined in this paper are mentioned in the analysed international instruments, but do not require the establishment of such jurisdictional claim:

“Each State may adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.” (Article 15.4 UN 2000 and Article 50.4 UN 2003)

Some national legislations have established jurisdiction over offences (including corruption) based on this principle. Paragraph 7, 2 nr. 2 of the German Criminal Code, for example, states that foreigners who have committed extraditable offences abroad can be prosecuted in Germany, if no extradition is granted (Pappas 1996, 24-26).

b. Jurisdiction as a result of a transfer of proceedings

Jurisdiction as a result of a transfer of proceedings is a form of jurisdiction by representation dependant on a concrete request of a State that has a primary jurisdictional claim. Three elements define jurisdiction as a result of transfer of proceedings: there is a request to start prosecution, this request comes from a State that is in the position to prosecute and prosecution in the requested State takes places or continues on the ground of this request.

The rationale behind this jurisdictional claim is the so-called 'proper administration of justice'. In these cases a State enforces jurisdiction not because it can justify a strong contact point, but because it is in the best position to do this (Vander Beken et al. 2002, 16). States cannot unilaterally divide jurisdiction on the ground of proper administration of justice, because this principle alone is too weak. Consequently jurisdiction on the basis of proper administration of justice can only be enforced at the explicit request of a State with original jurisdiction. The emphasis is on the State that considers that another State is in a better position to take over prosecution, and not on the State that ultimately will enforce jurisdiction.

If not involved in the procedure of transfer of proceedings, this type of jurisdictional claim can totally surprise the suspects and victims concerned and can consequently affect their legal status (Oehler 1983, 434-435). There are two possibilities to justify the predictability of the instrument of transfer of proceedings and to avoid *forum shopping*. First, a foregoing determination (in a treaty) of general criteria of proper administration of justice can be established to cope with the requirements of predictability and certainty (Pappas 1996, 137). The second possibility is to involve the suspect and the victim more closely in this procedure, as proper administration of justice is too vague and weak as a contact point for jurisdiction. In this option, suspects and victims are to be treated as persons with a

place and a voice and therefore have a decisive influence on this transfer procedure to justify prosecution (Vander Beken 1999, 215).

The international instruments relevant for the fight against corruption do not contain provisions which explicitly refer to this type of jurisdiction. However, when dealing with international co-operation, some instruments refer to the concept of transfer of proceedings (including the situation of transfer between States both having a primary jurisdictional claim):

“States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention when such a transfer is considered to be in the interests of the proper administration of justice [...]” (Article 21 UN 2000)

C. Conclusion

Presently, international instruments relevant for the fight against corruption allow and even stimulate States to establish all kind of territorial and extra-territorial jurisdictional claims. In some cases these claims are unilateral decisions of a State, without necessary involvement or agreement of other States.

The focus of the international instruments on the extension of the scope of jurisdictional claims of States – trying to avoid a *vacuum juris* – leads to a situation in which multiple jurisdictional claims are possible and even likely. As a result, nearly all international corruption cases will be confronted with multiple claims and thus with conflicts of jurisdiction. Therefore, the main jurisdictional question in international (corruption) cases is not to find States which have established jurisdiction, but to make the right choice between the States who are involved and can actually prosecute.

If double prosecutions and convictions are to be avoided, conflicts of jurisdiction should be prevented and solved in a way that the case is prosecuted in the “best” State. The quest for this “best” State affects both State and individual interests. For States issues of sovereignty and international politics are at stake. For suspects and victims jurisdictional claims determine the place of “their” trial and consequently the criminal justice system they are facing.

III. PREVENTING AND SOLVING CONFLICTS OF JURISDICTION

A. Prevention of conflicts of jurisdiction

Conflicts of jurisdiction can be avoided by limiting the establishment of jurisdiction. If States restrict their claims for jurisdiction, international corruption cases will be confronted with less conflicts of jurisdiction. However, this approach is not taken in the analysed international instruments as they stimulate, rather than temper the establishment of all types of jurisdiction – although Article 4.4 of the OECD 1997 obliges the Parties to *“review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if it is not, to take remedial steps”* - the rationale of this provision seems to be to have more jurisdiction, rather than less. Even European Union instruments, subject to Article 31.d of the Treaty on European Union which explicitly addresses the prevention of conflicts of jurisdiction, do not contain provisions explicitly limiting the establishment of jurisdiction. Introducing such provisions would require States not to take action in certain international cases which could be considered contradictory to their commitment to the international fight against corruption and affecting their sovereignty. The provision of the *Resolution on Corruption and Related Offences in International Business Activities* adopted by Young Penalists at the international Conference hosted by the Hungarian National Group of the Association Internationale de Droit Pénal (AIDP) of 11-15 September 2002 which goes in another direction, is therefore a remarkable exception to the general rule:

“It is necessary that States limit the exercise of their extraterritorial jurisdiction in order to prevent jurisdiction conflicts that arise from the international element of the offence of bribery

of foreign public officials and of officials of international organisations as well as bribery in the foreign private sector.

States should not provide jurisdiction over bribery of foreign public officials committed outside their territory unless they do not as yet extradite their own nationals or persons domiciled in their territory.

This should not preclude States to establish jurisdiction over bribery of officials of international organisations to which they are party to.

States should not provide for jurisdiction over bribery in the private sector committed outside their territory unless they do not as yet extradite their own nationals or persons domiciled in their territory.

This should not preclude States to establish jurisdiction over bribery in the private sector detrimental to a national company, if the condition of double criminality is fulfilled.”

B. Solving conflicts of jurisdiction

1. Two possible solutions

If prevention of conflicts of jurisdiction by limiting the scope of the establishment of jurisdictional claims is not (always) possible or opportune, action can be taken to guarantee the solution of such a conflict in a way that prosecution is effectuated by the State having the “best” claim.

Two solutions can be envisaged. The first possibility is to create an internationally accepted hierarchy in the claims of jurisdiction so that it can be decided by virtue of an international instrument which State is most suitable to prosecute. The second view starts from the assumption that an *a priori* hierarchical structure of jurisdictional claims is impossible, because the decision should be examined case by case and can only be done after deliberation (*a posteriori*). The following parts will investigate both.

2. A hierarchical list of jurisdiction criteria

During the sixties, the Council of Europe developed a Draft Convention concerning international conflicts of jurisdiction. The aim of this attempt was to create a hierarchical list of jurisdiction criteria. Three arguments supported the setting up of a convention, being (1) the international law recognizes the existence of different forms of jurisdiction, so the exclusion of positive conflicts of jurisdiction is impossible; (2) even jurisdiction based on territoriality can cause conflicts if States use various localisation criteria; and (3) such conflicts are undesirable, since they can lead to the situation where an offender is tried several times in different countries.

Further a hierarchical list was set up, making a distinction between primary and secondary claims of jurisdiction. The State where the crime has been committed and the State claiming jurisdiction on the basis of the protection principle were positioned on top, followed by claims based on the active personality principle and the universality principle (Council of Europe, Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters, 1972). After the submission of the Draft Convention to the Committee of Ministers, a Subcommittee of the European Committee on Crime Problems was charged with the further redaction of the Draft Convention. This Subcommittee had obviously a divergent view on the problem. It did not support the idea of a hierarchy of criteria since this was perceived as being too rigid and mechanical to adjust to concrete situations. Additionally, the Subcommittee did not agree that the place where the crime was committed is always the most appropriate forum of jurisdiction. Inspired by the resocialisation idea, the decision has been made that the place of prosecution was not to be appointed beforehand, since specific elements proper to every case should be taken into consideration (Vander Beken 1999, 384-393).

However, the development of such a hierarchical list was not innovative (see e.g. Article V.1.1 of the Draft International Criminal Code). Finally the original Draft Convention had little remains so the idea of a hierarchy of jurisdiction criteria has been replaced by the transfer of proceedings. The explanatory

report of the European Convention of Transfer of Proceedings in Criminal Matters (1972) gives a clear view of the discussion:

“The assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender which is increasingly given weight in modern penal law requires that the sanction be imposed and enforced where the reformative aim can be most successfully pursued, that is normally in the State in which the offender has family or social ties or will take up residence after the enforcement of the sanction.

On the other hand it is clear that difficulties in securing evidence will often be a consideration militating against the transmission of proceedings from the State where the offence has been committed to another State. The weight to be given in each case to conflicting considerations cannot be decided by completely general rules. The decision must be taken in the light of particular facts of each case. By attempting in this way to arrive at an agreement between the various States concerned, it will be possible to avoid the difficulties which they would encounter by a prior acceptance of a system restricting their power to impose sanctions”. (Council of Europe, Explanatory Report on the European Convention on the Transfer of Proceedings, 1972)

Since efforts to set up a list of criteria were not very fruitful and a hierarchical solution is considered too inflexible and mechanical to be suitable for any concrete situation, the drafting of an international list of jurisdiction criteria is considered as unfeasible and undesirable. Consequently, such an approach is also not taken in the international instruments relevant for the fight against corruption.

3. Case by case deliberation

a. Cooperation and consult

Since a hierarchical list of criteria is not suitable and a double conviction not desirable (*ne bis in idem*), deliberation seems to be a more efficient solution to deal with situations where several States claim jurisdiction. In the European Union such deliberation was defined as ‘*trying, on an ad-hoc basis, possibly using non-binding guidelines, to reach consensus on which of the Member States interested should go ahead with proceedings in situations where the jurisdiction of two or more Member States is given*’ (European Commission 2001, 5).

Except for the OAS Convention and the Council of Europe Convention, all analysed international instruments relevant for the fight against corruption refer to “cooperation” and “consult” in case of jurisdiction conflicts:

“When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult [...]” (Article 4.3 OECD 1997)

“When more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders [...]” (Article 9.2 EU 1997)

“If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another [...]” (Article 15.5 UN 2000 and Article 50.5 UN 2003)

b. The criteria used to decide on the best place for prosecution

b.1. Vague criteria in the corruption instruments

As criteria to guide these deliberations the international instruments relevant for the fight against corruption refer to “*determining the most appropriate jurisdiction*” (OECD 1997), “*centralising the prosecution in a single Member State*” (EU 1997) and “*coordinating their actions*” (UN 2000 and 2003). These criteria are vague and in the case of the EU Convention even disputable. Conflicts of jurisdiction should not necessarily be solved by centralising the prosecution in one particular State. In some cases, the conflict can be solved the “best” by splitting up and merging certain cases, specifically in the framework of joint investigations (Vander Beken et al. 2002, 24).

Since the criteria of the analysed international instruments do not provide sufficient guidance to support the deliberation process, further information is needed to define the content of the concept of proper administration of justice. In that respect, the position is taken that a proper administration of justice should not only mean swift and effective justice. As stated above, a balance is required between the need for efficient prosecution and considerations related to the legal position of the individuals involved: the resocialisation of the accused, prosecution in a country where the accused is familiar with the law and the language, the interests of the victim, ... (Van den Wyngaert 1999, 3). Two sorts of criteria can be used: positive and negative.

b.2. Positive criteria

Positive criteria of any kind are mentioned in various international treaties such as the Council of Europe Convention on the International Validity of Criminal Judgments (1970) and on the Transfer of Proceedings in Criminal Matters (1972). For example, art. 8 of the European Convention on the Transfer of Proceedings in Criminal Matters indicates the cases in which one contracting State may request the taking of proceedings in another contracting State. A request is possible if:

1. *the suspected person is ordinarily resident in the requested State;*
2. *the suspected person is a national of the requested State or if that State is his State of origin;*
3. *the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in its territory;*
4. *proceedings for the same or other offences are being taken against the suspected person by its prosecuting authorities;*
5. *the most important items of evidence are located in its territory;*
6. *the enforcement in its territory of a possible future sentence is likely to improve the prospects for the social rehabilitation of the person sentenced;*
7. *unlike in the requesting State, the presence of the suspected person can be ensured at the hearing of proceedings in its territory, or*
8. *unlike the requesting State, it could enforce a possible future sentence.*

These conditions are not cumulative and the list is exhaustive. The first four of the abovementioned criteria are objective, while the last four involve a subjective appreciation by the requesting State. These criteria are not listed in order of importance and none has overriding importance for the aims of the Convention.

b.3. Negative criteria and exercise of jurisdiction with unreasonable consequences

In order to define the appropriate criteria, it is also possible to focus on the negative criteria and consequently prohibit jurisdiction based on impermissible criteria.

An interesting negative criterion could be the *unreasonable consequences* of the exercise of jurisdiction. This additional criterion has been developed in 1965 and in 1986 by the American Law

Institute. The Restatement of 1986 formulates an explicit prohibition to exercise jurisdiction if this seems unreasonable in the light of the criteria mentioned. § 402 confirms the legitimacy of jurisdiction on the basis of the traditional links. § 403 adds that the presence of these links is not sufficient if the criterion of reasonableness is not taken into account. To reach this goal, § 403 adds an explicit interdiction to exercise jurisdiction on the basis of § 402 if this has unreasonable consequences (American Law Institute 1986):

*“(1) Even when one of the bases for jurisdiction under § 402 is present, a State may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another State when the exercise of jurisdiction is unreasonable.
(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
a. the link of the activity to the territory of the regulating State, i.e. the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
b. the connections, such as nationality, residence, or economic activity, between the regulating State and the person principally responsible for the activity to be regulated, or between that State and those whom the regulation is designed to protect;
c. the character of the activity to be regulated, the importance of regulation to the regulating State, the extent to which other States regulate such activity, and the degree to which the desirability of such regulation is generally accepted;
d. the existence of justified expectations that might be protected or hurt by the regulation;
e. the importance of the regulation to the international, political, legal or economic system;
f. the extent to which the regulation is consistent with the traditions of the international system;
g. the extent to which another State may have an interest in regulating the activity and
h. the likelihood of conflict with regulation by another State.
(3) When more than one State has reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more States are in conflict, each State has an obligation to evaluate its own as well as the other States’ interest in exercising jurisdiction in light of all the relevant factors, including those set out in subsection (2) and should defer to the other States if that State’s interest is clearly greater.”*

The criterion of “jurisdiction with unreasonable consequences” is compatible with the existing “abuse of process” in common law (Choo 1993) and the German “*Abwägungsfehlerlehre*” (Beulke 2000).

Since this criterion has developed from a rule of conduct towards a right, which can be compelled (American Law Institute 1986, 246 and 254) it could be argued that the concept of proper administration of justice has to include subjective rights to individuals (fair trial). This implies that it may be necessary to include the individuals concerned (suspects, victims) in the decisions about proper administration of justice and the best place for prosecution of international offences.

C. Conclusion

Preventing conflicts of jurisdiction in international corruption cases is very difficult since it requires States to accept considerable limitations to their existing jurisdictional claims. It is therefore not surprising that existing international instruments relevant for the fight against corruption do not address this issue.

Solving jurisdictional conflicts is thus necessary. This can be done by establishing a general and hierarchical list of jurisdiction criteria or by a case by case selection of the most appropriate place for prosecution. Experience has shown that a hierarchical list is not appropriate, as it is too rigid and

mechanical to be suitable for any concrete situation and because it is not possible to rank the criteria in order of importance. As a result, it is necessary to resort to deliberation, based on the concept of proper administration of justice.

Analysis shows that deliberation (consult, cooperation) is the option chosen in the international instruments relevant for the fight against corruption. However, the criteria to be used for this deliberation for determining the best place for prosecution are not further elaborated.

Starting from the position that the proper administration of justice is the central concept in this search for the best forum and that a right balance between the interests of the States and its citizens is needed, it is proposed to make use of the negative criterion “jurisdiction with unreasonable consequences”. This criterion allows the existing jurisdictional claims as far as these claims do not have unreasonable consequences for the States and the individuals concerned.

IV. FINAL CONCLUSION

The international aspects of criminal justice have increased significantly during the last decades. As a consequence more and more crimes have links to different States now.

Corruption crimes are not an exception to this rule as several international elements occur frequently in corruption cases: the nationality of the offender (foreign public official) or the place where the crime has been committed (crimes committed abroad).

Analysis of international instruments relevant for the fight against corruption and of some national legislations show that the first reaction to this internationalisation is focused on avoiding loopholes in the system: prosecution should not suffer from the internationalisation of corruption. Therefore, the scope of the criminal law should be extended.

Although this line of reasoning may be correct – especially regarding the prosecution of foreign public officials – it creates new problems without providing clear answers to it. The concern about a *vacuum juris* has led to a situation in which jurisdictional claims are or can be extended in a way that most international corruption cases can be prosecuted in several States. The problem is no longer *if* prosecution is possible, but *which State* will actually be charged with prosecution. The answer to that question is only addressed vaguely in the international instruments as they only refer to deliberation between States to solve the problem without defining the criteria applying to it. In this paper the importance of these criteria is stressed, both for the sovereignty of States and the interests of the individuals (suspects, victims) concerned. Taking into account the need for flexibility on the one hand and the need for transparency and a (*a posteriori*) control by a judicial authority on the other hand, the use of the negative criterion “jurisdiction with unreasonable consequences” is proposed in this paper.

Although this proposal may be subject to critique, it is not just an academic argument. The choice of the best forum for an international (corruption) case concerns investigators, prosecutors and decision makers all over the world. It is time it is given proper attention.

References

AMERICAN LAW INSTITUTE, *Restatement of the Law Third. Restatement of the Foreign Relations Law of the United States*, Saint Paul, Minnesota, American Law Institute Publishers, 1986, volume 1.

M.C. BASSIOUNI, *International Extradition. United States Law and Practice*. London-Rome-New York, Oceana Publications, 1987, Part I.

W. BEULKE, *Strafprozessrecht*, Heidelberg, C.F. Müller Verlag, 2000.

C.W. BLAKESLEY, "United States Jurisdiction over Extraterritorial Crime", *The Journal of Criminal Law and Criminology*, 1982, 1109-1163.

I. BROWNLIE, *Principles of Public International Law*, Oxford, Clarendon Press, 1990, 748 pp.

I. CAMERON, *The Protective Principle of International Criminal Jurisdiction*, Aldershot-Brookfield USA-Hong Kong-Singapore-Sidney, Dartmouth, 1994, 395 pp.

D. CHAIKIN, "Extraterritoriality and the Criminalization of Foreign Bribes", in B. RIDER (ed.), *Corruption: The Enemy Within*, The Hague-London-Boston, Kluwer Law International 1997, 285-301.

A. L.-T. CHOO, *Abuse of process and judicial stays of criminal proceedings*, Oxford Clarendon Press, 1993.

COE 1999 – Criminal Law Convention on Corruption, Council of Europe, Strasbourg, 27 January 1999, *European Treaties Series* N° 173.

N. COLTON, "Foreign Corrupt Practices Act", *American Criminal Law Review*, 2001, Vol. 38, 891-912.

COUNCIL OF EUROPE, European Convention on the International Validity of Criminal Judgments, 28 May 1970, *European Treaties Series*, n° 70.

COUNCIL OF EUROPE, European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, *European Treaties Series*, n° 73

COUNCIL OF EUROPE, Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters, 1972, *European Treaties Series*. n° 73.

COUNCIL OF EUROPE, Committee on Crime Problems, *Extraterritorial criminal jurisdiction*, Strasbourg, 1990, 26 pp.

COUNCIL OF EUROPE, Explanatory Report on the Criminal Law Convention on Corruption, 1998 (<http://conventions.coe.int/treaty/en/Reports/Html/173.htm>)

Draft International Criminal Code in M.C. BASSIOUNI, *A draft international criminal code and draft statute for an international criminal tribunal*, Dordrecht, Boston, Lancaster, Martinus Nijhoff Publishers, 1987, 191.

EUROPEAN COMMISSION, *Mutual Recognition of Decisions in Criminal Matters among the EU Member States and Jurisdiction*, Discussion Paper with Questions for Experts, 2001.

EU 1997 - Convention drawn up on the basis of Article K.3 (2) c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member

Sates of the European Union, Brussels, 26 May 1997, *Official Journal of the European Communities* C 195, 25 June 1997.

S.Z. FELLER, "Jurisdiction over offences with a foreign element" in M.C. BASSIOUNI and V.P. NANDA (eds.), *A Treatise on International Criminal Law*, Springfield Illinois, Charles Thomas Publisher, 1973, Vol II, 5-64.

FELLER, S.Z., Concurrent criminal jurisdiction in the international sphere, *Israel Law Review*, 1981, 41-74.

A. HENRICH, *Das passive Personalitätsprinzip im deutschen Strafrecht*, Freiburg im Breisgau, Max-Planck-Institut für ausländisches und internationales Strafrecht, 1994, 214 pp.

R. JENNINGS and A. WATTS, *Oppenheim's International Law*, London-New York, 1996, I. 554 pp.

F.A. MANN, "The international doctrine of jurisdiction in international law", *Collected Courses of The Hague Academy of International Law*, 1984, III, 9-116.

OAS 1996 – Inter-American Convention against Corruption, 29 March 1996, <http://www.oas.org/juridico/english/Treaties/b-58.html>

OECD 1997 – Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organisation for Economic Co-operation and Development, Brussels, 17 December 1997, *OECD DAFFE/IME/BR(97)20*.

D. OEHLER, *Internationales Strafrecht. Geltungsbereich des Strafrechts. Internationales Rechtshilferecht. Recht der Gemeinschaften. Völkerstrafrecht*, Cologne-Berlin-Bonn-Munich, Carl Heymans Verlag KG, 1983, 689 pp.

C. PAPPAS, *Stellvertretende Strafrechtsplege. Zugleich ein Beitrag zur Ausdehnung deutscher Strafgewalt nach § 7 Abs. 2 Nr. 2 StGB*, Freiburg im Breisgau, Max-Planck-Institut für ausländisches und internationales Strafrecht, 1996, 262 pp.

M. PIETH, International efforts to combat corruption, 9th International Anti-Corruption Conference (IACC), 10-15 October 1999, Durban, South Africa (http://www.transparency.org/iacc/9th_iacc/papers/day1/ws6/dnld/d1ws6_mpieth.pdf)

G. STESENS, "The international fight against corruption. General Report", *International Review of Penal Law* 2001, Vol. 72, 891-937.

UN 2000 – United Nations Convention against Transnational Organized Crime, Vienna, 15 November 2000, *A/RES/55/25*, 8 January 2001

UN 2003 – Revised draft United Nations Convention against Corruption, *A/AC.261/3/Rev. 3*, 5 February 2003.

C. VAN DEN WYNGAERT, 'Corpus Juris, Parquet européen et juge national vers une chambre préliminaire européenne', *Agon*, August 1999, N°23.

T. VANDER BEKEN, *Forumverdeling in het internationale strafrecht. De verdeling van misdrijven met aanknopingspunten in meerdere staten* (The Choice of the Forum in International Criminal Law. The Division of Crimes with Contact Points in Several States), Antwerp-Apeldoorn, Maklu 1999, 486 pp.

T. VANDER BEKEN, G. VERMEULEN, S. STEVERLYNCK and S. THOMAES, *Finding the Best Place for Prosecution. European Study on Jurisdiction Criteria*, Antwerp-Apeldoorn, Maklu, 2002, 91 pp.

T. VANDER BEKEN, G. VERMEULEN and O. LAGODNY, "Kriterien für die jeweils "beste" Strafgewalt in Europa. Zur Lösung von Strafgewaltskonflikten jenseits eines transnationalen Ne-bis-in-idem", *Neue Zeitschrift für Strafrecht*, 2002, 624-628.

T. VANDER BEKEN and N. SIRON, "Comparative Report", in T. VANDER BEKEN, B. DE RUYVER and N. SIRON (eds), *The organisation of the fight against corruption in the Member States and candidate countries of the EU*, Antwerp-Apeldoorn, Maklu, 2001, 13-33.

I. VAN HEERS, "Belgium", in T. VANDER BEKEN, B. DE RUYVER and N. SIRON (eds), *The organisation of the fight against corruption in the Member States and candidate countries of the EU*, Antwerp-Apeldoorn, Maklu, 2001, 49-68.

H.D. WOLSWIJK, *Locus delicti en rechtsmacht* (Locus delicti and jurisdiction), Deventer-Utrecht, Gouda Quint-Willem Pompe Instituut, 1998, 353 pp.