



University of Maribor

**5<sup>th</sup> Traditional Law Conference of the University of Ljubljana, Faculty of Law, Özyegin University Istanbul, Faculty of Law, and University of Maribor, Faculty of Law: Corruption – A Deviation or an Inherent Part of Human Society? Some Legal Considerations**

**(June 8<sup>th</sup> 2016, Ljubljana, Slovenia)**

(Conference Proceedings)

**Editor:**

dr. Suzana Kraljić





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**February 2017**

## **5th Traditional Law Conference of the University of Ljubljana, Faculty of Law, Özyegin University Istanbul, Faculty of Law, and University of Maribor, Faculty of Law: Corruption – A Deviation or an Inherent Part of Human Society? Some Legal Considerations**

SUZANA KRALJIĆ

**Abstract** Corruption is a dishonest or unethical conduct by a person (also company, state...) entrusted with a position of authority, with the intention to acquire certain benefits or advantages. Nowadays, corruption is present in all states and societies, and could be widespread in all legal and human relations. Corruption is mostly associated with embezzlement, bribery, coercion, extortion, blackmail... Therefore, the corruption is mostly of illegal nature. International and national anti-corruption initiatives and actions pay special attention to the fields where the impact of corruption affects the most vulnerable groups of people. On the international level the most active role is played by Transparency International, an international organisation fighting against corruption.

**KEYWORDS:** • corruption • criminal law • human rights • illicit arms trafficking • family law

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The illustration is a part of the composition, which was painted in the 15th century by Hieronymus Bosch (*The Seven Deadly Sins and the Four Last Things* - Museo del Prado, Madrid). It depicts the seven deadly sins. Corruption falls within the scope of greed (*avaricia*) - one of the deadly sins. Corrupt judge: the courtroom in the late middle age and modern age was usually outdoors. The judge is sitting on a bench under a tree (judicial linden) and holds a judicial stick. The attitude of the judge indicates that he is listening to the party of a lawsuit, while with the left hand he is slyly accepting a bribe from the other party. To the judge's right, the assessors, who are busy with their problems, are sitting on separate benches. It seems that they are not interested in what is happening around the judge. At the bottom of the illustrations are court accessories: a Code (open book), an ink bottle, a pen and a table

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## Corruption, the Object of Legal Protection and Democracy

ALTAN HEPER

**Abstract** There is a clear relationship between corruption and democracy. The countries where corruption is an immense problem, democracy faces enormous difficulties. This study which frequently refers to German Law, consists of three parts: The first part analyses from a juridical point of view the basic concepts on the topic of corruption such as offences related to corruption and elements of corruption like clients, actor and principal. The second part deals with the object of legal protection (German Rechtsgüterschutz) in offences of corruption, within the context of German Law and Turkish Law. The third part studies types of corruption and actors of corruption. The conclusion of the study is that corruption is connected to a strong relationship between corruption and democracy - more democracy leading to less corruption.

**KEYWORDS:** • corruption • bribery • object of legal protection • relationship between corruption and democracy

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## 1 Part One

### *What is corruption?*

Corruption is the act of accepting material or immaterial benefits for oneself or for a third party which cannot be claimed judicially, but can be gained by abusing ones entrusted position in administrative authorities, judiciary system, economic life, foundations and similar organisations (for more information please Kubbe, 2015:28; Völkel, Stark & Chwoyka, 2015: 13-19)

The offences of corruption involve accepting bribery, giving bribery and gaining benefits (detailed Sommer, 2010:14)

Transparency International, a worldwide organization fighting corruption and represented in Turkey, uses a different definition. According to this definition corruption is the act of abusing one's power entrusted to him, for personal benefit. In the definition used by Transparency International the abuse of power is highlighted as a criterion in its own right. Behind this lies the following conception: From a judicial point of view the sole important actor is the one who makes corruption possible. This definition does not expect a moral conduct from private institutions that give bribery. Therefore the entire responsibility must be assumed by the person who accepts bribery (see Elshorst, 2005: 181-195)

### *Corruption from judicial point of view*

The main element of a corrupt attitude is the violation of universal norms of behaviour by using a power position for personal benefit. These norms of behaviour may be moral values, official undertakings or legal regulations. Corruption is seen as a single interaction in which the participants gain benefit by performing their mutual acts; for example, affecting the verdict in return for money.

Corruption is a sort of compensation trade, but unlike a mutually beneficial exchange between two actors, it contains something additional to that. What is the additional element in corruption is not clear and well-defined. For instance, purchasing stolen goods deliberately is an illegal exchange, but it is not corruption (Saliger, 2014:19)

Corruption can be differentiated from other exchange possibilities such as a transaction in a market by taking this phenomenon's three actors into consideration.

The first actor is the one that gives bribery.

The second actor is the one that receives bribery.

The third actor is the one that commissions the bribe receiver.

In the literature of economics these actors are referred to as the Client, the Agent and the Principal.

The Principal and the Agent are in an engagement of contract style. In this engagement the Principal commissions a service from the Agent and supplies him with means and possibilities as well as a space to act for performing the service. The Agent can act within the boundaries of this space. This is the power position mentioned above. The agent takes advantage of this position to offer something to the Client in the exchange process, and he may often act to the detriment of the Principal.

The concept of corruption defines the activities of both the bribery giver and the bribery receiver.

These activities are defined by various Penal Codes as active bribery. At least one of the parties of this engagement has a power or holds an entrusted position. Therefore he finds himself within the conflict between the particularistic norms and official and/or universalistic norms. The parties weigh out the risks of being exposed and the benefits gained by corruption.

### *Turkish Law*

Lacking a definition of bribery, the Turkish Penal Code handles this offence in its Article 252 according to which:

(1) A person providing, directly or through intermediaries, benefits to a public official or to somebody appointed by him, for discharging or for not discharging an official duty shall be liable to imprisonment for four to twelve years.

(2) A public official drawing, directly or through intermediaries, benefits to himself or to somebody appointed by him, for discharging or for not discharging an official duty shall also be liable to same punishment indicated in the first paragraph.

## **2 Part Two**

### *Object of legal protection*

In this part, the discussions on the object of legal protection within the German Penal Law will be taken into consideration since these directly influence the discussions in the Turkish Penal Law science.

*Why is the object of legal protection important?*

The purpose of the criminal law is to guarantee the core area of legal behavioural norms. However, saying this needs the following clarification: This guarantee is not an end in itself but serves the protection of legal interests which are the most important function of criminal law. (Roxin, 1997: §. 2, Rn. 1-38; detailed Ünver, 2003,)

*What does the object of legal protection mean?*

Attempts to define what constitutes an object of legal protection are seldom and for the most part diffuse; let us therefore begin with examples in order to make the term more concrete:

An object of legal protection of the individual are especially life and limb, sexual self-determination, honour etc.

The object of legal protection of the public, whose protection also falls within the responsibility of the criminal law, are especially the confidentiality of government secrets in order to protect national security, the security of traffic.

These examples permit the term “the object of legal protection” to be defined as follows: The objects of legal protection are either simply taken up or actively formed by the legal system. They include life and limb as well as other legally acknowledged social interests. They are beneficial to the individual or the public and therefore enjoy the protection of the law. (Wessels & Beulke, 1999: Rn. 7) There is a distinction between the object of legal protection and the object of the act. An object of legal protection is the non-material good (the non-material social value), the protection of which is the purpose of the respective criminal statute. In contrast, we define the object of the act as the specific object at which a criminal offence is directed.

What the object of legal protection is protected by the German Penal Code’s Article 331 on bribery and the following articles are controversial.

German Penal Code’s Article 331 on bribery is as follows:

(1) A public official or a person entrusted with special public service functions who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of an official duty shall be liable to imprisonment not exceeding three years or a fine.

(2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed or will in the future perform a judicial act shall be liable to imprisonment not exceeding five years or a fine. The attempt shall be punishable.

(3) The offence shall not be punishable under subsection (1) above if the offender allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorises the acceptance or the offender promptly makes a report to it and it authorises the acceptance.

In both judicial systems it is supposed that there is a uniform legal value to be protected. However, the problem is the content of this uniformly protected legal value. The content is debateable (Überhofen, 1999:75; Wolter, 2016 Vor §. 331 Rn.9) . The debates are brought about by the employment of different terminologies on the one side, and the encounter with a complex structure of protected legal value, on the other (Sowada, 2009 , §. 331 Rn.31).

The views on the protected legal value put forth in the past must not be deemed wrong, but be seen as transcended. Today the “violation of obligation” or “cleanliness in fulfilling the official duty” is no longer taken into account as comprehensively protected legal value (Kohlrausch & Lange, 1956: §. 331 Rn. 1) The reason for this is the fact that these aspects are too vague and uncertain. With this vagueness and uncertainty, it is not possible to define the specific content of the corruption offences whereas such a definition is necessary to separate these offences from disciplinary penal law.

Two views are important for present day discussions. The first view focuses on the protection from the falsification of the state will in the offences of corruption (Schmidt, 1960: 802). The second view is based on the necessity of safeguarding the social confidence in the objectivity of the public decisions (Schröder, 1961: 289). According to this understanding the function of the public and justice administrations should be comprehended as a complex protected legal value. The protected legal value requires both the integrity of public offices and the confidence of citizens in this integrity Sowada, 2009: § 331 Rn.31).

The legislator in the German Law acts between these different views. In the preparatory works of the government proposal the protected legal value is described as the integrity (immunity to bribery) of public offices. According to this proposal the tradability of public services and the partiality of the workers of public offices, and by this way, the falsification of the public will must be prevented (Sowada, 2009: § 331 Rn. 32.; Hefendel, 2002: 391)

In the beginning The German Federal Court (BHG) interpreted the protected legal value in the Article 331 of German Penal Code as “cleanliness in fulfilling the official duty”. In the new rulings of the Federal Court, the protected legal value is seen, partly together with “cleanliness in fulfilling the official duty”, as confidence in the integrity and objectivity of the public offices and confidence in non-tradability of public services or confidence of the public opinion in the integrity of

performers of the public functions, and thus the objectivity of state decisions (The Decisions of German Federal Court, 1985, BGH in NSTZ, 497, 499).

### *Protected legal value in the Turkish Law*

The protected legal value in the literature of the Turkish Penal Law, as well as the German Law, is controversial in the offences of corruption (see Tezcan, Erdem & Önök, 2015: 1013). Some interpreters see the protected legal value as confidence in objectivity of the public offices. According to this interpretation the confidence in the objectivity and impartiality of the functionally competent state organs, and the confidence in incorruptibility of public functionaries are safeguarded by the criminalization of these offences (Artuk, Gökçen & Yenidünya, 2015: 1067) Some interpreters, on the other hand, adopt the views of the Italian Law on the offences of corruption and maintain that the protected value in such offences is the impartiality of the public administration and the integrity and objectivity of the public workers.

According to the prevailing understanding in the Turkish Law the non-tradability of the public services concerns both the state and the citizens. The non-tradability concerns the state because the bribery violates the public administration's principle of law-abidingness. The bribery makes the state functionaries dependent on the citizens. The non-tradability concerns the citizens because citizens have to make payment for the services which, under the normal conditions, they get without paying anything. The bribery concerns the society because tradability of public services violates the principle of equality of citizens before the law (Turkish Constitution, Article 10) (detailed for the object of legal protection for corruption offences Özbek, Kanbur, Doğan, Bacaksız , Tepe, 2015: 1039; Küçükince, 2010: 76, 77; Özen, 2010: 156-159).

According to the Turkish Penal Code Article 252/9, the punishment of the bribery offences on international arena or by the foreign functionaries is substantiated as follows: The state administration must be run fairly and there must be no unfair competition with the criminal elements.

## **3 Part Three**

### *Corruption and democracy*

In the corruption barometers published regularly by Transparency International it is stated that corruption is being perceived as an increasing worldwide problem in politics, economy and public administration.

In Turkish public and judicial administration corruption causes great material and non-material harms (the loss of citizens' confidence). For example, the commissioning of procurements to the companies, which under the conditions of

objectivity and transparency cannot win, results in the poor quality and expensiveness of work done by these firms. The expenditures of the benefits given for winning the procurement are added by these firms to their calculations and this leads to increased costs for the public. In some cases the bribery costs are camouflaged in the invoices, the services demanded by the procurement are not provided or not rendered as they should be. In the final account, the financial burdens are carried by the tax-payers. The abuse of public funds for private interests runs counter to the social welfare.

It general corruption causes decrease in the services of the public institutions and loss of their qualities, with an increase in their costs. According to the data provided by the World Bank, each person pays approximately 7% of his income to the harms resulting from corruption.

Political corruptions must be seen as a special and great threat for democracy.

One of the forms of political corruption is the transfer and employment of such persons in the private sector as former ministers of government, members of parliament and undersecretaries. These persons are paid lavishly by the private sector in the forms of salary and bonus which are incomparable higher than those they get in the public service.

Covert donations to political parties negatively affect the mechanisms of democratic decision-making.

The tradability of political decisions and the corruptibility of decision-makers (government ministers, parliament members, deputies in the municipal councils, mayors, etc.) is conducted by influencing the decisions. This influence is obtained by paying money to these persons or their relatives, or by securing posts and privileges (detailed, Lugon-Moulin, 2010: 125)

#### **4 Conclusion**

It is worthwhile to repeat Transparency International's definition for the threat to democracy posed by corruption: "Corruption is abuse of entrusted power for private gain."

Corruption results in serious political, ecological, social, macro and micro economic damages.

For democracy corruption means threats to social and economic rights, the loss of people's confidence, harms to judicial security and injuries to the legitimacy of state order.

Corruption produces apathy and anger with politics and breaks up the functions of both the society and the state, and this, in turn, results in the gain of strength by the totalitarian and radical movements.

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## Bribery in Turkish Criminal Law

YENER ÜNVER

**Abstract** Bribery is an unfair advantage gained due to the position of public officials; referring to Turkish Penal Code taking bribes or giving bribes is contrary to the law and shall be penalized. Bribery offense has been established 'against the public administration' in the Criminal Code. Since year 2000, Turkish legislators started to penalize 'international bribery'. The crime will be prosecuted and punished by criminal law in Turkey if the perpetrators of international bribery, victims or other elements have relation to Turkey or to a Turkish citizen or to a Turkish institution. In practice, these crimes are not followed meticulously, and this opens the road to the most important social problems of Turkish public life. Turkey has accepted international conventions in this field improving the legislation, even though this type of offence started to become more common, while this crime is a serious deterioration of fundamental moral values, which does not suit to a modern state.

**KEYWORDS:** • bribery • corruption • international bribery • bribery agreement • basic and intended bribery • public servant • unfair stakeholders

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## 1 General description

Bribery is one of the most important of corruption offences. It both indicates social decay and harm to public life. Although, this type of crime historically has been committed for centuries, individually, the understanding of this offense in the society and the state systems has changed putting this type of offense in more serious category. The modern social law state is damaged the most by this wrongful act. Community life, the field of law ethics are caused to be seriously corrupted, leading to the destruction of the faith and trust in state justice by ideal society and its' individuals. Moreover, giving or taking a bribe is an obstacle in equality access to public service and the enjoyment of justice, it prevents the development of oneself freely, prevents the ability to benefit from equal opportunities and life in a democratic state where individuals can not secure their future. Bribery damages individuals, companies, public institutions and state's relations beyond the limits including economics not only within the national borders, but also damaging to the international community at a higher rate in the supranational space.

Bribery offense has been arranged by the legislators in the Turkish Penal Code (TPC) art. 252, 253 and 254. The title of the chapter in the Act is "Reliability of the Public Administration and Crimes in Functioning". This particular crime has been identified in the Turkish Penal Code earlier. The first form of this type of crime and crime connected to some areas of law were arranged differently in some ways; the bribery offense will be examined below, according to the Turkish Penal Code which entered into force on 1 June 2005. The content of the New Law substances in article 252 and 254, criticized many aspects of the problem and practice and 7 years later the law has been amended. These amendments took place on 02.07.2012 in No:6352 Act article 87 and 88.

## 2 Bribery offence regulation in Turkish penal code

According to TPC art.252/1, bribery is to provide benefit to an individual in return for fulfilment or non-fulfillment of his duties contrary to the law. It is considered a crime to accept a bribe. To give or take bribe, can be performed directly or though the intermediaries. In order to establish the crime of taking bribe, an unlawful benefit must be transferred to a public official or his representative. In order to establish the crime of giving bribe, it must be shown that an individual or his representative has a net benefit or an interest in the relevant area. Only a 'public servant' can be guilty of taking bribe. Although, anyone can be guilty of giving bribe. The simple penalty for both offences is an imprisonment from four years for up to twelve years (TPC art. 252: paragraph: 1-2). In bribery offences where a public official or his representative processes a task in order to the benefit another for his own benefit, it would be fined anywhere from ten thousand Turkish Lira up to two million Turkish Lira as an administrative penalty. Due to that, the bribery crime should not be punished with a heavier administrative penalty

(Misdemeanours art. 43, paragraph 1, part: a). The bribery offence would be considered completed as soon as the parties agreed on the bribe (TPC art. 252, paragraph 3). In cases where there is a bribe failure or an offer of bribery has been rejected an offender's sentence is reduced by half (TPC art. 252, paragraph 4).

The offense shall be punished jointly when there is a public official or anyone else who is taking or giving a bribe. An indirect bribery of providing a benefit by the third party to a public official shall be punished as co-perpetrator (TPC art. 252, paragraph 5-6). The punishment of bribery perpetrators who are carrying the duties of judiciary, arbitrator, expert, notary or certified public accountants shall be increased by one third to half (TPC art. 252, paragraph 7).

The following persons, despite not being a public official, who receive an unfair advantage as a result of fulfilling or not fulfilling their duties, would be acted upon bribery offense by the following articles: a) professional organizations in the nature of public institutions, b) the public institutions or organizations established with the participation of professional organizations or public companies, c) Public institutions or organizations or activities performed by foundations within their professional organizations in the public nature, d) Public interest associations, e) Cooperatives, f) public corporations, individuals acting on their behalf (TPC art. 252, paragraph 8).

Turkish Penal Code (TPC) has also identified international crime of bribery (TPC Art. 252, paragraph 9). Related to an individual's duty execution and its fulfillment or non-fulfillment or due to an international commercial transactions in order to obtain a business or an unfair advantage giving or taking a bribe or an offer of a bribe constitutes a crime also: a) Foreign public officials selected in a state or appointed, b) international or supranational courts or judges who work in foreign courts, jury members or other officials, c) international or supranational parliament members, d) public bodies or state-owned enterprises also including, the person carrying out a public activity for a foreign country, and e) a legal dispute resolution in order to apply the arbitration procedure within the framework of appointed citizens or foreign referees, f) established on the basis of an international agreement including officials or their representatives. International bribery, despite being committed abroad by foreigners; a) in Turkey, b) a public institution in Turkey, c) the legal entity of a special law established under Turkish law, d) a dispute in regard to a Turkish citizens with regard to the institution which he is a part of, provided that when on Turkish territory despite the absence of complaint, the relevant investigation and prosecution would be made (TPC art. 252, paragraph 10).

Bribery offences by receiving an unfair advantage in return for the benefit provided on behalf of legal entities shall be subject to their specific security measures (TPC art. 253). The security measures which could be implemented are property confiscation or cancellation of operating permit (TPC art. 60, para: 1-2).

Failing to show effective repentance leads to impunity. However, for that to happen, the relevant official institution shall not have knowledge of bribery by an official servant in regret of taking bribe. If an individual who is accepting a bribe, returns the bribe to authorities before the relevant official institution has knowledge of it, he would not be punished. An individual who agrees upon a bribe, and who informs the higher authorities of being bribed before they learn about bribery in their own way, shall not be punished. An individual who agreed on giving or taking bribe, but who informs official authorities about it before them learning about it, shall not be awarded a penalty. Other individuals who participated in the process of bribery, but shortly after that regretted their decision and informed the competent authorities shall not be punished (TPC art. 254, paragraph: 1-3). However, individuals who are bribing foreign officials would not be able to benefit from the article on regret matter (TPC art. 254, paragraph 4). Turkish law applies to perpetrators who committed bribery on behalf of nationals or foreign nationals in a foreign country. (TPC art. 13, paragraph 1, part: a).

The Law No. 4483 on obtaining permission from public authorities before investigation and prosecution of public official on bribery offense shall not apply. In accordance with the Criminal Procedure Code on bribery investigation and prosecution will commence (Private Law No: 3628 art.17, 1990).

To investigate bribery, prosecutors, judges and courts can apply the methods of obtaining exceptional and secret evidence. For example, search and confiscation, classical search methods and halving measures, using telecommunications tool to uncover bribery (phone, email, SMS) communication monitoring, inspection, recording, communication proof, signal information detection method (Criminal Procedure Code CPC art. 135, paragraph 8, part: a, sentence: 12) or using technical means (such as audio or video, secretly remote devices) monitoring and recording methods (CPC art. 140, paragraph 1, part: a, sentence: 9).

Below, already agreed aspects and articles established in the criminal law will not be discussed. The main focus point here, as stated in the summary above, is the introduction of statutory regulation with legal fault or missing parts dealt by the courts in the implementation.

### **3 Important aspects from legal prespective and doctrine**

The legal values they seek to protect when dealing with the bribery offenses are described as public confidence in public administration and the duty of loyalty on public officials' on behalf of the public administration (Artuk, Gökçen & Yenidünya, 2015: 1068; Tezcan, Erdem & Önok, 2015: 1019). In contrast, some of the statements in the doctrine, the offense of bribery along with legal values seems to be protected at times. According to those writings an offense of bribery protects the functioning of the state administration, honesty in the administration,

trust, neutrality of public officials, fair and equal treatment of citizens (Özer, Kanbur, Doğan, Bacaksız & Tepe, 2015: 1039; Özen, 2010: 158-159). According to the third group of writers on this topic, protected legal values expressed by the regular work of administration and the form of the execution of the service requirements is the legally required value in itself (Soyaslan, 2010: 667).

One of the major reasons for giving or taking bribe is the services offered by public officials to public servants communities so called "honest services" and the separation from the principle by providing services in return for a personal gain (Yurtcan, 2008: 37).

However, the crime of taking bribes can only be committed by a public official. In contrast, anyone can give or assist the bribery. Also, as it can be seen from the description mentioned above, the crime committed by an individuals specified by the statute, the punishment is much more serious or it creates an offence of international bribery (TPC art. 252).

Taking bribe or giving bribe are two separate offences and therefore, would not affect the criminal responsibility of other perpetrators (Özer, Kanbur, Doğan, Bacaksız & Tepe, 2015: 1041).

In terms of this offence, an important issue is an adopted Turkish Penal Code art.252 in 2005 in which an offence of a basic bribery has not been established. In other words, the crime of a duty fulfillment by a public official in return for a personal gain which is contrary to the law has not been specified (For more details see 5. CD. 3.5.2007., E. 84, K. 3195; 5. CD. 7.11.2006., E. 18318, K. 8649). The reason for this is that fact that this action is very common in Turkey and the prevalence of belief that nobody would do their work without a bribe. This action, provided that in the event of some additional elements, it constituted a crime of abuse of position requiring a much lighter sentence (TPC art. 257/3). This might have been a big mistake which made a lot of damage in the fight against corruption. In this arrangement, the grounds were a disgrace. This wrong attitude of the legislator has been criticized in the doctrine (Ünver, 2010: 566-568).

The basic action of bribery offense as a crime of misuse of powers established as an offense and the misspelled form of the article and rationale were also criticized (Özen, 2010: 152). According to this regulation, an offense of bribery is only recognized when a public official is fulfilling or not fulfilling a task against his duties in order to gain an unfair advantage, however, a public official acting in accordance with his duties in return for an unfair advantage is not recognized as a crime (for example, performing or not performing his legal duties which he is already ought to do in return for a benefit). This approach can not be understood in terms of the fight against corruption and has been criticized. However, a citizen who was to provide an unfair benefit to a public servant in return for performance of his already legal duties was not considered to be innocent (Tezcan, Erdem &

Önok, 2015: 1016). Much later, the importance of these disadvantages has been understood and the relevant changes has been made recognizing this act as a form of bribery on 02.07.2012 in Act No. 6352.

The source of the regulations relating to bribery can be found in Penal Code 1858. Since that date, the offence of bribery has been identified as 'bribery agreement'. According to the new TPC art. 252 for a bribery to take place both sides must have a bribery agreement beforehand. An act of contracting parties, doing so in a free will is considered a crime, even if an unfair benefit contradicting the law does not cause any harm. Unlawful agreements are the subject to a crime and contract is void. An unlawful agreement should be made without external pressure, it must be agreed upon in a free will. When making such an agreement, the interlocutor's aware violence or fraud or other reasons should not be founded. If there is fraud, threats used to persuade one of the sides to make such an agreement it is not considered as bribery it is an extortion crime. (Artuk, Gökçen & Yenidünya, 2015: 1077).

The intention of this agreement, should be agreed upon by both sides with the provision of an unfair advantage to a public official. It is not important who an offer of an unfair advantage is coming from, an unfair benefit of fulfillment or non-fulfillment or benefit provision or the fulfillment or non-fulfillment of a promised task (for the deal) is not important in terms of forming the crime of bribery. (Tezcan, Erdem & Önok, 2015: 1024).

Along with all this, if an agreement is not present, but only there is promise, offer the bribery offense is not considered to be complete however, this crime would be evaluated in terms of bribery attempt (Ünver, 2010: 568). However, it should be noted that elements like offer or a promise in bribery has been rearranged in the new law. According to this law a bribery attempt would be equal to bribery offense (Özer, Kanbur, Doğan, Bacaksız & Tepe, 2015: 1046, 1053).

New TPC provided that even if a benefit contrary to the law does not reach an intended person, an agreement of bribery would be sufficient to form the crime and would be specified as an "enterprise crime" (Artuk, Gökçen & Yenidünya, 2015: 1063).

According to the old TPC art. 216 anyone assisting the crime of taking or giving bribe should be considered guilty. The new Turkish Penal Code (art. 252/5) abandoned this approach and preferred to punish the perpetrator who assistants the bribery as a separate offense. (Artuk, Gökçen & Yenidünya, 2015: 1061).

In order to form the crime of bribery a public official must fulfill or non-fulfill his official duties in exchange for an unfair benefit. If the perpetrators are not a public official the bribery offense is considered to be incomplete even if the fraud is present (Artuk, Gökçen & Yenidünya, 2015: 1071). The bribery is an exchange

for an unfair benefit (carried out or not carried out duty) must be related to a public official. This does not include concrete and specific job duties of public officials, but if an agreement of bribery does not include a public servant the bribery offense and its punishment would not arise (Tezcan, Erdem & Önok, 2015: 1018, 1022). According to this an assessment of the parties entering the agreement would be the main focus, whether the bribery matter is related to public officials or not. For the presence of the bribery agreement there should be a public officer in charge of administrative duties in order to make an affect in law. Without a doubt the source of law might be very different legal norms. (Özer, Kanbur, Doğan, Bacaksız & Tepe, 2015: 1041, 1049-1050).

Taking bribes for a fulfillment or non-fulfillment of a public duty, as a general task might also be the hiding of private documents as a private duty (Soyaslan, 2010: 667).

An unfair advantage which is the subject to bribery may have different kinds. Economic benefit, to provide a job vacancy, sexual relationship, promotion, economic or legal or other benefits are all in the unfair benefit category (Tezcan, Erdem & Önok, 2015: 1021). However, some writers do not specify whether the bribery occurs in case of sexual intercourse as an unfair advantage provided to a public official. These views are in the minority (For more details see: Özer, Kanbur, Doğan, Bacaksız & Tepe, 2015: 1040).

It should be argued on the punishment in the cases where an unfair advantage is of a very low value as well. In the Turkish doctrine, generally, it is considered that an unfair advantage should be of a particular important monetary value. Otherwise, it is not considered to be a crime. However, the reasoning of each author on this approach is different. Some say that, the crime should not be punished for lack of economic importance. Others consider the lack of wrongful action, and others for the disproportion of punishment and some think that, this action is socially appropriate (and it should be tolerated as borrowed cigarette or an invitation to dinner) (Tezcan, Erdem & Önok, 2015:1027; Özen, 2010: 176).

It is seen as a favor by a public official to fulfill or non-fulfill his duties in return for a meal or a free drink claiming that it can not constitute a bribe and should be tolerated in proportion (Soyaslan, 2010: 668). However, it is hard to agree with this point of view. This opinion has neither statutory nor legal basis. A neglect of duty or its abuse in return for a low cost of a meal or a drink as a community accepted act (tolerated by the law in small proportions) is outside of the scope, and it naturally would be enough to form an offense. Harm in small or in large proportion can not be the main focus corresponding with formation of crime. The detection of penalty and the personification specified by TPC art. 6 should be issued accordingly with the caused harm, lower limits of punishment for insignificant harm and upper limits of punishment for significant harm.

When providing benefits to private entities by the process of bribery, entities will be criminally sanctioned as well (see: Art. 252): However, the penalty for private entities in bribe cases is confiscation and cancellation of the operating permits. In the cases of confiscation punishment it should not lead to disproportionate consequences (See: Art. 60). Benefit which is not in favor of private entity, but usage of a private entity as a cover might lead to a bribery offense, but the sanction will not be able to apply. Although, according to Misdemeanours Act art. 43A even if a private entity has been punished with an administrative fine, an incorrectly edited conditions of criminal responsibility for legal persons and the lack of judicial fines, it is very difficult to hold a private entity responsible for his action (Ünver, 2010: 572).

According to the new Turkish Penal Code (unlike the old law) the benefit contrary to the law is not the compulsory element of the bribery. The presence of a promise is enough for punishment to proceed. The crime is considered to be formed regardless if the promise has been brought to an action or not.

The new TPC art. 54 and 55 held the confiscation as a general provision. In addition, Criminal Procedure Law 2005 (CPL) art. 256 held that the proceedings of the trial for confiscation should be held in private. Therefore, the new Turkish Penal Code (art. 217), unlike the old one did not include a special term on confiscation. The benefit obtained as a subject for the bribery contrary the law will be confiscated in accordance with the statutory regulations.

The regulation written in relation with regret of bribery has also been written wrongfully (TPC art.254). Here, not the tangible property or the provable behavior of the perpetrator is sought, but the vast majority of conditions impossible to prove. In order to apply the term of 'regret' the perpetrator should 'feel regret' and warn the judicial authorities about his actions. If so, himself and the other party to a crime who he has reported about to the authorities should really 'prove their regret which is impossible to do'. For that reason, the implementation of 'regret' condition is implemented by the court unconditionally. If the perpetrator has reported on the matter, an effective regret term is applied to his situation (Ünver, 2010: 572-573).

It also should be noted that, taking bribes as a crime (TPC Art. 252) is among the abuse of position crimes and has specific norms. In cases where an abuse of position by public officials in relation to bribery or abuse of any other position doesn't cause punishment of a public official misusing his position in exchange for an unfair benefit bringing harm to another, the crime would still qualify for an abuse of duty (TPC Art. 257); and the perpetrator would still be punished under the general crime. However, the actual crime would still be the bribe taking, due to the fact that the bribe giver can be anyone from public.



#### 4 The key points of judiciary decisions

Judicial decisions which don't count a basic bribe as a crime and attitude towards additional conditions of abuse of position has been criticized as weak fight against corruption, and 7 years later the need to change the new TPC art. 252 has appeared (5. CD. 23.01.2012., E. 4417, K. 155; 5. CD. 17.10.2011., E. 2000, K. 21995; 5. CD. 23.12.2010., E. 9162, K. 9980) (Artuk, Gökçen & Yenidünya, 2015: 1058-1059).

Judicial bodies accept an approach of bribery agreement not being linked to the condition. Even though many authors opposed this, the judicial bodies still have not changed their approach. According to the Supreme Court, if a bribery offense would be linked to be conditional, it would create not a bribery crime, but the crime of abuse of the position by the public official (See: 5. CD. 21.01.2008., E. 13815, K. 125; Krş.) (Artuk, Gökçen & Yenidünya, 2015: 1065). Depending on the condition stated by the Supreme Court, if there is a reason to ignore bribery it is because the condition has not been fulfilled and the bribery agreement didn't come to an action (CGK. 4.5.1987., E. 600, K. 245 footnote: 32. Krş. 5. CD. 8.11.2012., E. 2010/7250, K.2012/11043) (Yaşar, Gökcan & Artuç, 2014: 7639).

This Supreme Court's opinion, this is incorrect. There is no excuse to a crime in the definition. An important point here is for the bribe agreement to be made freely. If there is an agreement, even when made a condition, the use of public position in bad faith by a public official should be accepted as a crime on its own. If the Supreme Court accepts its mistake in implementation, a public official perpetrator, general crime perpetrator and an abuse of position even in a small proportion would be punishable. However, there is a major problem here, forgotten. If this is done, an individual who isn't a public official, but who misused his position in bad faith would be punishable, in other words, only the one who agreed to accept a bribe would be punished, but the bribe giver would not be punished. If so, it will lead to inequality of punishment in relation to the individuals who committed the same offense.

There is no particular form of bribery agreement. There can be written or oral agreements. An important point is a freely made agreement between the benefit provider and a public official to act in contradiction with his public duties in order to obtain that unfair advantage (5. CD. 19.2.1987., E. 7968, K. 962). The Supreme Court accepts implied bribe agreements (without explicitly, implicitly made) (5. CD. 19.2.2013., E. 2011/6540, K. 2013/1236).

The Supreme Court acknowledged that the crime occurs when the bribery agreement is made (5. CD. 12.6.2012., E. 5892, K. 6669). After making an agreement of an unfair advantage in exchange for an abuse of position, it was held

that it would not affect the formation of bribery even if the agreement has been withdrawn (Soyaslan, 2010: 668)

Not to catch an individual who made a bribery agreement, but to identify and hold responsible a public official who is accepting the bribe. By acting in this way, the Supreme Court accepts the non-existence of bribe agreement by the bribe taking perpetrator and therefore, is not able to issue the punishment. In contrast, when a public official is caught taking a bribe based on the agreement it is accepted to be an attempted bribe offence (See: CGK. 26.1.2010., E. 5-150, K. 1; CGK. 19.2.2013, E. 5-137, K. 58; 5. CD. 10.04.2015, E. 12049, K. 3055; 5. CD. 16.04.2013, E. 216, K. 3477; 5. CD. 08.03.2011., E. 3724, K. 1826. Krş. 5. CD. 29.11.1995., E. 2963, K. 4975; 5. CD. 28.3. 1996., E. 381, K. 949; 5. CD. 3.12.2012., E. 2011/493, K. 2012/12417; 5. CD. 3.12.2012., E. 2010/3571, K. 2012/10912).

The grounds for the decision in this direction by the Supreme Court is the non-acceptance that the bribery is caught in the middle of the bribery agreement. Even in the absence of a bribery agreement, the crime is considered as an attempt to bribery offense (5. CD. 8.1.2013., E. 2012/9703, K. 2013/38; 5. CD. 21.12.2012., E. 625, K. 770; 5. CD. 20.11.2012., E. 2010/5672, K. 2012/11664; 5. CD. 6.6.2012., E. 5891, K. 16387).

This implementation is not regulated in the texts of the law. Implementation is consistent with the law, but is against the constitution. Actually, anyone can be caught on this crime, a regular person or even a policeman. In such cases, both the TPC and CPL should have a private provision or a provocateur agent appropriate to the law or the legal proceedings institution (opportunity) in order to be able to catch public officials making contradictory agreements with individuals regulated with clear conditions which will enable punishment. Moreover, some author's opinion, that the bribery agreement can only be acceptable in order to catch the perpetrator and not to punish him, while in case of the perpetrator's guilt his bribe offence (in the light of regret) would be diminished as in TPC art. 254, should be argued (Tezcan, Erdem & Önok, 2015: 1024).

In contrast to this view, some authors believe that formally agreed upon just to catch yet another offender on the crime scene and not punish him as a result makes the fight against corruption very weak. These authors are debating the view that the criminal offenders caught should be punished (Yaşar, Gökcan & Artuç, 2014: 7641).

According to the Supreme Court, if a person requesting a bribe rejects it, then the offense stays in the category of attempted bribe (CGK. 13.12.1982., E. 5-422, K. 991). Likewise, if an unfair advantage is offered in return for a public official to fulfill the duties which he is already ought to do anyway and it is rejected it is considered an attempted crime (5. CD. 7.3.2006., E. 1006, K. 1440). Bribery is a

criminal offense available to the enterprise. In this perspective Supreme Court's approach is correct. However, The Supreme Court's ruling referred to in the above, is incorrect in terms of the facts. If any other bribe actions mentioned, have been completed half way, followed by the ruling, an attempted bribery offense would not be possible with an unfair advantage offered in this way. TPC art. 252/4 eases the punishment for the one who is trying to offer a bribe. In this case, the punishment fine amount would be reduced.

On the other hand, in order to form the bribery offense the bribery agreement should be present and an unfair advantage should be provided. After the job is done, an unfair advantage inconsistent with the law requested by the public official or an advantage taken without the previously made bribery agreement would not constitute bribery offence. In this case, it would only constitutes a disciplinary punishment for civil servants (Artuk, Gökçen & Yenidünya, 2015:1067).

According to the Supreme Court, for a bribery offense to be formed an unfair advantage must be provided as a result of an intended and thought through agreement (5. CD. 26.11.2007., E. 4413, K.9276). If the propertraitor is fulfilling the task which is outside of his job description, an officer or a public official, can not be punished. The Supreme Court's attitude is justified and appropriate, because this offense would not be an offence in the category of duty abuse. In case of the bribery the case should be concerned with public official duties. The bribery offense is not formed, when a person who is taking a bribe is not a public servant, or a public servant who would be fulfilling an action outside of his scope of responsibility.

Accordingly with doctrine of public officials, the supreme court accepts, offering women prostitution to public officials as bribe in order for them to act in an unlawful way in favor of the briber, as "unlawful benefit" (5. CD. 20.11.2007., E. 10651, K. 19002). This understanding also complies with the law.

Given, promised or agreed upon unlawful benefit, provided to public official for them to perform their duty against law, rather than how it should normally be performed, results in violation of the law. (5. CD. 14.5.2012., E. 3292, K. 5155, 5. CD. 24.12.2013., E. 2011/2701, K. 2012/13502).

The duty requested to be fulfilled or not fulfilled for unlawful benefit, is identified by Supreme Court as "operation that conflicts with law". According to the Supreme Court, in judgement of being against law in such situations, constitutions, regulations, directives or circular as well as law, should be considered (5. CD. 4.12.1991., E. 4130, K. 5318). However, this understanding is misplaced, because if type of crime is defined by norms of law instead of legislation this would be against the principle of legality (Constitution art. 2 and TPC art. 38). If regulatory rules (circulars, rules, regulations etc.) would determine the application and context of law, this would be against the principle of legality (Özen, 2010: 161).

Bribery is suitable to be considered as chain of crimes (joint) which is one of the types of combining, merger of crimes (muster) (See TPC. art. 43). If the same crime at the same time occurred requesting unlawful benefit from several people this would be bribery or attempt of bribery. However, according to the Supreme Court if requesting unlawful benefit or bribery judgement not resulted from the same decision of crime, this would not be chained (joined) offence but multiple separate bribery offences (5. CD. 5.5.1993., E. 975, K. 1951).

## 5 Conclusion

The way in which bribery opened to social degeneration and ethics vanishing, also led to the destruction of public confidence in the state administration, benefiting from public services, being treated equally, having equal opportunities and work discipline consistent with the law.

Accepting bribes being a very specific crime requires a proprietor to be a public official. In the old TPC the proprietor should have been an officer. The concept of a public servant causes differences in the interpretation, and the concept can not be detected easily, it is often argued if the proprietor should or should not be a public official. This crime and in this punishment along with the principle of legality is contrary to the certainty principle. The problems encountered in the implementation by the courts are present due to the fact that the guilt of the proprietor is decided upon him being a public official or not. When the perpetrator is considered to be a public servant, neither the bribe giving, nor the bribe taking is accepted as a formed offense (due to the bribery matters or agreements being directly linked to a public official). The concept of a public servant has been described in TPC as follows: "Assigned the execution of public activities or elected by any means person is a continuous or a temporary participating individual" (TPC art. 6/1, bend c). This article should be written in a more transparent, clear and certain manner referring to technical concepts.

Unlike in the old TPC, the new TPC 2005 does not define the crime of taking or giving bribe as separate offences with different punishments, but sees it in the same terms and regulates by the same criminal sanctions. Therefore, according to many authors and according to the new law, the crime of taking or giving bribe is a single crime, but has a different forms of processing. However, it is argued that, apart from taking or giving bribe being sanctioned in the same way, there is no other significant differences whether the offence of giving and the offence of taking bribe should stand as a separate crime, in the new law (Özen 2010: 154). Thus, this is an artificial argument. There is a major problem in this distinction. The important thing is that both actions must be punished. The unity of penalties does not always show that it is a single crime. In fact, it can be said that taking or giving bribe is a different offence and therefore is stated (distinction) in the same article. The main difference not being obvious at this point in terms of bribery agreement, rejection of the bribe and bribery assistance. The law is issuing the

same sanctions to both bribe giving and bribe taking offences. In this way it doesn't seem to be a proper regulation because the proprietor's statuses are leading to different amount of harm and the legal values of their violation are also not the same. In fact, bribe giving individual, is not always doing so to receive an illegal advantage, the offence is created due to feeling helpless.

In the first version of TPC, the Turkish legislator arranged the basic bribery as an offence and justified this in the society as 'a common thought that nothing can be done without bribery' which is wrong in the first place and contrary to the law. Despite the severe criticism of the legislator, this mistake has not been accepted on their behalf and led to other problems. This problematic point of view has also damaged and weakened an international fight against corruption. In 2012, this error has been corrected, and it is prudent that providing an unfair benefit, contrary to the law, in order to have something done, is a bribery offence.

Issuing gift to public officials is immoral and generally beyond the unjust, leading to an abuse of power by fulfilling or not fulfilling an official task and clearly constitutes a bribery offence. An unlawful benefits provided to public officials, even if called a gift, constitutes bribery. Therefore, some authors think that when a gift has a small value, it should not be considered a bribe, and the perpetrators should not be considered guilty of the offense of bribery (Özen, 2010: 177). However, it is not a proper view which can be suitable to the law. On the other hand, the Civil Servants Act art. 29/2 allows a public official to receive gift of a specific value, while the Ethics Committee determines the permitted value, however, this regulation is also contrary to the law. This article of the Act, brings a legal exception to bribery and a certain amount of bribery is legal which is not proper for the state law. However, the Civil Servants Act explicitly mentions that even if nothing in return is wanted, the gift can not be granted without a reason, therefore it is granted with an intention of bribery. On the other hand, the Regulation on Application Procedures and Principles of Ethical Conduct of Public Servants (Official newspaper: 13.04.2005 - No: 25785) art. 15 states that some gifts as listed, can be granted to public officials. In practice, much more valuable gifts are granted which are outside of the mentioned list or gifts granted in large quantity. The prohibited gifts must be reported to government agencies (Regulation art. 15). Reporting procedure 1990 and Declaration of Assets No:3628, Combating Bribery and Corruption Law art. 3. However, in reality, many senior public man and bureaucrats who accept gifts, even in front of the press are not judged according to the above mentioned legislation, in fact, are not judged at all.

However, it should be noted that bribery crime is not only in providing an unfair advantage to a public official. Therefore, if you want you can call it a gift, if you want you can call it something else, but when granted in the context of fulfillment or non-fulfillment of particular duties or with an agreement, it constitutes an offence of bribery. Therefore, a mere intimacy created by being pleased in order to thank someone, giving or taking a gift not being based on a previous agreement

constitutes a disciplinary offense, however, without power abuse it would not constitute a bribery offence.

On the other hand, when there is no proof that public officials who received an unfair advantage and as a result acted contradictory to their duties, the public official would be considered in the light of power abuse offence (TPC art. 257) (See: 5. CD. 6.3.2002., E. 7094, K. 1270 = For the ruling see:, footnote: 34) (Yaşar, Gökcan & Artuç, 2014: 7639).

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## **Fighting Corruption in the EU and Impact of the Policy on the Accession Negotiations With Turkey**

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**Abstract** It is clear that corruption remains one of the biggest challenges for all societies and countries, including societies and countries in Europe. The European Union has a general right to act in the field of anti-corruption policies, within the boundaries determined by the Treaty on the Functioning of the European Union. Without a doubt, accession process of Turkey to the European Union has brought a new focus on issues of corruption and public ethics. Fighting against corruption on a national level is not enough and will not be enough to eliminate it. Fight against Corruption needs to be made on both national and international levels because corruption is particularly serious due to its cross-border influences. Turkey, as a candidate member state, is under effects of EU Law and legislations on corruption. This has a direct impact on the accession negotiations.

**KEYWORDS:** • Turkey-EU accession • corruption • EU reforms • anti-corruption • Turkey-GRECO relations

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## 1 Introduction

It is clear that the process to become a full member of the European Union (EU) is not easy for Turkey that Turkey's aspirations to have a full membership of the EU span over half a century (Adaman, 2011: 309). It should be remembered that in July 1959, shortly after the creation of the European Economic Community (EEC) in 1958 Turkey made its first application to join and the EEC's response to Turkey's application in 1959 was to suggest the establishment of an association until Turkey's circumstances permitted its accession.

The application started the negotiations between Turkey and EEC. The ensuing negotiations finally resulted in signing the Agreement on September 12, 1963, creating an Association between Turkey and the EEC, also known as, Ankara Agreement. The Agreement was entered into force on December 1, 1964. Later, Turkey applied for full membership on April 14, 1987, on the basis of the EEC Treaty's article 237 which gave any European country the right to do so. It must be noted that Turkey's request for accession failed not under the relevant provisions of the Ankara Agreement, but those of the Treaty of Rome, underwent the normal procedures. The Helsinki Summit is important point for the relations between Turkey and the EU. A new area began in the relations after Turkey assumed "candidate status" during the Summit of Heads of State and Government in Helsinki on December 10-11, 1999 (Borchardt, 2010: 17). Later on, at the Brussel Summit on December 16-17, 2004, the decisions taken in the 1999 Helsinki Summit were reaffirmed, as the Council recognized that Turkey sufficiently fulfilled the political criteria and decided to open accession negotiations with Turkey on 3 October 2005 (Borchardt, 2010: 17).

It must be emphasized that in the accession process, 13 chapters<sup>1</sup> have been opened to negotiations so far and only one of them has been provisionally closed.<sup>2</sup> Meanwhile the negotiations on 8 chapters cannot be opened at present<sup>3</sup> as a result of the EU Council decision of December 2006. It is stated that no chapters can be provisionally closed on the grounds that Turkey does not undertake its obligations stemming from the Additional Protocol to Ankara Agreement regarding Turkey's position with respect to Greek Cypriot Administration.

## 2 Corruption

It is evident that the standard political economic literature defines "corruption" as the misuse of legislated power and position by public officers as well as political officials for illegitimate private gain (Adaman, 2011: 312). Corruption is one of the particularly serious crimes with a cross-border dimension and it is often linked to other forms of serious crimes, e.g. trafficking in drugs and human beings, and cannot be adequately addressed by states. It is clear that corruption is a complex social, political economic and legal phenomenon that affects all countries because corruption undermines democratic institutions, slows economic and political



development and contributes to governmental instability. There is a strong relation between corruption and democracy, more *democracy* leading to *less corruption* (Münir, 2016). In addition, corruption attacks and defects the social system (Saliger, 2014: 11), the foundation of democratic institutions by distorting electoral processes, preventing the rule of law and democracy, and creating bureaucratic quagmires whose only reason for existing is the soliciting of bribes (Saliger, 2014: 11).

It is sure that in general, violations of ethical and anti-corruption regulations weaken the rule of law like cancer cells and this increasingly and surely contaminates the whole system. For this reason, fighting with corruption is not just one country's problem. It is a problem for all nations to solve together because of the cross-border effect of it (Ünver, 2013: 7).

It is essential to note that economic development is stunted since foreign direct investment is discouraged and small business within the country often find it impossible to overcome the start-up costs required because of corruption and illegal ways of doing business. Obviously black and underground economy is a major matter of states that they have been dealing with. This problem also needs to be solved by different disciplines of law through international cooperation. It should be taken into account that fighting against corruption on national level and dimension only is not sufficient enough and it is definitely clear that it will not be in the future. There is no doubt that written or unwritten rules and agreements between countries are also not efficient for dealing with corruption. Therefore international studies on this matter by the authorities such as EU and UN, have gained more importance in last ten years (Ünver, 2013: 7).

### **3 Corruption and the EU**

It is noteworthy that corruption continues to be a challenge for Europe - a phenomenon that costs the European economy around 120 billion euros per year. It is certainly not acceptable that an estimated 120 billion Euros per year, or one percent of the EU GDP, is lost to corruption. According to the "Communication from the Commission to the European Parliament The Council And The European Economic And Social Committee, Fighting Corruption in the EU, Brussels, 6.6.2011 COM(2011) 308 final, the Council and the European Economic and Social Committee, Fighting Corruption in the EU" (the Communication) this is unquestionably not a new problem to the EU, and we will not be able to totally eradicate corruption from our societies, but it is telling that the average score of the EU members in Transparency International's Corruption Perception Index has improved only modestly over the last ten years. (COM(2011)308, 2011: 3)

This Communication emphasized that although the nature and extent of corruption vary, it harms all EU Member States and the EU as a whole. Additionally, the Communication explained that corruption inflicts financial damage by lowering

investment levels, hampering the fair operation of the internal market and reducing public finances. Lastly, it causes social harm as organised crime groups use corruption to commit other serious crimes, such as trafficking in drugs and human beings. Moreover, if not addressed, corruption can undermine trust in democratic institutions and weaken the accountability of political leadership.

In June 2011, the Commission set up a mechanism for the periodic assessment of EU States' efforts in the fight against corruption which could help create the necessary momentum for firmer political commitment by all decision-makers in the EU. First of all, the mechanism, part of a wider anti-corruption package, will allow for the periodic assessment of anti-corruption efforts in EU States, with a view to fostering political will, helping to step up anti-corruption efforts and reinforcing mutual trust. Obviously, it will also facilitate the exchanges of best practices, identify EU trends, gather comparable data on the EU 27 (now 28) and stimulate peer learning and further compliance with EU and international commitments. Furthermore, the EU reporting mechanism will prepare the ground for future EU policy initiatives in the area of anti-corruption (C(2011) 3673, 2011: 8).

EU member countries have taken many initiatives in recent years, but the results are uneven and more should be done to prevent and punish corruption. In addition, it can be said that Europeans are deeply worried about corruption and four out of five EU citizens regard corruption as a serious problem in their Member State (COM(2011)308, 2011: 3). In addition, the Eurobarometer survey results show that three quarters (78%) of Europeans think that corruption is widespread and more than half (56%) think that the level of corruption in their country has increased over the past three years (COM(2011)308, 2011: 3).

Corruption is very serious and important topic for the EU and also for the member states. This reality can be seen easily in the Commission reports. The report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, on 3.2.2014 COM(2014) 38 final (hereinafter: COM(2014) 38, 2014: 2-3) explained in detail that corruption continuous to be a challenge for the EU.<sup>4</sup> It should be taken into account that in its February 2014 report, the European Commission provides a clear picture of the situation in each Member State measures in place, outstanding issues, policies that are working and areas that could be improved. Moreover, the report shows that the nature and scope of corruption varies from one Member State to another and that the effectiveness of anti-corruption policies is quite different. Finally, it shows that corruption deserves greater attention in all EU Member States.

It should be remembered that EU Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption. Nevertheless, the results they deliver are not satisfactory across the EU. Sure that anti-corruption rules are not always vigorously enforced, systemic problems are

not tackled effectively enough, and the relevant institutions do not always have sufficient capacity to enforce the rules. Declared intentions are still too distant from concrete results, and genuine political will to eradicate corruption often appears to be missing.

#### **4 Current monitoring and evaluation Mechanisms**

It should be taken into consideration that at international level, the main existing monitoring and evaluation mechanisms are the Council of Europe Group of States against Corruption (GRECO), the OECD Working Group on Bribery, and the review mechanism of the UN Convention against Corruption (UNCAC), (COM(2011)308, 2011: 3). There is no doubt that those mechanisms provide an impetus for states parties to implement and enforce anti-corruption standards. Nevertheless they each have several features limiting their potential to address effectively the problems associated with corruption at EU level.

In this instance, it is to say that the most inclusive existing instrument relevant for the EU is GRECO, in as much as all Member States are participating. Through GRECO, the Council of Europe contributes to ensuring minimum standards in European legal area. Unfortunately, GRECO could not create a maximum standard in the EU. The Communication evaluated and specifically criticized this following: (...) however, given the limited visibility of the intergovernmental GRECO evaluation process and its follow-up mechanism, it has, so far, not generated the necessary political will in the Member States to tackle corruption effectively. Furthermore, GRECO monitors compliance with a spectrum of anticorruption standards established by the Council of Europe and accordingly focuses less on specific areas of the EU legislation, such as public procurement. The GRECO system, moreover, does not allow for comparative analysis and hence the identification of corruption trends in the EU, nor does it actively stimulate the exchange of best practices and peer learning (COM(2011)308, 2011: 5). Nevertheless, GRECO is still an extremely important institution in order to fight corruption in the EU. In addition, the development process of GRECO is still continuing in order to have the highest standard possible in the EU.<sup>5</sup>

An effectively functioning EU monitoring and assessment mechanism, the EU Anti-Corruption Report in detail, should be established to prompt stronger political will in the Member States and enforcement of the existing legal and institutional tools. There is no doubt that this mechanism should be combined with EU participation in GRECO. Additionally, the EU Anti-Corruption Report has been issued by the Commission every two years since 2013. It should be noticed that the establishment of the EU Anti-Corruption Report is the Commission's response to the call from Member States, in the Stockholm Programme,<sup>6</sup> to 'develop indicators, on the basis of existing systems and common criteria, to measure anti-corruption efforts within the Union', to monitor anti-corruption

efforts in the Member States on a regular basis. At this point, it would not be wrong to state that the Stockholm Programme is a correct strategy for combating corruption (Giannakopoulos, 2010: 43).

## 5 Impact of the policy on the accession negotiations with Turkey

It is essential to state that the EU requires certain standards for democracy, human rights and economic conditions in candidate countries during the integration process. Simultaneously, studies of democratization emphasize transparent regulatory reforms, accountability of politicians, progressive human rights and secure social and economic conditions for citizens as critical and indispensable factors and elements for consolidating democracy in democratizing nations (Mousseau, 2012: 63) (Borchardt, 2010: 20).

These factors and elements are regulated by article 2 and 3 of the Treaty on European Union (See: TEU article 2 and 3). Corruption-related issues have played an essential role in the delay of the EU membership of former candidates<sup>7</sup> and definitely continue to cause obstacles for the current and aspiring EU candidates (Kurtoğlu & Komşuoğlu, 2015: 302). It is absolutely undisputed that for the European Commission, continuous support at the highest political level for the fight against corruption would be most welcomed. Moreover this comment is mentioned repeatedly in various sections of the following Progress Report of the European Commission for Turkey. And it should be emphasized that the expectation is not only the adjustment of political, economic and administrative regulations, but also the proper and effective implementation of those regulations in effect. This expectation is valid for combating corruption and unethical governance. (Ömürkünülşen & Doig, 2012: 8). Especially from 2004 to 2009 there were a great deal of comments of the European Commission on the combating corruption and unethical conduct in the Regular Reports on Turkey's Progress Towards accession, Progress Reports, Commission Staff Documents Turkey (European Commission (2005) *Regular Report on Turkey's Progress Towards Accession 2004*, *European Commission, Turkey 2005 Progress Report*, *Commission Staff Working Document Turkey 2006-2007-2008-2009 Progress Reports*).<sup>8</sup>

Obviously, the accession negotiations with Turkey are not stable and they have certain tensions and conflicts. Of course, one of the important clashes between the parties is the fight against corruption. The EU has strongly criticized the way the Turkish government handled allegations of corruption in December 2013 (SWD(2013) 417, 2013: 12-13), expressing concerns about the independences of the judiciary and increased pressure on the media. The EU said that the response of the government following allegations of corruption in December 2013 has given rise to serious concerns regarding the independence of the judiciary and separation of powers. Later on, the EU underlined that it is crucial that the investigations into corruption allegations are properly conducted in full transparency and the

operational capabilities of the judiciary and the police are assured (SWD(2013) 417, 2013: 47-48).

The Commission Staff Working Document Turkey 2013 Progress Report Brussels, 16.10.2013 SWD(2013) 417 final explained that the fight against corruption, the Implementation of the National Anti-Corruption Strategy continued in Turkey. Notwithstanding, further efforts are needed to fully implement the Strategy, to follow up policy proposals from working groups on corruption-related issues and to engage effectively with civil society. The Commission said that the institutional set-up needs to be strengthened in Turkey and greater political will is needed to achieve concrete results. Obviously alignment with the recommendations of the Group of States against Corruption (GRECO) also remains a priority. Additionally, the Commission identified following details: In this context, the financing of political parties needs to be addressed, including provisions on prohibited funding sources, donation ceilings, and obligations on candidates to disclose assets and submit financial information during a campaign. Measures are required to reduce the broad scope of parliamentary immunity in corruption cases and to define objective criteria for the lifting of immunity. Arrangements to verify assets declared by political figures and public officials need to be strengthened. Turkey collects certain statistics on court decisions in corruption cases, but efforts are required to develop a thorough track record of investigation, indictment and conviction. Concerns remain about impartiality in the processing of anti-corruption cases. Turkey needs to ensure dissuasive penalties in all corruption cases (SWD(2013) 417, 2013: 12-13).

Commission Staff Working Document Turkey 2013 Progress Report indicated that anti-corruption policy Implementation of the 2010-14 National Anti-Corruption Strategy and Action Plan continued and the Report stated that working groups on corruption-related issues completed their work and submitted their report to the Ministerial Committee overseeing implementation of the Strategy. Later on, the Report explained that the working groups' policy suggestions included conducting annual country-wide corruption perception surveys and establishing comprehensive tracking of data on corruption. At this point, the Report underlined that these have not yet been followed up and the Report stated that the legal mandate of the Prime Ministry Inspection Board in the area of anti-corruption needs to be strengthened. The report also stated that continuing the operational independence of the Board and adequate human resources, including full-time staff, need to be ensured. No further progress can be reported on the alignment with the recommendations of the Group of States against Corruption (GRECO). Finally, the Report emphasized particularly that the adoption of a law addressing GRECO recommendations in the field of financing of political parties and regulating prohibited funding sources, donation ceilings, obligations on candidates to disclose their assets and to submit specified financial information during a campaign, is a priority. According to the Report no changes were

introduced with regard to the broad scope of immunities of members of parliament and certain public officials in corruption-related cases or with regard to establishing objective criteria for lifting their immunity. The situation has not much changed in Turkey since 2013, on the contrary it can be stated that the situation goes to a negative direction.

Finally on October 11, 2015 the Commission announced/explained the Commission Staff Working Document on Turkey 2015 Progress Report Brussels, 10.11.2015 SWD(2015) 216 final (hereinafter: SWD(2015) 2015: 16). The Report identified that Turkey reached some level of preparation in the fight against Corruption. The Report underlined that no progress has been achieved in the past year, and that in the absence of legislative developments on public transparency, corruption perception remains widespread (SWD(2015) 2015: 16). The Report pointed out the legal and institutional framework that allow undue influence by the executive in the investigation and prosecution of high-profile corruption cases and stated that this constitutes a major source of concern. According to the Report, Turkey does not have an independent anti-corruption body and a broad political consensus is required to tackle corruption properly. The Report highlighted that in the coming year, Turkey should, in particular, (i) strengthen the independence of prosecution and law enforcement agencies in high-level corruption cases; (ii) adopt legislation ensuring deterrent sanctions for corruption offences and ensure their effective enforcement; (iii) adopt an updated anti-corruption strategy and action plan setting out a clear vision and selecting a realistic number of priorities to tackle corruption effectively as well as establishing an independent anti-corruption body in line with UNCAC provisions (SWD(2015) 2015: 16-17).

## 6 Relations between Greco and Turkey

It is essential to note that Turkey joined GRECO in 2004 and since its accession; the country has been subject to evaluation in the framework of GRECO's Joint First and Second (in March 2005) and Third (in March 2010) Evaluation Rounds (Mert, 2013: 35) (GRECO the Fourth Evaluation Round Corruption prevention in respect of members of parliament, judges and prosecutors, Adoption: 16 October 2015 Publication: 17 March 2016, Public: Greco Eval IV Rep (2015) 3E) (hereinafter: GRECO Eval IV Rep 3E, 2015: 6). GRECO's current Fourth Evaluation Round, launched on January 1, 2012, deals with Corruption prevention in respect of members of parliament, judges and prosecutors. GRECO highlighted that it is breaking new ground and is underlining the multidisciplinary nature of its remit. Simultaneously, this theme has clear links with GRECO's previous work, notably its First Evaluation Round, which placed strong emphasis on the independence of the judiciary, the Second Evaluation Round, which examined, in particular, the executive branch of public administration, and the Third Evaluation Round, which focused on the incriminations of corruption (including in respect of parliamentarians, judges and prosecutors) and corruption prevention in the context of political financing. The Report underlined that within the Fourth Evaluation

Round, the same priority issues are addressed in respect of all persons and functions under the review, namely: (i) ethical principles, rules of conduct and conflicts of interest; (ii) prohibition or restriction of certain activities; (iii) declaration of assets, income, liabilities and interests; (iv) enforcement of the applicable rules; (iv) awareness (GRECO Eval IV Rep 3E, 2015: 6).

It must be taken into account that the report focuses on corruption prevention in respect of parliamentarians, judges and prosecutors. Moreover, it includes numerous recommendations to improve anti-corruption measures in all three groups, in respect of institutional settings and practices as well as with regard to the conduct of the officials concerned. Except those, the need to provide for more openness and transparency in the parliamentary process is highlighted as a major concern and parliamentary immunities are perceived as a significant obstacle for bringing MPs to justice when suspected of corruption. The Report stated that a substantial part of the report deals with the need to strengthen the independence of the judiciary from executive powers and political influence (GRECO Eval IV Rep 3E, 2015: 4-54).

Transparency is another critic point in the Report. Regarding the legislative process in the Turkish Parliament, GRECO calls for more transparency through the use of public consultation and regulation of various forms of conflicts of interest that occur in the daily work of MPs. In addition, it is explained in the report that measures are also required to ensure that parliamentary immunity is not used as a means to hinder or hamper criminal investigations against MPs suspected of corruption or other similar misconduct. The report stresses the need to step up efforts to establish codes of ethics for MPs, in particular to prevent situations of conflicting interests.

In Transparency International's 2014 Corruption Perceptions Index, Turkey ranks 64th out of 175 countries, dropping 11 places relative to 2013. According to Transparency International's 2015 Corruption Index, Turkey ranks 66th out of 168 countries, increasing 2 places relative to 2014. Obviously, a primary reason for Turkey's decline was certainly the corruption investigations launched in December 2013 against four ministers, their relatives, one district mayor and various other public officials and businessmen. Several suspects were charged with bribery, tender-rigging, export fraud or misuse of state-owned land in real-estate deals and various other charges (Transparency International, 2015). In this environment, corruption remains widespread, and unfair and partial treatment by the bureaucracy is common. Mostly at the local level, corruption remains a systemic problem. While municipalities controlled by opposition parties are closely watched by law-enforcement authorities and government inspectors, municipalities controlled by the politicians are shielded from proper investigations.

GRECO furthermore calls in the last Report on Turkey to take a number of dedicated measures in order to strengthen the independence of the judiciary in general and of the High Council of Judges and Prosecutors vis-à-vis executive powers in particular. GRECO also emphasizes the need to increase the influence of the judiciary itself in the selection process and training of judges and prosecutors and the need to adopt codes of ethics for these professional groups. It is essential to state that the security of tenure of judicial office holders needs to be reinforced considerably as a means of protecting judges and prosecutors from potential use of transfers and disciplinary measures, including dismissal, as a form of retaliation. GRECO also recommends that judges, upon appointment, be obliged to take an oath to adhere to fundamental principles of judicial independence and impartiality.

## 7 Conclusion

Corruption remains one of the biggest challenges for all societies and countries, including European societies and countries. The European Union has a general right to act in the field of anti-corruption policies, within the boundaries determined by the Treaty on the Functioning of the European Union. Without a doubt, accession process of Turkey to the European Union has brought a new focus on issues of corruption and public ethics. Fighting against corruption on a national level is not enough and will not be enough to eliminate it. Fight against Corruption needs to be made on both national and international levels because corruption is particularly serious due to its cross-border effects. Turkey, as a candidate member state, is under effects of EU Law and legislations on corruption. This has a direct impact on the accession negotiations.

Corruption is one of the particularly serious crimes with a cross-border dimension and it is often linked to other forms of serious crimes, e.g. trafficking in drugs and human beings, and cannot be adequately addressed by states. Obviously corruption is a complex social, political economic and legal phenomenon that affects all countries because corruption undermines democratic institutions, slows economic and political development and contributes to governmental instability.

Corruption is very serious and actual topic for the EU and also for the member states. This reality can be seen easily in reports of the Commission and of GRECO. EU Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption. Nevertheless, the results they deliver are not satisfactory across the EU. It is evident that anti-corruption rules are not always vigorously enforced, systemic problems are not tackled effectively enough, and the relevant institutions do not always have sufficient capacity to enforce the rules. Declared intentions are still too distant from concrete results, and genuine political will to eradicate corruption often appears to be missing.



The accession negotiations with Turkey are not stable and they have certain tensions and conflicts. Of course, one of the important differences between the parties is the fight against corruption. The EU has strongly criticized the way the Turkish government handled allegations of corruption in December 2013, expressing concerns about the independences of the judiciary and increased pressure on the media. The EU emphasized that the response of the government following allegations of corruption in December 2013 has given rise to serious concerns regarding the independence of the judiciary and separation of powers. Later on, the EU underlined that it is crucial that the investigations into corruption allegations are properly conducted in full transparency and the operational capabilities of the judiciary and the police are assured.

Turkey joined GRECO in 2004 and since its accession; the country has been subject to evaluation in the framework of GRECO's Joint First and Second (in March 2005) and Third (in March 2010) Evaluation Rounds. GRECO's current Fourth Evaluation Round, launched on January 1 2012, deals with "Corruption prevention in respect of members of parliament, judges and prosecutors". GRECO highlighted that it is breaking new ground and is underlining the multidisciplinary nature of its remit. It is clear that in Transparency International's 2014 Corruption Perceptions Index, Turkey ranks 64th out of 175 countries, dropping 11 places relative to 2013. According to Transparency International's 2015 Corruption Index, Turkey ranks 66th out of 168 countries, increasing 2 places relative to 2014.

GRECO furthermore announces in the last Report on Turkey to take a number of dedicated measures in order to strengthen the independence of the judiciary in general and of the High Council of Judges and Prosecutors vis-à-vis executive powers in particular. It also emphasizes the need to increase the influence of the judiciary itself in the selection process and training of judges and prosecutors and the need to adopt codes of ethics for these professional groups. In addition, the security of tenure of judicial office holders needs to be reinforced considerably as a means of protecting judges and prosecutors from potential use of transfers and disciplinary measures, including dismissal, as a form of retaliation. The report also recommends that judges, upon appointment, be obliged to take an oath to adhere to fundamental principles of judicial independence and impartiality.

## Notes

<sup>1</sup> Chapters are following: "4-Free Movement of Capital", "6-Company Law", "7-Intellectual Property Law", "10-Information Society and Media", "12-Food Safety, Veterinary and Phytosanitary Policy", "16-Taxation", "Statistics", "20-Enterprise and Industrial Policy", "21-Trans-European Networks", "25-Science and Research", "27-Environment", "28-Consumer and Health Protection", "32-Financial Control".

<sup>2</sup> Chapter 25-Science and Research.

<sup>3</sup> Chapters are following: "1-Free Movement of Goods", "3-Right of Establishment and Freedom to Provide Services", "9-Financial Services", "11-Agriculture and Rural Development", "13-Fisheries", "14-Transport Policy", "29-Customs Union" and finally "3-External Relations".

<sup>4</sup> Corruption seriously harms the economy and society as a whole. Many countries around the world suffer from deep-rooted corruption that hampers economic development, undermines democracy, and damages social justice and the rule of law. The Member States of the EU are not immune to this reality. Corruption varies in nature and extent from one country to another, but it affects all Member States. It impinges on good governance, sound management of public money, and competitive markets. In extreme cases, it undermines the trust of citizens in democratic institutions and processes, see COM(2014) 38, 2014: 2.

<sup>5</sup> GRECO had four evaluation rounds from 2000 to 2012.

<sup>6</sup> The Stockholm Programme provides a roadmap for European Union (EU) work in the area of justice, freedom and security for the period 2010-14.

<sup>7</sup> Bulgaria and Romania.

<sup>8</sup> European Commission, 2004 Regular Report on Turkey's Progress Towards Accession, European Commission, Turkey 2005 Progress Report, Commission Staff Working Document Turkey 2006-2007-2008-2009 Progress Reports.

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## Illicit Arms Trafficking Crime in International Law

MESUT HAKKI CAŞIN

**Abstract:** Small arms and light weapons-SALW, and also advanced weapons systems are the main tools used in today's international conflicts, be they inter-state wars, civil wars or the actions of organized crime that currently is an ongoing problem for the international community. (Dutes, 2015, Carmen-Christina, 2015). States needs SALW to keep public order. However uncontrolled SALW trade resulting serious armed violence's and mass casualties of the civilians.

**KEYWORDS:** SALW trafficking • transnational organized crime • international terrorism • UN Arms Trade Treaty • international stability

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## 1 Introduction

Today, we observe global supply of weapons and ammunition a critical transformation from traditional the demand of states to rogue states and non-state actors. If we look carefully into its structure, we can realize that illicit arms trade on one hand cultivate civil wars and regional conflicts, and on the other hand composes of highly complex game players such as arms sellers, transnational networks, states, corporate organizations, brokers, intermediaries, financiers, and shipping companies. First, in this paper I will first briefly define a critical academic question that after the Cold War international community debated what kind of world order will replace it. In short, arms' trafficking is associated with changing the power dynamics in developing countries or other fragile areas. Secondly, I'll try to make a conceptual analysis in case of SALW trafficking regarding the levels of involvement by different factors (peace and stability, arms supply & demand balance, eliminating illicit arms trade) in terms of international law liability and discussion establishment with possible control mechanism by knowledge in encouraging states and international organizations cooperation. Because, arms trafficking actors can use different international networks we define as "Black Market" by involving proxy individual brokers in order to penetrate and bypass barriers imposed by embargoes. Thus, from international and transnational crime level, arms trafficking phenomenon is more sophisticated than a basic term used to define some rogue actors stealing arms from a state for shipping. Furthermore these actors' network is using either legal or illegal components. With the involvement of systematic crimes together, transnational networks put efforts in order to combine (buyers-sellers-brokers-shipping) until delivering final destination point. In other words, this systematic international criminality transaction nature is not easy to eliminate the potential threats of SALW transfers with only legal instruments solutions due to their lack of information and transparency, and of enough data for various types of the potential arms markets.

## 2 Transformation of global arms trade structure

Internal wars have become the predominant form of violent conflict since World War- II also after the Cold War era, which result in more casualties than interstate wars during this period. Violent internal conflict of this type includes civil war, insurgency, sectarian conflict, ethnic conflict, terrorism, genocide, and irregular wars. Unfortunately, in spite of peaceful dissolution of the Warsaw Pact, we see new harmful conflicts band wagon: Breakup of Yugoslavia, 1991 Gulf War, 9/ 11 terrorist attacks to US, 2003 Iraq War, Arab Spring waves which triggered 2011 Libya War, Russian annexation of Crimea in 2014, also recently Syrian Civil War continues and brings mass migration tragedy without a peaceful solution. Now international community tries to bring peace to parts of the Middle East and North Africa, which suffer from very high levels of armed violence, armed conflict, and political instability. The risk of small arms diversion to non-state actors-NSA armed groups in these states<sup>1</sup> is also considered high (Small Arms Survey, 2015).<sup>2</sup>

Although the “communism ghost” left the European continent, the world is trapped with warm conflicts which triggered increasing amount of the illicit usage and trafficking of small arms and light weapons in global environment in conflict zones.<sup>3</sup> All these unpredictable developments have such serious results as serious violations of human rights and international humanitarian law regulations. This critical usage of small arms and trade network with organized crime brings forward new obligations to states which shape legal responsibility under the international law rules to cooperate (Boivin, 2005: 467). Today, violent conflicts are primarily supplied with illegally trafficked weapons. These weapons have played a critical role in escalating old conflicts, and initiating new ones worldwide. Previously, international treaties and legal norms had targeted global and national standards also aimed primarily to detect and diminish the supply, transport, and sale of illicit SALW. There are around half a billion military small arms all over the world (Shah, 2006). Although small arms and their associated ammunition represent only about five per cent of the total value of global arms exports (Legal Transfers), more than 80 percent of contemporary conflicts are fought with them. The illegal small arms trade is a hazardous issue that impacts every nation in the world. Whether developing or developed, every country is subjected to harm as the market for illicit arms is prominent and thriving. The United Nations Office for Disarmament claims the problem is a “worldwide scourge”. The illicit trafficking in small arms is a trans-national phenomenon. Arms brokers can operate because they are able to circumvent national arms controls and international arms embargoes, or to obtain official protection (Stohl, 2005). There are more than 200 million privately owned firearms in the United States, including 70 million handguns. This vast arsenal serves as a source of guns to youths and criminals, who may obtain them through a variety of means (Braga, Cook, Kenned, Mark H., 2002: 319-352). Today, firearms still provide a formidable global threat, responsible according to one estimate for more than 740,000 deaths, and three times as many casualties every year across the globe. About 80% of all conflict deaths come from small arms, and more than one-third of terrorist incidents worldwide have seen firearms as the weapon of choice (Noble, 2011). 12 billion bullets are produced every year. That’s almost enough to kill everyone in the world twice. 1,500 people are killed every day by conflict and armed violence. There’s an estimated **875 million guns** in the world right now, and about **8 million** ‘light weapons’ (such as heavy machine guns) are produced each year (Stohl & Hogendoorn, 2010).

- Do sovereign states have the right to defend themselves and their citizens under the lawful and appropriate manufacture and purchase of small arms?
- How can international community stop illicit transfer of conventional weapons to non-State actors?
- In terms of arms control and disarmament roles of the United Nations, how will practical steps shape the main obligation to prevent and control the proliferation of SALW stockpiles?

- How would international actors attempt to regulate international law for the global supply of SALW through soft law agreement and embargoes?

Modern sovereign states have an inherent right to self-defense and may use armed forces in conformity with the Charter of the United Nations. In October 2006, the UN General Assembly called for a vote to form an ATT. The Resolution was passed, which stated “the right of all States to manufacture, import, export, transfer and retain conventional arms for self-defense and security needs, and in order to participate in peace support operations.”

(United Nations General Assembly, 2016). Within this understanding, sovereign states have the equal right to acquire arms for their security, including arms from outside sources. However, international transfers of conventional arms have, in recent decades, acquired a dimension and qualitative characteristics which, together with the increase in illicit arms trafficking, give rise to serious and urgent concerns. Legal, political and technical differences in internal control of armaments and their transfer and, in some cases, inadequacy or absence of such controls can contribute to the growing illicit traffic in arms (Council on Foreign Relations, 1996). We identify as ‘illicit’ the weapons held, accumulated and used by non-state armed actors, and refer to their owners and users as ‘illicit arms holders’ to emphasize the fact that such people do not normally buy arms directly from legitimate sources of supply. Second, illicit small arms may be used by criminals to establish and maintain control of illegal economic activities (Markowski, Koorey, Hall & Brauer, 2009: 171-191).<sup>4</sup>

### **3 Why does illicit arms trafficking threaten the international peace and stability?**

*“Most present-day conflicts are fought with small arms and light weapons. They are the weapons of choice in civil wars and for terrorism, organized crime and gang warfare. Illicit small arms have a negative impact on security, contribute to the displacement of civilians, facilitate the violation of human rights and hamper social and economic development.”*

#### **Report of the UN Secretary-General**

SALW trafficking contributes to increased lethality of criminal violence by adding to the most lethal weapons in the world. However, SALW more than military belligerent parties, today their main victims, unfortunately, are too often civilians, among whom women and children are particularly affected. Secondly, the illicit trafficking of those deadly weapons presents a major obstacle to the socioeconomic development of the most developing countries. Deaths resulting from war, armed homicides, extra-judicial executions and excessive use of force by state security forces amount to over 500,000 per year or 1,500 per day. Many women and girls have been forced into sexual slavery by fighters, and many are

raped at gunpoint. Tragically, women and girls are often the forgotten victims of armed conflict (United Nations Assistance Mission for Iraq, 2014). “Small arms do not only make easy the taking and maiming of lives, but also kill economies and the social bonds on which every kind of collective institution and progress rely,” High Commissioner for Human Rights Zeid Ra’ad al Hussein said. “These are the weapons of the easy kill: the most portable, most easily accessible, most casual instruments of death - even a small child can, with its tiny muscles, vanquish a life,” he said, while noting that it was usually the most vulnerable, including children, that were killed (United Nations Security Council Debate, 2015). These weapons provide individuals and organized groups of non-state actors the tools to increase the intensity of violent internal conflict. “Small arms and light weapons destabilize regions; spark, fuel and prolong conflicts; obstruct relief programmes [sic]; undermine peace initiatives; exacerbate human rights abuses; hamper development; and foster a ‘culture of violence’ (United Nations Small Arms and Light Weapons). Another understanding for possible solution ways to SALW problem is that the international community reflected legal efforts, and in the 2015 resolution the United Nations Security Council noted that it is: “Gravely concerned that the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world continue to pose threats to international peace and security, cause significant loss of life, contribute to instability and insecurity.” (UN Office on Drugs and Crime, 2014). Small arms and ammunition products are often developed for military use, and then adapted to the civilian market. By definition, small arms and light weapons are easily portable. Compared to heavy weapons systems such as tanks or aircraft, they are also easy to conceal. They can be transported by individuals or light vehicles, hidden in small storage places and smuggled in shipments of legitimate cargoes. Using small weapons brings some critical advantages to them so suitable to contemporary intra-state conflicts, and they include: Low Cost and Wide Availability,<sup>5</sup> Lethality,<sup>6</sup> Simplicity and Durability,<sup>7</sup> Portability and Concealability.<sup>8</sup> All of these characteristics of light weapons have made them particularly attractive to the sort of paramilitary and irregular forces that have played such a prominent role in recent conflicts.<sup>9</sup> The use of weapons – be they legally purchased or illicit – has different impacts on people depending on their age and gender. The majority of perpetrators and direct victims of armed violence are young men. Women, however, suffer disproportionately from direct and indirect consequences, in both conflict and non-conflict settings, including sexual violence, disability and economic degradation (Kytömäki, 2015). The illegal small arms trade is a hazardous issue that impacts every nation in the world. Whether developing or developed, every country is subjected to harm as the market for illicit arms is prominent and thriving. The United Nations Office for Disarmament claims the problem is a “worldwide scourge” (Dutes, 2015). With up to 875 million small arms and light weapons in circulation worldwide and responsible for over half a million deaths each year, the Security Council today examined the means of intensifying the fight against their illegal proliferation, being told that the threat to international peace and security posed by the uncontrolled trade

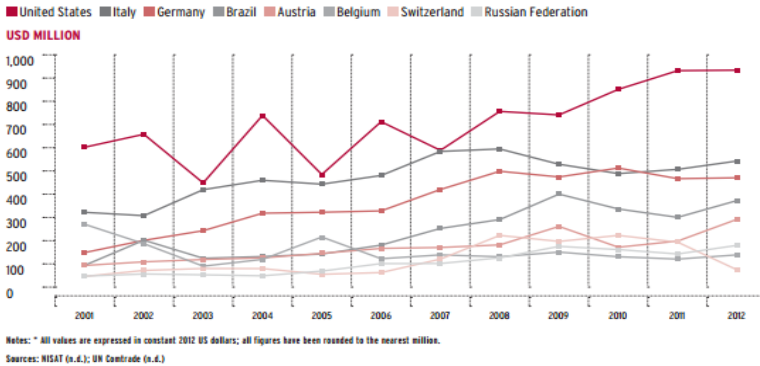
cannot be overemphasized (United Nations, 2008). Modern illicit small arms trafficking problem has an important factor contributing to other criminal activities such as drugs smuggling and human trafficking as well as terrorist violence activities. Of course, illegal drug trafficking is linked to illegal firearms markets. Transnational organized crime and drug trafficking is of growing concern, and particularly illicit trade's broad impact on development. Few, if any, countries are exempt. Drug trafficking has particularly severe implications because of the vast illegal profits it generates: an estimated 322 billion dollars a year (UN General Assembly, 2012). Terrorist and criminal groups are using these financial capacities to procure small arms stockpiles illegally in order to use them in the pursuit of their goals (Holtom, 2007: 221).

At the first quarter of the XXith century, smuggling weapons or their integral components have continued to foster conflicts between the states as well as empower evil non-state actors such as terrorist organizations, pirates, and revolts. These widespread human rights violations threaten the international peace and stability in spite of the responsibility of the modern states to protect their citizen's right of life and obeys the effective steps to stop proliferation of illegal arms to unauthorized actors. Under international law perspective, this is a difficult and complicated multi-layer international problem in its own right but also as an important factor contributing to other criminal activities; drugs smuggling and human trafficking as well as terrorist-organizations activities. These criminal activities can include the illicit transfer or diversion of materials, technology, and components of ammunition as well as the trafficking and theft of conventional weapons. In this regard, international community needs to have correct awareness which should have spread about the overall threat from this form of transnational crime; however, institutions to counteract the illicit transfer of weapons remain limited in scope. However, generally states should also refuse to authorize exports of weapons to places or end-users if such shipments are likely to be used in violations of human rights (International Committee of the Red Cross, 2007).

#### **4 Understanding nature of small arms marketing within the supply & demand balance impact**

The end of the Cold War resulted in an increase in the number of local wars and civil conflicts throughout the world, fought primarily with small arms and light weapons. Large quantities of small arms are in circulation today. Global small arms market is driven by several factors, such as rising number of wars and cross-border disputes, rise in terrorism, and increasing civilian use of small arms for sports and self-defense. Who are producing SALW? **Where are these SALW coming from?** In both developed and developing countries, people and armies provide a thriving market for both legal and illegal suppliers. I hope in order to understand the nature of international small arms marketing we need to estimate balance of dynamics within supply and demand correlations (Çaşın, 1994).





Source:

<http://www.smallarmssurvey.org/fileadmin/docs/AYearbook/2015/eng/Small-Arms-Survey-2015-Chapter-04-EN.pdf>

From the perspective of demand, weapons (and the crises they contribute to) cease to be the focus of intervention. This can be illustrated with a discussion of two existing definitions measuring the volume of arms production nationally may be attempted either from the supply<sup>10</sup> side or the demand side (Stockholm International Peace Research Institute, 2016).<sup>11</sup> I will try to briefly examine illicit small arms trade as an international market dimension with the key dimensions of supply-demand-broker's roles. Also, states have right to regulate production, import, and export of small arms in terms of their national law dimensions. (See Table-I) States can organize legal framework in form of licensing about arms production and sales essentials: The small weapons, licensing of production, licensing for export or import, and licensing for brokering principles. Thus, national laws norms, shape parallel responsibility with international treaties for an attempt to regulate the arms market.

In the absence of applicable national laws (either compliance or ends-based), there are no restrictions on private arms exporters. Secondly, national laws are not uniform across the international community. While a state may have strict national laws and enforcement mechanisms to thwart inappropriate transfers, many states lack national laws or enforcement mechanisms. These un-regulated or under regulated countries can serve as key exporters or intermediaries in the arms transfer system. The states national legal norms capacity to collect and analyze SALW data on firearms trafficking should be at the heart of international activity to implement these two measures. There are four types of sales most common in the weapons trade:

- **Government-to-government transfers (including aid):** the sale of new firearms, and/or the transfer of surplus military equipment no longer required by the supplier's own armed forces.
- **Commercial sales:** legal sales of firearms by private firms in one country to government agencies or private dealers in another. Usually, sales are regulated by the supplier country and the exporter is required to produce an enduser certificate testifying to the legitimacy of the transaction.
- **Government to non-state actors:** Insurgent or terrorist organizations among the different states.
- **Private Sales: Individuals** ordering and importing declared firearms; mostly through firearms dealers (Mouzos, 1999).

Because, all types of weapons, either modern or old products are used by humans but first they need to supply these weapons with ammunition in order to fire them. Supply-side initiatives are crucial to controlling manufacturers, brokers, and exports. There is a critical transformation between the past and present main producers of the SALW. Indeed, until the end of World War II, the major producers of these weapons were the industrialized nations. In recent decades, however, these established producers have been joined by China, Israel, South Africa and many developing countries.

Currently, there are over 300 manufacturers of light weapons and related equipment in 50 countries around the world, a 25% increase in the last decade alone (Arms Control Today, 1998).<sup>12</sup> In 2010, almost 3/4 of the world's weapons have been supplied by six of the world's most powerful countries: **USA** (34.84%), **Russia** (14.86%), **Germany** (7.43%), **United Kingdom** (6.57%), **China** (6.29%), and **France** (4%) (Amnesty International, 2012). There are an estimated 875 million small arms in circulation worldwide, produced by more than 1,000 companies from nearly 100 countries. All countries and numerous non-state armed groups—procure small arms; the Small Arms Survey estimates that their annual authorized trade exceeds USD 8.5 billion (Small Arms Survey, Weapons and Markets)<sup>13</sup> According to the UNODC the illegal firearms trade generates between €125 million to €236 million per year globally, which represents between 10 to 20% of the total trade in legal firearms. The United Nations 2011 Small Arms Survey estimates that the value of the global trade in illicit arms may be worth more than a billion dollars (United Nations Office on Drugs and Crime, 2011: 49). The mandate for the UNODC's work on firearms trafficking is based upon the Firearms Protocol of the United Nations Convention against Transnational Organized Crime (UNTOC). The Firearms Protocol to the UNTOC was adopted by UN General Assembly resolution 55/255 of 31 May 2001, and the Protocol entered into force on 3 July 2005. The Protocol contains a framework for States Parties to prevent the illicit traffic in firearms and their parts and components, and ammunition.<sup>14</sup> A seizure is defined in the UNTOC in Article 2 as “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued

by a court or other competent authority.” There are several caveats concerning seizure data:

- A seizure is a temporary measure, and seized goods may or may not be returned;
- Firearms can be seized for reasons not directly related to illicit trafficking (for example use in criminal acts);
- Data on seizures reflect different capabilities, policies and priorities of law enforcement agencies;
- Seizure data may also reflect different legal and regulatory frameworks concerning firearms (Marsh, 2015: 73-87).

In order to eliminate illegal small arms trafficking, international community tries to establish a framework for affecting the small arms problem, and that is the “UN Programme of Action to Prevent, Combat and Eradicate the Illicit trade in Small Arms and Light Weapons”. In All Its Aspects (UNPOA), as agreed upon by the majority of UN member states in 2001, this non-binding agreement seeks the development of national, regional, and global measures to prevent illicit trafficking of small arms. Most importantly, the UNPOA defines the problem and provides a forum for international cooperation. A major concern for exporters is the possible establishment of international transfer-controls: common standards for controlling the export, import, and transshipment of small arms. These controls would reduce the likelihood of receiving the authorizations necessary for transferring arms and discontinue the practice of indiscriminate arms sales. Transparency could also result in a more careful scrutiny of requests for export licenses and a lower rate of approvals. Furthermore, international regulation might increase the costs of production (Efrat, 2010: 97-131). In modern human history, illegal small arms trade is always a harmful matter which impacts all states in the world affairs. These troubles negatively impact every state either industrial or developing, and each state is subjected to lose as the dynamic market for illicit arms trafficking openly and booming volume. This problem is defined as a “worldwide scourge” by the UN Office for Disarmament (United Nations, 2010). The illicit proliferation of SALW can fuel and prolong armed violence and support illegal activities and the emergence of violent groups (NATO, 2015).

Of course, there is a dangerous reality on the table that the close connection between illicit SALW contributes to the development international terrorism, transnational organized crime, drugs trafficking, money-laundering, and other illicit financial transactions. All these criminal actions cooperate with illicit brokering in small arms and light weapons and arms trafficking, and the link between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as a major factor fueling and exacerbating many conflicts. Using trafficking SALW can aid facilitate increasing levels underscoring that could harm civilians, including women and children,

create instability and long-term governance challenges and complicate conflict resolution (United Nations Security Council, 2015).

There are strong correlations between illicit arms trafficking and trade balance within supply & demand shipments that weapons delivered to unauthorized users. The total value of the global market for arms is estimated to be \$60 billion per year, with 10-20% of that being illicit trade (Dutes, 2015). Small arms and light weapons are rarely reported in official statistics on the arms trade, are impossible to quantify independently, and are often manufactured and transferred covertly. The global small arms market is projected to grow from USD 4.09 Billion in 2015 to USD 4.92 Billion by 2020, at a CAGR of 3.8% during the forecast period. There are three types of sales most common in the weapons trade: government to government; government to non-state actors (for example insurgent groups) in another country; and commercial sales, including those not directly between seller and recipient, for example, brokered sales. Arms transfers in the first category generally comprise of the legal trade in weapons, as do the majority of commercial sales (PR Newswire, 2016).<sup>15</sup> Small arms also represent a sizeable industry: all countries - and numerous non-state armed groups -procure small arms. In doctrinal framework arguments, international market structures of the SALW four basic types are classified as military, white, gray and black. Nation-states will often use the gray and black arms markets in order to deniably support allies, undermine opponents or otherwise pursue their national interests. This was clearly revealed in the Iran-Contra scandal of the mid-1980s, but Iran-Contra only scratched the surface of the arms smuggling that occurred during the Cold War (Washington Post, 1998).<sup>16</sup> The United States and Soviet Union was delivered small arms and military ammunitions to their respective allies during the Cold War. Indeed, the relative decline in U.S. and Soviet military deliveries is clear from the statistics. From a high point in the 1960s of 85 percent of market share in world military equipment and services, the superpower share is now about 68 percent (Newman, 1998).

- **Military market**, Most sovereign arms producer states can sale and transfers their own production small arms and immunities under export licensing, end user certification, monitoring strong control with legally binding in transparency to the customer parties or other states for military legal defensive or military assistance purposes.
- The **white market** refers to the legal sale of weapons by governments or private manufacturers to other countries or governments. The white arms market is the legal, aboveboard transfer of weapons in accordance with the national laws of the parties involved and international treaties or restrictions. The parties in a white arms deal will file the proper paperwork, including end-user certificates, noting what is being sold, who is selling it and to whom it is being sold. There is an understanding that the receiving party does not intend to transfer the weapons to a third party.

- **Grey market sales**, however, are more difficult to classify. As is evident in their name, this type of sales covers a broad range of semi-legal or legally questionable transfers. Grey market firearms are not owned, used or conveyed for criminal purposes but may end up in the illicit market. A suggested definition is that grey sales are those which “violate national and international norms and policies, if not laws.” These networks facilitate transfers originated as legal state-to-state transfers and then divert them into conflict zones. This type of transaction is frequently used in cases where there are international arms embargoes against a particular country (like Liberia) or where it is illegal to sell arms to a militant group (such as the Revolutionary Armed Forces of Colombia, known by its Spanish acronym, FARC) (Stewart & Burton, 2009).
- **Black market deals** are illegal by the covert nature of the transaction. Transactions can be hidden through the concealment of the weapons through mislabeling, forging of documents, and the laundering of the proceeds obtained through the transaction (Rothe & Collins, 2011: 22-38). Government transfers to non-state actors and some commercial sales are those which most often fall into categories of illegal and **Black market transfers** generally refer to those which are knowingly conducted in violation of an existing arms embargo, national laws or other factors which make the sale criminal. Black market trafficking usually takes place on a regional or local level; publicly available data suggests that the multi-ton, inter-continental shipments organized by the ‘merchants of death’ account for only a small fraction of illicit transfers. There are no end-user certificates and the weapons are smuggled covertly. Examples of this would be the smuggling of arms from the former Soviet Union (FSU) and Afghanistan into Europe through places like Kosovo and Slovenia, or the smuggling of arms into South America from Asia, the FSU and Middle East by Hezbollah and criminal gangs in the Tri-Border Region (Small Arms Survey, Illicit Trafficking).

The use of front companies, third-party buyers or sellers, and suspect if not fraudulent documentation can form part of a grey market sale, complicating the picture and limiting the chances of detection (Meek, 2000: 3-14). What are the defining characteristics and roles of arms brokers in illicit arms transactions? Identifying who is, in fact, the ‘broker’ in a given arms transaction and outlining the scope and nature of his activities is not a simple task (United Nations Office on Drugs and Crimes, 2010).<sup>17</sup> Arms brokers can operate because they are able to circumvent national arms control measures and international arms embargoes or to obtain official protection. Because of the secrecy surrounding illicit arms transfers often makes it difficult to identify the actors involved and the services they provide. Arms broker may be defined as; an individual who facilitates and organizes arms transactions on behalf of suppliers and recipients for some form of compensation or financial reward. They have some special characteristics such as; invisibility, autonomy, expertise, and management.<sup>18</sup> Depending on the degree of

leverage they exert, brokers can also bring about states' 'passive' involvement in their activities, usually through a policy of non-interference, or acts of omission. Despite their central role in the arms business, the *activities of arms brokers are often unregulated*. Arms brokers who facilitate *unlawful arms transfers are aiding and abetting* violators of arms embargoes, armed groups, criminal gangs and terrorists, thus fueling insecurity and conflict in many regions of the world (United Nations Institute for Disarmament Research, 2006). (See TABLE –II)



Thus, it has been observed that brokers operating in this area play a potentially more malignant role than commission agent organizing conventional weapons sales. Its critical role will be to underline those international small arms marketing brokers operating in the 'grey' and 'black' sectors of the illicit small arms market. After Cold war, increasing massive surplus arms stocks from the West and the former Soviet bloc, together with new production; open new opportunities which link deals at advantageous prices for actors involved in ongoing heavy conflicts. Today brokers enjoy considerably greater access to supplies of new and surplus weapons than during the Cold War era. By arming combatants in both intra-and inter-state conflicts, their destabilizing role in geopolitical affairs assumes a far greater magnitude than their small numbers might suggest. Today, brokers often transfer military leftovers from one conflict to another (Small Arms Survey, 2001). Offshore banks and tax havens are used to hide, move and launder the large amounts of cash used in illegal arms sales. The increasingly borderless world allows for rapid and generally anonymous money transfers to destinations not yet

reached by international anti-money laundering efforts (United Nations Commission on Narcotic Drugs, 2008).

## 5 Role of international law for eliminating illicit arms trade

International illicit arms trade is based on the behavior of recipients and their actual use of the weapons. States and non-states actors have secretly carried out transfers shipping maritime, airway lines or land transportation SAWL because they are lightweight, cheap also easily camouflageable to long distances. International community has attempted to regulate the global supply of small arms through non-binding agreements and embargoes. **Illicit flows of small arms and light weapons undermine security and the rule of law, and through this, they increase the intensity of violent conflict. They are often a factor behind the forced displacement of civilians and massive human rights violations.** Since the illegal arms trade is reflecting international community's dangerous problem, it requires a global cooperation for deter and response. Of course, the safest way to guarantee full participation has to influence the upcoming common solution ways. **This raising global impact** of SALW trafficking on civilian populations has received increasing attention from international organizations including NGOs, academic institutions, national governments (Caşın, 2014: 461-478).

- How can we define clear *parameters for and agree on a comprehensive mechanism* for controlling the legal trade in these weapons?

There is extensive evidence that many of the weapons circulating in the *illicit market originate as state-sanctioned*, or legally transferred, weapons. An essential element of *efforts to combat illicit trafficking must therefore be to have control over the legal trade to prevent* diversion to unauthorized end-users. The key actor at the international level is the United Nations. The Wassenaar Arrangement, comprising arms exporting countries from around the world, has also adopted several important small arms measures (Small Arms Survey, International Measures). International small arms control efforts have focused on parallel major issues, including the negative effects of arms proliferation and misuse, and transnational organized crime as major threats to stability and security. These efforts have generated several instruments and processes that have mutually influenced each other:

- Central among these is the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects—known as the Programme of Action or PoA—adopted by UN member states in 2001.
- The final component in the suite of principal global instruments governing small arms control is the Arms Trade Treaty (ATT), adopted by UN member states in April 2013 (Parker, Wilson, 2014).

Nevertheless, since the mid-1990s, efforts to prevent small arms proliferation have intensified. Initiatives have developed at national, regional and global levels at a remarkable pace (by the glacial standards of international policymaking), with organizations such as the European Union, the Organization of American States, and the United Nations playing leading roles. At the same time, some governments have restrictively defined the illicit trade as those international transactions which are not authorized by either one or both states concerned in the transfers. Whilst such transfers are clearly illicit, a wider, global definition of the illicit trade in SALW has, in fact, been articulated by the UN Disarmament Commission (UNDC) whose definition of the illicit trade is "that international trade in conventional arms, which is contrary to the laws of States and/or international law". International law specifies a number of direct prohibitions on transfers of arms. These can take the form of UN arms embargoes and trade sanctions, which impose a ban on the export of some or all categories of arms to particular end-users, or controls on specific types of weapons whose effects are deemed inhumane or excessively injurious. International law also curtails states' freedom to authorize transfers with restrictions primarily dependent upon the use being made of the weapons. Accordingly, states should not transfer arms which they know could be used to violate the following principles:

- The prohibition on the threat or use of force;
- Non-intervention in internal affairs of other states;
- Preventing terrorism;
- International humanitarian law;
- Human rights law and standards; and
- Preventing genocide (British-American Security Information Council, 2000).

Historically, domestic crime prevention experts, police and governments have been interested in international aspects of firearms controls insofar as they affect domestic interests, for example, by fueling the illegal gun trade or by presenting models of what works and what does not work. International small arms control experts have recognized the strong link between peace building and preventing the proliferation of firearms, but tend to focus on the issues related to controlling small arms in conflict or post conflict contexts. The links between movements to improve domestic controls on firearms (gun control) and international effort to promote peace and disarmament (small arms control) have been obvious to many of the groups involved in the process (Cukier, 1998: 73-89). Today, also considering rising international conflicts on global dimensions, modern international law aims to achieve the goal of preventing the flow of weapons to criminal organizations, terrorists and other de-stabilizing non-state actors. All countries involved in the international trade in conventional weapons have a stake in securing adherence to international humanitarian law (IHL), preventing human rights violations, and promoting human security. The consequences of inadequate arms controls are often demonstrated through domestic instability, conflicts, crime



and corruption, as well as through other related problems such as human rights abuses, systematic homicides and gender-based armed violence. Irresponsible and illegal arms trading contribute to human insecurity in various ways: it hampers political life, disrupts health services, and leads to poor food and environmental security (Kytömäki). Yet, there is still much more to be done. Reports of lost, stolen, and diverted small arms and light weapons are daily reminders of the continued prevalence of weak export controls, poor stockpile security practices, and inadequate or nonexistent border security. Particularly disheartening are arms shipments to war zones and dictators. Since 2001, UN investigators have documented numerous violations of arms embargoes on governments and armed groups in Liberia, Sierra Leone, the Sudan, the Democratic Republic of Congo, and Somalia. There is no doubt that small arms are used to kill and injure hundreds of thousands of people worldwide each year and represent a major threat to human security. When we look into the international human rights law including international norms against genocide, war crimes limit the actions of the state's responsibility to protect the civilian victims. Because, non-state actors and terrorist organizations used SALW and modern ammunitions against human rights violations that international killings to civilians used in all these conflict environments. Thus, international law aims to limit SALW proliferation to non-state actors both in peacetime and wartime with the intention to prevent threats to the security of civilian citizens. Law enforcement has historically been a data-intensive endeavor. Investigating criminal activity, such as SALW trafficking, and implementing policy to correct deficiencies are heavily dependent upon information and intelligence for their success. The costs, such as time and money, associated with collecting, managing, analyzing, and disseminating information and intelligence directly affect the value of these resources to an organization (Gildea & Pierce, 2007: 1-31).

From 1991 to 2003, major exporters halted legal arms transfers to Iraq – on paper and in practice. But was the embargo successful? In August 1990, the UN Security Council imposed sanctions, including a full arms embargo, in response to Iraq's invasion of Kuwait and subsequent military misconduct (UN Resolution 661) (UNHCR, 1990). After the fall of Saddam Hussein in 2003, all trade restrictions were lifted, with the exception of the arms embargo, which was modified to allow for arms transfers to the interim government (Resolution 1483) (United Nations, 2003). For a better understanding, how illicit sales undermine embargoes may also be useful. Embargoes may increase demand not only from available legal suppliers, but also from black market sources. This becomes especially relevant in the post-Cold War era as embargoes have become increasingly multilateral, and former Soviet weapons have made their way to the black market. Additionally, when unilateral embargoes are implemented by a target's major suppliers, the black market may also provide replacement parts for existing weapons that alternate legal sources may not be able to offer (Erickson, 2013: 159-174). Controlling cross-border transfers of weapons is a particular challenge for the international community because it cannot be fully addressed without the

concerted action of all states (Boivin, 2005).<sup>19</sup> However, under international human rights law, states are not only responsible for the actions of their agents (e.g., military and law enforcement), but they also have a duty to prevent patterns of abuse committed by private persons, whether or not they are acting under the control of the state (Centre for Humanitarian Dialogue, 2006).<sup>20</sup> I hope, in order to avoid complicity in violations of international law—and in furtherance of all states' existing obligation to “ensure respect” for IHL—States must develop and rigorously apply detailed criteria to guide them in making decisions about the transfer of small arms and light weapons.

High levels of illicit arms and ammunition in circulation contribute to insecurity, cause harm to civilians and severely constrain assistance activities. The United Nations and other organizations providing protection, humanitarian aid and development resources are confronted with this reality on a daily basis (United Nations Security Council, 2015). The United Nations (UN) Programme of Action, the International Tracing Instrument and, most recently, the UN Arms Trade Treaty represent the main international commitments on combating and eradicating illicit SALW. Within this framework, states agreed to cooperate in combating and ultimately eradicating illicit SALW, through a series of legal and political commitments, at national, regional and international level (Cîrlig, 2015).

A clear, comprehensive set of laws, regulations, and administrative procedures that covers all aspects of the manufacture, transport, storage, transfer, and disposal of small arms and light weapons is a prerequisite to an effective national response to their illicit proliferation and misuse. Roughly three-quarters of UN member states have laws and procedures controlling the import of small arms, about two-thirds control production, and less than one-half control the transit of small arms through their territories. Because arms traffickers are experts at identifying and shifting their operations to countries with lax or nonexistent controls, these legal gaps are problematic (Schroeder & Stohl, 2006). At a meeting of 21 governments in Oslo in July 1998, the Canadian government presented a proposal for a ‘Global Convention Prohibiting the International Transfer of Military Small Arms and Light Weapons to Non-State Actors’. The proposal was presented a year after the signing of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction (Ottawa Treaty) and the report of the UN Panel of Experts on Small Arms (Holtom, 2012).<sup>21</sup> Signed by thirty-one state parties including Australia, Canada, Japan, the United States, and the European Union—the 2011 Anti-Counterfeiting Trade Agreement (ACTA) attempts to establish an international legal framework to address violations of intellectual property rights (Europe Commission Trade, 2008). The new UN Arms Trade Treaty (ATT) – which was adopted by the UN General Assembly in 2013 and entered into force in December 2014 – offers hope of a further reduction in armed violence against civilians, with associated positive impacts on living standards, health and education. The ATT has significant potential to promote human rights, IHL and human security by improving the responsibility and accountability of international arms transfer controls. **Under the landmark**

**(ATT) countries regulate the international trade in conventional weapons - from small arms to battle tanks, combat aircraft and warships - and work to prevent the diversion of arms and ammunition (United Nations Arms Trade Treaty).** The effects of the illicit and poorly regulated trade in conventional weapons are devastating. Governments have the main responsibility to enhance the control of arms flows, through their role in export control decisions. But human rights, IHL and human security touch everyone involved in the trade of conventional weapons, from importers to exporters to transit states. Unauthorized small arms trade is based on an alarming dangerous fact that impacts many nations globally. Illicit trade can interfere with infrastructure and governmental development, security and even education. This committee considers addressing the illicit arms trade as its own issue by carefully assessing whether the current ATT has had an effective result of reducing the number of arms trafficked and whether the negative impacts of trade upon communities have decreased. Three aspects on which all delegates should focus in regard to prohibited arms trade itself are *production, marking and tracing, and ammunition.*<sup>22</sup>

In terms of legal cost effectiveness and ethical side no one can ignore ongoing illicit weapons trafficking problem, we suggest a broader awareness, dangerously affects almost every region of the world. Because states under the responsibility and keep criminal responsibility for protection of their citizens' lives. This rule is binding all independent states complicity in connection with international treaties. We will propound following some academic questions in legal framework for control illegal arms trafficking:

- What can the UN and international community do to take better steps in order to *regulate responsibility on safeguard control effectively* by the involvement of transnational network to stop illicit SALW trade?
- How can we development of methods to monitor democratic public opinion awareness about illicit arms trade response of the EU Organization?
- What can nations do to supply SALW to the international market to make sure they are properly marking accountability framework and keeping data records of weapons to eliminate concept of criminality?

Under international criminal law the activities of arms trafficking give international community the need to effectively reinforce understanding of the linkages such as Report of the UN Commission on Crime Prevention and Criminal Justice (1997) domestic and international combined legal regulations efforts. This coordination network will be reducing the misuse (theft; diversion from surplus unwanted weapons partnership with primary, secondary via brokers) and to prevent proliferation of SALW. International agreements will also encourage nations to establish procedures to monitor legal sales, transfer and stockpiling of small arms and light weapons, and urge governments to make the illegal manufacture, trade and possession of such weapons a criminal offense. This objective to combat illicit trafficking of international law should establish and

strengthen international information exchange programs will be legally binding with follow-up processes to UN Report of the Disarmament Commission including an annual review of the status SALW defense contractors or as the military industry capacity marketing sales in legal dimension. The law may require designated state authorities to maintain records of all licensed firearms, including details of corresponding licensee. For legislation to be effective it is important that those affected by its provisions are aware of their new obligations and responsibilities. As such, providing accessible information to the public and across government agencies on the content and implications of new or revised laws is vital. Encompassed within this term, 'illicit transfers' are two overlapping categories: the grey market and the black market. The global illicit trade in small arms is estimated to be worth around US\$ 1 billion annually. The illicit trade accounts for 10-20 per cent of the total trade in small arms but is the prime culprit in fueling crime, civil conflict, and corruption. Since the end of the Cold War, the motives for supplying illicit small arms have become more financial and commercial than ideological (Small Arms Survey, 2001).

International and EU legal frameworks that have a bearing on illicit firearms trafficking are broadly defined, and leave signatories with considerable discretion on how key provisions are implemented. Example provisions on the criminalization of illicit firearms trafficking are included in the UNODC's Model Law. However, the Model Law itself has no binding force on EU Member States. The European Commission aims to make exports of firearms subject to export authorizations that must contain the necessary information for tracing the firearms, including the country of origin and of export, the consignee and the final recipient, as well as a description of the quantity of the firearms, their parts, components and ammunition. However, there are a number of limitations. Firstly, the legislation does not apply to firearms intended for military purposes. Secondly, it only concerns trade and transfers of firearms between EU Member States and countries outside the EU (European Union Publications Office, 2014). While there is a European Union (EU) directive on firearms, which regulates the movement of civilian-owned firearms throughout the EU, most other legislation to regulate the import, export and transfer of arms is promulgated at national level. There is a growing awareness, however, of the need for standardized guidelines across the EU that provide minimum criteria for the movement of weapons (Meek, 2000).

## **6 Conclusion**

Establishing international control over all arms is the primary condition for security and peace at global level. In sum, we assess that one of the most important steps will be that the international community should actively develop and implement legislation for all states arms production and sales contracts in their national law dimension. In this regard, I think it's important and necessary to develop new international criteria concepts, encourage accountability, law enforcement and encourage specific management for small transfers especially limitation of arms to non-state armed groups with establishment of effective

regulatory control on private arms brokers critical key points. As illustrated above, this law enforcement is so important specifically to promote public security and prevent human rights violations. To accomplish these important targets, states should reorganize control mechanisms for implementing UN and regional arms embargoes, such action will go a considerable way to prevent the unauthorized arms trade proliferation and misuse of SALW.

In order to prevent SALW from falling into the wrong hands, and limiting irresponsible uses of illegal arms by non-state actors we need strong international legal measures to control cooperation targeting the illegal firearms market. Thus, if international community gives main priority with *replaced ongoing strategies to control and regulate the legal firearms market* we can go ahead to deter the illegal arms trade worldwide. Otherwise, regarding global conflicts potential and dynamic arms demand capacity in terms of the raising level of violence's possibly that the *illegal market may become more effective* and could create new opportunities for criminal organizations. In the global small arms market, there are key weaknesses to the current system of laws. First, international law is applicable to states and inapplicable to non-state actors (NSAs). The international community has been slow to respond and adapt to the rise of power and influence of non-state actors and non-state actors can use this inadequate adaptation as a strategic opportunity (Snyder, 2008). Governments should be aware of the fact that the existence of arm trafficking is increasing all over the world. Attaching importance to the prevention of and crackdown on crime of arm trafficking is necessary for the security of the public

## Notes

<sup>1</sup> Armed rebel groups, 'freedom fighters', paramilitaries, or warlords; • Paramilitaries and other NSAs closely associated with state agencies; • Civilian militia including communal groups and militias, civil defence forces, vigilante groups; • Terrorists and terrorist organisations; • Criminals and criminal groups, including black market arms traders; • Political parties and associated political groups; • Private military companies.

<sup>2</sup> Between 2007 and 2012, conflict-related deaths were recorded in almost one out of two countries or territories in the region: Algeria, Egypt, Iran, Iraq, Lebanon, Libya, the Palestinian Territories, Syria, and Yemen. These nine countries and territories also rank among the 25 countries and territories with the lowest scores for 'political stability and absence of violence' in 2012, according to the World Bank's worldwide governance indicators.

<sup>3</sup> Conflict zones, or "complex emergencies," are defined by the United Nations and Interagency Standing Committee as "humanitarian crisis [es] in a country, region, or society where there is a total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing UN country programme."

<sup>4</sup> The proliferation of illicit small arms has significant potential implications for mortality rates and injury in any community, although it cannot always be assumed that non-state actors are more likely to misuse weapons than those employed by national governments. However, illicit arms are of particular interest precisely because, by definition, they lie outside the control of governments. The illicit holding of small arms, especially by

insurgents, poses a potential threat to the state monopoly of lethal force, possibly undermining social and economic stability and introducing an element of contestability into the rule of law.

<sup>5</sup> Because the production of small arms and light weapons requires little in the way of sophisticated technology, and because these weapons are manufactured for military, police and civilian use, there are plentiful suppliers around the world. In addition, the existence of many tens of millions of such weapons whether newly produced, given away by downsizing militaries or recycled from conflict to conflict leads to bargain-basement prices in many areas around the world.

<sup>6</sup> The increasing sophistication and lethality of rapid-fire assault rifles, automatic pistols and submachine guns and their diffusion to non-state actors has given such groups a firepower that often matches or exceeds that of national police or constabulary forces. With such weapons capable of firing up to 300 rounds a minute, a single individual can pose a tremendous threat to society. The incorporation of new technology into shoulder-fired rockets, mortars and light anti-tank weapons has only increased the firepower that warring factions bring to bear in civil conflicts.

<sup>7</sup> Small arms are easy to use and maintain, require little maintenance or logistical support and remain operational for many years. Such weapons require little training to use effectively, which greatly increases their use in conflicts involving untrained combatants and children.

<sup>8</sup> Small arms and light weapons can be carried by an individual soldier or light vehicle, are easily transported or smuggled to areas of conflict, and can be concealed in shipments of legitimate cargo.

<sup>9</sup> These forces have limited financial and technical means, lack professional military training, and often must operate in remote and inaccessible areas—all conditions that favor the use of small arms and light weapons. At the same time, many states have increased their purchases of these weapons for use in counterinsurgency campaigns against ethnic and political groups and to suppress domestic opposition movements.

<sup>10</sup> A *supply side approach* is based on company data of arms sales, where national arms production is the sum total for all companies in the national arms industry. There are numerous problems with this approach: Identifying all (or at least all sufficiently large) companies within the national arms industry. Separating military from civil sales for each company (as discussed above, this is not always possible). Avoiding double-counting – which happens if the sales of components and subsystems of one company are added to the sales of the final systems in which they are included of another company. Cross-border ownership of arms companies: in estimating arms production within a country, it would be necessary to include the arms sales of foreign-owned companies within the country, and exclude the arms sales of foreign subsidiaries of companies from the country in question. The division of a company's sales between operations in different countries is not always available.

<sup>11</sup> The *demand side approach* often offers more potential, as governments in developed economies generally publish reasonably detailed expenditure data, for example for equipment expenditure by the ministry/department of defense, or volume of contracts with industry. Many countries also publish annual figures on the value of arms exports. There are nonetheless often problems with this approach too: The private arms industry provides not only equipment to armed forces, but a range of outsourced services, which would come from the operations and maintenance budget, rather than equipment. Therefore figures for expenditure or contracts with industry, rather than just equipment spending, are needed. (This is available in some cases). Figures for government spending with industry must also exclude arms imports, or some other source of data on arms imports must be available.

Different countries employ different definitions of arms exports, so figures may not be comparable.

<sup>12</sup> Estimates of some common models produced by these countries in the past few decades show the enormity of the problem: 5 million to 7 million Belgian FAL assault rifles produced in 15 countries; 35 million to 50 million Soviet/Russian AK assault rifles manufactured by Soviet/Russian factories and licensees; 7 million German Heckler & Koch G3 assault rifles made in 18 countries; 8 million U.S. M-16 rifles produced in seven countries; and 6 million Chinese-made AK-type assault rifles.

<sup>13</sup> Procurement analysis suggests that within a 50 year period, world production of military assault rifles, carbines, pistols, and light and heavy machine guns would range between 36 million and 46 million units, with an annual production of small arms alone (firearms, rather than light weapons) averaging 700,000—900,000. Accurate assessments are difficult, complicated by the reluctance of many states to report publicly on their legal production, exports, and imports of small arms. Analysis of their illegal activities is even more difficult. Significantly, many important exporters are not major producers of small arms, with substantial numbers of legally acquired small arms entering illicit markets through corruption, seizure, and loss.

<sup>14</sup> It includes articles concerning illicit manufacturing and trafficking in firearms (as defined by the Protocol) as national criminal offences, criminalizing illicit manufacturing of and trafficking in firearms, having adequate security measures over stored firearms, establishing a system of authorization or licensing concerning legitimate manufacturing and commerce, marking, recording and tracing firearms, and international cooperation.

<sup>15</sup> While most arms trafficking appears to be conducted by private entities, certain governments also contribute to the illicit trade by deliberately arming proxy groups involved in insurgencies against rival governments, terrorists with similar ideological agendas, or other non-state armed groups.

<sup>16</sup> It consisted of three interconnected parts: The Reagan administration sold arms to Iran, a country desperate for materiel during its lengthy war with Iraq; in exchange for the arms, Iran was to use its influence to help gain the release of Americans held hostage in Lebanon; and the arms were purchased at high prices, with the excess profits diverted to fund the Reagan-favored "contras" fighting the Sandinista government in Nicaragua. It was a grand scheme that violated American law and policy all around: Arms sales to Iran were prohibited; the U.S. government had long forbidden ransom of any sort for hostages; and it was illegal to fund the contras above the limits set by Congress.’’

<sup>17</sup> The consistent players in this market are independent brokers, who communicate with the cartels, arrange financing, coordinate the lesser players and conduct the final sale. As in most industries, there are probably more and less successful brokers operating in parallel, coordinating both large and small operations, although the hormiga method likely constrains growth. This is undoubtedly organized crime, but organized crime of a type frustrating for law enforcement, since there are too many loosely connected players to make much headway through arrests and seizures. In the end, the cross-border trade in arms is best seen as a market, rather than a single criminal enterprise or a series of enterprises.

<sup>18</sup> **Invisibility:** Considering the transient, intangible, and invisible nature of facilitating and arranging deals, brokers often do not even see, much less take concrete possession of, the weapons they procure. As a result, they cannot easily be held legally accountable under contractual arrangements based on the notion of ownership.

**Autonomy:** Most brokers act independently as middlemen, which is what the term ‘broker’ implies. By bringing together buyers and sellers, they could, in principle, be said to bear equal responsibility for the arms transactions they facilitate. Because parties to an illicit

weapons deal rarely take recourse to contract litigation, brokers often serve as arbitrators or neutral third-party witnesses to minimize violations of the deal.

**Expertise:** Brokers are a source of sophisticated expertise for arms suppliers and buyers who might not otherwise know how to negotiate the dark corridors of illicit market deals. They Invisibility: Considering the transient, intangible, and invisible nature of facilitating and arranging deals, brokers often do not even see, much less take concrete possession of, the weapons they procure. As a result, they cannot easily be held legally accountable under contractual arrangements based on the notion of ownership.

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**Management:** Superior management skills are practically a prerequisite in this ‘profession’. Since brokers are usually the ones responsible for setting up and maintaining the structure of arms transactions, they play a vital role in maintaining the complex network of intermediaries and sub-contractors that comprise any given transaction. In addition, brokers’ abilities to secure the expertise of financial and transport agents and to ensure the timely flow of goods, documents, and payments illustrates their managerial skills in providing knowledge and know-how at the same time they are running covert, continent-spanning, military-style operations.

<sup>19</sup> It is a typical collective action problem, where lower regulatory standards or lesser regulatory capacity of a few states can usurp the best intentions of the rest. Too easily, small arms find their way to those who abuse them because states have not sufficiently controlled what leaves their territory and to whom it goes.

<sup>20</sup> Failure to exercise “due diligence” taking effective steps to protect individuals from organized crimes, such as kidnapping and killing for ransom, can amount to a violation of human rights law. Several recent regional agreements also include provisions calling for careful regulation of small arms in the hands of civilians. The Nairobi Protocol is one of the most specific on the regulation of guns in the hands of civilians. One of its objectives is to “encourage accountability, law enforcement and efficient control and management of small arms held by States Parties and civilians”.

<sup>21</sup> The proposal stressed the need to ensure that transfers of military SALW are better controlled to prevent their delivery or diversion ‘into the wrong hands’, and discussed a range of possible elements for the convention relating to definitions of SALW, international transfer and NSA. It also stressed the need to promote greater transparency of SALW transfers and mechanisms to assist States Parties to solve problems and review the operation of the mechanism.

<sup>22</sup> **Production:** Although addressing the sale and trade of arms, the ATT makes no mention of combatting the illegal production of small arms. In many parts of the world, bullets and weapons are built using spare materials that are available, and these weapons are among the hardest to track and stop, since they pass through no legally recognized state or business.

**Marking and Tracing:** “If national law enforcement officials were able to trace small arms back to their last legitimate owner, who might then be held accountable, this would form an effective measure against illicit trade and diversion.” Delegates should seek an effective way to mark and trace weapons upon production as well as encourage other nations to keep appropriate and accurate records.

**Ammunition:** Over 80 percent of ammunition trade is done outside of reliable export data. However it is the key to tracking illegal small arms trade. “Preventing [ammunition stockpile] resupply in unlawful situations should be a matter of prime concern.”



Ammunition stockpiles in heavily populated areas are easily sold as legitimate sales and are the cause of thousands of casualties each year.

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## International Adoption – Does Corruption Undermine its Noble Purpose?

SUZANA KRALJIĆ

**Abstract** Some countries, also the Republic of Slovenia, are facing with the problem of deficiency of eligible children for adoption. But on the other hand, there are also countries, where are present, constantly (for example: Russia) or due to specific reason (for example: war, natural disaster), many children who are abandoned by their parents, and living on the streets or in orphanages. The Hague Intercountry Adoption Convention therefore presents today important international document, which role and necessity cannot be ignored. Intercountry adoptions should follow the principle of subsidiarity, principle of the child best interests and the child's right to be heard. The intercountry adoption should serve the noble purpose – to give to the children, without parents or proper parental care - the second chance to get better childhood and life in new family.

**KEYWORDS:** • unparented children • subsidiarity • the best interest of the child • intercountry adoption • central authority

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## 1 Introduction

Parents are obliged to raise their children and care for their best interest. But, if parents are not capable, allowed or willing, the state has the duty to care for such children by several alternative forms of protection and upbringing of children (eg. foster care, guardianship, adoption, institutional care). Adoption being a permanent form in comparison with other measures (*adoption naturam imitator*) is frequently named as most appropriate and most qualitative alternative form of child's care. This noble goal is especially exposed in case of intercountry adoption that are supposed to enable the child a more secure, happier and better environment and family for child's growth. But, one cannot pass by the fact that in public and in media there are more and more »stories« raising doubt, whether intercountry adoption really is a better solution and for the best interest of the child. Namely, at intercountry adoption the changes are in the child's geographic, linguistic, religious, philosophical, cultural and other fields. A clear position has to be taken that adoption is meant for the child and not for the parents. However, frequently, the wish of individuals or couples to have a child that they might not be able to obtain naturally, is in the foreground. For the realization of this wish, they are prepared to pass the "cross road" and many "organisers" of intercountry adoptions are aware of that and make profit of potential adopters in different ways. Here, the economic component is in the foreground. In the same way, one cannot pass the fact that even adopters maybe do not follow the primary goal to be reached by the adoption (the best interest of the child), and wish adoption for other reasons (e.g. cheap labor force, social position, economic benefits, child trade aiming for organ donors, child prostitution, pedophilia and other). This is why in adoption, and especially in intercountry adoption, we have provided for proper mechanisms for the prevention of such adoptions. States facing criticism on the intercountry adoption in the past (e.g. Romania, Haiti, Guatemala) have restricted provisions regarding intercountry adoption and formed protective regulations making adoption of children abroad more difficult or impossible (e.g. moratory, supervision of the work of agencies dealing with adoption, training of social workers ...).

## 2 Short overview of the current situation in the field of adoptions in Slovenia

At the moment, in the Republic of Slovenia (RS) 509 applications for adoption have been filed (status of April 2015). Of these, there are 369 applications by either couples (married or not) or individuals, who have already been graded as proper for the adoption. The remaining 140 applications are still undergoing testing of appropriateness. In 2014 in RS there were 45 adoptions (14 from abroad), in 2015 there were 36 (11 from abroad) (MDDSZ, 2015). From the mentioned we can conclude that there are many couples in the RS, who wish to adopt a child, but there are essentially too few children. As 'demand is bigger than the supply', the waiting period of potential adopters may be more than even ten years. This is why



couples are ready to adopt a child from another state in their wish for a child. Consequently, the number of desires for intercountry adoption increased in the past months, as for many people, it might be the last chance to enable the fulfilling of the wish for a child.

Here, one has to emphasise that the situation shall not be marked as a new situation, since the RS has faced the lack of ‘children at disposal’ for adoption already in the time of former Yugoslavia. The status of that time was much more favourable, of course, as couples went for the children to other federal republics and to the autonomous regions and so, the so-called inter-federal adoptions came up. After the fall of former Yugoslavia, in the field of adoption there was a big emptiness, as at once there were no more ‘children at disposal for adoption’ (Kraljić, 2009: 87). Today, Slovenian couples and individuals think and also face adoption from abroad, i.e. intercountry adoption. In the past ten years, in this way most of the children in the frame of intercountry adoption in the RS were adopted from Russian Federation, Ukraine and Ghana (MDDSZ, 2015).

On the other hand, there are states that face a high number of children not taken care of by their parents. Protection and care dedicated to these children by their states is various. It reaches from foster care, institutional care, orphanage and frequently even unsatisfactorily, as is visible from expressions of child abuse (e.g. pornography, prostitution, slavery, the donation of organs, street kids). As even the institute of intercountry adoption may frequently be a source of child abuse, individual states, where ‘children are at disposal for adoption’ (e.g. Romania), determined and formed protective measures with the goal to make intercountry adoption more difficult, impossible or even hindered, when domestic children are adopted into another state. This problem is especially re-opened in the case of e.g. natural disasters (e.g. Haiti, Malaysia) and war events or military conflicts (e.g. Bosnia and Herzegovina, Syria, Afghanistan), when a larger number of children fitting for adoption occurs. In such cases, it is the task of the state to firstly search for the closer relatives of the child, and this is especially difficult in cases of natural disasters and war events, as search might last for several years. Only, if the child’s natural parents or other closer relatives cannot be found, other proper alternative care in the state of the child and finally adoption may be provided for and the child shall be ‘declared’ proper for intercountry adoption. In all this, time plays an important role. Namely, many wish for a child as young as possible. Time is a factor working against the children. Namely, children grow and become older, what practically lowers their chance for adoption at home, as well as intercountry adoption.

### **3 General on international adoptions**

The basis for adoption is already given in the Constitution of the Republic of Slovenia (Ustava Republike Slovenije) (hereinafter: CRS) from year 1991, which

in Art. 56/3 emphasizes, that children and minor who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy the special protection of the state. The state provides for protection of minor children always, when their healthy development is endangered or when this is demanded by other benefits of the child. This is the case at adoption, as by adoption as special form of protection of minors a same relation of parents and children appears between the adopter and adoptee. In these cases, the primary carriers of child care fall out, and due to several (subjective or objective) circumstances they are not able to care for their child. Such a child has to be provided for by an alternative form of protection and here, adoption represents the most qualitative possibility provided by the state. The adoption might be by the consent of the child's parents (e.g. the parents decide on their own to give the child for adoption) or without the consent of the parents (e.g. are permanently deprived of their parental right).

In line with art. 140, the Marriage and Family Relations Act (Zakon o zakonski zvezi in družinskih razmerjih) (hereinafter: MFRA) allows intercountry adoption of a child under certain conditions. It names that the adopter may exceptionally be a foreigner, if the Centre for Social Work cannot find adopters among the citizens of the RS for a child to be adopted. For an intercountry adoption, consent by the minister for family affairs and the minister for administrative affairs has to be obtained. The consent is not only needed in a case of a one-sided adoption, i.e. if the adopter is the spouse of the child's parent.

Since, as mentioned, there is not enough children ready for adoption, a potential adopter decides also for intercountry adoption that may happen based on:

- a) bilateral agreement (hereinafter: BA) – RS has concluded the BA (2008) only with Mazedonia. Expectations were huge before the entering into the BA with Mazedonia, but in practice they were not met;
- b) the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter: HAC) that was adopted in 1993 and stepped into force on May 1<sup>st</sup>, 1995. It has 96 member states today (status April 2016) (HCCH, 2015);
- c) The Private international law and Procedure Act (Zakona o mednarodnem zasebnem pravu in postopku) (hereinafter: PILPA) – if there is non BA or state of origin of a child or the receiving state is not a member of HAC, the PILPA is used.

The field of intercountry adoption is also touched by the Declaration on social and legal principles relating to the protection and welfare of children, with special reference to foster placement and adoption nationally and internationally, which was adopted by the General Assembly of the United Nations in year 1986 (hereinafter: Declarationa UN 1986). The Deklaraciona UN 1986 set special

grounds for the field of adoption, national and international, and the HAC built on those from 1993 on.

Today, the ground for intercountry adoption is represented by HAC, which is based on the principle of subsidiarity. Intercountry adoption shall be the *ultima ratio* possibility. First, one has to be sure on other possible alternative support to the biological parents with the intension not to separate the child from them. Only, if this is not possible, the child shall be given to adoption. If it is established that the child is proper for adoption, an adoption within the state shall be tested, and only after the failure of that international adoption shall be considered. The principles of subsidiarity derives from HAC (Preamble and art. 4) as well from Declaration UN 1986, which provides, that the the first priority for a child is to be cared for by his or her own parents (art. 3). When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute - foster or adoptive family or, if necessary, by an appropriate institution should be considered (art. 4 Declaration UN 1986). And finally, if a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family (art. 17 Declaration UN 1986).

The principle of subsidiarity of intercountry adoption may be followed also in the Convention on the Rights of the Child (Konvencija o otrokovih pravicah) (hereinafter: CRC) from 1989. Thus, from CRC derives that the primary goals are directed towards the preservation of the biological family and the child's parents. But, the primary goal shall be followed only, if by this the proper protection of the best benefits of the child may be reached. So, intercountry adoption represents a measure *ultima ratio*, as it is to be performed only, if all other measures to provide for the help to the natural parents and the quick return to the family of the child failed. When the circumstances of the case clearly show that the parents will not care for the child's upbringing and protection any more (for example: the death of parent, mental disease with no chance for healing, the parents' own decision not to care for the child, incapacity of the parents), there is an obligation by the state to provide the child with protection and upbringing in the framework of one of the alternative forms foreseen by national legislation (e.g. foster care, custody, adoption, etc..) (comp. art. 21 CRC). For the child, it is of essential meaning that the measures in such cases are quick and accurate. Adoption, among all alternative forms of upbringing and protection, represents the most qualitative one. Namely, the child as a human being is extraordinarily vulnerable due to the child's age and lack of development in early childhood, she/he needs parental care for survival that will enable it on a longer term to physically survive and mentally and spiritually development. Even the best institution may not provide for such a kind of care as is needed by babies and younger children (Bartholet, 2009: 15).

As mentioned, initiatives for intercountry adoption are already given in CRC, where it is already stated in the preamble that for his/her full and balanced personal development a child has to grow up in a family environment, in the atmosphere of happiness, love and understanding. This also derives from art. 2 Declaration UN 1986. All activities in connection to the children, the child's best interests will be the guiding principle. The states should ensure that every child has the right to grow up in a family environment, to know and be cared for by her or his own family, whenever possible. Recognising this, and the value and importance of families in children's lives, families needing assistance to care for their children have a right to receive it. When, despite this assistance, a child's family is unavailable, unable or unwilling to care for her/him, then appropriate and stable family-based solutions should be sought to enable the child to grow up in a loving, caring and supportive environment (UNICEF, 2015).

The concrete conventional support to the adoptions is given with the art. 21 CRC. States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. Also Declaration UN 1989 provides that in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration (art. 5). The phrase 'best interests of the child shall be the paramount consideration' makes clear that the interests of other persons must also be taken into consideration (e.g. the biological parents or the prospective adoptive parents) (Para-Arraguren, 1994).

Therefore, the states shall:

- a) ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary. Declaration UN 1986 provides, that sufficient time and adequate counselling should be given to the child's own parents, the prospective adoptive parents and, as appropriate, the child in order to reach a decision on the child's future as early as possible;
- b) recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. Also CRC follows the idea of principle of subsidiarity regarding the intercountry adoptions;
- c) ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of

national adoption. The same provision could be found also in art. 20 Declaration UN 1986;

d) take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it (also art. 20 Declaration UN 1986). It is forbidden that somebody shall gain material benefits from mediation in intercountry adoption without a just reason. Only relative costs, spending and rewards to people involved in adoption might be paid (art. 32 HAC);

e) promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs (art. 21 CRC).

We have to mention also art. 3 CRC that defines the principle of the best interests of the child. Mentioned art. 3 in its first paragraph provides, that in all actions concerning the children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. This principle could be found also in art. 4(1) European Convention on the Adoption of Children (revised) (hereinafter: ECAC) that was not yet ratified by the RS. From the mentioned derives that the mentioned principle also has to be the main guideline in proceedings of adoption. As in case of intercountry adoptions, frequently there is a movement of the child from one state to another, intercountry adoption also reaches into the field of the topic of immigration (Reitz, 2010-11). A child moves from its home state into another state and faces another language, culture, religion and civilisation, and therefore this principle has an important meaning right in intercountry adoption. Namely, at intercountry adoption, besides the separation from the natural parents and other relatives, also separation from the personal and state history, the home country, culture, language, religion, philosophical views, nature and other occurs. All the mentioned may be especially serious for older children, who have been involved into a certain environment for a longer time and have taken over cultural, linguistic, religious and other habits. Therefore, no intercountry adoption should be considered before it has been established that the child is legally free for adoption and that any pertinent documents necessary to complete the adoption, such as the consent of competent authorities, will become available. It must also be established that the child will be able to migrate and to join the prospective adoptive parents and may obtain their nationality (art. 22 Declaration UN 1986).

Frequently, the principle of the best interests of the child is abused, as the states use it as an excuse to hinder intercountry adoption (Kraljić, 2008: 423). In seeking for a solution regarding alternative care for a child, the state has to respect that it is of essential importance for the child that the solution is quick and permanent.

From this point of views it is mostly for the best interest of a child to be adopted as soon as possible. The earlier the adoption, the bigger the probability that between the adopter and the child psychological and family ties will be built, i.e. a relation like between natural parents and their child. Therefore, the state has to do everything that in case of the establishment of the fact that a child will not be able to return to the parents, it provides the child with a proper and early adoption.

#### 4 HAC: Background knowledge

Departing from art. 1, HAC set two fundamental goals, i.e. the introduction of guarantees to provide for the best interests of a child in intercountry adoption and that the child's fundamental rights are respected there, as well as the construction of the system of cooperation between the member states to guarantee for the respect of these securities and to prevent kidnapping, trade or traffic with children; to secure recognition of adoption made in line with HAC in the member states (Geč-Korošec & Kraljić, 1999: 231). HAC is applied only, when a child and the future adopter are from different states. For the member state, in which the child has habitual residence, HAC uses the term State of origin; the contracting state, where the future adopters live and to where the child shall be adopted, is called the receiving state. HAC is applied only for adoptions creating a permanent parent-child relation - *adoption naturam imitator* (art. 2/2 HAC). Thus, it refers as to full adoption as well as to single adoption; this is depending on the inner law of the member states of HAC. After art. 2/1 HAC a child may be adopted either by spouses or a single person. So, from the text of art. 2/1 alone derives that partners living in cohabitations cannot adopt a child under the HAC. The HAC as international treaty, which aim is to promote intercountry adoptions, create interracial, intercultural and interfaith families. Therefore, it is clear that HAC is based on the tolerance of diversity (Hilis, 1998). But is HAC open also to homosexuals as potential adopters? Deriving from the abovementioned art. 2/1 HAC, HAC is not open for adopters living in cohabitations. But is HAC also open for homosexual married couples? Wardle (2008: 135) states that none of its policies or principles endorses or opposes adoptions by gays and lesbians. The HAC is neutral, whether the adoptions of gays and lesbians is permitted. But the regulation of the ECAC revised explicitly extended the provisions to heterosexual unmarried couples who have entered into a registered partnerships in States which recognise that institution. ECAC revised also leaves States free to extend adoptions to homosexual couples and same-sex couples living together in a stable relationship (art. 7 ECAC revised).

Children may be adopted disregarding their nationality or legal status gained in their state of origin, but HAC is not applied, when a child reaches the age of 18 (art. 3 HAC) (Geč-Korošec & Kraljić, 1999: 231).

For a valid adoption, it is necessary to meet certain conditions according to HAC. So, the bodies of the home state (the state of residence of the child) have to establish:

- a) that the child is adoptable;
- b) that the intercountry adoption is in the child's best interests (kar je v skladu with art. 3 CRC and art. 4/1 ECAC revised);
- c) that the persons, institutions and authorities whose consent is necessary for the adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;
- d) that the consent have not been induced by the payment or compensation of any kind and have not been withdrawn;
- e) that the consent of the mother has been given only after the birth of the child;
- f) that the child, having regard to the age and degree of maturity, has been counselled and duly informed of the effects of the adoption;
- g) that the consideration has been given to the child's wishes and opinions;
- h) that the child's consent to the adoption has been given freely, in the required legal form, and expressed or evidenced in writing;
- i) that consent of the child has not been induced by payment and compensation of any kind (art. 4 HAC).

Such a regulation is also in line with the European convention on the exercise of children's rights (hereinafter: ECECR) that is based on art. 12 CRC, providing the child with a capacity to form its own opinion and expression of this in all matters referring to the child and the right to be heard in any judicial or administrative procedure in connection to the child, either immediately or through a representative or a competent authority, in a way that is in line with the regulations of inner legislation – i.e. also in case of intercountry adoption. In line with this, Art. 6 ECECR »**determines that the child's consent is needed for adoption, if it is capable of understanding the meaning and consequences of this. This capacity of a child is judged after the inner law of each state. A child with a sufficient degree of understanding has to be provided with all proper information in line with ECECR.** In the same way, it has to be provided with counselling by the judicial authority or through other persons or bodies on a personal level in private, if needed and in a way according to its degree of understanding, except if this would be in opposite to its best interests. Further, the child has to be enabled to express its opinion in line with its maturity and age, and the expressed opinion has to be properly respected (Kraljić, 2016).

The competent state authority also has to check, whether the future adopter is capable and proper for adoption (social anamnesia, psychological pedagogical

expertise). In the same way, it has to check, whether all counselling needed was obtained and whether the child will be allowed to enter into the receiving state and to permanently live there (art. 5 HAC).

HAC foresees the nomination of a central authority (hereinafter: CA) to deal with the tasks set forth by HAC (art 6(1)). The CA may conduct adoptions mediately or immediately by the help of services carrying public authority and being capable of conducting the tasks entrusted to them. The tasks of a CA are: collection of information, mutual information on functioning of the convention, prevention of unfounded gaining of material or other benefits in connection to adoption, having and exchanging of data on relations of a child and the foreseen adopters, following and enhancing of adoption proceedings, development of counselling for adoption, development of support services for adopters in the own state, exchange of reports and experience between the states (Geč-Korošec, Knez & Kraljić, 2002: 78-9).

CA may conduct certain activities also through institutions, to which authority is transferred and that have to follow only non-for-profit goals, has to work under the leadership and management of people with a capacity regarding their moral integrity, education and experience to work in the field of intercountry adoption, and those have to be under permanent supervision by the competent authorities of the state (art. 11). Every contracting state shall communicate to the Permanent Bureau of the Hague Conference on Private International Law on the designation of CA and, where appropriate, on the extent of their functions, as well as the names and addresses of the accredited bodies (art. 13 HAC).

The CA of the receiving state sends this report to the CA of the state of origin (art. 15 HAC). In line with art. 16 HAC, also the CA of the state of origin is obliged to prepare a report containing data on: the child's identity, the fitting for adoption, the origin, the social environment, the family and health anamnesia of the child and its family and all other eventual special needs of the child to the CA of the receiving state. In the same way, it has to respect the child's upbringing and ethnic, religious or cultural background; it has to secure that all consent was obtained in line with art. 4 HAC and also has to decide based on the data contained in the reports on the child and the applicants, so the foreseen adoption will be in the child's best interest.

HAC does not determine that adoption shall be conducted first and only then a transfer of the child into the receiving state, but it also enables adoption after the placement. But, art. 21 HAC determines that, in case of an adoption after the transfer of a child into the receiving state in case of opinion by the CA in this state, the further being of the child at the future adopters is not for the best interest of the child any more, it has to take measures to protect the child. Therefore, the CA has first to take care that the child is taken from the foreseen adopters and set up its contemporary upbringing and protection. As soon as possible, the child has to be placed in a new residence for the intension of adoption, but if this is not fitting,



it has to take care of another long-term upbringing and protection/custody. All these questions have to be consulted between the CA of the receiving state and the CA of the state of origin. IN an extreme case, the authority of the receiving state has to take care of the return of the child to the state of origin, whilst the child's best interest is respected, again.

Adoption conducted and recognised in one member's state has to be recognised also in other member states (art. 23/1 HAC). Recognition may be refused only, if it would be obviously against the public order (*ordre public*) of the state supposed to recognise adoption, and there the best interest of the child has to be respected (art. 24 HAC). The question of violation of the public order was handled also by the Supreme Court of the Republic of Slovenia in the case II Ips 462/2009 from 28 January 2010. The Supreme Court took the clear position that in principle, each state decides on its own, with values are fundamental for it. Since the RS is in EU and Council of Europe, the Slovenian public order also contains the public order of those institutions' law (the public order of the Community and the contentional public order building the so-called European Public Order). In the framework of the national public order, also those elements deriving from European legal sources have to be protected), which means that the courts of justice have to refuse recognition of foreign decisions, in spite of the fact that they are not violating the public order of their states, but they violate the common values. On the other hand, the courts of justice must not refuse recognition of decisions by a foreign court of justice, in spite of the fact that it is violating their public order, if this refusal would not be justified or proportional from the "European point of view". It would also be the question, whether to recognise a decision on adoption by an American court of justice, by which a homosexual couple adopted a child in the USA and wishes for recognition of this adoption in the RS, as well.

## 5 Intercountry adoptions: pro and cons

Already at the beginning, HAC stresses that intercountry adoption gives an opportunity that a child without a proper adopter in its own home state may be provided with an adopter from another state. HAC strives for the introduction of guarantees ensuring that intercountry adoptions run for the best interest of the child and that the fundamental rights of the child are respected. It wishes to construct a system of cooperation among the partner states that shall provide for respect for these guarantees. And by this also kidnapping, sale or traffic with children shall be prevented (Geč-Korošec, Knez & Kraljić, 2002: 78). The problem of intercountry adoptions is especially sensitive due to the possibility of a hidden child traffic and other forms of abuse that has been realised already in the practice of several states (e.g. Romania, Haiti). Therefore some countries, especially Romania ban the intercountry adoptions. But we must stress that intercountry adoption should not be connected just with negative consequences. In the spotlight must be placed positive view and consequences of international

adoptions and that are child's interests. Certainly is for the best interests of the children if they are adopted in safe familiar environment. The ban of intercountry adoptions often means that abandoned, orphaned and unparented children are placed in institutional care (orphanages) and stay there for many years. The care in such institutions is often impersonal, what marks children for life. Therefore, the children separated from their families and communities during war or natural disasters or other circumstances merits special mention. Family tracing should be the first priority and intercountry adoption should only be envisaged for a child once these tracing efforts have proved fruitless, and stable incountry solutions are not available. The focus is given on preventing the underlying causes of child abuse, exploitation and violence (UNICEF, 2015).

We can separate authors, writing about intercountry adoption, in two groups:

- a) the first group consists of the authors who define intercountry adoptions as a positive solution for unparented children (Iusmen, 2013; Bartholet, 2010-11; Reitz, 2010; Carlson, 2011; Smolin, 2005; Wardle, 2008);
- b) the second group is represented by authors who indicate intercountry adoptions as a system filled with documented and on-going patterns of baby stealing, child trafficking, adoption agency corruption, re-homing, coercion of natural parents into giving up their child and legal violations (Dodds, 2009: 76). The possibility of adopting babies from foreign countries decrease the attention and possibility for adoption from the domestic children which are labelled as 'hard-to-place' children (older children, children with mental or physical disabilities, children from ethnic minorities) (Dickens, 2002).

Dodds (2015) also compares intercountry adoptions with Atlantic slave trade:

- a) both are driven by insatiable consumer demand and need, utilize a system of pricing and dependent on intermediaries in the form of slave hunters and adoption agencies;
- b) both systems are based on the exchange of human beings for money. The slave, born in Africa, was snatched by the slave trader and sold at the auction on the market to slave owner. Today the adoption agency snatches the child, born in a distant land, from a natural mother and sold to adoptive parents through the use of the 'internet market';
- c) for both (for the slave and the adoptee) it is argued to be better for them as compared to those left behind;
- d) both are responses to a need – slavery filled the need for labor and the international adoption fills the needs of prospective parents who desire to create or build a family, or fulfil the savior role.

UNICEF states that the intercountry adoptions have been growing in last years. The international effort is to ensure that adoptions are carried out in a transparent,

non-exploitative, legal manner to the benefit of the children and families concerned. In some cases, however, adoptions have not been carried out in the ways that served the best interest of the children - when the requirements and procedures in place were insufficient to prevent unethical practices, such the sale and abduction of children, coercion or manipulation of birth parents, falsification of documents<sup>1</sup> and bribery (UNICEF, 2015).

In the early 1990s Romania was the main provider of children for the intercountry adoptions worldwide, and especially to USA. Due to poor regulation and the lack of observance of international instruments regulating intercountry adoptions, many abuses were detected. Adoption agencies set up database of children fit for intercountry adoption. Children have been listed with »price tags«, with sums from \$ 6.000 - \$ 30.000, based on their age, health and physical features. Many of children were neither orphans nor abandoned by their parents. They were sold by biological families and adoption agencies manufactured the papers which presented the children as orphans (Iusmen, 2013: 7). New or expectant mothers were placed under various pressures to give up their children for intercountry adoptions (Dickens, 2002: 77). The system in Romania was insufficient to protect the children, what should be the primary guideline also and especially in the case of intercountry adoptions. The adoptions were in best interests of the adopters and not of the adopted children for three reasons: i) it generated the money without outing the interests of the child first; ii) it discouraged domestic adoptions; iii) all children who not qualify as adoptable were adopted (Iusmen, 2013: 8). Therefore, Romania placed in 2001 the moratorium on intercountry adoptions. In following years Romania accepted new laws, which set concrete rules regarding the intercountry adoptions (e.g. conditions, protection, help for biological families, family-type childcare services...). After the ban of intercountry adoption, the number of children in residential care dropped from 57.181 in 2000 to 22.742 in 2011 due to de-institutionalization, while the number of children placed in family care solutions doubled, peakink to 43.518 in 2011 (Iusmen, 2013).

Since 1990, close to 250.000 foreign children have been brought to USA on the basis of orphan visas for the purpose of adoption. This is the greatest relocation of children in USA since the Orphan Trains of 1855-1929 (Dodds, 2015: 76). Corruptions and abuse in USA are so vast, that between 1995-2008, nearly half of the 40 countries listed in by the US State Department as the top sources for the intercountry adoption temporarily halted adoptions or were prevented from sending children to USA (Dodds, 2015: 76).

Adoption agencies often misuse young, unmarried and destitute mothers. This mothers give their children for adoption with the intention to provide better life for their children (Dodds, 2015; Hayes, 2011). Argumentum a contrario is given by Carlson, who argues, that adoptive parents don't take the child from biological parents. The biological parents relinquish the child for adoption without financial

payment and coercion. They decide to give their child away because of their own situation (poverty, to many own children, poor housing circumstances, illness...) (Carlson, 2011). Therefore, we can come to the conclusion, that the necessity for the intercountry adoptions is today very strong present, is undeniable and for many children last saving grace for better life.

On one hand the adoption agencies charge the adoptive parents with very high grants for adoption proceedings (e.g. up US\$ 65.000), and on the other hand the monthly amount which would allow a mother and a child to stay together as a family were in Ethiopia is US\$ 15 per month (Dodds, 2015; Peterson, 2011). But keeping unparented children in their country of origin does nothing to actually strengthen the economic and political situation of poor countries and their people (Bartholet, 2009: 27). It is difficult to determine the border between the illicit and legal payments, and which costs exceed 'reasonable remuneration' and become 'improper gain'. The costs can differ regarding the wages, living conditions, structures and needs in each state. The fees between the Australian overseas adoption programs vary immensely from country to country, from AUD\$ 1000 to adopt from Thailand to US\$ 12.000 to adopt from Korea or US\$ 9.500 from Ethiopia (Petersen, 2011: 14).

Carlson (2011), Bartholet (2010/11) and Reitz (2010-11) stress they are aware that illegalities exist also in area of international adoptions, but that the adoption abuse is not widespread. The corruptions, trafficking, fraud, or other abuses should not obscure or negate the positive impacts of international adoptions on children, which have been abandoned or unparented. Smolin (2005: 452) also emphasis that the cultural dominance of corruption (in his case in India) is no reason to leave Indian children to suffer from infanticide, abandonment, starvation, living in the streets, being raised under horrific conditions in institutions, or other such fates.

But however, UNICEF still supports intercountry adoptions and defines it as a stable and permanent care option for individual children who cannot be cared for in a family setting in their country of origin (UNICEF, 2015). Unparented children have a right to be placed in international adoption if that is where family, love and homes are available. They have right to be liberated from conditions characterizing orphanages, street life, and foster care (Bartholet, 2009: 16).

## **6 Final thoughts**

Today is undeniable, that adoption is the best alternative care for children without parents or if the parents don't want to take care about their child. Some countries are today facing with problem of missing of the eligible children for adoptions. Therefore, they are searching for new possibilities. The HAC opened better possibility for intercountry adoptions, which have been connected in past years with many negative reactions. Despite all negativities, which we have been faced in past years, we cannot overlook positive facts on intercountry adoption. The

adoption and also intercountry adoption is in the best interests of child, because the adoption gives to the children the second chance to become a permanent care in a loving family. Some authors stress that restriction, prohibitions, moratoria or banning the intercountry adoptions could prevent from corruptions and misuses. But, if more countries would prohibit the intercountry adoptions, or raise costs and regulatory hurdles, the costs of intercountry adoptions will increase and more irregularities, bound to the adoptions, may occur. And many of children will be deprived of the last chance to get better life.

## Notes

<sup>1</sup> The falsification of documents was also present in history of Slovenian foster care. Concretely in 19th century, foster mothers have been paid for the foster care for orphaned children. But the foster mothers misused foster care in many ways: the children were killed or strongly neglected – they have been deprived of the most basic needs (food, care, hygiene, they were exposed to cold...). Furthermore, it came to various frauds (e.g. married couples gave their own children in orphanage and then took them out with the contract as foundlings; the foundlings have been taken out of the orphanage, killed intentionally and foster mothers had shown their own children of appropriate sex and age in order to continue the receiving the foster care payment from the state (Stariha, 2010).

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## The Notion of Corruption, Benefit and Social Adequacy in German Criminal Code

JAN STANJKO

**Abstract** Corruption is a phenomenon that can be approached from many different angles. In this contribution, it is outlined how acts of corruption, actions of the bribed and the briber, are incriminated in German criminal law. Emphasis is given to the meaning of the term benefit, an important constituent element of many incriminations discussed. Along those lines the author also touches upon the doctrine of social adequacy. It is emphasized that German literature offers more than one proposal on how to apply this theory and seems to favour a case-by-case approach. The author concludes that such an approach may be questionable in the light of the principle of legality.

**KEYWORDS:** • corruption • bribery • German criminal law • social adequacy • benefit • principle of legality • legal certainty • public official • wrongful agreement

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## 1 Introduction

The word *corruption* derives from Latin, '*corrumpere*' meaning *to spoil* or *to destroy* (Etymonline, 2016). It goes without saying that the meaning of the word changed during the course of history. Nevertheless, one could argue that corruption is a phenomenon which still poses a great threat to modern society. In a sense, it *is* a poison, corroding democratic and legal systems and spoiling modern society. Even worse so, it is a phenomenon which may occur in taciturn and concealed circumstances, making it hard for governments to address and control it (Engle, 2011: 1173). In other words, corruption is surrounded by the fog of conspiracy (Ferlinc, 2015: 16). Consequentially, legislatures tend to incriminate corrupt behaviour. The German Bundestag is no exception.

The principle of criminal law as a last resort, as *ultima ratio*, plays an important role in the structure of German criminal law (Roxin, 2006: 45-47). Nonetheless, the German lawgiver decided to fight corruption using the instrument of criminal law. More importantly, in the past the Bundestag had strong tendencies to widen the scope of incriminations repeatedly. It has been contributing to an increasingly stricter approach to fighting domestic and international corruption – seemingly in correlation with the developing understanding of the impact corruption has on the Western civilization society (Smolej & Gorenak, 2013: 7).

Even though the concept of corruption is not limited to the context of criminal law (Stroligo, 1998: 930), we will argue that it is still of vital importance to understand the criminal offences and their development to fully grasp the inconvenience we nowadays call *corruption*. In this contribution we will therefore focus on the German substantive criminal law, as a very influential representative of the group of countries with continental legal systems.<sup>1</sup>

First, we will outline the incriminations concerning corruption in German criminal code, Strafgesetzbuch (henceforth: StGB) and grasp how they are connected to each other to form a system of the so called bribery offences. Next, we will take a closer look at the meaning and the scope of the term *benefit* and the doctrine of social adequacy, arguably inseparably connected with it. The goal of this article is namely a clear understanding of the German regulation on corruption by foreign and domestic judges and lawyers alike. The findings of German substantial criminal law can be used in a foreign legal system, especially if they are based upon the continental legal system and if a comprehensive domestic legal praxis has not been developed yet.

## 2 Corruption and bribery offences

The German equivalent of the term discussed above, namely '*Korrruption*', is however not used in StGB. What is commonly understood as corruption is namely covered with criminal offences concerning bribery ('*Bestechungsdelikte*') and in



some cases other concurrent crimes (*'Begleitdelikte'*). Here we will not thoroughly analyse the latter, as such a task would transcend the boundaries and purpose of this article. But let us nonetheless mention that the notion of concurrent crimes is entangled with the concept of *'Tateneinheit'*, defined in 52 StGB as '[...] the same act violat[ing] more than one law or the same law more than once [...]' (Bohlander, 2015). Concurrent crimes in cases concerning corruption are typically embezzlement and abuse of trust (*'Untreue'*, 266 StGB), assistance given in official capacity (*'Strafverteilung im Amt'*, 258a StGB), forgery (*'Urkundenfälschung'*, 267 StGB), restricting competition through agreements in the context of public bids (*'Wettbewerbsbeschränkende Absprachen bei Ausschreibungen'*, 298 StGB), making false entries in public records (*'Falschbeurkundung im Amt'*, 348 StGB), breach of official secrets and special duties of confidentiality (*'Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht'*, 353b StGB), to name but a few (Bock, 2008: 199; Heintschel-Heinegg, 2015: §299 par. 37).

But let us turn our attention to offences which form the bulk of incriminations concerning corruption – the so called bribery offences. Bribery offences consist of two major groups. On one hand, StGB contains incriminations where a public official (*'Amtsträger'*) is involved.<sup>2</sup> On the other hand, it also contains a fair amount of incriminations where a public official is not (necessarily) involved.

### **3 Bribery offences wherein a public official is not involved**

The group of incriminations where a public official is not involved first off consists of crimes against elections, ballots and the parliamentary decision-making process itself. Bribing voters (*'Wählerbestechung'*) is incriminated in 108b StGB, while bribing delegates (*'Bestechlichkeit und Bestechung von Mandatsträgern'*) is incriminated in 108e StGB. Secondly, the corruption occurring in the private sector – taking and giving bribes in commercial practice<sup>3</sup> – is penalized in 299 StGB (*'Bestechlichkeit und Bestechung im geschäftlichen Verkehr'*). This article was originally a part of the Gesetz gegen den unlauteren Wettbewerb, the law on protection of competition (henceforth: UWG). Initially, the protection of free and fair legally permissible competition,<sup>4</sup> financial interests of competitors and their right to equal opportunity were the legally protected interests of this incrimination.<sup>5</sup> This means that this incrimination is, at least in this part, an interesting mix of an abstract offence where the object of legal protection is solely endangered (*'abstraktes Gefährdungsdelikt'*) with respect to competitors and an offence where the object of legal protection is actually harmed (*'Verletzungsdelikt'*) with respect to the fair competition.<sup>6</sup>

To allegedly neutralize some legal blind spots concerning the fight against corruption, the scope of 299 StGB was extended quite drastically in 2015.<sup>7</sup> This incrimination now also covers corruption in principle-agent triangle relations. Accordingly, the legally protected interests covered with 299 StGB now also

include the protection of principal's assets.<sup>8</sup> The German legislature decided to sanction any action wherein the zone of protection regarding any of these interests is breached *via* corruption and bribing while purchasing ('*Bezug*')<sup>9</sup> goods or commercial services.

The offence at hand is a *delictum proprium*, a crime which can only be committed by an employee or an agent of an (either public or private) undertaking ('*Unternehmen*').<sup>10</sup> The notion of undertaking includes any long-lasting commercial activity which includes the exchange of service and consideration. The goal of achieving a surplus defined in the statute of an undertaking is not a necessary condition. This is why public companies and undertakings with a solely charitable, cultural or social purpose are also included (Kühl & Heger, 2014: §299 par. 2).

Both, the actions of the passive (the bribed) and the active party (the briber) are incriminated in 299 StGB (Selinšek, 2011: III-IV). Demanding, allowing himself to be promised or accepting a benefit by the bribed is incriminated in the 1<sup>st</sup> paragraph, while the offering, promising or granting a benefit by the briber is incriminated in the 2<sup>nd</sup> paragraph. The meaning of the notions *benefit* and *wrongful agreement* are furthermore crucial to the understanding of 299 StGB – they will be considered in the following paragraphs. Both are namely a common constitutive element of incriminations regarding corruption.<sup>11</sup>

#### 4 Bribery offences wherein a public official is involved

What seems to be of first and foremost importance to the German legislature – as well as what seems to catch the most attention of the general public – are offences connected to corruption wherein a public official is involved (Bock, 2008: 199). This group of incriminations contains crimes against the integrity of public administration. To prevent even an appearance of corruption in the ranks of public officials is arguably a legal interest in itself.<sup>12</sup> These offences are mainly contained in chapter thirty of StGB, titled *offences committed in public office*: taking bribes ('*Vorteilsannahme*', 331 StGB); taking bribes meant as an incentive to violating one's official duties ('*Bestechlichkeit*', 332 StGB); giving bribes ('*Vorteilsgewährung*', 333 StGB); giving bribes as an incentive to the recipient's violating his official duties ('*Bestechung*', 334 StGB). Chapter thirty also includes some additional articles regarding certain aggravated cases of bribery (335 StGB) arbitration (337 StGB) and others (335a StGB) that need to be mentioned. They will, however, not be discussed in this article. What ought to be emphasized, however, is 336 StGB. Interestingly enough, the German lawgiver decided to emphasize that the omission to act is equivalent to the performance of an official act or a judicial act within the meaning of articles 331 to 335a (Fischer, 2014: §336)

When talking about article 331 StGB and the following articles, it might be worthwhile mentioning that the briber should have an intent regarding the fact that the bribed is a public official. He needs to be aware that the bribed is not just a private individual. Furthermore, even a mistake of law (*'Verbotsirrtum'*) in that regard can exclude the culpability or at least be taken into account as a mitigating circumstance (Bock, 2008: 201). In the second paragraph of article 331 StGB, the cases where the bribed is a judge are covered.

The difference in incriminations concerning the person which takes the bribe (the difference between 331 StGB and 332 StGB) is in the relation between the payment and the exercise of a service. In 331 StGB, a *benefit* (a bribe) is provided to a public official to achieve, on the part of the official, an exercise of service. What seems to be relevant is the acceptance of the contribution by the beneficiary and the benefactor's consciousness of the fact that he provided a service or will provide a service in the future (Bock, 2008: 200). It is, however, not necessary that either the briber or the bribed are aware of the *exact* service that would have been provided by the bribed. The incrimination therefore also includes the 'grooming' of relations (*'Klimapflege'*) between public officials and private individuals. It is furthermore of utmost importance that the legality of the provided service is not of relevance.<sup>13</sup> This incrimination therefore seems to show that even an appearance of influencing a public official is reason enough for proclaiming an act a criminal offence.

332 StGB counts as an aggravated form of crime (*'Qualifikationstatbestand'*) when compared to 331 StGB and incriminates the abuse of an official position. The bribed and the briber are aiming at the fulfilment of a specific service by the public official and thereby conclude a so called wrongful agreement (*'Unrechtsvereinbarung'*) (Kühl & Heger, 2014: §299 par. 5).<sup>14</sup> The bribe is in that sense a *quid pro quo*, an equivalent of the desired service. The intent of mere bringing forth benevolence or general sympathy on the side of the bribed does not suffice. It is worthwhile noticing that 299 StGB follows the same pattern – a wrongful agreement also has to be concluded in advance.<sup>15</sup> The time of an agreement of fulfilment is in this respect not relevant – the moment when the wrongful agreement is concluded bears more importance (Fischer 2014, §299 par. 21-21a). More importantly, mere rewarding of actions already carried out is in that respect not relevant (Heintschel-Heinegg, 2015: §299 par. 19, 29; Kühl & Heger, 2014: §299 par. 4-5).

Furthermore, it has to be emphasized that in 332 StGB the performance of the desired service has to be contrary to the public officials' duties (*'Pflichtwidrig'*). This means that it has to be contrary to law, the administrative regulations, directives, general instructions or instructions of supervisors (Fischer, 2014: §332 par. 7-8). Moreover, according to 332 III StGB the decision is also contrary to the public official's duties if the public official is allowed to exercise discretion and

the decision has been at least partially influenced by the provided benefit. Even if the public official feigns the willingness to provide the service, such an act may be incriminated if he indicates his willingness to violate his duties (Fischer, 2014: §332 par. 9; Bock, 2008: 200).

Two further incriminations concern the party which provides the bribe (333 StGB and 334 StGB). The difference between the one and the other corresponds the differences between 331 StGB and 332 StGB, meaning that 334 StGB aims at a stricter and narrower concept of the quasi-contractual relationship. Accordingly, the argument needs to aim at a service of the public official which constitutes a breach of the public officials' duties. In short: it is an inverted image of the incriminations discussed above, not concerning the bribed public official, but the briber himself. We should nonetheless emphasize that according to 334 III StGB, a mere attempt to induce the public official to violate his duties with a bribe is considered an offence. The threshold for the accomplishment of a crime and full liability of the briber ('*Vollendungsstrafbarkeit*') is thereby shifted backwards to the stage of an attempt.<sup>16</sup> 333 StGB is on the other hand concerned with the 'grooming' of relations between a public official and a private individual. (Fischer, 2014: §333 par. 7, §331 par. 24; Bock, 2008: 200).

## 5 Corruption and the healthcare sector

After examining both the regulation of bribery concerning the private and public sector, we have to draw our attention to the regulation regarding bribery in the healthcare sector. The reason why we are tackling the issue of bribery in the healthcare sector at the end of our discussion about general outlay of incriminations concerning corruption is its peculiar development. The issue of whether doctors, licensed to perform contractual medical care (henceforth: contractual doctors), can be counted as either *public officials* in the sense of 331 StGB and the following articles or an agent ('*Beauftragter*') of the German health insurance fund ('*Krankenkasse*') in the sense of 299 StGB, has been in the apple of discord amongst German legal theorists for quite some time (Greeve, 2016: par. 12).

The issue has been outlined in a resolution by the 3rd criminal chamber of the BGH from 2011.<sup>17</sup> The ruling concerned a company which provided benefits for contractual doctors if they issued a certain amount of medical prescriptions, stating that a medical device the company produced is needed by the patient. The court emphasized that a contractual doctor can indeed be counted as a public official in the sense of 333 and 334 StGB when they are issuing prescriptions for medical aids ('*Hilfsmitteln*'). The insurance fund can namely be counted as an 'other agency' in the sense of 11 III (c) StGB. The additional criteria, an appointment ('*Bestellung*') of a contractual doctor for performance of public administration tasks was also affirmed. The reasoning provided by the court was that granting a licence to a contractual doctor was supposedly by itself a reason enough to include

the doctor in the machinery of the public administration – only by acquiring the licence, a contractual doctor acquires specific competences and responsibilities and is thereby included in a 'subtly organised public system'. The 3<sup>rd</sup> Chamber argued that the inclusion in the public medical care structure is the decisive criteria according to which contractual doctors are public officials and proposed that the grand criminal panel of BGH (should) decide on the matter. The 3<sup>rd</sup> chamber also posed a subsidiary question in case that the grand chamber would disagree with its views: can a contractual doctor be liable under the incrimination of bribery in private sector according to 299 StGB?

The grand criminal panel of the BGH decided on the matter in 2012.<sup>18</sup> It did not agree with the arguments provided by the 3<sup>rd</sup> criminal chamber and declared that contractual doctors are neither liable as public officials nor as agents of the public insurance fund. The BGH agreed that the insurance fund can be considered an 'other agency' in the sense of 11 III (c) StGB, but disagreed that individual contractual doctors are appointed to perform tasks of public administration on behalf of the insurance fund. The judges argued that the decisive criteria for determining if a contractual doctor performs tasks of public administration is the question whether the doctor acts with sovereign authority in relation to private individuals (*hoheitlicher Eingriff*) or if the personal relationship is more prevalent between the parties. They then took into consideration that (a) contractual doctors are self-employed and not included into a public hierarchical structure, (b) the relationship between the patient and his doctor is of confidential and personal nature and that the patient can freely choose the doctor; (c) provisions concerning prescriptions of drugs and medical devices are not a sufficient condition to presume that a contractual doctor performs tasks of public administration. On these grounds, the grand criminal panel argued that doctors do not act with sovereign authority because the perception of the tasks performed by doctors is not considered as such by the third party, the patient. The court went on to emphasize that even if that were the case, providing a licence to a contractual doctor cannot be viewed as an appointment (*Bestellung*) by the public insurance fund, as argued by the 3<sup>rd</sup> criminal chamber.

Furthermore, the grand criminal chamber decided that contractual doctors also cannot be viewed as agents of a commercial business (now *undertaking*) in the sense of 299 StGB. An agent is namely obliged to act in the best interests of his client, he needs to follow his instructions etc. The court then took into consideration the fact that a doctor is not obliged to perform in the best interest of the public insurance fund, but in the best interest of his patients. Moreover, even if the contractual doctor seems to act contrary to the principle of economic efficiency (*gebot der Wirtschaftlichkeit*), the public fund cannot control the contractual doctors on its own because it is partly dependant on associations of statutory health insurance physicians (*Kassenärztliche Vereinigung*). On these

grounds, the grand criminal panel argued that doctors cannot be considered agents of the German public insurance fund as they are lacking the capacity of an agent.

With this ruling, the BGH opened a quite wide legal gap, as bribing a doctor or taking a bribe as a doctor suddenly was not a criminal act anymore (Greeve, 2016: par. 12). Because the new opening posed a threat to the German health care system, legislature swiftly responded in 2016 by adding two new articles to StGB – 299a and 299b, thereby closing the legal gap the BGH opened.<sup>19</sup> According to these incriminations, receiving or giving bribes is herewith a criminal act. 299a is concerned with the passive party, with the bribed, while 299b incriminates the active act of bribing. It is also worthwhile mentioning that the current regulation does not only include the prescription of drugs, medical aids and other medical products, but also ordering of such products for direct application and acquisition of patients or medicinal test material.

## 6 The notion of benefit

The brief overview of the incrimination systematization concerning corruption in German substantive criminal law should suffice as a background to further examine a narrower topic. We want to draw our attention to a certain term most prevalently used by the German lawgiver in incriminations concerning corruption and bribery: '*Vorteil*', usually translated into English as *benefit*. A demand, an offer, a promise or a grant of *benefit* is generally an element of statutory provisions concerned with bribery and corruption.<sup>20</sup> In the following paragraphs, we will try to illuminate its content from multiple perspectives.

The first, perchance the most obvious consideration, quite possibly deals with the following question: who should be the benefiter of the bribe for the bribed and the briber to be liable? Should the benefiter be the bribed, or in the case article 331 StGB and the following articles, the public official himself? The answer to these questions leans heavily upon the changes that were made in StGB in 1997.<sup>21</sup> As part of the agenda to fight corruption, the bribery offences were revisited to include a wider field acts by the bribed and the bribers. As a result, it is now explicitly stated in 299 StGB, 299a StGB, 299b StGB, 331 StGB, 332 StGB, 333 StGB and 334 StGB that the benefiter does not necessarily have to be the bribed himself. A benefit for a third person (*for another*) is sufficient for criminal liability of the briber or the bribed.<sup>22</sup> Such a concept reflects the core structure of incriminations wherein a public official is involved. It shows that even altruistic actions performed by a public official can be in discord with the underlying principles of administrative law and thereby undermine the trust of the general public in objectivity of governmental decisions (Eser, 2014: § 331 par. 20).

As for the meaning of the term *benefit* itself, the BGH decided in a number of cases that it should be interpreted quite widely. BGH defined *benefit* as any unpaid performance the offender is not entitled to claim and which objectively improves

his material or immaterial standing (Kühl & Heger, 2014: § 331 par. 4).<sup>23</sup> It is sufficient if it objectively improves the beneficiary's economical, legal or even personal stand (Joecks & Miebach, 2014, §299 par. 18). What count as benefits are for example gifts or presents of any art, but also other contributions that can be counted as an asset or which improve the economical stand of the receiving party, the beneficiary. It is furthermore not of relevance if the contribution either originates from the benefactor or if the contribution lowers the benefactor's assets. The fact that the beneficiary obtains the benefit on grounds of an action performed by the benefactor is a sufficient condition.<sup>24</sup>

The worth of the benefit is, as a matter of principle, also not relevant. Smaller presents, promotional gifts or so called 'freebies' can be considered as relevant contributions. It is, however, of great importance to consider if these gifts can be exempted on grounds of doctrine of social adequacy ('*Sozialadäquanz*') and its negligible worth. Both can namely be viewed as an indication that, for example, a gift should not be considered an unfair preference of another in the sense of 299 StGB (Greeve, 2016: par. 37). But let us first further examine the notion of benefit, before moving on to the doctrine of social adequacy.

In case of an exchange of goods or services, a benefit can also consist of the surplus value of the beneficiary. Even an invitation for a drink or dinner can suffice.<sup>25</sup> This is however not the case if the meal is partially paid by the supposed beneficiary.<sup>26</sup> We should also emphasize that the benefit does not necessarily have to be of a lasting nature. The beneficiary can namely pass it to another at any given moment (Greeve, 2016: par. 37).

A benefit can also be: a prevention of danger threatening the beneficiary; regular granting of loans, irrespectively of terms and conditions concerning the repayment of the loan; deferment of payments; granting of a rebate or commissions; a waiver of claims; 'kick-backs'; periodical payments coupled with the revenue; the handing over of a rental car; the placement of a secondary job; a holiday invitation; a ride and an overnight stay with some additional services included; excursions at the expense of the benefactor; sometimes sexual acts (Greeve, 2016: par. 38; Heintschel-Heinegg, 2015: §299 par. 15; Joecks & Miebach, 2014: §299 par. 18; Spickhoff, 2014: §302, par. 49.). Even a mere conclusion of a contract can sometimes be viewed as a benefit.<sup>27</sup>

Moreover, if a salesperson, employed at either a wholesale or a retail company, receives a sales bonus in exchange for preferring certain products over competitive products, the sales bonus can also constitute a material benefit according to 299 StPO.<sup>28</sup> In addition, the promise to support a relative regarding the application for a worthwhile job could also count as a benefit. However, both parties have to agree upon the fact that the applicant is not entitled to this benefit (Greeve, 2016: par. 39 – 40).<sup>29</sup>

A gift that does not have a material worth can also be considered a benefit (Greeve, 2016: par. 41). The necessary condition thereof is the objectively measurable betterment of the beneficiary's standing. This condition can be hard to determine in certain cases (Heintschel-Heinegg, 2015: §299 par. 18). A benefit is therefore anything that improves the stand of the beneficiary, provided that the beneficiary is not entitled to such a claim – covering material as well as immaterial benefits. Examples of an immaterial benefit are: bettering the academic reputation; enhancing of an informal standing in a company; awarding an honorary office; even tolerating obscene actions. It has, however, been noted in legal theory that a certain degree of relevance (*Erheblichkeit*) is needed for the immaterial benefit to actually count as a benefit (Kindhäuser, Neumann & Paeffgen, 2014: §299 par. 38; Heintschel-Heinegg, 2015: §299 par. 185).<sup>30</sup>

## 7 Doctrine of social adequacy

What is also considered to be relevant for the understanding of the notion of *benefit* is the question if we are dealing with a socially adequate act (*Sozialadäquates Handeln*). Though the meaning and the exact scope of *social adequacy* may sometimes be vague, we will first deal with another issue regarding this doctrine. It is not entirely clear, what the legal consequences of a socially adequate act are, regarding the bribery offences. The question at hand is fairly straight forward and is connected with the German construction and elements of a crime.

Although it is claimed that consequences of a socially adequate benefit are anything from grounds for exemption from punishment (*'Strafausschließungsgründe'*) to grounds for exemption of guilt (*'Entschuldigungsgründe'*) and grounds for justification (*'Rechtfertigungsgrund'*), it is predominant in the literature that the first element of a crime, the *'tatbestandsmäßigkeit des Handelns'* is not given. (Joecks & Miebach, 2014: §331 par. 110). The notion of *benefit* itself supposedly cannot include such acts. The social adequacy is furthermore only considered by some authors as an aspect of the wrongful agreement discussed above (Joecks & Miebach, 2014: §331 par. 100-108).<sup>31</sup> For the purpose of this article, we will presume that social adequacy is an aspect of the notion of benefit. Not because we want to argue that one of outlined views is superior to the other, but because one of the main purposes of this article is to examine the notion of *benefit* in German substantive criminal law. Moreover, even the proponents of the contrary view agree that there is no harm in considering the doctrine of social adequacy as part of the concept of a benefit (Kindhäuser, Neumann & Paeffgen, 2014: §331, par. 63).

Be that as it may, according to the wording of StGB, a very wide range of contributions can be considered as benefits, and ultimately as bribes. In certain cases, this would lead to outcomes which would appear quite absurd. In other words, the question can arise as to how substantive criminal law deals with polite



conduct and/or etiquette on one hand and corruption on the other (Bock, 2008: 201).

The currently prevalent view in German literature proposes using the doctrine of social adequacy to declare that some contributions are not incriminated. This may include smaller gifts which are viewed as politeness or courtesy. With other words, the conduct has to be socially acceptable and, in a sense, of a customary nature. What is more, the conduct has to be in overall accordance with the protection of legally protected interests (*Rechtsgutzschutz*) (Bock, 2008: 201).

In the sense of article 331 StGB and the following articles, this means that at least an abstract danger of influencing the public administration has to be present. It is, however, not clear how exactly this rule should be applied to the case at hand (Bock, 2008: 201). There are, for example, no clear rules as to where a *de minimis* threshold (*Bagatellgrenze*) should be drawn. Is giving a simple pen to an official, for example, a contribution that should be viewed as an act of corruption? How expensive does the pen have to be to constitute a criminal act?

Some draw the line quite low and do not allow much leeway: when considering if a gift given to a public official is acceptable or not, one should weigh if an ordinary private individual could also expect the same gift or not. Nevertheless, according to this interpretation, a bottle of wine as a Christmas present, for example, could potentially be treated as a socially adequate gift – and consequentially not a bribe (Joecks & Miebach, 2014: §331 par. 112).

Literature however prominently offers a similar, yet slightly different, analogous threshold: the benefit should not incline one to believe that an obligation of the bribed towards the briber exists on grounds of receiving the benefit (Joecks & Miebach, 2014: §331 par. 114; Kühl & Heger, 2014: §299 par. 5). Accordingly, bribe payments cannot be exempted, even if they are common and much needed to conclude a deal or to be competitive in a foreign market (Heintschel-Heinegg, 2015: §299 par. 24).<sup>32</sup>

Also to be taken into account are directives, guidelines and circulars. They can play an important role of setting a *de facto* legally binding threshold for accepting gifts. On one hand, they can contribute to the formation of a *de minimis* threshold via the doctrine of social adequacy. On the other hand, they can also play an important role as instruments of approval in the sense of 331 III StGB and 333 III StGB (Bock, 2008: 201; Joecks & Miebach, 2014: §331 par. 104, 113).

As far as the use of article 299 StGB is concerned, the doctrine of social adequacy also has to be taken into account. In principle, it is used in the same way as in article 331 StGB and the following articles. Literature, however, prominently emphasizes that, in connection with 299 StGB, social adequacy is not simply the

'usual' social conduct (Heintschel-Heinegg, 2015: §299 par. 15.1): The following questions need to be addressed when deciding upon the social adequateness of a certain contribution: (1) is the contribution of an incidental nature or is it aimed at a performance of an act, and (2) did the benefactor act with a dishonest intent? Contributions in form of hard cash or expensive gifts in that sense hardly ever constitute a socially adequate gift (Kindhäuser, Neumann & Paeffgen, 2014: §299, par. 39-40).

Moreover, what needs to be mentioned is that the threshold of socially adequate benefits should not be set as low as for bribery offences where a public official is involved (Greeve, 2016: par. 42) As a consequence, yet another *de minimis* test of adequacy, a test regarding 299 StGB, is proposed by some: a contribution cannot constitute an unfair benefit if it objectively does not seem to be able to sufficiently influence the will regarding the decision at hand.<sup>33</sup> The standard of living of the beneficiary therefore has to be taken into account. This is why sometimes even an invitation to a local golf tournament should in certain cases be tolerated (Eser, 2014: §299 par. 20).

On the other hand, part of literature effectively proposes that the outlined threshold regarding the ability of the contribution to influence the will of the decision-maker is furthermore used to determine the social adequacy of a benefit provided to a public official. An invitation for a lunch or even to a public event can hereby be in accordance with law – depending on the position of the public official and other facts regarding the concrete event (Joecks & Miebach, 2014: §331 par. 104-105).

Let us conclude with a thought that the doctrine of social adequacy is very flexible and that its results seem to vary quite substantially. The literature even advocates different abstract concepts and tests regarding the *de minimis* threshold (Knauer, 2014: 855-856). The question at hand, namely if a benefit is socially adequate or not, seems to be decided on a case-by-case basis – a fact we find quite surprising, taking into account that *criminal liability* of a human is being considered.

## 8 Conclusion

Considering our findings, it seems to us that a clear and unambiguous rule regarding the threshold of a socially adequate benefit does not exist. Literature prominently considers 30 Euro to be a threshold for public officials (Heintschel-Heinegg, 2015: §331 par. 31). This limit is however unreliable because the doctrine of social adequacy also depends on various other factors, sometimes even various directives, guidelines and circulars. Consequentially, public officials and other potential perpetrators have to deal with a high degree of *legal uncertainty* (Eser, 2001: 205-206).

Although the threshold for corruption regarding bribery in commercial practice seems to be less strict, the problem of legal uncertainty regarding this field of

incriminated acts is perhaps even greater. If the threshold is set higher, it does not by itself follow that it is less ambiguous.

Nevertheless, some may find that ample discretion and the abolishing of rigid criteria is either a necessity or a necessary consequence of the structural fabric of a certain field and its regulation (Fischer, 2014: §331 par. 26-26c) On the contrary, we found that the sheer danger of unequal rulings provided by the doctrine of socially adequate benefit is too severe and therefore poses a problem that needs to be addressed accordingly. The case-by-case approach may lack the quality of *legal certainty* and therefore does not seem to be compatible with the *principle of legality*<sup>34</sup> – a value in itself, a legal principle which any modern system of criminal law should take into consideration. (Heintschel-Heinegg, 2015: §331 par. 32.1; Roxin, 2006: 172-175).

On the other hand, we were impressed with the rich, in number and substance, case law regarding the constitutive element of nearly every incrimination in German substantive criminal law that deals with bribery: the notion of benefit. The ample case law on both, the material and the immaterial side of the concept, provides a valuable source of viewpoints and guidelines for foreign and domestic judges and lawyers alike.

Last but not least, during our research we found that the German legislature was recently very active in filling the gaps and widening the scope of incriminations regarding corruption. We outlined the rationale behind these changes in StGB. It remains to be seen, however, if the newly forged weapon against the disease we call corruption shall prove to be effective or not

## Notes

<sup>1</sup> For more on how the German law influenced the Slovenian substantive criminal law regarding elements and the concept of a crime see Ljubo Bavcon et al., *Kazensko pravo: splošni del*, 6th ed. (Ljubljana: Uradni list RS, 2014), 149-150.

<sup>2</sup> The term *public official* is defined in 11 StGB: '[...] 'public official' means any of the following if under German law (a) they are civil servants or judges; (b) otherwise carry out public official functions; or (c) have otherwise been appointed to serve with a public authority or other agency or have been commissioned to perform public administrative services regardless of the organisational form chosen to fulfil such duties. [...]' (Bohlander 2015).

<sup>3</sup> The notion of a *commercial practice* is the element that excludes purely private conduct and acts imbued with public authority (*'hoheitliches Handeln'*) (Spickhoff 2014, § 302 par. 51).

<sup>4</sup> Illegal and immoral activities may therefore fall out of reach of 299 StGB (Heintschel-Heinegg 2015, §299 par. 14; Kühl and Heger 2014, §299 par. 3). Furthermore, not solely domestic competition is protected, but fair competition in general, worldwide (Wolf 2006, 787; Kühl and Heger 2014, §299 par. 1).

<sup>5</sup> Mere harming of confidence in fairness of competition is on the contrary not considered a threat to the fair competition – as opposed to incriminations which protect even the perception of fairness of an administrative apparatus (331 StGB and the following articles) (Kindhäuser, Neumann and Paeffgen 2013, § 299, par. 44).

<sup>6</sup> Furthermore, it should be added that the nature of the legally protected interest in 299 StGB is not entirely clear. Some, for example, argue that 299 StGB is a pure 'abstraktes Gefährungsdelikt' (Eser 2014, §299, par. 2).

<sup>7</sup> Gesetz zur Bekämpfung der Korruption, 20.11.2015, BGBl I 2025.

<sup>8</sup> Momsen is sceptical about this solution, especially because of the artificial dichotomy of 266 StGB and 299 StGB (Heintschel-Heinegg 2015, §299 par. 6).

<sup>9</sup> Purchasing of goods includes the whole process from ordering to the delivery and the payment of goods or services (Eser 2014, §299 par. 22).

<sup>10</sup> More on the nature of *delictum proprium* ('Sonderdelikten') Hans-Heinrich Jescheck, Lehrbuch des Strafrechts: Allgemeiner Teil, 5th rev. ed. (Berlin: Duncker & Humblot, 1988), 239-240; Bavcon, Kazensko parvo, 199; Selinšek Liljana, Kazensko pravo: splošni del in osnove posebnega dela (Ljubljana: GV Založba, 2007), 115-117.

<sup>11</sup> Although a certain analogous relation in regards to a contractual relation seems to exist, we should emphasize that a wrongful contract is not a contract *per se* (Spickhoff 2014, § 302 par. 74).

<sup>12</sup> These incriminations are therefore '*abstrakte Gefährungsdelikten*', the same as 299 StGB (Heintschel-Heinegg 2015, §331 Rn. 4). More on the nature of legally protected interests ('Rechtsgut') and their role in German legal system Claus Roxin, Strafrecht: Allgemeiner Teil. Bd. 1, Grundlagen, der Aufbau, der Verbrechenslehre, 4<sup>th</sup> rev. ed. (München: Verlag C. H. Beck, 2006), 16-29; Bavcon, Kazensko pravo, 204-207.

<sup>13</sup> The third paragraph decriminalizes the act of the bribed in two different ways: if accepting of the gift is authorized in advance, the action is justified ('*Rechtfertigungsgrund*'). If it is authorized *ex post facto*, the criminal liability of a criminal act is retroactively revoked ('*Strafaufhebungsgrund*') (Bock 2008, 200).

<sup>14</sup> The wrongful agreement is also the constitutive element of 331 StGB and 33 StGB, although in a very loosened form, as discussed above (Heintschel-Heinegg 2015, §331 par. 25).

<sup>15</sup> The statue demands that, at least according to the perpetrator, a *do ut des* relations exists between the benefit provided and the expected performance by the bribed. 'Grooming' of relations therefore principally cannot be included in 299 StGB (Kindhäuser, Neumann and Paeffgen 2014, § 299 par. 42; Eser 2014, § 299, Rn 20).

<sup>16</sup> More on stages of a criminal act ('*Stufen der Straftat*') and the concept of an attempt in German criminal law Jescheck, Lehrbuch des Strafrechts, 458-476.

<sup>17</sup> BGH, 05.05.2011 - 3 StR 458/10.

<sup>18</sup> BGH, 29.03.2012 – GSt 2/11.

<sup>19</sup> Gesetz zur Bekämpfung von Korruption im Gesundheitswesen, 30.05.2016, BGBl. I S. 1254. The statute came into force on the 4th of June 2016.

<sup>20</sup> Benefit is a constitutive element of the following incriminations: 108b StGB, 108e, 299 StGB, 299a StGB, 299b StGB, 300 StGB, 331 StGB, 332 StGB, 333 StGB, 334 StGB, and 335 StGB.

<sup>21</sup> Korruptionsbekämpfungsgesetz, 13.8.1997, BGBl. I S. 2038.

<sup>22</sup> Some argue that the benefit nonetheless has to be connected with a benefit for the bribed. There are, however, arguably more reasons to believe that such a benefit is not a necessary condition (Spickhoff 204, § 302, par. 28; Heintschel-Heinegg 2015, §299 par. 15.1; Greeve par. 7 – 10).

<sup>23</sup> See also BGH GA 1981, 572.

<sup>24</sup> BGH NSTZ 1987, 326, 327.

<sup>25</sup> RG GA 1941, 383.

<sup>26</sup> BGH GA 1967, 154.

<sup>27</sup> Meaning that the conclusion of the contract itself can be a benefit, notwithstanding the equivalence between service and consideration (Joecks and Miebach 2014, §299 par. 18).

<sup>28</sup> RGSt 48, 291, 293.

<sup>29</sup> See also BGHSt 8, 214, 215.

<sup>30</sup> This does not mean that the immaterial benefits necessarily have to lead to a material benefit. This however seems to be the most common development – a general rule with but a few exceptions (Spickhoff 2014, §302, par. 26).

<sup>31</sup> For more on the historical development regarding the doctrine of social adequacy see Florian Knauer, "Zur Wiederkehr der Sozialadäquanz im Strafrecht – Renaissance einer überholten Rechtsfigur oder dogmatische Kategorie der Zukunft?" *Die Zeitschrift für die gesamte Strafrechtswissenschaft* 126, no. 4 (2014): 846-852.

<sup>32</sup> See also BGH, 23.10.2002, 1 StR 541/01.

<sup>33</sup> The reason for a more lenient approach is most likely the fact that the concept of an unfair competition has to be taken into account (Kühl and Heger 2014, §299, par. 5; Kindhäuser, Neumann and Paeffgen 2014, §331 par. 39-40).

<sup>34</sup> For more on legal certainty, predictability and the principle of legality (*nullum crimen sine lege certa*) as underlying principles of criminal law see Roxin, *Strafrecht*, 172-175; Bavcon, *Kazensko pravo*, 132; Selinšek, *Kazensko pravo*, 64.

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