

Corruption and legal certainty; the case of Albania and the Netherlands Implementation of the Criminal Law Convention on Corruption in a transitional and consolidated democracy

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1. Introduction

It is estimated that hundreds of billions of Euros are paid in bribes worldwide every year and hundreds of billions of Euros from public funds are being misused or misallocated as a result thereof. Corruption among public officials is detrimental to the administration of public affairs. Moreover, corruption poses a serious threat to the stability of democratic institutions and the functioning of the market economy. It also threatens the rule of law, democracy and human rights.¹ The globalisation of the economy and society makes it very difficult to effectively combat this phenomenon only at a national level. Therefore, in 1994 the Ministers of Justice of the Council of Europe recommended that corruption be addressed at a European level. It was felt important to establish a mechanism to monitor the implementation of the anti-corruption standards adopted by the Council of Europe.² To this end, the Group of States against Corruption (GRECO) was set up in 1999.³ The aim of GRECO is to improve the capacity of its members to fight corruption and ensure compliance with the Council of Europe's anti-corruption standards, among which the Criminal Law Convention on Corruption is the most prominent one.⁴

When talking about corruption, one naturally thinks of developing countries or, to put it more capriciously, young democracies. Such a presumption is usually confirmed by the corruption indexes held by international organizations such as Transparency International (TI). Traditionally, young democracies are ranked very low in those indexes, while the so-called consolidated democracies are usually listed at the top of the list.⁵ This general statement may be true around the world and examples thereof can be found in Europe where a discrepancy in corruption levels may be observed between Western European states and the post-communist states of Central and (South) Eastern Europe. It may thus be argued that, despite the above-mentioned measures, corruption still remains a problem in many Member States of the Council of Europe. The question, therefore, is why is there such a discrepancy? The answer to such a

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1 GRECO, *Monitoring compliance with Council of Europe anti-corruption standards*, Strasbourg, January 2007, also available on GRECO's homepage (<<http://www.coe.int/greco>>).

2 Council of Europe, *Combating corruption. Anti-corruption instruments of the Council of Europe*, Strasbourg, February 2007, p. 3.

3 Resolution (99) 5 establishing the Group of States against Corruption (GRECO), adopted on 1 May 1999.

4 Appendix to Resolution (99) 5, Statute of the Group of States against Corruption (GRECO), Art. 1.

5 In the indexes of Transparency International countries with a high level of corruption are listed at the bottom while countries with a low level of corruption are placed at the top of the list.

general question may be found in many factors such as a correlation between corruption and poverty⁶ or in the (legal) culture of a particular country. However, our paper focuses on the substantive criminal legislation. More specifically, this paper addresses the clarity of this legislation from the point of view of legal certainty. The principle of legal certainty as a fundamental principle of criminal law requires that legislation is drafted with sufficient precision. This principle is also enshrined in Article 7 of the European Convention on Human Rights. In the context of Article 7, the European Court of Human Rights has held that criminal legislation should be accessible and foreseeable for the citizen in order to regulate his conduct accordingly.⁷ Clear (criminal) legislation is also a key factor to effective enforcement.⁸

In order to find out whether the discrepancy in corruption levels corresponds with a discrepancy in legal provisions, we embarked upon a comparative exercise aimed at exploring the implementation of the Criminal Law Convention on Corruption in a consolidated Western European democracy and a young South Eastern European democracy. For the example of a consolidated system of democracy and the rule of law we might have chosen any state in Western Europe. However, the focus will be on the Netherlands, because we feel sufficiently competent in that system to present the details relevant to the debate. For the young democracy we opted for Albania. That reflects the composition of our team where one of its members is a native Albanian, which gave us easy access to our research sources in their original language. Both the Netherlands and Albania have ratified the Criminal Law Convention on Corruption, yet another factor which led us to the choice of countries. Last but not least, according to the Corruption Perceptions Index for 2009, issued by TI, Albania was listed as number 95 (2007: 105, 2008: 85) and the Netherlands as number 6.⁹

Corruption comprises a wide range of human activities which are criminalised in both countries. The term ‘corruption’ can be defined as the achievement of personal gain through the abuse of one’s office.¹⁰ However, our study focuses on the *passive bribery of public officials*.¹¹ The reason for this is twofold. By choosing to focus only on one aspect of corruption we seek to avoid engaging in a study which can become bogged down in generalities. Furthermore, the passive bribery of public officials can be considered as the core of the corruption-related offences, since the fight against corruption is mainly aimed at promoting the integrity of public administration (represented by the public official). Active bribery can be seen as an attempt by an individual or a company to induce the public official to act corruptly, which takes place before the official actually accepts the bribe.¹²

This paper successively discusses the Criminal Law Convention on Corruption (Section 2), the Albanian provisions on the passive bribery of public officials (Section 3) and the Dutch provisions on the passive bribery of public officials (Section 4). In each section, after making some general remarks, we focus on three specific aspects: the definition of the offence, the concept of ‘undue advantages’ and the concept of ‘public official’. Finally, in Section 5, an analysis is made and some conclusions are drawn. For our study we consulted the Dutch

6 Transparency International, *Annual Report 2007*, June 2008, p. 26.

7 *Kokkinakis v. Greece*, [1993] ECHR (Ser. A.), Paras. 40, 41, 50; *CR v. United Kingdom*, [1995] ECHR (Ser. A.), Para. 34.

8 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, p. 578.

9 The list is available on TI’s homepage (<<http://www.transparency.org>>).

10 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, p. 599.

11 In this paper the term ‘public official’ is used in a broad sense, including *inter alia* high state officials, elected officials and judges. Since the term ‘corruption’ is often used to describe ‘bribery’, we use these terms alternatively.

12 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 355-358.

legislation and doctrine as well as the case law of the Dutch courts.¹³ For the Albanian material we relied on legislation, the case law of the Albanian courts and, due to a lack of scholarly research to date, on interviews with members of the Supreme Court (*Gjykata e Lartë*), the District Court (*Gjyaktë e Shkallës së Parë*) of Tirana, the Joint Investigation Unit Against Economic Crime and Corruption at the Public Prosecutor's Office (*Prokuroria e Rrethit Gjyqësor*) of Tirana and with members of the Criminal Law Department of the Law School of the University of Tirana.¹⁴

2. The Criminal Law Convention on Corruption

2.1. General remarks

International conventions play a key role in addressing the worldwide and cross-border nature of corruption.¹⁵ When a suspect flees across a national border, law-enforcement bodies can be faced with immense difficulties. Because transnational crime thrives on differences in regulations among countries, the harmonisation of national legislation is of the utmost importance.¹⁶ International anti-corruption conventions are increasingly important in a world in which states and private actors are increasingly interconnected through travel, communications and trade. The range of anti-corruption conventions and instruments that exist today are the results of an international consensus that emerged in the early 1990s.¹⁷ Since then, the international legal framework prohibiting bribery has expanded dramatically.¹⁸

In 1997, the Ministers of Justice of the Council of Europe recommended that efforts be intensified to ensure the adoption of a Criminal Law Convention on Corruption (hereinafter the Convention) providing for a co-ordinated criminalisation of corruption offences and for enhanced cooperation in the prosecution of offences. This Convention was opened for signature in 1999.¹⁹ It entered into force on 1 July 2002. As of 2009, 42 states had ratified the Convention.²⁰

GRECO shall monitor the implementation of the Convention by the Parties (Article 24). Any state which becomes a party to the Convention automatically accedes to GRECO.²¹ However, the reverse is not true: a State Party may choose to participate only in GRECO, but not to accede to the Convention. As a consequence, membership of GRECO overlaps, but is not identical to, membership of the Convention.²² All members participate in, and submit themselves without restriction to, the mutual evaluation and compliance procedures.²³

13 The discussion of Dutch case law focuses on Supreme Court rulings. When discussing the Albanian provisions we relied on the case law of the lower courts, because there is (almost) no case law from the Albanian Supreme Court on this issue.

14 We are fully aware of the fact that the interviews that we conducted are only indicative. Therefore, we do not use them as primary sources. However, those interviews were indispensable in gaining a better picture of the practice of the courts and public prosecutors in Albania, since the academic publications on the matter are very few or non-existent. We also used these interviews as an inspiration for further research.

15 Transparency International, *Annual Report 2007*, June 2008, p. 17.

16 F. Pakes, *Comparative Criminal Justice*, 2004, pp. 142-143.

17 See <<http://www.transparency.org>> ('Anti-corruption conventions and instruments explained').

18 C. Corr *et al.*, 'Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures', 1999 *Vanderbilt Journal of Transnational Law*, p. 1343.

19 Criminal Law Convention on Corruption (ETS No. 173). See <<http://www.coe.int/greco>>.

20 See <<http://www.coe.int/greco>>.

21 Currently, GRECO comprises 46 Member States: 45 European States (including Albania and the Netherlands) and the United States of America (GRECO, *Monitoring compliance with Council of Europe anti-corruption standards*, Strasbourg, January 2007). The functions, composition, operation and procedures of GRECO are described in its Statute (Appendix to Resolution (99) 5, Statute of the Group of States against Corruption (GRECO)).

22 See <<http://www.transparency.org>> ('Summary Overview Council of Europe Criminal Law Convention on Corruption').

23 The 'horizontal' evaluation procedure involves the collection of information through questionnaires, on-site country visits and the drafting of evaluation reports. Measures taken to implement recommendations are assessed by GRECO under a separate compliance procedure. See Council of Europe, *Combating corruption. Anti-corruption instruments of the Council of Europe*, Strasbourg, February 2007, pp. 81-82;

The principal aim of the Convention is to develop common standards concerning certain corruption offences, although it does not prescribe a uniform definition of corruption. One difficult aspect of the prosecution of transnational corruption cases – particularly that of the bribery of foreign public officials – relates to the definition of corruption offences, often diverging because of the meaning of ‘public official’ in domestic laws. By harmonising the definition of these offences, the requirement of dual criminality will be met by the States Parties to the Convention.²⁴ Its wide scope, reflecting the Council of Europe’s comprehensive approach to combating corruption, is one of the main characteristics of the Convention.²⁵ The requirement to criminalise the passive bribery of public officials will be discussed below. Other offences that are covered by the Convention are bribery in the private sector (Articles 7 and 8), trading in influence (Article 12), money laundering (Article 13) and accounting offences (Article 14). Having regard to the serious nature of the criminal offences established in accordance with the Convention, each Party shall provide effective, proportionate and dissuasive sanctions and measures (Article 19). This provision involves the obligation to attach to the commission of these offences penalties of imprisonment of a certain duration, which can give rise to extradition.²⁶ Article 23 deals with measures to facilitate the gathering of evidence and the confiscation of proceeds. This provision ‘(...) acknowledges the difficulties that exist to obtain evidence that may lead to the prosecution and punishment of persons having committed those corruption offences defined in accordance with the present Convention. Behind almost every corruption offence lies a pact of silence between the person who pays the bribe and the person who receives it. In normal circumstances none of them will have any interest in disclosing the existence (...) of the corrupt agreement concluded between them’.²⁷

In 1997 the European Union (EU) Council adopted a ‘Convention in the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union’.²⁸ This Convention is limited to acts of bribery involving EU and Member State officials.²⁹ Also in 1997, the Organisation for Economic Cooperation and Development (OECD) adopted a treaty to address corruption: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).³⁰ This Convention commits its signatories to enact legislation that criminalises the *active* bribery of *foreign* public officials.³¹ The sanctioning of the foreign public official is not a concern of the OECD; this is left to the state which is the ‘victim’ of the corruption.³² The Council of Europe Convention goes beyond the EU Convention, providing for the criminalisation of the bribery of public officials of any foreign country. In two respects it also goes beyond the OECD Convention. Firstly, it deals with both the active and passive sides (the giver and the recipient of the

GRECO, *Monitoring compliance with Council of Europe anti-corruption standards*, Strasbourg, January 2007; <<http://www.coe.int/greco>> (‘How does GRECO work?’).

24 Council of Europe, *Explanatory Report on the Criminal Law Convention of Corruption*, p. 5, available at <<http://conventions.coe.int>> (hereinafter Explanatory Report).

25 *Ibid.*, p. 6.

26 *Ibid.*, p. 19.

27 *Ibid.*, p. 23.

28 *OJ C* 195, 25.6.1997.

29 C. Corr *et al.*, ‘Damned If You Do, Damned If You Don’t? The OECD Convention and the Globalization of Anti-Bribery Measures’, 1999 *Vanderbilt Journal of Transnational Law*, pp. 1296-1299.

30 F. Heimann *et al.*, *Progress Report 2008. Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Transparency International, 24 June 2008, pp. 6-8.

31 Z. Gounari, ‘The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Theory and Practice’, 2004/2005 *CAR CEPMLP Annual Review* 9, pp. 1-6, available at <http://www.dundee.ac.uk/cepmlp/car/html/CAR9_ARTICLE2.pdf>.

32 M. Pieth *et al.* (eds.), *The OECD Convention on Bribery: A Commentary*, 2007, pp. 50-56.

bribe). Secondly, whereas the scope of the OECD Convention is limited to international business transactions, the Council of Europe Convention does not contain a restriction as to the context in which the bribery occurs.³³ Also notable in connection with the Council of Europe Treaty is the substantial participation of Eastern European countries (including Albania), given their general absence from other anti-corruption measures.³⁴

2.2. The requirement to criminalise the passive bribery of public officials

Definition of the offence

Article 3 deals with the requirement to criminalise the passive bribery of domestic public officials. This offence is mirrored by active bribery (Article 2); the two types of bribery are two sides of the same phenomenon. The basis for a violation is an improper *quid pro quo*: a person gives something of value to a public official, expecting the official to use his or her position for the benefit of this person.³⁵ Article 3 reads as follows:

‘Article 3 – Passive bribery of domestic public officials

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.’

The offence of passive bribery can only be committed intentionally and the intent has to cover all other substantive elements of the offence. Intent must relate to a future result: the act or omission intended by the briber. However, it is immaterial whether the public official actually acted or refrained from acting as intended. The Explanatory Report points out that the bribery provisions of some Member States make a distinction as to whether the act, which is solicited, is a part of the official’s duty or whether he is going beyond his duties. However, such an extra element of a ‘breach of duty’ was not considered to be necessary for the purposes of the Convention. The confidence of citizens in the fairness of public administration would also be severely undermined if the official would have acted in the same way without the bribe.³⁶

It is immaterial whether the ‘request’ was actually acted upon by another person, because the request itself is the core of the offence. Likewise, it does not matter whether the official requested the advantage for himself or for anyone else. ‘Receiving’ may for example mean the actual taking of the benefit by the official himself or by a third party (his spouse, colleague, political party, etc.). Irrespective of whether the recipient or the beneficiary is the official himself or a third party, the transaction may be performed through intermediaries. It is not a criminal

33 Explanatory Report, *supra* note 24, p. 11.

34 C. Corr *et al.*, ‘Damned If You Do, Damned If You Don’t? The OECD Convention and the Globalization of Anti-Bribery Measures’, 1999 *Vanderbilt Journal of Transnational Law*, note 337.

35 *Ibid.*, pp. 1258-1259.

36 Explanatory Report, *supra* note 24, pp. 8-9. Art. 36 does provide Parties with the possibility of declaring that they shall criminalise the active bribery of foreign public officials, of officials of international organisations or of judges and officials of international courts only to the extent that the undue advantage is intended to induce the bribee to act or refrain from acting in breach of his duties as an official or judge. The notion of a ‘breach of duties’ is to be understood in a broad sense, also implying that the official had a duty to exercise judgement or discretion impartially; Explanatory Report, *supra* note 24, p. 29.

offence under the Convention to receive an advantage after the act has been performed by the official, without prior offer, request or acceptance.³⁷

Undue advantages

The undue advantages may be of an economic nature, but may also be of a non-material nature. Crucial is whether the offender (or a third party) is placed in a better position than before the offence was committed. An advantage is ‘undue’ if the recipient is not lawfully entitled to accept or receive it. The word ‘undue’ aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.³⁸

Public official

The ‘perpetrator’ in Article 3 can only be a public official. For the purpose of this Convention, ‘public official’ shall be understood by reference to the definition of ‘official’, ‘public officer’, ‘mayor’, ‘minister’ or ‘judge’ in the national law of the state in which the person in question performs that function and as applied in its criminal law (Article 1). The drafters of the Convention wanted to cover all possible categories of public officials, in order to avoid loopholes in the criminalisation of public sector corruption. However, this does not necessarily mean that states have to redefine their concept of ‘public official’ in general. Where a public official of the prosecuting state is involved, its own national definition is applicable. If the offence involves a public official of another state, the prosecuting state may apply the definition of a public official (of that other state) only insofar as that definition is compatible with its national law (Article 1(c)).³⁹

Each Party shall also establish as criminal offences the conduct referred to in Articles 2 and 3, when involving members of domestic public assemblies (Article 4), foreign public officials (Article 5), members of foreign public assemblies (Article 6), officials of international organisations (Article 9), members of international parliamentary assemblies (Article 10) and judges and officials of international courts (Article 11).

3. Albania

3.1. General remarks

After the Second World War, Albania experienced one of the cruellest communist regimes in the world. The country was isolated and repression was felt in all social activities. However, ironically enough, repression and social control did have a ‘positive’ effect: corruption was almost non-existent.⁴⁰ Although the old communist Criminal Code contained provisions on bribery, they were almost never applied.⁴¹ December 1991 marked the end of the communist era in Albania. At the time of our study, 18 years later, Albania has already taken the first step towards accession to the EU by signing the Association and Stabilization Agreement with the EU.⁴² In April 2009 Albania also became a member of NATO and applied for EU membership. Full integration into the Euro-Atlantic structures still remains the main political aim. Despite the

37 *Ibid.*, pp. 8-9.

38 *Ibid.*, pp. 8-9.

39 *Ibid.*, pp. 6-7.

40 L. Gjonca, *Korrupsioni dhe Krimi i Organizuar* (Corruption and Organised Crime), 2004, pp. 40-48.

41 *Ibid.*

42 COWEB(2006) 86.

progress that Albania has made in strengthening its democracy and the rule of law, corruption is nowadays a widespread problem and constitutes an obstacle to full integration.⁴³ Nevertheless, it should here be noted that the Albanian authorities have continuously tried to take anti-corruption measures and enact legislation which meets international and European standards.⁴⁴ One of the measures taken that is worth mentioning in this context is the setting up of the Joint Investigation Unit Against Economic Crime and Corruption at the Public Prosecutor's Office of Tirana.⁴⁵ The Unit is comprised of members of various public authorities which are considered to be 'corruption-sensitive'.⁴⁶ The purpose of the unit is to attain a better coordinated prosecution of corruption cases since information is processed more efficiently and the overlapping investigative powers of the various authorities is avoided. The investigations are led by the Public Prosecutor's Office of Tirana. The Unit, which was set up as an experiment, has proven to be successful. In its first year of existence, 50 cases of corruption were prosecuted.⁴⁷ Many of those cases are still ongoing and some of them have already resulted in convictions.⁴⁸ The Prosecutor General's Office is considering setting up similar units also in other important districts of the country.⁴⁹

Efforts to meet the international and European anti-corruption standards are also noticeable in the field of legislation. The new Albanian Criminal Code (hereinafter ACC) of 1995 has made certain forms of corruption a criminal offence. The ACC has been amended on several occasions since its entry into force and new forms of corruption offences have been introduced. On 19 July 2001 Albania ratified the Convention with no reservations or declarations and it entered into force on 1 July 2002.⁵⁰ As a result thereof, the ACC was again amended in 2004 in order to bring the provisions of the Code into line with the requirements of the Convention. Since then the ACC contains several provisions on corruption. The remainder of this section seeks to describe and analyse the implementation of the Convention in Albania. As already mentioned in the introduction to this paper, the focus will be on the passive bribery of public officials. To this end we will first give a general overview of the provisions in the ACC concerning the passive bribery of public officials and then we will point out some of the problematic elements of those provisions.

43 COM(2009) 533 final, pp. 6-10; see also EC Commission, *Commission proposes visa free travel for citizens from the Western Balkans*, (Press release, Brussels 15, July 2009) available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1138&format=HTML&aged=0&language=EN&guiLanguage=en>>; OSCE, *Legal Sector Report for Albania*, Tirana 2004, pp. 23-25. Although Albania shows a significant improvement in TI's Corruption Perceptions Index of 2008, this index clearly demonstrates that corruption remains a serious challenge. Albania scored 3.4 (where 10 represents extremely clean and 0 highly corrupt); its 2007 score was 2.9. See <<http://www.transparency.org>> (Press release, 'CPI 2008: Progress: Albania shows marked improvement', Tirana, 24 September 2008).

44 See, for example, GRECO, Second Evaluation Round, *Report on Albania*, Strasbourg, 14-18 March 2005, p. 8 (hereinafter referred to as GRECO Report 2005).

45 Prokuroria e Rrethit Gjyqësor Tiranë, *Analiza Vjetore e Prokurorisë të Rrethit Gjyqësor Tiranë* (Annual Analysis of the Public Prosecutor's Office, District of Tirana), 2008, p. 12.

46 The public authorities which participate in the Unit are the Customs Authorities, the Financial Police, the Internal Audit of the Public Sector, the Supreme State Audit and the Bank of Albania.

47 Prokuroria e Rrethit Gjyqësor Tiranë, *Analiza Vjetore e Prokurorisë të Rrethit Gjyqësor Tiranë* (Annual Analysis of the Public Prosecutor's Office, District of Tirana), 2008, pp. 12-13.

48 See Section 3.2 of this paper.

49 Prokuroria e Rrethit Gjyqësor Tiranë, *Analiza Vjetore e Prokurorisë të Rrethit Gjyqësor Tiranë* (Annual Analysis of the Public Prosecutor's Office, District of Tirana), 2008, p. 14.

50 GRECO, First Evaluation Round, *Evaluation Report on Albania*, Strasbourg, 9-13 December 2002, p. 10 (hereafter referred to as GRECO Report 2002); GRECO Report 2005, *supra* note 44, p. 2.

3.2. Legislation

Definition of the offence

Passive corruption by public officials constitutes a criminal offence by virtue of Articles 259, 260 and 319a of the ACC. Article 259 ACC may be regarded as the general provision on passive corruption by public officials. According to Article 259 ACC:

‘Soliciting or taking, directly or indirectly, by a person who exercises public functions, of any undue advantage or of any such promise for himself or for a third person, or accepting an offer or promise deriving from an undue advantage, in order to act or refrain from acting in the exercise of his duty or function, is punished with a prison term of two to eight years and a with fine from five hundred thousand to one million Lekë.’⁵¹

The core elements of the human behaviour which is criminalised in Article 259 ACC are the same for the other two provisions. The only aspects which differ are the perpetrators and the level and severity of the sanctions. Thus, Article 260 ACC criminalises the passive bribery – defined in the same words of Article 259 ACC – of senior state officials or local elected officials. The sanctions that this category of officials risk when committing the offence of passive bribery are a term of imprisonment of four to twelve years and a fine from one million to five million Lekë. Article 319a ACC deals with passive corruption by judges, prosecutors and other officials of the justice system and it imposes a term of imprisonment of three to ten years and a fine from eight hundred thousand to four million Lekë.

The Convention requires the criminalisation of passive corruption when committed intentionally. One issue that immediately catches the eye in the Albanian provisions on passive corruption is the lack of any explicit mention of the *mens rea*. However, this does not mean that no *mens rea* is required for the offence of passive corruption. The Albanian Criminal Law (doctrine) does not require that the *mens rea* is mentioned in every provision of the code. Intention is defined in Article 15 ACC and negligence in Article 16 ACC. Express mention of the *mens rea* is made only in cases of negligence offences or premeditated offences. All the other offences where no express mention is made of the *mens rea* imply the existence of intention.⁵²

One of the elements of the offence of passive corruption is that the person in question should ‘act or refrain from acting in the exercise of his duty or function’. The Albanian courts seem to have taken a formalistic view since it is required that the public official is formally authorised to carry out the official act.⁵³ In this respect, the scope of the Albanian provision seems to be narrower in comparison with the Dutch one.⁵⁴

It might already be obvious that the wording of the Albanian provisions on passive corruption by public officials is almost the same as the wording of the Convention. Nevertheless, the existence of three different provisions on the passive bribery of public officials has already generated some problems. It is not always clear which of those provisions is applicable to certain public officials. Moreover, it seems that the meaning of the term ‘undue advantage’ is not entirely clear. These issues are elaborated further below.

51 One Euro is approximately 122 Lekë.

52 See for a detailed analysis I. Elezi *et al.*, *Komentari i Kodit Penal të Republikës së Shqipërisë* (Commentary of the Criminal Code of the Republic of Albania), 2001, pp. 11-33, 37-42, 111-122. See also *Gjykata e Rrethit Gjyqësor Tiranë*, vendim nr. 361, 2006 and vendim nr. 897, 2006.

53 *Gjykata e Rrethit Gjyqësor Tiranë*, vendim nr. 462, 2006.

54 See Section 4.2 of this paper.

Undue advantage

The Albanian provisions on passive corruption follow the Convention and expressly refer to ‘any undue advantage’ (Article 3 of the Convention). The Criminal Code does not contain any definition of the term. The *travaux préparatoires* do not contain any definition of this term either. There is only one isolated case at the District Court of Korça where the public prosecutor charged a university lecturer with the passive corruption of a person who exercised public functions in accordance with Article 259 ACC. The lecturer was alleged to have solicited a female student for sexual contacts in exchange for a good grade. The District Court of Korça decided that sexual contacts or favours do not represent any monetary or material value and therefore cannot be regarded as undue advantages for the purposes of Article 259 ACC.⁵⁵ It is difficult to imagine how this decision could be in line with the purpose of the Convention which seeks to criminalise also undue advantages of an immaterial nature.⁵⁶ It is also difficult to foresee the impact of this decision on future case law. It was already mentioned above that the Albanian authorities seem to have transplanted the Convention’s definition of passive corruption into the Criminal Code. Recent research has demonstrated that in cases of legal transplants and in the absence of any other sources, the Albanian courts and especially the Supreme Court tend to consult the original source of the transplanted provision when they interpret that provision.⁵⁷ We would therefore encourage the Albanian courts and especially the Supreme Court to continue this trend and to ignore the decision of the District Court of Korça and interpret the term ‘undue advantage’ in conformity with the spirit of the Convention.

Public official

Unlike the Dutch Criminal Code,⁵⁸ the ACC does not use the term ‘public official’ in the definition of the offence of the passive bribery of public officials. As described above, there are three categories of public officials which can be the subject of the criminal offence of passive bribery. Nevertheless, the ACC does not contain any definition of each of these categories of officials. Unfortunately, so far, there is no case law from the Supreme Court on the interpretation of the substantive elements of the provisions on passive corruption by public officials.⁵⁹ However, the lower courts and especially the District Court of Tirana have already delivered a considerable amount of decisions on the issue. Article 259 ACC has generated most of the existing case law on passive corruption by public officials. There is a wide range of persons who have been tried under Article 259 ACC as persons who exercise public functions.⁶⁰ Surprisingly enough, all the lower courts have also not formulated any definition of the term ‘a person who exercises a public function’. One would expect that the courts would use the definition of Article 2(1) of the Law on the Status of Civil Servants,⁶¹ but this is not the case. According to this

55 *Gjykata e Rrethit Gjyqësor Korçë*, vendim nr. 345, 2006. The court amended the charge and convicted the lecturer of the offence of sexual relations by the misuse of a duty under Art. 105 ACC.

56 See Section 2.2 of this paper; see also Explanatory Report, *supra* note 24, pp. 8-9.

57 I. Peçi *et al.*, ‘Judicial Interpretation and Substantive Legality in Criminal Law: A Comparative Study on Distribution of Power in Albania and The Netherlands’, 2009 *European Journal of Crime, Criminal Law and Criminal Justice* 17, pp. 113-135.

58 See Section 4.2 of this paper.

59 The only case law from the Supreme Court on the passive bribery of public officials concerns procedural matters, mainly related to the pre-trial detention of the suspects. See for a summary of the existing case law on this point, *Gjykata e Lartë*, vendim nr. 5, 2009. See also *Gjykata e Apelit Tiranë*, vendim nr. 526, 2008.

60 For example, the following persons were tried by the District Court of Tirana as persons exercising public functions under Art. 259 ACC: a cashier of the Albanian Electric Corporation (KESH) (vendim nr. 797, 2005), police officers (see among many decisions vendim nr. 1198, 2005), two directors and a teacher at an elementary school (vendim nr. 897, 2006), a lecturer at the Police Academy (vendim nr. 361, 2006), an army commander (vendim nr. 498, 2008), medical doctors at the University Medical Centre of Tirana (see among many decisions vendim nr. 526, 2008), the Secretary General of the Ministry of Labor, Social Affairs and Equal Opportunities (vendim nr. 636, 2008) etc.

61 Law No. 8549, 1999.

definition ‘civil servants’ are those employees of the institutions of central or local public administration who exercise public authority in functions of a managerial, organizational, supervisory or implementing nature. Even though this definition is not included in the Criminal Code itself, we consider its existence as positive from the point of view of legal certainty. However, in the absence of any other definition in the case law, we deem it desirable that the courts explicitly refer to the definition of Article 1 of the Law on the Status of Civil Servants. In this way the persons who fall under the definition of Article 1 of the Law on the Status of Civil Servants will also be aware that they might be considered as persons who exercise public functions for the purpose of Article 259 ACC. Reference in the Criminal Code to a non-exhaustive list of public officials in a separate normative act, which can be amended more easily and which provides flexibility, may be an even better solution.⁶²

Some tension may also be observed in the relationship between Article 259 and Article 260 ACC. The Public Prosecutor of Tirana has charged a General Director at the Ministry of Defence with the offence of passive corruption by senior state officials under Article 260 ACC.⁶³ At the time of writing the case is still pending trial, but the District Court of Tirana has already decided upon a similar case, where the Secretary General of the Ministry of Labour, Social Affairs and Equal Opportunities was convicted of passive corruption by a person who exercises a public function under Article 259 ACC.⁶⁴ It is therefore unclear why the Public Prosecutor decided to charge the person in question with the offence of passive bribery by senior state officials under Article 260 ACC. The *travaux préparatoires* are silent on the meaning of the term ‘senior state official’. Nevertheless, based on the decision of the District Court of Tirana and the *ratio legis*, it may be argued that for the purposes of Article 260 ACC senior state officials may be considered to be those officials who carry out constitutional functions and who are appointed in accordance with and whose functioning is regulated by the Constitution.⁶⁵ The Dutch approach where ministers, mayors or certain other political officials are explicitly mentioned in one of the provisions on passive corruption may be an even better solution from the point of view of legal certainty.⁶⁶

The interaction between Article 259 and Article 319a ACC has also proved to be problematic in relation to the officers and agents of the judicial police. The judicial police carry out all criminal investigations which the public prosecutor has delegated to them or has ordered them to carry out.⁶⁷ The judicial police are primarily comprised of members of the regular police, members of the financial, military and forest police and members of the judicial police sections at every public prosecutor’s office throughout the country to whom a special law has given the powers of the judicial police.⁶⁸ Other persons to whom the law, within the margin of their function, has attributed the powers of the judicial police can also be officers or agents of the judicial police.⁶⁹ In a series of decisions from the District Court of Tirana officers of the judicial

62 See further Section 4.2 of this paper.

63 *Prokuroria e Rrethit Gjyqësor Tiranë*, Pr. Nr. 3/2008.

64 *Gjykata e Rrethit Gjyqësor Tiranë*, vendim nr. 636, 2008.

65 Judges of the Supreme and Constitutional Courts are also appointed in accordance with the Constitution and their functioning is clearly regulated in the Constitution. However, even if our definition of high state officials stands, it is difficult to argue that these judges can be regarded as high state officials for the purposes of Art. 260 ACC. Passive corruption by judges, prosecutors and other officials of the justice system is criminalised by Art. 319a ACC and it thus seems more logical to bring the judges of the Supreme and the Constitutional Court under the realm of this Article. See for the Supreme Court Arts. 136, 137 and 139-142 of the Albanian Constitution; for the Constitutional Court see Arts. 124-134 of the Albanian Constitution.

66 See Section 4.2 of this paper.

67 Art. 30(1)(2) Albanian Code of Criminal Procedure.

68 Art. 32 Albanian Code of Criminal Procedure. See also Arts. 2, 6 and 11 of Law No. 8677, 2000 on the Organization and the Functioning of the Judicial Police.

69 *Ibid.*

police have been tried under Article 259 ACC, thus for the passive bribery of persons who exercise public functions.⁷⁰ In line with these decisions, the public prosecutor of the district of Durrës charged an officer of the judicial police of the district of Durrës with the offence of the passive bribery of persons who exercise public functions, thus Article 259 ACC. However, the District Court of Durrës amended the charge and charged him with the offence of the passive bribery of judges, prosecutors and other officials of the justice system, in accordance with Article 319a ACC.⁷¹ Unfortunately the District Court of Durrës did not give any reason why it did not follow the case law of the District Court of Tirana. According to its brief reasoning, officers of the judicial police should be considered as officials of the justice system because the nature of their function makes them an indispensable part of that system. It should be noted here that the *travaux préparatoires* are again silent on the exact meaning of the term ‘other officials of the justice system’.

In cases of contradictory decisions on a certain matter from the lower courts but also from the criminal chamber(s) of the Supreme Court itself, Article 438 of the Code of Criminal Procedure empowers the Supreme Court to deliver a unifying decision in a plenary session of the Grand Chamber.⁷² Unifying decisions very often concern qualification issues of substantive criminal law. Their purpose is to unify the practice of the courts (including the Supreme Court itself) in future similar cases.⁷³ Therefore, unifying decisions by the Supreme Court may solve the tensions described above. The distinction offered by the Albanian legislation for three different categories of public officials and the stricter sanctions for certain senior officials might be justifiable in policy terms. However, in the absence of unifying decisions by the Supreme Court and taking into account the silence of the *travaux préparatoires* we observe that the construction of three different provisions which criminalise (the same) passive bribery of three different categories of public officials is contrary to the legal certainty that a Criminal Code should ensure. As it was demonstrated above it is not always clear which article applies to certain situations.

One last point concerns the passive bribery of foreign public officials. Article 5 of the Convention requires the Member States to criminalise the passive corruption of foreign officials. So far Albania has not taken any legislative (or other) measure to comply with this obligation.

4. The Netherlands

4.1. General remarks

The reputation of the Netherlands is that of a corruption-free country. According to TI’s Corruption Perception Index the Netherlands has continuously been among the least corrupt nations, also in comparison to many other Western democratic countries. The impression that corruption is not a widespread phenomenon in Dutch administration is confirmed by empirical findings as well as expert opinions.⁷⁴ Ever since the introduction of the first Dutch Criminal Code in 1809 the passive bribery of public officials has been a criminal offence.⁷⁵ When the current Criminal Code entered into force in 1886, the offence was included in two articles (Articles 362 and 363).

70 See among others *Gjykata e Rrethit Gjyqësor Tiranë*, vendim nr. 606, 2007 and vendim nr. 835, 2007.

71 *Gjykata e Rrethit Gjyqësor Durrës*, vendim nr. 632, 2008.

72 See also Art. 141(2) Albanian Constitution.

73 Unifying decisions are based on a concrete case brought before the Supreme Court. They are legally binding on the courts (including the Supreme Court in future similar cases) by virtue of Art. 438 Albanian Code of Criminal Procedure.

74 L. Huberts, *National Integrity Systems, Country Study Report, The Netherlands 2001*, Transparency International 2001, pp. 3-8.

75 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 110-115 and pp. 187-190.

These articles were not substantively amended until 2001, when the anti-corruption regulations were tightened as a consequence of a bill to ratify and implement the OECD Convention, the EU Corruption Protocol⁷⁶ and other international instruments.⁷⁷ The Implementation Bill⁷⁸ provided for several amendments to Dutch legislation in order to meet the obligations under these conventions.⁷⁹ The Netherlands joined GRECO in 2001 and ratified the Criminal Law Convention on Corruption in 2002.⁸⁰ In 2005 the GRECO evaluation team recommended increasing the level of fines in relation to some bribery offences.⁸¹ This recommendation was implemented in the context of a partial revision of the Criminal Code and certain other laws.⁸² A draft bill was submitted to the Second Chamber of Parliament on 20 March 2008.⁸³

A National Public Prosecutor for corruption was created in 2000. This prosecutor directs investigations into the corruption of foreign public officials and can advise, assist or direct national corruption investigations. A special investigation service of the Dutch police (the *Rijksrecherche*) is responsible for investigating certain cases of corruption, especially when extra safeguards regarding the impartiality of the investigation are required (for example, cases concerning police officers or politicians). However, most corruption cases are dealt with by the regular police forces.⁸⁴

4.2. Legislation

Definition of the offence

The offence of the passive bribery of public officials is criminalised by virtue of Articles 362 to 364a of the Dutch Criminal Code (hereinafter DCC). Article 363 DCC reads as follows:

‘Article 363

1. A prison sentence of not more than four years or a fine in the fifth category will be imposed on the public official:

76 The Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, Accompanying the Convention on the Protection of the European Communities’ Financial Interests (Book of Treaties 1996, 330).

77 L. Huberts, *National Integrity Systems, Country Study Report, The Netherlands 2001*, Transparency International 2001, pp. 11-13; J. Roording, ‘Corruptie in het Nederlandse strafrecht’ (Corruption in Dutch Criminal Law), 2002 *Delikt en Delinkwent*, pp. 110-115.

78 *Stb.* 2000, 616 (entry into force 1 February 2001).

79 OECD, *Netherlands. Review of Implementation of the Convention and 1997 Recommendation*, p. 1, available at <<http://www.oecd.org/dataoecd/39/43/2020264.pdf>>. Later on the Netherlands also signed the United Nations Convention against Corruption (58th General Assembly, Resolution 58/4, 31 October 2003); see H. de Doelder *et al.*, ‘Het Verdrag van de Verenigde Naties tegen corruptie: waardevol voor Nederland?’ (The United Nations Convention against Corruption: Useful for the Netherlands?), 2006 *Delikt en Delinkwent*, pp. 833-854.

80 The Convention entered into force in respect of the Netherlands on 1 August 2002. The Netherlands has made reservations to Art. 12 (trading in influence) and Art. 17 (jurisdiction) of the Convention. The Netherlands has limited the territorial application of the Convention to the Kingdom of the Netherlands in Europe. The Additional Protocol to the Convention was ratified on 16 November 2005 and entered into force in respect of the Netherlands on 1 March 2006. See GRECO, Third Evaluation Round, *Evaluation Report on the Netherlands on ‘Incriminations (ETS 173 and 191, GPC 2)’ (Theme I)*, Strasbourg, 9-13 June 2008, p. 3 (hereinafter GRECO Report 2008). GRECO adopted the First Round Evaluation Report on the Netherlands in 2003, the Second Round Evaluation Report in 2005 and the Third Round Evaluation Report on Incriminations in 2008. These Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO’s homepage (<<http://www.coe.int/greco>>).

81 GRECO, Second Evaluation Round, *Evaluation Report on the Netherlands*, Strasbourg, 10-14 October 2005, p. 9 (hereinafter GRECO Report 2005). See also G. Smid, ‘Toezicht op de (uit)werking en naleving op nationaal niveau van internationale verdragen op het gebied van corruptiebestrijding’ (Monitoring the Functioning of and Compliance with International Conventions concerning Corruption at a National Level), 2009 *Strafblad*, no. 1, pp. 63-64.

82 GRECO, Second Evaluation Round, *Compliance Report on the Netherlands*, Strasbourg, 16-19 October 2007, pp. 3-5.

83 *Kamerstukken II 2007-2008*, 31 391, no. 2. See for a discussion of this draft bill E. Sikkema, ‘De strafrechtelijke corruptiewetgeving: opmerkingen naar aanleiding van wetsvoorstel 31 391’ (Criminal Legislation concerning Corruption), 2009 *Strafblad*, no. 1, pp. 5-13.

84 GRECO, First Evaluation Round, *Evaluation Report on the Netherlands*, Strasbourg, 24-28 March 2003, pp. 10-11 (hereinafter GRECO Report 2003).

1° who accepts a gift, promise or service, knowing or reasonably suspecting that it is given, made or offered to him in order to induce him to act or to refrain from acting in his service, contrary to his duty (...).’

A distinction is made between bribery inducing an unlawful act or an omission in return, on the one hand, and bribery inducing a legitimate act or an omission in return, on the other. This distinction is relevant for the severity of the maximum punishment that can be imposed.⁸⁵ Cases of bribery where the desired or obtained outcome is a breach of an official’s duty are treated more seriously than situations in which there is no element of a breach of duty. Passive bribery of a public official, involving an act or an omission not contrary to his duty (Article 362 DCC), carries a maximum sentence of two years’ imprisonment (or a fine). If the bribery involves an act or an omission contrary to his duty (Article 363 DCC), the maximum sentence is four years’ imprisonment (or a fine). This distinction between the provisions does not lead to unnecessary complications – for example, defendants charged under Article 363 DCC are acquitted if a breach of duty cannot be established – as it is possible to prosecute a person on the basis of both provisions, with the judge reaching the final decision.⁸⁶

The Convention does not make a distinction as to whether or not the solicited act is a breach of duty. The confidence of citizens in the fairness of public administration would be severely undermined in both cases.⁸⁷ In our view it would be desirable to abolish the distinction between legitimate acts (Article 362 DCC) and unlawful acts (Article 363 DCC) in its entirety. Case law concerning the term ‘contrary to his duty’ seems to be unclear. As a result of the very broad view that the courts take with respect to the scope of the provision of Article 363 DCC, the provision of Article 362 DCC seems to have become more or less superfluous. Finally, an important advantage of joining the two Articles referred to is that the legislation concerning bribery could be greatly simplified.⁸⁸

Unlike the Albanian provisions, the Dutch provisions on bribery do not explicitly indicate that gifts or services can also be received ‘indirectly’. All the same, it is not necessary that the gift or service is provided to the public official himself by the briber in person.⁸⁹ The Minister of Justice has indicated that the text of the provisions was deliberately formulated in a broad manner to ensure that intermediaries also fall within the scope of the provisions.⁹⁰ Case law has confirmed that a gift or service rendered does not have to be for the public official himself. For example, the provision by a construction firm of an apartment free of charge for a period of five years to the daughters of a public official should be regarded as a gift to the public official himself.⁹¹

In the provisions on passive bribery the phrase ‘to act or to refrain from acting in his service’ is used. In this regard, it is not required that the public official is formally authorised to carry out the official act; it is only required that his function enables him to carry out the desired

85 GRECO Report 2003, *supra* note 84, p. 24; GRECO Report 2008, *supra* note 80, pp. 3-5.

86 GRECO Report 2008, *supra* note 80, p. 23. The GRECO evaluation team recommends considering increases to the sanctions for public sector bribery not involving a breach of duty (Art. 362 DCC), thereby ensuring that the sanctions for these offences are effective, proportionate and dissuasive in practice (Art. 19 of the Convention); see GRECO Report 2008, *supra* note 80, p. 26.

87 See Section 2.2 of this paper.

88 For an elaborately substantiated position on this issue, see E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 263-269.

89 GRECO Report 2008, *supra* note 80, p. 7.

90 *Handelingen II* 1999-2000, no. 91, p. 5893. See also E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, p. 207.

91 District Court (*Rechtbank*) of Rotterdam 14 December 2004, LJN AR7472, as confirmed on appeal by the Court of Appeal (*Gerechtshof*) of The Hague 19 April 2006, LJN AW2327.

act.⁹² The provisions on bribery relate to both the acts and omissions of public officials. It is irrelevant whether the desired act or omission actually took place.⁹³ The Supreme Court (*Hoge Raad*) has ruled that bribery does not relate only to situations in which there is a direct connection between the gift, on the one hand, and a specific act in return, on the other. It also comprises giving gifts to a public official ‘in order to establish and/or maintain a relationship with that public official with the aim being to obtain preferential treatment’.⁹⁴

In relation to the *mens rea*, the above-mentioned legislative amendments of 2001 introduced the phrase ‘or reasonably expecting’ in Articles 362 and 363 DCC. This means that the perpetrator will not only be held criminally liable if it can be established that he acted intentionally, but also if he (did not know but) should have understood that he received an advantage for a certain purpose.⁹⁵

Undue advantages

Whereas the Albanian provisions on passive bribery explicitly refer to ‘any undue advantage’ (Article 3 of the Convention), the Dutch provisions use the terms ‘gift’, ‘promise’ and ‘service’ instead. When the Criminal Code was amended in 2001, the term ‘service’ was introduced to clarify the existing corruption provisions.⁹⁶ It was the Minister of Justice’s intention to establish unequivocally that providing a service, such as supplying a holiday home for an exceptionally low rent, is also included.⁹⁷ Case law indicates that a gift, promise and service involve both material and immaterial advantages. In contrast to the Albanian situation,⁹⁸ the Dutch Supreme Court has ruled that a gift would include sexual favours as well.⁹⁹ Although the gift (etc.) will need to have some sort of value for the recipient, this could nevertheless be of a non-commercial nature and may only be of value to the person who receives it.¹⁰⁰ The gift does not need to have a monetary value. It was expressly decided not to make a distinction between gifts according to their monetary value. This implies that customary gifts of little value (for example, representational gifts) also potentially fall within the scope of the provisions on passive bribery.¹⁰¹ This might include a bottle of wine, a cup of coffee or a cigar. Only something that could not possibly have any value at all to anyone and is completely worthless cannot be regarded as a gift. In addition, no distinction is made between ‘undue’ and ‘due’ advantages. One might wonder whether the scope of the provisions is too broad in this respect. Does this mean that the public official is not allowed to accept any gift at all, not even a pen? It should be observed that criminal liability is limited to situations in which the official accepts the gift ‘knowing or reasonably suspecting’ that it is being given to him in order to induce him to act in his service. This *mens rea* requirement will normally not be met when he accepts something of very little value or a

92 *Hoge Raad* (Supreme Court) 2 June 1909, W 8890; *Hoge Raad* 26 June 1916, NJ 1916, p. 916; *Hoge Raad* 7 April 1919, NJ 1919, 527; *Hoge Raad* 26 May 1919, NJ 1919, 653; *Hoge Raad* 7 June 1920, W 10 591. For a discussion of this case law see E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 269-276. See also GRECO Report 2008, *supra* note 80, p. 8.

93 *Hoge Raad* 22 February 2000, NJ 2000, 557. See also E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 204-205.

94 *Hoge Raad* 27 September 2005, LJN AT8318; *Hoge Raad* 20 June 2006, NJ 2006, 380.

95 GRECO Report 2008, *supra* note 80, pp. 8-9; E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 237-242.

96 GRECO Report 2008, *supra* note 80, p. 6.

97 See the *travaux préparatoires* (*Memorie van toelichting*) to the draft law amending the corruption provisions: *Kamerstukken II* 1998-1999, 26 469, no. 3, p. 4.

98 See Section 3.2 of this paper.

99 *Hoge Raad* 31 May 1994, NJ 1994, 673. See also J. Roording, ‘Corruptie in het Nederlandse strafrecht’ (Corruption in Dutch Criminal Law), 2002 *Delikt en Delinkwent*, p. 120.

100 See *inter alia* *Hoge Raad* 25 April 1916, NJ 1916, p. 551.

101 GRECO Report 2008, *supra* note 80, p. 7.

customary representational gift.¹⁰² In other words, a gift which is given in order to induce the public official to act in his service will be ‘undue’ by default. Therefore, an explicit reference to ‘undue’ advantages in the provisions on bribery seems unnecessary.

The Dutch provisions also address the making of a gift or promise (etc.) in return for an act or omission that occurred in the past.¹⁰³ Thus, they exceed the requirements of the international conventions.¹⁰⁴

Public official

The Dutch Criminal Code does not contain an explicit definition of who is to be considered a ‘public official’.¹⁰⁵ In the absence of such a definition, case law plays an important role in determining the exact scope of this term. The courts take a very broad view of who is to be considered a public official.¹⁰⁶ According to the Supreme Court a public official is ‘a person appointed by public authorities to a public position, in order to perform a part of the duties of the state and its bodies’.¹⁰⁷ Whether this person can also be classified as a public official in terms of employment law is irrelevant.¹⁰⁸ The application of these criteria has resulted in the classification of – amongst others – a tram driver employed by a public transport company as a public official.¹⁰⁹ More recently the Supreme Court extended this definition to a person appointed under the supervision and responsibility of the Government to a position that cannot be denied a public character.¹¹⁰ Employees of the (privatized) Dutch Railways cannot be regarded as public officials because they are not appointed ‘under the (direct) supervision and responsibility of the Government’.¹¹¹ Article 84 DCC explicitly extends the definition to members of general representative bodies (domestic public assemblies), the military, judges and arbitrators.¹¹²

The general provisions on passive bribery also cover persons whose appointment as a public official is pending, as well as former public officials. They also apply to national judges. In addition, Article 364 covers the specific aggravated offence of the bribery of a judge to influence a decision in a case over which he presides.¹¹³ If the offence has been committed by a minister, mayor or certain other political officials, the maximum sentence can also be increased (Article 362(3) DCC and Article 363(3) DCC).¹¹⁴ Following an amendment to the Criminal Code in 2001, the bribery of foreign public officials has been criminalised by making the general provisions on the passive bribery of public officials also applicable to foreign officials (Article

102 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 217-223.

103 *Ibid.*, pp. 282-291.

104 OECD, *Netherlands. Review of Implementation of the Convention and 1997 Recommendation*, p. 5, available at <<http://www.oecd.org/dataoecd/39/43/2020264.pdf>>. See also J. Roording, ‘Corruptie in het Nederlandse strafrecht’ (Corruption in Dutch Criminal Law), 2002 *Delikt en Delinkwent*, p. 156.

105 See GRECO Report 2008, *supra* note 80, pp. 10-11.

106 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, p. 599.

107 See *inter alia* *Hoge Raad* 30 January 1911, W 9149; *Hoge Raad* 25 October 1915, NJ 1915, 1205; *Hoge Raad* 28 February 1921, NJ 1921, 521. For a discussion of the case law see E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 30-36.

108 *Hoge Raad* 7 October 1947, NJ 1948, 39.

109 *Hoge Raad* 26 June 1984, NJ 1984, 790; *Hoge Raad* 1 December 1992, NJ 1993, 354.

110 *Hoge Raad* 30 May 1995, NJ 1995, 620; *Hoge Raad* 18 May 2004, NJ 2004, 527. See also J. Roording, ‘Corruptie in het Nederlandse strafrecht’ (Corruption in Dutch Criminal Law), 2002 *Delikt en Delinkwent*, pp. 117-118.

111 *Hoge Raad* 7 April 2009, NJ 2009, 187.

112 GRECO Report 2003, *supra* note 84, pp. 3-4; GRECO Report 2008, *supra* note 80, p. 10.

113 GRECO Report 2008, *supra* note 80, pp. 3-4. On the bribery of judges see E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, pp. 383-405. Dutch legislation also deems active and passive bribery in the private sector to be punishable (Art. 328ter DCC). Finally, active and passive bribery during elections has also been made punishable (Art. 126 DCC). See GRECO Report 2003, *supra* note 84, p. 24.

114 GRECO Report 2008, *supra* note 80, p. 9.

364a DCC).¹¹⁵ The elements of the offence of the bribery of public officials thus accordingly apply to the bribery of foreign public officials.¹¹⁶ The same is true of the bribery of officials of international organisations. Pursuant to Article 364a DCC, persons working in the public service of an organisation governed by international law are considered to be public officials.¹¹⁷

The concept of a public official as interpreted by the courts appears to encompass all the categories of functions mentioned in Article 1 of the Convention. However, in 2008 the GRECO evaluation team did observe that the scope of this concept is unclear. A person might not even be aware that he was considered to be a public official for the purpose of the Criminal Code.¹¹⁸ Therefore the evaluation team recommends analysing whether there is a need, for the sake of legal certainty, to clarify which functions are covered by the notion of ‘public official’.¹¹⁹

In principle we agree that an explicit definition of the term ‘public official’ in the Criminal Code seems desirable from the point of view of legal certainty. However, in practice it seems impossible to reach a clear definition. Any definition would necessarily have to be very broad and vague, with a view to the wide variety of different functions that need to be covered.¹²⁰ A list of all the specific categories of functions that are covered by the term ‘public official’ in the Criminal Code would have to be very long and would have to be frequently amended so as to keep it up to date. Maybe the best option would be a reference in the Criminal Code to a non-exhaustive account in a separate regulation (*Algemene Maatregel van Bestuur* (an Order in Council)), which can be amended more easily. Thus, a certain amount of flexibility can be guaranteed.

5. Analysis and conclusions

As we already observed in the introduction, a discrepancy in corruption levels exists between young democracies like Albania, on the one hand, and consolidated democracies like the Netherlands, on the other. Corruption appears to be a widespread phenomenon in Albania, affecting most of its institutions.¹²¹ In 2005, it was indicated that corruption remains one of the main concerns in Albania.¹²² In contrast, the Netherlands appears to be one of those GRECO members that are least affected by corruption. Statistics on the prosecution of corruption seem to be indicative of quite a low level of corruption in the Netherlands. The common view of the Dutch authorities is that corruption is not a major problem and that it is not a widespread phenomenon.¹²³

115 J. van Zijl *et al.*, ‘Buitenlandse corruptie: een binnenlandse zaak’ (Foreign Corruption: a Domestic Matter), 2009 *Strafblad*, no. 1, pp. 47-56; J. Roording, ‘Corruptie in het Nederlandse strafrecht’ (Corruption in Dutch Criminal Law), 2002 *Delikt en Delinkwent*, pp. 118-120.

116 GRECO Report 2008, *supra* note 80, pp. 10-11.

117 *Ibid.*, p. 14. Members of foreign public assemblies are considered to be ‘persons working in the public service of a foreign state’ within the meaning of Art. 364a DCC (GRECO Report 2008, *supra* note 80, p. 11). Accordingly, members of an international parliamentary assembly are considered to be ‘persons working in the public service of an organisation governed by international law’, within the meaning of Art. 364a DCC. This also includes judges and officials working for international courts. In addition, Art. 364a(3) DCC provides that judges of international courts are equated with judges within the meaning of Art. 364 DCC (GRECO Report 2008, *supra* note 80, p. 15). The terms ‘public official’ and ‘judge’ also apply to arbitrators, pursuant to Art. 84(2) DCC. Although the concept of a trial by jury is not known in the Dutch legal system, jurors are equated with judges for the purpose of the provisions on corruption; see *Kamerstukken II* 2004-2005, 30 156 (R1791), A and no. 1, p. 5 (*travaux préparatoires* to the ratification documents concerning the Additional Protocol). As foreign public officials and foreign judges are equated with domestic public officials in Art. 364a, the elements of the offence of the bribery of public officials and judges also seem to apply to foreign arbitrators and foreign jurors (GRECO Report 2008, *supra* note 80, p. 16).

118 See also E. de Vries Robbé *et al.*, *Ambtscriminaliteit aangegeven?* (Crimes by Public Officials Reported?), 2008, pp. 20-24 and p. 112 (with respect to the legal obligation for public officials to report certain crimes, Art. 162 of the Code of Criminal Procedure).

119 GRECO Report 2008, *supra* note 80, pp. 22-23.

120 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, p. 80 and pp. 599-600.

121 GRECO Report 2002, *supra* note 50, p. 31.

122 GRECO Report 2005, *supra* note 44, pp. 6-8 and p. 14.

123 GRECO Report 2003, *supra* note 84, pp. 7-9 and p. 28.

We posed the question whether this discrepancy corresponds with a discrepancy in the anti-corruption legislation in both countries. Our paper focused on the implementation of the Criminal Law Convention on Corruption, especially in connection with the definition of the offence of the passive bribery of public officials. In particular we looked at the clarity and the accessibility of this definition from the point of view of legal certainty. In this context, a generally good legal framework seems to be in place in both countries.¹²⁴

In general the Albanian anti-corruption legislation seems to comply with the requirements of the Convention. The Albanian definition of the passive bribery of public officials is almost the same as the definition in the Convention. The Albanian (lower) courts seem to have extensively applied the provisions of corruption offences in a considerable amount of cases. However, unlike the Netherlands, it is remarkable that Albania has not yet enacted any provision on the passive bribery of foreign public officials. Moreover, we observed that the Albanian legislation lacks the desirable legal certainty on certain points. The exact meaning of the term ‘undue advantage’ seems to be unclear. The only court decision on the matter appears to interpret the term restrictively. In our view the Albanian courts should ignore this interpretation and follow the Convention in future similar cases. Last but not least, the Albanian Criminal Code, just as its Dutch counterpart, does not contain any definition of the term ‘public official’. The Albanian legislator has chosen to adopt a construction of three different provisions which criminalise (the same) passive bribery of three different categories of public officials. We observed that the scope of these provisions is not always clear. For the sake of legal certainty, it is desirable to clarify which category of public officials falls under each provision.¹²⁵

Dutch criminal legislation is on the whole in line with the requirements of the Convention. The corruption offences in the Dutch Criminal Code cover a wide range of corrupt behaviour. In addition, these provisions seem to be interpreted broadly by prosecutors and judges and the case law underlines the broad scope of the provisions. However, this is not to say that there are no issues of concern.¹²⁶ Some of these issues, particularly in connection with legal certainty, have been discussed above. In our view, the Dutch provisions could be greatly simplified by abolishing the distinction between bribery inducing an unlawful act or an omission in return (Article 363 DCC) and bribery inducing a legitimate act or an omission in return (Article 362 DCC). In the Dutch provisions, no distinction is made between ‘due’ and ‘undue’ advantages. Bearing in mind that the scope of these provisions is limited by the *mens rea* requirement, an explicit reference to ‘undue’ advantages seems unnecessary. Finally, the Dutch Criminal Code does not contain an explicit definition of the term ‘public official’. Whereas the concept of a public official as developed in the case law seems to encompass all categories of officials covered by the Convention, the exact scope of this concept appears to be unclear. From the point of view of legal certainty it is desirable to clarify which specific functions are covered by this concept, but a certain amount of flexibility should be guaranteed.¹²⁷

We have signalled some discrepancies as well as some similarities in the anti-corruption legislation of both countries. We have also observed some problems in relation to legal certainty. However, we conclude that the discrepancies in the legislation and the problems with legal certainty are relatively minor and therefore can hardly clarify the discrepancy in corruption levels. In the majority of cases, the definition of passive bribery in general and of ‘public

124 See for Albania GRECO Report 2002, *supra* note 50, p. 31 and GRECO Report 2005, *supra* note 44, pp. 14-15. For the Netherlands see GRECO Report 2008, *supra* note 80, pp. 21-23.

125 See Section 3.2 of this paper.

126 GRECO Report 2008, *supra* note 80, pp. 21-23.

127 See Section 4.2 of this paper.

officials' and 'undue advantages' in particular will be clear. The Bribe Payers Perception Index, published by TI, indicates that the willingness to pay bribes is partially a function of culture.¹²⁸ In addition, no amendment of the criminal law provisions can prevent a number of structural bottlenecks from continuing to occur. Bribery remains a victimless offence; both parties have an interest in preserving secrecy. Moreover, corruption occurs within Government institutions, which will be reluctant to wash their dirty linen in public. Given these bottlenecks, broadening criminal liability will only be able to contribute to a limited degree to a more effective approach to corruption. Sufficient means to realise the actual investigation, prosecution and trial are of vital importance.¹²⁹ Simply enacting anti-corruption laws will fail to solve the problem of corruption.

128 C. Corr *et al.*, 'Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures', 1999 *Vanderbilt Journal of Transnational Law*, pp. 1299-1303.

129 E. Sikkema, *Ambtelijke corruptie in het strafrecht* (Corruption of Public Officials in Criminal Law), 2005, p. 601.