

FIGHTING CORRUPTION SERIOUSLY? AFRICA'S ANTI-CORRUPTION CONVENTION

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'[I]f [Africa] fails to stop corruption,
corruption is most likely going to stop
[Africa].'¹

I. INTRODUCTION

The erstwhile Organization of African Unity (OAU) may have been 'the soul of the continent' in fighting 'for the integrity of Africa and the human dignity of all the peoples of the continent';² but it certainly was not 'the soul of the continent' in fighting corruption seriously. The body demonstrated a high degree of insensitivity and passivity towards corruption, allowing the ailment to develop into a pandemic. All that is about to change, as the African Union (AU),³ which replaces the OAU,⁴ has taken a bold step towards immunizing Africa against corruption pandemic. At the second annual summit of the AU Assembly holding in Maputo, Mozambique, in July 2003, the AU adopted

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1 Akin Oyeboade, 'An Overview of Corruption in Nigeria,' in *Political Reform and Economic Recovery in Nigeria* 603, 612 (I.A. Ayua & D.A. Guobadia, eds., 2001) [hereinafter *Political Reform and Economic Recovery in Nigeria*].

2 *The Durban Declaration in Tribute to the Organization of African Unity and the Launching of the African Union*, Assembly of the AU, 1st Ord. Sess., Durban, South Africa, 9–10 July 2002, ASS/AU/Decl. 2(1) [hereinafter *Durban Decl.*], paras. 13 & 14, available at <http://www.africa-union.org/en/news.asp?newsid=175>.

3 See *Constitutive Act of the African Union*, adopted 11 July 2000, entry into force 26 May 2001, CAB/LEG/23.15, 8 African Y.B. Int'l L. 479 (2000) (as amended by the *Protocol on Amendments to the Constitutive Act of the African Union*, adopted 11 July 2003) [hereinafter *AU Act*] (establishing the African Union (AU) for political and economic integration and cooperation to meet the aspiration of Africans). The AU was inaugurated on 9 July 2002, in Durban, South Africa.

4 *Id.*, Art. 33(1).

the African Union Convention on Preventing and Combating Corruption.⁵ The Convention, which has already been opened for signature, ratification or accession by the Member States of the AU—pursuant to its Article 23(1)—‘shall enter into force thirty (30) days after the date of the deposit of the fifteenth instrument of ratification or accession.’⁶

This article overviews the AU Corruption Convention and welcomes the initiative of the AU to address a problem that, though ‘universally disapproved yet [is] universally prevalent.’⁷ The Convention is an attempt to develop international law on corruption in Africa, as there is no general international law on the problem. Some of its provisions, however, will constitute presumptive evidence of emergent rules of general international law.⁸ The Convention also fulfils a major component of the New Partnership for Africa’s Development (NEPAD)⁹—the newest made-in-Africa prescription aimed at the sustainable development of the continent.¹⁰ NEPAD emphasizes certain success factors as imperatives to the achievement of its set goals, one of which is political governance and capacity building. African states, in particular, promise to adopt effective measures to combat corruption and embezzlement,¹¹ in the hope that developed countries will, *inter alia*, ‘set up co-ordinated mechanisms to combat corruption effectively, as well as commit themselves to the return of monies (proceeds) of such practices to Africa.’¹²

This Article adopts a socio-legal approach, arguing that while a continental legal framework is certainly necessary to fight corruption, the war should also be fought from non-legal fronts. It starts with a brief appraisal of the

5 See *African Union Convention on Preventing and Combating Corruption*, adopted 11 July 2003, available online on the web site of the African Union <<http://www.africa-union.org>> [hereinafter AU Corruption Conv.]. A draft convention had earlier been agreed upon on 19 September 2002 by the Executive Council of the AU at its conference in Addis Ababa, Ethiopia. See Draft African Union Convention on Preventing and Combating Corruption, Min/Draft/AU/Conv/Comb/Corruption (II) Rev.5, available at <http://www.africa-union.org/en/docs/DRAFT%20AU%20CONV%20CORRUPTION%20E%20REV%205.pdf> [hereinafter Draft Conv.].

6 AU Corruption Conv., *id.*, Art. 23(2) (providing also that ‘For each State Party ratifying or acceding to the Convention after the date of the deposit of the fifteenth Instrument of Ratification, the Convention shall enter into force thirty (30) days after the date of the deposit by that State of its instrument of ratification or accession.’ *Id.*, Art. 23(3)).

7 David Hess and Thomas W. Dunfee, ‘Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption),’ 33 *Cornell Int’l L.J.* 593, 595 (2000).

8 See *North Sea Continental Shelf Cases*, 1969 ICJ Rep. 4, 12.

9 See Organisation for African Unity, *The New Partnership for Africa’s Development* (October 2001), available at http://www.iss.co.za/African_facts/RegOrganisations/unity_to_union/pdfs/oau/keydocs/NEPAD.pdf [hereinafter NEPAD].

10 NEPAD is a logical response to the call by the UN Secretary-General for the implementation of Sustainable Development Initiatives for Africa. It is also Africa’s original initiative towards the achievement of the Millennium Development Goals. See generally *UN Millennium Declaration*, G.A. Res. 55/2, 8th Plenary Mtg., U.N. Doc. A/Res/55/2 (2000).

11 See NEPAD, *id.*, at para. 83.

12 *Id.*, at para. 188.

problem of corruption in Africa and of why international cooperation to combat organized crime is important (Part I). Next, the Article overviews the Convention, in a comparative perspective (Part II) and goes beyond the Convention to consider other complementary, including non-legal, measures that African States must address to make the Convention a success (Part III). The Article finally calls on African leaders to expedite action on the ratification and, thereafter, to set up the necessary processes for the Convention's implementation (Part IV).

II. CORRUPTION IN AFRICA AND THE NEED FOR INTERNATIONAL COOPERATION TO COMBAT ORGANIZED CRIME

A. *Corruption, Africa and the World*

A revolution occurred in 1995, in terms of empirical findings on corruption, when TI first published its Corruption Perceptions Index (CPI)—an annual ranking of countries according to their perceived levels of corruption. In subsequent years, there have been other empirical researches and findings on corruption, published by international organizations, aid agencies, research centres, Non-governmental Organisations (NGOs) and private companies. These studies range from opinion polls and composite indices to regression analyses, focus groups and diagnostic studies.¹³ The TI's annual CPI, however, has remained a template and a point of departure for any serious research analysis on corruption. By putting countries on a continuous scale, it has shown that it is possible to make country comparisons by assessing perceptions of the extent of corruption¹⁴ and has, thereby, changed worldwide perceptions regarding corruption.

To say that corruption is a serious problem in Africa is to state the obvious; corruption has become a way of life such that the average African has embraced fatalism or slipped into a deterministic view of life, "*Que sera, sera.*"¹⁵ From whichever angle it is viewed, the verdict of the international community, including TI, international financial institutions—such as The World Bank and IMF—and other Western donor countries is that Africa is a sink of corruption. This verdict appears to be justifiable, as a typical African society has become an emblem of crass materialism, with leaders famous for financial excesses, and the public service a symbol of graft. A typical national media in

13 E.g., the World Bank and the International Monetary Fund (IMF) have studied the macro-economic and social implications of corruption in depth and have published several working papers, journal articles and books on the phenomenon of corruption over the last few years.

14 See Transparency International (TI), *Global Corruption Report 2001*, 232 (2001) [hereinafter TI Report 2001] (offering a revealing portrait of corruption for the year 2000–01) (examining the current "state of corruption" around the world, analysing recent developments, identifying ongoing challenges and pointing to possible solutions).

15 What will be, will be.

Africa regularly carries stories of looted monies stashed in foreign banks, lost through endemic corruption and abuse of office. Extensive governmental involvement in the economy and regulation of public life worsen the situation, creating the basis for corrupt practices. Thankfully, most governments in Africa are now transiting from one party or military dictatorships and command economies to political pluralism and market economies. Even at that, corruption still abounds.

Corruption cuts across all facets of the society—public and private—and exists in the political, economic, social, religious, and cultural spheres. All forms of corruption are prevalent in Africa, ranging from small-scale bribes required for normal bureaucratic procedures to large-scale payment of considerable sums of money in return for preferential treatment or access. To get a passport in many African countries, the officials demand some money; to get one's phone installed, one has to give out bribes. The police, who are supposed to maintain law and order, are themselves embodiments of corruption and graft, glorying in unmediated power, mounting checkpoints and extorting money from law-abiding motorists and citizens.¹⁶

It is, however, political corruption that has done the greatest harm to Africa's economic, political and social developments, undermining the legitimacy of public institutions. The illicit acquisition of personal wealth by public officials and their cronies have had damaging effects on society, ethical values, justice, the rule of law, and sustainable developments in Africa. The level of corruption and the figures involved stagger belief; usually the figures constitute a substantial proportion of the resources of the state concerned. In Zimbabwe, for example, numerous cases of large-scale official corruption have been reported in recent years; the fraud department of the Zimbabwe Republic Police reported that 91 percent of the cases it investigated in 1998 had occurred in the government, and three-quarters of them had involved the award of tenders and contracts.¹⁷ In 1999–2001, misuse of resources in the Zimbabwean government and in state-run companies cost the country close to \$800 million.¹⁸ In Mali, the former President, Moussa Traore and several of his associates were recently charged for "economic crimes." Traore was accused of misappropriating 2 billion CFA francs (US \$2.6 million).¹⁹ Arab Moi's Kenya was similarly characterized by economic mismanagement, foreign debt, rampant corruption, political repression and ethnic tensions.

Nigeria presents a dramatic case study, as "egotistic" graft increasingly outweighed the "solidaristic" sort in the successive Nigerian governments,

16 See Niels Uldriks and Piet van Reenan, "Human Rights Violations by the Police," 2 *Hum. Rts. Rev.* 64, 72 (2001) (noting that in many parts of Africa, 'hard, repressive conduct on the part of the police is regarded as legitimate' by many; and such attitude 'increases the likelihood of police violations of human rights').

17 Economic Commission for Africa (ECA), *Economic Report on Africa 2002: Tracking Performance and Progress* 133 (2002) [hereinafter ECA Report 2002].

18 *Id.*

19 *Expo Times* (Sierra Leone), 26 September 2000, cited in TI Report 2001, *supra* note 14, at 82.

especially the military.²⁰ Successive military regimes²¹ have always cited corruption on the part of civilians as one of their reasons for usurping constitutional power. Ironically, these “messiahs” have proved to be the worst in the enterprise of taking corruption seriously. The centralized structure of military administration, with its concentration of power in the hands of a maximum ruler or a clique of the ruling junta at the head of the hierarchy, makes massive corruption and other forms of gross abuse of power possible. The result is a country that, for the last eight years, has been competing with Bangladesh for the first or second position as the most corruption nation in the world, based on the TI annual corruption index.

Recent scandals rocking the present civilian administration in Nigeria have given force to the assertion that ‘corruption can be said to have become our fundamental objective and directive principle of state policy.’²² One such scandal involved a former Senate President, Chuba Okadigbo, now late, who was alleged to have misused public funds and was impeached in August 2000.²³ Meanwhile, a 2002 Report of the Auditor-General of Nigeria on the management of the country’s finances in the year 2001 gave ‘a damning verdict of very poor financial discipline in the entire system.’²⁴ The Report uncovered and queried various financial irregularities in government expenses, including the Presidency, legislature and the judiciary. The irregularities, according to the report, relates to non-compliance with record-keeping rules, over-invoicing, non-retirement of cash advances, lack of audit inspection, payment for jobs not done, double debiting, contract inflation, lack of receipts to back-up purchases made, and release of monies without approving authorities.²⁵ In all this, several sums of monies running into billions of the country’s currency—naira—have been frittered away.

Corruption in Africa must be situated in the context of the global corruption problem, since, like AIDS or, for that matter, SARS, corruption pays no credence to race, sex, or geography; in a sense, ‘all have sinned.’ In recent years, corruption scandals have rocked France, Germany, Venezuela, Brazil, Mexico, Pakistan, Japan, Korea, the United States and the Netherlands. Empirical findings also show that corruption is on the increase in Latin America, Eastern Europe and the former Soviet Union.²⁶ These northern countries and multinational companies have, in fact, played active roles in worsening corruption in Africa. In several countries making up the Organization for Economic Cooperation and Development (OECD), for example,

20 These terms are attributable to Stanislaw Andreski, *The African Predicament: A Study in the Pathology of Modernisation* 101–2 (2nd ed., 1969).

21 Between 1 October 1960—when Nigeria gained political independence—and May 1999, when the last military regime handed back power to the civilians—the military has ruled Nigeria for almost thirty years.

22 Oyebode, *supra* note 1, at 604.

23 See *The Economist* (UK), 12 August 2000.

24 ‘The Auditor-General’s Report,’ *The Guardian* [Nig.], 16 January 2003, at 8.

25 *Id.*

26 See, e.g., TI Report 2001, *supra* note 14, at 226 (noting how surveys in Latin America, Eastern Europe and the former Soviet Union led to the findings and a consensus that corruption has significantly increased in recent years).

the bribery of foreign officials by companies remains legal and is even tax-deductible in some.²⁷ The international dimension of corruption gained currency particularly in the 90s by reason of the growing globalisation of services, goods and people, accompanied by the internationalisation of illegal activities. Corruption virtually exploded across the newspaper columns and law reports all over the world at the beginning of the 1990s, irrespective of economic or political regimes. In Russia, for example, 'a single decade of privatisation of state assets resulted in the outflow of tens of billions of dollars into the personal overseas bank accounts of former state officials.'²⁸

Although not an *alibi*, it may also be said that the endemic dimension of corruption in Africa is the result of "modernization," which, in this context, could be defined to mean 'the wholesale import of non-African scenarios and solutions.'²⁹ This kind of modernization preaches that Africa would prosper by rejecting itself and that '[t]he future was not to grow out of the past, organically and developmentally, but from an entirely alien dispensation.'³⁰ Modernization is based on materialism; and materialism, by its nature, encourages corruption. This philosophy is alien to ancient African culture, where wealthy individuals acquired their fortunes on their own initiatives and abilities and within limits prescribed by social mores and religious precepts. As Ayittey observed, '[t]here is not much evidence to suggest the use of political office for self-enrichment.'³¹ In African culture, a person's place in the society was determined more by his contribution to its well being, not by his birth or station in life. Class-consciousness, which is a dominant feature of Western culture, was considered to be detrimental to the larger interests of society and was discouraged.³² Thus, though few African countries, such as Ghana, 'probably experienced the reign of a corrupt dynasty between the sixth and eighth centuries,'³³ corruption was not a common feature of the indigenous African system of government.³⁴

The above observation was collaborated in a detailed account of life in the empire of Mali by Ibn Battuta, a Berber of Tangier (Morocco), who visited Mali in 1533 at a time that the empire had already passed the peak of its

27 See Global Coalition for Africa, 'Corruption and Development in Africa,' Maputo, Mozambique, 1-2 November 1997, GCA/PF/N:2/11/1997, available at <http://www.gca-cma.org/epfdoc97.htm>.

28 TI Report 2001, *supra* note 14, at 3.

29 See Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* 199 (1992) (an informed and concerned reflection on Africa's current deep disappointments with the nation-state, exploring, *inter alia*, the wasted years of colonialism).

30 *Id.*

31 George Ayittey, *Indigenous African Institutions* 234 (1991).

32 See Dickson A. Mungazi, *Gathering Under The Mango Tree: Values in Traditional Cultures in Africa* 10 (1996).

33 Anta Diop, *Pre-Colonial Black Africa* 65 (1987).

34 Ayittey, *supra* note 31, at 233.

greatness:

[T]he thing that impressed Ibn Battuta most was the character of the people and the quality of their government. He records that the people were of exceptional honesty and that the government strictly punished anyone who engaged in dishonest practices. The corrupt governor of Walata, for example, was completely stripped of his possession and privileges.³⁵

This probably explains why Africa generally did not experience the kind of misery and crisis that has become the continent's signature today.³⁶ Decades of alien rule following the Berlin Conference of 1884–5 and the subsequent slicing of Africa into different spheres of exploitation have undermined African civil society. Colonialism and the resultant patrimonial African states have subverted hitherto traditional structures, institutions and values or made them subservient to the economic and political needs of the imperial powers.³⁷ By the time of independence, Africa was left with no valid structures for the future; and by then, corruption had already begun its malignant life and it was not long before it metastasise throughout the whole body of the continent.

B. *Why International Co-operation to Combat Organized Crime is Necessary*

Until relatively recently, many nations have not been willing to address the problem of corruption, 'despite the host of negative effects tied to international corruption and the fact that virtually every country in the world has laws against domestic bribery.'³⁸ But things are changing; there are seismic activities on all fronts, including efforts of the Council of Europe, the European Union (EU), the Organization of American States (OAS), and the OECD. As early as 1977, for example, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.³⁹ In 1996, the OAS adopted the Inter-American Convention against Corruption,⁴⁰ while the Council of the EU adopted the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union in 1997.⁴¹ Of note also is

35 G. T. Stride and Caroline Ifeka, *Peoples and Empires of West Africa* 57 (1971).

36 Davidson, *supra* note 29, at 9.

37 See *Algiers Declaration*, OAU Assembly of Heads of State and Government, 35th Ord. Sess., Res. AHG/Dec.1(XXXV), OAU Doc. DOC/OS(XXVI)INF.17a (1999) [hereinafter *Algiers Decl.*] (arguing that colonialism laid an economic infrastructure that was 'geared exclusively to satisfying the needs of the colonial metropolis').

38 Andrea D. Bontrager Unzicker, Note, 'From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery,' 7 *Ind. J. Global Legal Stud.* 655, 659 (2000).

39 See *Corruption and Integrity Improvement Initiatives in Developing Countries*, UN Pub., Sales No. E.98.III.B.18.

40 See, e.g., *Inter-American Convention Against Corruption* of 29 March 1996, OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev.2, see also 35 I.L.M. 724 [hereinafter *Inter-Am. Corruption Conv.*].

41 See *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union*, adopted May 26, 1997, *Official*

the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on January 27, 1999⁴² and the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 9 September 1999.⁴³

A UN Ad Hoc Committee for the Negotiation of a Convention against Corruption is currently discussing a draft Convention against Corruption in Vienna, which could pave way for a more powerful and universal consensus about the unacceptability of the problem.⁴⁴ With major breakthroughs in negotiations on the return of assets obtained through bribery and embezzlement to the country of origin—representing a new fundamental principle in international treaties⁴⁵—and on a broad series of preventive measures,⁴⁶ the Committee is close to reaching a final agreement. Corruption has led to the depletion of national wealth in a number of countries. This explains why some of those countries whose former dictators have stolen hundreds of millions and billions of dollars—including the Philippines and Nigeria—are making a great contribution in the search for new rules.⁴⁷ During the third session of the Ad Hoc Committee, Libya particularly pressed for the inclusion of freezing, seizure, confiscation and return of assets of proceeds derived from corruption.⁴⁸ The Draft UN Convention, when adopted, will definitely enhance cooperation between governments⁴⁹ and help standardize the way in which individual countries deal with corruption in their national legislation.

Meanwhile, the UN Convention against Transnational Organized Crime⁵⁰ has already received its 40th ratification and, thus, entered into force on

Journal of the European Communities, C 195, June 25, 1997 [hereinafter EU Corruption Conv.].

42 See *Criminal Law Convention on Corruption*, Council of Europe, E.T.S. No. 173 [hereinafter Crim. L. Conv.].

43 See *Civil Law Convention on Corruption*, Council of Europe, E.T.S. No. 174 [hereinafter Civil L. Conv.].

44 See *Revised Draft United Nations Convention against Corruption*, A/AC.261/3/Rev.5 (2003) [hereinafter Draft UN Conv.].

45 See *id.*, Art. 64 (describing the return of assets as 'a fundamental principle' of the Convention).

46 The agreement on preventive measures includes norms of conduct for public officials, greater transparency based on public access to information on government businesses, and stricter procurement regulations and measures against money laundering. See *id.*

47 See 'UN treaty to fight corruption worldwide should be ready by autumn,' UN News Centre, Aug. 2002, available at <<http://www.un.org/news>> (last visited Aug. 11, 2003).

48 A/AC.26/L.14.

49 The principle of international cooperation is the lynchpin of the Draft Convention. See, e.g., Draft UN Conv., *supra* note 44, Art. 50 bis (1) (enjoining cooperation among states in criminal matters with regards to extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, law enforcement, joint investigations, and special investigation techniques). See also *id.*, Art. 64 (noting that the principle of return of assets shall afford States Parties 'the widest measure of cooperation and assistance').

50 See *Convention against Transnational Organized Crime*, signed at the High-Level Political Signing Conference, held in Palermo, Italy, from 12–15 December 2000. See also

September 29, 2000.⁵¹ The Convention is the international community's response to the progressing globalization of organized crime. By ratifying the Convention, States Parties commit themselves to incorporate the treaty provisions into their domestic laws and to adopt a series of crime-control measures, including the criminalization of participation in an organized criminal group, money laundering, corruption, and obstruction of justice. They will also be expected to adopt measures that will include enactment of extradition laws, etc.

Many sub-regional inter-governmental groupings in Africa have taken initiatives to put the problem of corruption in the front burner of their programs. In June 2000, the eight-member Economic and Monetary Union of West Africa (UEMOA)⁵² signed a Transparency Code for the Management of Public Finances, calling for a "qualitative change" in the conduct of public finances.⁵³ The Economic Community of West African States (ECOWAS),⁵⁴ on its part, held the first meeting of a new Inter-Governmental Action Group against Money Laundering in Dakar in November 2000.⁵⁵ In May 2001, Attorneys-Generals and Ministers of Justice of ECOWAS Member Countries issued the Accra Declaration on Collaborating against Corruption, as part of the growing regional concern with corruption.⁵⁶ Member States have also begun to develop a Community Protocol on Corruption and have called for international assistance in the recovery of national wealth that had been stolen and deposited abroad.⁵⁷

All these are welcome developments; indeed, international cooperation to fight corruption should occur on a number of levels, including formal cooperation arrangements that allow for extradition and exchange of information, law enforcement liaison networks, and sharing of skills and capabilities. Fighting corruption internationally is a means of defending the stability of democratic institutions, the rule of law, human rights and social progress. It also provides states with procedures and methodologies that will help them assess the efficacy of measures taken and facilitate the promotion of compatible efforts against corruption. Regional

generally *UN Declaration on Corruption and Bribery in International Business Transaction*, G.A. A/Res/51/191, Dec. 16, 1996; *UN Resolution on International Code of Conduct for Public Officials*, G.A. A/Res/51/59; *UN Resolution on International Cooperation Against Corruption and Bribery in International Commercial Transactions*, G.A. A/Res/52/87, Dec. 12, 1997.

51 See G.A. Res. 55/25, annex I.

52 UEMOA Member States are: Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

53 See TI Report 2001, *supra* note 14, at 84 (offering a revealing portrait of corruption for the year 2000–01).

54 ECOWAS Member States are: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

55 See TI Report 2001, *supra* note 14, at 84, *citing West Africa* (UK), 26 November 2000.

56 *Id.*

57 See *id.*, *citing* ECOWAS, 'Press Release,' 24 May 2001.

corruption conventions, in particular, provide bases for the development of regional governance norms that different institutions involved in anti-corruption programs—governmental and non-governmental—could rely upon. Since bilateral cooperation takes its root from the domestic laws of the states, a multilateral treaty would force African countries to review their domestic laws in order to harmonize them with their international obligations.

There are other reasons why international cooperation to combat corruption should be both a vision and an urgent mission. Transnational crime is constantly evolving and growing, like a virus. Criminal groups have embraced today's global economy and the sophisticated technology that goes with it. Only concerted, as opposed to fragmented, efforts will combat these groups. Corruption itself has international dimensions; organized crimes, such as money laundering and drug trafficking,⁵⁸ usually manifest themselves through corruption. Monies embezzled or illicitly obtained in one country are usually laundered through a network of transfers and camouflage. Only an effective international cooperation can unravel such syndication. Forceful collective action is needed to sever the links between organized crime, corruption and similar anti-social activities. Experience has shown that these issues are clearly beyond the control of individual states; they demand international collaboration. These crimes are increasingly becoming sophisticated and well financed; and many countries, especially those in Africa, do not have the capacity, finance or technology to effectively counter it. Only a centrally co-ordinated approach to fight the menace can have the desired result.

While the efficacy of regional mechanisms to fight corruption is still a matter of debate, the truth is that regional approaches to problems with international dimensions are becoming increasingly relevant in an age of globalisation. Regional cooperation has already taken place towards tackling environmental problems⁵⁹ and drug trafficking. Regionalism, which is

58 Cf. Inter-Am. Corruption Conv., *supra* note 40, preamble (acknowledging that 'corruption is often a tool used by organized crime for the accomplishment of its purposes').

59 See, e.g., *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, adopted 30 January 1991, entry into force 22 April 1998, 30 I.L.M. 773 reprinted in 1 *African Y.B. Int'l L.* 268 (1993) (mandating State Parties, *inter alia*, to 'take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act,' *id.*, Art. 4(1)); and *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, entry into force 16 June 1969, OAU Doc. CAB/LEG/24.1 (mandating Contracting Parties, *inter alia*, 'to adopt the measures to ensure conservation, utilization and development of soil, water, flora and fauna resources in accordance with scientific principles and with due regard to the best interests of the people,' *id.*, Art. 2).

a variant of globalism, has also proved effective in the international protection of human rights; it should equally prove effective in the collective fight against corruption.⁶⁰

III. THE PHYSIOGNOMY OF THE AU CORRUPTION CONVENTION

The Convention has 28 articles, excluding its preamble, which could be taken into consideration when interpreting its provisions.⁶¹ Consideration of the preamble is also normally necessary in cases of doubt. Some provisions in the Convention are substantive⁶²—in that they define offences and prescribe penalties—while majority of others are procedural,⁶³ directing State Parties and their relevant agencies on what to do to implement the substantive provisions. This part attempts a critical overview of some of the salient provisions of the Convention, starting with its jural postulates and then proceeding to other issues. For some structural reasons, some provisions of the Convention will be discussed or highlighted in the part following this.

A. *Legal Fictions*

Law, no less international law, always makes use of legal fictions, defined as assumptions of a beneficial or at least harmless character that are intended to promote a just outcome.⁶⁴ So what are the legal fictions or basic assumptions inherent in the Convention? The AU situates the Corruption Convention within a larger context of the AU Act, human rights treaties, especially the African Charter on Human and Peoples' Rights,⁶⁵ as well as several other declarations and resolutions elaborated by African leaders in the past. It recalls

60 See *e.g.*, Draft UN Conv., *supra* note 44, preamble (noting that 'the globalization of the world's economy has led to a situation where corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential').

61 See *Vienna Convention on the Law of Treaties*, Art. 31 adopted 22 May 1969, in force 27 January 1980; U.K.T.S. 58 (1980), Cmnd. 7964; 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969); 63 A.J.I.L. 875 (1969) [hereinafter "Vienna Conv."] (providing that the context for the purpose of the interpretation of a treaty shall comprise, *inter alia*, its preamble).

62 See *e.g.*, AU Corruption Conv., *supra* note 5, Arts. 4, 6, and 8.

63 See *e.g.*, *id.*, Arts. 5 (legislative and other measures), 7 (measures on declaration of assets and establishment of code of conduct), 9 (measures on access to information), 10 (measures on funding of political parties), 11 (mechanisms to combat corruption in the private sector), 14 (fair trial provisions) and 15 (extradition procedures).

64 See generally Lon Fuller, *Legal Fictions* (reprinted 1967); and P. Olivier, *Legal Fictions: An Analysis and Evaluation* (1975).

65 See African Charter on Human and Peoples' Rights, adopted by the then Organization of African Unity (OAU) Assembly of Heads of State and Government on June 27, 1981, entry into force 21 October 1986, OAU Doc. OAU/CAB/LEG/67/3/Rev.5, available at <http://www.achpr.org/africancharter.doc> [hereinafter African Charter].

many of these declarations, such as the 1990 Declaration on the Fundamental Changes Taking Place in the World and their Implications for Africa; the 1994 Cairo Agenda for Action Relaunching Africa's Socio-economic Transformation; and the Plan of Action Against Impunity adopted by the Nineteenth Ordinary Session of the African Commission on Human and Peoples Rights in 1996, as subsequently endorsed by the 64th Ordinary Session of the Council of Ministers held in Yaounde, Cameroon in 1996.⁶⁶ These Declarations, according to the Convention, 'underlined the need to observe principles of good governance, the primacy of law, human rights, democratization and popular participation by the African peoples in the process of governance.'⁶⁷

The Convention, in its Preamble, also recalls the AU Act, which enjoins Member States to coordinate and intensify their cooperation, unity, cohesion and efforts to achieve a better life for the peoples of Africa.⁶⁸ The major postulate of the Convention is 'the need to respect human dignity and to foster the promotion of economic, social, and political rights,'⁶⁹ in accordance with relevant human rights instruments. It recognizes that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples.⁷⁰ It, thus, recalls the call of the AU Act on African states to promote and protect human and peoples' rights, consolidate democratic institutions and foster a culture of democracy and ensure good governance and the rule of law.⁷¹

The Convention summarizes its legal fictions under its substantive provisions titled "Principles."⁷² These are respect for democratic principles and institutions, popular participation, the rule of law and good governance; respect for human and peoples' rights in accordance with the African Charter and other relevant human rights instruments; and transparency and accountability in the management of public affairs.⁷³ Others are the promotion of social justice to ensure balanced socio-economic development; and condemnation and rejection of acts of corruption, related offences and impunity.⁷⁴ These principles have become common refrain in several treaty and non-treaty instruments adopted by African leaders in recent memory, such as in

66 See AU Corruption Conv., *supra* note 5, preamble.

67 *Id.*

68 *Cf.* AU Act, *supra* note 3, Art. 3.

69 AU Corruption Conv., *supra* note 5, preamble.

70 *Id.*, preamble., *cf.* AU Act, *supra* note 3, preamble.

71 *Id.*, preamble., *cf.* AU Act, *id.*, preamble.

72 There are similarities in drafting style between the AU Act and the AU Corruption Convention; both draw distinctions between objectives and principles. *Cf.* AU Act, *supra* note 3, Arts. 3 & 4 with AU Corruption Conv., *supra* note 5, Arts. 2 & 3.

73 See *id.*, Art. 3.

74 See *id.*

the Algiers Declaration of 1999,⁷⁵ the Lome Declaration of 2000,⁷⁶ the AU Act,⁷⁷ and the NEPAD.⁷⁸

B. Objectives

The Convention sets its objectives within the context of African specificities. While, for example, the Convention seeks to promote and strengthen the development of mechanisms for the prevention, detection, punishment and eradication of corruption and related offences in the public and private sectors in Africa,⁷⁹ it balances this with the need to promote socio-economic development by removing obstacles to the enjoyment of egalitarian—that is, economic, social and cultural—rights as well as libertarian—that is, civil and

75 See *Algiers Declaration*, *supra* note 37, paras. 17–18, reiterating African leaders'—'commitment to the protection and promotion of human rights and fundamental freedoms ... emphasize the indivisibility, universality and inter-dependence of all human rights, be they political and civil or economic, social and cultural, or even individual or collective ... are convinced that the increase in, and expansion of the spaces for freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation, would further contribute to the consolidation of modern African States underpinned by the rule of law, respect for the fundamental rights and freedoms of the citizens and the democratic management of public affairs.'

76 See *Lome Declaration*, OAU Doc. AHG/Decl.2 (XXXVI) (July 12, 2000), [hereinafter "Lome Decl."], preamble, para. 13, (stating that the OAU commits itself 'to continue to promote respect and protection of human rights and fundamental freedoms, democracy, rule of law and good governance in our countries'); *cf. id.*, preamble, para. 22 (stating that the OAU is mindful of the fact 'that development, democracy, respect for fundamental freedoms and human rights, good governance, tolerance, culture of peace are essential prerequisites for the establishment and maintenance of peace, security and stability').

77 See AU Act, *supra* note 3, preamble, para. 9 (providing that the AU is determined 'to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'); preamble, para. 10 (a further determination by African leaders 'to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively'); Art. 3(g) (providing that the AU will 'promote peace, security, and stability in Africa; and promote democratic principles and institutions, popular participation and good governance. '); Art. 3(k) (the promotion of 'co-operation in all fields of human activity to raise the living standards of African peoples'); Art. 4(l) (promotion of gender equality); and 4(m) (respect for democratic principles, human rights, the rule of law and good governance); and 4(n) (promotion of social justice to ensure balanced economic development).

78 See, NEPAD, *supra* note 9, para. 202 (providing that NEPAD's objective is to consolidate democracy and sound economic management of the continent and that African leaders, through NEPAD, are making a commitment to African people and the world to work together in rebuilding the continent. It is a pledge to promote peace and stability, democracy, sound economic management and people-oriented development, and to hold each other accountable in terms of the agreements outlined in the Program); and para. 79 (noting that Africa 'undertakes to respect the global standards for democracy, the core concepts of which include political pluralism,' and fair elections that allow people to freely choose their leaders). See also *id.*, paras. 7, 43, 49, 71, 80 and 183.

79 See *AU Corruption Conv.*, *supra* note 5, Art. 2(1).

political—rights.⁸⁰ This special emphasis is rightly situated, because a denial of egalitarian rights leads to poverty and poverty exacerbates other social ills like corruption—in the same way that political corruption leads to a denial of egalitarian rights. The problem is that, though African states take the universality, indivisibility and interdependence of all rights as given,⁸¹ leaders of these states often discriminate against egalitarian rights in their implementation. The result is a rising crime rate in many African countries, like Nigeria, Zimbabwe, South Africa, and Kenya; in the absence of viable means of livelihood, many citizens have resorted to illegal means, including advanced fee fraud. African states need to learn the elementary lesson that security provides for freedom and freedom generates security.

Other objectives in the Convention include the promotion, facilitation and regulation of cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa;⁸² the coordination and harmonization of the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent;⁸³ and the establishment of the necessary conditions to foster transparency and accountability in the management of public affairs.⁸⁴ Ironically, the issue of asset recovery is conspicuously absent in the list of objectives in the AU Corruption Convention, whereas it is a prominent feature of the UN Draft Convention.⁸⁵ Overall, the objectives are laudable, like most other treaties adopted in Africa; the major problem lies with translating these lofty objectives into reality. What will be needed is a strong political will on the part of states, which, unfortunately, seems to be lacking, given previous experiences in the continent.

80 See *id.*, Art. 2(4).

81 See, *e.g.*, African Charter, *supra* note 65, preamble, para. 7, providing that: 'it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.'

The OAU re-emphasized the indivisibility, universality and inter-dependence of all human rights in the Algiers Decl., *supra* note 37, *cf.* *Vienna Declaration and Program of Action*, adopted at the World Conference on Human Rights, A/CONF.157/24, 25 June 1993 [hereinafter "Vienna Decl."], Art. 1(1) ('The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question').

82 See AU Corruption Conv., *supra* note 5, Art. 2(2). *Cf.* Draft UN Conv., *supra* note 44, Art. 1(a) (setting out, as one of its purposes, the promotion and strengthening of measures to prevent and combat corruption more efficiently and effectively).

83 See AU Corruption Conv., *id.*, Art. 2(3).

84 See *id.*, Art. 2(5). *Cf.* Draft UN Conv., *supra* note 44, Art. 1(c).

85 See Draft UN Conv., *id.*, Art. 1(b).

C. Substantive Offences

1. Defining Corruption

The Convention defines corruption to mean 'the acts and practices including related offences prescribed in this Convention.'⁸⁶ This provision, like the Inter-American Corruption Convention,⁸⁷ is evasive, as it fails to formulate or describe precisely what constitutes corruption. It is appropriate, therefore, to attempt a definition of corruption before examining certain "substantive offences" in the Convention. Etymologically, the word "corruption"—*adjective* "corrupt"—comes from the Latin verb "*corruptus*" (to break); it literally means broken object. The English Dictionary defines it as 'the state of being or becoming decayed'; "a spoiling, deteriorating"; a "pervasion"; or a "moral decay".⁸⁸ Though "corruption" does not, fundamentally, denote any particular transgression,⁸⁹ it is, nonetheless, a form of behaviour that departs from ethics, morality, tradition, law and civic virtue.⁹⁰ It connotes impropriety, encompassing 'all forms of reprehensible, indecorous or infamous conduct especially when such is evinced in the performance of some official, quasi-official or fiduciary responsibility.'⁹¹ Corruption arises both in political and bureaucratic offices and can be petty or grand, organized or unorganized.

Though it often facilitates criminal activities—such as drug trafficking, money laundering, and prostitution—corruption is not restricted to these activities.⁹² It is a basket that includes such behaviours as bribery (consideration given as an inducement to influence a conduct in one's favour and which is contrary to standing rules⁹³), embezzlement (the illegal diversion of a principal's goods to one's own use⁹⁴), fraud (a misrepresentation done to obtain unfair advantage by giving false information⁹⁵), nepotism (the show of

86 *Id.*, Art. 1.

87 See Inter-Am. Corruption Conv., *supra* note 40, Art. 6.

88 *The New Lexicon Webster's Dictionary of the English Language* 219 (1991).

89 See Peter J. Henning, 'Public Corruption: A Comparative Analysis Of International Corruption Conventions And United States Law,' 18(3) *Arizona J. Int'l & Comp. L.* 793 (2001) ('At a fundamental level, the term "corruption" does not denote any particular transgression, and need not even be conduct that would constitute a crime.' *Id.*, at 794).

90 See UN Office on Drugs and Crime, *Corruption*, available at <http://www.undcp.org/odccp/corruption.html> (last visited 12 December 2002) [hereinafter UN Office on Drugs and Crime].

91 Oyeboade, *supra* note 1, at 604.

92 It is, indeed, important to keep crime and corruption analytically distinct in order to understand the problem and devise proper remedies. See United States Agency for International Development (USAID), 'Anti-Corruption Resources: What is Corruption?' available at <<http://www.usaid.gov/democracy/anticorruption/corruption.html>>.

93 See P. Matsheza and C. Kunaka, *Anti-Corruption Mechanisms and Strategies in Southern Africa* (2000), cited in Noel Kututwa and Constance Kunaka, 'Practical Value of Legislation to Combat Organised Crime: A Southern African Perspective,' 2nd *World Conference on Modern Criminal Investigation, Organized Crime and Human Rights*, Durban, 3–7 December 2001, available at <http://www.tsa.ac.za/conf/papers/kututwa.pdf> (last visited 17 January 2003).

94 See Kututwa *et al. Id.*

95 *Id.*

special favours to one's relatives as against other competitors in such areas as appointments and securing of contracts⁹⁶), and money laundering (depositing and transferring money or other proceeds of illegal activities; it is an act of legitimising proceeds of illegal activities⁹⁷). Others include insider trading (the use of information secured during the course of duty as an agent for personal gain. Usually, such information is leaked to companies competing for tender or on the stock exchange, thereby giving the party with such information an unfair advantage over other competitors⁹⁸), under/double invoicing,⁹⁹ and extortion (the unlawful extraction of money or favours by force or intimidation¹⁰⁰).

Bribery is at the heart of corruption in many countries, especially in developing countries, though it is condoned in some countries. In the fourteenth century, *bribery* took in the idea of extortion or demanding money with menaces; and a *briber* meant the person doing the menacing and so getting the money. It was in the sixteenth century that the meaning flipped over, so that *briber* meant instead the person handing over the money.¹⁰¹ It is also not clear the nature of relationship between corruption and certain "harmless courtesies" or "general indulgence"—tips to waiters or to traffic wardens, gifts during Boxing Day, plying one's customer's representative with food and drink, etc?¹⁰² Are these acts of corruption? The question, according to Glanville Williams, 'must be decided by reference to the size of the gift, its customary nature, its openness, and other such factors.'¹⁰³ It is submitted that this test is not helpful to the ordinary woman or man on the street that is making choices about living, giving and receiving on a daily basis. Obviously, '[a] gift of appreciable value not required by the obvious necessities of the situation should be accounted corrupt.'¹⁰⁴ In the final analysis, William's test is evidential and can only be settled by a jury or judge in the courtroom.

96 *Id.*

97 *Id.*

98 *Id.*

99 Under invoicing aims at avoiding paying duty and taxes and is a prevalent form of corruption in the private sector. The culprit produces invoices and money earned that he under-declares with the connivance of the buyer. Double invoicing, on the other hand relates to issuing multiple invoices for purposes of misleading public authorities for private gain. See *id.*

100 *Id.*

101 Michael Quinion, in *World Wide Words*, available online at <<http://www.quinion.com/words/topicalwords/tw-bri1.htm>>.

102 Glanville Williams, *Textbook of Criminal Law* 885 (1983). Similarly, Adedokun Adeyemi excludes from the definition of corruption, on grounds of proof, 'instances of the criminal justice official who, *suo moto*, decides to show favour, without any form of benefit or gratification being involved, on the basis of such considerations as family, township, ethnic, school, club, professional or other such relationship,' Adedokun Adeyemi, 'The Impact of Corruption on the Administration of Justice in Nigeria,' in *Political Reform and Economic Recovery in Nigeria*, *supra* note 1, at 678.

103 Williams, *id.*, at 885.

104 UN Office on Drugs and Crime, *supra* note 90.

What is certain is that corruption is a form of “abuse of power”;¹⁰⁵ in this sense, it involves the use of one’s public position for illegitimate private gains. However, abuse of power and personal gain can occur both in the public and private domains and, often, in collusion with individuals from both sectors.¹⁰⁶ Generally, private organizations could be accomplices or victims of corruption in the public sector. They are usually accomplices and beneficiaries where their motivation is to obtain certain advantages from corrupt public servants that they would be unable to obtain or that they could get only with greater difficulty or expense through open methods.¹⁰⁷ However, they could be victims of corruption where, for example, they are coerced to make payments to some corrupt public officials or to face intolerable obstacles in the conduct of their business.¹⁰⁸

To summarize, corruption could be defined as the abuse of power for private gain. Transparency International (TI) defines it as ‘the misuse of entrusted power for private gain. This includes both public and private sector corruption, at petty and grand levels.’¹⁰⁹ The Lebanon Anti-Corruption Initiative Report 1999 defines it as ‘the behaviour of private individuals or public officials who deviate from set responsibilities and use their position of power in order to serve private ends and secure private gains.’¹¹⁰ The term “private gain,” as used in the above definitions, should be elastic to include, in the case of Africa, both benefits accruing directly to the person entrusted with the power as well as those that accrue to his ethnic nationality, political party and other members of his clientele. The reason is due to the absence of rational decision by those entrusted with power; most decisions are coloured by ethnic, religious and other primordial considerations that continue to determine the allocation of claims and opportunities in the continent. So what are the acts of corruption under the Convention?

‘Acts of Corruption’

Article 4 is titled ‘Scope of Application’ and lists the various acts of corruption to which the Convention applies as well as their related offences. They include:

- (a) the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

105 “Power,” in this sense, can be defined as the legal capacity to alter jural relations; see R.W.M. Dias, *Jurisprudence* 87 (1985) (noting also that abuse of power by public officials amounts to “rule by law,” in the sense that laws are used as instruments of government policy. In contrast, the “rule of law” “is the use of law, among other things, to curb the misuse of law-making power by government,” *id.*).

106 See UN Office on Drugs and Crime, *supra* note 90.

107 See J.M. Elegido, ‘Fighting Corruption in Nigeria,’ 4(1) *Modus Int’l L. & Bus. Q.* 84, 85 (1999).

108 *Id.*

109 TI Report 2001, *supra* note 14, at xv.

110 Cited in UN Office on Drugs and Crime, *supra* note 90.

- (b) the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- (c) any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
- (d) the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
- (e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
- (f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
- (g) illicit enrichment;
- (h) the use or concealment of proceeds derived from any of the acts referred to in this article; and
- (i) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or on any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.

Without prejudice to the foregoing, the provisions of the Convention shall also be applicable to any other act or practice of corruption and related offences not described in the Convention subject, however, to mutual agreement between or among two or more State Parties to the present Convention.¹¹¹ The Convention might be contemplating such further acts of corruption like the bribery of foreign public officials by large multinational corporations (MNCs). The Convention ought to have dealt specifically with this, because the offering of bribes to foreign public officials, including

¹¹¹ See AU Corruption Conv., *supra* note 5, Art. 4(2).

officials of public international organisations, is at the root of many corrupt administrations in Africa. Such corrupt practices usually are intended to retain business or other undue advantage in relation to the conduct of international business, including the provision of international aid. The Draft UN Convention, on its part, specifically addresses this problem, enjoining States Parties to adopt

such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.¹¹²

A major problem with the AU Corruption Convention will be that of proof, as the Convention strikes at every kind of solicitation, acceptance, gift, favour, promise, advantage, offering, granting, or whatever it may be called, in relation to the performance of public or private functions. It should, however, be stressed that corruption may be one-sided;¹¹³ thus, it will not be necessary to establish an agreement, for example, between the bribe giver and receiver in order to secure a conviction. With regards to specifics, it needs stressing that the above provisions apply both to a “public official” and “any other person”. The Convention defines a ‘public official’ as ‘any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy.’¹¹⁴ This definition is wide enough to cover an agent of a public official; thus, it will not be a defence that the act in question is related to the affairs of some other principal. Similarly, although the Convention does not define the phrase “any other person,” it may be taken to mean private persons or organizations. This is fortified by the meaning that the Convention ascribes to the words “private sector,” meaning ‘the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government.’¹¹⁵

A few more substantive offences deserve emphasis.

112 Draft UN Conv., *supra* note 44, Art. 19 bis (2). Presumably, this provision is not intended to affect immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law. See, e.g., Paul Szasz, ‘International Organizations, Privileges and Immunities,’ in 2 *Encyclopedia of Public International Law* 1325, 1326 (Rudolf Bernhardt ed., 2000) (noting that the provision of privileges and immunities ‘is neither merely a housekeeping problem for those organizations nor an insidious encroachment on the equal application of the rule of law, but rather an essential device for protecting these organizations from unilateral and sometimes irresponsible interference by individual governments’).

113 Williams, *supra* note 102, at 885.

114 *Id.*, Art. 1.

115 *Id.*

a. *Illicit Enrichment*

The Convention makes a point of singling out 'illicit enrichment' for emphasis,¹¹⁶ defining it as 'the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income,'¹¹⁷ a definition that the Draft UN Convention mirrors.¹¹⁸ Consequently, State Parties bind themselves, subject to their domestic laws, to adopt necessary measures in order to establish an offence of illicit enrichment under their respective laws.¹¹⁹ For States that have already done so, then illicit enrichment is to be considered as an act of corruption or a related offence for the purposes of the Convention.¹²⁰ A State that has not established illicit enrichment as an offence, nevertheless, is required to provide assistance and cooperation to the requesting State with respect to the offence, unless this is at variance with its domestic laws.¹²¹

b. *Laundering of the Proceeds of Corruption*

There has been growing commitments on the part of international community to discourage criminal or illicit activities that result in "dirty" monies. Sectors of the international community have adopted treaties, such as the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime,¹²² and soft laws¹²³ and established bodies with the task of confronting the problem of money laundering. One such body is the Financial Action Task Force (FATF), formed by the Heads of State and Government of the seven major industrialized countries (G-7) in collaboration with the President of the European Commission. The FATF is charged with responsibility for developing and promoting policies to combat money laundering. Its 40 Recommendations¹²⁴ is growing to become the international best practice on anti-money laundering measures.

Africa, on the other hand, has been slow in putting in place strict anti-money laundering measures. This reluctance in taking early measures to confront the problem of money laundering made Western countries and donor agencies to conclude that Africa was indirectly encouraging more brazen corruption among public officials. This probably explains why the AU Corruption Convention pays particular stress on laundering of the proceeds of corruption. Realizing that weak anti-money laundering regulatory

116 *Id.*, Art. 4(1)(g).

117 *Id.*, Art. 1.

118 Draft UN Conv., *supra* note 44, Art. 25.

119 AU Corruption Conv., *supra* note 5, Art. 8(1).

120 *Id.*, Art. 8(2).

121 *Id.*, Art. 8(3).

122 See *e.g.*, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, adopted by the Council of Europe, Strasbourg, 8.XI.1990.

123 See *e.g.*, Directive 2001/97/EC of the European Parliament and of the Council (of Dec. 4, 2001) amending Council Directive 91/308/76 of Dec. 28, 2001.

124 See FATF, *The Forty Recommendations* (2003), available at <<http://www.oecd.org/fatf/pdf/40Recs-2003/en.pdf>>.

and supervisory domestic regimes could encourage corruption, the Convention directs States Parties to 'adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (a) The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action;
- (b) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences; and
- (c) The acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences.¹²⁵

The UN Draft Convention generally follows the above classification, though it adds a fourth, that is, '[p]articipation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of' the offense of money laundering.¹²⁶ The UN Draft Convention especially encourages States Parties to apply the provision 'to the widest range of predicate offences,¹²⁷ defined to include 'offences committed both within and outside the jurisdiction of the State Party in question.'¹²⁸ It is important, in this regard, to stress that money-laundering offences covered in the UN Draft Convention and, *a fortiori*, the AU Corruption Convention should be independent and autonomous offences, so that a prior conviction for the predicate offence should not be necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances.

D. *Obligations of State Parties*

The Convention sets out detailed obligations of States Parties for the purposes of the objectives set forth in the Convention. They are generally couched in the form of adopting "legislative and other" measures to secure the offences listed in the Convention. They are also couched in the form of positive, as opposed to negative, duties—'State Parties undertake to ...'¹²⁹ or 'State Parties commit themselves to ...'¹³⁰ or 'Each State Party shall adopt ...'¹³¹ These indicate that States have to take certain (positive) action to give effect to these

125 See AU Corruption Conv., *supra* note 5, Art. 6.
 126 Draft UN Conv., *supra* note 44, Art. 33(1)(a)(ii).
 127 *Id.*, Art. 33(2)(a).
 128 *Id.*, Art. 33(2)(c).
 129 AU Corruption Conv., *supra* note 5, Art. 5.
 130 *Id.*, Art. 7.
 131 *Id.*, Art. 9.

offences in their domestic legal order. The duties enjoined on State Parties are counterparts or correlatives of the offences defined in the Convention. Counterpart duties, for example, are frequently used in international human rights instruments, as alternative ways of formulating rights. When rights entail positive duties, it may be preferable to specify those duties, which is more concrete than proclaiming rights.¹³²

The obligations listed in the Convention include measures to establish, 'as offences,' the acts of corruption as defined in the Convention;¹³³ to establish, maintain and strengthen independent national anti-corruption authorities or agencies;¹³⁴ and to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services.¹³⁵ Others are measures to protect informants and witnesses in corruption and related offences, including protection of their identities;¹³⁶ to ensure that citizens report instances of corruption without fear of consequent reprisals;¹³⁷ and to punish those who make false and malicious reports against innocent persons in corruption and related offences.¹³⁸

Mention must also be made of the obligation to strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force.¹³⁹ Further down, the Convention enjoins State Parties to also 'adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences,'¹⁴⁰ although it is not clear why this should not be included under the Article 5 provisions.

Due to the avalanche of corruption in the public service of many African States, and considering the role that such service play in national development, State Parties further commit themselves to taking specific measures to deal with corruption and related offences in the public service. This includes a requirement that all or designated public officials should declare their assets at the time of assumption of office, during and after their term of office in the

132 Cf. *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16, 1966; entry into force Jan. 3, 1976, G.A. Res. 2200 A (XXI); UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter "ICESCR"], Art. 2(1) ('Each State Party to the present Covenant undertakes to take steps ...'); and Art. 3 ('The States Parties to the present Covenant undertake to ensure ...'); African Charter, *supra* note 65, Art. 1 ('The Member States ... shall recognize ...'); Art. 25 ('States Parties to the present Charter shall have the duty to promote and ensure ...'); and Art. 26 ('States Parties to the present Charter shall have the duty to guarantee ...').

133 AU Corruption Conv., *supra* note 5, Art. 5(1).

134 *Id.*, Art. 5(3).

135 *Id.*, Art. 5(4).

136 *Id.*, Art. 5(5).

137 *Id.*, Art. 5(6).

138 *Id.*, Art. 5(7).

139 *Id.*, Art. 5(2).

140 *Id.*, Art. 9.

public service¹⁴¹—something that is seldom done in African countries. They also promise to create an internal committee or a similar body mandated to establish a code of conduct and to monitor its implementation, and sensitise and train public officials on matters of ethics;¹⁴² develop disciplinary measures and investigation procedures in corruption and related offences with a view to keeping up with technology and increase the efficiency of those responsible in this regard;¹⁴³ and ensure transparency, equity and efficiency in the management of tendering and hiring procedures in the public service.¹⁴⁴ They also commit themselves to ensuring that, *subject* to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials.¹⁴⁵

This last issue, that is immunity from investigation and prosecution of officials for corruption, is really problematic and is capable of undermining any serious effort to fight corruption. Most domestic legislation, in particular constitutions, usually grant certain public officers immunity from prosecution for anything done while in office,¹⁴⁶ though this does not stop them, at least, from being investigated for any act of official misconduct.¹⁴⁷ This, in effect, means that the Corruption Convention will be subject to such immunities and State Parties logically will ratify the Convention with reservations which, in any event, it permits.¹⁴⁸ In the alternative, such States must undertake the usually difficult process of constitutional amendment in order to bring their municipal laws into conformity with the Convention.

Like in the definition of the offence, State Parties are also required to adopt 'legislative and other measures' to prevent and combat acts of corruption and related offences in the private sector.¹⁴⁹ This includes establishing mechanisms that encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights¹⁵⁰ and adopting other measures necessary to prevent companies from paying bribes to win tenders.¹⁵¹

141 *Id.*, Art. 7(1).

142 *Id.*, Art. 7(2).

143 *Id.*, Art. 7(3).

144 *Id.*, Art. 7(4).

145 *Id.*, Art. 7(5).

146 See, e.g., Constitution of the Federal Republic of Nigeria 1999, *available at* <http://www.nigeriangallery.com/Constitution1.htm> [hereinafter Nigerian Const.], S. 308 (providing that no civil or criminal proceedings shall be instituted or continued against a President, Vice-President, Governor or Deputy Governor during his term of office and that such a person shall not be arrested, compelled to appear in court or imprisoned during the same period).

147 See, e.g., *Gani Fawehinmi v. Inspector General of Police & Ors.* (2002) 8 M.J.S.C. 1 [Nig.] (holding that a Governor can be investigated and that evidence both analytical and forensic can be assembled, collated and weighed without violating section 308 of the Nigerian Constitution; see *id.*, at 26).

148 See AU Corruption Conv., *supra* note 5, Art. 24(1) (permitting reservations to the Convention). On the effect of reservations, see *infra*.

149 *Id.*, Art. 11(1).

150 *Id.*, Art. 11(2).

151 *Id.*, Art. 11(3).

E. Jurisdiction

Subject to any other criminal jurisdiction exercised by a State Party in accordance with its domestic law,¹⁵² the Convention vests each State with jurisdiction over acts of corruption when:

- (a) the breach is committed wholly or partially inside its territory;
- (b) the offence is committed by one of its nationals outside its territory or by a person who resides in its territory;
- (c) the alleged criminal is present in its territory and it does not extradite such person to another country; and
- (d) when the offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.¹⁵³

The Convention, however, contains the *non bis id idem* principle, which seeks to protect an accused person against double prosecution.¹⁵⁴

F. Extradition

General international law prohibits a State, in the absence of a treaty, from taking measures on the territory of another State to enforce its national laws without the consent of the latter. One State may not arrest a person, or serve summons on him or execute an order for the production of documents, on the territory of another except under terms of a treaty or other forms of authorization.¹⁵⁵ This flows from the proposition that jurisdiction is territorial and remains the best foundation for international law.¹⁵⁶ A State cannot demand the surrender of an alleged criminal as of right, subject, of course, to the exception of crimes under international law—war crimes, crimes against humanity, and crimes against peace. States must depend on the cooperation of other States to obtain surrender of suspected or convicted criminals who are or have fled overseas. The principles of extradition law provide the procedure to regulate such mutual cooperation, based, in part, on reciprocity.¹⁵⁷ Globalisation has not changed this rule; on the contrary, it has made it more relevant.

The Convention, thus, confers on each State Party the right to request for the extradition of persons alleged to commit offences falling within the ambit

¹⁵² *Id.*, Art. 13(2).

¹⁵³ *Id.*, Art. 13(1).

¹⁵⁴ *Id.*, Art. 14(3) (providing that 'a person shall not be tried twice for the same offence').

¹⁵⁵ See *Lotus case*, 1927 PCIJ, Ser. A, no. 10, at 18; *Service of Summons Case*, ILR 38, 133.

¹⁵⁶ See Ian Brownlie, *Principles of Public International Law* 301 (1998) (noting, however, that the territorial theory has failed 'to provide ready-made solutions for some modern jurisdictional conflicts,' *id.*).

¹⁵⁷ See *id.*, at 318; and generally I.A. Shearer, *Extradition in International Law* (1971).

of the Convention.¹⁵⁸ Similarly,

Each State Party undertakes to extradite any person charged with or convicted of offences of corruption and related offences, carried out on the territory of another State Party and whose extradition is requested by that State Party, in conformity with their domestic law, any applicable extradition treaties, or extradition agreements or arrangements existing between or among the State Parties.¹⁵⁹

The Convention, thus, serves as the legal basis for State Parties to make extradition requests from each other irrespective of whether or not there has been a previous extradition treaty between them.¹⁶⁰ State Parties are also deemed to have incorporated all offences covered by the Convention into their municipal laws as extraditable offences.¹⁶¹

Acceding to a request for extradition is not automatic. Thus, where there is a request for extradition, a Requested Party may, if it has within its territory any person charged with or convicted of offences, refuse to extradite the person on the ground that it has jurisdiction over the offences. Where that happens, then the Requested Party shall, without fail and delay, submit the case to its competent authorities for prosecution unless otherwise agreed with the Requesting Party. He shall also report the outcome of the prosecution to the Requesting Party.¹⁶² This provision plausibly seeks to prevent abuses by States seeking to use the Convention to silence oppositions; thus, Requesting States must be circumspect or cautious in granting extradition requests. More specifically, Africa is a continent where peaceful succession through free and fair democratic elections are exceptions than the rule; where State-sponsored violence and intimidation continue to force the opposition into exile; where regimes still totter and fall due to military incursions into the constitutional and political process; where politics is still a zero sum game; and where incumbent regimes set up all kinds of probe panels to excavate both real and imagined misdeeds of their predecessors, often to divert attention away from their failures to deliver on the pre-election promises.

The Convention has not abolished existing extradition treaties or agreements between States Parties; it merely fills in gaps that may exist. However, on matters of corruption and related offences between State Parties, the Convention takes precedence over previous extradition treaties or agreements.¹⁶³ Similarly, the Convention permits a Requested State Party to take into custody a person whose extradition is sought and who is present in its territory. It should also take necessary steps to ensure the presence of an accused person

158 See AU Corruption Conv., *supra* note 5, Art. 15(1).

159 *Id.*, Art. 15(5).

160 See *id.*, Art. 15(3).

161 *Id.*, Art. 15(2).

162 *Id.*, Art. 15(6).

163 See AU Corruption Conv., *supra* note 5, Art. 21 (providing that the 'Convention shall in respect to those State Parties to which it applies, supersede the provisions of any treaty or bilateral agreement governing corruption and related offences between any two or more State Parties.').

at the extradition proceedings, having regard to its domestic law and other applicable extradition treaties and upon satisfaction that the circumstances so warrant and are urgent.¹⁶⁴ There could be situations where the evidence available to the Requesting State Party could lead to a conviction whereas the same evidence cannot ground a conviction in the Requested State Party. It is not clear from the Convention how such differences could be resolved in view of the apparent diplomatic row such a stalemate could cause the States concerned.

Overall, it is important to stress that one of the basis of extradition, whether with regards to corruption or other crimes, is the rule *aut dedere aut judicare* (either punish or let others punish);¹⁶⁵ this rule is increasingly appearing in many modern conventions. The AU Corruption Convention, however, does not provide a guide in situations where a State Party refuses to either prosecute or extradite its nationals for political reasons, as is usually the case in many African countries. A related, though not direct, case in point is the granting of asylum to Charles Taylor by the Nigerian Government in the face of criminal indictment by the Special Court for Sierra Leone's war crimes. In such situations, safe havens will be created for corrupt officials, as is the case with ex-President Fujimori now in Japan.

G. Due Process Provisions

The Convention contains certain safeguards to ensure due process and guarantee the rights to a fair trial of a person accused of corruption. It goes without saying that due process is essential to the maintenance of certain immutable principles of justice; it constitutes the standard that society has the right to expect from those entrusted with the exercise of sovereign prerogatives.¹⁶⁶ Consequently, the Convention provides that:

Subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and Peoples' Rights and any other relevant international human rights instrument recognized by the concerned States Parties.¹⁶⁷

What are these "minimum guarantees" contained in the African Charter? The Charter's provisions on fair trial, as further elaborated and developed

164 *Id.*, Art. 15(7).

165 See M. Cherif Bassiouni, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

166 See Haji N. Muhammad, 'Due Process of Law for Persons Accused of Crime,' in *The International Bill of Rights: The Covenant on Civil and Political Rights* 138, 139 (Louis Henkin ed., 1981).

167 AU Corruption Conv., *supra* note 5, Art. 14.

by the African Commission on Human and Peoples' Rights,¹⁶⁸ include the right to—

- (a) an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;¹⁶⁹
- (b) be presumed innocent until proven guilty by a competent court or tribunal;¹⁷⁰
- (c) defence, including the right to be defended by counsel of his choice;¹⁷¹ and
- (d) be tried within reasonable time by an impartial court or tribunal.¹⁷²

The Charter also prohibits *ex post facto laws*, providing that: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.'¹⁷³ This safeguards against arbitrary prosecution, conviction and punishment. It ensures that citizens are, at all times, fully aware of the state of the law under which they are living.

It may also briefly be noted that the International Covenant on Civil and Political Rights¹⁷⁴ obviously falls within the Convention's category of 'any

168 See, e.g., 'Resolution on the Right to Recourse and Fair Trial,' adopted by the African Commission at its 11th Ordinary Session in Tunis, Tunisia, in March 1992, *Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1991–92*, ACHPR/RPT/5th, Annex VI; 'Resolution on Respect and the Strengthening of the Independence of the Judiciary,' adopted at the 19th Ordinary Session of the Commission held in Ouagadougou, Burkina Faso, in March 1996, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1995–96*, ACHPR/RPT/9th, Annex VII; and 'Resolution on the Right to a Fair Trial and Legal Assistance in Africa,' adopted at the 26th Ordinary Session of the Commission held in Kigali, Rwanda, in November 1996, *Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999–2000*, AHG/222(XXXVI), Annex IV. See also generally Ibrahim A.B. El-Sheikh, 'Preliminary Remarks on the Right to a Fair Trial Under the African Charter on Human and Peoples' Rights,' in *The Right to a Fair Trial* 325 (David Weissbrodt and Rudiger Wolfrum eds., 1997).

169 See African Charter, *supra* note 65, Art. 7(1)(a).

170 *Id.*, Art. 7(1)(b).

171 *Id.*, Art. 7(1)(c).

172 *Id.*, Art. 7(1)(d).

173 *Id.*, Art. 7(2). See, e.g., *Kokkinakis v. Greece* (1993) 17 EHRR 397, where the European Court of Human Rights, in interpreting an equivalent provision in the European Convention on Human Rights (ECHR) prohibiting *ex post facto laws*, held that the provision is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage; but that it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused detriment. However, the Court noted that ECHR provision cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

174 See *International Covenant on Civil and Political Rights*, adopted 16 Dec. 1966; G.A. Res. 2200 A (XXI); U.N. GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 999 U.N.T.S. 171; entered into force 23 March 1976 [hereinafter "ICCPR"].

other relevant international human rights instrument recognized by the concerned States Parties.¹⁷⁵ As at June 13, 2002, forty-five African States have ratified the Covenant, while three countries—Guinea-Bissau, Liberia, and Sao Tome and Principe—have signed but have not yet ratified it.¹⁷⁶ The ICCPR provides, *inter alia*, that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’¹⁷⁷

H. Follow-Up Mechanism: Advisory Board on Corruption

1. Appointment and Composition

One of the most important provisions in the Convention is the establishment of an Advisory Board on Corruption (“the Board”) within the AU institutional framework.¹⁷⁸ The eleven member Board shall be elected by the Executive Council of the AU. No educational qualification is required, apparently reflecting the fact that corruption is not a problem of the head but of the heart. A man of great intellect is not necessarily a man of great integrity. All that the Convention requires is that the members of the Board should be chosen ‘from among a list of experts of the highest integrity, impartiality, and recognized competence in matters relating to preventing and combating corruption and related offences, proposed by the State Parties.’¹⁷⁹ The appointment must show gender sensitivity and geographical spread.¹⁸⁰ The appointees shall serve in their personal capacity¹⁸¹ and shall be appointed for a period of two years, renewable once.¹⁸²

2. Functions

In addition to any other task relating to corruption and related offences that may be assigned to it by the policy organs of AU,¹⁸³ the functions of the Board shall be to promote and encourage the adoption and application of anti-corruption measures in Africa; collect and document information on the nature and scope of corruption and related offences; develop methodologies for analysing the nature and extent of corruption, and disseminate information and sensitise the public on the negative effects of corruption and related offences; advise governments on how to deal with the scourge of corruption and related offences in their domestic jurisdictions; and collect

175 AU Corruption Conv., *supra* note 5, Art. 14.

176 See *Status of Ratifications of the Principal International Human Rights Treaties*, at <http://www.unhchr.ch/pdf/report.pdf> (hereinafter “*Status of Ratifications*”) (providing status of ratification by treaty) (last visited 20 June 2002).

177 ICCPR, *supra* note 174, Art. 14(1).

178 See AU Corruption Conv., *supra* note 5, Art. 22(1).

179 *Id.*, Art. 22(2).

180 *Id.*

181 *Id.*, Art. 22(3).

182 *Id.*, Art. 22(4).

183 *Id.*, Art. 22(5).

information and analyse the conduct and behaviour of multi-national corporations operating in Africa and disseminate such information to national authorities designated under Article 18(1) of the Convention.¹⁸⁴

The Board will also work towards the adoption of harmonized codes of conduct of public officials; and build partnerships with the African Commission on Human and Peoples' Rights, African civil society, governmental, Intergovernmental and non-governmental organizations to facilitate dialogue in the fight against corruption and related offences. More significantly, it shall submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this Convention.¹⁸⁵ The reporting obligation of the Board also gives rise to a reporting obligation of each State Party, to be considered below.

A defect in the Convention's provisions is that, unlike the FAFT and IMF systems, there is no express system of mutual evaluation of each country's performance in anti-corruption measures in Africa. It is surprising that the Convention fails to make provision for such a mechanism, given Africa's new penchant for self-monitoring. The New Partnership for Africa's Development, for example, has established such a peer-review mechanism, known as the African Peer Review Mechanism (APRM). The aim of the APRM is to 'foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration in the continent.'¹⁸⁶ Since, as noted earlier, one of the goals of NEPAD is combating corruption and encouraging good governance, it will be desirable for the APRM to work in partnership with the Advisory Board established under the AU Corruption Convention.

3. *State Reporting Obligations*

In order to make the reporting obligation of the Board easier, the Convention, in turn, provides for a reporting obligation on the part of State Parties. Accordingly, within a year after the coming into force of the instrument, States Parties shall communicate to the Board on the progress they have made in the implementation of the Convention.¹⁸⁷ Thereafter, national anti-corruption authorities or agencies of each State shall report—through their relevant procedures—to the Board, at least, once a year before the ordinary sessions of the policy organs of the AU,¹⁸⁸ most likely the Assembly and Executive Councils of the Union.

Reporting obligations of state entities to international bodies has now become a part of international law and relations. The practice has now been

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD)*, OAU Assembly of Heads of State and Government, 38th Ord. Sess., Durban, South Africa, 8 July 2002, ASS/AU/Decl.1(1), para. 6, at <http://www.africaunion.org/en/commpub.asp?ID=106>.

¹⁸⁷ AU Corruption Conv., *supra* note 5, Art. 22(7).

¹⁸⁸ *Id.*

generally been accepted as playing a constructive and potentially rewarding means for governments, on the one hand, and the international community, on the other hand, to achieve a variety of objectives. Such reporting brings about a constructive dialogue between the State concerned and an independent international group of experts. Such routine international accountability serves the best interest of the State, the citizens and the international community.¹⁸⁹

The Convention has not set out the guidelines for the reporting obligations of the States. It may, however, be assumed that the Board, which is given the power to adopt its own rules of procedure,¹⁹⁰ will correspondingly formulate relevant guidelines for the reporting obligations.

I. Signature, Ratification, Reservations, and Denunciation

Now that the Convention has been adopted, it is open for ratification by the Member States of the AU,¹⁹¹ and will enter into force thirty days after the date of the deposit of the fifteenth instrument of ratification or accession.¹⁹² However, for a party ratifying or acceding to the Convention after the date of the fifteenth ratification, then the Convention shall enter into force thirty days after the date of the deposit by that State of its instrument of ratification or accession.¹⁹³ Some multilateral treaties allow states to choose to unilaterally modify or even decline to accept certain provisions of the treaty, even though they have signed and ratified it. This is the case with regards to the Convention, which allows any State Party, at the time of adoption, signature, ratification or accession, to make reservation to it, provided, however, that 'each reservation concerns one or more specific provisions and is not incompatible with the object and purposes of this Convention.'¹⁹⁴

189 See Philip Alston, 'The Purpose of Reporting,' in *Manual on Human Rights Reporting* 19, 20 (United Nations, 1997).

190 AU Corruption Conv., *supra* note 5, Art. 22(6).

191 *Id.*, Art. 23(1). International law distinguishes ratification from signature or even accession. A signature does not usually bind a country to the treaty obligations of itself; it is merely the initial assent, usually from the date of adoption to a certain period. When a state has not signed a treaty during the period when it is "open for signature," it can only become a party to the treaty through accession (otherwise known as adherence or adhesion). The effect is the same, though accession does imply that the acceding state did not take part in the negotiations that produced the treaty, but was invited by the negotiating states to accede to it; it also involves being party to the whole treaty by full and entire acceptance of all its provisions precluding reservations to any clause. It has also been applied to mean acceptance by a state of a treaty or convention after the prescribed number of ratifications for its entry into force has been deposited; see I.A. Shearer, *Starke's International Law* 417 (1994); and Akehurst's *Modern Introduction to International Law* 133 (P. Malanczuk ed., 1997); *contra* Vienna Conv., *supra* note 61, Art. 2, where "accession" received the same definition as "ratification."

192 See AU Corruption Conv., *supra* note 5, Art. 23(2).

193 *Id.*, Art. 23(3).

194 *Id.*, Art. 24(1); *cf.* Vienna Conv., *supra* note 61, Art. 2(1)(d) (defining a reservation as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude

Special provisions concerning the making of reservations in a treaty may present difficult problems of interpretation, as demonstrated in the *Anglo-French Continental Shelf Arbitration*.¹⁹⁵ The reason is because of the divergence of practice with regards to the legal effect of reservations, a point that the ICJ also stressed in the *Reservation to Genocide Convention*.¹⁹⁶ Must a reservation be accepted by all of the parties to be valid and, if not, what is the treaty relationship between a party that makes a reservation and one that objects to it? The least objectionable solution appears to be the “compatibility” test, by which ‘a State which has made ... a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention ...’¹⁹⁷ This is also the one favored by the Convention under consideration, although it is not without practical problems, since ‘[t]he application of the criterion of compatibility with object and purpose is a matter of appreciation.’¹⁹⁸

However, the Convention provides that a State that has made a reservation shall withdraw it as soon as circumstances permit and shall notify the Chairperson of the AU Commission accordingly.¹⁹⁹ On the other hand, a State Party may denounce the Convention ‘by sending notification to the Chairperson of the Commission.’²⁰⁰ Such denunciation shall take effect six months after the date of receipt of notification.²⁰¹ The Convention, however, provides that, even after denunciation, ‘cooperation shall continue between State Parties and the State Party that has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal.’²⁰²

This article believes that the provisions on reservations and denunciation will serve to whittle down the impact of the Convention and render it ineffective. State Parties could have done without these provisions in the Convention. As things stand, it could turn the AU from a noble enterprise.

IV. FIGHTING CORRUPTION SERIOUSLY? PRACTICE IS BETTER THAN PRECEPTS

The Convention, when ratified by African states, will, undoubtedly, go a long way towards confronting corruption in Africa and complementing efforts earlier adopted by African countries at the municipal levels to tackle the menace. It is important, in this regard, for countries in Africa to also periodically

or to modify the legal effect of certain provisions of the treaty in their application to that State’). Brownlie is of the opinion that this definition ‘begs the question of validity, which is determined on a contractual and not a unilateral basis,’ Brownlie, *supra* note 156, at 612–13.

195 54 ILR 6, at 41–57.

196 1951 ICJ REP. 15.

197 *Id.*, cf. Vienna Conv., *supra* note 61, Art. 19.

198 Brownlie, *supra* note 156, at 615.

199 See AU Corruption Conv., *supra* note 5, Art. 24(2).

200 *Id.*, Art. 26(1).

201 *Id.*

202 *Id.*, Art. 26(2).

evaluate relevant legal instruments and administrative measures on corruption in order to determine their adequacy to prevent and fight corruption. In Nigeria, for example, succeeding governments have always enacted various laws to deal with corruption and related offences. However, until 1975, governments' concern with the problem was only by way of declaration of assets, investigations and recovery of public property corruptly acquired.²⁰³ Recent laws dealing with various aspects of the problem in Nigeria include the *National Drug Law Enforcement Agency Act*,²⁰⁴ *Money Laundering Act*,²⁰⁵ *Advanced Fee Fraud and Other Related Offences Act*,²⁰⁶ and *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree*.²⁰⁷ These enactments were intended to 'cover the full ramifications of the crime, plug loopholes, create stringent penalties, provide for speedy, effective and more appropriate procedures, provide for specialised institutional framework for dealing with the crimes and, more importantly, to manifest government's determination and preparedness to do battle with the criminals.'²⁰⁸

To be effective, the fight against corruption should go beyond mere pious irrelevances and sanctimonious trivialities. It must be dynamic and holistic,²⁰⁹ because corruption itself is dynamic and has cross cutting dimensions and impacts. Emphasis should be equally distributed among preventive, enforcement and prosecutorial measures. To be effective, corruption policies of states must promote the participation of society and must reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.²¹⁰ States must, in particular, promote a sense of integrity among public officials, including individuals and institutions playing a regulatory role in that connection, and enhancing their

203 B.O. Nwabueze, *Military Rule and Constitutionalism* 207–8 (1992) (noting also that trial for corruption in the ordinary courts often ended in failure, mainly due to ineptitude and pervasion on the part of the investigating police officers. See *id.*, at 208).

204 See *National Drug Law Enforcement Agency Act*, Cap. 253 Laws of the Federation of Nigeria 1990 (establishing an Agency to enforce laws against the cultivation, processing, sale, trafficking and use of hard drugs and empowering the Agency to investigate persons suspected to have dealings in drugs and other related matters).

205 *Money Laundering Act* (No. 3) of 1995.

206 *Advanced Fee Fraud and Other Related Offences Act* (No. 13) of 1995.

207 *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree* (No. 18) of 1994.

208 C.O. Okonkwo, 'Legal and Institutional Mechanisms against Corruption in Nigeria,' in *National Conference on the Problems of Corruption in Nigeria* 342 (Nigerian Institute of Advanced Legal Studies, 2001). Most recently, the Government of Obasanjo has also enacted the Economic and Financial Crimes Act 2003.

209 TI, *e.g.*, has advocated the use of a holistic approach in the fight against corruption. It has also developed the elements of a 'national integrity system,' which are mechanisms supporting accountability and transparency; a partnership between government and civil society organizations; administration reform and countering conflict of interests in the public services; accountability of the decision makers; appropriate mechanisms that provide public officials with channels for reporting acts of alleged corruption; independence of the judiciary; open, genuine, competitive and transparent systems of procurement; self-regulation of the private sector; an alert press, with the freedom to discharge its role as public watchdog; and creation of independent anti-corruption agencies. See Transparency International, *Transparency International Source Book* 1–7 (1997).

210 See *e.g.*, Draft UN Conv., *supra* note 44, Art. 5(1).

reporting duties and capabilities. They must develop mechanisms for regulating the management of public funds and for introducing rules guaranteeing transparency in public transactions, both local and international. They must review their domestic laws—including penal codes—to reflect the gravity of the corruption phenomenon and its impact on development, and to introduce deterrent penal, civil, administrative and economic sanctions.²¹¹ They must be willing and ready to address the presently inadequate investigative capacity of the law enforcement agencies so as to raise the level of detection and punishment of corrupt practices. Flexible and streamlined methods of investigation and criminal procedure must be ensured. The law enforcement bodies must have the same technology as the criminal groups and be well equipped to solve the problem.

This part elaborates on some of the preventive and remedial issues highlighted above, including non-legal measures needed to tackle the problem of corruption.

A. *Independence and Integrity of National Anti-Corruption Bodies*

The first and, perhaps, the greatest challenge to the fight against corruption in Africa is how to secure the independence of institutions charged with the implementation of the various anti-corruption laws. This, of course, presupposes that each State Party to the Convention will be obliged to establish an anti-corruption unit where there is none. Such units, which already exist in few African countries, could be one of the essential elements of a national strategy to combat corruption pandemic—all things being equal—including the dissemination of knowledge about the prevention of corruption. This, of course, demands that those bodies be free from undue influence, since it is difficult to fight corruption in countries where judicial institutions are weak and where the rule of law and adherence to formal rules are not rigorously observed. Only an independent institution will be able to curb corruption, otherwise uncertain political wills will determine the strength of the fight against the problem.²¹² It is absolutely important to attach high-level value to the functions of these agencies, including close monitoring and a strict disciplinary regime to ensure their incorruptibility. They should also be provided with necessary and sufficient material resources and specialized staff as well as training necessary for them to carry out their functions.

Recent events in Africa show that most anti-corruption agencies are either not truly independent or officials of such agencies are themselves corruptible. In Kenya, the High Court declared the Kenya Anti-Corruption Authority unconstitutional in December 2000.²¹³ In South Africa, a constitutional

211 See *e.g.*, the proposal by the Government of Tunisia at the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption Buenos Aires, 4–7 Dec. 2001, A/AC.261/IPM/8, available online on the Web site of the UN Office on Drugs and Crime, at <<http://www.unodc.org>>.

212 See TI Report 2001, *supra* note 14, at 82.

213 *Id.*, at 3.

commission excluded the head of the Special Investigating Unit mandated to probe corruption in that country from taking part in a high-profile investigation.²¹⁴ On February 21, 2003, the Nigerian federal legislators—the National Assembly—hurriedly repealed and replaced the Independent Corrupt Practices and Other Related Offences Act 2000 with another Act of same name in 2003.²¹⁵ The new law has considerably whittled down the powers of the Commission and the penalties for persons convicted of offences in the subsisting law. President Obasanjo's veto of the new bill has been overridden by the legislators,²¹⁶ who are accusing the executive of using the ICPC to witch-hunt political opponents. The ICPC itself has openly accused the lawmakers of repealing the Act to escape investigation and prosecution, as their act came only when the ICPC turned its searchlight on certain members of the National Assembly. Before the amendment, the Chairman of the ICPC—retired Justice Mustapha Akanbi—had attributed the slow pace of the crusade²¹⁷ to alleged sabotage by some state governors.²¹⁸

Such erosions of the independence of anti-corruption agencies have serious implications for public support and acceptance of these agencies and what they stand for. Several reports also show that, in Africa and elsewhere, there are deeper levels of corruption within the police, customs and courts, the very agencies that are at the heart of any measure to tackle the problem of corruption.²¹⁹ This, in part, explains why even those states that already have national laws to deal with corruption have achieved little or no success, because the integrity of the judiciary or officials of similar agencies is a determining factor in the success of any criminal justice system. In Equatorial Guinea, for example, the President of the Supreme Court and the President of the Constitutional Court were dismissed in 2001, after a special anti-corruption commission exposed the embezzlement of funds in the judiciary.²²⁰

It is important for African states to insulate these institutions from the very epidemic that they seek to cure, by appointing persons of proven integrity to these institutions. Unless the measuring rod is independent of the thing measured, we can do no measuring. The legal norms designed to curb corruption,

214 *Id.*

215 In June 2000, the Obasanjo Government enacted *The Corrupt Practices and Other Related Offences Act 2000*, Cap. 359 Laws of the Federation of Nigeria 2000 [hereinafter *Corrupt Practices Act*], which prohibits and prescribes punishment for corrupt practices and other related offences. See *id.*, §§ 8–27. For commentary on the Act, see Paul D. Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000,' 45(2) *J.A.L.* 173 (2001).

216 See 'Senate Overrides President's Veto on Anti-graft Bill,' *The Guardian* [Nig.], 8 May 2003, at 1.

217 The Commission is yet to conclude a single case, let alone convict any. This has made ordinary Nigerians to conclude that the Obasanjo government does not have the courage to move against some powerful individuals, particularly former military rulers, who have corruptly enriched themselves while in the public service.

218 See *Vanguard* [Nig.], 7 September 2001, at 1.

219 UN Office on Drugs and Crime, *supra* note 90 (noting the "mounting evidence" of widespread judicial corruption in many parts of the world).

220 See TI Report 2001, *supra* note 14, at 84, citing *Agence France Presse*, 25 January 2001.

however well targeted and efficient, will be crippled where the institutions themselves are corrupt.

B. *Good Governance*

There is a symmetrical relationship between good governance and corruption; good governance curbs corruption in the same way that the disappearance of corruption in a polity enhances good governance.²²¹ Good governance, regrettably, has been a scarce commodity in most African countries; Africa's economic meltdown is largely the result of poor economic management by its leaders, including official and political corruption. In Kenya, for example, poor economic governance has inhibited or hobbled development; '[w]eak infrastructure, widespread corruption, escalating insecurity, poorly managed public resources, and the public sector's inability to deliver services efficiently have undermined development.'²²² In Nigeria, years of military misrule, combined with 'substantial leakage of public revenue and dissipation of oil export earnings through mismanagement and political patronage and corruption fuelled by ethnic divisions,'²²³ have made Nigeria a rich country of poor people. Even at present, 'the country has rarely committed to the right policy mix to translate its formidable potential into economic performance.'²²⁴ It has also been asserted, with regards to Zimbabwe, that many of the problems across sectors in that country can be linked to one central difficulty: the 'crisis of governance.'²²⁵

It is estimated that Africa and other developing states will need 3.7 per cent annual growth in per capita incomes in order to halve the share of people living on \$1 a day.²²⁶ At present, most Sub-Saharan African countries run at an average economic growth rate of 3.3 per cent a year.²²⁷ So what is the solution? *Good governance*. Since the road out of Jerusalem is usually the same road into it, African states must show contrition and embrace good governance practices in order to jump out of the present economic mire and jumpstart their economies. Good governance is a basket of many practices: a professional civil service, elimination of corruption in government, a predictable, transparent and accountable administration, democratic

221 See e.g., *Attorney-General, Ondo State v. Attorney-General, Federation* [2002] F.W.L.R. (Pt. 111) 1972 at 2002 [Nig.] [hereinafter *A-G, Ondo State* case] ('It cannot be disputed that a country with less corrupt practices stands a chance of good government.').

222 See TI Report 2001, *supra* note 14, at 7 (noting also that these governance problems have hurt private sector activities in Kenya, as shown by the decline in investment, *id.*).

223 *Id.*, at 8–9.

224 *Id.*, at 8.

225 *Id.*, at 133.

226 *Id.*, at 2.

227 See African Development Bank (ADB), 'Achieving the Millennium Development Goals in Africa: Progress, Prospects, and Policy Implications,' in *Global Poverty Report 2002*, 10 (2002) [hereinafter ADB Global Poverty Report] (noting also that, at this rate, most African countries will not achieve the Millennium Development Goals by 2015, though 'they can—on present trends—be expected to make substantial progress toward it,' *id.*).

decision-making, the supremacy of the rule of law, effective protection of human rights, an independent judiciary, a fair economic system, appropriate devolution and decentralization of government, and appropriate levels of military spending.²²⁸

Until very recently, good governance was not found in the political dictionary of many African governments. Even now that the pace of democratisation seems to have gathered momentum in the continent,²²⁹ good governance still remains in short supply in many countries. In Ethiopia, for example, good governance is still largely absent, 'notwithstanding efforts to develop policies and laws that promote legitimacy, accountability, transparency, the rule of law, and popular participation.'²³⁰ Of course, there has been some progress in creating more effective and transparent systems for the management of public resources, as evident in improvements in basic macroeconomic indicators.²³¹ But these are peripheral. In the great majority of cases, the capacity of the state—in administrative, regulatory, and technical capacities—is still inadequate in many countries.²³²

Since democratic political systems and open economies provide the best opportunities for controlling corruption, African States should restructure the public sector, reform the management of public spending, and strengthen public sector accountability. This is what good governance entails—'the responsible use of political authority to manage a nation's affairs.'²³³ It is in this context that, for example, the Convention's provision on funding of political parties makes inordinately good sense. It provides that each State Party to the Convention should adopt legislative and other measures to '[p]roscribe the use of funds acquired through illegal and corrupt practices to finance political parties' and to '[i]ncorporate the principle of transparency into funding of political parties.'²³⁴ This is rightly situated.

However, since it is the key to economic development, good governance must be participatory, transparent and accountable.²³⁵ It entails not just the

228 See L.C. Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection,' 13 *Harv. Hum. Rts. J.* 1, 16–17 (2000).

229 See generally Nsongurua Udombana, 'Articulating the Right to Democratic Governance in Africa,' 24(4) *Mich. J. Int'l L.* 1209 (2003) (on file with the author) (discussing the emergent right to democratic governance in Africa).

230 ECA Report 2002, *supra* note 17, at 105.

231 See ADB Global Poverty Report 2002, *supra* note 227, at 16.

232 *Id.*

233 C.J. Dias and D. Gillies, *Human Rights and Democracy* 10 (1993).

234 AU Corruption Conv., *supra* note 5, Art. 10.

235 See Ngaire Woods, 'Good Governance in International Organization,' 5 *Global Governance* 41, 43–46 (1999) (arguing that the three core elements of good governance are participation, accountability, and fairness); *cf.* ADB Global Poverty Report 2002, *supra* note 227, at 16, noting that:

Participatory democratic systems and the rule of law are essential to ensure that leaders are held accountable to the people and that open and transparent systems exist for the management of public resources. Such systems are also required to create an enabling environment for the private sector—by ensuring respect for

absence of official corruption but also the guarantee of basic political rights—the right to vote and to join the political party of one's choice, freedom of expression, supremacy of the rule of law, an independent judiciary, and free and fair elections.²³⁶ It includes measures that allow 'members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and ... on decisions and legal acts that concern members of the public.'²³⁷ Good governance must also be effective and equitable, in order to promote the rule of law.²³⁸ Indeed, transparency and accountability are two key elements to combat corruption. This is why, for example, it is important to make morality a necessary element of the criteria of validity of an exercise of legal power, otherwise judicial control becomes of little avail.²³⁹

If good governance becomes the norm in Africa, it will certainly reduce political corruption and bring about economic growth. Transparency and accountability will bring competitive advantages, increase credibility, not only from an ethical but also from an economic perspective, and promote development in African countries. This, in turn, will make it possible—but by no means certain—for African states to satisfy economic, social and cultural rights, which, as shown earlier, is one of the objectives of the Convention. Effective public budget and financial management together with mechanisms for ensuring accountability in the use of scarce resources are, thus, critical aspects of public actions to reduce poverty.²⁴⁰

C. *Civil Society Engagement*

The civil society has been defined as comprising those associational bodies between the personal and the state.²⁴¹ In spite of the ambiguities and conflicts inherent in real civil societies,²⁴² these groups have become the centrepiece—organizationally, materially and ideologically—of the civil movements and

property rights and by creating legal and judicial systems that enforce contractual obligations and create a level field for private enterprise.

236 See ECA Report 2002, *supra* note 17, at 133 (noting, e.g., that '[t]hese rights have eluded Zimbabweans, and the human rights situation in the country is generally perceived as grave,' *id.*).

237 Draft UN Conv., *supra* note 44, Art. 9(a).

238 United Nations Development Programme (UNDP), 'Governance and Sustainable Development,' *UNDP Policy Document* (1997) available at <<http://magnet.undp.org/policy/default.html>>; United Nations Development Programme (UNDP), 'Reconceptualising Governance,' *Un Discussion Paper*, available at <http://magnet.undp.org/Docs/!UN98-21.PDF/Recon.htm>.

239 See A.O. Obilade, 'Abuse of Legal Power,' in *Nigerian Essays in Jurisprudence* 44, 45 (T.O. Elias and M.I. Jegede, eds., 1993) (examining the extent to which abuse of legal power is an impediment to social justice).

240 See ADB Global Poverty Report 2002, *supra* note 227, at 16.

241 See Paul Gifford, 'Book Review,' 30 *J. Religion in Africa* 494, 495 (2000) (reviewing *Civil Society and Democracy in Africa: Critical Perspectives* (Nelson Kasfir ed., 1998)).

242 See e.g., *Civil Society and the Political Imagination in Africa: Critical Perspectives* (John L. Comaroff & Jean Comaroff, eds., 1999) (revealing that it is important to stress that civil society could be multi-faceted in its many guises, inherently exclusive and

protests for reform and change.²⁴³ In normative terms, the civil society is a force and an increasingly crucial agent for societal resistance to state excesses, limiting authoritarian government, strengthening popular empowerment, enforcing political accountability, reducing the socially atomising and unsettling effects of market forces, and improving the quality and inclusiveness of governance.²⁴⁴

African leaders have now accepted the vital role of civil societies in nation building as a fact. This probably explains why several instruments adopted by the OAU/AU in recent times acknowledge their role, while encouraging Member States to positively engage this group.²⁴⁵ The Convention is not different. It recognizes the importance of the civil society in the fight against corruption and enjoins State Parties to involve “the Media and Civil Society at large” in popularising the Convention.²⁴⁶ More specifically, State Parties are to create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs;²⁴⁷ ensure and provide for the participation of civil society in the monitoring process and consult this group in the implementation of the Convention;²⁴⁸ and ensure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial.²⁴⁹

This paper calls on African civil society to take up this challenge boldly and mobilize the citizens to demand for greater transparency from those entrusted

egalitarian and susceptible to high-handed and parochial application in unfamiliar territory).

243 Michael Bratton, “Beyond the State: Civil Society and Associational Life in Africa,” 41 *World Politics* 407 (1989).

244 See James Manor *et al.*, *Civil Society and Governance* (1999), available at <http://www.ids.ac.uk/ids/civsoc/public.doc> (a concept paper for a comparative research project on civil society and governance).

245 See e.g., AU Act, *supra* note 3, at preamble. (expressing the need for African governments to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among the peoples); *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, AU Assembly, 1st Ord. Sess., Durban, South Africa, 9 July 2002, available at http://www.au2002.gov.za/docs/summit_council/secprot.htm [hereinafter PSC Prot.], Art. 8(10)(c) (providing that in situations of conflict, the Peace and Security Council (PSC) may decide to hold open meetings and may, *inter alia*, invite civil society organizations involved and/or interested in a conflict or a situation under consideration by the PSC to participate, without the right to vote, in the discussion relating to that conflict or situation); Art. 8(11) (providing that the PSC may hold informal consultations with parties concerned by or interested in a conflict or a situation under its consideration, as well as with, *inter alia*, civil society organizations as may be needed for the discharge of its responsibilities); and Art. 20 (providing that the PSC shall encourage NGOs, community-based and other civil society organizations, particularly women’s organizations, to participate actively in the efforts aimed at promoting peace, security and stability in Africa and that, when required, such organizations may be invited to address the PSC).

246 AU Corruption Conv., *supra* note 5, Art. 12(1)

247 *Id.*, Art. 12(2).

248 *Id.*, Art. 12(3).

249 *Id.*, Art. 12(4).

with power and to hold them accountable. It must work hard to arrest corruption in high and low places before Africa collapses. There are things in life that are irreparable; there is no road back to yesterday. The problem, however, is that the civil society itself needs strengthening, having been weakened by decades of suppression by the military and one party dictatorship.

D. *Moral Rearmament through Civic Education*

One of the most exciting and innovating provisions in the Convention is the requirement that States Parties '[a]dopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics.'²⁵⁰ This is of utmost importance, particularly in our humanistic societies where strenuous efforts are made to remove morality from every facet of life. The modern man is extremely sceptical about the whole idea of objective moral truth, appealing, rather, to "scienticism." The argument is that it is the natural sciences, with their procedures of observation and repeatable experiments, which alone can tell humanity what objective facts there are "out there."²⁵¹

This article submits that a great amount of folly in modern societies is the result of this 'poison of subjectivism'—the popular but false separation of value and fact, or law and morals. Young minds are particularly being trained to reject any notion of value as somehow unreal compared to facts. Modern societies now define "good" to mean whatever men are conditioned to approve; and the conditioning takes place daily through eugenics, psychological manipulations of infants, and media propaganda (now made easier by the Internet). The paradox is that, in seeking to reject all values, modern societies have placed themselves in the position of needing leaders and people with the very qualities they reject; which is the same thing as saying that they want to eat their cakes and have them back. Such, according to C.S. Lewis, is the tragic-comedy of modern civilization:

we continue to clamour for those qualities we are rendering impossible. ... In a sort of ghastly simplicity we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honour and are shocked to find traitors in our midst. We castrate and bid the geldings be fruitful.²⁵²

A belief in the objectivity and validity of reason must be maintained otherwise all thoughts are accidents and we can know no truths and have no knowledge. If a man, Lewis advises, will take a little trouble to visit any library

²⁵⁰ *Id.*, Art. 5(8).

²⁵¹ See J.W. Harris, *Legal Philosophies*, 21 (1997).

²⁵² C.S. Lewis, *The Abolition of Man* 35 (1977) (discussing the trends in modern thinking that seek to subordinate the human mind and soul to the processes of natural phenomena, thus bringing about "the abolition of man").

and peruse the *Encyclopedia of Religion and Ethics*, he will almost immediately 'discover the massive unanimity of the practical reason in man.'²⁵³

From the Babylonian *Hymn to Samos*, from the Laws of Manu, the *Book of the Dead*, the Analects, the Stoics, the Platonists, from Australian aborigines and Redskins, he will collect the same triumphantly monotonous denunciations of oppression, murder, treachery and falsehood, the same injunctions of kindness to the aged, the young, and the weak, of almsgiving and impartiality and honesty.²⁵⁴

Corruption is a moral problem and morality is 'secreted in the interstices' of the legal system. Just as blindness presupposes sight, so corruption reveals a standard of goodness, honesty and integrity, of which society has fallen short. Integrity incorporates morality and ethical behaviour; it does not replace, nor is it an alternative to, them; and integrity ought to underpin all behaviour in society. For this to happen, it is important for Africa to return to the maxims of traditional morality, otherwise all scientific and technological breakthroughs, as well as economic planning, will simply be a waste of time. The road to the Promised Land must run past Sinai.²⁵⁵ African countries need, for example, to overhaul their education system to incorporate and emphasize moral and ethical teachings, especially at the primary and secondary levels. The curricula should, *inter alia*, emphasize values of integrity and honesty, which are the benchmarks for real progress in any society.²⁵⁶ The media, as the Convention acknowledges, has a crucial role to play in preserving African values; this can be achieved if the media redirects and revitalizes its programs from propaganda to nation building.

253 C.S. Lewis, *Christian Reflections* 104 (1980).

254 *Id.* (noting that all of these religions and philosophies are in substantial agreements in these moral issues, with some local variations, of course; but these are, at worst, differences of belief about facts, *id.*, at 104–5). Cf. Simone Weil, *Gateway to God* 37–38 (1974) ('Obvious as are the fluctuations of morality in accordance with time and place, it is equally obvious that the morality which proceeds directly from mystic thought is one, identical, unchangeable. This can be verified by turning to Egypt, Greece, India, China, Buddhism, the Moslem tradition, Christianity and the folklore of all countries.').

255 It was at Mount Sinai that God gave the Ten Commandments to the children of Israel—through Moses—on their pilgrimage to the land of Canaan, the Promised Land. See generally *Exodus 19 & 20*. These laws, also known in Greek as the 'Decalogue,' were guidelines for daily living and bear many similarities to the Code of Hammurabi, an ancient law code named after an early king of Babylonia. The Ten Commandments awakened in the Israelites 'the new idea of God in all its clarity and purity, untainted by magic, free from a variegated and grotesques imagery, and conceived as something other than a materialistic preparation for perpetuating the self beyond the grave,' Werner Keller, *The Bible as History*, 140 (1956). However, the history of Israel from the moment the Commandment was given on was one of long record of violation of the laws, resulting in the judgment of the captivities.

256 Cf. Nsongurua Udombana, 'Enforcement of Morals: A Re-evaluation,' in *Unilag Readings in Law* 321, 345 (E.O. Akanki ed., 1999) (noting that '[a] legal system that does not address the moral facet of human behaviour is one that inadequately comprehends human nature. It is almost certainly doomed to fail').

The call for a moral rearmament of youths through civic education will obviously meet with the objection that it is unorthodox; but the idea is not new in Africa, as morality is the bedrock of African societies. The African Charter, for example, was the first legally enforceable treaty to employ the language of duties in detailed and explicit forms.²⁵⁷ In this respect, it goes beyond correlative duties of individuals that many human rights instruments explicitly or implicitly impose; it does not define duties that are simply the "other side" of individual rights. The principles and ideals underlying the African conception of duties, which run from individuals to the state and to other groups and individuals, include:

respect for, and protection of, the individual and individuality within the family and the greater socio-political unit; deference to age because a long life is generally wise and knowledgeable; commitment and responsibility to other individuals, family and community; solidarity with fellow human beings, especially in times of need; tolerance for difference in political views and personal ability; reciprocity in labor issues and for generosity; and consultation in matters of governance.²⁵⁸

To sum up, Africa should begin to prepare its youths for leadership through sound moral upbringing, so that they will not grow up to see political office as an easy and quicker route to amassing wealth. A prudent society must spend, at least, as much energy on preserving what it has as on improvement, bearing in mind that '[t]he shape of a society must depend on the ethical nature of the individual and not on any political system, however apparently logical or respectable.'²⁵⁹

V. CONCLUSION

This article, in embarking on an overview of the AU Corruption Convention, has demonstrated that corruption is a common problem of mankind and that all countries are threatened by it. As is always the case with endemic problems in the world, such as HIV/AIDS, poverty, etc. Africa is disproportionately plagued by corruption. It is in this context that this article sees the adoption of the Convention as a welcome development. The absence of a multilateral treaty against corruption in Africa and, indeed, globally, has limited the scope of investigations in crimes with international dimensions. It has undermined public confidence in African governments, prevented states from being compelled, jurisprudence from being developed, justice from being given, and the necessary publicity from being made. The adoption of the Corruption Convention is a shining example of international co-operation in criminal matters to address a serious and complex issue. It is a right step in the international community's efforts to stand up to transnational crimes. The rule of

²⁵⁷ See generally African Charter, *supra* note 65, Arts. 27–29.

²⁵⁸ Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties,' 35 *Va. J. Int'l L.* 339, 344 (1995).

²⁵⁹ E.L. Epstein, 'Notes on Lord of the Flies,' in William Golding, *Lord of the Flies* 186 (1954).

law must be emphasized throughout the world and international cooperative mechanisms are needed to ensure that criminals are brought to justice. Now that the Convention has been adopted, the AU should adopt appropriate measures and pressures to ensure a quick ratification and should, thereafter, put in place necessary mechanisms for its implementation. These formalities of completion are explicit requisites for the legality of the Convention. It is when the Convention enters into force that Africans and, indeed, the international community will be convinced that African leaders have demonstrated the political will to counter the challenge of corruption and other forms of organized crime, at least in principle.

This article, of course, is keenly aware that anti-corruption programs will not succeed in Africa simply by enacting laws and establishing institutions. The battle to combat corruption in the continent is not just a legal battle, since corruption is a prism with many sides and requires action from both legal and non-legal angles—including morality. Anti-corruption efforts must, in addition to legal controls, demonstrate serious intent to deal with the malaise, which can only occur by means of realistic and creative strategies for prevention, implementation and monitoring. This article has highlighted some, by no means all, of these strategies. One thing is clear from all of the above: corruption is attracting more public scrutiny in the present than in the past; the secretive web that once shrouded it is fast disentangling. There is now a growing tide of awareness in Africa, as elsewhere, that combating the plague is integral to achieving a more effective, fair and efficient government. This awareness creates hope for Africa, which cannot bear the costs of corruption, as it impedes development and minimizes the ability of governments to reduce poverty. This also explains why an early entry into force of the Convention is not an option but an imperative, since it will, hopefully, kick-start a crusade for the moral rearmament of Africa.

The adoption of the Convention, like the start of many journeys, is a first vital step towards fighting corruption seriously in Africa. Since the paths are still uneven, there will certainly be many obstacles to circumvent, including obstacles of ratification, entry into force and the establishment of relevant mechanisms for implementation both at the municipal and continental levels. If there is a political will, then there is, at least, hope that the crusade will succeed step by one debilitating step, rather than in one big triumph. The one thing that is needful is for the crusaders—in this case African leaders—to live by example, if they expect to win converts in this great crusade. A preacher gains few proselytes where his own behaviour contradicts his message; a greater transparency in all areas of governance in Africa is possibly the most potent single instrument against corruption. Practice, if not better than precept, may, at least, prove to be easier.