

AFRICA'S APPROACH TO THE INTERNATIONAL WAR ON CORRUPTION: A CRITICAL APPRAISAL OF THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

Lucky Bryce Jatto Jnr*

I. INTRODUCTION

Corruption¹ “causes enormous losses of wealth to society”² and is “the invisible tax that raises the cost of doing business”.³ As a result of added costs, foreign investors are disinclined to do business in jurisdictions with high levels of corruption.⁴ For these reasons corruption is inimical to the development of international trade.

Although a fairly global phenomenon; the African region appears to be worst affected by the scourge of corruption. It has been opined that “corruption has the most severe effect in developing

* LL.B. (First Class Honors), LL.M. candidate at the Faculty of Law, University of Manitoba, Fellow of the Marcel A. Desautels Centre for Private Enterprise and the Law, and Recipient of the Manitoba Graduate Scholarship, and of the University of Manitoba International Graduate Student Entrance Scholarship.

¹ In the specific context of the present discussion, the following definitions of corruption are adopted: “the abuse of entrusted power for private gain” and the payment of “bribes to [dishonest] government bureaucrats to get ‘favors’ such as permits, investment licenses, tax assessments, and police protection”. See respectively Transparency International, “What is Corruption?”, online: Transparency International <http://www.transparency.org/about_us>; Ali Al-Sadig, “The Effects of Corruption on FDI Inflows” (2009) 29 *Cato Journal* 267 at 267.

² Bryan Schwartz, “An Efficient and Simplifying Approach to Creating a Balanced FTAA: Cutting and Pasting from Other Treaties and Institutions” (2001) 1 *Asper Rev. of Int'l Bus. and Trade Law* 33 at 34.

³ U.S., Department of Commerce International Trade Administration, *Addressing the Challenges of International Bribery and Fair Competition: The Third Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998*, Executive Summary (2001), cited in Lori Ann Wanlin, “The Gap between Promise and Practice in the Global Fight against Corruption” (2006) 6 *Asper Rev. of Int'l Bus. and Trade Law* 209 at v; See Al-Sadig, *supra* note 1 at 267-269.

⁴ See Al-Sadig, *supra* note 1 at 268-269, 283, 289; Paolo Mauro, *Why Worry About Corruption?* (Washington D.C.: International Monetary Fund, 1997) at 6.

nations”,⁵ where the malaise of corruption has been described as a “great resource waster”.⁶ Yet, nearly one third of the world’s developing – or “emerging and developing” – nations are to be found on the African continent alone.⁷ In the same vein, Transparency International’s Corruption Perceptions Index (CPI),⁸ a measurement of the perceived level of public sector corruption in one hundred and eighty countries and territories around the world, indicates that in 2009, of the eighty most corrupt nations in the world, thirty-seven – nearly half – were African states. The country with the lowest ranking on the CPI was Somalia in Northeast Africa.⁹ These sobering statistics prove that corruption is a major issue in Africa. As shown at the outset, one effect of corruption is to discourage international trade – the international flow of goods, services and capital – in markets where corruption is rife.¹⁰ Hence the pervasiveness of corruption among the developing nations of Africa is bound to hinder their participation in international trade.

⁵ Heather Manweiller & Bryan Schwartz, “A Proposal for an Anti-Corruption Dimension to the FTAA” (2001) 1 *Asper Rev. of Int’l Bus. and Trade Law* 67 at 69.

⁶ *Ibid.*

⁷ See International Monetary Fund, “World Economic and Financial Surveys: World Economic Outlook Database – WEO Groups and Aggregates Information October 2009”, online: (2009) International Monetary Fund <<http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/groups.htm#w>> (List of Emerging and Developing Economies).

⁸ Transparency International is an international civil society organization committed to combating corruption. See Transparency International, “About Transparency International: What is Transparency International?”, online: <http://www.transparency.org/about_us>.

⁹ Transparency International, “Corruption Perceptions Index 2009”, online: <http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table>. The Corruption Perceptions Index (CPI) table based on thirteen independent surveys indicates the perceived level of public-sector corruption in a country or territory by showing a country’s ranking and score, the number of surveys used to determine the score, and the confidence range of the scoring. “[W]e can be 90% confident that the true score for [any given] country lies within [the indicated] range.” The implication of these figures is that at the end of 2009 well over half of Africa’s constituent states fell within the list of eighty of the world’s most corrupt nations.

¹⁰ See text accompanying note 4.

On the other hand, the fact that about two thirds of the membership of the World Trade Organization (WTO)¹¹ consists of developing nations¹² and that nearly half of these are African states¹³ gives a global dimension to the corruption issue. With the progressive lowering of trade barriers and the increased mobility of goods and services made possible under the WTO system, there is potential for the proliferation of corruption everywhere within the system. The reality is that the menace of corruption may spread from Africa via trading channels towards climes presently perceived to be relatively less affected by corruption – the advanced and developed member states of the WTO.¹⁴ Ultimately, this will have the same negative implications for international trade highlighted above – increased cost of doing business, economic disincentive to the influx of foreign investment, and the attendant enervation of international trade – in those climes.¹⁵

Given this grim prognosis, the success or otherwise of anti-corruption initiatives mounted within the African continent is an issue of profound significance in the context of international trade law. Foremost of these initiatives is the adoption by the African

¹¹ The WTO is an international organization that “provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all. [It] also provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application.” See WTO, “About the WTO – A Statement by the Director General”, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm>.

¹² WTO, “Understanding the WTO: Developing Countries - Overview”, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm>.

¹³ WTO, “Understanding the WTO: The Organization – Members and Observers”, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>. As of July 23, 2008, forty-two of the WTO’s 153 members were African states, as were nine out of the thirteen states that enjoyed *observer* status. The expectation being that the observer states would ultimately become members of the WTO as they are obligated to “start accession negotiations within five years of becoming observers.”

¹⁴ In this connection, it has been opined, correctly in our view that “[i]n some limited but important respects...an open trade regime may exacerbate corruption. The exposure of a society to the...mercenary or corrupt attitudes of foreign business officials may be a source of ethical pollution, rather than a moral uplift.” Manweiler & Schwartz, *supra* note 5 at 71.

¹⁵ See texts accompanying notes 4 and 10.

Union (AU)¹⁶ of the *African Union Convention on Preventing and Combating Corruption (AU Convention)*.¹⁷ This paper analyzes the anti-corruption mechanism put in place by this convention in the light of its underlying principles, highlights the strengths and limitations of the *AU Convention* and provides useful recommendations for improvement.

II. OVERVIEW OF THE AU CONVENTION

The *AU Convention* was adopted on July 11, 2003 and came into force on August 5, 2006. It comprises a preamble and twenty-eight articles,¹⁸ many of which impose mandatory obligations on

¹⁶ The AU, the successor to the Organization of African Unity, is a federation of all African states except Morocco. It was founded in 2002 and has as one of its objectives the promotion of “sustainable development at the economic, social and cultural levels as well as the integration of African economies”. See AU, “African Union in a Nutshell”, online: <http://www.africa-union.org/root/au/AboutAu/au_in_a_nutshell_en.htm>.

¹⁷ *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, (entered into force 5 August 2006) online: Union Africaine <<http://www.africa-union.org/root/au/documents/treaties/treaties.htm>> [*AU Convention*]. Two other significant initiatives are the adoption of the *Southern African Development Community Protocol against Corruption*, 14 August 2001, (entered into force 6 July 2005) and the *Economic Community of West African States Protocol on the Fight against Corruption*, 21 December 2001, (not yet entered into force), both of which are sub-regional anti-corruption treaties.

¹⁸ Addressing such matters as: definition of terms (*AU Convention*, *supra* note 17, art. 1); the objectives of the convention (*ibid.*, art. 2); the governing principles of the convention (*ibid.*, art. 3); the scope of application of the convention (*ibid.*, art. 4); measures geared towards combating corruption and related offences in both the public service (*ibid.*, art. 7) and the private sector (*ibid.*, art. 11); the role of the media and civil society (*ibid.*, art. 12); the specific legislative and related measures parties to the convention undertake to implement, including but not limited to the criminalization of various forms of corruption and related practices (*ibid.*, arts. 5, 6 & 8); guaranteeing right of access to information (*ibid.*, art.9); proscribing the funding of political parties through the proceeds of corruption (*ibid.*, art. 10); incorporating transparency into the funding of political parties (*ibid.*); confiscation and seizure of the proceeds and instrumentalities of corruption (*ibid.*, art. 16); and the creation of domestic authorities charged with enforcement of legal regimes made pursuant to the convention (*ibid.*, art. 20); the determinants of jurisdiction over acts of corruption and related offences (*ibid.*, art. 13); minimum guarantees of a fair trial (*ibid.*, art.14); extradition issues (*ibid.*, art.15); measures geared at overcoming obstacles posed by bank secrecy laws (*ibid.*, art.17); regional and international cooperation (*ibid.*, arts. 18 & 19); implementation and monitoring mechanisms (*ibid.*, art. 22); supremacy of the

the State Parties.¹⁹ In relation to anti-corruption matters, the provisions of the *AU Convention* prevail over any other international, regional or bilateral agreement concluded “between any two or more State Parties”.²⁰

The *AU Convention* adopts a holistic and pragmatic approach to combating both foreign and domestic corruption. It seeks to engender and reinforce the development of mechanisms necessary for the prevention, detection, punishment, and eradication of corruption and related offences in the public and private sectors,²¹ as well as to establish conditions necessary for ensuring “transparency and accountability in the management of public affairs.”²² Accordingly, the key provisions of the *AU Convention* are built around the principles of: prevention of corruption; transparency and accountability; detection of corruption; criminalization of corruption; and effective implementation and monitoring mechanisms.²³ Put together, these principles make for a formidable anti-corruption apparatus. Each of these principles shall be examined presently.

III. THE KEY PROVISIONS OF THE *AU CONVENTION*

a. Prevention of Corruption

Two of the avowed objectives of the *AU Convention* are the ‘prevention’ and ‘eradication’ of corruption in the public and private sectors. The prevention or eradication of any social ill often requires significant changes in attitudes and values, and such

convention over sub-regional and bi-lateral anti-corruption agreements (*ibid.*, art. 21); and final clauses regarding signature, ratification, accession, entry into force, reservations, amendment, denunciation, depositary, and authentic texts (*ibid.*, arts. 23-28).

¹⁹ A ‘State Party’ in the context of our present discussion is a member state of the AU which has ratified or acceded to the *AU Convention* and therefore undertaken to be bound by the obligations provided within. See *AU Convention*, *supra* note 17, art. 1. As at 9 April 2010, only thirty-one of the AU’s fifty-three member states had ratified or acceded to the *AU Convention*.

²⁰ *Ibid.*, art. 21.

²¹ *Ibid.*, art. 2(1).

²² *Ibid.*, art. 2(5).

²³ *Ibid.*, arts. 2(1), 2(5), 3(3), 3(5).

fundamental changes are impossible without moral education and information-driven re-orientation at the grassroots. Significantly, Manweiller and Schwartz have identified “*illiteracy*” and “lack of public *information* distinguishing between corrupt and non-corrupt practices” as possible causes of corruption in developing countries.²⁴ Clearly, to prevent or eradicate corruption, purposeful education and general information are needed. In recognition of this need, the *AU Convention* obligates each State Party to “[a]dopt and strengthen mechanisms for promoting...awareness in the fight against corruption and related offences” and for educating its population “to respect the public good and public interest”.²⁵ Some of the mechanisms suggested in the *AU Convention* are the inclusion of these tenets in school curricula and the sensitization of the media. Furthermore, State Parties are to create a legislative framework that ensures the right of access to any information required to facilitate the fight against corruption and related offences,²⁶ and to ensure that the media is given access to information in cases of corruption and related offences.²⁷

Also not to be overlooked is the role of law as an instrument of social change and the need in any society for an agency charged with the administration or enforcement of legal norms to midwife such change. Accordingly, the *AU Convention* obligates each State Party to enact specific legislation that will incorporate the various anti-corruption principles and measures espoused in it,²⁸ and to “[e]stablish, maintain and strengthen independent national anti-corruption authorities or agencies” that will among other things enforce the penal statutes promulgated in pursuance of the *AU Convention*.²⁹

There is no doubt that the implementation of all the foregoing measures within the territory of each State Party will go a long way in bringing about the needed behavioral shifts necessary for the prevention and eradication of corruption in Africa.

²⁴ Manweiller & Schwartz, *supra* note 5 at 69 [emphasis added].

²⁵ *AU Convention*, *supra* note 17, art. 5(8).

²⁶ *Ibid.*, art. 9.

²⁷ *Ibid.*, art. 12(4).

²⁸ See *AU Convention*, *supra* note 17, arts. 5, 6, 8, 9, 10, 16, 20.

²⁹ *Ibid.*, arts. 5(3), 20.

b. Transparency and Accountability

Closely connected with the need for education, information and a legislative framework for the prevention and eradication of corruption are the twin principles of transparency and accountability. Transparency for one is a self-sufficient check against the potential “malfeasance...corruption and self-serving behavior” of authority figures.³⁰ It is the principle that requires that those who are affected by administrative decisions, business transactions or charitable work” be allowed “to know not only the basic facts and figures but also the [applicable] mechanisms and processes. It is the duty of civil servants, managers and trustees to act visibly, predictably and understandably.”³¹

Transparency creates a level-playing field and equips individuals with objective criteria for making accurate assessments of the probity of decisions or transactions that affect them – known mechanisms and processes. On the other hand, accountability which means “giving an account for one’s actions or inactions...[and] which serves best to limit actions and insure a minimum compliance...is one [sure] proof against corruption.”³² The certain knowledge that one will account for their own actions (accountability), coupled with the existence of an effective mechanism for detecting inappropriate conduct – public knowledge of expected standards and processes (transparency), will usually prompt one to conduct one’s affairs aboveboard.

One of the strengths of the *AU Convention* is that it is replete with provisions that mandate State Parties to incorporate the principles of transparency and accountability into the institutions and processes within their respective domestic regimes that are most prone to corruption. For example, the State Parties undertake to abide by the principles of “[t]ransparency and

³⁰ Craig Forcese, “The First Casualties of War: Disclosure and Privacy in the Post-9/11 Era”, Book Review of *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* by Stanley A. Cohen & *Blacked Out: Government Secrecy in the Information Age* by Alasdair Roberts (2006-2007) 38 *Ottawa L. Rev.* 105 at 106.

³¹ Transparency International, “Frequently asked questions about corruption”, at no. 2 online: Transparency International

<http://www.transparency.org/news_room/faq/corruption_faq#faqcorr2>.

³² Michael Jackson, “I, Burocrat” (2008) 1 *Journal of Parliamentary and Political Law* 369.

accountability *in the management of public affairs*³³ and to create an enabling environment for the media and civil society “to hold *governments* to the highest levels of transparency and accountability *in the management of public affairs*”.³⁴ Furthermore, to render political party funding, and fiscal, procurement, tender, and hiring processes more ‘transparent’ and therefore insulated from clandestine corrupt practices, State Parties are required to:

- (i) create a legislative framework that incorporates the principle of transparency into the “*funding of political parties*”,³⁵
- (ii) adopt legislative and other measures that will facilitate “internal accounting, auditing and follow-up systems...in the *public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services*”,³⁶ and
- (iii) ensure “transparency” in the “*management of tendering and hiring procedures in the public service*”.³⁷

Similarly, in a bid to ensure greater ‘accountability’ on the part of public officials, businessmen, service providers, managers, directors, and trustees; and thereby discourage them from engaging in corrupt practices, the State Parties are to:

- (i) adopt legislative and other measures to establish as offences the corrupt practices described in the *AU Convention*;³⁸
- (ii) mandate “public officials to declare their assets at the time of assumption of office, during and after their term of office in the public service”;³⁹
- (iii) create an internal committee “mandated to establish a code of conduct and to monitor its implementation, and sensitize and train public officials on matters of ethics”;⁴⁰

³³ *AU Convention*, *supra* note 17, art. 3(3) [emphasis added].

³⁴ *Ibid.*, art. 12(2) [emphasis added].

³⁵ *Ibid.*, art. 10(b) [emphasis added] (a provision unique to the *AU Convention*).

³⁶ *Ibid.*, art. 5(4) [emphasis added].

³⁷ *Ibid.*, art. 7(4) [emphasis added].

³⁸ *Ibid.*, arts. 5, 6, 8, 10.

³⁹ *Ibid.*, art. 7(1).

- (iv) “[d]evelop disciplinary measures and investigation procedures in corruption and related offences;”⁴¹
- (v) ensure that “any immunity granted to public officials” does not operate as “an obstacle to the investigation of allegations against and the prosecution of such officials”;⁴²
- (vi) adopt legislative and other measures to “combat acts of corruption and related offences committed in and by agents of the private sector”,⁴³ and
- (vii) “adopt such legislative measures as may be necessary to enable...confiscation of proceeds” of corruption or property of equivalent value, and “repatriation of proceeds of corruption”.⁴⁴

By thus incorporating the principles of transparency and accountability into the institutions and processes most prone to corruption, State Parties may succeed in eradicating it altogether or at the very least make it unattractive.

c. Detection of Corruption

In order to facilitate the detection of corruption, the *AU Convention* encourages whistle-blowing and witness-protection. The *AU Convention* primarily obligates the State Parties to adopt measures “that ensure citizens report instances of corruption *without fear of consequent reprisals*”⁴⁵ and to create a legal framework that affords protection to informants and witnesses in cases of corruption and related offences.⁴⁶ To check abuse of these salutary provisions however, the State Parties are equally required to put in place legislation that punishes persons who make false and malicious reports against innocent persons.⁴⁷

Next, the *AU Convention* addresses oft-employed legalistic obstacles to the detection of corruption offences, such as

⁴⁰ *Ibid.*, art. 7(2).

⁴¹ *Ibid.*, art. 7(3).

⁴² *Ibid.*, art. 7(5).

⁴³ *Ibid.*, art. 11(1).

⁴⁴ *Ibid.*, art. 16(1)(b) & (c).

⁴⁵ *Ibid.*, art. 5(6) [emphasis added].

⁴⁶ *Ibid.*, art. 5(5) (e.g. protection of identity).

⁴⁷ *Ibid.*, art. 5(7).

immunity, official secrecy, and banking secrecy laws. In particular, the State Parties are to ensure that official immunity does not shield public officials from the investigation of allegations of corruption made against them.⁴⁸ They are also required to enact 'freedom of information' legislation that will enable access to information regarding corruption offences.⁴⁹ Furthermore, State Parties are to empower their domestic courts "to order the confiscation or seizure of banking, financial, or commercial documents."⁵⁰ In this regard, "banking secrecy" may not be invoked as grounds for refusal to comply with the requirements of the *AU Convention*.⁵¹ Rather, the State Parties are enjoined to enter into bilateral agreements waiving banking secrecy "on doubtful accounts".⁵²

By thus encouraging popular participation in the reporting and detection of corruption offences, the *AU Convention* ensures that instances of such offences that would otherwise have gone undetected because of fear of reprisal are more likely to be brought to the light. Furthermore, by mandating the removal of legal impediments to the successful investigation and prosecution of corruption offences, the *AU Convention* ensures that, once brought to light, they are adequately investigated, without needless obstruction of access to available evidence.

d. Criminalization of Corruption

An important facet of the *AU Convention's* anti-corruption apparatus is its provisions on the criminalization of corruption. The *AU Convention* obligates State Parties to proscribe by legislation and other means a wide range of corrupt practices, covering both the demand and supply side of domestic and foreign corruption in both the public and private sectors.⁵³ Some of the offences contemplated by the *AU Convention* include: solicitation or acceptance of a bribe by a public official,⁵⁴ solicitation or

⁴⁸ *Ibid.*, art. 7(5).

⁴⁹ *Ibid.*, arts. 9, 12(4).

⁵⁰ *Ibid.*, art. 17(1).

⁵¹ *Ibid.*, art. 17(3).

⁵² *Ibid.*, art. 17(4).

⁵³ *Ibid.*, art. 5(1).

⁵⁴ *Ibid.*, art. 4(1)(a).

acceptance of a bribe by a person in the private sector,⁵⁵ active bribery of a public official,⁵⁶ active bribery of a person in the private sector,⁵⁷ abuse of power or position by a public official,⁵⁸ embezzlement of public or private property,⁵⁹ trading in influence within the public or private sector,⁶⁰ illicit enrichment,⁶¹ laundering of the proceeds of corruption,⁶² and funding of political parties through proceeds of corruption.⁶³ Consistent with recognized principles of criminal law, the *AU Convention* contemplates (as separate offences) participation as principal, co-principal, agent, instigator, accomplice or accessory after the fact in the commission or attempted commission of and the collaboration or conspiracy to commit any of the aforesaid offences.⁶⁴

At first blush it would appear that the *AU Convention* does not address foreign corruption, but limits its scope to domestic corruption. This is because unlike some other international anti-corruption conventions, the *AU Convention* does not employ the terms *foreign*, *domestic*, *national* or *international* in denoting separate heads of corruption offences.⁶⁵ Rather the *AU Convention* frequently employs the phrase “public official or any other

⁵⁵ *Ibid.*, art. 4(1)(e).

⁵⁶ *Ibid.*, art. 4(1)(b).

⁵⁷ *Ibid.*, art. 4(1)(e).

⁵⁸ *Ibid.*, art. 4(1)(c).

⁵⁹ *Ibid.*, art. 4(1)(d).

⁶⁰ *Ibid.*, art. 4(1)(f).

⁶¹ *Ibid.*, arts. 4(1)(g), 8.

⁶² *Ibid.*, arts. 4(1)(h), 6.

⁶³ *Ibid.*, art. 10(a).

⁶⁴ *Ibid.*, art. 4(1)(i).

⁶⁵ See *Criminal Law Convention on Corruption*, 27 January 1999, Eur. T.S. 173 (entered into force 1 July 2002) [*COE Criminal Convention*], arts. 2, 3, 4, 5, 6, 9, 10, 11 (active bribery of *domestic* public officials, passive bribery of *domestic* public officials, bribery of members of *domestic* public assemblies, bribery of *foreign* public officials, bribery of members of *foreign* public assemblies, bribery of officials of *international* organizations, bribery of members of *international* parliamentary assemblies, bribery of judges and officials of *international* courts); *United Nations Convention Against Corruption*, GA RES. 58/4, UN ODC, 31 October 2003 (entered into force 14 December 2005) [*UN Convention*], arts. 15, 16 (bribery of *national* public officials, bribery of *foreign* public officials and officials of public *international* organizations). Compare *AU Convention*, *supra* note 17, art. 4(1)(a)-(f).

person”.⁶⁶ On a closer examination however, it is apparent that the *AU Convention* does in fact address foreign corruption. Its definition of a public official as “*any* official or employee of the *State* or its agencies”⁶⁷ – and not just the official or employee of a *State Party* or its agencies – admits of both domestic and foreign public officials. Similarly, the use of the even wider term ‘*any other person*’ in connection with many of the corruption offences described by the *AU Convention* necessarily includes in its scope domestic, national, foreign, international, and ‘of an international organization’. Then too, the undertaking by the State Parties to “[s]trengthen 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 [anti-corruption] legislation in force”⁶⁸ signifies at least an intention to combat foreign corruption involving corporations.⁶⁹

On the whole, the *AU Convention* scores high as a comprehensive international instrument that discourages, by

⁶⁶ *AU Convention, ibid.*

⁶⁷ *Ibid.*, art. 1(1) [emphasis added].

⁶⁸ *Ibid.*, art. 5(2) [emphasis added].

⁶⁹ See also *AU Convention, supra* note 17, art. 19 which provides:

In the spirit of international co-operation, State Parties shall:

1. Collaborate with countries of origin of multi-nationals to criminalise and punish the practice of secret commissions and other forms of corrupt practices during *international trade transactions*.
2. Foster regional, continental and international cooperation to prevent corrupt practices in *international trade transactions*.
3. Encourage all countries to take legislative measures to prevent corrupt public officials from enjoying ill-acquired assets by freezing their *foreign accounts* and facilitating the repatriation of stolen or illegally acquired monies to the countries of origin.
4. Work closely with *international, regional and sub regional financial organizations* to eradicate corruption in development aid and cooperation programmes by defining strict regulations for eligibility and good governance of candidates within the general framework of their development policy [emphasis added].

criminalization, a broad spectrum of corrupt practices – domestic and foreign – in the public and private spheres.

e. Monitoring and Implementation Mechanisms

With regard to the obligations or minimum standards prescribed within the international legal system, an issue of major concern usually relates to implementation. In this regard, the twin questions that arise are how best to ensure that governments of sovereign states comply with the requirements of international instruments that bind them and what mechanisms offer the best means for effectively monitoring compliance levels. Generally, one or more of the following mechanisms are employed in monitoring the domestic implementation of international conventions: self-evaluation, expert review, and mutual evaluation (peer-review).⁷⁰

In the self-evaluation model, each government provides in response to a questionnaire *its* own assessment of *its* level of compliance with the requirements of a given instrument of international law. Based on the resulting data, a system of comparative ranking among governments may evolve, which in turn may serve to incentivize greater compliance. The obvious drawback of this model is that the resulting information may not be reliable, given the potential for individual governments to exaggerate their accomplishments and/or minimize their shortcomings.⁷¹

Expert review, as the name suggests, involves assessment of government performance “by an expert or a panel of experts sufficiently knowledgeable about national laws and institutions and the convention at hand.”⁷² Unlike the self-evaluation model, expert review is characterized by independence and objectivity of the assessors which translates into reliable results. In addition, in the expert review model, the monitoring process benefits from the knowledge and expertise of the assessors. It has been opined that

⁷⁰ Transparency International, “How Does Intergovernmental Monitoring Work in General?”, online:

<http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms>.

⁷¹ *Ibid.*

⁷² *Ibid.*

a possible drawback of expert review is that “governments may choose to reject the findings of the expert review. The adversarial nature of the process may not lead to actual changes in state implementation.”⁷³

In the mutual evaluation or peer-review model, the monitoring body comprises government representatives drawn from the states that are party to the relevant international instrument.⁷⁴ It brings pressure to bear on individual state parties through a mix of “formal recommendations”, “informal dialogue”, and even a system of comparative ranking.⁷⁵ Although in a peer-review model the assessment relies heavily on mutual trust and “is conducted on a non-adversarial basis”,⁷⁶ the same drawback that characterizes the system of expert review – namely possibility of rejection by a recalcitrant state⁷⁷ – could very well arise. In addition, the mutual review model could just as easily as the self-evaluation model yield unreliable results, where government representatives out of sheer national pride exaggerate the compliance ratings of their home governments and minimize their failings. In some cases, this could possibly create a deadlock and stall the evaluation process altogether where each government representative exalts misguided patriotism over objectivity.

The expert review monitoring mechanism is most preferable because of its inherent assessor independence, objectivity, and deployment of expertise. This is the model adopted by the *AU Convention*. The *Convention* establishes a review panel known as the ‘Advisory Board on Corruption within the African Union’ (the AU Advisory Board), comprising eleven members “elected by the Executive Council” of the AU. The members of the AU Advisory Board are elected “from among a list of experts” with a proven track record of “integrity, impartiality” and “competence in matters

⁷³ *Ibid.*

⁷⁴ E.g. the Council of Europe’s ‘Group of States against Corruption’ (GRECO) monitors the implementation of both the *COE Criminal Convention* and the *Civil Law Convention on Corruption*, 4 November 1999, Eur. T.S. 174, (entered into force 1 November 2003) [*COE Civil Convention*]. See *COE Criminal Convention*, *supra* note 65, art. 24; *COE Civil Convention*, art. 14.

⁷⁵ Transparency International, *supra* note 70.

⁷⁶ *Ibid.*

⁷⁷ See text accompanying note 73.

relating to preventing and combating corruption and related offences".⁷⁸ The primary functions of the AU Advisory Board are to "promote and encourage adoption and application of anti-corruption measures" within Africa, to "advise governments on how to deal with the scourge of corruption and related offences in their domestic jurisdictions" and to make periodic reports to the Executive Council of the AU "on the progress made by each State Party in complying with the provisions" of the *AU Convention*.⁷⁹ In carrying out its functions, the AU Advisory Board works closely with national governments, the national anti-corruption authorities or agencies created by the State Parties pursuant to the *AU Convention*,⁸⁰ African civil society, and intergovernmental and non-governmental organizations "to facilitate dialogue in the fight against corruption and related offences".⁸¹

The AU Advisory Board is also to "develop methodologies for analyzing the nature and extent of corruption in Africa".⁸² One way the AU Advisory Board can do this effectively is to develop a system of comparative ranking.⁸³ The threat of poor ratings for failure to comply fully with the requirements of the *AU Convention* will likely bring pressure to bear on State Parties to comply more fully. Furthermore, unlike the practice with most peer-review monitoring mechanisms, which rely to some extent on "country self-assessments based on a questionnaire"⁸⁴ and allow room for subjective and unreliable results⁸⁵, the AU Advisory Board receives annual reports on the progress made in the implementation of the *AU Convention* from the *independent* national anti-corruption authorities or agencies created pursuant to the *AU Convention* by

⁷⁸ *AU Convention*, *supra* note 17, art. 22(1), (2) (the list of experts is proposed by the State Parties to the *AU Convention*).

⁷⁹ *Ibid.*, art. 22(5)(a), (d), (h).

⁸⁰ See text accompanying note 29.

⁸¹ *AU Convention*, *supra* note 17, art. 22(5)(g).

⁸² *Ibid.*, art. 22(5)(c).

⁸³ The AU Advisory Board is empowered to adopt its own rules of procedure. See *Ibid.*, art. 22(6).

⁸⁴ E.g. the GRECO system of monitoring. See Transparency International, "Group of States against Corruption (GRECO)" Transparency International, online: <http://www.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms/greco_monitoring>.

⁸⁵ See text accompanying note 71.

the State Parties.⁸⁶ In addition, given its mandate to “build partnerships”,⁸⁷ the AU Advisory Board may invite submissions from civil society and private sector organizations, which together with its published compliance rankings and the progress reports from national anti-corruption authorities or agencies, may form the basis for a comprehensive report with recommendations that will bring public pressure to bear on national governments and effectively compel them to implement the provisions of the *AU Convention*.

In the final analysis, the AU Advisory Board is so structured as to harness the merits of both the expert review and peer-review monitoring models, while jettisoning the shortcomings of the latter; thereby creating an effective implementation and monitoring mechanism for the *AU Convention*.

IV. THE LIMITATIONS OF THE AU CONVENTION

Notwithstanding the foregoing salutary provisions, the *AU Convention* is nevertheless subject to two important limitations: the absence of a provision on civil remedies and of a mechanism for the resolution of disputes. Both limitations will be presently highlighted along with specific recommendations for reform.

a. Absence of Civil Remedies

The *AU Convention* does not provide for the granting of civil remedies to persons who have suffered damage as a result of acts of corruption. This omission betrays a failure on the part of the framers of the *AU Convention* to recognize the fact that often individuals, companies and even states suffer adverse financial consequences or other damages as a result of corruption, and that damages of that nature may not always be adequately redressed by a system that merely punishes corrupt practices as wrongs against the State through the traditional means of jail terms, fines,⁸⁸ confiscation, and repatriation of proceeds of corruption.⁸⁹

⁸⁶ *AU Convention*, *supra* note 17, art. 22(7).

⁸⁷ *Ibid.*, art. 22(5)(g). Also see text accompanying notes 80 and 81.

⁸⁸ A fine is simply a penalty for an offence. While on rare occasions it may be equivalent in value to the actual loss of the victim of corruption, a fine is usually

Persons who suffer damage as a result of corruption should have the right to initiate a civil action in order to obtain full compensation for such damage, whether material damage, pure economic loss, or non-pecuniary loss is involved. To that end, it is suggested that the State Parties to the *AU Convention* take advantage of its amendment provisions.⁹⁰ They should include in the *AU Convention* provisions that afford effective civil remedies to victims of corruption, over and above the penal sanctions prescribed under domestic anti-corruption legislation.⁹¹

b. Absence of a Dispute Resolution Mechanism

As with any legal instrument, some of the provisions of the *AU Convention* are capable of giving rise to disputes regarding interpretation and/or application. For example, the *AU Convention* makes detailed provisions for determining when a State Party may exercise jurisdiction over acts of corruption and related offences.⁹² Two such circumstances are when a State Party is of the view that a corruption offence, “although committed outside its jurisdiction, affects” its “vital interests” and when “the deleterious or harmful

an amount arbitrarily stipulated by the State as a sufficient deterrent of prohibited conduct, irrespective of the actual amount of loss incurred in particular cases. Moreover, fines are usually paid over to *the State* and not to the one who has actually suffered the loss. In the unlikely event that a fine or a proportion of it were to be paid to the victim, there are certain circumstances where a fine nevertheless does not represent adequate compensation for loss because, for example, the loss is non-pecuniary or is one of a purely economic nature (e.g. *loss of profits* or *earnings* occasioned by corrupt practices) to which fines are not usually extended.

⁸⁹ While repatriation relates to the assets acquired as a result of an act of corruption and usually contemplates restoration to a victim of corruption, as in the case of a fine, repatriation does not adequately redress non-pecuniary and pure economic losses.

⁹⁰ See *AU Convention*, *supra* note 17, art. 25.

⁹¹ In this regard, the *COE Civil Convention* is worthy of emulation as it makes elaborate provisions concerning the redressing of loss occasioned by corruption through the instrumentality of civil remedies.

⁹² See *AU Convention*, *supra* note 17, art. 13 (e.g. when the act of corruption is committed wholly or partially inside its territory, by one of its nationals outside its territory or by a person who resides in its territory, and when the alleged criminal is present in its territory and it does not extradite such person to another country).

consequences” of such an offence “impact on the State Party.”⁹³ A dispute may arise as to what the *vital interests* of a state are, or when the consequences of a corrupt act may validly be said to impact on a State Party in whose territory the act did not take place and the applicable tests in either case. In addition, the *AU Convention* mandates State Parties to treat corruption offences as extraditable offences⁹⁴ and to honor extradition requests.⁹⁵ It also prescribes the obligations of a State Party which refuses an extradition request on the basis that it has jurisdiction over the offence in question.⁹⁶ Again, the failure to perform any one of these obligations may give rise to a dispute among State Parties.

The *AU Convention* does not however contain a single provision setting out the procedure or forum for settling any disputes that may arise in connection with the interpretation or application of its provisions. This may be because the Court of Justice of the African Union exercises jurisdiction over disputes relating to the interpretation, application or validity of AU treaties in general.⁹⁷ Given the emphasis of the AU on promoting “cooperation among the State Parties *to ensure the effectiveness*” of the anti-corruption measures put in place by the *AU Convention*,⁹⁸ a dispute settlement process less favorable to acrimony and strained relations may be preferable to litigation at the Court of Justice of the African Union. To that end, it is here suggested that the *AU Convention* be amended to mandate State Parties to seek resolution of any disputes that arise in connection with the interpretation or application of the *AU Convention* – firstly

⁹³ *Ibid.*, art. 13(1)(d).

⁹⁴ *Ibid.*, art. 15(1)-(4).

⁹⁵ *Ibid.*, art. 15(5).

⁹⁶ *Ibid.*, art. 15(6).

⁹⁷ AU, *Protocol of the Court of Justice of the African Union*, 11 July 2003, (entered into force 11 February 2009), art. 19(1)(b) [*Protocol of the Court of Justice*]. The *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, (not yet entered into force) [*Protocol and Statute*] is intended to replace the *Protocol of the Court of Justice*. Among other things, it replaces the Court of Justice of the African Union with the African Court of Justice and Human Rights. However, since the *Protocol and Statute* has not yet entered into force, the relevant judicial organ for the determination of disputes arising in connection with AU treaties in general remains the Court of Justice of the African Union.

⁹⁸ *AU Convention*, *supra* note 17, art. 2(2) [emphasis added]. See also *AU Convention*, *supra* note 17, arts. 18 (cooperation and mutual legal assistance) & 19 (international cooperation).

through *negotiation* and where settlement cannot be achieved through negotiation within a reasonable time, through *arbitration*. Only where both processes fail to yield a positive resolution of the dispute should it be referred to the Court of Justice of the African Union for adjudication.

V. CONCLUSION

We have seen that the *AU Convention* represents a holistic and pragmatic approach to combating both foreign and domestic corruption in the public and private sectors. It prescribes proactive steps for preventing corruption such as grassroots education, sensitization of the media and comprehensive legislation. It also mandates State Parties to incorporate the principles of transparency and accountability into the institutions and processes most prone to the scourge of corruption. The *AU Convention* obligates State Parties to facilitate the detection of corruption by doing away with legal impediments to the proper investigation of corrupt practices including immunity, official secrecy and banking secrecy laws, and encourages the reporting of corruption through its whistle-blowing and witness-protection provisions. By far the most important aspects of the anti-corruption measures mounted by the *AU Convention* are the provisions criminalizing a broad spectrum of corrupt practices covering both the demand and supply side of domestic and foreign corruption in both the public and private sectors.

Effective monitoring and implementation of the far-reaching provisions of the *AU Convention* is made possible through the instrumentality of an eleven-member expert review panel, the AU Advisory Board, which works closely with national governments, national anti-corruption authorities or agencies, civil society and intergovernmental and non-governmental organizations to bring public pressure to bear on national governments to comply more fully with the obligations assumed by the State Parties under the *AU Convention*.

However, this paper has identified two important weaknesses of the *AU Convention*. One of these is the absence of provisions to redress loss occasioned by corruption through the instrumentality

of civil remedies. In this regard, it is suggested that the *AU Convention* be amended to provide for a system that entitles victims of corruption to seek and obtain compensation in the form of civil remedies over and above the penal sanctions prescribed under domestic anti-corruption legislation, as these sanctions alone may not always adequately redress the kinds of losses that corruption occasions.

In addition, the AU Convention omits a dispute resolution clause. This omission leaves conflicting State Parties with recourse only to the Court of Justice of the African Union, with all the attendant disadvantages that litigation portends including acrimony and strained relations. Recognizing that the success of the AU's war on corruption depends largely on mutual cooperation and interdependence among member states, it is preferable to adopt less adversarial dispute resolution processes. To that end, this paper recommends a three-step dispute resolution mechanism involving recourse first to negotiation, then arbitration, and finally litigation.

In the final analysis, the *AU Convention* represents a giant stride by the members of the AU to rid Africa of endemic corruption and marks a positive contribution to the global war on corruption. Its overall success will, however, depend on the conscientious implementation by African governments of the anti-corruption policies prescribed by the framers of the *AU Convention*.