

**THE INTERNATIONAL DIMENSION OF AFRICA'S
STRUGGLE AGAINST CORRUPTION**

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Abstract

Even after more than fifty years of independence, corruption remains one of the most important obstacles to the improvement of the human condition in Africa. In recognition of corruption's role in poverty and underdevelopment in Africa, African countries have adopted the African Union Convention on Preventing and Combating Corruption to serve as a legal tool to fight corruption and its deleterious effects on development efforts in the continent. Additionally, African countries have become Signatory Parties to other anti-corruption conventions, including the United Nations Convention Against Corruption, with the expectation that these conventions will help them in their efforts to deal effectively and fully with this important development constraint. This paper argues that the success of any anti-corruption scheme in Africa will be determined, to a great extent, by the strength, efficiency, and efficacy of national institutional and judicial frameworks. Thus, the most important first step in effectively dealing with corruption in Africa must be the reconstruction and reconstitution of the post-colonial state through democratic constitution making to provide each country with institutional and judicial systems that adequately constrain civil servants and politicians and prevent them from carrying out their duties arbitrarily and capriciously and from behaving with impunity.

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I. INTRODUCTION

Africa is the only part of the world which, since the 1960s, has been regressing economically.¹ Significant research has been devoted to uncovering the causes of poverty and underdevelopment in Africa.² The bulk of these studies have blamed continued poverty in Africa on several endemic factors, including (1) military coups d'état; (2) destructive ethnic mobilization, which has resulted in the massacre of many people, destroyed national economic infrastructures and disrupted most wealth-creating activities;³ (3) excessive population growth; (4) natural disasters, which include prolonged droughts, locusts, and floods; (5) high external and often unmanageable debt; (6) dependence on the industrial market economies of the West for development and food

¹ For example, according to the United Nations Development Program (UNDP), of the 24 poorest countries in the world in 2007, as measured by the Human Development Index (HDI), 22 (or 92%) of them were found in Africa. United Nations Development Program, *Human Development Report, Overcoming barriers: Human mobility and development* (Hampshire: Palgrave Macmillan, 2009) at 171-74, online: UNDP

<http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf>. During the last fifty years, few African countries have been able to make significant improvements in the standards of living of their citizens. The only countries in Africa to make the UNDP's list of "high human development" countries were Libya and Mauritius. However, it is the latter that has a well-integrated and sustainable economy. Most of Libya's "development" comes primarily from the export of raw materials, notably petroleum and petroleum products. The region of the continent called sub-Saharan Africa remains marred in extremely high rates of poverty and deprivation despite its significant endowments of natural resources. See generally The World Bank, *World Development Report 2008: Agriculture for Development* (Washington: The World Bank, 2007), online: <http://siteresources.worldbank.org/INTWDR2008/Resources?WDR_00_book.pdf.

² Some of the most important studies of poverty in Africa include, The World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action*, 1981; Organization of African Unity, *The Lagos Plan of Action for the Economic Development of Africa 1980-2000* (Geneva: International Institute of Labour Studies, 1981), online: UNCEA <http://www.uneca.org/itca/ariportal/docs/lagos_plan.PDF>; Zaki Ergas, "In Search of Development: Some Dimensions for Further Investigation" (1986) 24 *The Journal of Modern African Studies* 303.

³ For example, in 1994, hundreds of thousands of Rwandans were slaughtered by the Interahamwe militia. In fact, in April 1994, as many as 50,000 people were massacred in one location—the Murambi technical school in southern Rwanda. The killers were so efficient at carrying out their heinous crimes that in only 100 days, they had killed as many as 800,000 of their fellow citizens. Nicki Hitchcott, "Writing on Bones: Commemorating Genocide in Boubacar Boris Diop's *Murambi*" (2009) 40:3 *Research in African Literatures* 48.

aid; (7) excessive exploitation of the region's natural resources, which is often accompanied by agro-ecological degradation; and (8) political and bureaucratic corruption.⁴

Some scholars have argued that a more effective way to study and appreciate the dilemmas of underdevelopment in Africa is to recognize that poor economic performance in the continent has both external and internal dimensions.⁵ The external causes of Africa's development crisis, according to these scholars, include "an international exchange system which often does not function to the advantage of primary product-exporters... the deflationary economic policies followed by the industrial North, notably a strong dollar and high interest rates, [which] have serious 'ripple' effects in poor countries which are saddled with large debts."⁶ These views were made in the 1980s and since then, economic conditions in many of the market economies of the industrial North have changed significantly, including, for example, a relatively weak dollar. Nevertheless, many African countries continue to struggle with huge, dollar-denominated external debts. In order to secure favorable debt-servicing terms from the international donor community, the debtor-countries have been forced to subordinate national policies to *conditionalities* mandated by the World Bank and the International Monetary Fund.⁷

⁴ See generally Ergas, *supra* note 2.

⁵ *Ibid.* at 303-304.

⁶ *Ibid.* Few African countries have been able to successfully escape the patterns of economic activity imposed on them by colonialism—during the colonial period, as Europeans annexed African lands and created colonies, the latter were structured to serve as producers of primary commodities for export to the metropolitan economies. Today, even after more than fifty years of independence, most African countries continue to depend on the export of primary commodities for most of their foreign exchange earnings and on their former colonizers for both export and import trade. Despite the proliferation of economic integration schemes throughout the continent, intra-African trade remains insignificant, as most African countries continue to prefer trade with their former colonizers. See generally John Mukum Mbaku & Suresh Chandra Saxena, eds., *Africa at the Crossroads: Between Regionalism and Globalization* (Connecticut: Praeger, 2003).

⁷ In order for African and other developing countries to qualify for additional lending from either the Bretton Woods institutions (the World Bank and the IMF) or Western public and private financial institutions, the prospective borrower must agree to implement a basket of reforms which include, but are not limited to, elimination of most public subsidies, devaluation of the national currency, deregulation of the trade sector, and more reliance on markets for the allocation of resources. See generally Fantu Cheru, *The Silent Revolution in Africa: Debt, Development and Democracy* (London: Zed Press, 1989); Kevin Danacher, ed., *50 Years is Enough: The Case Against the World Bank and the International Monetary*

The internal causes of poverty in the continent, which significantly outweigh the external ones, include "excessive state control of the economy, massive and pervasive corruption, merciless exploitation of the peasantry, and ethnic violence verging on genocide."⁸

Additionally, some scholars have argued that poverty and underdevelopment in Africa is due to mistakes in policy design and implementation made by individuals who, although honest and well-meaning, were either totally incompetent or ill-equipped to perform the task of managing modern and complex economies.⁹ As a matter of fact, by the mid-1970s, many students of African political economy were calling for concerted efforts to be made to bring into the African public services individuals who were well-educated and had acquired the skills necessary to manage a complex bureaucracy. These new crop of bureaucrats were also expected to be highly disciplined, ethical, and possess a high level of personal integrity so that they could more effectively fight bureaucratic corruption and in the process, improve governance and the allocation of resources.¹⁰

By the late 1980s it had become obvious, even to casual observers, that the policies African policymakers were implementing to deal with poverty and deprivation were not working. In fact, at this time more than two-thirds of the countries in sub-Saharan Africa were no longer able to meet their public obligations and were eventually forced to turn to the Bretton Woods institutions for financial aid.¹¹ Today, virtually all of these countries continue to

Fund (Boston: South End Press, 1999); C. Baylies, 'Political Conditionality' and *Democratization*, 22 *Review of African Political Economy* 321 (1995).

⁸ Ergas, *supra* note 2 at 304. Recent instances of violent ethnic mobilization include ethnic-induced massacres in Rwanda, Kenya (after the presidential elections of 2007), Sierra Leone, and Liberia. See generally Hitchcott, *supra* note 3 (*Rwanda*); George Klay Kieth Jr., *The First Liberian Civil War* (New York: Peter Lang Publishing, 2008); Mark Huband, *The Liberian Civil War* (New York: Frank Cass Publishers, 1998); & James Youboty, *The Liberian Civil War: A Graphic Account* (Parkside Impressions Enterprises, 1993). For Kenya, see Institut Français De Recherche en Afrique (IFRA), *The General Elections In Kenya, 2007: Special Issue* (2008), 38 *Les Cahiers d'Afrique de l'Est*, online: IFRA http://www.ifra-nairobi.net/resrouces/cahiers/Cahier_38.pdf.

⁹ See generally John Mukum Mbaku, *Institutions and Development in Africa* (Trenton, NJ & Asmara, Eritrea: Africa World Press Inc., 2004); & Colin Leys, *The Rise and Fall of Development Theory* (Indiana: Indiana University Press, 1996).

¹⁰ Mbaku, *supra* note 9 at 2-3.

¹¹ The World Bank and the International Monetary Funds (called Bretton Woods institutions, after the town in New Hampshire (USA) where the Bretton Woods Agreements, which established these multilateral institutions, were deliberated

struggle with extremely high levels of external debt, poor economic performance, and local populations that are not able to meet even their basic needs.¹² Like most students of African political economy, I see “deep-rooted” and endemic corruption as one of, if not, the most “serious contemporary developmental challenges facing the continent” today.¹³ As argued by Adama Deing, a scholar who was chosen by the then Organization of African Unity (OAU)¹⁴ to analyze the impact of corruption on the legal, political and economic spheres in Africa, “corruption and impunity are antithetical to the enjoyment of economic, social and cultural rights and the enemy of the principle of good governance.”¹⁵ Recognizing the critical role played by corruption in political and economic underdevelopment in the continent, the AU adopted the *African Union Convention on Preventing and Combating Corruption* in Maputo, Mozambique, on July 11, 2003.¹⁶ While the *AU Convention* has many objectives, the overriding aim is the desire by the Signatory States to minimize corruption’s extremely negative impact on the creation of the wealth that the continent needs very urgently to fight poverty and improve the living standards of a restless population.¹⁷

upon and signed in 1944). See United Nations Development Program, *Human Development Report 2000* (New York: Oxford University Press, 2000), online: UNDP < http://hdr.undp.org/en/media/hdr_2000_ch0.pdf >.

¹² See J.E. Stepanek, *Wringing Success From Failure in Late Developing Countries: Lessons from the Field* (Westport: Greenwood Publishing, 1999) for a stimulating treatment of Africa’s failure to develop. A more recent treatment can be found in Todd J. Moss, *African Development: Making Sense of the Issues and Actors* (Boulder, Colorado: Lynne Reiner Publishing, 2007).

¹³ Thomas R. Snider & Won Kidane, “Combating Corruption Through International Law in Africa: A Comparative Analysis” (2007) 40 *Cornell Int’l L. J.* 691 at 692.

¹⁴ The ineffective and anachronistic OAU was replaced by another intergovernmental organization called the African Union (AU) in 2002. See generally Russell Roberts, *The African Union* (Broomall, P.A.: Mason Crest Publishers, 2008) & Samuel M. Makinda & F. Wafula Okuma, *The African Union: Challenges of Globalization, Security, and Governance* (Oxford: Routledge, 2008).

¹⁵ Kolawole Olaniyan, “Introductory Note to African Union (AU): Convention on Preventing and Combating Corruption” (2004) 43 *I.L. M* 1 at 3.

¹⁶ See AU, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, (entered into force 5 August 2006) [*AU Convention*] online: AU <[http://www.africa-](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf)

[union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf) > [*AU Convention*]. The AU Convention entered into on August 5, 2006, upon ratification by fifteen African States. As of October 7, 2009, 43 countries had signed the AU Convention and 30 States have ratified it.

¹⁷ See the *AU Convention*, *supra* note 16, art. 2.

The *AU Convention* is not the first effort made by Africans to deal with their development problems. Earlier efforts at a unified approach toward resolving the continent's multifarious development problems, including corruption, include *The Lagos Plan of Action* and *The New Partnership for Africa's Development* (NEPAD), which, unfortunately, have not met the expectations of their designers.¹⁸ As will be argued in this paper, while the entry into force of the *AU Convention* is a critical milestone in the efforts of the AU to chart a new path for poverty alleviation and development in Africa, the *AU Convention's* success in curbing corruption and providing the wherewithal for sustained economic growth and development will be determined to a great extent by how well individual African countries are able to undertake necessary institutional reforms to provide laws and institutions that are capable of effectively constraining civil servants and politicians and preventing them from engaging in the various forms of political opportunism (including corruption and rent seeking) that have become major constraints to entrepreneurial activities and wealth creation. Consequently, the task of curbing corruption in the African economies, as in any other economy, rests squarely on domestic institutions and the bureaucrats who manage them. As will be argued in this paper, international law can complement Africa's anti-corruption effort by helping African countries (1) extradite suspects who have fled abroad to avoid domestic prosecution; (2) recover proceeds of corrupt transactions that have been "invested" overseas; and (3) constrain the ability of transnational business executives to bribe African policymakers.

¹⁸ The now defunct and abandoned Lagos Plan of Action (LPA) was designed in 1981 by the OAU with the main objective of making significant improvements in the living standards of Africans by the year 2000. The LPA was really never implemented because of a litany of problems, the most important of which was the lack of financing. NEPAD was established in July 2001 as a development initiative of the OAU with the following as its main objectives: (1) eradicate poverty; (2) put all African countries, individually and as a group, on the path to sustainable economic growth and development; (4) halt the marginalization of Africa in global affairs; (5) significantly improve women's participation in political and economic governance; and (6) integrate Africa into the global marketplace under conditions in which Africa would participate gainfully in global trade. The NEPAD document can be found at <http://www.nepad.org/>. For a rigorous critique of NEPAD, see generally John Mukum Mbaku, "NEPAD and Prospects for Development in Africa" (2004) 41 *International Studies* 387; Kempe Ronald Hope, "From Crisis to Renewal: Towards a Successful Implementation of the New Partnership for Africa's Development" (2002) 101 *African Affairs* 387.

II. A BRIEF OVERVIEW OF CORRUPTION

a. An Overview and Impact of Corruption on African Economies

Several definitions have been advanced in the social science literature for corruption. In a 1967 study of corruption and its impact on political development, Professor J. S. Nye defined corruption as,

[b]ehavior which deviates from the normal duties of a public role because of private-regarding (family, close private clique), pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behavior as bribery (use of reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).¹⁹

Other scholars argue that an effective definition of corruption, that is policy relevant must be couched in terms of the public interest.²⁰ For example, Carl J. Friedrich states:

[t]he pattern of corruption may therefore be said to exist whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards, such as the expectation of a job in the future, induced to take actions which favor whoever provides the reward and thereby damage the group or organization to which the functionary belongs, specifically the government.²¹

In Africa, most people see corruption primarily in terms of political opportunism by civil servants and politicians. Opportunism in this context, involves a series of extra-legal behaviors by the country's ruling elites, which impose significant costs on public and private transactions and limit, and in some cases, stunt, political, social and economic development. Specifically, corruption is seen in

¹⁹ J. S. Nye, "Corruption and Political Development: A Cost-Benefit Analysis" (1961) *Am.Pol.Sc.R.* 417, 419.

²⁰ Carl J. Friedrich, "Corruption Concepts in Historical Perspective" in A. J. Heidenheimer, M. Johnston & V.T. Le Vine, eds., *Political Corruption: A Handbook* (New Jersey: Transaction Publishers, 1989) at 15.

²¹ *Ibid.*

terms of (1) the illegal appropriation of public resources by civil servants and politicians; (2) illegal taxation of private-sector economic activities; (3) nepotism; (4) embezzlement of common resources; (5) privatization of one's public office in order to use it to extract extra-legal income and other benefits for the office holder; and (6) capricious and arbitrary enforcement of state regulations.²²

b. Impact of Corruption on African Societies

While there may be a disagreement as to the most effective way to define corruption, scholars are virtually agreed on corruption's impact on the African economies.²³ It has been argued that except for HIV/AIDS, corruption remains "one of the most insidious things to attack African societies since the 1960s."²⁴ First, corruption can provide perverse incentives in the public sector and make it virtually impossible for civil servants and politicians to perform their jobs effectively and efficiently. In a study of Cameroon, Professor Nantang Jua determined that corruption severely distorts the costs of procuring necessary supplies for government departments.²⁵ For example, if a government office needs reams of paper for its copier, and it is determined that the paper will cost 5 million francs CFA (FCFA)²⁶ when purchased in the open market, then the bureau chief will authorize an order for the paper to be purchased, but at a price of 10 million CFA. The surplus of 5 million CFA over the market price will be shared between the bureau chief, the store's accountant and the store owner.²⁷

²² See generally S. Rasheed, Corruption, Ethics, and Accountability in Africa: Toward a Responsive Agenda for Action, in A. Aderinwale ed., *Corruption, Democracy and Human Rights in Southern Africa* (Abeokuta, Nigeria, Africa Leadership Forum 1995) at 43-44.

²³ See generally Kempe R. Hope, Sr. & B. Chikulo, eds., *Corruption and Development in Africa: Lessons from Country Cases Studies* (New York, St. Martin's Press 2000) [Hope Sr. & Chikulo] (detailing the extremely negative impact of corruption on political, social and economic development in several African countries).

²⁴ John Mukum Mbaku, *Corruption in Africa: Causes, Consequences, and Cleanups* (United Kingdom: Lexington Books, 2007) at 102 [Mbaku, *Corruption in Africa*].

²⁵ Nantang Jua, "Cameroon: Jump Starting an Economic Crisis" (1991) 21 *Africa Insight* 2.

²⁶ The franc CFA (*Communauté Financière Africaine*) is Cameroon's currency. At the current exchange rate (as of October 16, 2009), one U.S. dollar is equal to FCFA 440.

²⁷ Jua, *supra* note 25 at 165. To frustrate the efforts of the media to successfully investigate and report on their illegal activities or to make it very difficult for state prosecutors to take successful legal action against them, the three principals in

Second, corruption forces the public to pay twice for public goods and services. For example, in Cameroon, individuals who go to public hospitals for service are often asked by the staff to pay bribes before service can be rendered. Patients who refuse or are unable to pay the requested bribes are either not provided with any service or are granted inferior and/or ineffective service. Yet, many of these individuals have already paid the taxes used to fund these public institutions.²⁸

Third, corruption significantly increases the cost of maintaining a public sector and hence, places a heavy burden on the local economy. In fact, Africa's public sectors are often described as "bloated," highly inefficient, parasitic, and generally unproductive.²⁹ The government sector consumes enormous amounts of scarce resources and contributes virtually no value-added to national development.³⁰

Fourth, corruption can make it very difficult for the country to make effective and efficient use of its human capital. For example, when bureau managers make hiring or promotion decisions they

this extra-legal transaction will share the ill-gotten gains with their co-workers. For example, in Cameroon, it is quite common for civil servants who receive bribes or "earn" extra-legal income through various illegal schemes, including the one described here, to share the proceeds of these activities with their subordinates and bosses, as well as other influential individuals in the political jurisdiction of which they are part, including high-ranking police officers, magistrates, other judicial officers, and various politicians. See generally Jua, *supra* note 25; Charles M. Fombad, "Endemic Corruption in Cameroon: Insights on Consequences and Control" in Hope, Sr. & Chikulo, *supra* note 23, 234.

²⁸ See, e.g., Mbaku, *supra* note 24 at 103; Jua, *supra* note 25 at 162-70 & Fombad, *supra* note 27 at 234-60.

²⁹ Mbaku, *supra* note 24 at 105. These bureaucracies consume an enormous amount of resources and provide society with services that do not only fail to foster the national welfare but actually impede private exchange, effectively stunting the creation of wealth. In fact, in designing and implementing public policies, civil servants in many African economies often prefer policies, which although they are extremely inefficient and impose significant costs on society, allow them to garner for themselves, significant extra-legal income.

³⁰ *Ibid.* Throughout Africa, many government sectors, as presently constituted, are considered major constraints to genuine economic development. Hence, there is a push by many donors and multilateral organizations (e.g., the World Bank and the IMF) for a restructuring of the post-colonial state to provide each country with more effective institutional and judicial systems. See generally Kelechi A. Kalu & Peyi Soyinka-Airewele, eds., *Socio Political Scaffolding and the Construction of Change: Constitutionalism and Democratic Governance in Africa* (Africa: Africa World Press, 2009) 35 [Kalu & Soyinka Airewele].

may refuse to seek out the most qualified individuals, but instead prefer individuals who can help them and their bureaus maximize revenues from bribes and other forms of corruption.³¹ The outcome of such an approach to promotion and recruitment is that “efficient rent seekers and not people who are skilled at serving the public will be allowed to rise to the top of the bureaucracy.”³²

Fifth, in economies pervaded by corruption it may become quite difficult or virtually impossible to “cultivate a professional, efficient, competent, and responsive civil service,” one that can carry out, in an efficient and equitable way, the state’s domestic development agenda.³³ Here, hiring decisions will not be made based on candidates’ qualifications, education and skills, and the potential to serve the public effectively, but on such non-job related factors as the candidate’s political connections and potential for helping the bureau maximize its income from corruption.³⁴ In such economies, “competence, hard work, integrity and experience” are not desired qualities in a worker.³⁵ Instead, “subservience and loyalty” usually emerge as the most desirable qualities in public employees. In fact, in a study of the civil service in Zambia, M. Szeftel determined that junior civil servants intentionally avoided employing generally accepted criteria for evaluating public enterprises in an effort not to offend their superiors. By engaging in such unprofessional conduct, they pleased their supervisors, ensured that they were promoted, and granted bigger compensation packages, but in the process helped the country adopt perverse policies, which seriously damaged the country’s prospects for effective poverty alleviation.³⁶

Sixth, corruption can distort international trade flows and make it difficult for the country to attract the foreign investment that it needs to supplement domestic efforts at capital formation.³⁷ As has been argued by Professor Tatah Mentan, corruption enhances the activities of trans-border drug dealers and transnational terrorists.³⁸

³¹ Mbaku, *supra* note 24 at 105.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.* at 105-106. See also M. Szeftel, “Corruption and the Spoils System in Zambia” in Michael Clarke, ed. *Corruption: Causes, Consequences and Control* (1983) 163 at 169-70.

³⁵ *Ibid.* at 106.

³⁶ Szeftel, *supra* note 36 at 180-81.

³⁷ Mbaku, *supra* note 24 at 107.

³⁸ Tatah Mentan, *Dilemmas of Weak States: African and Transnational Terrorism in the Twenty-First Century* (England: Ashgate Publishing Ltd., 2004). (arguing that corruption can make it relatively easy for drug dealers to capture local

Countries with corrupt, opportunistic and weak bureaucracies offer these terrorists the opportunity to “capture” and utilize domestic financial institutions to bring their “working capital” into the legitimate global financial system and thus, make it possible for them to finance their operations throughout the world.³⁹

Finally, high levels of venality in the public sector can force citizens, who are already skeptical about the effectiveness of a highly fractionalized state, to lose respect for and interest in the government and its various organs.⁴⁰ Throughout Africa today, most people struggle to meet their basic needs. Yet, a select group of civil servants and politicians and politically dominant business operatives in these extremely poor countries are able to maintain living standards that are comparable to those of the rich and famous in the industrial market economies of the West thanks to the engagement of these African elites in corruption and other forms of political opportunism. Depending on the nature of national laws and institutions, top civil servants and politicians in many African countries may be able to misappropriate resources earmarked for public goods and services for their own private use. By being able to “prostitute” their public offices, many civil servants and politicians maintain relatively decadent lifestyles while their fellow citizens continue to suffer in poverty and deprivation.⁴¹ Hence, dealing effectively with corruption is a most urgent public policy priority in virtually all African countries.

III. THE INTERNATIONAL DIMENSION OF CORRUPTION

a. Introduction

The most important recent development in the struggle against corruption in Africa is the fact that policymakers in many countries around the world are gradually recognizing corruption’s global reach and are willing to engage in cooperative efforts to cleanup corruption and minimize its impact on political and economic development.⁴² This renewed effort to harmonize the global

financial institutions and use them to launder their illegal profits and for transnational terrorist groups to use these institutions to transmit money to their operators world-wide).

³⁹ *Ibid.*; Mbaku, *supra* note 24 at 107.

⁴⁰ *Mbaku, ibid.* at 108.

⁴¹ *Ibid.*

⁴² *Ibid.* at 117.

“war” against corruption is evidenced in the fact that during the last few years, several international and regional conventions against corruption have been concluded.⁴³

Why this sudden interest in combating corruption at the international level—an interest that has significant implications for the struggle against corruption in Africa? First, critical changes in the global political economy during 1989-1991 (i.e., the collapse of the Soviet Union, as well as of many authoritarian regimes in Africa) reduced the tolerance of many ordinary citizens, especially Africans who had been oppressed by many years of colonialism and post-independence dictatorships, “for incompetence, malfeasance, and venality in the public sector.”⁴⁴ As argued by some Africanist scholars, since the late 1980s the balance of power in most countries, including those in Africa, has been shifting in favor of more transparency and accountability in the public sectors.⁴⁵

Second, after the Cold War ended, economic interdependence increased significantly—greater levels of economic integration have made certain that high levels of corruption, for example in Nigeria, can have deleterious effects not only on the Nigerian economy, but also on other economies in Africa and around the world.⁴⁶ Third, tremendous improvements in communication and information technology have radically changed the international financial architecture and in the process, enhanced the ability of Africa's corrupt civil servants and bureaucrats to hide the proceeds of their corrupt activities. In fact, the emergence of electronic forms of money transfer has made it quite easy for corrupt officials to transfer their ill-gotten gains to safe havens in the Caribbean and Western Europe. Businesses and individuals seeking to bribe government officials in order to secure or retain business no longer have to truck into the offices of these officials heavy suitcases full of money and risk being

⁴³ These include, The African Union Convention on Preventing and Combating Corruption, The UN Convention Against Corruption, The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Council of Europe's Corruption and Criminal Law Convention, and the Inter-American Convention Against Corruption.

⁴⁴ Mbaku, *supra* note 24 at 117-118.

⁴⁵ Patrick Glynn, Stephen Kobrin & Moisés Naím, “The Globalization of Corruption”, Kimberly Ann Elliott, ed., in *Corruption and the Global Economy* (Washington, D.C.: Institute for International Economics, 1997).

⁴⁶ Among the fraud schemes listed on the FBI's website as among those to look at for because of their global impact are the Nigerian Letter or 419 Fraud. See FBI, “Internet Fraud” (15 December 2009), online: Federal Bureau of Investigation <<http://www.fbi.gov/majcases/fraud/internetschemes.htm>>.

photographed by an inquisitive newspaper reporter—bribes can now be made through electronic transfers.

Fourth, until recently many European countries did not only fail to outlaw the bribery of foreign officials by their corporations operating abroad, but actually allowed a tax deduction for such payments.⁴⁷ Corruption threatens not only African economies, but also the maintenance of the multilateral trading system that is critical to global peace and prosperity. A fully functioning, competitive and viable global economy cannot be maintained if some players can gain a comparative advantage, not by innovation and managerial expertise, but through the payment of bribes to national regulators. Thus, companies located in countries that prohibit corruption would be placed at a competitive disadvantage. This is demonstrated by the fact that before the OECD enacted the 1994 *Recommendation on Bribery in International Transactions*, U.S.-based multinational companies, which since 1977 have been prohibited by the *Foreign Corrupt Practices Act* and other federal laws from bribing foreign officials, had been complaining that they could not compete effectively against their European counterparts in securing foreign contracts because many European companies were not only legally allowed to pay bribes to foreign public officials, but were granted tax credit for such payments.⁴⁸

b. The International Community Recognizes Corruption as a Major Development Constraint

Even before the events of September 11, 2001 made evident the role of corruption in the financing of transnational terrorism, many countries had already recognized corruption as an important and insidious force in other trans-border criminal activities. In fact, in 1988 more than 100 countries signed the *UN Convention Against*

⁴⁷ In 1994, the OECD put forth its first official effort to fight the bribery of foreign public officials in business transactions. In its 1994 Recommendation on Bribery in International Transactions, the OECD directed its members to use domestic law to combat international corruption, specifically that associated with the bribery of public officials in order to secure or retain contracts. See generally OECD, *Update On the Implementation of The OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*, OECD (2002), online: OECD <<http://www.oecd.org/data/oecd/48/7/2371427.pdf>>.

⁴⁸ *The Foreign Corrupt Practices Act*, 15 U.S.C. §§ 78dd-1, *et seq.* The *Foreign Corrupt Practices Act* was enacted in 1977 and has since been amended (1988 & 1998). Its provisions have been held constitutional in several federal court decisions. See, e.g., *U.S. v. Kay*, 359 F.3d 738 (5th Cir. 2004) [*U.S. v. Kay*]; *U.S. v. King*, 2003 WL 22938694 (8th Cir. 2003).

Trafficking in Illicit Narcotics and Dangerous Drugs and pledged to “criminalize money laundering, improve the ability of law enforcement agencies to track the activities of money launderers, and take part in the global effort to fight international drug trafficking.”⁴⁹ As the last decade of the twentieth century began, the political and economic systems of many developed industrial countries were threatened by corruption-related scandals. For example, as the international community was meeting in Naples, Italy in 1994, to examine ways to increase their cooperation in the fight against organized crime, drug trafficking and various forms of cross-border criminal activities, their host, Prime Minister Silvio Berlusconi, was under investigation for corruption.⁵⁰

In recent years, many governmental and non-governmental organizations, especially in the developed countries, have become interested in fighting global corruption. For example, since the mid-1990s, the U.S. Agency for International Development (USAID) has developed and implemented several anti-corruption schemes, many of which are binding on recipients of U.S. aid, in an effort to enhance the performance and viability of its projects, especially in Africa and other parts of the developing world.⁵¹

In 2004, Freedom House, a New York-based non-governmental organization that tracks and studies civil liberties and political rights around the world, completed an analysis of government performance in the areas of civil liberties, rule of law, anti-corruption and transparency, and accountability and public voice in thirty countries, which were struggling to transition from authoritarian to democratic governance.⁵² Since then, Freedom House has taken an active role in the fight against corruption and

⁴⁹ Mbaku, *supra* note 24 at 121-122.

⁵⁰ See “138 Countries Seek to Combat Global Crime” *Los Angeles Times* (24 November 1994), online: Los Angeles Time < http://articles.latimes.com/1994-11-24/news/mn-1104_1_organized-crime>.

⁵¹ For a review of the USAID’s anticorruption effort, see generally USAID, “A Handbook on Fighting Corruption” (February 1999), online: USAID < http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnace070.pdf>.

⁵² Adrian Kratnycky & Sarah Repucci, “Countries at a Crossroads 2004: At the Crossroads of Reform and Repression”, online: Freedom House < <http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=1&ccrpage=2&ccrcountry=0>> Among the group of countries studied were Kenya, Morocco, Nigeria, Sierra Leone, Uganda, and Zimbabwe.

has made recommendations to the global community on how to effectively combat corruption.⁵³

Perhaps one of the most visible (and arguably, one of the most effective) NGOs involved in the war against global corruption is the Berlin-based Transparency International (TI).⁵⁴ Since its founding in 1993 it has successfully established national chapters in many countries including those in Africa. TI produces and distributes many materials to help national governments, businesses and, civil society fight corruption. One of its most important publications is the *TI Source Book*, which provides policymakers with practical tools (e.g., sources of information on local corruption) to fight corruption.⁵⁵

The United Nations has also become involved in the anti-corruption movement. In 1997 the UN General Assembly adopted the *UN Declaration Against Corruption and Bribery in International Commercial Transactions*. In it, the UN called for all member countries to take action domestically and to cooperate with each other to fight all forms of corruption, bribery and other related illegal activities associated with international business transactions.⁵⁶ In 2000, the so-called Millennium Assembly of the General Assembly of the UN adopted the *UN Convention Against Transnational Organized Crime*—the convention is considered a legally binding instrument and commits each signatory state to criminalize the following offenses associated with transnational organized crime: money laundering; corruption; obstruction of justice; and participation in an organized criminal organization.⁵⁷ However, recognizing that it was necessary to have a legal instrument against global corruption that was separate from the *UN Convention Against Transnational Organized Crime*, the UN General Assembly adopted a *Convention*

⁵³ *Ibid.*

⁵⁴ Information about TI can be found at <http://www.transparency.org/>.

⁵⁵ Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System—TI Source Book 2000* (London: Transparency International, 2000), online: TI <<http://www.transparency.org/publications/sourcebook>>. For a recent discussion of this publication; see generally Mbaku, *supra* note 24 at 330-44.

⁵⁶ United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, GA Res. 51/191, UN GAOR, UN Doc. A/Res/51/191, (1997).

⁵⁷ *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, GA Res. 55/25, UN GAOR, UN Doc. Res. 55/25 (2000) [UN, Res. 55/25]. This convention has since been supplemented by two protocols—The Protocol Against the Smuggling of Migrants (2000) (which deals with organized criminal groups that smuggle migrants) & The Protocol Against Trafficking in Persons (2000) (which deals with modern slavery).

Against Corruption in 2003 and specifically targeted (1) bribery of public officials; (2) money laundering involving public funds; (3) fraud involving public procurement; and (4) embezzlement of public funds.⁵⁸ The *Convention*, which will be discussed later in this paper, emphasized four instruments for fighting corruption—(1) criminalization; (2) prevention; (3) international cooperation; and (4) asset recovery.⁵⁹

Many countries and regional organizations have also contributed to the war against global corruption. One of the most important contributions is the United States' *Foreign Corrupt Practices Act (FCPA)*, which was first enacted in 1977 and has since gone through many amendments.⁶⁰ In 2003, the African Union (AU) adopted its *Convention on Preventing and Combating Corruption* at Maputo, Mozambique. In the following sections, I will examine various international legal instruments used to fight global corruption. Given the critical role played by the United States and its enormous economy in global trade and politics,⁶¹ in addition to the fact that U.S. appeal court decisions have a significant impact on international law, as well as on national legal systems around the world,⁶² I will specifically examine the United States' *FCPA*. In addition, I will take a look at the *UN Convention on Corruption* and demonstrate how these international legal instruments can enhance the ability of Africa's national legal systems, working within the *AU Convention*, to deal effectively with domestic, as well as transnational corruption. Finally, I will advance the argument that the most efficient and sustainable way for African countries to fight corruption is for each country to provide itself with an efficient and fully functioning institutional and judicial system. The latter should serve

⁵⁸ *United Nations Convention against Corruption*, GA RES. 58/4, UNODC, 31 October 2003 (entered into force 14 December 2005) [*UN Convention*].

⁵⁹ *Ibid.*

⁶⁰ *FCPA*, *supra* note 48.

⁶¹ The United States has one of the most important economies in the world, both in terms of trade and national output. In 2007, for example, out of U.S. \$54,347,038 million in total world output, the U.S. economy accounted for \$13,811,200 million (or 25%) of that amount. The nearest competitor to the United States is Japan, which in 2007 had a gross domestic product of \$4,376,705 million (or 8% of global output). In terms of trade, the United States accounted for as much as 11% of global trade (exports plus imports) in 2007. See World Bank, *World Development Report 2009: Reshaping Economic Geography*, (Washington D.C.: The World Bank, 2009) at 356-57, 358-59.

⁶² For example, the decision of the U.S. Appeals Court for the Second Circuit in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) established the legal foundation for the enforcement of international human rights in U.S. courts and in the process, significantly enhanced international law.

as the foundation for the cooperation and mutual legal assistance that these countries need to deal effectively with corruption.

IV. INTERNATIONAL LEGAL INSTRUMENTS AND THE STRUGGLE AGAINST CORRUPTION IN AFRICA

a. Introduction

In the mid-1970s, the United States was embroiled in a corruption scandal⁶³ that would eventually lead to the resignation of Richard Nixon as President of the United States. The Watergate Affair rekindled the interest of many scholars in the study of political corruption.⁶⁴ One important benefit of the Nixon corruption scandal is that congressional investigation of the Watergate Affair provided the foundation for U.S. officials to look at efforts by U.S.-based multinational companies to corrupt foreign public officials in order to obtain or retain business. During the SEC's investigation, over 400 U.S. corporations admitted that they had made "questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties."⁶⁵

⁶³ The so-called Watergate Affair began with the arrest of five men suspected of breaking into the headquarters of the Democratic National Committee at the Watergate complex in Washington, D.C. on June 17, 1972.

⁶⁴ See generally the influential study, L. Berg, H. Han & J. Schmidhauser, *Corruption in the American Political System* (United Kingdom: Wingdale Books Ltd, 1976). (defining political corruption as behavior by private or public individuals, which "violates and undermines the norms of the system of public order which is deemed indispensable for the maintenance of political democracy" *ibid.* at 3). For a more recent treatment of the corrupt abuse of political power by the Nixon administration, see generally Anthony Summers, *The Arrogance of Power: The Secret World of Richard Nixon* (New Zealand: Penguin Books Ltd, 2000).

⁶⁵ U.S. Department of Justice & Department of Commerce, "Lay Person's Guide to the FCPA", online: Department of Justice <<http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>> ["Lay Person's Guide"]. See also Peter W. Schroth, "The United States and International Bribery Conventions" (2002) 50 AM J. Comp. L. 593, 593-98. Schroth examines the various reports put out by the SEC after it completed its investigation. Among the companies implicated in the bribery scandal were Exxon and Lockheed Martin. The foreign officials who had been bribed included then Prime Minister of Japan, Tanaka Kakuei, Prince Bernhard of the Netherlands, and Prime Minister of Italy, Giovanni Leone. See generally Securities and Exchange Commission, 94th Congress, 2d Session, Report on Questionable and Illegal Corporate Payments and Practices 1, 1 (Comm. Print 1976); House Committee on Interstate & Foreign Commerce, Unlawful Corporate Payments Act of 1977, H. R. Rep. No. 95-640, at 4 (1977).

The SEC's investigation revealed a problem that was global in nature and one that threatened to seriously damage the international trading system—effectively dealing with it called for a coordinated international effort.⁶⁶ U.S. authorities, however, soon realized that the efforts of most countries and international organizations in respect of the war on corruption at this time were limited to “declarations and condemnations.”⁶⁷ Beginning in the spring of 1976, several U.S. lawmakers introduced bills that eventually resulted in the passage of the *Foreign Corrupt Practices Act of 1977 (FCPA)*.⁶⁸ The *FCPA* was the first legislative effort in the United States to make it a crime to bribe foreign public officials.⁶⁹ Other international legal instruments designed to combat international corruption include the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*⁷⁰ and the UN's *Convention Against Corruption*.

This time in Africa was one of radical and transformative change. South Africa's infamous apartheid system had been dismantled and many of the continent's post-independence authoritarian regimes had collapsed, giving way to continent-wide constitutional conferences to provide each country with more

⁶⁶ See Schroth, *supra* note 65 at 597.

⁶⁷ Snider & Kidane, *supra* note 13 at 697. For example, the UN and the Organization of American States (OAS) both passed resolutions, whose provisions did not have the force of law. See Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, GA Res. 3514 4, UN GAOR, 30th Sess., Supp. No. 34, UN Doc. A/10034 (1976); *Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises*, 10 July 1975, 14 I. L. M. 1326; See also Schroth, *supra* note 65 at 593.

⁶⁸ For a discussion of the *FCPA*, see generally Alejandro Posadas, “Combating Corruption Under International Law” (2000) 40 *Duke J. Comp. & Int'l* 345 (<https://www.law.duke.edu/journals/djcil/downloads/djcil10p345.pdf>).

⁶⁹ *Ibid.* at 359.

⁷⁰ U.S. corporations, which were now subject to the *FCPA*, were partly responsible for forcing Congress to “lobby” the OECD to enact its anti-corruption convention in order to “level” the field within which business had to compete for foreign contracts. See Posadas, *supra* note 67 at 376. The U.S. Department of Commerce determined that between 1993 and 1996, U.S.-based multinational companies “lost an estimated \$100 billion from differences in the regulation of international corrupt practices.” Snider & Kidane, *supra* note 13 at n. 40. See also Richard Lawrence, *U.S. Anti-Corruption Drive Pays*, *J. Comm.* (Newark), Jun. 20, 1996, at 1A. Note that at this time, in many OECD countries, the bribery of public officials in order to obtain and retain business was not only legal, but companies engaging in the practice could derive significant tax benefits from their governments. See Posadas, *supra* note 67 at 376.

effective governance systems.⁷¹ Part of Africa's transition to democratic governance involved finding ways to deal effectively with one of the most perverse institutions in the continent, and a major constraint to social, economic and political development, corruption. Thus, as part of the continent's effort to improve governance, the Assembly of the Heads of State of the Organization of African Unity (OAU) in 1998 expressed its interest in designing and adopting a convention on combating corruption.⁷² The OAU's efforts were eventually brought to fruition by the African Union (the successor organization to the OAU) with the adoption of the *AU Convention on Preventing and Combating Corruption* in Maputo, Mozambique on July 10-12, 2003.⁷³

b. The U.S. Foreign Corrupt Practices Act (FCPA)

The *FCPA* was designed by Congress to regulate the way U.S. corporations carry out their business transactions outside the country.⁷⁴ Specifically, the statute was designed to combat corrupt practices in international business transactions involving U.S. firms.⁷⁵ The *FCPA* consists of two important components: (1) compliance and (2) penalties—civil or criminal.⁷⁶ The “compliance” component sets legal standards for transactors to provide information about their transactions (“record-keeping standards”) and the “penalties” component criminalizes certain international trade practices.⁷⁷ The standards established by the *FCPA* apply to certain categories of natural and legal persons who are designated as follows: (1) “issuers,”⁷⁸ “domestic concerns,”⁷⁹ and “persons other

⁷¹ For a comprehensive treatment of Africa's transition to democratic governance, see generally John Mukum Mbaku & Julius Omozuanvbe Ihonvbere, eds., *The Transition to Democratic Governance in Africa: The Continuing Struggle* (United Kingdom: Greenwood Publishing Group, 2003); Julius Omozuanvbo Ihonvbere & John Mukum Mbaku, eds., *Political Liberalization and Democratization in Africa: Lessons from Country Experiences* (Westport: Praeger Publishers, 2003).

⁷² See Kolawole Olanniyani, “Introductory Note to African Union (AU): Convention on Preventing and Combating Corruption” (2004) 43 I.L.M. 1.

⁷³ See Alihaji B.M. Marong, “Toward a Normative Consensus Against Corruption: Legal Efforts on the Principles to combat Corruption in Africa, (2002) 30 *Denv.J.Intl’& Pol’y* 99.

⁷⁴ *FCPA*, *supra* note 48, §§ 78dd-1, *et seq.* The *FCPA* was amended in 1988 and 1998.

⁷⁵ See “Lay Person's Guide”, *supra* note 65 at 2.

⁷⁶ See generally *FCPA*, *supra* note 48, §§ 78dd-1, *et seq.*

⁷⁷ *Ibid.*, §§ 78dd-1 to -3.

⁷⁸ *Ibid.*, § 78dd-1.

⁷⁹ *Ibid.*, § 78dd-2.

than issuers or domestic concerns.”⁸⁰ The term “issuer” is not defined in the *FCPA*. However, based on how it is used in the statute, it is clear that it refers to legal persons or corporations that have “a class of securities registered pursuant to section 781 of this title.”⁸¹ The *FCPA*, however, provides a definition for “domestic concern,” which is

- (A) any individual who is a citizen, national, or resident of the United States; and
- (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.⁸²

The category “persons other than issuers and domestic concerns” covers “any person other than an issuer that is subject to section 30A of the *Securities Exchange Act* of 1934 or a domestic concern”⁸³ who undertakes international trade transactions while in the territory of the United States, regardless of the means used to carry out those transactions.⁸⁴

Only “issuers” are required by the *FCPA* to keep records of their transactions abroad. An issuer is required to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁸⁵ In addition, each issuer must establish and maintain an internal accounting system that provides

- reasonable assurances that—(i) transactions are executed in accordance with management’s general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted

⁸⁰ *Ibid.*, § 78dd-3.

⁸¹ *Ibid.*, § 78dd-1(a). This definition has been confirmed in judicial interpretations. See, e.g., *U.S. v. Kay*, *supra* note 48 at 762-63. In addition, the Lay-Person’s Guide to *FCPA*, jointly issued by the U.S. Departments of Justice & Commerce, confirms this definition of “issuer” (*supra* note 65).

⁸² *Ibid.*, § 78dd-2(h)(1).

⁸³ *Ibid.*, § 78dd-3(a).

⁸⁴ Note that “territory of the United States” includes the 50 states and U.S. territories, possessions and commonwealths.

⁸⁵ *FCPA*, *supra* note 48 § 78m(b)(2)(A).

accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets.⁸⁶

An issuer who fails to comply with these regulations is subject to civil and criminal penalties.⁸⁷

Unlike the provisions that prescribe record keeping, which apply only to “issuers,” the provisions of the *FCPA* that criminalize international corruption apply to all three categories of natural or legal persons.⁸⁸ The *FCPA* contains many substantive provisions. Perhaps, the most important, in terms of curbing global corruption, is where the *Act* defines illegal conduct by any of the three categories of natural or legal persons:

It shall be unlawful . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of value.”⁸⁹

In order to offend this provision, the offending party must approach anyone within these three categories of persons with the offer, payment, or promise to pay—(1) foreign officials; (2) foreign political party, or candidate for foreign political office; and (3) third persons who might serve as an intermediary with the knowledge that “all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.”⁹⁰

The *FCPA* is designed to minimize corruption in international business transactions. Hence, in order for penalties to attach,

⁸⁶ *Ibid.*, § 78m(b)(2)(B).

⁸⁷ *Ibid.*, § 78ff. Notice that stiffer fines, including imprisonment of up to 20 years, may be imposed for willful violations, and false and misleading statements (§ 78ff(a)).

⁸⁸ The three categories are: (1) issuers (*ibid.*, § 78dd-1); (2) domestic concerns (§ 78dd-2); and (3) persons other than issuers and domestic concerns (§ 78dd-3). Despite the fact that the prohibitions relating to each class of persons are codified in different sections of the statute, these are identical.

⁸⁹ This provision appears in all three sections of the statute that apply to the three categories of natural and legal persons. See *FCPA*, *ibid.*, §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

⁹⁰ See *ibid.*, §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

payments, offers, or promises made by any of the defined categories of natural or legal persons must be for the purposes of:

- (A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or
- (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.⁹¹

Enforcement of the *FCPA* provisions is the responsibility of the Securities and Exchange Commission (SEC) and the U.S. Attorney General. While the enforcement of *FCPA* provisions by the SEC is limited to civil penalties and instances in which securities⁹² are involved, the Attorney General has broader powers to enforce violations of the *FCPA*. Specifically, the Attorney General is empowered to issue opinions,⁹³ as well as guidelines,⁹⁴ seek injunctive relief,⁹⁵ “administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, other documents which the Attorney General deems relevant or material to such investigation.”⁹⁶ Most important from the viewpoint of fighting global corruption is the fact that the U.S. Attorney General can criminally prosecute any party alleged to have violated any *FCPA* provisions.⁹⁷ In addition to civil and criminal action, the government may also bar any person or firm found to have violated the *FCPA* from engaging in any type of business with the U.S. Government;⁹⁸ rule such natural or legal person ineligible to receive an export license;⁹⁹ bar or suspend (through the SEC) such

⁹¹ *Ibid.*, § 78dd-1(a)(2).

⁹² The term “security,” as used in the *FCPA*, is defined by the *Securities Act of 1933*, 15 USC § 77a *et seq.*, online: U.S. SEC <<http://www.sec.gov/about/laws/sa33.pdf>>.

⁹³ *FCPA*, *supra* 48, § 78dd-1(e).

⁹⁴ *Ibid.*, §78dd-1(d).

⁹⁵ *Ibid.* § 78dd-2(d).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, §§ 78dd-1 to -3.

⁹⁸ “Lay Person’s Guide”, *supra* note 65 at 64.

⁹⁹ *Ibid.*

persons from the securities business;¹⁰⁰ disqualify such persons from participating in foreign investment programs underwritten by the Overseas Private Investment Corporation (OPIC);¹⁰¹ and bar any payments made in violation of the *FCPA* from being considered as business expenses deductible under U.S. tax laws.¹⁰²

c. *United Nations Convention Against Corruption*

The *United Nations Convention Against Corruption (UNCAC)* has as its main objective the elimination of corruption in order to enhance the efficient and effective management of “public affairs and public property.”¹⁰³ Specifically, the *UNCAC* aims:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.¹⁰⁴

The *UNCAC* was designed to serve as a comprehensive international legal instrument against corruption and hence its seventy-one articles deal with virtually all aspects of corruption and cover both the demand for and supply of corruption.¹⁰⁵ Nevertheless, it can be shown that the *UNCAC*'s main emphasis is on “prevention,” “criminalization,” and “enforcement.”¹⁰⁶ Recognizing that global corruption cannot be effectively combated without the help and cooperation of national legal systems, the *UNCAC* imposes mandatory duties on States Parties—they must develop and implement effective anti-corruption policies. Specifically, each State Party shall, “in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *UN Convention*, *supra* note 58, art. 1.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, arts. 1-71.

¹⁰⁶ *Ibid.*, Chapter II of the *UNCAC* deals with “Preventive Measures,” Chapter III deals with “Criminalization,” and Articles IV and V deal with “Enforcement.” See also Snider and Kidane, *supra* note 13 at 707.

management of public affairs and public property, integrity, transparency and accountability.”¹⁰⁷

The *UNCAC* recognizes the fact that in many countries, an important problem associated with fighting corruption is the fact that quite often national legal systems do not adequately constrain counteracting agencies (e.g., the police and the judiciary). Hence, the *UNCAC* specifically requires States Parties to “take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.”¹⁰⁸ For example, studies of corruption in several African countries show that civil servants, who include judges, other judicial officers, and the police, are among some of the most corrupt public servants in these countries.¹⁰⁹

The *UNCAC* also recognizes that efforts at corruption control cannot be successful without the participation of civil society. Thus, the convention specifically calls for States Parties to enhance the ability of civil society, grass-roots organizations, as well as other non-governmental organizations, to participate fully and effectively in combating corruption. Part of the effort to enhance private-sector participation in corruption control requires national governments to ensure transparency in the management of public resources.¹¹⁰

To further strengthen the national government's ability to fight corruption, the *UNCAC* criminalizes certain practices, whether committed in the private or public sectors. These include bribery, extra-legal or illicit enrichment, embezzlement, and “prostitution” of one's public office.¹¹¹

A very important part of the *UNCAC* is international cooperation in the fight against corruption. The Convention provides specific guidelines that deal with substantive and procedural issues associated with the various aspects of fighting global corruption. The

¹⁰⁷ *Ibid.*, art. 5(1).

¹⁰⁸ *Ibid.*, art. 11(1).

¹⁰⁹ See generally Mbaku, *Corruption in Africa*, *supra* note 24; Hope Sr. & Chikulo, *supra* note 23.

¹¹⁰ *UN Convention*, *supra* note 58, arts. 10, 13.

¹¹¹ *Ibid.*, arts. 15-23. Here, prostitution of one's office involves influence peddling or where civil servants sell the functions of their office to the public for pecuniary or non-pecuniary benefits. The rewards are considered extra-legal enrichment and subject to sanction under most national laws.

most important of these include (1) extraditions,¹¹² and (2) mutual assistance in investigations, prosecutions, and judicial proceedings.¹¹³

One of the most important consequences of grand corruption in Africa is that much of the money illegally appropriated by civil servants and politicians is usually deposited in numbered accounts in foreign banks. Thus, the *UNCAC*'s emphasis on asset recovery is very important for many poor countries, whose corrupt and opportunistic leaders have illegally appropriated national financial resources and have either deposited them in foreign banks or have used them to purchase foreign real property.¹¹⁴ Article 51 states specifically that “[t]he return of assets pursuant to this chapter is a fundamental principle of this *Convention*, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”¹¹⁵ In fact, asset recovery was considered so critical and fundamental an issue that the States Parties devoted an entire chapter of the *Convention* (Chapter V, Articles 51-59) to dealing with it.¹¹⁶

The *UNCAC* provides detailed procedures on how States Parties can initiate action in the courts of a State Party where the illegally obtained assets are currently located in order to recover them.¹¹⁷ The *UNCAC* also establishes a Conference of the States Parties to the *Convention* “to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this *Convention* and to promote and review its implementation.”¹¹⁸ The Conference is expected to review, on a periodical basis, the extent to which States Parties are implementing the *UNCAC* and to make recommendations for improving the *Convention*'s role in combating global corruption.¹¹⁹

The *UNCAC* is an international agreement entered into voluntarily by the majority of the world's sovereign nations, with the aim of tackling one of the most intractable development constraints of this century—corruption. Nevertheless, it is important to realize, especially in the case of Africa, that while many countries may be

¹¹² *Ibid.*, art. 44.

¹¹³ *Ibid.*, art. 46.

¹¹⁴ *Ibid.*, art. 51.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, arts. 51-59.

¹¹⁷ *Ibid.*, arts. 53-59.

¹¹⁸ *Ibid.*, art. 63(1).

¹¹⁹ *Ibid.*, art. 63(4)(e)-(f).

willing to cooperate fully in the global fight against corruption, they may not be able to do so either because ruling elites in these countries are the direct beneficiaries of the “corruption enterprise,” national institutions (e.g., the police and the judiciary) are simply incapable of functioning as effective counteracting agencies, or countries fear that international cooperation against corruption involves surrender of a certain level of national sovereignty. Where the national government is considered by most people as illegitimate,¹²⁰ it is not likely that civil society will cooperate with such a government in the fight against corruption. As will be argued later in this paper, it is unlikely that a regime, which enjoys little or no domestic legitimacy and hence, must struggle on a daily basis to hold on to power, can cooperate effectively with other governments to fight corruption.¹²¹ Thus, it is necessary that legal and governance structures in these countries first be strengthened, enhancing their ability to contribute positively to the struggle against global corruption.¹²²

d. The African Union Convention on Preventing and Combating Corruption

The *African Union Convention on Preventing and Combating Corruption* is one of the latest regional legal instruments for fighting transnational corruption¹²³ and is based on principles, which the States Parties believe undergird governance in the continent in the twenty-first century. Such principles include “[r]espect for democratic principles and institutions, popular participation, the rule of law and good governance.”¹²⁴ As is evident from the tone of the Convention’s preamble, the States Parties were alarmed by corruption’s deleterious effects on “political, economic, social and cultural stability of African States,” as well as by corruption’s “devastating effects on the economic and social development of the African peoples.”¹²⁵

¹²⁰ This is quite often the case where a government has come to power through a military coup d’état or through other extra-constitutional process (e.g., a rigged election).

¹²¹ See generally Mbaku, *Corruption in Africa*, *supra* note 24 at 344-47.

¹²² In the case of Africa, Mbaku examines the many ways in which African countries can reconstruct and reconstitute their states in order to provide themselves with institutional arrangements that adequately constrain civil servants and politicians and enhance the fight against corruption. See Mbaku, *Corruption in Africa*, *supra* note 24 at 152-95.

¹²³ *AU Convention*, *supra* note 16.

¹²⁴ *Ibid.*, art. 3(1).

¹²⁵ *Ibid.*, at Preamble.

Taking the principles mentioned above into consideration and cognizant of the need to arrest corruption's pernicious impact on African societies, the *AU Convention* places emphasis on three critical aspects of the war against venality in the continent: (1) prevention, (2) criminalization, and (3) international cooperation.¹²⁶ These provisions impose certain duties on both the public and private sectors. With respect to fighting corruption in the public sector, States Parties "commit themselves to:

1. Require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service.
2. Create an internal committee or a similar body mandated to establish a code of conduct and to monitor its implementation, and sensitize and train public officials on matters of ethics."¹²⁷

Virtually all the provisions begin with "State[s] Parties commit themselves to"¹²⁸ or "State[s] Parties undertake to"¹²⁹ and hence, are stated in a non-mandatory manner.¹³⁰ With regard to the private sector,

State[s] Parties undertake to: 1. Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector. 2. Establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights. 3. Adopt such other measures as may be necessary to prevent companies from paying bribes to win tenders.¹³¹

The *AU Convention* makes allowance for the participation of civil society and its organizations (e.g., the private media) in combating corruption.¹³² Civil society is expected to serve as a check on the exercise of government agency. Specifically, civil society and its organizations are expected to "hold governments to the highest

¹²⁶ *Ibid.*, arts. 4-24.

¹²⁷ *Ibid.*, art. 7(1)(2).

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, arts. 11, 12.

¹³⁰ Compare to the *FCPA*'s frequent use of the word "shall," as in "No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls . . ." at *FCPA* § 78m(b)(5).

¹³¹ *AU Convention*, *supra* note 16, art. 11(1).

¹³² *Ibid.*, art. 12.

level of transparency and accountability in the management of public affairs.”¹³³

The *AU Convention*'s criminalization provisions are designed specifically to define “acts of corruption and related offenses,”¹³⁴ establish jurisdiction,¹³⁵ and enumerate numerous criminal offenses that are associated with and implicate corruption.¹³⁶ For example, acts of corruption include: “[t]he 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, favor, 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.”¹³⁷ It is important to note that the *AU Convention* criminalizes both the demand for and supply of corruption. It also criminalizes “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.”¹³⁸

The *AU Convention* is greatly concerned about the misuse of public office for private gain and hence, criminalizes any behavior by a public official that involves the wielding of undue influence—that is conduct related to all the offenses discussed earlier.¹³⁹ For example, *the AU Convention* criminalizes,

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.¹⁴⁰

¹³³ *Ibid.*, art. 12(2).

¹³⁴ *Ibid.*, art. 4(1).

¹³⁵ *Ibid.*, art. 13.

¹³⁶ *Ibid.*, art. 4.

¹³⁷ *Ibid.*, art. 4(1)(a).

¹³⁸ *Ibid.*, art. 4(1)(c).

¹³⁹ *Ibid.*, art. 4(1)(f).

¹⁴⁰ *Ibid.*

Other conduct criminalized by the *AU Convention* includes illicit enrichment,¹⁴¹ concealment of one's ill-gotten gains,¹⁴² and participation in various inchoate crimes, which include conspiracy and attempt.¹⁴³ The *AU Convention* devotes an entire article¹⁴⁴ to "laundering the proceeds of corruption" and defines laundering as:

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.¹⁴⁵

The *AU Convention* is designed to cover corrupt behavior committed by anybody, whether that behavior takes place in the public or private sectors.¹⁴⁶ A "public official" is "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."¹⁴⁷

The "enforcement" component of the *AU Convention* consists of two sub-parts—a domestic component and an international component. Within the domestic arena, the *AU Convention* mandates not only the general improvement of each State Party's legal system but the passage of legislation to give effect to the provisions of the *AU Convention*—that is, to the obligations that the States Parties have assumed under the *Convention*.¹⁴⁸ It is important to note that while some of the provisions use "permissive language" and hence are not mandatory, others use mandatory language.¹⁴⁹ For purposes of effective enforcement of measures against corruption, the *AU*

¹⁴¹ *Ibid.*, art. 4(1)(g). "Illicit enrichment" is defined 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" (*Ibid.*, art. 1).

¹⁴² *Ibid.*, art. 4(1)(h).

¹⁴³ *Ibid.*, art. 4(1)(i).

¹⁴⁴ *Ibid.*, art. 6.

¹⁴⁵ *Ibid.*, art. 6(a).

¹⁴⁶ See generally *ibid.*, arts. 4, 11.

¹⁴⁷ *Ibid.*, art. 1.

¹⁴⁸ See, e.g., *ibid.*, art. 5, 6.

¹⁴⁹ For example, Article 6 states as follows: "States Parties *shall* adopt such legislative and other measures as may be necessary to establish as criminal offences" [emphasis added]. Article 5, on the other hand, uses the language "State Parties *undertake to*" (*ibid.*, art.6.) [emphasis added].

Convention makes it mandatory for States Parties to “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 offenses.”¹⁵⁰ The role of civil society and its organizations—notably, the media—is also emphasized.¹⁵¹

To enhance legitimacy of the enforcement process and improve its acceptance by the people, the *AU Convention* reiterates “the need for due process for anyone accused of committing any offense” and requires that all individuals accused of corruption-related offenses be granted a “fair trial in accordance with recognized principles of human rights.”¹⁵² Specifically,

[s]ubject 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.¹⁵³

Although the struggle to minimize corruption in the African economies will, invariably, depend on domestic efforts, the international dimension should not be discounted. For instance, most civil servants and politicians who accumulate assets through corrupt means in Africa usually “invest” those ill-gotten gains in foreign banks and financial institutions.¹⁵⁴ Thus, provisions on extradition,¹⁵⁵ confiscation and seizure of the proceeds and instrumentalities of corruption,¹⁵⁶ and mutual legal assistance¹⁵⁷ are

¹⁵⁰ *Ibid.*, art. 9.

¹⁵¹ *Ibid.*, art. 12.

¹⁵² Snider & Kidane, *supra* note 13 at 715.

¹⁵³ *AU Convention*, *supra* note 16, art. 14.

¹⁵⁴ See generally Mbaku, *Corruption in Africa*, *supra* note 24 at 96-97 Victor T. LeVine, *Political Corruption: The Ghanaian Case* (California: Hoover Institution Press, 1975) (arguing that most of the assets accumulated by African ruling elites through corruption are usually invested abroad).

¹⁵⁵ *AU Convention*, *supra* note 16, art. 15.

¹⁵⁶ *Ibid.* at art. 16. See also *ibid.*, art. 17, which mandates that States Parties not use their bank secrecy rules to frustrate the efforts of other States Parties which are attempting to gather information necessary to prosecute alleged criminal offenses associated with corruption or recover assets, which have been accumulated through engagement in illegal activities. However, this article also mandates that the “[r]equesting State shall not use any information received that is protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless with the consent of the Requested

quite critical to the continent's fight against transnational corruption.

Cooperation at the international level extends to signatories and non-signatories alike. Article 19(3) of the *AU Convention* is designed to make sure that offending parties do not escape justice by fleeing to non-signatory countries.¹⁵⁸ For purposes of "cooperation and mutual legal assistance," each State Party must designate a national authority who will be responsible for receiving assistance requests and cooperating as indicated in the *Convention*.¹⁵⁹ Also in relation to international cooperation, the AU is to establish an Advisory Board consisting of eleven independent members,¹⁶⁰ whose job is to monitor the implementation and proper functioning of the *Convention*.¹⁶¹

e. A Comparative Analysis of the Anti-Corruption Conventions

In this section, I will attempt to undertake a comparative analysis of the *AU Convention* with the *Foreign Corrupt Practices Act* and the *UN Convention Against Corruption*. The analysis will be divided into three sections dealing with (a) substantive provisions; (b) procedural provisions; and (c) others.

1. The Conventions' Substantive Provisions

The primary objective of all three legal instruments is to minimize corruption. However, while the *UNCAC* and the *AU Convention* deal with corruption in its broadest meaning, the *FCPA* aims to "make it unlawful for a U.S. person and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person."¹⁶² The *FCPA* aims to achieve its objectives by mandating record-keeping standards for "issuers" of securities and empowering the U.S. Department of Justice and the SEC to impose civil and criminal penalties on any party that does not

State Party" (*ibid.*, art. 17(2)).

¹⁵⁷*Ibid.*, art. 18.

¹⁵⁸ *Ibid.*, art. 19(3).

¹⁵⁹ *Ibid.*, art. 18(1)-(2).

¹⁶⁰ *Ibid.*, art. 22(3). Each member will serve in his or her personal capacity.

¹⁶¹ *Ibid.*, art. 22(5)(a)-(i). The *AU Convention*, however, fails to deal effectively with the issue of sanctions against States Parties, which violate provisions of the convention.

¹⁶² "Lay Person's Guide", *supra* note 65 at 2.

comply with these standards.¹⁶³ Thus, while the *FCPA* is concerned primarily with trying to improve the efficiency of the international trading regime, both the *UNCAC* and the *AU Convention* focus primarily on efforts to minimize the deleterious effects of corruption on social, political and economic development.¹⁶⁴

Unlike the *FCPA* and the *UNCAC*, the *AU Convention* views corruption as an important constraint to economic and political development and considers the successful combating of corruption as critical to development and good governance.¹⁶⁵ As argued by Snider and Kidane, the *AU Convention* “takes a rights and good governance approach to the problem of corruption.”¹⁶⁶ The *AU Convention*’s first objective is “[t]o promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offenses in the public and private sectors.”¹⁶⁷ The second objective of the *Convention* is to “[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.”¹⁶⁸ Third, the States Parties to the *Convention* must “undertake to abide” by the principle of “[r]espect for human and peoples’ rights in accordance with the *African Charter on Human and Peoples Rights* and other relevant human rights instruments.”¹⁶⁹ Finally, the *Convention* calls for “[t]ransparency and accountability in the management of public affairs” and the “[p]romotion of social justice to ensure balanced socio-economic development.”¹⁷⁰

2. The Conventions’ Main Mechanisms For Combating Corruption

All three conventions (*FCPA*, *UNCAC*, and *AU Convention*) focus on private-sector activities that contribute to corruption. Within these, the most important provisions designed to fight

¹⁶³ *FCPA*, *supra* note 48, §78dd 1-3.

¹⁶⁴ See generally *AU Convention*, *supra* note 16; *UN Convention*, *supra* note 58.

¹⁶⁵ See generally *AU Convention*, *supra* note 16, arts. 2, 3.

¹⁶⁶ Snider & Kidane, *supra* note 13 at 717.

¹⁶⁷ *AU Convention*, *supra* note 16, art. 2(1).

¹⁶⁸ *Ibid.*, art. 2(4). As is evident in other parts of the *Convention*, one of the most important of the obstacles mentioned in this section is “corruption,” which must be eradicated in order to enhance the ability of Africans to enjoy their civil, political, and economic rights.

¹⁶⁹ *Ibid.*, art. 3(2).

¹⁷⁰ *Ibid.*, art. 3(3) (4). See also Snider & Kadane, *supra* note 13 at 717.

corruption can be grouped into two categories: (a) the accounting and record-keeping provisions; and (b) the anti-bribery provisions.

The Accounting and Record-Keeping Provisions

The *FCPA* imposes on “issuers” record-keeping requirements—“[e]very issuer . . . shall . . . make and keep books, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and devise and maintain a system of internal accounting controls.”¹⁷¹ Under the *FCPA* the “accounting and record-keeping” provisions tend to be lesser known than the anti-bribery provisions. Yet, the accounting and record-keeping provisions “constitute a more potent mechanism that has implications far greater than simply deterring improper payments to foreign officials.”¹⁷² In addition to the fact that accounting and record-keeping provisions affect the global operations of all issuers,¹⁷³ “including their majority-owned foreign subsidiaries and their officers, directors, employees, and agents acting on behalf of an issuer,”¹⁷⁴ the provisions also “directly affect domestic practices, including practices wholly unrelated to the making of improper inducements in foreign settings.”¹⁷⁵ An entity that violates the accounting and record-keeping provisions (e.g., maintaining inaccurate or falsified records or failing to provide adequate internal accounting controls) may be subject to criminal prosecution.¹⁷⁶

Unlike the *FCPA*, which focuses on the private sector, the *AU Convention* places emphasis on the public sector and advises States Parties to “[a]dopt legislative and other measures 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

¹⁷¹ *FCPA*, *supra* note 48, §78m(b)(2).

¹⁷² Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* (United States: American Bar Association, 2005) at 21.

¹⁷³ An issuer is defined as any legal persons or corporations that have “a class of securities registered pursuant to section 781 of this title” (*FCPA*, *supra* note 48, § 78m(b)(6)). See also Deming, *supra* note 172 at 8.

¹⁷⁴ Deming, *ibid.* at 21.

¹⁷⁵ *Ibid.*

¹⁷⁶ *FCPA*, *supra* note 48, § 78m(b)(4)-(5). Criminal liability only attaches to those who “knowingly falsify” records or “knowingly circumvent” a system of internal accounting controls. See also Deming, *ibid.* at 43.

management of public goods and services.”¹⁷⁷ Additional *AU Convention* measures for combating corruption that are geared towards the public sector include the requirement that public officials declare their assets, develop codes of conduct, and establish “disciplinary measures and investigation procedures in corruption and related offenses.”¹⁷⁸

In addition to the fact that most of the *AU Convention's* provisions are not stated in mandatory language, the *Convention* does not provide any deterrence or penal scheme, instead, leaving the penalizing process to the States Parties. This represents a significant weakness of the *AU Convention*, especially given the fact that few African countries have been able, since independence, to undertake the types of institutional reform that can produce laws and institutions capable of adequately and effectively combating corruption and other forms of political opportunism.¹⁷⁹

Unlike the *AU Convention*, the *UNCAC* provides a comprehensive set of provisions for the prevention of corruption in both the private and public sectors.¹⁸⁰ Given the fact that most of the signatories to the *AU Convention* are also signatories to the *UNCAC*, the hope is that the *UNCAC* will fill in the gaps left by the *AU Convention*, which include the imposition of sanctions on violators.¹⁸¹ For example, the *UNCAC* specifically requires each State Party to “take measures . . . to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to

¹⁷⁷ *AU Convention*, *supra* note 16, art. 5(4). The *AU Convention's* Article 11, which deals with the private sector, does not expressly impose any accounting and record-keeping requirements on private entities operating in member states.

¹⁷⁸ *Ibid.*, art.7.

¹⁷⁹ For a review of the literature on the failure of African countries to engage in effective and democratic constitutional reforms to provide themselves with institutional arrangements capable of fully and effectively constraining civil servants and politicians and hence, minimizing corruption in the public sector, see generally Mbaku, *Corruption in Africa*, *supra* note 24. See also Victor T. LeVine, “The Fall and Rise of Constitutionalism in West Africa” (1997), 35 *J.Mod.Afr.Stud* 2 at 181 (arguing that most of the post-independence constitutional reforms in West Africa created institutions, which enhanced the ability of civil servants and politicians to exploit their public positions, through corruption, rent seeking, and other forms of opportunism, for private gain).

¹⁸⁰ *UN Convention*, *supra* note 58, Chapter II. The *UNCAC* devotes an entire chapter to preventive measures.

¹⁸¹ Snider & Kidane, *supra* note 13 at 718.

comply with such measures.”¹⁸² Since the *AU Convention* leaves the matter of compliance and penalties to the discretion of States Parties, and given the continent’s checkered past with institutional reforms, it is highly unlikely that many of these countries will be able to muster the political will and the resources needed to undertake the institutional reforms necessary to establish fully functioning schemes against corruption.¹⁸³

The Anti-Bribery Provisions

The anti-bribery provisions criminalize certain conduct and omissions and are the most substantive measures against transnational corruption contained in the *FCPA*, *UNCAC*, and *AU Conventions*. The *FCPA*’s anti-bribery provisions prohibit “an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” by an issuer.¹⁸⁴ Hence, the *FCPA* focuses primarily on the supply side of the corrupt transaction. Conversely, the *UNCAC* and the *AU Convention* both deal with demand and supply sides of corrupt transactions.¹⁸⁵ While the *AU Convention* prohibitions extend to

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, favor, 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,¹⁸⁶

the provision does not apply to “authorizations,” a loophole that could seriously limit the effectiveness of the *AU Convention* as a legal instrument against corruption.

¹⁸² *UN Convention*, *supra* note 58, art. 12(1).

¹⁸³ Professor Charles Manga Fombad, in a study of corruption in Cameroon, concluded that “[t]he nonchalance of the political leadership is probably the most serious obstacle that exists to the fight against corruption.” (Fombad, *supra* note 27 at 253). The *AU Convention* recognizes the important part played by the private/independent media in the fight against corruption. However, throughout the continent, the private press continues to be one of the most oppressed and marginalized civil society organizations. As a consequence, the media have not been able to participate fully and effectively in the struggle against corruption and other forms of venality in the African economies.

¹⁸⁴ *FCPA*, *supra* note 48, § 78dd-1(a).

¹⁸⁵ See generally *UN Convention*, *supra* note 58; *AU Convention*, *supra* note 16.

¹⁸⁶ *AU Convention*, *supra* note 16, art 4(1)(b).

Only the *UNCAC* expressly provides an intent requirement.¹⁸⁷ In all the provisions dealing with “criminalization and law enforcement” the *UNCAC* uses the expression “when committed intentionally” throughout in the definition of criminal acts.¹⁸⁸ Nevertheless, the *UNCAC* does not expressly define the type of mens rea that is required for conviction. “Knowledge and purpose,” however, are anticipated.¹⁸⁹

The *FCPA*'s reference to a mens rea requirement is covered by frequent references to “knowingly” and “corruptly” in the *Act*'s provisions. For example, “[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).”¹⁹⁰ The SEC, which plays a coordinate role together with the Department of Justice in enforcing the *FCPA*, identified four categories of illegal or illicit payments that U.S. entities were making at the time Congress was considering enacting the 1977 *FCPA*.¹⁹¹ One of those categories is payments “made with the *intent* to assist the company in obtaining or retaining government contracts.”¹⁹²

In *U.S. v. Kay* the U.S. Court of Appeals for the Fifth Circuit held that “Congress intended for the *FCPA* to apply broadly to payments *intended* to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage.”¹⁹³ Therefore, the *FCPA* anticipates an intent element.

However, in the *AU Convention*'s criminalization of corruption provisions no reference is made to a requirement of mens rea; instead, this requirement is left to the discretion of individual States Parties, which are expected to insert it in legislation implementing the Convention and its provisions. As argued by Professors Thomas R. Snider and Won Kidane, “consistently and completely omit[ting]

¹⁸⁷ *UN Convention*, *supra* note 58, art. 15.

¹⁸⁸ See generally *UN Convention*, *supra* note 58, Chapter III. See also Snider & Kidane, *supra* note 13 at 720.

¹⁸⁹ Snider & Kindane *supra* note 13 at 720.

¹⁹⁰ *FCPA*, *supra* note 48, § 78m(b)(5), (g)(1).

¹⁹¹ U.S. Report of the Securities and Exchange Commission on questionable and illegal corporate payments and practices submitted to the Senate Banking, Housing, and Urban Affairs Committee, United States Senate, 94th Cong. (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1976) at 25-27 [*SEC Report*].

¹⁹² *Ibid.* at 26 [emphasis added]. See also *U.S. v. Kay*, *supra* note 48 at 748.

¹⁹³ *U.S. v. Kay*, *supra* note 48.

any reference to a mens rea requirement” and leaving it “for the State[s] Parties’ own decisions in their domestic jurisdictions . . . could result in inconsistent application of the criminalization provisions of the *AU Convention* and may have profound effect on the actual content of the assumed obligations.”¹⁹⁴ While it is possible that African countries seeking to implement the *AU Convention* by enacting national legislation can design laws that incorporate a mens rea requirement, it is difficult for one to be optimistic given a post-independence history characterized by mostly opportunistic institutional reforms.¹⁹⁵

Professors Snider and Kidane suggest that African countries “could make use of the already developed jurisprudence of the *FCPA*, including the definition of mens rea offered under *Liebo*.”¹⁹⁶ In a continent still trying to recover from a long history of violent exploitation through foreign-imposed governance structures,¹⁹⁷ one needs to treat such advice with caution. Combating corruption effectively requires strong, viable, and sustainable institutions, especially those that are “locally-focused and complement already existing local structures for conflict resolution and the solving of

¹⁹⁴ *Supra* note 13 at 722.

¹⁹⁵ Democratic constitution making, a process that can allow an African country to produce the types of institutional arrangements that effectively constrain civil servants and politicians and prevent them from engaging in corruption, rent seeking, and other forms of political opportunism, such as occurred in South Africa in the early 1990s, is a rarity in Africa. In fact, during the last 50 years, most African countries have undertaken only opportunistic institutional reforms, which have produced laws and institutions that stunt entrepreneurship and wealth creation, but enhance the ability of ruling elites to monopolize the supply of legislation. In post-independence Africa, South Africa’s post-apartheid constitutional exercise is a rare experience in democratic constitutional making. For a review of how opportunism on the part of Africa’s post-independence political elite has contributed to increased levels of venality in the continent, see Mbaku, *Corruption in Africa*, *supra* note 24. See also LeVine, *supra* note 179.

¹⁹⁶ Snider & Kidane, *supra* note 13 at 722. “*Liebo*” refers to *U.S. v. Liebo*, 923 F.2d 1308 (8th Cir. 1991).

¹⁹⁷ Many formal institutions in the African countries, especially those in sub-Saharan Africa, are essentially those that were imposed by the European countries that colonized these countries. For example, in addition to the French language, the constitutions of most francophone countries in Africa are copies of the constitution of the Fifth French republic. See generally LeVine, *supra* note 179; Victor T. LeVine, *The Cameroons: From Mandate to Independence* (Berkeley: University of California Press, 1964) (arguing that the first constitution of the former UN Trust Territory of Cameroons under French administration, which gained independence on January 1, 1960 and took the name *La République du Cameroun*, was a copy of the constitution of the Fifth French Republic (1958)).

problems.”¹⁹⁸ So that the African peoples can see their national laws and institutions as tools and instruments for organizing their lives and therefore accept and support them, the compacting of any anti-corruption rules must be undertaken through a democratic process—one in which all relevant stakeholders are provided the facilities to participate fully and effectively in constitution making.¹⁹⁹

V. DOMESTIC ENFORCEMENT MECHANISMS: THE KEY TO EFFECTIVE CORRUPTION CLEANUPS IN AFRICA

In this section I draw on the experiences of Nigeria and Cameroon to show that the success of any anti-corruption scheme, even one agreed upon by many countries, depends, to a great extent, on the effectiveness of each country's domestic laws and institutions.²⁰⁰ Thus, while international and regional conventions such as the *UNCAC* and the *AU Convention* are important, the main focus for fighting corruption in Africa must be placed on making certain that each country provides itself with an effective and fully functioning legal system, particularly one that is capable of adequately constraining civil servants and politicians and preventing them from engaging in political opportunism.²⁰¹

The main argument goes as follows: First, each African country must engage in state reconstruction to provide itself with new and more relevant laws and institutions—such a reform process should produce an institutional and judicial system that adequately constrains state custodians,²⁰² provides entrepreneurs with incentive

¹⁹⁸ Mbaku, *Corruption in Africa*, *supra* note 24 at 186.

¹⁹⁹ For a review of the literature, see generally Mbaku, *Corruption in Africa*, *supra* note 24.

²⁰⁰ The success of the *FCPA* in combating the bribery of foreign public officials by U.S. companies derives, *inter alia*, from the fact that the SEC and the U.S. Department of Justice (DOJ) have been given broad statutory powers to prosecute natural and legal persons accused of violating any *FCPA* provisions. Both the SEC and the DOJ have exercised these powers quite effectively, as evidenced by the several legal actions taken against offending parties. See generally *U.S. v. Kay*, *supra* note 48; *U.S. v. King*, *supra* note 48. Specifically, the success of the *FCPA* as a legal tool for fighting global corruption derives from the fact that it is supported by an effective and fully functioning legal system.

²⁰¹ See generally Stepanek, *supra* note 12 (arguing that underdevelopment and poverty in Africa can be explained by the lack of strong and viable laws and institutions, especially those capable of dealing effectively with political opportunism).

²⁰² State custodians refer to civil servants and politicians.

structures that encourage and enhance wealth creation,²⁰³ promotes the peaceful coexistence of each country's diverse population groups, and minimizes corruption.²⁰⁴ Second, each country should employ the mechanisms provided by the *AU Convention*, the *UNCAC*, and other international conventions to complement domestic anti-corruption efforts and significantly enhance its ability to reach suspected violators and their "ill-gotten gains" through extradition and asset recovery.²⁰⁵ Finally, each country should establish mechanisms to enhance international cooperation, and where necessary, mutual legal assistance (including mutual assistance in investigations and the gathering of data on corruption), to deal with issues such as extradition, recovery of misappropriated assets, jurisdiction (as it relates to the prosecution of alleged violators), and choice of laws.²⁰⁶

a. Domestic Institutional and Judicial Frameworks as Keys to Effective Anti-Corruption Strategies: Lessons from Cameroon and Nigeria for the AU Convention

Corruption flourishes and eventually becomes endemic in polities with poorly-developed, non-viable, and weak institutional arrangements.²⁰⁷ This is the case in Cameroon and Nigeria, where colonially-imposed institutional arrangements, all of which were primarily "structures of exploitation, despotism, and degradation,"²⁰⁸

²⁰³ Incentive structures in most African countries today actually discourage the creation and wealth, forcing citizens to depend, instead, on government transfers, most of which are derived from foreign aid and other remittances. See generally Mbaku, *Corruption in Africa*, *supra* note 24; Stepanek, *supra* note 12.

²⁰⁴ For a discussion of how a poorly-developed set of laws and institutions, specifically, a weak and ineffective legal system, destroys peaceful coexistence of ethnic groups, provides perverse incentives, which discourage and stunt entrepreneurial activities, and generally discourage economic growth and development, see Olufemi Taiwo, "Of Citizens and Citizenship" in Okon Akiba, ed., *Constitutionalism and Society in Africa* (England: Ashgate Publishing Limited, 1988) 55.

²⁰⁵ Both the *AU Convention* and the *UNCAC* emphasize the need for international cooperation and the *AU Convention* has provisions that deal with "cooperation and mutual legal assistance." See *UN Convention*, *supra* note 58; *AU Convention*, *supra* note 16, art. 18.

²⁰⁶ While the *UN Convention* and the *AU Convention* allude to some of these issues, implementation is left to the discretion of the States Parties. See, e.g., *AU Convention*, *supra* note 16, art. 18.

²⁰⁷ See generally Fombad, *supra* note 27 at 246.

²⁰⁸ Robert Fatton Jr., "Liberal Democracy in Africa" (1990) 105 *Pol.Sci.Q.* 455 at 457, online:

continue to provide the basic foundation for national legal systems.²⁰⁹ In countries with well-developed institutional and judicial frameworks, allegations of corruption against any natural or judicial persons are usually investigated thoroughly and prosecuted. If the accused are found guilty, sanctions are imposed as mandated by law.²¹⁰ In Nigeria and Cameroon, allegations of corruption are usually dismissed as either harmless rumors or political gossip initiated by disgruntled members of the opposition.²¹¹ In both countries journalists who dared to investigate high-ranking officials accused of corruption (the so-called “untouchables”) have been threatened, harassed, and prosecuted under extremely harsh draconian laws and sentenced to long prison terms and their assets seized.²¹²

The key to an effective anti-corruption strategy, as has been argued in this paper, is a set of formal laws and institutions, which adequately constrain the state. In the case of Cameroon and Nigeria, and in fact of other former European colonies in Africa, for these institutional mechanisms to function effectively, they must be locally-focused—that is, they must be created through a bottom-up, inclusive and participatory process. Each country's relevant stakeholders must be provided the facilities to participate fully and effectively in the creation of these institutions.²¹³

<<http://adpm.pbworks.com/f/Africa%2BLiberal%2BDemocracy%2BFatton%2B1990.pdf>>.

²⁰⁹ See also Fombad, *supra* note 27 at 246.

²¹⁰ Successful prosecutions of cases of political and bureaucratic corruption in the United States are too numerous to mention. Note, however, that the *Watergate Affair* is one of the most important manifestations of the effectiveness of the U.S. judicial system against political corruption—the case led to the resignation of President Nixon. See *Berg*, et al., *supra* note 64.

²¹¹ *Fombad*, *supra* note 27 at 246.

²¹² For Cameroon see Fombad, *supra* note 27; Lyombe Eko, “Hear All Evil, See All Evil, Rail Against All Evil: *Le Messenger* and the Journalism of Resistance in Cameroon”, in Joseph Takougang & John Mukum Mbaku, eds., *The Leadership Challenge in Africa: Cameroon Under Paul Biya* (Trenton, N.J.: Africa World Press, 2004) 123. For Nigeria see John Erero & Tony Oladoyin, “Tackling the Corruption Epidemic in Nigeria” in Hope, Sr. & Chikulo, *supra* note 23, 261; John Mukum Mbaku, “Constitutionalism and Governance in Africa”, in Kalu & Soyinka-Airewele, eds., *Socio Political Scaffolding and the Construction of Change: Constitutionalism and Democratic Governance in Africa* (Trenton, N.J.: Africa World Press, 2009) 35 [Mbaku, “Constitutionalism and Governance in Africa”].

²¹³ Cameroon's first constitution, for example, was a “modified” version of the constitution of the French Fifth Republic. Although there have been several amendments, the constitution, which is a foundation for all of the country's legal institutions, remains essentially a French creation, with virtually no participation

1. Formal Structures to Constrain the Behavior of State Custodians

An important legacy of colonialism was the exploitative and despotic nature of governance.²¹⁴ Many African countries, including Cameroon and Nigeria, inherited that approach to governance and have continued to exercise it with impunity. According to Fombad, “[o]ne of the most enduring legacies of Cameroon’s predominantly French legal heritage is the absence of any respect for the rule of law. There was never any constitutional measure designed to prevent arbitrary government as was found in most former British colonies.”²¹⁵ In Nigeria, however, whatever constitutional measures were left behind by the departing British were destroyed shortly after independence in 1960, when the military overthrew the government and ruled by decree until 1999. Although Nigeria is today ruled by a constitution, the latter was not developed through a democratic process. Instead, the constitution was developed secretly by the military in 1999 as part of the agreement for it to leave office and surrender the apparatus of government to a civilian regime.²¹⁶

2. Competencies of the Various Branches of Government

One of the most important contributions of American constitutionalism to modern governance is *judicial review*.²¹⁷ The latter, along with the doctrine of separation of powers, can help African countries minimize the tendency of their leaders to behave in arbitrary and tyrannical ways.²¹⁸ While the constitutions of both Cameroon and Nigeria address the issue of separation of powers, these constitutions fail to provide the tools needed for this important doctrine to function effectively and fully in either country. For

from Cameroonians or consideration of their interests and values. See generally LeVine, *supra* note 197.

²¹⁴ Fatton, *supra* note 208.

²¹⁵ Fombad, *supra* note 27 at 246.

²¹⁶ The military overthrew the government of Nigeria’s First Republic in 1966, accusing it of high levels of corruption, thuggery, financial malfeasance, and self-enrichment at the expense of the general population. In an address to the nation, one of the coup leaders, Major C. Kaduna Nzeogwu, promised a restless and skeptical population that the military would quickly clean up corruption, restore respectability and integrity to the civil service and return to the barracks. Not only did the military develop into one of the most corrupt institutions in the country, but it also prolonged its stay in power until 1999 when it was chased out by post-Cold War pro-democracy riots.

²¹⁷ *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803).

²¹⁸ Mbaku, “Constitutionalism and Governance in Africa”.

example, in Cameroon, “[c]onstitutional supremacy and the attempted separation of powers is compromised by the creation of an ‘imperial president of the Republic’ who has the powers to manipulate the legislature and the judiciary freely.”²¹⁹ Hence, it is virtually impossible for the judiciary and the legislature to serve as an effective check on the executive branch.

3. Independence of the Judiciary

In the fight against corruption, no domestic institution has more significance than the judiciary. Unfortunately, judicial systems in both Cameroon and Nigeria are unable to function effectively as anti-corruption instruments because of the lack of independence. Both countries do not enjoy a history or tradition of judicial independence. Consequently, whatever independence the judiciary has is based on constitutional provisions and any other statutory guarantees.

Cameroon’s constitution states that “[j]udicial [p]ower shall be independent of the executive and legislative powers,”²²⁰ but then goes on to declare that “[t]he President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal department.”²²¹ The practice in Cameroon and in Nigeria, is not judicial independence. Judiciaries in both countries, due primarily to the structures of their constitutions and to the absence of a tradition and history of judicial independence, have become effective tools for the executive branch to control and dominate governance and engage, with impunity, in various forms of opportunism for personal benefit.²²²

Many countries have been able to pull themselves out of corruption and moral decay and engage in productive activities, which have generated for them the wealth that they need to deal with

²¹⁹ Fombad, *supra* note 27 at 247.

²²⁰ Cameroon, *Constitution of the Republic of Cameroon*, 20 May 1972, (entered into force 2 June 1972), art. 37(2). [*Cameroon Constitution*], online: University of Richmond < <http://confinder.richmond.edu/admin/docs/Cameroon.pdf>>.

²²¹ *Ibid.*, art. 37(3).

²²² As research by Professor Charles Manga Fombad has shown, the president used the judiciary effectively to win elections in 1996 and 1997. For example, prior to these elections, a presidential decree was issued doubling the salaries of judicial officers. Salaries of Supreme Court judges, whose job it is to certify the results of each election, including the presidential election, were increased by almost 200 percent, in addition to a bundle of various perks and privileges. See Fombad, *supra* note 27 at 247-48.

poverty and material deprivation. As is the case with many of today's developed countries, the ability to achieve such "miraculous" results requires decisive action to establish institutional arrangements that adequately constrain the state and effectively prevent its custodians from engaging in political opportunism.

V. CONCLUSION

After more than fifty years of independence, corruption continues to prevent Africans from creating the wealth that they need to deal effectively with endemic poverty. Therefore, corruption is presently one of the most challenging barriers to economic development in Africa.

In recognition of the critical part played by corruption in poverty and underdevelopment, African countries have developed and adopted the *AU Convention* to serve as a legal tool to combat corruption and its deleterious impact on their development efforts. In addition, African countries have also become parties to other anti-corruption conventions (e.g., the *UNCAC*) and hope that statutes in the developed countries (e.g., the United States' *FCPA*), which criminalize the bribery of foreign public officials, will help them in their efforts to deal effectively with this major development constraint. As I have argued in this paper, the success of any anti-corruption scheme in the continent will be determined, to a great extent, by the strength and efficacy of national institutional and judicial frameworks. Hence, the most important first step in fighting corruption in Africa must be state reconstruction to provide each country with effective and fully functioning institutional and judicial systems—those that adequately constrain civil servants and politicians and prevent them from performing their jobs in an arbitrarily and capricious manner and from behaving with impunity.

Of course, international laws such as the *UNCAC* and statutes in the developed countries that are designed specifically to regulate the conduct of global trade (e.g., the *FCPA* of the United States), should complement the domestic efforts of African countries and significantly enhance the ability of the latter to deal with corruption. Thus, while international legal instruments, such as the *UNCAC* may be able to help Africa in its fight against corruption, the quality of each African country's legal system remains the critical element in the anti-corruption movement.