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Introduction

"Little did we suspect," remarked Nelson Mandela, "that our own people, when they get that chance, would be as corrupt as the apartheid regime. That is one of the things that has really hurt us."[1] Africa is the only continent that has grown poorer over the last three decades.[2] The causes of Africa's existing predicaments are complex;[3] however, there is no argument that deep-rooted corruption is one of the most serious contemporary developmental challenges facing the continent.[4] Mr. Adama Dieng,

1. *See* ROBERT GUEST, THE SHACKLED CONTINENT 232 (2005) (citing Howard Barrell & Sipho Seepe, *A Sense of Hope*, MAIL & GUARDIAN (Johannesburg), Mar. 2, 2001).

2. According to the World Bank, more than 314 million Africans now live on less than $1 per day. *See* The World Bank, Africa - Regional Brief, http://www.worldbank.org (follow "Countries" hyperlink, then follow "Africa" hyperlink, then follow "Overview" hyperlink, then follow "Regional Brief" hyperlink) (last visited Sept. 6, 2007). The number of Africans so situated is nearly twice as many as in 1981. *See id.*

3. A simplistic indicator of the predicament is the following often repeated fact: Fifty years after the first colony in Africa gained independence, the continent is poorer and its capacity to manage its affairs weaker than it was before. By economic measurements, after three decades and $550 billion in aid, the African poor are poorer. Michael Holman, *An Africa That Takes Care of Itself*, L.A. TIMES, May 23, 2006, at B13. Every year, the same amount of money that Africa receives in aid, estimated at about $15 billion, pours out of the continent. *See id.* Approximately 40% of Africa's savings are held in accounts outside the continent—in stark contrast to 6% in East Asia and 3% in South Asia. *See id.* Moreover, every year about 70,000 trained Africans leave the continent to work in the developed world. *See id.*

4. The World Bank estimates that corrupt governments, along with their business partners, take in excess of $1 trillion in bribes each year and more subtle forms of corruption vitiate another $1.5 trillion in procurement decisions. *See* Transparency International - USA Program: Fighting Global Corruption, http://www.transparency-usa.org/intro.html (last visited Sept. 6, 2007). The former U.N. Secretary General Kofi Annan called corruption "one of the biggest obstacles to development." *See* Kofi Annan, Sec'y Gen., United Nations, Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption (Oct. 31, 2003), *available at* http://

who the Secretary General of the Organization of African Unity (OAU), the precursor of the African Union (AU), entrusted with the task of studying the legal, political, and economic implications of corruption in Africa, stated in his 2004 report that "corruption and impunity are antithetical to the enjoyment of economic, social and cultural rights and the enemy of the principle of good governance."[5] Cognizant of this fact, the AU adopted the Convention on Preventing and Combating Corruption (AU Corruption Convention).[6] Foremost among its objectives is promoting development through preventing, detecting, and punishing acts of corruption.[7] By no means unique, the AU Corruption Convention is the latest in a series of international efforts to combat corruption through international law.[8] Although the very adoption and entry into force of the AU Corruption Convention is a significant step, its real impact will depend on several crucial considerations, including clarity of the substantive obligations imposed, conformity of the newly adopted norms with existing legal and human rights obligations, proper municipal implementation of these norms, good governance, proper monitoring, and robust international enforcement.

This Article makes a timely effort to evaluate the recently adopted AU Corruption Convention in light of existing international legal norms relating to corruption, which will inevitably inform and shape its future progress. More particularly, this Article endeavors to characterize the AU Corruption Convention's approach to combating corruption and discern lessons regarding interpretation, implementation, and enforcement from other pre-existing instruments.

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www.unodc.org/unodc/en/speech_2003-10-31_1.html. The *Independent* reported that in 2005 alone, the amount of capital that flowed into the United Kingdom (U.K.) from African and South American countries, where it is most needed, amounted to $385 billion, dwarfing the aid that the U.K. offers these nations on a yearly basis. *See* Philip Thornton, *Third World Cash Exodus 'Points to Laundering,'* INDEP. (London), May 16, 2006, at Bus.-47. *Africa News* reported that Bono stated that "[t]he small 'c' in corruption is like a plague as deadly as the HIV virus and it is not just the businessman, and the ones that are hurt the most are the ones that have nothing." *Bono Urges African Leaders to Tackle Corruption*, AFRICA NEWS, May 23, 2006, http://www.veritate.net/edm/viewer.jsp?m=6ynN&s=kRaHLU.

5. *See* Kolawole Olaniyan, *Introductory Note to African Union (AU): Convention on Preventing and Combating Corruption*, 43 I.L.M. 1, 3 (2004). Adama Deing later became the registrar of the International Criminal Tribunal for Rwanda (ICTR).

6. *See* African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf [hereinafter AU Corruption Convention]. The AU Corruption Convention entered into force on August 5, 2006, upon the ratification of the fifteenth African nation. Twenty-one nations have ratified the AU Corruption Convention as of the publication of this article. They are: Algeria, Burkina Faso, Burundi, Comoros, Congo, Kenya, Libya, Lesotho, Madagascar, Mali, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe. *See* AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION (2007), *available at* http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf.

7. *See* AU Corruption Convention, *supra* note 6, art. 2.

8. For a discussion of the initiation and development of these instruments, see *infra* Part I.

The Article is divided into two parts. Part I offers background information on corruption and describes pre-existing legal efforts to combat the phenomenon. The pre-existing legal instruments of international significance include the United States Foreign Corrupt Practices Act,[9] the United Nations Convention Against Corruption,[10] the Organization for Economic Cooperation and Development Anti-Bribery Convention,[11] and the Inter-American Convention Against Corruption.[12] Part II offers a comparative analysis of the most important provisions of the AU Corruption Convention and these instruments, identifying commonalities and divergences in

9. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1415, *amended by* the International Anti-Bribery and Fair Competition Act of 1988, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to -3, 78ff (1998)) [hereinafter FCPA]. Although the FCPA was a domestic legislative initiative intended to combat international corruption, it is the primary source of the international initiatives that followed. *See, e.g.*, Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 192 (2005) (noting that the United States' outlawing of international bribery in 1977 was the earliest attempt to combat international corruption by law). A comparison of the FCPA with the AU Corruption Convention is important not only because the FCPA is the primary source of the international initiatives that followed but also because many of the substantive provisions share the same characteristics. As a result, the jurisprudence of the FCPA can properly inform an interpretation of the AU Corruption Convention.

10. United Nations Convention Against Corruption, U.N. Doc. A/58/422 (Oct. 7, 2003), *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf [hereinafter UNCAC]. As of the publication of this article, 140 countries have signed the treaty, of which 95 have ratified it. *See* United Nations Office on Drug & Crimes, United Nations Convention Against Corruption, *Ratification/Signatories*, http://www.unodc.org/unodc/crime_signatures_corruption.html (last visited Sept. 6, 2007).

11. Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Corruption Convention]. Thirty-seven countries have ratified this treaty. *See* Organisation for Econ. Co-operation & Dev., Anti-Bribery Convention, http://www.oecd.org/department/0,2688,en_2649_34859_1_1_1_1_1,00.html (last visited Sept. 6, 2007). A discussion of the Council of Europe's Corruption and Criminal Law Convention is not included because it does not significantly depart from the other instruments either structurally or substantively. Additionally, the European regional approach is more or less represented by the OECD Corruption Convention. *See* Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505, *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm. A number of other regional and sub-regional legal instruments tackle the phenomenon of transnational corruption in different ways; however, a discussion of these instruments is not included in this article in the interest of avoiding duplication. Examples of these instruments include: (1) the Economic Community of West African States (ECOWAS) Protocol on the Fight Against Corruption, (2) the Southern African Development Community Protocol Against Corruption, and (3) the Convention on the Protection of the European Communities' Financial Interests.

12. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/Treaties/b-58.html [hereinafter IACAC]. Thirty-three of the thirty-four OAS member states have signed and ratified the IACAC. *See* Interamerican Anti-Corruption Convention: Access to Information, http://www.transparency.org/global_priorities/access_information/conventions/interamerican_anti_corruption_convention (last visited Sept. 7, 2007).

their substantive and procedural prescriptions and fundamental approaches.

I. Background

A. The Nature of Corruption and Its Impact on Economic Performance

In metaphorically explaining the scarcity of definitive economic studies regarding the impact of corruption on economic performance, Nicholas Sanchez and Alan R. Waters suggest that "corruption is like sex was in Victorian England: it absorbs intense activity and is the subject of much speculation, but it is seldom considered a suitable topic for serious economic analysis."[13] They acknowledge, however, the overwhelming evidence that:

> [e]very revolution in the less developed world has been at least partially inspired by the desire to drive out corrupt rulers and officials, replacing them with honest men and raising the moral tenor of society. But the process is never completed. One regime replaces another, and the corruption appears again.[14]

The source of the greatest challenge relating to corruption in economically underdeveloped countries is perhaps the very fact that political power is often the main, if not the sole, source of economic benefit.[15] The challenges are indeed difficult, because the fight is essentially against one's own self in the face of immense corrupting influences.

The adverse macroeconomic impact of corruption is becoming increasingly evident. For example, empirical studies suggest that, at a minimum, corruption lowers investment, which in turn adversely affects overall economic performance.[16] Perhaps more importantly, corruption undermines social welfare by redistributing a nation's wealth in a manner that generates tensions or exasperates existing ones.[17] The consequences

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13. Nicholas Sanchez & Alan R. Waters, *Controlling Corruption in Africa and Latin America*, *in* THE ECONOMICS OF PROPERTY RIGHTS 279 (Eirik G. Furubotn & Svetozar Pejovich eds., 1974). Ronald Wraith and Edgar Simpkins opine to the same effect: "It is frustrating to try to write, one's phrases wrapped in a cocoon of ambiguity, about something which everybody knows, which no one dares openly to acknowledge, which can rarely be proved and which may lead to serious trouble if one is in the least incautious . . . . Of corruption among the common or less gifted citizens one may write a little more freely." RONALD WRAITH & EDGAR SIMPKINS, CORRUPTION IN DEVELOPING COUNTRIES 14 (1964).

14. *See* Sanchez & Waters, *supra* note 13, at 279.

15. *See, e.g.*, Yemi Osibajo, *Human Rights, Economic Development and the Corruption Factor*, *in* HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA 121 (Paul Zeleza & Philip McConnaughay eds., 2004) (citing JACQUELINE COOLIDGE & SUSAN ROSE-ACKERMAN, HIGH LEVEL RENT SEEKING AND CORRUPTION IN AFRICAN REGIMES: THEORY AND CASES (1997)) (suggesting that political power simply means economic power).

16. *See id.* at 125 (citing Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995); Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681 (1995)).

17. For an analysis of distributive issues, see, e.g., EDWARD ROLLA PARK, EFFECT OF GRAFT ON ECONOMIC DEVELOPMENT: AN EXAMINATION OF PROPOSITION FROM LITERATURE (1969).

of corruption in less stable societies can indeed be dramatic. Jeremy Pope of Transparency International has suggested that "to any observer, it is clear that a quantum shift has taken place. Whereas in former times the people of a country crippled by corruption would have looked to the army to topple the tyrants, today, in many parts of the world, they march to do it for themselves."[18]

Nobel Laureate Oscar Arias Sanchez has remarked:

> When the public at large demonstrate for more accountability and decent government in so many countries of the world they are motivated, to no small extent, by anger over corruption: corruption that humiliates the poor who must bribe officials for minimal services; corruption that bankrupts the honest trader; corruption that empowers unscrupulous captains of commerce and their partners, dishonest politicians; corruption which spreads like a cancer to kill all that is decent in society.[19]

The task of combating corruption is a daunting one with no simple answers. It is a never-ending evolution. Establishing an international legal regime is but one essential component that drives the process forward.

B. Combating International Corruption by Law

Professor Peter Schroth suggests that "any discussion of international measures against corruption and bribery must begin with the United States."[20] The suggestion is valid because the controversies surrounding President Richard Nixon's presidency relating to the Watergate incidents of 1972[21] could rightfully be characterized as the *sine qua non* of contemporary efforts to combat corruption by law.[22]

In early 1974, investigations linked to Watergate revealed, *inter alia*, several instances of money laundering through foreign countries and the

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18. Jeremy Pope, *Corruption in Africa: The Role for Transparency International*, *in* CORRUPTION, DEMOCRACY AND HUMAN RIGHTS IN EASTERN AND CENTRAL AFRICA 143 (Ayodele Aderinwale ed., 1995). Pope mentions the following examples:

> People everywhere are on the move: In Bangladesh they choked the streets of Dhaka to bring down a corrupt President Ershad; in Latin America thousands of "painted faces" took to the streets to depose President Collor of Brazil; Guatemala's President Elias fled the country as Nobel Peace Prize winner Rigoberta Menchu addressed thousands of citizens on the streets of Guatemala City. Earlier, the people of the Philippines had defied the army to shoot as they marched through the streets of Manila to bring down the corrupt regimes of President Marcos. The list goes on.

Id. at 142.

19. *Id.* at 139. Arias Sanchez made this statement at the opening of the Transparency International Offices in Berlin in November 1993. *Id.*

20. *See* Peter W. Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws Against Corruption*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 83, 87 (2003).

21. Over the years, Watergate has attracted extensive coverage. For a comprehensive discussion, see ANTHONY SUMMERS, THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON (2000).

22. *See generally* Peter W. Schroth, *The United States and International Bribery Conventions*, 50 AM. J. COMP. L. 593, 593-98 (2002).

use of campaign funds to bribe foreign officials.[23] Because U.S. multinational corporations were implicated in the investigations, the Securities and Exchange Commission (SEC) began to conduct its own investigations of illegal payments that these corporations made in foreign countries.[24] These inter-related investigations contributed to President Nixon's resignation on August 8, 1974.[25] The congressional corruption investigations and hearings, however, did not end with Nixon's resignation. Over the next three years, the SEC gathered admissions from four hundred U.S. multinational corporations that they made payments amounting to $300 million in bribing foreign officials.[26] One hundred and seventy-seven of the multinationals that admitted corrupt practices or bribery were Fortune 500 companies, including Exxon and Lockheed Martin.[27] The recipient foreign public officials included Japanese Prime Minister Tanaka Kakuei, Prince Bernhard of the Netherlands, and Italian Prime Minister Giovanni Leone.[28]

The newly discovered magnitude of the problem called for an international effort, which the United States spearheaded.[29] The diplomatic effort, however, was limited to declarations and condemnations.[30] By April 1976, the SEC discovered serious improprieties on the part of multinationals, but the adverse publicity failed to produce serious remedial measures. Only three corporations forced the resignation of their chief executive officers, and, moreover, no prosecutions ensued.[31] Lockheed Martin, the largest government contractor at that time, reported increased profits that year.[32] Noting these facts, Senator William Proxmire introduced a bill to the Senate on April 5, 1976,[33] which triggered the introduction of other bills and hearings that culminated in the enactment of the

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23. *See* Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 348-50 (2000).

24. *See id.* at 349.

25. *See* Schroth, *supra* note 22, at 595.

26. *See id.* (citing SECURITIES & EXCHANGE COMM'N, 94TH CONG., 2ND SESS., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1, 1 (Comm. Print 1976); HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 95-640, at 4 (1977)).

27. Schroth, *supra* note 22, at 595.

28. *Id.* at 595-96.

29. *Id.* at 597.

30. For example, on July 10, 1975, the United Nations General Assembly adopted a resolution condemning corruption by transnational corporations and others involved in corruption. *See* Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, G.A. Res. 3514, U.N. GAOR, 30th Sess., Supp. No. 34, at 69, U.N. Doc. A/10034 (1975). The Organization of American States also passed a resolution against acts of international bribery and related offenses. Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to Be Observed by Such Enterprises, July 10, 1975, 14 I.L.M. 1326 (1975). None of the provisions in these resolutions has the force of law. Schroth, *supra* note 22, at 593.

31. *See Foreign and Corporate Briberies: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1976).

32. *See* Posadas, *supra* note 23, at 354.

33. *See id.*

Foreign Corrupt Practices Act of 1977 (FCPA).[34] This unprecedented Act was the first national legislation to criminalize foreign bribery.[35]

From 1977 to 1996, the FCPA was the only law that targeted international corruption.[36] The Organization of American States' Inter-American Convention Against Corruption (IACAC), which came into effect twenty years after the FCPA, was the first binding international convention aimed at combating corruption.[37] On March 29, 1996, a specialized conference of thirty-four member states of the Organization of American States adopted the IACAC, which entered into force on March 6, 1997, marking the beginning of an international legal regime to combat corruption.[38]

The next important international development relating to corruption was the adoption of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Corruption Convention) in November 1997.[39] Because European multinationals had no parallel legal obligations to abstain from certain business practices in foreign countries, the U.S. business community perceived the FCPA as a disadvantage and strongly pushed for the OECD corruption initiative.[40] Taking note of this concern, the U.S. Congress amended the FCPA in 1998 and advised the President to negotiate with the United States' major trading partners at the OECD.[41] After lengthy negotiations, the OECD Corruption Convention entered into force on February 15, 1999, becoming the second international convention aimed at combating international corruption.[42]

The increasing consciousness of the adverse global economic consequences of corruption brought previously regional efforts to combat corruption through international law to the global level.[43] On January 22, 2001, the U.N. General Assembly declared, in Resolution 55/61, that a global international convention was necessary to combat international corruption.[44] On October 31, 2003, the General Assembly adopted the United Nations Convention Against Corruption (UNCAC) in Resolution

34. *Id.* at 357-58. The FCPA amended the 1934 Securities and Exchange Act and is codified under 15 U.S.C. §§ 78dd-1 to -2.

35. *See* Posadas, *supra* note 23, at 359.

36. *See* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 244 (1998).

37. *Id.*

38. *Id.*

39. *See* Posadas, *supra* note 23, at 381.

40. According to the U.S. Department of Commerce, between 1993 and 1996, U.S. business lost an estimated $100 billion from differences in the regulation of international corrupt practices. *See* Richard Lawrence, *US Anti-Corruption Drive Pays*, J. COMM. (Newark), Jun. 20, 1996, at 1A. For example, European nations such as France and Germany not only allowed the provision of "courtesies," but have also offered tax deductions for such "courtesies." Posadas, *supra* note 23, at 376.

41. The amendment is codified at 15 U.S.C. § 78dd-1.

42. *See* Posadas, *supra* note 23, at 380.

43. *See* Webb, *supra* note 9, at 192.

44. *See* G.A. Res. 55/61, U.N. Doc. A/RES/55/61 (Jan. 22, 2001).

58/4.[45] Ninety-seven nations signed this Convention at a ceremony held in Merida, Mexico in December 2003.[46] The UNCAC entered into force on December 14, 2005, following the September 15, 2005 ratification by the thirtieth state.[47] As of the publication of this article, ninety-five states have ratified the UNCAC and 140 have signed the Convention.[48]

At about the same time that these international initiatives were underway, anti-corruption efforts also surfaced in Africa. The use of law to tackle the problem of corruption in Africa dates back to 1998. In 1998, at the Thirty-Fourth Ordinary Session held in Ouagadougou, Burkina Faso, the Assembly of Heads of State and Governments of the OAU first expressed its determination that corruption posed a significant problem to the continent.[49] The Assembly gave the Secretary General the task of convening a commission of experts to study means of combating, *inter alia*, corruption and impunity.[50] The Secretary General then assigned Mr. Adama Dieng to study the consequences of corruption in Africa.[51] Mr. Dieng subsequently submitted his report, along with a draft convention, that proved to be one of the key background materials that aided the negotiation process ultimately resulting in the AU Corruption Convention.[52] At a more practical level, perhaps the most significant effort in the evolution of anti-corruption efforts in Africa was the February 1999 adoption of a framework comprising twenty-five anti-corruption principles.[53] These principles, subscribed to by eleven countries, focused on containing corrupt practices relating to international business transactions and promoting external development assistance to Africa.[54]

In November 2001, the AU assigned a committee of legal experts to

45. United Nations Convention Against Corruption, http://www.unodc.org/unodc/en/crime_convention_corruption.html (last visited Sept. 7, 2007).

46. *See* Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law: Adoption of U.N. Convention Against Corruption*, 98 AM. J. INT'L L. 182, 184 (2004).

47. *See* United Nations Convention Against Corruption, http://www.unodc.org/unodc/crime_signatures_corruption.html (last visited Sept. 7, 2007).

48. *Id.* The African nations that have ratified the UNCAC include Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Djibouti, Egypt, Kenya, Lesotho, Liberia, Libya, Madagascar, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Uganda, and Zimbabwe. *See id.*

49. ASSEMBLY OF HEADS OF STATE & GOV'T, DECLARATIONS AND DECISIONS ADOPTED BY THE THIRTY-FOURTH ORDINARY SESSION OF THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT ¶ 6 (1998), *available at* www.africa-union.org/root/au/Documents/Decisions/hog/8HoGAssembly1998.pdf; *see also* Olaniyan, *supra* note 5, at 2.

50. Olaniyan, *supra* note 5, at 2.

51. *Id.*

52. *Id.* The negotiation process included two meetings of experts in Addis Ababa, Ethiopia, from November 26-29, 2001 and September 16-17, 2002. Numerous international and regional organizations, including the World Bank, Transparency International, United Nations Development Program, and the African Development Bank, attended the negotiations. *Id.*

53. *See* Alhaji B.M. Marong, *Toward a Normative Consensus Against Corruption: Legal Efforts of the Principles to Combat Corruption in Africa*, 30 DENV. J INT'L L. & POL'Y 99, 99-100 (2002).

54. *Id.* Shortly thereafter, some sub-regional efforts also took effect. *Id.*

draft an anti-corruption convention.[55] The draft, called the African Union Convention on Preventing and Combating Corruption, was approved at a ministerial conference on September 18-19, 2002.[56] The African Union Assembly adopted the draft during its meeting in Maputo on July 10-12, 2003,[57] and the AU Corruption Convention entered into force on August 5, 2006 upon the ratification of the fifteenth nation.[58] As of the publication of this Article, the AU Corruption Convention has been ratified by twenty-one states.[59]

C. Description of Key Anti-Corruption Legal Instruments

To set the stage for the comparative analysis in Part II, this section provides a brief description of the structure and content of all the legal instruments described above with the exception of the OECD Corruption Convention. The essential provisions of the OECD Corruption Convention have been incorporated into the FCPA and are discussed as part of the FCPA.[60] The description begins with the FCPA because, although a domestic law, the substantive provisions of the FCPA served as a model for all of the international conventions; the AU Corruption Convention is the latest beneficiary of the model.[61] Moreover, because the provisions of the AU Corruption Convention will be implemented through the domestic laws of State Parties,[62] a comparison with an important and effective domestic legal instrument such as the FCPA is particularly useful.

1. *United States Foreign Corrupt Practices Act (FCPA)*

In pursuing its objective of combating corrupt practices in international business, the FCPA sets forth two interrelated major components: (1) compliance and (2) civil or criminal penalties.[63] The first component establishes record-keeping standards,[64] and the second component makes

55. *See* Schroth, *supra* note 20, at 89-90.
56. *Id.*
57. *Id.*
58. *See* AFRICAN UNION, *supra* note 6.
59. *Id.*
60. Congress incorporated the essential provisions of the OECD Corruption Convention into U.S. law through the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302. This Act amended the FCPA in several respects: (1) it expanded the scope of its coverage to include any person in U.S. territory who violates the FCPA regardless of whether that person is an issuer or a domestic concern, FCPA, *supra* note 9, § 78dd-3, (2) it broadened the territorial jurisdiction by adding alternative grounds, *id.* §§ 78dd-1(g), 78dd-2(i), (3) it extended the definition of corrupt practices to include offering things of value for the purpose of "securing any improper advantage," *id.* § 78dd-1(a)(1)(A)(iii), and (4) it added officials of public international organizations to the definition of "public official," *id.* § 78dd-1(f)(1)(A). Because the description of the FCPA given in Part I.C.1 includes all of these newly incorporated principles, a separate discussion of the OECD Corruption Convention would be redundant.
61. *See generally* AU Corruption Convention, *supra* note 6.
62. *Id.* arts. 7(2), 17(1), 22(7).
63. *See generally* FCPA, *supra* note 9.
64. *See id.* § 78m(b).

certain foreign trade practices illegal.[65] These standards apply to three categories of natural and juridical persons, which are designated by terms of art: "issuers,"[66] "domestic concerns,"[67] and "persons other than issuers and domestic concerns."[68]

The FCPA does not define the term "issuer;" however, it is clear from the usage that it refers to juridical persons or companies that have a class of securities registered pursuant to the amended Securities and Exchange Act of 1934.[69] The FCPA defines the term "domestic concern" as:

> (A) any individual who is a citizen, national, or resident of the United States;
> (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.[70]

The term "persons other than issuers and domestic concerns" covers almost everyone who engages in international trade while in the territory of the United States by any means of doing business.[71] The three categories cumulatively cover almost every conceivable natural and juridical person engaged in an international commercial activity with any ties to the United States.

The provisions that prescribe record-keeping standards apply only to issuers and require the keeping of records "in reasonable detail, accurately and fairly reflecting the transactions and dispositions of the assets of the issuer."[72] The provisions also require that issuers establish a system of accounting and record keeping designed to offer "reasonable assurances" of compliance.[73] Failure to comply with these record-keeping provisions results in civil and criminal penalties.[74]

The provisions that criminalize international bribery and related offenses regulate all three categories of natural or juridical persons.[75] Perhaps the most important substantive provision of the FCPA is the section that defines unlawful conduct. It states that "[i]t shall be unlawful . . . to

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65. *See id.* §§ 78dd-1 to -3.
66. *See id.* §§ 78m, 78dd-1.
67. *See, e.g., id.* § 78dd-2.
68. *See id.* § 78dd-3.
69. *See generally id.* §§ 78m, 78dd-1.
70. *See id.* § 78dd-2(h)(1).
71. *See id.* § 78dd-3(a)(1). All the substantive prohibitions are identical. *See id.* § 78dd-3.
72. *See id.* § 78m(b)(2).
73. *See id.* § 78m(b)(2)(b). The Act defines the terms "reasonable assurances" and "reasonable detail" as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." *Id.* § 78m(b)(7).
74. *See generally id.* § 78ff. Willful violation may result in imprisonment for up to 20 years. *See id.* § 78ff(a).
75. Although the three categories are codified in three different sections, the sections contain identical language. *See generally id.* §§ 78dd-1 (relating to issuers); *id.* § 78dd-2 (relating to domestic concerns); *id.* § 78dd-3 (relating to persons other than issuers and domestic concerns).

make use of the mail or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value."[76] Under the FCPA, for these offers, payments, or promises to be unlawful, they need to be provided to at least one of three categories of persons: foreign officials,[77] foreign political parties or candidates, or third persons who may act as intermediaries "while knowing" that the intermediaries would offer all or part of such benefits to the former two categories.[78] Most importantly, such offers, payments, or promises must be made for purposes of:

> (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
>
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, [i]n order to assist such issuer [or domestic concern] in obtaining business for or with, or directing business to, any person.[79]

The use of mail and other means of interstate commerce is a jurisdictional ground on which to hold issuers and domestic concerns who engage in the defined unlawful conduct responsible in the United States. The FCPA also establishes an alternative jurisdictional ground for conduct that takes place exclusively in foreign countries without the use of any means or instrumentality of interstate commerce. It states in relevant part that "[i]t shall be unlawful . . . to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the giving of anything of value . . . irrespective of . . . the use of the mail or any means or instrumentality of interstate commerce."[80]

The FCPA provides for an exception to the general rule and establishes two affirmative defenses. The exception provision states that the prohibi-

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76. *See id.* §§ 78dd-1(a), 78dd-2(a).

77. The Act defines foreign officials to include: "[a]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *Id.* § 78dd-1(f)(1).

78. *See id.* §§ 78dd-1(a)(1)-(3), 78dd-2(a)(1)-(3). According to the Act:

> A person's state of mind is 'knowing' with respect to conduct, a circumstance, or a result if – (i) such person is aware that such person is engaged in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person had a firm belief that such circumstance exists or that such result is substantially certain to occur. (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

Id. § 78dd-2(h)(3)(A)-(B).

79. *See id.* §§ 78dd-1(a)(1)-(3), 78dd-2(a)(1)-(3).

80. *See id.* § 78dd-1(g).

tion "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."[81] As will be discussed in Part II.A.3.c, this obviously controversial defense for the performance of routine government services is not available under the AU Corruption Convention.

The two affirmative defenses established by the FCPA are: (1) "[t]he payment, gift, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, or candidate's country"[82] and (2) such payments are a "reasonable and bona fide expenditure such as travel and lodging."[83] As discussed in Part II, the AU Corruption Convention would render the first affirmative defense completely irrelevant by criminalizing the receipt of every conceivable reward.

The FCPA prescribes severe civil and criminal penalties for violations of any one of the provisions by any of the natural and juridical persons subject to the statute's authority.[84] If enforcement authorities prove willful disregard of the statute, penalties for natural persons may include imprisonment for up to twenty years.[85]

The SEC and the Attorney General enforce violations of the FCPA. The SEC enforcement authority is limited to instances where securities are involved, and the penalty is limited to civil fines.[86] In contrast, the Attorney General is given significant compliance and enforcement authority, and is empowered to issue guidelines[87] and opinions,[88] seek injunctions,[89] administer oaths, subpoena witnesses, and compel the production of relevant evidence.[90] Importantly, the Attorney General may also pursue criminal prosecutions.[91]

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81. *See id.* § 78dd-1(b). The term "routine governmental action" is defined as:
> an action which is ordinarily and commonly performed by a foreign official in – (i) obtaining permits, licenses, or other documents to qualify a person to do business in a foreign country; (ii) processing government papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance, or inspections related to transit of goods across country; (iv) providing phone services, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

Id. § 78dd-1(f)(3).

82. *See id.* § 78dd-1(c)(1).

83. *See id.* § 78dd-1(c)(2).

84. *See generally id.* §§ 78dd-2(g), 78ff.

85. *See id.* § 78ff(a).

86. *See id.* § 78u-1(a).

87. *See id.* § 78dd-1(d).

88. *See id.* § 78dd-1(e).

89. *See id.* §§ 78dd-2(d), 78dd-3(d).

90. *See id.* § 78dd-2(d).

91. *See generally id.* §§ 78dd-1 to -3. For U.S. Department of Justice criminal investigation and prosecution policy, see generally 9-47.000 Foreign Corrupt Practices Act of 1977 (As Amended), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/47mcrm.htm (last visited Sept. 7, 2007).

2. *Inter-American Convention Against Corruption (IACAC)*

The IACAC was designed with three major objectives: (1) to prevent corrupt practices,[92] (2) to criminalize and punish corrupt practices,[93] and (3) to ensure international cooperation in enforcement efforts.[94]

The IACAC contains several provisions aimed at achieving these policy objectives,[95] which can be broadly categorized into substantive and procedural provisions. The substantive provisions set forth appropriate preventative measures, define crimes, and provide the scope of the IACAC's coverage.[96] Because the IACAC's enforcement depends on domestic legislative implementation and international cooperative measures, the procedural provisions provide for the international obligations that must be undertaken to completely enforce the substantive provisions of the Convention.[97]

With respect to the preventative measures of the substantive provisions, the IACAC obligates State Parties to establish "[s]tandards of conduct for the correct, honorable, and proper fulfillment of public functions" commensurate with a list of eleven detailed guidelines.[98] The most important guidelines are registering incomes and liabilities of public officials, transparent procurement and hiring, revoking tax incentives for corrupt practices, encouraging anonymous reporting of corrupt practices, establishing oversight bodies, and maintaining proper records.[99]

With respect to defining crimes, the IACAC assumes three broad categories: acts of corruption,[100] transnational bribery,[101] and illicit enrichment.[102] As defined under the IACAC, acts of corruption have two dimensions: the solicitation-or-acceptance dimension and the offering-or-granting dimension. These are designed to combat corrupt practices from both the demand and supply ends.[103]

For both dimensions, the IACAC defines illegal conduct using identi-

92. *See* IACAC, *supra* note 12, art. II ("To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption.").

93. *See id.*

94. *See id.* art. II(2) ("To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.").

95. *See id.*

96. *See id.* art. I (Definitions), III (Purposes), V (Jurisdiction), VIII (Transnational Bribery), IX (Illicit Enrichment).

97. *See id.* art. V (Jurisdiction), VII (Domestic Law), X (Notification), XI (Progressive Development), XII (Effect on State Property), XIII (Extradition), XIV (Assistance and Cooperation), XV (Measures Regarding Property), XVI (Bank Secrecy), XVIII (Central Authorities).

98. IACAC, *supra* note 12, art. III.

99. *See id.* art. III(4)-(5), (7)-(10).

100. *See id.* art. VI.

101. *See id.* art. VIII.

102. *See id.* art. IX.

103. *See, e.g., id.* art. VI(1)(a)-(b).

cal language.[104] The IACAC prohibits both the direct or indirect "solicitation or acceptance" by or "offering or granting" to "a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions."[105] The IACAC also criminalizes "any act or omission in the discharge of . . . duties . . . for the purpose of illicitly obtaining benefit."[106] In addition, it establishes inchoate offenses relating to the proscribed conduct, namely "[p]articipation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article."[107] The IACAC also makes "[t]he fraudulent use or concealment of property" obtained as a result of corruption a criminal act in and of itself.[108]

The IACAC singles out transnational bribery and illicit enrichment for separate treatment.[109] The transnational bribery provision has both substantive and procedural aspects. It defines the crime of transnational bribery in exactly the same way as it does corrupt practices.[110] Principally, however, it obligates State Parties to proscribe the crime of transnational bribery in their domestic laws and sets forth the jurisdictional grounds for doing so.[111]

Perhaps the most controversial of all the provisions of the IACAC is that pertaining to "illicit enrichment." The IACAC defines "illicit enrichment" as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."[112] The IACAC uniquely defines "illicit enrichment" as a criminal offense.[113] For obvious constitutional and jurisprudential concerns, the provision that defines the crime of "illicit enrichment" is limited, applying "[s]ubject to its Constitution and the

104. *See id.*
105. *Id.*
106. *Id.* art. VI(1)(c).
107. *Id.* art. VI(1)(e).
108. *Id.* art. VI(1)(d).
109. *See id.* art. VIII, IX.
110. *See id.* art. VIII; *cf.* art. VI (defining acts of corruption).
111. The IACAC provides:

> Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another state, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.

Id. art. VIII.
112. *Id.* art. IX.
113. *See, e.g., id.*

fundamental principles of [the State Party's] legal system."[114]

The IACAC does not expressly establish any exceptions or affirmative defenses; however, the use of the just-mentioned language "[s]ubject to its Constitution and the fundamental principles of its legal system" in some of the substantive provisions suggests that exceptions and affirmative defenses may be established under municipal laws as long as they are not contrary to the object and purpose of the IACAC.

The IACAC's procedural provisions accomplish two primary objectives: setting forth jurisdictional grounds and laying out enforcement mechanisms.[115] The jurisdictional provisions follow traditional grounds, including the commission of the crime in the territory of the state, the commission of the crime by nationals or habitual residents of the state, and the presence of the offender within the state.[116] The IACAC does not foreclose the possibility of invoking other jurisdictional grounds as may be appropriate under the municipal criminal laws of State Parties.[117]

The enforcement provisions are detailed and primarily require that the State Parties establish criminal offenses in their municipal laws.[118] The IACAC obligates each State Party to enforce the provisions regardless of whether any injury to state property occurred.[119] The State Parties are also required to cooperate among themselves to properly enforce the Convention's substantive provisions.[120] The most significant cooperation requirement relates to extradition of suspected offenders.[121] Other measures of enforcement cooperation include tracing, freezing, and seizing proceeds of corrupt practices,[122] forfeiting property involved in the corrupt practice,[123] and revoking bank secrecy defenses.[124] The IACAC also obligates State Parties to designate a central authority for assistance and cooperation.[125]

3. *United Nations Convention Against Corruption (UNCAC)*

The UNCAC, as a universal legal instrument, is more detailed and

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114. *Id.* Primarily meant to address some constitutional concerns of the United States and Canada relating to the crime of "illicit enrichment," this phrase has also been included in the definition of the crime of transnational bribery. *See id.* art. VIII.

115. *See id.* art. V (Jurisdiction), VII (Domestic Law), XI (Progressive Development), XIII (Extradition), XIV (Assistance and Cooperation), XV (Measures Regarding Property), XVI (Bank Secrecy), and XVIII (Central Authorities).

116. *See id.* art. V(1)-(3).

117. *See id.* art. V(4).

118. *See id.* art. V.

119. *See id.* art. XII ("For application of this Convention, it shall not be necessary that the acts of corruption harm State property.").

120. *See id.* art. XIV ("[S]tate parties shall afford one another the widest measure of mutual assistance by processing requests.").

121. *See id.* art. XIII.

122. *See id.* art. XV(1).

123. *See id.* art. XV(1)-(2).

124. *See id.* art. XVI ("The Requested State shall not invoke bank secrecy as a basis for refusal to provide the assistance sought by the Requesting State.").

125. *Id.* art. XVIII(1).

comprehensive than any of the regional instruments.[126] Its objectives are stated in simple terms:

> (a) [t]o promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) [t]o promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) [t]o promote integrity, accountability and proper management of public affairs and public property.[127]

The UNCAC contains seventy-one articles dealing with essentially every aspect of corruption from both the supply and demand sides.[128] It focuses on three major areas: prevention, criminalization, and enforcement. One chapter consists of ten detailed provisions that are dedicated to standards for the prevention of corrupt practices in both the public and private sectors.[129] Although some of its preventative rules are mandatory, others are permissive.[130] The preventative measures emphasize establishing policies, empowering independent monitoring bodies, promoting public awareness, and, most importantly, the State Parties' cooperation.[131] The detailed rules touch upon the principles that need to be followed in the course of recruiting, hiring, and promoting public sector officials.[132]

For the private sector, the UNCAC sets forth compliance rules pertaining to record keeping, accounting, and auditing.[133] It also mandates the prescription of civil and criminal penalties for failure to adhere to the compliance standards.[134] Most importantly, the UNCAC tackles the very difficult and sensitive issue of corruption related to the prosecutorial service and the judiciary. It requires State 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."[135] The same rule also applies to prosecutorial officials.[136]

Additionally, the Convention calls for effective participation of society, particularly civil society; non-governmental organizations; and community-based organizations. It also emphasizes the need for transparency

126. *See* UNCAC, *supra* note 10.
127. *Id.* art. 1.
128. *Id.*
129. *See generally id.* ch. II.
130. For example, Article 5(1) states that "[e]ach 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 management of public affairs and public property, integrity, transparency and accountability." *Id.* art. 5(1). Article 5(2), on the other hand, states that "[e]ach party shall endeavor to establish and promote effective practices aimed at the prevention of corruption." *Id.* art. 5(2).
131. *Id.* arts. 4-5.
132. *See, e.g., id.* art. 7.
133. *Id.* art. 12.
134. *Id.* art. 12(1).
135. *Id.* art. 11(1).
136. *Id.* art. 11(2).

in the management of public finances.[137]

Another important means of combating corruption in the UNCAC is the criminalization of certain practices, including bribery, embezzlement, trading influence, abuse of functions, and illicit enrichment.[138] The UNCAC also criminalizes indirect but related offenses, such as concealment of illegal proceeds and obstruction of justice,[139] and establishes inchoate offenses and offenses of complicity, including preparation, participation, and attempt.[140]

The criminalization provisions cover both the offering and accepting of bribes, favors, misappropriations, and diversions.[141] The provisions cover a wide variety of individuals, including officials of governments,[142] public international organizations,[143] and the private sector.[144] Some of the provisions dealing with government officials contain mandatory language, but others are stated in permissive language. For example, the main anti-bribery provision states that:

> Each State Party *shall adopt* such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or

137. *Id.* arts. 10, 13.

138. *Id.* arts. 15-23. Criminal liability relates to both the public and private sectors. *See id.* Juridical persons may also be held criminally responsible for these offenses. *Id.* art. 26.

139. *Id.* arts. 24-25.

140. *Id.* art. 27. Although the UNCAC uses mandatory language for the establishment of criminal responsibility for participation as an accomplice, assistant, or instigator, it uses permissive language for the criminalization and punishment of attempt and preparation. *Id.*

141. *Id.* arts. 15-20.

142. The UNCAC defines a "public official" as:

> (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;
> (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

Id. art. 2(a). The UNCAC also defines the related term of "[f]oreign public official" as "any person holding a legislative, executive or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise." *Id.* art. 2(b).

143. The UNCAC defines officials of public international organizations as "an international civil servant or any person who is authorized by such organization to act on behalf of that organization." *Id.* art. 2(c).

144. *Id.* arts. 15-16, 21-22.

> herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[145]

An example of a permissive provision is the following article dealing with the solicitation or acceptance of an undue advantage by foreign public officials:

> Each State Party *shall consider adopting* such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[146]

The use of permissive and mandatory language in the various provisions is apparently the result of the negotiation process and suggests a realistic compromise.

The enforcement provisions are detailed. They include guidelines for domestic enforcement as well as international cooperation. With respect to domestic enforcement, they set standards for the exercise of prosecutorial discretion and establish jurisdictional grounds.[147] They provide for methods of enforcement, including freezing, seizure, or confiscation of property.[148] They also provide for the protection of both fact and expert witnesses and victims of corrupt practices.[149] Most importantly, the enforcement provisions create two distinct private remedies: (1) a private cause of action to seek compensation for damages as a result of corrupt practices,[150] and (2) invalidation of contracts or other relations vitiated by corrupt practices.[151]

One chapter of the UNCAC is exclusively devoted to international cooperation, setting forth detailed guidelines. Specifically, it deals with substantive and procedural issues often attending extraditions,[152] investigations, prosecutions, and judicial legal proceedings.[153] Generally, this chapter calls for the "widest measure of mutual legal assistance in investi-

145. *Id.* art. 15 (emphasis added).
146. *Id.* art. 16(2) (emphasis added).
147. *Id.* arts. 30, 42.
148. *Id.* art. 31.
149. *Id.* arts. 32-33.
150. *Id.* art. 35 ("Each State Party shall take such measures as may be necessary, in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damages as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.").
151. *Id.* art. 34 ("With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, State Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial measure.").
152. *Id.* art. 44.
153. *Id.* art. 46.

gations, prosecutions and judicial proceedings."[154]

The UNCAC endorses special investigative techniques including controlled delivery,[155] electronic and other forms of surveillance, and undercover operations.[156] It calls for special rules for the admission of evidence obtained through such means in court, but, for obvious reasons, it makes the use of such methods subject to the basic principles of each State Party's domestic laws.[157]

One of the most important means of enforcement is the recovery of assets obtained as a result of corrupt practices. Although the negotiations relating to the provisions of asset recovery proved very difficult,[158] the Convention expressly states that asset recovery is "a fundamental principle."[159] One chapter exclusively addresses matters pertaining to asset recovery.[160] It begins with the prevention and detection of transfers of proceeds of criminal conduct[161] and then emphasizes three important interrelated concepts: (1) "high-value accounts,"[162] (2) persons with "prominent public functions,"[163] and (3) "enhanced scrutiny."[164] In other words, it establishes enhanced scrutiny for high-value accounts owned by persons occupying prominent public functions or any one closely associated with them.[165] It also mandates appropriate record keeping and reporting by public officials of any foreign accounts that they have authorized or with which they are associated.[166]

The UNCAC then sets forth detailed provisions relating to recovery of assets obtained through corruption.[167] It imposes the unusual measure of allowing civil actions in the courts of any State Party by any other State Party to claim ownership of property acquired through the commission of an offense.[168] It also requires recognition of legitimate ownership of the requesting state and the payment of compensation when the right is estab-

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154. *Id.*

155. "Controlled delivery" is a term of art defined as "the technique of allowing illicit or suspected consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offense and the identification of persons involved in the commission of the offenses." *Id.* art. 2(i).

156. *Id.* art. 50(1).

157. *Id.*

158. *See generally* Webb, *supra* note 9, at 192 (discussing the negotiating history of the UNCAC).

159. *See id.* art. 51 ("The return of assets pursuant to this chapter is a fundamental principle of this Convention, and State Parties shall afford one another the widest measure of cooperation and assistance.").

160. *Id.* ch. V.

161. *Id.* art. 52.

162. *Id.* art. 52(1). The UNCAC does not define this term.

163. *Id.* The UNCAC also does not define this term; however, the definition of a public official provided under article 2 of the UNCAC may be used as a guideline to determine the meaning of this term.

164. *Id.* art. 52(2)(b).

165. *Id.* art. 52.

166. *Id.* art. 52(6).

167. *Id.* arts. 53-59.

168. *Id.* art. 53(a).

lished.[169] Other means of enforcement include the recognition by State Parties of property freezing, seizure, and confiscation orders by any State Party upon a showing of "reasonable basis" for such action.[170] The UNCAC also makes detailed procedural rules regarding the submission and processing of a request for cooperation in such areas as identifying, tracing, freezing, and confiscating assets,[171] as well as the return and disposal of such assets.[172]

The UNCAC also envisages technical assistance and exchange of information and expertise.[173] In particular, it calls for training and technical assistance for developing countries to build their capacity to combat corruption.[174]

Finally, and perhaps most importantly, the UNCAC establishes a conference of State Parties "to improve the capacity of and cooperation between State Parties to achieve the objective set forth in this Convention and to promote and review its implementation."[175] The duties of the conference include periodically reviewing the implementation of the UNCAC by State Parties and making recommendations for the improvement of the Convention and its implementation.[176] The UNCAC also calls for the establishment of an "appropriate mechanism or body to assist in the effective implementation of the Convention."[177]

4. *African Union Convention on Preventing and Combating Corruption (AU Corruption Convention)*

The AU Corruption Convention is the latest of all of the international conventions dealing with transnational corruption. Although relatively brief, it tackles the most important aspects of transnational corruption. From the outset, it lays out the fundamental principles that underscore the obligations that State Parties assume. These principles are stated in part as "respect for democratic principles and institutions, popular participation, the rule of law and good governance."[178]

Predicated on these principles, the AU Corruption Convention mandates three essential steps: (1) prevention, (2) criminalization, and (3) international cooperation.[179] The preventative measures are stated in scat-

169. *Id.* art. 53(b)-(c).
170. *Id.* art. 54(1)(a)-(c), (2)(a)-(c). These measures may be taken without a criminal conviction. *Id.* art. 54(1)(c). The UNCAC establishes a "reasonable basis" standard. *Id.* art. 54(2)(b).
171. *Id.* art. 55.
172. *Id.* art. 57.
173. *Id.* arts. 60-62.
174. *Id.* art. 60; *see also id.* art. 62(2)(b) (imposing an obligation on ratifying states to try "to enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully").
175. *Id.* art. 63.
176. *Id.* art. 63(4)(e)-(f).
177. *Id.* art. 63(7).
178. *See* AU Corruption Convention, *supra* note 6, art. 3(1).
179. *Id.* arts. 4-24.

tered provisions following some criminalization provisions and are very brief. With respect to the public sector, they require that all or at least "some designated" public officials "declare their assets at the time of assumption of office during and after their term of office in the public service."[180] The provisions also call for the creation of internal bodies or committees to establish, implement, and monitor codes of conduct for public servants.[181] They also require maintenance of internal accounting, auditing, and follow-up systems.[182] Notably, these provisions are stated in non-mandatory language.[183]

Preventative measures relating to the private sector include the adoption of "legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector."[184] Preventative measures also include the "establish[ment of] mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights."[185] As part of the preventative measures, the AU Corruption Convention calls for the involvement of civil society and the media primarily to "hold governments to the highest level of transparency and accountability in the management of public affairs."[186]

The criminalization provisions define crimes and establish jurisdiction. They establish numerous criminal offenses including:

> the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.[187]

In criminalizing such conduct on both the demand and supply sides, the Convention repeats the exact same language for "offering" and "granting" benefits.[188] The AU Corruption Convention also criminalizes any action or omission of duties for the purposes of illicit advantage.[189]

Despite the noted controversy surrounding the issue of diversion of funds, the AU Corruption Convention criminalizes the diversion of funds for personal benefit of state funds entrusted for different legitimate pur-

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180. *Id.* art. 7(1).

181. *Id.* art. 7(2).

182. *Id.* art. 5(4).

183. *See id.* art. 7 ("In order to combat corruption and related offences in the public service, State Parties commit themselves to . . ."), art. 11 ("State Parties undertake to . . .").

184. *Id.* art. 11(1).

185. *Id.* art. 11(2). The AU Corruption Convention also calls for the adoption of "other measures as may be necessary to prevent companies from paying bribes to win tenders." *Id.* art. 11(3).

186. *Id.* art. 12.

187. *Id.* art. 4(1)(a).

188. *Id.* art. 4(1)(b).

189. *Id.* art. 4(1)(c).

poses.[190] The AU Corruption Convention further criminalizes the "offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity . . . ."[191]

The AU Corruption Convention then proceeds to more problematic areas of criminal jurisprudence and purports to criminalize conduct related to the above-cited offenses. For example, it criminalizes acts related to the improper influence of officials:

> [t]he 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.[192]

As discussed in Part II, this is one of the provisions that is very difficult to enforce and likely to present significant challenges to prosecutors and courts. The last three substantive criminalization provisions are similar.[193] One of them addresses "[i]llicit enrichment,"[194] 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."[195] The remaining two provisions criminalize the use or concealment of proceeds of the criminal conduct previously discussed and establish inchoate offenses, including conspiracy and attempt.[196]

A separate provision proscribes laundering the proceeds of corruption.[197] It defines laundering as:

> [t]he 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 action."[198]

It also criminalizes the "concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to

190. *Id.* art. 4(1)(d). There was serious controversy relating to this provision because these acts were not considered criminal acts in some jurisdictions. *See also* Olaniyan, *supra* note 5, at 2.

191. *See* AU Corruption Convention, *supra* note 6, art. 4(1)(e).

192. *Id.* art. 4(1)(f).

193. *Id.* art. (4)(1)(g)-(i).

194. *Id.* art. 4(1)(g).

195. *Id.* arts. 1, 8.

196. *Id.* art. 4(1)(h)- (i). It is important to note here that, in contrast to the UNCAC, the inchoate offenses do not include preparation. *See infra* notes 264-65 and accompanying text.

197. AU Corruption Convention, *supra* note 6, art. 6(a).

198. *Id.*

property which is the proceeds of corruption or related offences."[199] Finally, it includes a broad provision barring receipt and use of the proceeds of corruption. The exact prohibition is "the acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences."[200] As discussed in Part II, this last provision could, if broadly construed, cover a wide range of benefit recipients.

The coverage of the AU Corruption Convention extends to public officials and to "any other person," including members of the private sector.[201] A public official is defined as "any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy."[202] The AU Corruption Convention does not define "any other person" and, as such, its ordinary meaning is presumably retained. Given this wide application, the emphasis seems to be on the corrupt act that is committed rather than on the accountability of officials.

The other major component of the AU Corruption Convention is the enforcement component. This component has two sub-components: one domestic and one international. In the domestic arena, the AU Corruption Convention mandates the establishment of domestic enforcement systems, including the enactment of laws to give effect to the State Party's Convention obligations.[203] The domestic sub-component also emphasizes the importance of access to information[204] and the involvement of civil society and the media in monitoring, implementing, and enforcing the principles that the AU Corruption Convention sets forth.[205]

The AU Corruption Convention follows typical jurisdictional grounds for investigation and prosecution: the place of commission of the offense, the nationality and residence of the offender, and the presence of the offender in a given territory.[206] In what might be considered a slight deviation from the traditional jurisdictional grounds, the AU Corruption Convention also permits a State Party to exercise its authority based on a consequences-or-effects test, which is satisfied "when the offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party."[207]

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199. *Id.* art. 6(b).

200. *Id.* art. 6(c).

201. *See e.g.*, *id.* art. 4(a)-(b); *see also id.* art. 11(1).

202. *Id.* art. 1.

203. *See, e.g.*, *id.* arts. 5-6, 10-11. Some of the provisions use mandatory language, but others use permissive language. *Compare id.* art. 5 ("shall"), *with id.* art. 6 ("undertake to").

204. *Id.* art. 9.

205. *Id.* art. 12.

206. *Id.* art. 13(1)(a)-(c).

207. *Id.* art. 13(1)(d).

The AU Corruption Convention makes an interesting departure at the enforcement level by reiterating the need for due process for anyone accused of committing any offense. It includes a mandatory provision for fair trial in accordance with recognized principles of human rights and also emphasizes the principle against double jeopardy.[208]

The international cooperation provisions include extradition;[209] tracing, seizure, and confiscation of proceeds of corruption;[210] and mutual legal assistance.[211] The international cooperation also extends to collaboration with non-parties so that corrupt officials may not be able to enjoy "ill-acquired assets" in countries that are not party to the Convention.[212] Most importantly, the AU Corruption Convention notes the importance, although in non-mandatory language, of eradicating corruption in development aid.[213]

Finally, the AU Corruption Convention maps out two important steps with respect to international cooperation: (1) the creation or designation of a national authority for purposes of mutual legal assistance and cooperation,[214] and (2) the establishment of an advisory board on corruption within the AU as a follow-up mechanism (Advisory Board). The Advisory Board, which is to consist of eleven independent members, has the duty of monitoring the implementation of the Convention.[215]

II. A Comparative Analysis

This section offers a comparative analysis of the AU Corruption Convention with the FCPA, the IACAC, and the UNCAC. Although the comparative analysis of the AU Corruption Convention with the FCPA is detailed, in the interest of brevity, the comparison with the other instruments is limited to the unique and essential aspects of those instruments. This section is divided by the substantive and procedural subject matters that these various legal instruments cover.

A. Substantive Provisions

As discussed in Part I.C.1, the provisions of the FCPA are essentially designed to combat corruption by U.S. companies operating in or dealing

208. *Id.*; *see also id.* art. 14.
209. *Id.* art. 15.
210. *Id.* art. 16. It also provides for the revocation of bank secrecy defenses that might be available in the course of investigations, tracing, and confiscation efforts. *See id.* art. 17.
211. *Id.* art 18.
212. *Id.* art. 19(3).
213. *Id.* art. 19(4). Unfortunately, however, the AU Corruption Convention does not mention corruption in humanitarian aid.
214. *Id.* art. 20.
215. *Id.* art. 22. More specific tasks of the Advisory Board include: promoting the adoption of the AU Corruption Convention, understanding the nature and scope of corruption in Africa, researching and disseminating information, advising governments regarding their efforts to combat corruption, understanding the nature of the operation of multinationals in Africa, developing codes of conduct for public officials, and submitting annual reports to the AU Executive Council. *Id.* art. 22(a)-(i).

with foreign states. The emphasis of the AU Corruption Convention is the opposite, i.e., combating corruption from the "demand" end. As such, the two legal instruments could indeed be viewed as complementary in U.S.-Africa relations. It also means, therefore, that U.S. companies operating in Africa are now subject to a new dimension of anti-corruption law in a different context. There are several points of intersection and divergence between the FCPA and the AU Corruption Convention. This section discusses the most significant of them.

There is no jurisdictional overlap between the AU Corruption Convention and the IACAC, but a comparison is essential because the principles enshrined under each have global implications and the challenges they intend to tackle are virtually identical. Moreover, as regional instruments, they share the same jurisdictional and enforcement challenges. As such, a brief comparison is included in this section.

The AU Corruption Convention squarely overlaps with the UNCAC not only in terms of the challenges they purport to overcome but also in terms of membership and potentially duplicative international obligations. Therefore, this section compares the most essential aspects.

1. Objectives and the Methods of Attainment of the Objectives

All four legal instruments are designed to achieve essentially the same objectives. Their coverage, however, differs in some important respects. The primary objective of the FCPA is to deter corrupt practices by setting record-keeping standards and prescribing civil and criminal penalties for failure to comply with those standards or engaging in corrupt acts.[216] The objectives of the AU Corruption Convention are stated more generally as preventing and combating corrupt practices in order to promote and strengthen development.[217] As the AU Corruption Convention suggests, corruption is a major developmental challenge for Africa. Thus, the provisions are designed to serve a developmental goal. The FCPA, on the other hand, is primarily designed to ensure the integrity of the United States' transnational trading system. The proscriptions of the two instruments overlap to the extent that the United States and AU Corruption Convention State Parties engage in commercial relationships.

Although the UNCAC, IACAC, and AU Corruption Convention generally share many of the same characteristics, differences in emphasis can be noted. For example, only the IACAC expressly links corruption with the proceeds of "illicit narcotics trafficking."[218] Another example is that the stated purposes of the IACAC and UNCAC do not directly link the challenge of corruption to development and good governance, but the AU Corruption Convention treats it as a fundamental premise.[219] As will be apparent from the discussion in the following sections, a consistent theme evident in the AU Corruption Convention, but absent from the other

216. *See generally* FCPA, *supra* note 9.
217. *See generally* AU Corruption Convention, *supra* note 6, art. 2.
218. *See* IACAC, *supra* note 12, preamble.
219. *See e.g.*, AU Corruption Convention, *supra* note 6, arts. 2-3.

instruments, is the connection that the AU Corruption Convention expressly draws between the challenges of corruption and development, rule of law, good governance, and socio-economic rights. The objective statements make it clear that the AU Corruption Convention takes a rights and good governance approach to the problem of corruption.[220] This appears to be a fundamentally different policy approach and is quite unique to the AU Corruption Convention. However, this important theme is not fully developed and could benefit from the provisions of the other instruments, particularly the UNCAC.

2. Compliance and Prevention

Simply stated, the compliance provisions of the FCPA are designed to serve the same purpose as the prevention provisions of the three international conventions, albeit on a smaller and more practical level, focusing exclusively on the private sector.[221] The FCPA requires that all issuers keep records and establish internal accounting and auditing systems showing their compliance with its requirements.[222] The primary objective of this requirement is deterrence in the preventative sense.[223] It is arguably a far more effective deterrent tool than the criminalization provisions because it covers all issuers subject to U.S. jurisdiction and attaches severe civil and criminal penalties for failures.[224]

The AU Corruption Convention, in contrast, imposes only limited concrete preventative steps and focuses on the public sector.[225] The primary preventative-measures provision requires State 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, expenditure and procedures for hiring, procurement and management of public goods."[226] Although the AU Corruption Convention is silent about the consequences of failure to comply

220. For example, the AU Corruption Convention's first statement of objectives reads as follows: "Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors." *See id.* art. 2(1). Likewise, the first statement of principles provides that the State Parties undertake to abide by the principle of "[r]espect for democratic principles and institutions, popular participation, the rule of law and good governance." *See id.* art. 3(1). It also goes on to state that State Parties are to abide by the principle of "[r]espect for human and people's rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments." *Id.* art. 3(2). It also calls for the promotion of social justice. *Id.* art. 3(4); *see also* Olaniyan, *supra* note 5.

221. *See generally* FCPA, *supra* note 9.

222. *See generally id.* § 78m.

223. STUART H. DEMING, FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 21-28 (2005).

224. *See* Schroth, *supra* note 22, at 599. It is important to note that the FCPA record-keeping and accounting requirements are imposed in addition to the extensive already existing SEC disclosure requirements. *Id.*; *see also* DEMING, *supra* note 223, at 21 (suggesting that the record-keeping provisions represent "a more potent mechanism that has implications far greater than simply deterring improper payments to foreign officials").

225. *See* AU Corruption Convention, *supra* note 6, art. 2.

226. *See id.* art. 5(4).

with these requirements, the State Parties are presumably also obligated to adopt some penalizing scheme.

Other preventative measures are limited to requiring the declaration of assets by public officials, developing disciplinary and ethical rules of conduct, and establishing internal committees for the implementation and monitoring of the ethical rules.[227] The provisions are stated in non-mandatory language, and no particular penalizing scheme can be inferred for failure to comply with these requirements.[228] Despite the apparent emphasis on the principles and objectives of the AU Corruption Convention, the prescribed preventative measures fall short of ensuring compliance because they require no penal or deterrent scheme, in contrast to the FCPA's superior deterrent effect. This absence of penal and deterrence schemes is one of the weaknesses of the AU Corruption Convention.

The preventative measures of the IACAC are more direct and cover both the private and public sectors.[229] They essentially adopt the FCPA compliance provisions and add a public sector dimension. More importantly, unlike the AU Corruption Convention, the IACAC's preventative measures call for establishing an enforcement mechanism for the standards set by the preventative measures.[230]

The UNCAC devotes an entire chapter to preventative measures.[231] The provisions are elaborate and cover every conceivable measure of prevention and corruption both in the private and public sectors. These provisions have the capacity to fill in the gaps left by the AU Corruption Convention, including the need for sanctions. For example, one important provision calls for the establishment of a penalizing scheme for failure to comply with preventative measures. It states that "[e]ach State Party shall 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 comply with such measures."[232] The UNCAC also provides for the cooperation of law enforcement and relevant private entities.[233]

Because preventative measures are not likely to be effective where there are no deterrent measures attached, the AU Corruption Convention's preventative provisions would have been more effective if they contained complementary deterrent provisions like those contained in the UNCAC. The omission might be explained by the obvious lack of emphasis of the AU Corruption Convention on the private sector. However, the provision of a deterrent scheme with respect to preventative measures associated with the public sector would obviously be equally effective. A closer and

227. *Id.* art. 7.
228. *See id.*
229. IACAC, *supra* note 12, art. III.
230. *Id.* art. III(2).
231. *See generally* UNCAC, *supra* note 10, ch. II.
232. *See id.* art. 12(1).
233. *Id.* art. 12(2)(a).

more comprehensive look at this issue is indeed warranted.[234]

3. *Criminalization Provisions*

a) Anti-Bribery Provisions

The most important substantive measure that the FCPA, the IACAC, the UNCAC, and the AU Corruption Convention all adopt in order to combat corrupt practices in transnational commercial relations is the criminalization of certain conduct and omissions. However, the definitions of the particulars of the crimes contained in these instruments differ in some significant ways. This is an area where individuals and entities that may be subject to the requirements of more than one of the four instruments must pay particular attention because of the possibility of heightened responsibilities in one of the instruments. This section offers a comparative analysis of the substantive definitions of the crimes and identifies areas where there may be additional responsibilities.

The FCPA is unique in one important respect: it is focused primarily on the "supply side" of the equation as it addresses only the "offering or granting" aspect of the transaction.[235] The IACAC, the UNCAC, and the AU Corruption Convention address both the supply and demand sides of transactions, albeit with different levels of emphasis.[236] As a result of this differing approach, U.S. individuals and entities that are subject to any one of these instruments are inevitably subject to additional "demand side" rules.

Furthermore, differences exist among these corruption-related instruments even on the "supply side." For example, the FCPA's prohibition extends to committing corruptly "any act . . . 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 giving of anything of value."[237] The AU Corruption Convention's parallel provision extends in relevant part to "the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefits, such as a gift, favour, promise or advantage . . . ."[238] According to this provision, the prohibition extends to an offer, an actual grant, or a promise but does not apply to authorizations. Although individuals and entities who offer, promise, and make actual payments may be penalized under both instruments, authorization of such offers, promises, or payments is not expressly covered by the AU Corruption Convention. This particular omission is also characteristic of the IACAC[239] and the UNCAC.[240]

234. Even the UNCAC's penalizing scheme relating to preventative measures is limited to the private sector. *See id.* However, there is no apparent jurisprudential reason not to extend the same scheme to the public sector, particularly in the African context where most of the international trade involves public institutions and public officials.

235. *See supra* notes 76-79 and accompanying text.

236. *See supra* notes 105, 128, and 188, and accompanying text.

237. *See* FCPA, *supra* note 9, § 78dd-1(g)(1) (emphasis added).

238. *See* AU Corruption Convention, *supra* note 6, art. 4(1)(b).

239. *See* IACAC, *supra* note 12, art. VI.

240. *See* UNCAC, *supra* note 10, art. 27.

The significance of authorization responsibility relates to the chain of command in multilateral enterprises, which often operate through agents and subsidiaries.[241] The practical effect is even more significant when officials of multinationals who are not subject to the FCPA carry out the authorization. State Parties to the AU Corruption Convention may consider an amendment to fill this gap as there is no valid justification for this kind of immunity.

Another important distinction is the kind of benefits that are prohibited. Although the prohibitions of the FCPA are limited to extension of strictly pecuniary benefits,[242] the AU Corruption Convention includes the extension of non-pecuniary benefits such as favors and advantages that may not necessarily be quantified.[243] The AU Corruption Convention provision thus expressly distinguishes favors and advantages from purely pecuniary gains.

The IACAC uses similar language to the AU Corruption Convention. It prohibits the extension of "articles of monetary value or other benefits such as a gift, favor, promise [or] advantage . . . ."[244] It makes a clear distinction between strictly pecuniary benefits and non-pecuniary advantages. The UNCAC's treatment of the prohibited benefits is broader than even the AU Corruption Convention and the IACAC. It is phrased differently as "[t]he promise, offering or giving . . . of an undue advantage."[245] Although the UNCAC does not define "undue advantage," it is presumably broader than purely pecuniary benefits, gifts, and favors.[246]

The only one of the four instruments that expressly incorporates an intent requirement in the definition of the offenses is the UNCAC.[247] The remaining three conventions discuss intent with varying degrees of clarity. The UNCAC's relevant anti-bribery provision states that "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, *when committed intentionally* . . . ."[248] Although the UNCAC uses the term "when intentionally committed" consistently in all the provisions defining crimes,[249] it does not define the exact status of mens rea required. Nevertheless, it is fairly clear that knowledge and purpose are anticipated.

The FCPA uses the term "knowingly"[250] in some provisions and "cor-

241. *See* Low et al., *supra* note 36, at 266. For a discussion of vicarious liability, see DEMING, *supra* note 223, at 29-39.

242. *See* FCPA, *supra* note 9, § 78dd-1(a).

243. AU Corruption Convention, *supra* note 6, art. 4(1)(b).

244. *See* IACAC, *supra* note 12, art. VI(b).

245. *See* UNCAC, *supra* note 10, art. 16(1).

246. "Undue advantages" may include advantages as to goodwill and reputation. *See, e.g.*, Low et al., *supra* note 36, at 267.

247. *See* UNCAC, *supra* note 10, art. 15.

248. *See id.* art. 16(1) (emphasis added).

249. *See, e.g., id.* arts. 17-25.

250. *See, e.g.*, FCPA, *supra* note 9, § 78m(b)(5) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account . . . ."); *id.* § 78dd-1(a)(3).

ruptly" in others as mens rea requirements.[251] Although the provisions that use the term "knowingly" have sufficient clarity as to the mens rea requirement,[252] the provisions that use "corruptly" lack the same level of clarity but do suggest some level of knowledge or purpose. For example, in *United States v. Liebo*, the U.S. Court of Appeals for the Eighth Circuit suggested that "corruptly" means intentionally or with the knowledge of the purpose.[253] In this case, the knowledge requirement was outcome-determinative. The appellant, Liebo, was convicted of committing acts in violation of the bribery provisions of the FCPA.[254] The conviction related to Liebo's purchase of an air ticket for a Niger Government official. The most important issue during Liebo's appeal was whether he did so "corruptly," or with corrupt intent,[255] which the jury had found in convicting him. New evidence surfaced after the conviction showing that Liebo's superior in the company authorized the ticket purchase. The Eight Circuit ordered a new trial because the new evidence suggested that if Liebo was acting under an instruction, he may not have had a corrupt intent.[256] One of the court's rules for ordering a new trial was that the newly discovered evidence "must be of such a nature that, on a new trial, the newly discovered evidence would probably produce an acquittal."[257] One can conclude from this that the court considered authorization to be a valid defense to charges of corrupt intent. Therefore, the case is a useful illustration of the importance of clearly defining mens rea requirements in criminalization provisions of anti-corruption laws. It is particularly important because the circumstances often implicated in transnational corruption involve multiple parties, different corporate hierarchies, and complex transactions.[258]

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251. *See, e.g., id.* § 78dd-1(a), (g)(1).

252. The FCPA defines the term "knowing" as "[a] person's state of mind is 'knowing' with respect to conduct, a circumstance, or result if– (1) such person is aware that such person is engaged in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur." *Id.* § 78dd-2(h).

253. *See* 923 F.2d 1308, 1312 (8th Cir. 1991). The court endorsed the following jury instruction as an accurate definition of the term "corruptly": "the offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so . . . an act is 'corruptly' done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means." *Id.*

254. *Id.* at 1309.

255. *Id.* at 1311. The other ground for the appeal was that there was insufficient evidence to show that the air ticket was purchased to retain or obtain business. *See id.* The court did not rule in the appellant's favor on this point. *Id.* at 1311-12.

256. *See id.* at 1314.

257. *Id.* at 1313.

258. The *Liebo* case is a very good example of the complexity of transactions involved in transnational corrupt practices and demonstrates the need for clear rules. From 1983 to 1987, the litigant Liebo was a vice president of a Minnesota company, NAPCO International, which sold military equipment and supplies. *See id.* at 1309. In 1983, the Government of Niger signed a contract with a West German company for the servicing of Lockheed cargo planes. *See id.* Because the Niger Government ran out of funds to pay for the service work, the German company sought an American parts supplier to qualify the Niger Government for a U.S. Department of Defense loan. *See id.* The German company then contacted NAPCO, which agreed to get involved. *See id.* Liebo and

In contrast, the criminalization provisions of the AU Corruption Convention consistently and completely omit any reference to a mens rea requirement.[259] Presumably left for the State Parties' own decisions in their domestic jurisdictions, this could result in inconsistent application of the criminalization provisions of the AU Corruption Convention and may have a profound effect on the actual content of the assumed obligations. State Parties who are considering drafting their national laws in accordance with the AU Corruption Convention could make use of the already developed jurisprudence of the FCPA, including the definition of mens rea offered under *Liebo*. At the AU level, however, in the interest of clarity and consistent application, the adoption of the exemplary UNCAC approach, which consistently uses the phrase "when intentionally committed," could be an essential step to ensuring consistent and fair application of the criminalization provisions.

The mens rea issue pertaining to inchoate offenses is even more complicated. The FCPA criminalizes "corruptly" doing "any act . . . in furtherance of an offer, payment, [or] promise to pay,"[260] which prohibits inchoate offenses relating to violations of the FCPA.[261] The AU Corruption Convention also criminalizes participation and proscribes inchoate offenses relating to the underlying crimes of corruption.[262] Its application extends to "participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article."[263]

The UNCAC includes a separate provision outlawing preparation and attempt.[264] However, it inexplicably omits conspiracy as a criminal offense even though it mandates the very controversial criminal offense of preparation to commit the underlying offenses.[265] The IACAC expressly establishes the crimes of participation, conspiracy, and attempt as part of

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another company official flew to Niger and approached an important official of the Niger Government in an effort to become the primary contractor for supplying cargo plane equipment and parts. *See id.* The official, who had easy access to the President of Niger, also had a cousin who was a diplomat of Niger in Washington, DC. *See id.* By arrangement, the company gave money to the Niger official through the diplomat in Washington DC. *See id.* at 1309-10. The diplomat had opened a bank account under the diplomat's then-girlfriend's name in Minnesota. *See id.* Liebo also purchased air tickets for the diplomat's honeymoon trip to Europe. *See id.* at 1310. Liebo was charged with seventeen violations of the FCPA. *See id.* at 1310 n.1. A jury acquitted Liebo of sixteen of the charges for different reasons but convicted him of the charge relating to the ticket purchase. *See id.* at 1310-11. The important issue on appeal was whether Liebo acted "corruptly" in purchasing the tickets, i.e., whether the mens rea requirement was met. *Id.*

259. The same is true with respect to the IACAC as well. *See, e.g.*, IACAC, *supra* note 12, arts. VI, VIII.

260. *See, e.g.*, FCPA, *supra* note 9, § 78dd-1(g).

261. *See, e.g.*, United States v. King, 351 F.3d 859 (8th Cir. 2003) (upholding a conviction for conspiracy to violate the FCPA).

262. *See* AU Corruption Convention, *supra* note 6, art. 4.

263. *See id.* art. 4(1)(i).

264. *See* UNCAC, *supra* note 10, art. 27(1)-(2).

265. *See id.* art. 27(1)-(3).

the general definition of the underlying crimes.[266] In this respect, it is indeed the clearest model of all the conventions.

Complex evidentiary issues will inevitably arise in the application of these and related criminalization rules. *United States v. King* demonstrates the complexity of evidentiary issues that could arise in the enforcement of transnational corruption offenses.[267] In this case, a Kansas company sought to obtain land in Costa Rica for a large-scale development project.[268] The defendant, King, was one of the largest investors.[269] The FBI investigated a suspected $1 million payment to Costa Rican officials for purposes of winning land concessions.[270] The FBI procured the cooperation of involved individuals who agreed to tape record conversations of some individuals, including King.[271] On appeal, King challenged the admissibility of the tapes on three grounds: (1) the admission of the tapes as evidence without the presence of the persons with whom he had conversation violated his Sixth Amendment right to confrontation, (2) the admission of only a portion of the tapes violated the evidentiary rule of completeness, and (3) the accuracy of the tapes was not verified.[272]

The court rejected King's first argument, reasoning that the hearsay rules and the confrontation clause generally protect the same values and emanate from the same source. As such, "no independent inquiry into reliability is required when evidence falls within a firmly rooted hearsay exception," i.e., the co-conspirator exception.[273] The court further noted that under the Federal Rules of Evidence, statements of co-conspirators may be admitted if the government demonstrates by the preponderance of the evidence that "(1) a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, (3) and that the declaration was made during the course and in furtherance of the conspiracy."[274] It held that the government met all of these requirements.[275] The court also rejected King's completeness argument on the ground that it did not affect the fairness of the trial[276] and accuracy argument on factual grounds.[277]

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266. *See* IACAC, *supra* note 12, art. VI(e) ("Participation as a principal, co-principal, instigator, accomplice, or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.").

267. *See* 351 F.3d 859.

268. *Id.* at 862.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 864.

273. *Id.* at 865. The court rejected the argument that co-conspirator statements required some independent indicia or reliability, citing to the Supreme Court's ruling in *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987). *See id.*

274. *Id.* (citing United States v. Beckman, 222 F.3d 512, 522 (8th Cir. 2000)).

275. *Id.*

276. The court noted the rule of completeness as provided in Federal Rule of Evidence 106: "When a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other wiring or recorded statement which ought in fairness to be considered contemporaneously with it." *Id.* at 865-66 (citing FED R. EVID. 106).

As *King* demonstrates, properly enforcing the substantive criminalization rules requires detailed procedural and evidentiary rules. Under the AU Corruption Convention, the details of the offenses and the evidentiary requirements are, however, left for the determination of each State Party. Varied evidentiary rules could result in inconsistent or even conflicting applications. Uniform application of substantive rules may only be ensured through uniform rules of procedure and evidence. As such, it is important that State Parties consider harmonizing their rules of procedure and evidence, at least those that pertain to international corruption cases. As noted in Part II.B.2.a.i, it would be incumbent upon the Advisory Board set up under Article 22 to propose methods harmonizing rules of procedure and evidence in the interest of uniform application of the substantive rules contained in the AU Corruption Convention.[278]

b) Other Bribery Related Offenses

As noted previously and discussed in more detail in Part II.A.4, the most important common characteristic that distinguishes the AU Corruption Convention, IACAC, and UNCAC from the FCPA is criminalization of conduct on both the "supply" and "demand" side. The FCPA is strictly limited to the offering-or-granting aspect of the transaction. As a domestic law, a number of constraints (not the least of which is the lack of authority to prescribe, i.e., inability to bind other nations by a domestic law) necessitated such a limitation. As a result, the FCPA criminalizes far less corruption-related conduct than the other three instruments. The UNCAC, on the other hand, criminalizes far more conduct than the remaining two. A discussion of the most important corruption-related offenses contained in the AU Corruption Convention, UNCAC, and IACAC follows.

i. Breach of Duty or Abuse of Functions

The AU Corruption Convention and IACAC use identical language to criminalize breach of duty for the purpose of obtaining illicit benefit. The particulars are stated as "[a]ny act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party."[279] This prohibition applies in addition to or irrespective of the underlying corrupt act of solicitation or acceptance discussed in Part II.A.3.a. The provision is not, however, without serious problems. First, as the United States suggested in its understandings of the IACAC, "[i]ts lit-

277. *Id.* at 866.

278. The responsibilities of the Advisory Board include promoting the application of the anti-corruption measures, developing and promoting harmonization of codes of conduct, and advising State Parties on the means of dealing with corruption offenses in their domestic jurisdictions. *See* AU Corruption Convention, *supra* note 6, art. 22(c)-(f). *Compare* AU Corruption Convention, *supra* note 6, art. 4(c), *with* IACAC, *supra* note 12, art. VI(c).

279. *See* IACAC, *supra* note 12, art. VI(c); *see also* AU Corruption Convention, *supra* note 6, art. 4(c). The only difference is the use of gender-specific language in the AU Corruption Convention.

eral terms would embrace a single preparatory act done with the requisite 'purpose' of profiting illicitly at some future time, even though the course of conduct is neither pursued, nor in any sense consummated."[280] In jurisdictions where there are no general attempt laws, as is the case with U.S. federal law, the implementation of this provision would be problematic. Precisely for this reason, the United States attached understandings opting out of this provision.[281]

Second, because breach of duty is an essential component of the main solicitation or acceptance provision without which no responsibility could attach, it may raise some substantive due process and double jeopardy issues. For example, the AU Corruption Convention and the IACAC contain an almost identical solicitation provision: "the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefits, such as gifts, favor, promise or advantage for himself or for another person or entity, *in exchange for any act or omission in the performance of his or her public functions.*"[282] The solicitation-or-acceptance and the breach-of-duty provisions essentially punish the same conduct. A distinction may be made, however, that the solicitation provision could apply where there is no conduct or omission except a promise to breach a lawful duty. This definition, which includes promises regardless of whether the act or omission materializes, is indeed a liberal interpretation of the "in exchange for" language. The alternative interpretation would make the discharge of duty provision redundant or unduly onerous. The cumulative application of these two provisions would inevitably invite due process and double jeopardy challenges. As such, domestic application must not be encouraged.

The UNCAC adopted a better formulation that can address some of these concerns. The solicitation-or-acceptance provision of the UNCAC states the following: "[t]he solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain in the exercise of his or her official duties."[283] The discharge-of-duty provision, under the title "abuse of functions," on the other hand, states:

> [t]he abuse of functions or position, that is, the performance of or failure to perform an act, *in violation of laws*, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for him-

280. *See* Senate Resolution Advising and Consenting to the Treaty on Inter-American Convention on Corruption, S. REP. NO. 106-7809 (2000), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/intlagree/related/senate-resolute.html [hereinafter Senate Resolution on Inter-American Convention on Corruption].

281. *Id.* ("The United States will not criminalize such conduct per se, although significant acts of corruption in this regard would be generally subject to prosecution in the context of one or more other crimes.").

282. *See* AU Corruption Convention, *supra* note 6, art. 4(a) (emphasis added); *see also* IACAC, *supra* note 12, art. VI(a). Identical language is used in both except the replacement of "goods of monetary value" with "articles of monetary value." *Compare* AU Corruption Convention, *supra* note 6, art. 4(a), *with* IACAC, *supra* note 12, art. VI(a).

283. UNCAC, *supra* note 10, art. 15(b) (emphasis added).

self or herself or another person or entity.[284]

This approach is distinguishable because it requires a violation of law independent of the violation of the same anti-bribery provisions that are the sources of responsibility under the solicitation provision.

ii. Diversion or Use of State Property

The AU Corruption Convention and IACAC criminalize the diversion or improper use of state property by a public official in similar non-mandatory language.[285] Neither convention attempts to establish a direct link between the criminalization of this conduct and the international trading system, i.e., their provisions regarding diversion or use of state property seemingly apply to wholly domestic events.[286]

The UNCAC's approach to the diversion issue is to the same effect with two important exceptions.[287] First, the UNCAC's approach states the issue in mandatory language.[288] Second, the UNCAC's approach includes the crime of embezzlement,[289] which may not necessarily be covered by the diversion provisions of the AU Corruption Convention and IACAC.[290] This is, however, one of very few areas where all three conventions seem to prescribe remedies for purely domestic matters without a direct link to transnational corruption.

iii. Conversion, Concealment, or Laundering of Proceeds

All three conventions criminalize the use and concealment of proceeds of corruption independently of and in addition to the underlying offenses.[291] However, the provisions' scope of coverage and degree of clarity differ in some significant ways.

The IACAC is the briefest and the most ambiguous of all three. It only prohibits the "fraudulent use or concealment" of proceeds of corrup-

284. *Id.* art. 19 (emphasis added).

285. *See* AU Corruption Convention, *supra* note 6, art. 4(d); *see also* IACAC, *supra* note 12, art. XI(b)(d).

286. *See* AU Corruption Convention, *supra* note 6, art. 4(d); *see also* IACAC, *supra* note 12, art. XI(b)(d). An independent provision of the IACAC states that "[i]t shall not be necessary that the acts of corruption harm State property" in order for the convention to apply. IACAC, *supra* note 12, art. XII. Although the other conventions do not contain a similar provision, there is no suggestion in the criminalization provisions of the other conventions that State property must be harmed.

287. *See* UNCAC, *supra* note 10, art. 17.

288. *See id.*

289. *Id.*

290. *Id.* ("Each state party shall adopt legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her own benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position."). The implication of the breach-of-trust element is often what distinguishes the crime of embezzlement. *See, e.g.*, JOSHUA DRESSLER, CRIMINAL LAW 901 (1994).

291. *See* UNCAC, *supra* note 10, art. 23; AU Corruption Convention, *supra* note 6, arts. 4(h), 6; IACAC, *supra* note 12, art. VI(d).

tion.[292] The criminalization of the "use" of proceeds is sufficiently difficult to apply, yet the IACAC qualifies it by adding "fraudulent" to the already murky concept. The AU Corruption Convention and the UNCAC do not qualify the "use" prohibition. As such, any use of the proceeds of corruption is considered an independent crime. In particular, the prohibition of the "use" of proceeds under all three instruments is likely to be a source of great jurisprudential difficulty in domestic application.[293]

The AU Corruption Convention and UNCAC each have an independent provision on the offense of laundering proceeds of corruption in addition to the "use and concealment" provision.[294] Using identical language, these provisions criminalize the "conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offenses for the purpose of concealing or disguising the illicit origin."[295]

These two conventions also establish third-party responsibility by criminalizing any assistance provided for any person involved in the commission of the crimes of corruption to evade the legal consequences.[296] The third-party responsibility extends to knowing "acquisition, possession or use" of proceeds of corruption.[297] The UNCAC criminalizes participation in laundering-related crimes and expressly prohibits conspiracy and attempt to commit the underlying or object crimes.[298] The AU Corruption Convention, on the other hand, conspicuously fails to criminalize participation and related inchoate offenses in the laundering provision.[299]

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292. *See* IACAC, *supra* note 12, art. VI(d).

293. The term raises a number of troubling ambiguities. For example, would it mean that a corrupt government official who takes cash in exchange for a corrupt act and keeps it in his office drawer does not violate the provisions? Would it mean that the provisions would only become operational when the official spends the first penny? The controversy might relate to what exactly "use" means: buying lunch that day with the money or using a credit card with the anticipation that the bill would be paid using the illicit money? Furthermore, what if the official is apprehended before the bill is paid? Also, if he made ten different purchases, would he be charged with ten different counts of violations of the "use" provision? The IACAC's qualification of the "use" provision would appear to solve some of these problems; however, it would mean that an independent fraud needs to be established, which itself would bear a separate set of consequences. Although these issues could be addressed in detailed domestic criminal statutes, the conventions do not clarify the exact obligation that devolves on State Parties. As discussed in Part II.A.3.b.iii, the UNCAC carefully addresses the types of corruption and laundering-related offenses with which these conventions are primarily concerned.

294. *See* UNCAC, *supra* note 10, art. 23; AU Corruption Convention, *supra* note 6, art. 6.

295. *See* UNCAC, *supra* note 10, art. 23; AU Corruption Convention, *supra* note 6, art. 6.

296. *See* UNCAC, *supra* note 10, art. 23; AU Corruption Convention, *supra* note 6, art. 6.

297. *See* UNCAC, *supra* note 10, art. 23(1)(b)(i); AU Corruption Convention, *supra* note 6, art. 6(c).

298. *See* UNCAC, *supra* note 10, art. 23(1)(b)(ii).

299. *See* AU Corruption Convention, *supra* note 6, art. 7. The general provision pertaining to participation is limited to use and concealment, which covers a narrower set of offenses than laundering as defined under this provision. *Id.* art. 4(h)-(i), 7. In contrast to the AU Corruption Convention, the UNCAC makes an additional and indepen-

The UNCAC also covers additional and related offenses such as obstruction of justice, participation by legal persons, and embezzlement of property in the private sector.[300] The UNCAC's coverage of related offenses is comprehensive and makes the obligations undertaken significantly clearer.

iv. Illicit Enrichment

Perhaps the most controversial criminal offense that the three conventions establish is the crime of "illicit enrichment." Each convention defines the offense, in exactly the same language: "a 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."[301] The IACAC, the first one of the three to establish the offense, uses mandatory language, but the other two use non-mandatory language.[302] For reasons stated below, all three conventions subject the establishment of the offense to the constitutions and "fundamental principles" of the domestic laws of the State Parties.[303]

Although the crime of "illicit enrichment" might appear to be a good weapon to combat corruption, it is fundamentally flawed as a matter of recognized principles of criminal justice. The reservations and understandings attached to the U.S. ratification of the IACAC neatly summarize the flaw in this offense as follows:

> The offense of illicit enrichment as set forth in Article IX of the Convention, however, places the burden of proof on the defendant, which is inconsistent with the United States constitution and fundamental principles of the United States legal system. Therefore, the United States understands that it is not obligated to establish a new criminal offense of illicit enrichment under Article IX of the Convention.[304]

The clause "subject to its constitution and fundamental principles of its legal system" was presumably inserted because of such concerns.[305] How-

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dent provision for participation and attempt. *See* UNCAC, *supra* note 10, art. 27. While adopting legislation criminalizing participation is mandatory under UNCAC article 27(1), establishing related inchoate offenses—preparation and attempt—is not mandatory under article 27(2) and (3).

300. *See* UNCAC, *supra* note 10, arts. 22, 25-26.

301. *See* UNCAC, *supra* note 10, art. 20; AU Corruption Convention, *supra* note 6, arts. 1, 8; IACAC, *supra* note 12, art. IX.

302. *See* UNCAC, *supra* note 10, art. 20; AU Corruption Convention, *supra* note 6, arts. 1, 8; IACAC, *supra* note 12, art. IX.

303. *See* UNCAC, *supra* note 10, art. 20; AU Corruption Convention, *supra* note 6, arts. 1, 8; IACAC, *supra* note 12, art. IX.

304. *See* Senate Resolution on Inter-American Convention on Corruption, *supra* note 280. The presumption of innocence is so fundamental that its disregard would violate the U.S. Constitution, particularly the Fifth Amendment and the Due Process Clause. Under the Due Process Clause, the prosecution must prove each element of an offense beyond a reasonable doubt. *See, e.g.*, In re Winship, 397 U.S. 358, 364 (1970). The Constitution prohibits the shifting of this burden to the criminal defendant. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 210 (1977).

305. Aware of the broad exceptions that might be invoked through this phrase, commentators have referred to it as an "escape clause." Low et al., *supra* note 36, at 248-49.

ever, even with such a clause, the premise is so flawed that Canada also attached express understandings not to implement this provision.[306]

Regardless of this flaw, however, both the UNCAC and the AU Corruption Convention adopted the illicit enrichment provision, albeit in non-mandatory language. It is highly doubtful that compromising the fundamental principle of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course. This is particularly true in Africa where, as the AU Corruption Convention suggests, the crime of corruption is directly linked with the rule of law and good governance. In fact, it directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples' Rights.[307] The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment.

There are alternative means of achieving the objective of this provision. One important alternative, which the conventions adopt, is the assets-disclosure requirement. Another way of targeting illegally obtained wealth is what the United States cited in its understandings to the IACAC—namely, the prosecution of public officials for tax evasion should they acquire unexplainable wealth.[308]

c) Exception

With respect to exceptions, a significant distinction exists between the FCPA and the three conventions. Most importantly, the FCPA makes an

306. Canada's understanding reads, "As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed by Canada's Constitution, Canada will not implement Article IX, as provided for by this provision." B-58 Inter-American Convention Against Corruption, http://www.oas.org/juridico/english/Sigs/b-58.html. For an alternative view that illicit-enrichment clauses impose only an evidentiary burden on a defendant and do not remove the prosecutor's legal burden, see generally Ndiva Kofele-Kale, *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes*, 40 INT'L LAW. 909 (2007).

307. *See, e.g.*, The African [Banjul] Charter on Human and People's Rights, art. 7(b), 21 I.L.M. 58 (1982) ("The right to be presumed innocent until proved guilty by a competent court or tribunal."); International Covenant on Civil and Political Rights, art. 14(2), Dec. 16, 1966, 999 U.N.T.S. 171 ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."). These international legal instruments guarantee innocence until guilt is proven in criminal cases, but they do not extend this guarantee to civil cases. This limitation raises the question of whether illicit enrichment could serve as a basis for bringing civil actions against corrupt public officials. The possibility is particularly noteworthy when considered in conjunction with the potential for private rights of action based on corrupt acts provided by the UNCAC and possibly by the AU Corruption Convention. *See* Low et al., *supra* note 36, at 284 (contending that "[t]he United States could possibly avoid the constitutional problems arising from [illicit enrichment] by providing that only civil liability would attach to any violations of the illicit enrichment provision. Civil penalties do not trigger the same constitutional protections that criminal penalties do.").

308. *See* Senate Resolution on Inter-American Convention on Corruption, *supra* note 280.

exception for "routine government action."[309] This exception states:

> Subsections (a) and (g) [anti-bribery provisions] of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official.[310]

A combination of different factors contributed to Congress's decision to make an exception for low-level facilitation payments that are not intended to secure a decision. These factors include enforcement priorities and concerns for competitive advantages for U.S. companies.[311]

Such payments are, however, considered acts of corruption under the IACAC, AU Corruption Convention, and the UNCAC. The common definition of corruption crimes under the IACAC and AU Corruption Convention expressly prohibits "the offering or granting of *any* goods of monetary value, or other benefit . . . in exchange for any act or omission in the performance of his or her public functions."[312] The UNCAC takes a similar approach with the IACAC and the AU Corruption Convention.[313]

In the absence of any express exception for low-level facilitation payments, the ordinary meaning of the conventions' provisions suggests that *any* payment in exchange for *any* action is prohibited.[314] This is one

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309. *See* FCPA, *supra* note 9, § 78dd-1(b).

310. *Id.* The FCPA defines the term "routine governmental actions" as:

> [o]nly an action which is ordinarily and commonly performed by a foreign official in –
>
> obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> processing governmental papers, such as visas and work orders;
>
> providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
>
> actions of a similar nature.

Id. § 78dd-1(f)(3)(A). However, the term does not include "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." *Id.* § 78dd-1(f)(3)(B).

311. *See e.g.*, Low et al., *supra* note 36, at 269-70; *see also* J. Lee Johnson, *A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing*, 63 MO. L. REV. 979, 985-86 (1998).

312. *See* AU Corruption Convention, *supra* note 6, art. 4(b) (emphasis added); *see also* IACAC, *supra* note 12, art. VI(b).

313. *See* UNCAC, *supra* note 10, art. 15 (employing under-advantage language).

314. Although the conventions do not expressly include exceptions for low-level facilitation payments, they also do not expressly prohibit them when justified. Because of this lack of direction, the issue is not without controversy. For example, the Report of the Inter-American Judicial Committee on Model Elements for Inclusion into the Domestic Shares of State Parties hinted that parties may make exceptions for facilitation payments. *See* Low et al., *supra* note 36, at 269-70. On the other hand, the inclusion of "any level of its hierarchy" in the definition of public official in the IACAC and AU

important area where U.S. companies may be subject to a different and more onerous standard than the FCPA when operating outside the United States.

d) Affirmative Defenses

The FCPA is also distinguishable from all three conventions with respect to affirmative defenses. It provides for two distinct affirmative defenses. The first one states that:

> [i]t shall be an affirmative defense to actions under subsections (a) and (g) [anti-bribery provisions] of this section that - (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.[315]

This provision was enacted at a time when such situations were presumed to have existed. The conventions, however, do not recognize any such defense. In fact, they purport to abolish all kinds of bribery-related activities in the widest sense possible.[316] As these conventions become widely ratified and recognized, this particular affirmative defense of the FCPA will become increasingly irrelevant because there will be fewer and fewer written domestic laws legalizing any act of corruption.[317]

The second affirmative defense relates to the payment of bona fide business expenditures, such as travel and lodging expenses, for government officials that are "directly related to- (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[318]

The conventions make no express exceptions for these kinds of bona fide expenditures; however, whether these offers or benefits violate the conventions may depend on individual cases. The conventions categorically prohibit the acquisition of any benefits "in exchange for any act or omission in the performance of his or her public functions."[319] The bona fide expenditures may be entirely legitimate so as to not fall under the anti-bribery provisions. The challenge, however, is to distinguish whether a business decision is made because of promotion- and demonstration-associated travels and related benefits or in spite of such benefits. Drawing such distinctions will prove very difficult. In fact, precisely because of the difficulty associated with the application, the FCPA allows concerned par-

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Corruption Convention suggests that there is a clear position on the issue of low-level facilitation payments. *See* AU Corruption Convention, *supra* note 6, art. 1; IACAC, *supra* note 12, art. I.

315. *See* FCPA, *supra* note 9, § 78dd-1(c)(1).

316. *See generally* UNCAC, *supra* note 10, art. 1; AU Corruption Convention, *supra* note 6, art. 2; IACAC, *supra* note 12, art. II.

317. In fact, the AU Corruption Convention goes so far as to revoke any applicable immunity that might protect public officials in the exercise of their duties. *See* AU Corruption Convention, *supra* note 6, art. 7(5).

318. *See* FCPA, *supra* note 9, § 78dd-1(c)(2).

319. *See* UNCAC, *supra* note 10, arts. 15-16; AU Corruption Convention, *supra* note 6, art. 4(a); IACAC, *supra* note 12, art. VI(1)(a).

ties to seek clarification from the Attorney General regarding any contemplated specific conduct.[320]

The extent of the congruity or divergence of the FCPA's bona fide expenditure provisions and the anti-bribery provisions of the conventions will become clearer as they continue to govern overlapping sets of circumstances.

4. Scope of Coverage

As indicated in Part I.C.1, the jurisdictional reach of the FCPA, particularly after the OECD amendments, covers any natural or juridical person with some commercial nexus with the United States. However, the focus is strictly on the "supply" side, i.e., the offer, payment, or promise to pay or the authorization thereof.[321] In contrast, all three conventions add a "demand" side prohibition, i.e., solicitation or acceptance.[322] The FCPA, as domestic law, is inherently limited to regulating the conduct of persons who have some concrete relations with the United States but omits those receiving the benefits.

In this respect, the Fifth Circuit's opinion in *United States v. Castle*[323] is instructive. In *United States v. Castle*, the court stated that it was "an affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to the acts constituting a violation of the substantive law."[324] The necessary parties that the court said to have been left out were "foreign official[s]" as defined under the FCPA.[325] The FCPA defines a "foreign official" as:

> [a]ny officer or employee of a foreign government or any department or agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[326]

The AU Corruption Convention and the IACAC define a "public official" in similar language as "[a]ny official or employee of the State or its agencies including those who have been selected or elected to perform activities or functions in the name of the State or in the service of the State at any level of the hierarchy."[327]

One category of officials that the FCPA covers but that the two conventions possibly do not regulate is that comprising officials of joint public-

320. *See* FCPA, *supra* note 9, §§ 78dd-1(e)(1) (Issuers), 78dd-2(f)(1) (Domestic Concerns).

321. *See, e.g., id.* § 78dd-2(a), 7(5). The UNCAC contains a similar but less stringent provision. *See* UNCAC, *supra* note 10, art. 30(2).

322. *See* UNCAC, *supra* note 10, arts. 15-16; AU Corruption Convention, *supra* note 6, art. 4; IACAC, *supra* note 12, art. VI.

323. 925 F.2d 831 (5th Cir. 1991).

324. *Id.* at 836.

325. In the case, "foreign officials" are the same category of persons that the conventions call "public officials."

326. *See* FCPA, *supra* note 9, § 78dd-2(h).

327. *See* AU Corruption Convention, *supra* note 6, art. 1.

private enterprises or parastatals. Although the use of the term "instrumentality" in the FCPA seems to cover this category of officials,[328] there is no similar reference to them in the conventions and it is debatable whether the definition of "public official" in these conventions, though broad, is broad enough to cover officials of public enterprises or parastatals. The UNCAC's definition of "public official," on the other hand, is more elaborate and expressly covers officials of public enterprises.[329]

The possible omission of officials of public enterprises in the AU Corruption Convention's definition of "public official" may have a significant impact on the coverage of the convention because in most African economies, which are in the process of liberalizing, public enterprises or parastatals with some governmental control conduct various international commercial relations.[330] Although this category of officials may arguably be covered under the broad definition of "public official" or perhaps the anti-bribery catch-all provision as "any other person,"[331] the UNCAC's more focused approach towards this category of major players is highly desirable. In the interest of clarity, State Parties should be encouraged to adopt the UNCAC's approach of defining the term "public official" in their domestic legislation.

The IACAC and the AU Corruption Convention also omit officials of public international organizations from their definition of public officials. This omission is significant because the economic impact of public international organizations, particularly in developing economies, is enormous as they are involved in development and humanitarian aid. The UNCAC expressly covers this category of persons. This approach must be encouraged.

All three conventions, however, omit officials of non-governmental organizations (NGOs) from their definition of public officials. In today's reality, NGOs are major economic players, particularly in Africa. The

328. The term "instrumentality" is not defined under the FCPA; however, reference is usually made to its definition in the Foreign Sovereign Immunities Act, which defines it as an entity the majority of whose shares is owned by the government. 28 U.S.C. § 1603(a), (b) (2006).

329. *See* UNCAC, *supra* note 10, art. 2.

330. Officials of public enterprises are also not covered under the private sector provisions of the AU Corruption Convention because private sector is defined as exclusively private without any government control. *See* AU Corruption Convention, *supra* note 6, art. 1 ("Private Sector means the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government."). Although the government owns public enterprises at least in part, public entities are not strictly agencies of the government and are operated similar to a private company. The OECD Corruption Convention employs workable criteria to determine whether officials of public organizations should be considered public officials for purposes of the AU Corruption Convention, namely "traditional indicia of control such as majority stock ownership, majority of directors, or appointing a majority of directors of the administrative body of an entity." DEMING, *supra* note 223, at 97. Privately held companies that perform public functions or obtain government subsidies may also be considered parastatals. *Id.*

331. *See, e.g.*, AU Corruption Convention, *supra* note 6, art. 4.

developed world often directs its development and other forms of assistance through NGOs. Thus, the omission of this category of persons is also significant. State Parties must be encouraged to include NGO officials in their domestic legislations.

One area of coverage to which the AU Corruption Convention extends in mandatory terms, but the other conventions and FCPA do not, is political parties. Under Article 10 of the AU Corruption Convention, State Parties are required to "adopt legislative and other measures to . . . [p]roscribe the use of funds acquired through illegal and corrupt practices to finance political parties" and to "[i]ncorporate the principle of transparency into funding of political parties."[332] Although the UNCAC similarly addresses criteria for candidates, election to public office, and transparency in the funding of candidates and political parties, it does so in non-mandatory language.[333]

B. Procedural Provisions

1. Jurisdiction

For obvious jurisdictional reasons, the FCPA's coverage is focused and specific. In simple terms, it applies to natural and juridical persons who are otherwise subject to the jurisdiction of U.S. courts because of nationality, residence, presence, or any type of commercial nexus. The FCPA, initially limited to issuers and domestic concerns, now applies to all other persons who are present in the territory of the United States because of the OECD amendments.[334]

There are no significant divergences between the FCPA's existing jurisdictional grounds and the grounds adopted under the AU Corruption Convention and the IACAC. The distinctions that exist mainly relate to the nature of the FCPA as domestic legislation and the AU Corruption Convention and IACAC as international conventions. As international conventions, the AU Corruption Convention and the IACAC set the standards by which State Parties are to enact their own domestic laws in accordance with those standards. More specifically, jurisdiction under the AU Corruption Convention and IACAC extends to (1) offenses committed in the territories of State Parties, (2) offenses committed by nationals or habitual residents of State Parties, and (3) offenses committed by persons present in the territories of State Parties.[335]

Although the IACAC jurisdictional grounds mirror the FCPA, the AU Corruption Convention adds an additional, controversial jurisdictional

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332. *See id.* art. 10.

333. *See* UNCAC, *supra* note 10, art. 7(2)-(3). Earlier drafts of the UNCAC contained mandatory language on political parties in a separate article, but in the final version, as part of a "substantial compromise," the language was modified and moved to Article 7, which addresses the public sector. *See* Webb, *supra* note 9, at 215-18.

334. *See* FCPA, *supra* note 9, §§ 78dd-1 to -3.

335. *See* AU Corruption Convention, *supra* note 6, art. 13(a)-(c); IACAC, *supra* note 12, art. V(1)-(3). These are traditional jurisdictional grounds recognized under international law. IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 300-05 (3d ed. 1979).

ground. The AU Corruption Convention subjects anyone who commits a bribery crime anywhere to the jurisdiction of a State Party if the offense "although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party."[336] As can clearly be seen from this provision, the coverage could be extremely broad. Particularly noteworthy is the "deleterious and harmful consequences" grounds for jurisdiction. Not only are they overbroad, but they are also left for the subjective determination of the given State Party. This provision will undoubtedly face serious challenges in being incorporated into some State Parties with matured constitutional systems.[337] It will also likely become the subject of controversy with respect to the issue of extradition discussed in Part II.B.2.b.ii.

The UNCAC contains much broader jurisdictional grounds, including offenses committed in vessels and aircraft registered under the laws of a State Party, offenses committed against nationals of State Parties, offenses of laundering committed outside the territories of a State Party but with a view to having a related offense committed in those territories, and offenses committed against a State Party.[338] The former two categories are traditionally recognized jurisdictional grounds under international law,[339] but the latter two categories could potentially be subjects of controversy in practical application.

Under their current formulation, none of the three conventions prioritizes jurisdictional entitlement. As such, they could give rise to conflicting assertions of civil or criminal jurisdiction. Harmonization guidelines could help significantly in alleviating this potential challenge.

2. Enforcement

The primary objective of the AU Corruption Convention, IACAC, and UNCAC is enactment of FCPA-like statutes in the domestic laws of State Parties. Although the enactment of such domestic laws is the first and most important step in enforcement, the conventions also require certain enforcement steps after their provisions are implemented into domestic laws. As in the other contexts, there are significant similarities and differences between the instruments in the enforcement context. This section provides a comparative analysis of the enforcement mechanisms envisaged under each of these instruments.

a) Domestic Enforcement

i. Government Enforcement

Under the FCPA, the SEC and the U.S. Justice Department (DOJ) have

336. *Id.* art. 13(a)-(d).

337. Presumably for the reasons stated here, the IACAC mentions a similar ground under its scope of application but omits "effects or consequences" as an independent jurisdictional ground. *See* IACAC, *supra* note 12, arts. IV-V.

338. *See* UNCAC, *supra* note 10, art. 42(1)-(3).

339. *See* BROWNLIE, *supra* note 335, at 300-05.

the duty of enforcement.[340] The SEC enforces the compliance and anti-bribery provisions of the FCPA with respect to civil liability for issuers;[341] the DOJ enforces the criminal provisions.[342]

The IACAC does not specifically mandate the creation of an independent national anti-corruption enforcement agency.[343] Presumably, State Parties to the IACAC can rely on existing government agencies similar to the SEC and DOJ.[344] The AU Corruption Convention and UNCAC, however, require each State Party to establish an independent anti-corruption enforcement agency or authority.[345] The relevant AU Corruption Convention provision requires State Parties to "[e]stablish, maintain and strengthen independent national anti-corruption authorities or agencies."[346] The UNCAC's corresponding provision emphasizes the independence that such agencies must enjoy and stresses the need for law enforcement and interagency cooperation.[347]

Presumably, under both conventions, State Parties may choose to affiliate such independent agencies with their existing law enforcement agencies. Such agencies' degree of autonomy and relationship with other government agencies are left for State Parties to determine by national legislation. Because uniformity in this respect is vital, harmonization guidelines would be very helpful. In the case of State Parties to the AU Corruption Convention, it is incumbent upon the Advisory Board to devise mechanisms to ensure the harmonization of State Parties' efforts.

ii. Private Right of Action

Prior to 1991, it was unclear whether a private right of action could be implied from the substantive provisions of the FCPA. The basis of the controversy was an implication doctrine that the Supreme Court announced in 1916 in *Texas & Pacific Railway v. Rigsby*.[348] In this case, the Court held that a private right of action is implicit in a statute designed to protect a certain class of persons where the violation harms such persons.[349] Over time, however, the Court modified this proposition. By the time the issue

340. *See* Michael D. Nilsson, *Foreign Corrupt Practices Act*, 33 AM. CRIM. L. REV. 803, 811 (1996).

341. *Id.*

342. *Id.* Criminal liability may attach to individuals or enterprises. Each criminal violation of the anti-bribery provisions by an enterprise may result in a fine of up to $2 million. For example, in 1995, under a plea agreement, Lockheed paid a civil and criminal penalty of $24.8 million. *See* Low et al., *supra* note 36, at 260. Individuals, including directors and executives, could face up to five years of imprisonment, a $10,000 fine per violation, or both. *See* FCPA, *supra* note 9, §§ 78dd-2(g)(2)(A), 78ff(c)(2)(A).

343. *See generally* IACAC, *supra* note 12.

344. The IACAC, however, recommends that State Parties maintain "oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing, and eradicating corrupt acts." *Id.* art. III(9).

345. *See* UNCAC, *supra* note 10, art. 36; AU Corruption Convention, *supra* note 6, art. 5(3).

346. AU Corruption Convention, *supra* note 6, art. 5(3).

347. *See* UNCAC, *supra* note 10, arts. 36-38.

348. 241 U.S. 33 (1916).

349. *Id.* at 39-40.

of private rights of action was raised under the FCPA, Congressional intent was held to be the most significant factor in determining whether a private right of action was implied by a statute.[350] Unable to find a Congressional intent to grant a private right of action, U.S. courts of appeals consistently held that the FCPA did not give rise to such a right.[351] The Supreme Court denied certiorari on this issue, thereby effectively settling the law.[352]

Consistent with this position, the IACAC does not make any reference to the issue of a private right of action.[353] The UNCAC, in contrast, explicitly provides for a private right of action. Article 35 of the UNCAC provides:

> [e]ach State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.[354]

Although Article 35 is cast in mandatory language, the *travaux preparatoires* states that "[w]hile article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so."[355] Accordingly, Article 35 appears to give states considerable latitude in determining the particulars of the private rights of action provided for in each state. Thus, for example, the American Bar Association has taken the position with respect to the FCPA that

> [a]lthough U.S. courts do not recognize a private right of action under the [FCPA], they do recognize private remedies in certain circumstances for corruption-related actions. Corruption related activities have, for example, served as predicate acts for civil RICO [Racketeer Influenced and Corrupt Organizations Act] claims . . . and for claims of tortious interference with prospective economic advantage . . . . Cases have also been brought in tort under the theory of conversion, for example, as in the cases against the former Philippine President Ferdinand Marcos and the former leader of Haiti, "Baby Doc" Duvalier.[356]

An important example of bribery serving as the predicate act for a civil RICO claim in U.S. jurisprudence is *W.S. Fitzpatrick & Co., Inc. v. Environ-*

350. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 688-709 (1979); Touche Ross & Co. v. Redington, 422 U.S. 560, 578 (1979).

351. *See, e.g.*, Lamb v. Philip Morris, Inc., 915 F.2d 1024, 1028-29 (6th Cir. 1990); McLean v. Int'l Harvester Co., 817 F.2d 1214 (5th Cir. 1987).

352. Lamb v. Philip Morris, 498 U.S. 1086 (1991).

353. *See generally* IACAC, *supra* note 12.

354. UNCAC, *supra* note 10, art. 35.

355. Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of Its First to Seventh Sessions: Addendum*, ¶ 38, U.N. Doc. A/58/422/Add. 1 (Oct. 7, 2003).

356. KENNETH B. REISENFELD, AM. BAR ASS'N, SECTION OF INT'L LAW, RECOMMENDATION 10-11 (2005), *available at* http://www.abanet.org/intlaw/policy/crimeextradition/conventioncorruption08_05.pdf (internal citations omitted).

mental Tectonics Corp., Int'l.[357] Additionally, the UNCAC contains a provision that enables State Parties to "consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action," further empowering private parties under the UNCAC.[358]

Although the AU Corruption Convention does not explicitly provide a private right of action, it does involve the private sector in the fight against corruption and makes specific provisions to this effect. For example, the AU Corruption Convention states that "State Parties undertake to establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect for the tender procedures and property rights."[359] This provision can be meaningfully implemented if State Parties grant private rights of action for private injuries resulting from corrupt practices. Again, it is incumbent upon the Advisory Board to suggest the details of such an important alternative enforcement mechanism.

This is another important area where U.S. companies could be subjected to more onerous obligations than that of the FCPA when engaged in business abroad. Particularly noteworthy is the interaction between the possibility of a private right of action under the above-quoted UNCAC and AU Corruption Convention provisions and the gratuities for the routine governmental action exception under the FCPA.[360] It is now imperative for any U.S. entity involved in international transactions to research not only the domestic laws of the countries of engagement but also their international obligations under the anti-corruption conventions. These private-right-of-action related provisions of the UNCAC and AU Corruption Convention serve as illustrative examples of overlapping and sometimes divergent obligations that the multiple legal regimes impose.

b) International Enforcement

One of the most important factors that necessitated the involvement of international law in combating corruption is the need for international enforcement cooperation. Because international corruption often involves

357. 493 U.S. 400 (1990). In this case, a competitor brought a civil action against a company under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Robinson-Putnam Act, and a state-law anti-racketeering act after the DOJ brought charges against the company and its chief executive officer under the FCPA for paying a bribe to a Nigerian government official to win a contract for constructing and equipping an aeromedical center in Nigeria. *See id.* at 401-02, 404-05, 409-10. *Fitzpatrick* is best known for providing the Court's most recent pronouncement on the act of state doctrine. The precise issue on appeal in *Fitzpatrick* was whether the act of state doctrine bars U.S. courts from hearing cases when doing so would require imputing to a foreign official an unlawful motivation in the performance of his official acts. *See id.* at 401. The Court concluded that no foreign sovereign act was at issue and the case could proceed because the Court only had to determine whether the motivations of the U.S. government official in executing the contract at issue violated U.S. law and need not consider whether the contract was valid under Nigerian law. *See id.* at 405-06.

358. UNCAC, *supra* note 10, art. 34.

359. AU Corruption Convention, *supra* note 6, art. 11(2).

360. *See* FCPA, *supra* note 9, § 78dd-1(b).

conduct or omissions in two or more countries or persons from two or more countries, effective international enforcement mechanisms are essential. This section discusses the international enforcement mechanisms envisaged by the three conventions.

i. International Cooperation in General

All three conventions mandate international cooperation in their efforts to prevent, detect, investigate, and punish corruption.[361] More specifically, the IACAC and the AU Corruption Convention envisage agency-to-agency cooperation in processing requests for assistance in investigations and prosecutions of crimes that occur in one or the other State Parties.[362] Both call for wide cooperation in this regard but use slightly different language.[363] The AU Corruption Convention envisages more areas of cooperation. It makes mandatory provisions for less concrete forms of cooperation, including the exchange of expertise, studies, and research, and the sharing of codes of ethics.[364]

The UNCAC devotes one whole chapter to international cooperation.[365] The provisions are very detailed, enumerating the purposes for which evidence may be requested and covering instances where assistance may be denied.[366] These provisions also provide detailed procedural guidelines.[367] They could provide a model for AU Corruption Convention State Parties' efforts to harmonize their domestic laws to comply with the AU Corruption Convention. The Advisory Board could also consider the UNCAC provisions in its assistance of State Parties in their implementation efforts.

ii. Extradition

Extradition figures prominently in all three conventions, not only because it denies safe haven for violators but also because it serves as a significant deterrent mechanism. The extradition provisions contained in each of the three conventions mirror the criminalization provisions.[368] For

361. *See* UNCAC, *supra* note 10, arts. 43, 46; AU Corruption Convention, *supra* note 6, art. 18; IACAC, *supra* note 12, art. XIV.

362. *See* AU Corruption Convention, *supra* note 6, art. 18(1); IACAC, *supra* note 12, art. XIV(1).

363. *See* AU Corruption Convention, *supra* note 6, art. 18 ("State Parties provide each other with the greatest possible technical cooperation and assistance in dealing immediately with requests from authorities"); IACAC, supra note 12, art. XIV(a) ("The State Parties shall offer one another the widest measure of mutual assistance by processing requests").

364. *See* AU Corruption Convention, *supra* note 6, art. 18(3)-(4).

365. *See generally* UNCAC, *supra* note 10, ch. IV.

366. *Id.* arts. 46(3), 46(9)(b)(c). Instances where cooperation may be afforded include: collecting evidence, serving process, executing searches and seizures, examining sites and objects, and generally providing information and evaluations. An instance where cooperation may be refused is the absence of dual criminality, i.e., when the conduct is not deemed criminal in the requested state.

367. *Id.* ch. IV.

368. *See* UNCAC, *supra* note 10, art. 44; AU Corruption Convention, *supra* note 6, art. 15; IACAC, *supra* note 12, art. XIII.

example, the relevant provision of the AU Corruption Convention states that "[o]ffenses falling within the jurisdiction of this Convention shall be deemed to be included in the internal laws of State Parties as crimes requiring extradition."[369] The IACAC also ties its extradition reach to its criminalization provisions by stating that "[t]his article shall apply to the offenses established by the State Parties in accordance with this Convention."[370]

Both the AU Corruption Convention and IACAC provide that the crimes defined therein should be considered extraditable offenses under existing and future extradition treaties between and among State Parties.[371] Moreover, both conventions provide (in identical language) that in the absence of exclusive extradition treaties, the conventions serve as the basis for extradition.[372] This provision is significant because it is an extradition treaty in and of itself as between parties that do not have an independent extradition treaty. In the case of the IACAC, however, the United States attached reservations to the application of this provision. For example, the United States

> shall not consider this Convention as the legal basis for extradition to any country with which the United States has no bilateral extradition treaty in force. In such cases where the United States does not have a bilateral extradition treaty in force, that bilateral extradition treaty shall serve as the legal basis for extradition for offenses that are extraditable in accordance with this Convention.[373]

This reservation does not, however, have practical significance because at the time of ratification, the United States already had extradition treaties with all of the State Parties to the IACAC.[374]

The UNCAC's extradition provision is very detailed and covers specific areas that the other two do not. These specifics include various instances that could feasibly arise, such as multiple offenses where only one is extraditable, evidentiary requirements for extradition, minimum penalty requirements, preventative custody pending extradition, obligation to prosecute when not extraditing, conditional extraditions, and situations where extradition may be refused.[375] These detailed provisions address some of the important issues that may arise in domestic implementation and are good models for domestic legislation. They could also serve as a

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369. AU Corruption Convention, *supra* note 6, art. 15(2).

370. IACAC, *supra* note 12, art. XIII(1).

371. AU Corruption Convention, *supra* note 6, art. 15(2); IACAC, *supra* note 12, art. XIII(2).

372. *See* AU Corruption Convention, *supra* note 6, art. 15(3); IACAC, *supra* note 12, art. XIII(3) ("If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from a State Party with which it does not have such treaty, it shall consider this Convention as a legal basis for all offences covered by this Convention.").

373. Senate Resolution on Inter-American Convention on Corruption, *supra* note 280. The word "not" appears to have been included erroneously in the text of the resolution.

374. *See* Low et al., *supra* note 36, at 287 n.172.

375. *See generally* UNCAC, *supra* note 10, arts. 44(1), (18).

good reference for the Advisory Board in its efforts to attain uniformity in the implementation of the AU Corruption Convention provisions.

iii. Asset Recovery and Bank Secrecy

Although extradition targets individual offenders, asset recovery targets the illicitly obtained assets. Asset recovery plays a significant role in combating transnational corruption. The conventions pay particular attention to this mechanism because transfer of corruptly obtained assets and laundering are major problems affecting many economies today. According to the estimates of the International Monetary Fund, three to five percent of the world's gross domestic product is a result of laundered money.[376] In quantitative terms, it involves $600 billion to $1.8 trillion dollars each year.[377] The majority of this money is believed to derive from the corrupt practices that the conventions intend to combat.[378] Asset recovery is a mechanism that the conventions designed to deal with the illicit wealth.

All three conventions deal with asset recovery as a means of enforcing the criminalization provisions with different levels of emphasis.[379] The IACAC focuses on tracing, freezing, seizure, and forfeiture of proceeds of criminal conduct.[380] It also provides for the proceeds to be transferred in part or in whole to a "State Party that assisted in the underlying investigation or proceedings."[381] Thus, the IACAC seems to focus on punishing offenders and reimbursing investigation- and prosecution-associated costs, rather than returning assets taken through corrupt acts.

The AU Corruption Convention's approach to asset recovery is broader and envisages high-level corruption and movement of wealth that has a direct impact on a nation's economy.[382] For example, the AU Corruption Convention does not use the term forfeiture, which connotes purposefully penalizing the offender. Instead, the AU Corruption Convention uses the term "repatriation of proceeds of corruption," a term which sug-

376. Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, *Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived from Acts of Corruption*, ¶ 9, U.N. Doc. A/AC.261/12 (Nov. 28, 2002).

377. *Id.*

378. *Id.*

379. *See generally* UNCAC, *supra* note 10, art. 51-59; AU Corruption Convention, *supra* note 6, art. 16; IACAC, *supra* note 12, art. XV.

380. *See* IACAC, *supra* note 12, art. XV.

381. *Id.*

382. One explanation for this focus is the history of grand corruption that transferred large amounts of wealth from Africa to foreign countries. In 2001, the Transparency International-sponsored Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth found that an estimated $20 to $40 billion worth of assets have been corruptly misappropriated in Africa and shipped to foreign countries. *See* Press Release, Transparency Int'l, The Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth Illegally Appropriated and Banked or Invested Abroad (Mar. 4, 2001), *available at* http://www.ipocafrica.org/cases/assestsrecovery/officialdocuments/NyangaDeclaration.pdf [hereinafter Nydanda Declaration] (citing Rena Singer, *New Ways to Monitor Kleptocrats*, CHRISTIAN SCI. MONITOR, Dec. 27, 2000). For example, the Nigerian Government has recovered $750 million through asset recovery efforts. *Id.* at pre-amble.

gests the accumulation of wealth in foreign countries and the returning of such wealth to its rightful location.[383] The purpose of repatriation does not appear to be merely punishing the offender or reimbursing investigation costs but also includes regaining national wealth. The AU Corruption Convention makes the remedy of "repatriation of proceeds" available with or without extradition, further suggesting that asset recovery in the AU Corruption Convention context is not a mere criminal punishment.[384] Such provisions are consistent with the AU Corruption Convention's focus on development and good governance.

The UNCAC devotes an entire chapter to asset recovery and treats the issue at a level of detail that the others do not.[385] From the outset, it states that "[t]he return of assets pursuant to this chapter is a fundamental principle of this Convention, and State Parties shall afford one another the widest measure of cooperation and assistance in this regard."[386] As a universal instrument, this is one of the most important areas where the UNCAC has a clear advantage over the regional instruments. It sets forth obligations for parties on both sides of the often intercontinental movement of assets, which may not be parties to the same regional conventions.[387]

The UNCAC takes a comprehensive approach to asset recovery. The provisions can be broadly categorized into two types of provisions: (1) prevention and detection provisions and (2) recovery provisions.[388] The prevention provisions are unique to the UNCAC and obligate State Parties to require their financial institutions to verify the identity of their customers and "conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members . . . ."[389] Other measures that financial institutions in potential destination countries need to consider include information sharing, keeping records of suspicious transactions, identifying beneficial owners, scrutinizing the establishment of banks without physical presence, and other related measures.[390] The preventative provisions are formulated in mandatory language and could have significant impact if appropriately implemented.

With respect to recovery, the UNCAC designs both direct and indirect recovery. The direct recovery measure, perhaps more practical, deals with the obligation of states to afford one another *locus standi* to initiate civil

383. *See* AU Corruption Convention, *supra* note 6, art. 16(1)(c).
384. *See id.* art. 16(2)-(3).
385. *See generally* UNCAC, *supra* note 10, ch. V.
386. UNCAC, *supra* note 10, art. 51.
387. For example, one of the Transparency International-sponsored Nyanga Declarations shows the concern over trans-continental transfer of wealth. It states that "[i]t is not only illegal but blatantly immoral that so much wealth stolen from some of the world's poorest countries is allowed to circulate freely in the economies of some of the world's wealthiest nations in Europe, the Americas, the Middle East and diverse offshore havens." Nyanga Declaration, *supra* note 382, at 1.
388. *See generally* UNCAC, *supra* note 10, ch. V.
389. *Id.* art. 52(1).
390. *Id.* art. 52(1)-(4).

actions in one another's civil courts for the establishment of title of ownership and subsequent recovery.[391] The indirect measures, *inter alia*, include recognizing judgments and confiscation orders of other states' courts, and freezing and seizure of property pending investigation or prosecution.[392] The UNCAC also sets forth detailed procedural rules regarding international cooperation for purposes of confiscation and repatriation of such assets.[393]

This universal coverage of the UNCAC is unique and is an area that the AU Corruption Convention is inherently unable to cover fully because of its territorial limitations. Although State Parties to the AU Corruption Convention could benefit from the details set forth under the UNCAC as models of implementation of the asset recovery provisions of the AU Corruption Convention, AU members who have not yet done so should be encouraged to accede to the UNCAC. The asset recovery provisions of the UNCAC are particularly beneficial to AU member states that have lost and are still losing significant amounts of wealth through the cross-continental movement of illicit wealth. The cooperation of destination nations is essential. Indeed, states involved on both sides of the movement of illicit wealth throughout the world should be encouraged to accede to the UNCAC. That is ultimately the only way that asset recovery can have a meaningful impact in the fight against corruption.

The bank secrecy rules enshrined under all three conventions, which have varying degrees of clarity,[394] are designed to supplement the asset recovery rules. These secrecy rules obligate State Parties to empower their enforcement agencies or courts to have access to bank secrets for investigation and prosecution purposes. These are important rules without which the asset recovery provisions would have little impact.

C. Unique Characteristics of the AU Corruption Convention

Corruption as a global challenge is increasingly addressed universally through international law. The AU Corruption Convention is part of this universal response. However, the AU Corruption Convention has some unique areas of emphasis that are not shared by the other conventions. This uniqueness is a result of the distinct challenges confronting Africa today.

Corruption is a serious developmental challenge for Africa and is linked to the issues of good governance, democracy, and institutional building. It is evident that the drafters of the AU Corruption Convention recognized the broader implications of corruption. As a result, they emphasized the need for good governance and institutional reform. In line with this approach, they incorporated and reemphasized the importance of traditional notions of justice, including the necessity of according a fair

391. *See id.* art. 53.
392. *See id.* art. 54.
393. *Id.* arts. 55, 57.
394. *See id.* art. 40; AU Corruption Convention, *supra* note 6, art. 17; IACAC, *supra* note 12, art. XVI.

trial to the accused in all cases and the prohibitions against double jeopardy and malicious prosecution.

1. Good Governance Approach

One article of the AU Corruption Convention is devoted to a statement of principles. Neither the UNCAC nor the IACAC contains a parallel provision. The fundamental principles are stated as:

> The State Parties to this Convention undertake to abide by the following principles:
>
> 1. Respect for democratic principles and institutions, popular participation, the rule of law and good governance.
> 2. Respect for human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.
> 3. Transparency and accountability in the management of public affairs.
> 4. Promotion of social justice to ensure balanced socio-economic development.
> 5. Condemnation and rejection of acts of corruption, related offenses and impunity.[395]

State Parties to the AU Corruption Convention recognize that any attempt to combat corruption in Africa without applying these fundamental principles would be futile. Indeed, the ordering of these principles suggests that the eradication of corruption cannot occur without progress on the other principles. One observer neatly summarizes the central difficulty, stating that "[t]oo often, former rulers are accused of corruption at the same time as the new rulers are creating corrupt structures of their own that will repeat the pattern. The effort to retrieve looted funds should be combined with affirmative programs of reform."[396] Without real socio-economic and political reform, the cycle of corruption is difficult to break. The AU Corruption Convention's underlying principles attest to the growing awareness that corruption is not just another kind of criminal conduct; rather, it profoundly impacts the economic foundations of nations.[397] Accordingly, State Parties to the AU Corruption Convention pledged to bring about

395. AU Corruption Convention, *supra* note 6, art. 3. *Compare* IACAC, *supra* note 12, art. II ("The purposes of this Convention are: 1. To promote and strengthen the development by each of the State Parties of the mechanisms needed to prevent, detect and eradicate corruption; and 2. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance."), *with* UNCAC, *supra* note 6, art. 1 ("The purposes of this Convention are: (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.").

396. Webb, *supra* note 9, at 211-12 (citing Susan Rose-Ackerman, *Establishing the Rule of Law*, *in* WHEN STATES FAIL: CAUSES AND CONSEQUENCES 185 (Robert Rotberg ed., 2004)).

397. *See* AU Corruption Convention, *supra* note 6, art. 3.

accountability in government and private affairs.[398] By recognizing that corruption cannot be combated without accountability, the AU Corruption Convention took a good governance approach to corruption. Though ambitious, it is realistic and will likely contribute to the slow journey towards accountability and democratic order in African states.

2. *Rights-Based Approach*

The AU Corruption Convention's rights approach is evident from its statement of objectives.[399] One of the objectives, unique to the AU Corruption 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."[400] By and large, the AU Corruption Convention characterizes corruption as a phenomenon that deprives people of the enjoyment of not only their socio-economic rights but their human rights in general. Despite this unique approach, however, the remedies that the AU Corruption Convention prescribes are similar to the pre-existing instruments that adopted a crime control approach.

a) Malicious Prosecution

There are many challenges involved in enforcement of the criminalization provisions. One of the most serious challenges that the AU Corruption Convention envisages is the use of the Convention to promote political and other forms of corruption instead of fighting them. There is a real danger that individuals or groups within a government who genuinely fight corruption may be targeted for false accusations by other members of the same government using the AU Corruption Convention. This is a disturbing potential misuse of the Convention, which could defeat its own purpose. For example, Transparency International reported a "disturbing pattern of false accusations against officials who fight corruption in high places."[401] In one important case of alleged corruption, the Nicaraguan Government falsely accused an official who was known for his fight against corruption.[402] The possible use of accusations of corruption against political opponents is also evident.

Cognizant of this possibility, State Parties to the AU Corruption Convention added a unique provision with respect to this particular issue. The provision obligates State Parties to "[a]dopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offenses."[403] This provision in par-

398. *See id.* art. 2.
399. *See id.* art. 2.
400. *Id.* art. 2(4).
401. Press Release, Transparency Int'l, Transparency International Deeply Concerned over Arrest of Nicaraguan Comptroller-General (Nov. 12, 1999), http://www.transparency.org/news_room/latest_news/press_releases/1999/1999_11_15_nicaragua.
402. *See Nicaragua: Arrest of Comptroller-General Causes Widespread Concern*, TI NEWSLETTER (Transparency Int'l, Berlin), Dec. 1999. The accused official was Agustin Jarquin Anaya, former Comptroller General of Nicaragua. *Id.*
403. AU Corruption Convention, *supra* note 6, art. 5(7).

ticular, if properly implemented, would guard the AU Corruption Convention from being used as another instrument of repression by unscrupulous rulers. The drafters of the AU Corruption Convention were cognizant of the fact that without proper guarantees of fairness and justice, the prescriptions they made could become worse than the ailment they were designed to treat. In keeping with this notion, the AU Corruption Convention also paid particular attention to important human rights guarantees, most importantly, a fair trial and a prohibition against double jeopardy.

b) Fair Trial

Another area that makes the AU Corruption Convention unique is its emphasis on treatment of the accused, which protects a higher value than the substantive provisions. Under the title "Minimum Guarantees of a Fair Trial," the AU Corruption Convention guarantees the following:

> Subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and Peoples' Rights and any other relevant international human rights instrument recognized by the concerned State Parties.[404]

The AU Corruption Convention is unique in its emphasis on the rights of the accused and its reference to human rights instruments. Any law enforcement attempt that does not take the fundamental rights of the accused into account can cause more harm than good to society. This is particularly true in many parts of Africa where law enforcement institutions and the judiciary in general can best be characterized as "fragile."[405]

Although the UNCAC does not take the rights approach and does not even mention human rights, it makes a similar provision for protecting the rights of the accused.[406] More importantly, the UNCAC contains an independent provision dealing with corruption relating to the judiciary and prosecutorial services.[407] This is unique to the UNCAC and could be an important supplement to the AU Corruption Convention's good governance and rights approach because the prosecutorial service and the judiciary are responsible for the administration of justice. AU Corruption Convention State Parties must be encouraged to adopt the UNCAC provision on prosecutorial and judicial corruption in their implementation legislation because an independent and incorruptible judiciary is essential to combat corruption and helps guarantee good governance.

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404. *Id.* art. 14.

405. Professor Peter Schroth used this term to describe the courts in Africa. He acknowledges that he borrowed the term from a Mozambican lawyer who is an acquaintance of his. Schroth, *supra* note 20, at 107.

406. *See* UNCAC, *supra* note 10, arts. 30(4), 44(14).

407. *See id.* art. 11(1)-(2) ("[T]ake measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary [and prosecution services]. Such measures may include rules with respect to the conducts of members of the judiciary [and prosecution services].").

c) Double Jeopardy

Consistent with its rights approach, the AU Corruption Convention expressly prohibits double jeopardy.[408] This prohibition, which the other two conventions omit, is particularly essential because the jurisdictional grounds that all the conventions create overlap significantly and a given set of circumstances could therefore give rise to multiple assertions of jurisdiction. Inevitably, that would lead to valid extradition requests that may not be refused even if it means that the accused would be subjected to double jeopardy. The assumption that the prohibition against double jeopardy does not apply when multiple sovereigns are involved may explain the IACAC's and UNCAC's omission.[409] However, the danger of subjecting an innocent person to judicial ordeals in multiple states or subjecting a person to multiple punishments for the same offense seems to outweigh benefits that omission of the prohibition may bring. As such, the AU Corruption Convention's approach to double jeopardy is not only fair and desirous but also in line with its rights and good governance approach. Compromising fundamental principles of justice for the benefit of law enforcement is more dangerous than illicit benefits and, as such, should not be encouraged.

Conclusions and Recommendations

Africa's decision to join the growing trend of combating corruption through international law by adopting the AU Corruption Convention is a remarkable step. Concrete results, however, require strong commitment, clarification of obligations, and proper, harmonized, and consistent implementation and enforcement of the norms set forth under the Convention. This Article has attempted to compare the substantive and procedural provisions of the AU Corruption Convention with the FCPA, IACAC, and UNCAC to identify areas of commonality and divergence. This Article has also tried to show the complementarities of these conventions. In particular, this Article identified specific areas of the instruments other than the AU Corruption Convention, which could benefit the AU Corruption Convention State Parties' implementation efforts. This Article further identified specific areas of the other instruments that the AU Corruption Convention Advisory Board could benefit from in executing its follow-up and harmonization obligations.

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408. *See* AU Corruption Convention, *supra* note 6, art. 13(3) ("Notwithstanding the provision of paragraph 1 of this article, a person shall not be tried twice for the same offence.").

409. *See, e.g.*, Chukwurah v. United States, 813 F. Supp. 161, 167 (E.D.N.Y. 1993) (stating that the principle of double jeopardy does not prohibit dual prosecution by U.S. and foreign sovereign officials of the same act). The same principle applies in the context of the United States federal system. *See, e.g.*, Health v. Alabama, 474 U.S. 82 (1985) (sustaining prosecution by two states of the same defendant for the same offense); United States v. Lanza, 260 U.S. 377 (1922) (sustaining federal conviction following a state conviction for the same offense).

Most importantly, this Article recapitulated Africa's unique approach to combating corruption through international law. The AU Corruption Convention takes into account Africa's unique predicaments. It is an instrument based on the recognition of Africa's existing reality. It is not only designed to serve as a crime control instrument but also to complement Africa's struggle to achieve accountability, good governance, the rule of law, democracy, and development. The AU Corruption Convention's recognition of such challenges is evident. Indeed, it is the only instrument of its kind that takes a good governance and human rights approach. Although the entire concept requires systematic development, it is a remarkable beginning. Without accountability, respect for human rights, and good governance, corruption cannot be combated meaningfully. Africa should bring up the issue of human rights and good governance in every forum. The AU Corruption Convention was such an instance, and implementation efforts should keep sight of the underlying and fundamental principle on which the AU Corruption Convention is predicated: "[r]espect for democratic principles and institutions, popular participation, the rule of law and good governance. Respect for human and peoples' rights."[410] Combating a phenomenon that is directly intertwined with the exercise of state power without appropriate institutional reform may be like putting the cart in front of the horse. Therefore, the AU Corruption Convention's good governance and human rights approach must be encouraged and developed further in all implementation and enforcement stages.

The AU Corruption Convention is a profound step by its own accord, but as a regional instrument, its scope, including its degree of international cooperation, is limited to combating corruption in Africa. In reality, however, international corrupt practices, particularly the movement of illicitly obtained assets that have a significant impact on Africa's economy, involve States on other continents that the AU Corruption Convention cannot bind. The full benefits of the AU Corruption Convention can materialize only if there is a corresponding obligation on the part of the destination countries. The only legal instrument of a universal nature that could bind all states to the same standard is the UNCAC. In relation to corruption that involves other continents, therefore, to avoid clapping with one hand, State Parties to the AU Corruption Convention and all other nations who wish to fight corruption through international law must accede to the UNCAC. That is the best way of addressing issues involved in the cross-continent corruption that is seriously affecting Africa's development today.

410. AU Corruption Convention, *supra* note 6, art. 3(1)-(2).