

The African Union Convention on Preventing and Combating Corruption: A critical appraisal

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Summary

This article analyses the Convention on Preventing and Combating Corruption that was adopted at the African Union summit in Maputo in July 2003. While recognising that the Convention represents a significant step in the efforts to counteract corruption across Africa, the author argues that the strong link between corruption and the violation of human rights is not sufficiently emphasised in the Convention. The Convention also suffers from excessive use of claw-back clauses and lacks a serious and effective mechanism for holding states accountable. The author suggests that the Convention should be amended to become a protocol to the African Charter on Human and Peoples' Rights, thus bringing the provisions under the supervision of the African Commission and the African Human Rights Court.

1 Introduction

The adoption by the African Union (AU) Assembly of Heads of State and Government of the Convention on Preventing and Combating Corruption (Anti-Corruption Convention)¹ on 11 July 2003, marked an

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¹ African Union Convention on Preventing and Combating Corruption, 11 July 2003, at <<http://www.africa-union.org/Officialdocuments/Treaties%20Conventions%20Protocols/Convention%20on%20Combating%20Corruption.pdf>>. For the drafting history of the Anti-Corruption Convention, see eg K Olaniyan 'Introductory note to African Union (AU): Convention on Preventing and Combating Corruption (2004) 43 *International Legal Materials* 1.

event of great importance regionally and nationally in the fight against corruption.² The Convention criminalises corruption in the public and private sector, obligating state parties to adopt legislative, administrative and other measures to tackle corruption, which is reported to cost Africa approximately \$148 billion annually.³ State parties agree to implement the provisions of the Convention in their national law and practice. The Convention will enter into force 30 days after the date of the deposit of the fifteenth instrument of ratification or accession.⁴

The Anti-Corruption Convention aims to achieve four objectives: first, to promote and strengthen the development in Africa of anti-corruption mechanisms;⁵ second, to promote, facilitate and regulate co-operation among state parties;⁶ third, to remove obstacles to the enjoyment of human rights, including economic, social and cultural rights;⁷ and fourth, to establish conditions necessary to foster transparency and accountability in the management of public affairs.⁸ However, while the Anti-Corruption Convention brings some striking novelties to international efforts against corruption specifically by linking corruption and human rights, it does not spell out the precise content of this relationship or reflect a coherent framework of remedies for individuals or groups whose human rights are violated as a result of corruption. Rather, it focuses on criminal sanctions, and leaves out victims, especially vulnerable and excluded individuals or groups, thus denying them direct access to remedies, such as compensation and restitution. The large-scale corruption of Africa's resources and wealth for safe havens abroad by those entrusted with its control and management has seriously limited governments' ability to fulfil their human rights

² Although there have been a number of noteworthy developments in relation to corruption at sub-regional level, such as the Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS), the Convention is the first regional agreement on corruption adopted by the AU since its establishment in July 2000, following the adoption of the Constitutive Act of the AU to replace the Charter of the Organization of African Unity (OAU), in existence since 1963. See eg Southern African Development Community (SADC), Protocol Against Corruption (14 Aug 2001), at <<http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p>> (accessed 31 May 2004).

³ Olaniyan (n 1 above).

⁴ Art 23(2) Anti-Corruption Convention. The Convention received its first ratification (Comoros) in April 2004. As at 1 June 2004, 27 other countries had signed the document. These are Algeria; Benin, Burkina Faso, Burundi; Côte d'Ivoire, Congo, Democratic Republic of Congo (DRC); The Gambia; Ghana; Guinea; Kenya; Lesotho, Libya; Liberia; Madagascar, Mali; Mozambique; Namibia; Nigeria; Rwanda; Senegal; Sierra Leone; South Africa, Tanzania; Togo; Uganda and Zimbabwe; <<http://www.Africa-union.org>> (accessed 31 May 2004).

⁵ As above, art 2(1).

⁶ As above, art 2(2).

⁷ As above, art 2(4).

⁸ As above, art 2(5).

obligations, locking individuals and groups into cycles of dependency and despondency. Moreover, governments generally abhor the idea of transposing anti-corruption initiatives into the human rights framework.

Yet, the link between corruption and human rights, especially economic, social and cultural rights, is direct and strong and can hardly be contested. While human rights law grants to individuals basic rights to live with dignity, and freedom to explore ways towards development and prosperity, corruption, especially large-scale corruption,⁹ impedes the full realisation of these fundamental objectives. Corruption systematically drains the state's 'maximum available resources',¹⁰ precipitating poverty, unnecessary debt burden, and economic crisis which inevitably magnify dispossession, hunger, disease, illiteracy, and insecurity. Corruption brings about unfair consequences for the vulnerable groups of the society, including the poor, women and children, perpetrating and institutionalising discrimination. By exploiting a nation's natural resources and wealth for the personal gain of leaders, rather than socio-economic development of a country, corruption jeopardises the needs and well-being of future generations.

The approach adopted by the Anti-Corruption Convention appears to presume the adequacy and effectiveness of the accountability institutions and the systems designed to protect human rights; or that state interest and those of individuals or groups are the same, and will always coincide. However, in practice this is rarely the case. The absence of provisions in the Convention for adequate compensation for individuals or groups whose human rights are violated as a result of corruption means the interests of states and their agents would continue to predominate.

Nevertheless, it is clear that a human rights approach to corruption would not only help to increase the implementation of the Convention, but also enhance international accountability in respect of human rights, especially in Africa where respect for those rights are the exception, rather than the rule. In the absence of an adequate legal response, the

⁹ This type of corruption has been called 'indigenous spoliation', defined as '[the theft] by national officials of the wealth of the states of which they are temporary custodians'. Kofele-Kale describes it as 'a systematic looting and stashing, largely in foreign banks, of the financial resources of a state; the arbitrary and systematic deprivation of the economic rights of the citizens of a nation by its leaders, elected and appointed, in military regimes as well as civilian governments'; N Kofele-Kale *International law of responsibility for economic crimes* (1995) 13.

¹⁰ See art 2(1) International Covenant on Economic, Social and Cultural Rights. The article provides: 'Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical assistance, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures' (my emphasis).

adoption of an alternative remedial strategy becomes of paramount importance, if only to shift attention to the economically and socially vulnerable sectors of the population. This article appraises the Anti-Corruption Convention and argues that its overall effectiveness will depend in the main on the possibility of its being firmly placed within the framework of the African Charter on Human and Peoples' Rights (African Charter)¹¹ and its implementation mechanisms.

2 Content of the AU Anti-Corruption Convention

Given the events in the United States (US) in the 1970s¹² and the subsequent adoption of international conventions¹³ (after initial opposition by some countries, including Germany and France), and

¹¹ See African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58 (entered into force 21 October 1986), at <http://www.africa-union.org/Official_documents/Treaties%20Conventions%20Protocols/Banjul%20Charter.pdf> (accessed 31 May 2004).

¹² Instances of illegal campaign contributions and laundering of such money through foreign countries, and of the use of campaign funds to bribe foreign officials in the 1970s resulted in the promulgation of the Foreign Corrupt Practices Act 1977. The Act aims to, among others, criminalise and regulate extraterritorial bribery. The 1988 amendment to the Act requires the US President to seek international cooperation in suppressing business bribery. See Foreign Corrupt Practices Act 1977, Pub L No 95-213, 91 Stat 1494 as amended by International Anti-Bribery and Fair Competition Act of 1998, Pub L No 105-366, 112 Stat 3302.

¹³ In 1996, the Inter-American Convention against Corruption was negotiated under the auspices of the Organisation of American States (OAS) (1996) 35 *International Legal Materials* 724 (entered into force 6 March 1997). The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was negotiated a year after, in 1997, by the Organisation for Economic Co-operation and Development (OECD) S Treaty Doc No 105-43, (1998) 37 *International Legal Materials* 1 (entered into force 15 February 1999); the Criminal Law Convention on Corruption by the Council of Europe (COE) in 1999; <<http://www.coe.fr/eng/legaltxt/173e.htm>> and Civil Law Convention on Corruption (1999), Euro TS No 174; Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 OJ (C 195) 1; UN Convention against Corruption, adopted by the UN General Assembly in 2003 (see UN Doc A/58/PV50 19 (31 October 2003)). See generally A Posadas 'Combating corruption under international law' (2000) 10 *Duke Journal of Comparative and International Law* 345; N Kofele-Kale 'The right to a corruption-free society as an individual and collective human right: Elevating official corruption to a crime under international law' (2000) 34 *International Law* 149 157; BC Harms 'Holding public officials accountable in the international realm: A new multi-layered strategy to combat corruption' (2000) 33 *Cornell International Law Journal* 159; M Sperber 'Foreign Corrupt Practices Act' (2002) 39 *American Criminal Law Review* 679; JT Noonan *Bribes* (1984) 656.

declarations¹⁴ to deal with the problem of corruption globally, the impetus for the elaboration of norms specifically dealing with corruption shifted to Africa. This shift generated intense activity at the regional non-governmental organisations (NGOs) level and within the framework of the AU. In 1998 the decision was made to draft a regional convention on corruption when the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at its 34th ordinary session held in Ouagadougou, Burkina Faso, adopted Decision AHG-Dec 126 (XXXIV) in which it expressed its determination to tackle impunity and corruption. The process leading to the drafting and adoption of the Anti-Corruption Convention included two 'experts' meetings in Addis Ababa, Ethiopia from 26 to 29 November 2001 and 16 to 17 September 2002, respectively. Following the approval in March 2003, by the Executive Council of the AU meeting in N'djamena, Chad, the text of the Anti-Corruption Convention was finally completed, and recommended to the AU Assembly for adoption.

The overall structure of the Anti-Corruption Convention is similar to that of the Inter-American Convention against Corruption. Its text comprises of a Preamble and 28 articles. The Preamble clearly places the Convention in the context of the Constitutive Act of the AU,¹⁵ the African Charter and the Plan of Action Against Impunity adopted by the 19th ordinary session of the African Commission on Human and Peoples' Rights (African Commission).¹⁶ It recalls the human rights obligations imposed on states by these instruments;¹⁷ recognises the

¹⁴ See UN Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, GA Res 3514, UN GAOR, 2441st plenary meeting (1975), United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, GA Res 51/191, UN GAOR, 51st Sess Agenda Item 12, Annex, UN Doc A/RES/51/191 (1996); International Co-operation Against Corruption and Bribery in International Commercial Transactions, GA Res 52/87, UN GAOR, 52d Sess, 70th Meeting, Agenda Item 103, UN Doc A/RES/52/87 (1997); Action Against Corruption and Bribery in International Commercial Transactions, GA Res 53/176, UN GAOR, 53d Sess, 91st Meeting, Agenda Item 92, UN Doc A/RES/53/176 (1998). Also in 1998, the UN (through its Centre for International Crime Prevention) initiated a Global Programme Against Corruption to promote anti-corruption measures in transitional economies and to make public sector action more transparent and accountable. Its principal aims include promoting democratic reform; building a strong civil society to monitor the state; strengthening the rule of law, and building partnerships to ensure the implementation of anti-corruption policies and laws. See UN Global Programme Against Corruption, <<http://www.undcp.org/corruption.html>>; United Nations Manual on Anti-Corruption Policy, <<http://www.odccp.org/pdf/crime/gpacpublications/manual.pdf>>. See also the 25 Principles to Combat Corruption in Africa adopted in 1999 by Benin, Botswana, Ethiopia, Ghana, Malawi, Mali, Mozambique, Senegal, South Africa, Tanzania and Uganda, at <<http://www.gca-cma.org/epastact.htm>> (accessed 31 May 2004).

¹⁵ Constitutive Act of the AU, 11 July 2000, OAU Doc CAB/LEG/23 15 (entered into force 26 May 2001) <http://www.africa-union.org/About_AU/Constitutive_Act.htm> (accessed 31 May 2004).

¹⁶ As above, Preamble paras 3 & 5.

¹⁷ As above, Preamble para 5.

need to promote and protect human rights, including economic, social and cultural rights,¹⁸ noting that freedom, equality, justice, peace, good governance and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples.¹⁹ The Preamble also enjoins state parties to 'co-ordinate and intensify their co-operation, unity, cohesion and efforts to achieve a better life for the peoples of Africa'.²⁰

Furthermore, the Preamble acknowledges that corruption undermines accountability and transparency in the management of public affairs²¹ and requires state parties to build partnerships between governments and civil society organisations.²² In addition to criminalisation, the Anti-Corruption Convention also focuses on preventive measures. It spells out the objectives, obligations and mechanisms to implement those obligations, provisions on international co-operation and technical assistance, provisions on information exchange, public awareness and education, research and final legal provisions relevant to the operation of the Convention on issues such as entry into force and reservation. The Convention attacks both the demand and supply sides of corruption in that it requires state parties to criminalise both the solicitation or acceptance, and the offering or granting of bribes.²³ It prohibits foreign bribery²⁴ and obligates state parties to take measures to combat the illicit enrichment of government officials.²⁵ If they have not already done so, state parties are required to criminalise 'acts of corruption and other related offences', outlined in article 4 of the Convention.

Article 1 of the Convention defines corruption as 'acts and practices including related offences proscribed in this Convention', and illicit enrichment 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'. Accordingly, article 4 enumerates what the Convention considers 'acts of corruption and related offences' to include the offering of illicit payments;²⁶ acts or omissions by government officials for the purpose of obtaining a bribe;²⁷ the fraudulent diversion by a public official or any other person of any property belonging to the state or its agencies;²⁸ the offering or giving, promising, soliciting or

¹⁸ As above, Preamble paras 3 & 4.

¹⁹ As above, Preamble para 1.

²⁰ As above, Preamble para 5.

²¹ As above, Preamble para 7.

²² As above, Preamble para 10.

²³ As above, art 4(a)(b)(e)(f).

²⁴ As above, art 19(1)(2).

²⁵ As above, arts 5(1), 8(1)(2).

²⁶ As above, art 4(b).

²⁷ As above, art 4(c).

²⁸ As above, art 4(d).

accepting, undue advantage to or by any person in a private sector entity;²⁹ the use or concealment of proceeds derived from the acts enumerated in the Convention;³⁰ and participation as a principal, co-principal, agent, instigator, accomplice, accessory after the fact, in a conspiracy to commit enumerated acts.³¹

Further, state parties agree to adopt legislative and other measures to establish these acts as offences, and to strengthen national control measures in order to ensure that the setting up and operations of foreign companies in their territories are subject to national legislation.³² State parties also agree to adopt measures to establish, maintain and strengthen independent national anti-corruption authorities or agencies, and internal accounting, auditing and follow-up systems.³³ Moreover, the Anti-Corruption Convention obligates state parties to strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption.³⁴

The Convention obligates state parties to ensure the right of access to any information that may be required to assist in the fight against corruption.³⁵ State parties agree to consult and seek the full participation of the media in the implementation of the Convention and to create an enabling environment that will enable the media and other civil society organisations to hold governments to the highest levels of transparency and accountability in the management of public affairs, for example by giving them access to information in cases of corruption.³⁶ However, the dissemination of such information must not adversely affect the investigation process and the right to a fair trial.³⁷ Additionally, they are required to adopt measures to protect informants and witnesses in corruption, including protection of their identities, so that citizens can report instances of corruption without fear of consequent reprisals.³⁸ State parties must punish anyone who makes false and malicious reports against innocent persons in corruption offences.³⁹

According to the Convention, state parties must establish as criminal offences: the conversion, transfer or disposal of property, which is the proceeds of corruption,⁴⁰ and the concealment or disguise of the true

²⁹ As above, art 4(e)(f).

³⁰ As above, art 4(h).

³¹ As above, art 4(i).

³² As above, art 5(1)(2).

³³ As above, art 5(3).

³⁴ As above, art 5(8).

³⁵ As above, art 9.

³⁶ As above, art 12(1)(2)(3)(4).

³⁷ As above, art 12(4).

³⁸ As above, art 5(5).

³⁹ As above, art 5(7).

⁴⁰ As above, art 6(a).

nature, source, location, disposition, movement, ownership of or the use of such property.⁴¹ State parties also agree to ensure that public officials declare their assets at the time of assumption of office, during and after their term of office.⁴² In this respect, they are required to create an internal committee which would establish a code of conduct and monitor its implementation, sensitise and train public officials on matters of ethics; develop disciplinary measures and investigation procedures in corruption offences.⁴³ According to article 7, 'subject to the provisions of domestic law, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials'.⁴⁴

Moreover, the Anti-Corruption Convention requires state parties to prevent and tackle acts of corruption by agents of the private sector, and to establish mechanisms to: encourage participation by the private sector in the fight against unfair competition; respect tender procedures and property rights; and prevent companies from paying bribes to win tenders.⁴⁵ Furthermore, each state party is required to exercise jurisdiction over 'acts of corruption' contained in the Convention (and enumerated above) in cases where: the breach is committed wholly or partially inside its territory; the offence is committed by one of its nationals outside its territory or by a person who resides in its territory, and it does not extradite such person to another country; or when the offence, although committed outside its jurisdiction, affects its vital interests or consequences of such offence impact on the state party.⁴⁶ However, the Convention asserts that a person shall not be tried twice for the same offence.⁴⁷

The Anti-Corruption Convention also requires each state party to adopt measures to, among others, enable its competent authorities to search, identify, trace, administer, freeze or seize the 'instrumentalities and proceeds of corruption' pending a final judgment; and to confiscate and repatriate proceeds of corruption.⁴⁸ State parties are also obligated to adopt measures to empower their courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents with a view to implementing the Convention.⁴⁹ The Convention prohibits the invocation of banking secrecy with

⁴¹ As above, art 6(b).

⁴² As above, art 7(1).

⁴³ As above, art 7(2)(3).

⁴⁴ As above, art 7(5).

⁴⁵ As above, art 11(1)(2)(3).

⁴⁶ As above, art 13(1)(a)(b)(c)(d).

⁴⁷ As above, art 13(3).

⁴⁸ As above, art 16(1)(a)(b)(c).

⁴⁹ As above, art 17(1).

respect to offences it establishes or pursuant to it.⁵⁰ Further, state parties express their commitment to enter into bilateral agreements to waive banking secrecy on doubtful accounts and to allow competent authorities the right to obtain from banks and financial institutions, under judicial cover, any evidence in their possession.⁵¹

State parties agree to apply extradition provisions in the Anti-Corruption Convention to the corruption offences that they must criminalise.⁵² They must also include such offences in every extradition treaty that may be concluded between or among them.⁵³ Further, a state party that makes extradition conditional on the existence of a treaty may consider the Convention as the legal basis for extradition with respect to any offence to which the Convention applies.⁵⁴ On the other hand, state parties that do not make extradition conditional on the existence of a treaty must recognise offences to which the Anti-Corruption Convention applies as extraditable offences among themselves.⁵⁵ If a state party refuses extradition on the basis that it has jurisdiction, the requested state must submit the case to its competent authorities for prosecution.⁵⁶

State parties are also required to provide each other with technical co-operation and assistance in dealing with requests from national authorities with a mandate to prevent, detect, investigate and punish 'acts of corruption'.⁵⁷ In addition, state parties agree to provide technical assistance in drawing up programmes and codes of ethics or organising joint training courses involving one or several states in tackling corruption.⁵⁸ They also agree to co-operate among themselves, including by conducting and exchanging studies, expertise and researches on how to address corruption.⁵⁹ The Convention requires state parties to co-operate and encourage each other in taking measures to prevent corrupt public officials from enjoying ill-acquired assets by freezing their foreign accounts and facilitating the repatriation of stolen monies to the countries of origin.⁶⁰

Further, they are required to collaborate with countries of origin of multi-nationals to criminalise and punish the practice of secret commissions during international trade transactions; and foster regional

⁵⁰ As above, art 17 (3).

⁵¹ As above, art 17(4).

⁵² As above, art 15(1).

⁵³ As above, art 15(2).

⁵⁴ As above, art 15(3).

⁵⁵ As above, art 15(4).

⁵⁶ As above, art 15(6).

⁵⁷ As above, art 18(1).

⁵⁸ As above, art 18(4).

⁵⁹ As above, art 18(3).

⁶⁰ As above, art 19(3).

and international co-operation to prevent corruption in such transactions.⁶¹ Moreover, state parties are required to work closely with international, regional and sub-regional financial organisations to eradicate corruption in development aid and co-operation programmes by defining strict regulations for eligibility and good governance of candidates within the general framework of their development policy.⁶² Finally, the Convention requires that state parties provide mutual assistance in criminal matters with respect to the covered offences.⁶³

3 Implementation mechanism

The Convention establishes an oversight or monitoring mechanism.⁶⁴ Thus, article 22 creates an Advisory Board on Corruption within the AU (the Board).⁶⁵ The Board shall comprise 11 members, elected by the Executive Council of the AU from among a list of experts of the 'highest integrity, impartiality, and recognised competence in matters relating to preventing and combating corruption, proposed by the state parties'.⁶⁶ In the election of the members of the Board, the Executive Council 'shall ensure adequate gender representation, and equitable geographical representation'.⁶⁷ Further, members of the Board are supposed to serve in their personal capacity, for a period of two years, renewable only once.⁶⁸

The functions of the Board are to promote and encourage the adoption and application of anti-corruption measures on the continent;⁶⁹ collect and document information on the nature, scope, and extent of corruption;⁷⁰ develop methodologies for analysing the problem of corruption in Africa;⁷¹ and disseminate information and sensitise the public on the negative effects of corruption.⁷² The Board will also advise governments on how to deal with corruption in their domestic jurisdictions;⁷³ collect information and analyse the conduct and behaviour of multi-national corporations operating in Africa, and disseminate

⁶¹ As above, art 19(1)(2).

⁶² As above, art 19(4).

⁶³ As above, art 18(6).

⁶⁴ As above, art 22(1).

⁶⁵ As above.

⁶⁶ As above, art 22(2).

⁶⁷ As above.

⁶⁸ As above, art 22(3)(4).

⁶⁹ As above, art 22((5)(a).

⁷⁰ As above, art 22(5)(b).

⁷¹ As above, art 22(5)(c).

⁷² As above.

⁷³ As above, art 22(5)(d).

such information to national authorities;⁷⁴ develop and promote the adoption of harmonised codes of conduct of public officials;⁷⁵ build partnerships with the African Commission, African intergovernmental organisations and NGOs in order to facilitate dialogue on corruption.⁷⁶

The Advisory Board is required to submit a report to the Executive Council 'on a regular basis' on the progress made by each state party in complying with the provisions of the Convention,⁷⁷ and to 'perform any other task relating to corruption that may be assigned to it by the policy organs of the African Union'.⁷⁸ State parties are obligated to communicate to the Board within a year after the coming into force of the instrument, on the progress made in the implementation of the Convention.⁷⁹ Thereafter, each state party shall ensure that its national anti-corruption authorities or agencies report to the Board at least once a year before the ordinary sessions of the policy organs of the AU.⁸⁰

4 Strengths and weaknesses of the Anti-Corruption Convention

As noted above, the Anti-Corruption Convention represents a significant step in the efforts to develop international standards to counteract the systemic corruption across Africa. In effect, the Convention imposes obligations on African countries to take a leadership role in the international fight against corruption in the public and private spheres. The Convention has the potential to reduce or even eliminate opportunities for heads of state and other top state officials to exploit the global banking system to conceal or launder the proceeds of political corruption from their countries. Indeed, the Convention imposes considerably detailed obligations on state parties to take action to identify such proceeds and to facilitate their return.

The ratification of the Convention by member states of the AU also means that state parties would need to comprehensively reform their substantive municipal laws in order to deny safe haven to funds. By imposing obligations on governments to tackle bank secrecy, the Convention would reduce the attractiveness of jurisdictions that often serve as a destination for stolen funds. In addition, it could serve as a tool to bring criminal complaints against those suspected to have been

⁷⁴ As above, art 22(5)(e).

⁷⁵ As above, art 22(5)(f).

⁷⁶ As above, art 22(5)(g).

⁷⁷ As above, art 22(5)(h).

⁷⁸ As above, art 22(5)(i).

⁷⁹ As above, art 22(7).

⁸⁰ As above.

involved in acts of corruption, no matter where the offence is committed. It could also make offshore jurisdictions to be more accountable, in terms of co-operating with requests for mutual legal assistance and to limit bank secrecy in criminal cases. The Anti-Corruption Convention represents a multilateral framework to deal with corruption. Because of its nature and impact beyond a state border, corruption requires a multilateral approach if it is to be tackled effectively and comprehensively. Overall, if fully ratified and implemented, the Convention would commit African governments to remove safe havens not only for bribers but also for corrupt government officials and private individuals.

However, whether broad and effective compliance can be achieved, even if the Convention is widely ratified, is an open question. Beyond ratification, African governments would need to establish and strengthen institutional and legal mechanisms on the domestic fronts if the fight against corruption is to be won. Also, the Convention faces some significant shortcomings.

First, as stated above, apart from a general and excessively vague reference to economic, social and cultural rights in its Preamble, the Anti-Corruption Convention does not characterise corruption as a massive and direct violation of human rights. It therefore fails to comprehensively address the critical link between corruption, especially large-scale corruption and those rights, and to provide effective remedies for victims of corruption.

Second, the Anti-Corruption Convention, like the African Charter, suffers from excessive use of claw-back clauses which tend to limit or undermine some of its progressive provisions.⁸¹ For example, article 7 provides that any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and prosecution of such officials, 'subject to the provisions of domestic legislation'. Under article 8, state parties are required to establish under their laws an offence of illicit enrichment 'subject to the provisions of their domestic laws'. Similarly, article 14 provides for the right to a fair trial for those suspected to have committed acts of corruption 'subject to domestic law'. These clauses can permit a state, in its almost unbounded

⁸¹ However, one must note the progressive attitude of the African Commission towards giving the claw-back clauses in the African Charter a narrow reading. For example, in a case against Nigeria, involving the government's retroactive decree creating a new institution to control the Bar Association and its lawyer members, the African Commission held that both art 7, dealing with the right to fair trial, and art 10, dealing with freedom of association, had been violated, despite the claw-back clause contained in art 10. As the Commission suggested, the right enunciated in art 10 entails 'first and foremost a duty of the state to abstain from interfering with the free formation of association'; *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).

discretion, to restrict its treaty obligations to eradicate corruption within its territory. By granting supremacy to national laws, the clauses also could seriously emasculate the effectiveness of the Convention as well as its uniform application by member states. If not properly construed, the clauses could defeat, frustrate, or annul the fundamental objectives of the Convention: eradication of corruption and promotion and protection of internationally recognised human rights, including economic, social and cultural rights.

Third, the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among state parties, including a potential claim by one party that another is failing to properly carry out its obligations. Also, the Convention merely requires members of the Board to be experts with 'recognised competence in matters relating to preventing and combating corruption'. There is no requirement in the Convention that members of the Board possess recognised competence in the field of human rights. Thus, it cannot be assumed that the Board would be able to deal with the human rights concerns of corruption. The Board is merely to advise governments 'on how to deal with the scourge of corruption'. Clearly, such advice may carry little weight or be completely ignored by governments, since its legal authority may be questioned. Its limited mandate means that there is little chance for the Advisory Board to translate the norms of the Convention into reality or provide important clarifications of the obligations imposed by the Convention. Without a meaningful implementation system for the Convention, it cannot be assumed that states would take seriously their obligations to end corruption let alone afford legal recourse and compensation to individuals or groups whose human rights are violated as a result of corruption.

5 Toward adjusting the Anti-Corruption Convention as a protocol to the African Charter

The transformation of the Anti-Corruption Convention into a coherent and consistent body of international human rights law to address corruption, especially large-scale corruption, is vital if it is to achieve its desired end. To give content and effect to its principles, the Anti-Corruption Convention should be amended in order to place it firmly in the framework of the African Charter. This could easily be accomplished by strengthening the Convention in the light of the Charter, and adding it as a protocol to the Charter. Such a protocol would transform the provisions of the Anti-Corruption Convention into a coherent and workable body of human rights law.

The foundation for implementing this proposal has already been laid in several articles of the African Charter and the jurisprudence of the African Commission. It is beyond the scope of this article to comment in detail on the framework of the African regional human rights system in this respect. It is fair to mention, though, some central, defining elements of the African Charter. The African Charter, like many other human rights instruments, reflects the principle that human beings cannot enjoy freedom from fear and want unless conditions are created whereby everyone may enjoy his or her human rights. Its fundamental aim is to protect all people against poverty by guaranteeing them rights to food, education, shelter, health and water, among other rights, and by imposing legal obligations on states to respect, protect and fulfil those rights. In addition, the Charter recognises that peoples have a right to economic self-determination, by virtue of which they may freely dispose of their natural resources and wealth.⁸² Thus, the national community in which resources are found must be a significant beneficiary of their exploitation.⁸³ Further, the norms of non-discrimination and equality, which lie at the heart of international protection of human rights,⁸⁴ demand that particular attention be given to vulnerable groups and individuals in such groups, including the poor, women and children. In sum, the central objective of the African Charter is to ensure that all citizens live freely and with dignity and enjoy equal protection of the law. Achievement of this objective is subject to resource availability and may be realised progressively, but human rights law also establishes a core or minimum obligation for states to ensure the satisfaction of essential levels of basic needs.⁸⁵ Also, states must move as expeditiously and effectively as possible towards the full realisation of these rights.⁸⁶

⁸² See WM Reisman 'Comment, harnessing international law to restrain and recapture indigenous spoliation' (1989) 83 *American Journal of International Law* 56. See also Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803, 17 UN GAOR Supp (No 17) 15, UN Doc A/5217 (1962).

⁸³ Reisman (n 82 above) 57.

⁸⁴ See eg art 2 of the African Charter to the effect that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status': The African Commission has expressed that art 2 'lays down a principle that is essential to the spirit of this convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings'; *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

⁸⁵ See UN Committee on Economic, Social and Cultural Rights General Comment No 3 (1990) para 10.

⁸⁶ As above, para 9.

Against this background, a protocol to the African Charter that clearly articulates principles that address the human rights dimension of corruption and provide victims of corruption with effective remedies would give added significance and enforceability with respect to progressive provisions of the Anti-Corruption Convention. The proposed protocol should incorporate provisions that would ensure that financial institutions acting as havens to stolen funds can be held directly accountable with respect to such funds.

Similarly, a protocol devoted to a rights-based approach to corruption would help to attract international attention to the effects of corruption on the enjoyment of basic human rights. No other approach will adequately address the problem of corruption in Africa. Moreover, adjusting the Anti-Corruption Convention to the African Charter as a protocol would give the legal regime governing corruption the enforcement mechanism it needs to be effective, that is, the African Commission and the African Court on Human and Peoples' Rights (African Court)⁸⁷ when the Court is fully established, and would provide effective remedies to individuals and groups. It would also avoid the necessity of having to draft a distinct human rights treaty on corruption and create an acceptable enforcement mechanism. The human rights obligations and enforcement of the African Charter have already been negotiated and established. Thus, transforming the Anti-Corruption Convention into a protocol would save time and resources, and not require separate structures and institutions.

Although the African Charter enforcement mechanism at the moment may be less than optimal, it nonetheless offers in several respects, not least the fundamental utility of the Charter itself, the best option for the creation of a regional human rights framework to tackle corruption. Indeed, the African Charter offers an established mechanism by which to monitor, file complaints, and report on states' efforts to eliminate human rights violations arising from acts of corruption. Whatever its present inadequacies may be, the African Commission and the African Court, if adequately supported and resourced and independently managed, could in the long run develop into institutions with considerable potential and indeed promise to contribute to developing standards and jurisprudence on the rights-based approach to corruption being suggested here. By expanding the parameters of the African Charter broadly and inclusively to accommodate the prohibition of corruption, the African Commission and the African Court can best

⁸⁷ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 9 July 1998, Doc OAU/LEG/MIN/AFCHPR/PROT1Rev2 (1997), at <<http://www.africa-union.org/Officialdocuments/Treaties%20Conventions%20Protocols/africancourt-humanrights.Pdf>> (accessed 31 May 2004).

contribute to the promotion and protection of human rights in Africa. The energy and conviction that have so far been demonstrated by the African Commission concerning the development of its individual communication procedure, including through its recent decision in the *Ogoni case*⁸⁸ and the potential contribution of an African Court, would seem to suggest that the prospects for the future are positive.

Additionally, by reinforcing the connection between corruption and human rights, the proposed protocol may serve as a valuable experience for other regional human rights systems as well as the United Nations (UN) system, which are lagging behind in this respect. In addition, it may spur on the UN to take steps to promote awareness of the human rights concerns raised by corruption, especially large-scale corruption, and foster respect for the principles delineated in the proposed protocol. Through the African regional human rights system, the proposed human rights framework for corruption may become established international human rights law.

The African Commission possesses great promise in terms of clarifying and developing the standards that might be applied to ensure compliance with its foundational instrument, the African Charter. Similarly, the Commission is capable of assessing the degree to which state parties are in reality acting in conformity with their obligations under the Charter. In sum, it could take remedial or preventive action to ensure compliance with treaty obligations. However, the Commission cannot serve as an effective tool for addressing the human rights dimension of corruption in Africa without the willingness of states to comply with their treaty obligations and a demonstration of expertise and independence by its members. A region-wide ratification of the Protocol Establishing the African Court and adoption of declarations by state parties that would allow individuals or NGOs direct access to the Court is vital to strengthen the ability of the African Charter and its implementation mechanisms.

From a human rights viewpoint, adjusting the Anti-Corruption Convention to the African Charter as a protocol would help to reinvigorate the institutions of states necessary to achieve the eradication of corruption, highlighting the failure or deliberate refusal of governments to live up to their human rights obligations. Such a course would also emphasise the abiding obligations of governments to work towards elimination of corruption, and to commit themselves to address its corrosive impact on the human rights of the citizens.

The idea of providing effective remedies to victims of official corruption is not a new one. Indeed, the Council of Europe recognised in 1999, through the adoption of its Civil Law Convention on Corruption

⁸⁸ Communication 155/96, *Social and Economic Rights Action Centre & Another v Nigeria*, Fifteenth Annual Activity Report 2000–2001.

(Civil Law Convention), the need to 'provide fair compensation to persons who have suffered damage as a result of corruption'.⁸⁹ The Convention complements the Council's Criminal Law Convention on Corruption designed to criminalise corruption in the public and private sector. The Civil Law Convention, which allows no reservation entered into force on 1 November 2003. It is the first attempt to address the remedies aspect of corruption problem.⁹⁰ The Civil Law Convention deals with such issues as compensation for damage, state liability for acts of corruption committed by public officials and contains provisions that promote international co-operation and assistance in providing remedies to victims of corruption. It requires state parties to provide in their domestic law 'for effective remedies for persons who have suffered as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage'.

In order to obtain compensation under the Civil Law Convention, the plaintiff must show the following: occurrence of damage, whether the defendants acted with intent or negligently, and the causal link between the corrupt behaviour and the damage.⁹¹ Furthermore, article 5 provides that state parties 'shall provide . . . appropriate procedures for

⁸⁹ According to art 2 of the Civil Law Convention, 'For the purpose of this Convention corruption means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other under advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe, the undue advantage or the prospect thereof.'

⁹⁰ It was at the 1994 Malta Conference of the European Ministers of Justice that the Council of Europe began to deal with the problem of corruption more directly. At the Conference, the ministers considered that corruption was a threat to human rights, rule of law and democracy. They believed that given its pre-eminent position, and the fundamental values that it champions, the Council should respond effectively to the problem. At their meeting in Prague in 1997, the European Ministers of Justice recommended speeding up the implementation of the Programme of Action against corruption and to complete the preparation of an international civil law instrument that would deal with the issue of compensation for damage caused by corruption. This was followed by the adoption of resolution by the Summit of the Heads of State and Government of the Council of Europe instructing the Committee of Ministers to secure the completion of international legal instruments on the basis of the Programme of Action against Corruption. In 1996, the Committee of Ministers asked the Multidisciplinary Group on Corruption (GMC) 'to start a feasibility study on the drawing up of a convention on civil remedies for compensation for damage resulting from acts of corruption'. The study, completed in 1997, deals with the following issues: accessibility and effectiveness of civil law remedies; determination of the main potential victims of corrupt behaviours; the problems of evidence and of proof of the causal link between acts and damage; and international cooperation. The study concludes that international convention on remedies against corruption is both possible and necessary. After extensive work and consultation, the GMC finalised a draft Civil Law Convention on Corruption and on 24 June 1999, transmitted it to the Committee of Ministers for adoption.

⁹¹ Art 4 Civil Law Convention.

persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the state or, in the case of a non-state party, from that party's appropriate authorities'. The Civil Law Convention also establishes a monitoring mechanism, the 'Group of States against Corruption', to supervise the implementation of the Convention by state parties. Furthermore, article 13 of the Convention provides that state parties

shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments and litigation costs, in accordance with the provisions of relevant international instruments on international co-operation in civil and commercial matters to which they are party, as well as with their internal law.

The Civil Law Convention indicates the Council's intent not only to tackle the criminal aspects of corruption, but also to repair any harm that corruption causes. Therefore, the Convention sends a hopeful note about the possibilities offered by the human rights framework, and offers one example at least of how to confront the impact of corruption on the human rights of individuals and groups and how to find a way through. African governments could consult and take lessons from the Civil Law Convention on Corruption in their efforts to draft a protocol on the human rights aspects of corruption.

6 Conclusions

One of several defects noticeable in the Anti-Corruption Convention is that it is devoid of human rights content, rendering it almost entirely a toothless tiger. By focusing strictly on the criminal aspects of corruption, without entrenching its human rights dimensions, the Convention excludes the possibility of remedies for victims of official corruption. The drafters of the Convention missed an important opportunity to build on developing international statements, such as the Council of Europe Civil Law Convention on Corruption, in this area.

The apparent reluctance of the drafters of the Anti-Corruption Convention to place it squarely within the framework of human rights law is not only manifestly distorted, but inconsistent and incompatible with African governments' human rights obligations. In short, it inevitably makes hollow and meaningless those obligations, ultimately undermining the fundamental principle of international accountability. It is unacceptable from the perspective of the relevant international standards, not being reconcilable with the voluntary assumption of international human rights obligations. Recognising the indissoluble link between acts of corruption and the human rights of groups as well as individuals would have a beneficial effect, not only in terms of improving

the protection of those rights offered by the international law of human rights, but also in developing a more effective legal framework to deal with corruption.

Furthermore, the conceptualisation of corruption as a violation of human rights would immediately recognise state and international responsibility, not only to terminate the practice, but also to furnish effective remedies. It could provide a comprehensive tool to establish connections between law, policy planning, resource allocation, advocacy and community mobilisation and support, inject principles of accountability and transparency into the existing national anti-corruption laws, and give priority attention to comprehensive solutions to the human rights impact of corruption, thereby protecting the most vulnerable, who are its principle victims. Accordingly, a rights-based approach to corruption could engage the responsibility of the state in a way that other approaches cannot.

The potential and promise of the human rights framework to address corruption cannot be overstated. Rights-language was used to criticise and challenge the egregious abuses by the Nazi regime and to put perpetrators to trial at Nuremberg after the victory of the Allied Powers in World War II; and to fight colonial rule in Africa and elsewhere. However, it is essential to bear in mind that while a rights-based approach is a virtual necessity for dealing with the problem of corruption in Africa, it cannot in itself solve the multidimensional problems presently afflicting Africa any more than the human rights framework can solve the declining social, economic and political conditions being witnessed in other parts of the world. The progress to be made will depend largely on the willingness of governments to honour international human rights obligations and to ensure not a rhetorical commitment to human rights, but a practical one.