

## The African Union Convention against Corruption

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The Organisation of African Unity (OAU) was born out of the struggle for independence of the 1950s and the early 1960s. Its short-term goals included abolishing apartheid and assisting African countries in gaining full independence from their colonial rulers. Under the spur of the pan-Africanists, the OAU also sought to realise the dream of a united Africa.

In the post-World War II atmosphere of ideological bipolarisation between East and West, some African leaders took sides while others opted for non-alignment. As African countries were wooed by the superpowers, issues such as human rights, the rule of law and public participation in decision-making were downgraded on the political agenda. The leaders who had been a strong force in the struggle for independence (Kwame Nkrumah in Ghana and Tanzania's Julius Nyerere), the powerful trade unions and the successful multiparty systems were gradually replaced with one-party states and dictatorships. These regimes were mostly tolerated by cold war superpowers that regularly fought wars by proxy throughout the continent, and in southern Africa in particular. Mobutu Sese Seko was one such dictator who plundered the resource-rich Zaire (now Democratic Republic of Congo) for more than 30 years with the tacit approval of some of his backers in Western capitals. Anti-corruption initiatives were on no one's agenda. Moreover, the word 'corruption' was taboo, even within the international financial institutions (IFIs).

With the collapse of the Berlin Wall, the leadership vacuum in many countries became exposed to populations that increasingly demanded democracy, human rights and public participation. Corrupt leaders could no longer hide behind the coat-tails of their foreign sponsors, for whom most of the African continent had become less strategically important. As IFIs and bilateral donors began applying pressure for good governance and democratisation, African states recognised the need to strike a balance between the state, private sector, civil society and the media.

Together with local pressure groups, international organisations like Amnesty International mounted a continuous campaign against human right violations, but the OAU only reacted in the early 1980s. Indeed, the African Charter on Human and Peoples' Rights came into force in 1986.

The 1990s saw a return to the multiparty system. Pressure from civil society, the media and political parties quickly pushed corruption and governance issues to the fore. The IFIs adopted a good governance agenda as part of structural adjustment programmes (SAPs). This trend produced ambiguous results, since it not only entrenched calls for more accountable governance, but also created mistrust of the good governance agenda among those critical of the ravaging effects of SAPs. It was against this backdrop that the OAU, predecessor of the new African Union (AU), was to seek a continental approach

to a problem that had taken on a magnitude similar to that of the human rights issue in the 1980s.

## The roots of the African Union convention

The African Union Convention on Preventing and Combating Corruption and Related Offences is inspired by the African Charter on Human and Peoples' Rights and other declarations, none of which explicitly mentions corruption.<sup>2</sup>

Indeed, the fight against corruption was not specifically introduced at the regional level until June 1998, at a session of the assembly of heads of state and government in Ouagadougou, Burkina Faso. The assembly passed a resolution calling on the secretary general to convene a high-level meeting of experts in cooperation with the African Commission on Human and Peoples' Rights. These experts were to consider ways of removing obstacles to the enjoyment of economic, social and cultural rights – such as through the fight against corruption and impunity – and propose appropriate legislative and other measures for reform. The scene was set for the drafting of a historic convention. Civil society groups, including Transparency International, actively participated in the writing of the first draft of the AU convention at expert meetings in Addis Ababa in November 2001 and September 2002. Throughout the drafting process, they lobbied for the inclusion of provisions on asset recovery, political party financing, access to information and whistleblower protection.

The 28-article AU document started out as the Convention on Preventing and Combating Corruption, but definitional problems and discrepancies in legal systems led the drafting committee to add the words 'and Related Offences'. The document was designed to be easily applied as a framework for any national anti-corruption strategy. The convention was adopted in July 2003 at the AU summit in Maputo, Mozambique, and now awaits 15 ratifications before entering into force.<sup>3</sup> Countries that have adopted, but not ratified, the document may spontaneously decide to enact selected provisions of the convention into national law, instead of proceeding with the ratification process (whereby the entire treaty becomes applicable as national law).

## Objectives, principles and features

The objectives of the convention emphasise cooperation between signatories, encouraging them to 'promote and strengthen the development ... of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in Africa' and to ensure the effectiveness of these measures.<sup>4</sup> Issues of good governance are also highlighted.

The convention concentrates on four main approaches to combating corruption: prevention, punishment, cooperation and education. In particular, it strengthens the

laws on corruption by listing offences that should be punishable by domestic legislation; it outlines measures to be undertaken to enable the detection and investigation of corruption offences; it indicates mechanisms for the confiscation and forfeiture of the proceeds of corruption and related offences; it determines the jurisdiction of state parties; it organises mutual assistance in relation to corruption and related offences; it encourages the education and promotion of public awareness on the evils of corruption; and it establishes a framework for the monitoring and supervision of enforcement of the convention. Provisions for this monitoring process also make reference to the involvement of civil society. Significantly, the convention focuses on both public and private sector corruption and calls for the implementation of specific anti-corruption laws in both sectors.

### **The convention's scope of application**

The convention clearly defines corruption, adopting a now common approach: corruption is no longer an offence in which only the public official can be the principal offender. Although the role of the public official remains central, the convention also includes a requirement to 'adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector'. It also calls for the establishment of 'mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights'.<sup>5</sup>

Furthermore, the convention defines corruption broadly enough to pre-empt conflicts of interpretation involving civil law and common law jurisdictions.<sup>6</sup> Civil law jurisdictions normally distinguish between embezzlement and corruption, partly because the penal code considers them distinct offences and because corruption is construed to mean bribery (as opposed to embezzlement). Furthermore, civil law countries consider embezzlement and corruption offences to involve public officials or public funds. As it reads now, the AU convention – especially with the addition 'and related offences' – captures both civil and common law systems.

Critics of the AU convention see the provision on illicit enrichment as an erosion of the principle of the presumption of innocence in criminal law. In a criminal case of illicit enrichment, which involves unjustified wealth, the prosecution carries the burden of proof and must therefore show beyond reasonable doubt that acquired wealth is not justified by the earnings. Under the convention, the prosecution is not legally obligated to show beyond a reasonable doubt that wealth exceeds income. Nor does the prosecution necessarily have to show that unjustified earnings are the result of corruption, as it is automatically presumed that unjustified earnings derive from a corrupt source. If implemented, such provisions are likely to face legal challenges, particularly in countries where the presumption of innocence is constitutionally enshrined.

The convention also addresses the confiscation and forfeiture of corrupt proceeds, bank secrecy, cooperation and mutual legal assistance. It calls on signatories to introduce legislation on money laundering and commits them to require designated public officials to declare their assets at the time of assumption of office, as well as during and after their term.<sup>7</sup> A last-minute inclusion in the convention, the provision on political party funding states that each signatory is to 'adopt legislative and other measures to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties' and to 'incorporate the principle of transparency into funding of political parties'.<sup>8</sup>

## Monitoring and enforcement of the convention

Modelled on the African Commission on Human and Peoples' Rights, the advisory board is the AU's only formal monitoring measure at the international level and at the level of the AU commission. It is to submit regular reports to the executive council on the progress made by each signatory in compliance with the provisions of the convention. The board lacks powers of investigation and cannot denounce acts of corruption. The convention provides that its 11 members be elected for two-year terms by the executive council 'from among a list of experts of the highest integrity and recognised competence in matters relating to preventing and combating corruption and related offences'. The document also calls on the executive council to ensure that the board have 'adequate gender representation, and equitable geographical representation'. Board members are to 'serve in their personal capacity', but the fact that they are proposed by signatories does not help to guarantee their independence.

As part of the monitoring process, national anti-corruption authorities are expected to send reports to the advisory board at least once a year, before the regular AU sessions. A drawback of this system is that the AU has no means of sanctioning countries that fail to report, unlike in the reporting process for the African Charter on Human and Peoples' Rights. Within the convention's monitoring framework, national authorities are designated for the purposes of 'cooperation and mutual legal assistance', which foresees that they will communicate with each other directly. In addition, the convention advocates 'necessary independence and autonomy' for the national authorities. Defining the role of national authorities is an important element of the convention since many African countries do not have an authority dealing exclusively with issues of corruption. In its present form, the convention does not prevent countries from simply establishing complacent national commissions. An amendment to the convention would need to be passed in order to introduce an outline of a desirable structure and operation of such bodies.<sup>9</sup>

With respect to enforcement, the convention shall operate like an extradition treaty among countries not already bound by them. Until it enters into force, however, extradition is only possible between states that have bilateral or multilateral treaty arrangements.

The convention also lays the groundwork for recognition by signatories of civil society and the media, committing signatories to 'fully engage in the fight against corruption and related offences and the popularisation of this convention with the full participation of the media and civil society at large'. States are to draw up individual legal frameworks that would permit civil society and the media to be integrated into this process. These statutes should take into consideration the role defined for civil society in article 12, namely that civil society and the media should be encouraged to hold governments to the highest levels of transparency and accountability; to participate in the monitoring process and be consulted in the implementation of the AU convention; and to be given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial. Despite these guidelines, and in view of the fact that the present climate tends to brand civil society and the media as opposition groups in many countries, it may be some time before their role becomes entrenched in the statute books. Similar provisions in the sub-regional Southern African Development Community Protocol against Corruption have also proven too 'loose' to provide for a clearly defined oversight function for civil society.

Whistleblowers are also addressed in the convention, which requires signatories to 'adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities' and to 'adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals'. Nonetheless, these efforts to ensure whistleblower protection may be undermined by a provision calling on signatories to 'adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences'. Other forms of redress, such as civil action, normally suffice in such situations.

It should be noted that the convention's procedure permits any signatory to opt out of some or all issues. Under article 24, states may announce reservations (based on article 15) on one or more provisions deemed incompatible with the object and purposes of the convention. A state may maintain this reservation until circumstances permit its withdrawal. Under article 26, states are also entitled to denounce the convention in its entirety, by notifying the chairperson of the commission with six months' notice. Regardless of its apparent imperfections, the convention represents the first universal framework for the fight against corruption for member states of the AU. The challenge now is for African governments to show political will to implement – and enforce – the AU convention against corruption. Active lobbying by African media and civil society organisations can positively influence this process. Additional pressure from international actors could contribute to the impact of what amounts to Africa's first continental structure for combating corruption within each state's sovereign borders. In addition, the AU convention is likely to benefit from growing national pressure to prevent and punish bribe paying.

For the AU convention to have a measurable impact on corruption, civil society and other pressure groups will have to claim possession of the monitoring process. By joining forces as coalitions, they can help ensure that its signatories successfully implement this new treaty.

## Notes

1. Akere Muna is chairman of TI Cameroon.
2. Other sources of inspiration for the drafting of the AU convention are the 1990 Declaration on the Fundamental Changes Taking Place in the World and Their Implications for Africa; the 1994 Cairo Agenda for Action Re-launching Africa's Socio-economic Transformation; and the Plan of Action against Impunity adopted by the 19th ordinary session of the African Commission on Human and Peoples' Rights in 1996 and subsequently endorsed by the 64th ordinary session of the Council of Ministers held in Yaoundé, Cameroon. The most recent impetus for the convention came from the 37th ordinary session of the Assembly of Heads of State and Government of the OAU held in Lusaka, Zambia, in July 2001, as well as the declaration adopted by the first session of the Assembly of the Union held in Durban, South Africa, in July 2002, relating to the New Partnership for Africa's Development, or NEPAD, which calls for the setting up of a coordinated mechanism to combat corruption effectively.
3. The convention was initially approved by the AU's ministerial conference in Addis Ababa on 18–19 September 2002. It was later approved by the executive council in N'djamena, Chad, on 5–6 March 2003.
4. Article 2.
5. Article 11.
6. Article 4 (d).
7. Articles 6 and 7.
8. Article 10 (a) and (b).
9. The procedure for amending the convention is a three-stage process: (1) a signatory must submit a written request to the chairperson of AU commission; (2) the chairperson must circulate the proposed amendment to signatories, granting reviewers a period of at least six months from the circulation date; (3) a two-thirds majority is required for the amendment to enter into force.