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THE AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

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When the United Nations Convention against Corruption[1] was opened for signature at Merida, Mexico, on 9 December, 2003, the Associated Press reported, "It is … the first anticorruption pact to cover Asia and Africa".[2] That is not true, because the Southern African Development Community's Protocol Against Corruption[3] was opened for signature in 2001 and the African Union Convention on Preventing and Combating Corruption[4] was opened for signature five months before the UN Convention, at Maputo, on 9 July, 2003. However, Africa has not covered itself in glory by the excellence of the AU Convention, and it is no excuse that the UN Convention too is deeply flawed.[5]

By November 2004, the AU Convention had been ratified by six countries.[6] Article 15(2) requires 15 ratifications for its entry into force. Before that

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[1] G.A. Res. A/RES/58/4, 31 Oct., 2003, opened for signature 9 Dec., 2003, available at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

[2] Associated Press, "U.N. Anticorruption Treaty Aims to Ease Retrieval of Dirty Money", *Wall Street Journal*, 9 Dec., 2003.

[3] Protocol Against Corruption, opened for signature 14 Aug., 2001, available at http://www.sadc.int/index.php?action=a1001&page_id=protocols_corruption and http://www1.oecd.org/daf/nocorruptionweb/pdf/SADC.pdf. It can be difficult to determine the ratification status of SADC instruments; for example, in late November 2004, the latest "Update on the Status of Member States Signatures and Ratification of, and Accessions to the SADC Treaty, Protocols and other Legal Instruments", available at http://www.sadc.int/index.php?action=a1001&page_id=protocols_status, was still as at 6 May, 2003. However, a month earlier, the SADC secretariat had been kind enough to send me the version as at 12 October, 2004. By the latter date, the Protocol Against Corruption had been ratified by Botswana, Lesotho, Malawi, Mauritius, South Africa, Tanzania, Zambia and Zimbabwe. See generally P. Matsheza, "SADC Protocol Against Corruption: Making It Work", 29 Dec., 2001, available at http://www.10iacc.org/download/workshops/cs52d.pdf; K. Nyirenda, P. Matsheza, and H. Mupita, *Southern African Development Community Anti-Corruption Laws: A Case for Harmonisation*, Harare, 2004, which discusses Lesotho, Malawi, Mauritius, Namibia, South Africa, Zambia and Zimbabwe.

[4] African Union Convention on Preventing and Combating Corruption, opened for signature 11 July, 2003, available at http://www.africa-union.org/Official_documents/Treaties_Conventions_Protocols/Convention on Combating Corruption.pdf. The French version is available at http://www.africa-union.org/Official_documents/Treaties_Conventions_fr/Convention sur la lutte contre la corruption.pdf. The Arabic and Portuguese versions are not available on line, but the AU's staff was kind enough to provide me copies of them.

[5] Some of these flaws are discussed in P. Schroth, "Termites in the House: Notes on the Illusion of Substance in the UN Convention against Corruption", *Proceedings of the 2004 Academy of International Business Northeast Annual Conference*, Smithfield, Rhode Island, 2004, 162–170 [hereinafter "Termites in the House"]. Another is mentioned in the text at n. 44 below, on art. 31 of the UN Convention. On the other hand, the UN Convention has some very good points, such as the private-sector accounting provisions mentioned at n. 50 below and the provisions on asset-recovery (Chapter V, arts. 51–59).

[6] Comoros, Libya, Lesotho, Namibia, Rwanda and Uganda, according to the latest available "List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption", available at http://www.africa-union.org/Official_documents/Treaties_Conventions_Protocols/List/African Convention on Combating Corruption.pdf.

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process is completed, it should be repaired. At a minimum, in addition to conforming the various translations to the French text, (1) the illicit enrichment clause should be either deleted or amended to protect the human right of the presumption of innocence; (2) the clause defining mere theft as corruption should be amended to treat ordinary theft as corruption only when committed in connection with one of the usual crimes of corruption; (3) the clause protecting whistleblowers should be amended to protect them even when their assertions turn out to be false, if the assertions are not proved to have been unreasonable in the circumstances or made in bad faith; (4) the jurisdiction clause should be amended to eliminate the claim of extraterritorial jurisdiction over acts deemed to affect a country's "vital interests", even though having no effects within that country; and (5) the clause protecting private records should be amended to require judicial supervision at all times, not merely the consent of the Requested State Party. In my opinion, in addition, (6) the accounting requirements should be extended to the private sector, perhaps by making mandatory the provisions on this subject that are optional in the Inter-American Convention.[7]

Problems in the English, Portuguese and Arabic Texts

A starting place for discussion of the AU Convention is its four versions, in French, English, Portuguese and Arabic, all of which, according to article 28, are equally authentic. The four texts often say different things. At some points, one or more of the texts obviously does not make sense, so officials and courts may look to the versions in one or more other languages—if they can find them and read them, neither of which is a trivial matter—in the hope of learning what was intended. Worse, at several points, the texts do make sense in each language, so that the differences, sometimes major, may never be suspected.

I do not mean to suggest that inaccurate translations are the main problem with the AU Convention, but they are pervasive and set a negative tone. In addition, the English translation of the AU Convention is poorly written in several senses, such as omission of words necessary to intelligibility, great inconsistency in style and the use of undefined terms as if they were terms of art. Part of the cause of this is amendments to the draft OAU or AU Convention in 2002.[8] Most of the time, looking only at the 2001 and 2002 English

[7] This article builds on, and should be read together with, P. Schroth, "National and international constitutional law aspects of African treaties and laws against corruption", (2003) 13 *Transnational Law and Contemporary Problems* 83 [hereinafter "Constitutional law aspects"]. The background is developed there; omitting most of that, this article adds details and examples from the final texts of the AU Convention. In particular, that article had been set in type when the final AU Convention became available in English and long before I obtained the Arabic and Portuguese versions.

[8] Compare Organization of African Unity, *Draft OAU Convention on Combating Corruption, Experts' Meeting to Consider the Draft OAU Convention on Combating Corruption*, 26–29 Nov., 2001, Addis Ababa, Expt/Draft/OAU/Conv/Comb/Corruption (I) [hereinafter "2001 Draft"] with African Union, *Draft African Union Convention on Preventing and Combating Corruption, Ministerial Conf. on the Draft African Union Convention on Preventing and Combating Corruption*, 18–19 Sept., 2002, Addis Ababa, Min/Draft/AU/Conv/Comb/Corruption (II) Rev.5 [hereinafter "2002 Draft"]. See also Organization of African Unity, *Report of the Experts' Meeting to Consider the Draft OAU/AU Convention on Combating Corruption*, 26–29 Nov., 2001, Addis Ababa, Expt/OAU/Conv/Comb/Corruption/Rpt.1 (I); African Union, *Report of the Ministerial Conference on the Draft African Union Convention on Preventing and Combating Corruption*, 18–19 Sept., 2002, Addis Ababa, Min/Draft/AU/Conv/Comb/Corruption/Rpt.1(II)Rev.1.

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texts, it seems possible to understand what sort of change was intended, but the important step of integrating the new words into the English text was never carried out.

Here are two examples of missing words. First, in the English translation, paragraph 1 of article 7 requires that State Parties commit themselves to:

> "Require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service."

It is plain that one or more additional words are needed between "office" and "during". In the French version, the italicized words have no counterpart in the English text:

> "Exiger que tous les agents publics ou ceux qui sont désignés par la loi déclarent leurs biens lors de leur prise de fonctions, *ainsi que* pendant et à la fin de leur mandat."

The Portuguese translator found a slightly different solution, which also makes sense, but is not quite the same as the French:

> "Exigir que todos os funcionários públicos ou os que são designados a declarem os seus bens e recursos na altura de assumirem as suas funções no serviço público, durante *o seu exercício* e no término *do mesmo*."

That problem is solved in the Arabic by use of the word و [and] where the French has "ainsi que", but the possibility of requiring the declaration only from designated officials and not from all—which is clearly expressed in the French, English and Portuguese texts—is omitted:

> مطالبة الموظفين العموميين بتقديم إقرار عن ممتلكاتهم وثرواتهم قبل تولى مهام وظيفة عامة وخلال مدة توليهم هذه الوظيفة وبعد انتهاء مدة خدمتهم.

The way the remainder of the Arabic is phrased seems to suggest that former officials must report throughout their lives. This might possibly be read into the English "*after* their term of office", but surely not into "à la fin de leur mandat" or "no término do mesmo", which say "*at* the end".

Similarly, in the English translation, paragraph 2 of article 11 requires that State Parties undertake to:

> "Establish mechanisms to encourage participation by the private sector in the fight against unfair competition,[9] respect of the tender procedures and property rights."

Literally, this requires encouragement of "the fight against ... respect of the tender procedures and property rights".[10] The French and the Portuguese translation say exactly the opposite—that is, they make this clause say what apparently was intended—by including the italicized words:

> "Mettre en place des mécanismes pour encourager la participation du secteur privé à la lutte contre la concurrence déloyale, *et pour assurer* le respect de la procédure des marchés et des droits à la propriété."

[9] "Unfair competition" and similar terms in the other languages, when used as legal terms of art, ordinarily refer to types of sales promotions—especially very large discounts—not to bribery. This clause appears to use the term in an unusual sense, possibly meaning unfairly competing for state contracts by bribery, although that is never made clear.

[10] The reading, "participation by the private sector in ... respect of the tender procedures" also fails, because it implies "participation by the private sector in ... property rights".

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> "Estabelecer mecanismos para encorajar a participação do sector privado na luta contra a concorrência desleal, *e para assegurar* o respeito pelos contratos e os direitos de propriedade."

However, the last words of the Portuguese and Arabic versions, "o respeito pelos contratos e os direitos de propriedade" and احترام العقود وحقوق الملكية, seem to be based on the words "legally protect *contracts* and property rights" in article 8(2) of the 2001 draft[11] and fail to reflect the change from "contracts" to "tender procedures" in 2002.[12]

A technical solution is provided by article 33(4) of the Vienna Convention on the Law of Treaties:

> "[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[13]

It would be better, however, to eliminate the need for this embarrassing resort to the French by correcting the English, Portuguese and Arabic texts, preferably before ratification. Some other provisions should be changed anyway, so the technical amendments can be made at the same time.

Comments on the Substance

Illicit enrichment and the presumption of innocence

Article 1 defines "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", and article 8 requires, "subject to the provisions of their domestic law", that State Parties make this a crime. This is truly astonishing. It says plainly—and this is the same in the French, Portuguese and Arabic texts—that *any person* must be ready to explain each significant increase[14] in his assets or be punished as a criminal.

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[11] In the "2001 Draft", above, n. 8, the English version of article 8 reads:

> "**Private sector**
> State Parties undertake to:
>
> 1. Adopt legislative and other measures to prevent and combat acts of corruption committed in and by the private sector.
> 2. Establish mechanisms to encourage participation by the private sector in the fight against unfair competition, legally protect contracts and property rights.
> 3. Adopt such other measures may be necessary to prohibit companies from paying bribes to win contracts or tenders."

[12] See also "Private–Private" section of this article, below.

[13] This article of the Vienna Convention on the Law of Treaties (opened for signature 23 May, 1969, 1155 U.N.T.S. 331, available at http://www.un.org/law/ilc/texts/treaties.htm) and those it mentions were recently discussed at length and applied by the International Court of Justice in the LaGrand Case (*Germany* v. *United States of America*), No. 104, Judgment, 27 June, 2001, 2001 I.C.J. 104, 40 I.L.M. 1069 (2001), www.icj-cij.org/=icjwww/idocket/igus/igusjudgment/igus_ijudgment_toc.htm, discussed in H. Lowry and P. Schroth, "Survey of 2000–2001 developments in international law in Connecticut", (2002) 76 *Connecticut Bar Journal* 217. Note that article 32, which allows recourse "to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", might be a sufficient basis for some or all of the necessary corrections.

[14] The Arabic used for "significant increase" is الزيادة الهائلة, which I understand as a huge or astonishing increase—a standard that may lead to more acquittals of Arabic-speaking defendants than of those who speak English, French ("augmentation substantielle") or Portuguese ("aumento significativo").

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I submit that this clause is a nullity, however, even as to officials, because it is "subject to the provisions of … domestic law". I prefer the position, which has been taken by the African Commission on Human and Peoples' Rights, that the domestic law of 53 African countries includes the Banjul Charter,[15] a treaty that is in force by ratification, with or without implementing legislation,[16] even though, without such legislation, it may not be enforceable in the domestic courts of some dualist jurisdictions. If this is not accepted, the minimum position is that a State Party that fails to implement in its domestic law the rights required by the Charter is in violation of its treaty obligations.

In fact, article 14 of the AU Convention refers to the Banjul Charter:

> "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 recognised by the concerned States Parties."

There is, of course, the question why this too is "subject to domestic law". I hope the intent is to be in line with a recent trend—in some post-Communist Eastern European constitutions, for example—of understanding the human rights conventions as setting minimum standards, while insisting that domestic law can provide greater protection of human rights than is required by treaty. I fear, however, that it may be thought by some to mean something worse, namely that this treaty provision may be overridden by a contrary domestic law.[17]

In any event, article 7(1)(b) of the Banjul Charter provides that "Every individual shall have … the right to be presumed innocent until proved

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[15] African Charter on Human and Peoples' Rights, 27 June, 1981, entered into force 21 Oct., 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Sources include http://www.achpr.org/english/_info/charter_en.html; http://www.africa-union.org/Official_documents/Treaties_Conventions_Protocols/Banjul Charter.pdf and http://www1.umn.edu/humanrts/instree/z1afchar.htm. The 53 State Parties and the dates on which they ratified the Charter are set forth in the "List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights", 27 Aug., 2004, http://www.africa-union.org/Official_documents/Treaties_Conventions_Protocols/List/African Charter on Human and Peoples Rights.pdf.

[16] Despite the delay in establishing an African Court on Human and Peoples' Rights (Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, 10 June, 1989, entered into force 25 Jan., 2004, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT/III (1998), available at http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf and http://www.achpr.org/english/_info/court_en.html), it has been the position of the African Commission on Human and Peoples' Rights that the provisions of the Banjul Charter are binding without implementing legislation, even in dualist jurisdictions.

> "The Commission takes the view that when a state ratifies the African Charter, it is obligated to uphold the fundamental human rights contained therein, even if it does not enact domestic legislation to effect the Charter's incorporation.
> * * *
> The African Commission has, in a number of communications, seemed to invoke the self-evident principle of pacta sunt servanda to nullify municipal legislation of state parties that conflicts with their obligations under the African Charter. In all these cases the Commission confirmed that a government's obligation remains unaffected irrespective of a purported revocation of the domestic effect of the Charter."

N. Udombana, "Between promise and performance: revisiting States' obligations under the African Human Rights Charter", (2004) 40 *Stanford Journal of International Law* 105, 127, 128. See also F. Viljoen and L. Louw, "The status of the findings of the African Commission: from moral persuasion to legal obligation", [2004] 48 *J.A.L.* 1.

[17] See "Termites in the House", above, n. 5.

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guilty by a competent court or tribunal". Note also article 11(1) of the Universal Declaration of Human Rights:[18]

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

To quiet those who might assert the Universal Declaration is not a binding treaty, article 14(2) of the International Covenant on Civil and Political Rights[19] repeats this right:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

There are constitutional presumptions of innocence in many African constitutions, such as the strong provision in paragraph 35(2) of the South African Constitution, which guarantees to the accused the right "to be presumed innocent, to remain silent, and not to testify during the proceedings". Recently, a court in Cameroon dismissed the charges against defendants who were treated as guilty before trial, which shows that the presumption of innocence at least sometimes affects real life.[20]

Sometimes, however, as in Nigeria, the presumption is qualified in a way that seems calculated to save the illicit enrichment clause:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts."[21]

This lower standard appears also in the constitutions of some other African countries,[22] but the right proclaimed in the Banjul Charter, the Universal

[18] Universal Declaration of Human Rights, 10 Dec., 1948, G.A. Res. 217 (III), UN GAOR, 3d. Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[19] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), adopted and opened for signature 16 Dec., 1966, entered into force 23 Mar., 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Fifty of the 53 countries that have ratified the Banjul Charter (see n. 15 above) are listed in Office of the United Nations High Commissioner for Human Rights, "Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004", http://www.unhchr.ch/pdf/report.pdf, as having ratified the International Covenant on Civil and Political Rights. The exceptions are Comoros, Mauritania and Sahrawi Arab Democratic Republic.

[20] *The People* v. *Nya Henry & 4 Ors*., Suit No. BA/236c/01–02, Court of First Instance, Bamenda (29 Oct., 2001), cited and discussed in N. Enonchong, "The African Charter on Human and Peoples' Rights: effective remedies in domestic law?", [2002] 46 *J.A.L.* 197, and N. Enonchong, "Human rights violations by the executive: complicity of the judiciary in Cameroon? *The People* v. *Nya Henry*, *The People* v. *Dr. Martin Luma*", [2003] 47 *J.A.L.* 265.

[21] Constitution of the Federal Republic of Nigeria, s. 36(5). The Nigerian Constitution contains all too many illusory rights. Another example is double jeopardy, s. 36(9) (emphasis added):

> "No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence *save upon the order of a superior court*."

The corresponding article 14(7) of the International Covenant on Civil and Political Rights has no such qualification:

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[22] For example, Constitution of the Republic of Kenya, ss. 77(2)(a), 77(12)(a); Constitution of Uganda, s. 28(4)(a). See "Constitutional law aspects", above, n. 7, at 105–107.

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Declaration of Human Rights and the International Covenant on Civil and Political Rights is unqualified and their higher standard should be applied, even to public officials.

Canada and the United States rejected the less sweeping clause on illicit enrichment of the Inter-American Convention Against Corruption[23] on the explicit ground that it violated the presumption of innocence.[24] Russia and the EU joined in objecting to early versions of the similar—but now optional—article 20 of the UN Convention.[25] Illicit enrichment may appropriately be made a crime of corruption, but the presumption of innocence must be preserved, by leaving the burden of proof on the prosecution.

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[23] Inter-American Convention Against Corruption, 29 Mar., 1996, entered into force 6 Mar., 1997, OEA/Ser. K/XXXIV.1, CICOR/doc. 14/96 rev. 2, 35 I.L.M. 724 (1996).

[24] Canada attached to its ratification of the Inter-American Convention this "Statement of Understanding":

> "Article IX provides that the obligation of a State Party to establish the offence of illicit enrichment shall be 'Subject to its Constitution and the fundamental principles of its legal system'. 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."

Canada's statement is available at www.oas.org/juridico/english/sigs/b-58.html. The position of the United States was this:

> "The United States of America intends to assist and cooperate with other States Parties pursuant to paragraph 3 of Article IX of the Convention to the extent permitted by its domestic law. The United States recognizes the importance of combating improper financial gains by public officials, and has criminal statutes to deter or punish such conduct. These statutes obligate senior-level officials in the federal government to file truthful financial disclosure statements, subject to criminal penalties. They also permit prosecution of federal public officials who evade taxes on wealth that is acquired illicitly. 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."

Senate Resolution of 27 July, 2000, available at www.usdoj.gov/criminal/fraud/fcpa/OAS.htm. For discussion of the US position, see P. Schroth, "The United States and the international bribery conventions", (2002) 50 *American Journal of Comparative Law* (supp.) 593, 615–619 [hereinafter "United States and bribery conventions"]; "Constitutional law aspects", above, n. 7, at 104.

[25] United Nations Convention Against Corruption, above, n. 1. Art. 20 reads:

> "**Illicit enrichment**
> Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."

To the point in the text, see "United States and bribery conventions", above, n. 24, at 615–619; "Constitutional law aspects", above, n. 7, at 104; P. Schroth and A. Bostan, "International constitutional law and anti-corruption measures in the European Union's accession negotiations: Romania in comparative perspective", (2004) 52 *American Journal of Comparative Law* 514 [hereinafter "EU and Romania"]. I find it difficult to express the extent of my outrage at the idea that a country whose government chooses to replace the presumption of innocence, which is required by several human-rights treaties, with a presumption of guilt in certain corruption cases can claim the endorsement of a United Nations treaty, but this is an article about the AU Convention, not the UN Convention.

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Mere theft as corruption

Article 4(1)(d) includes, in its definition of "acts of corruption and related offenses":

> "the diversion by a public official *or any other person*, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, *that such official has received* by virtue of his or her position."[26]

Making mere theft a crime of corruption[27] is a mistake; the treaty is more likely to retain a consensus and to be an effective weapon against corruption if it maintains its focus. Also, this is another clause whose meaning is obscured by failure to incorporate an amendment in good English, Portuguese and Arabic.

The most glaring uncertainty in this clause is: if the crime can be committed by "any other person", who is "such official"? From the English translation, it might be supposed that the property must have been entrusted to an official, but then any person can commit the crime of diverting it, and the same conclusion might be drawn from the Portuguese and the Arabic, which refer to "bens ... que esse funcionário tenha recebido" and ممتلكات... قد تسلمها هذا الموظف. In the French, however, in place of "that such official has received" we find "qu'il a reçus", making it clear that the crime can be committed only by the one who has received the property. It is impossible to reconcile the French, on one hand, with the English, Portuguese and Arabic, on the other: the courts will be forced to choose. One approach is to rectify the English, Portuguese and Arabic texts, by reading them as if they were the same as the French.[28] It is not unlikely, however, that a court may find this does not meet the standard of clarity required for the definition of a crime.

Private–private corruption

Since 1998, the European Union has been on record as supporting joint action against corruption that is wholly in the private sector,[29] such as bribery by a representative of one private company in order to secure business from another private company. In 2003, a main point of controversy between the United States and the EU was said to be article 12 of the UN Convention, which now deals with private–private corruption in a way that the government of the United States believes will require no change in US law. Article 12 advances the cause, nevertheless, with the most detailed treatment of private–private corruption in any treaty so far.

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[26] Emphasis added.

[27] I would not object if theft for the purpose of bribery, theft to carry out the mission one has been bribed to do, etc. were crimes of corruption.

[28] See P. Schroth, "Language and law", (1998) 46 *American Journal of Comparative Law* (supp.) 17, 29.

[29] European Union, Joint Action of 22 Dec., 1998 adopted by the Council on the basis of art. K.3 of the Treaty on European Union, on corruption in the private sector, 98/742/JHA, OJ L358/2, 22 Dec., 1998.

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In this context, and despite the claims to innovation found in some press releases, article 11 of the AU Convention is very simple:

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

In the first paragraph of this article, "and by agents of" seems to add nothing, because active bribery by agents of the private sector is covered already in article 4.[30] One way of reading this is by noting the identity of the words "corruption and related offences" here and in article 4: i.e., article 11(1) requires State Parties to legislate against all the same acts in the private sector as in the public sector. I do not propose to use up my limited space detailing the difficulties with this; perhaps it will suffice to ask the reader to imagine transposing the illicit enrichment provision to the private sector, so that every entrepreneur, every company officer and every employee will be guilty of a crime unless he successfully proves the legitimate source of each significant increase in his assets. I am forced to add here that the Ministers may actually have meant something like this reductio ad absurdum, because the definition of illicit enrichment in article 1 refers to "the significant increase in the assets of a public official *or any other person* . . . ".

As to the other paragraphs of article 11, it may be significant that the 2001 draft[31] referred to contracts in both, but that word was later eliminated in both, leaving only tender procedures and tenders. Whatever message is intended is cryptically conveyed, but could it be that the Ministers intended to exclude mere private sector contracts, limiting these paragraphs to public tenders?

The English here tracks the French, which has "la procédure des marchés" and "l'attribution des marchés", but the Portuguese is just wrong. The problem in the second paragraph of the Portuguese translation is noted in the first section of this article, above. In the third paragraph, the Portuguese

[30] Shortening article 4, to make the point: "This Convention is applicable to . . . (a) the solicitation or acceptance, directly or indirectly, by a public official or any other person . . . ; (b) the offering or granting, directly or indirectly, to a public official or any other person . . . ; (c) any act or omission in the discharge of his or her duties by a public official or any other person . . . ; (d) the diversion by a public official or any other person . . . ; (e) 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, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties; (f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof . . . ;".

[31] "2001 Draft", above, n. 8.

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translation is even worse:

> "Adoptar quaisquer outras medidas julgadas necessárias para impedir que as companhias paguem subornos com o objectivo de ganhar contratos ou adjudicações."

This is not even a good translation of the 2001 draft, which reads, in the English version:

> "Adopt such other measures may [sic] be necessary to prohibit companies from paying bribes to win contracts or tenders,"

because "adjudicações" do not, in normal usage, include tenders. (A better choice would be "licitações".) Finally, although the Arabic speaks too generally of العقود [contracts] in the second paragraph, it correctly uses a term meaning tenders in the third: الرشاوى للفوز بالعطاءات.

Whistleblowers

There are two great tasks for law and government with regard to whistleblowers: the first, namely requiring that information provided be investigated and the results disclosed, is so strongly the opposite of the culture of secrecy of most governments that progress has been very limited throughout the world.[32] The second great task, of protecting whistleblowers—notably employees and the news media—has proceeded just as slowly. I think it is fair to say that whistleblowers in the United States and the United Kingdom usually suffer serious damage to their careers, despite the legal protection they are accorded.[33] This seems to be true also in South Africa, despite the Protected Disclosures Act, 2000.[34] It may be that, in some countries, whistleblowers may have much worse to fear than mere career damage.

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[32] There is some progress in getting freedom of information laws on the books, which is not necessarily the same as making them effective. According to a recent study, over fifty countries now have freedom of information laws, but the only African countries listed are South Africa and Zimbabwe. D. Banisar, *The freedominfo.org Global Survey: Freedom of Information and Access to Government Record Laws around the World*, May 2004, available at http://www.freedominfo.org/survey/global_survey2004.pdf. However, Zimbabwe's Access to Information and Privacy Act is anything but a freedom of information law; as Mr Banisar points out, id. at 96:

> "While the title refers to FOI and privacy, the main thrust of the law is to give the government extensive powers to control the media by requiring the registration of journalists and prohibiting the 'abuse of free expression'.
> * * *
> The act's primary function has been to repress journalists and newspapers opposed to President Mugabe. The Supreme Court ruled in September 2003 that the Daily News, the nation's only independent newspaper, must register with the Media Commission and it was shut down by police for failing to do so. A number of journalists have also been arrested under the act (many of whom were jailed for the violations), including one from the UK *Guardian*, who was later deported."

[33] Whistleblower Protection Act of 1989, 5 U.S.C. §§1201–1222 (USA); Public Interest Disclosure Act, 1998, c. 23 (United Kingdom). See R. Vaughn, T. Devine, and K. Henderson, "The Whistleblower Statute prepared for the Organization of American States and the global legal revolution protecting whistleblowers", (2003) 35 *George Washington International Law Review* 857; W. De Maria, "Common Law—Common Mistakes: The Dismal Failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom", International Whistleblowers Conference, University of Indiana, 12–13 April, 2002, available at http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/DeMaria_laws.pdf.

[34] Act 26 of 2000. The South African law is weaker than that of the United Kingdom and most other countries in the respect that it provides no indemnity to whistleblowers.

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Article 5 attempts to deal with this very difficult set of issues in paragraphs 5, 6 and 7. The first of these suggests awareness of the physical danger to some whistleblowers by including, among the required measures, "protection of their identities". Paragraph 7, however, touches the second most difficult issue:

> "Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences."

As usual, the devil is in the details: in many countries, the threat of such punishment is an effective deterrent to honest whistleblowers who expose the guilty, because even truthful assertions may be very difficult to prove, particularly if the opposition in court has the extensive resources of the state or a large corporation. For example, a recent study points out that laws of this sort have sometimes dissuaded even the news media from reporting corruption in Romania.[35] A more nuanced provision is needed, protecting even those whistleblowers whose assertions turn out to be false, provided they are not proved to have been unreasonable in the circumstances (including the circumstances of limited information and the necessity of informing the public of activities of public officials and expenditure of public money in the democratic exercise of free speech and a free press) or to have been made in bad faith.[36]

An excessive claim of jurisdiction

Article 13 contains a claim of jurisdiction going far beyond what is normal and customary:

> "1. Each State Party has jurisdiction over acts of corruption and related offenses when:
> ***
> (d) when [sic] the offence, although committed outside its jurisdiction [sic], 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."[37]

That is, if I, as the legislator of a State Party, in my sole discretion deem that a theft or an illicit enrichment occurring in some other part of the world affects my vital interests, article 13 gives me jurisdiction to punish it, even if the act has no effects in my country. Furthermore, if the accused can be found

[35] "EU and Romania", above, n. 25, at 410–434 and accompanying text.

[36] This point is developed in "EU and Romania" above, n. 25, at 444–454 and accompanying text.

[37] Although the repetition of "when" cannot be traced to the French text, the idea of "jurisdiction … outside its jurisdiction" can:

> "1. Chaque Etat partie est compétent pour connaître des actes de corruption et d'infractions assimilées lorsque:
> * * *
> (d) l'infraction, bien que commise en dehors de sa compétence, affecte, du point de vue de l'Etat partie, ses intérêts vitaux, ou lorsque les conséquences ou les effets délétères et nuisibles de ces infractions ont un impact sur cet Etat partie."

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in any country that is a party to the AU Convention, article 15 requires that he be extradited to stand trial in my courts.

Excessive destruction of bank confidentiality

Another area requiring subtlety and sensitivity is individual privacy, including, in particular, the confidentiality of bank records and other personal data. Decades before the excesses of the USA Patriot Act,[38] some US officials decided the confidentiality of a bank's records about its customers was an evil, leading to the ironically named Bank Secrecy Act.[39]

The American war on bank secrecy, recently rationalized as part of the all-consuming war on terrorism, has sometimes been successful as an export, although less so lately, because the Bush Administration has sold it with less enthusiasm than did the Clinton Administration. At the same time, however, the world is decisively rejecting the American government's laissez faire approach to data privacy, as in EU Directive 95/46/EC[40] and the Japanese Personal Information Protection Act of 2003.[41] The Charter of Fundamental Rights of the Union, which is part of the Treaty Establishing a Constitution for Europe,[42] includes, as article II-8, the constitutional right to protection of personal data.[43]

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[38] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). In *Doe* v. *Ashcroft*, No. 04 Civ. 2614 (VM), 2004 U.S. Dist. LEXIS 19343 (S.D.N.Y. 28 Sept., 2004), one of the outrageous parts of the USA Patriot Act was held unconstitutional and the Attorney General and the Federal Bureau of Investigation were "enjoined from issuing national security letters under 18 U.S.C. § 2709, or from enforcing the provisions of 18 U.S.C. § 2709(c)", id. at *164. Enforcement was stayed for 90 days, to give the government an opportunity to appeal. As the court explained, id. at 2–3:

> "The FBI's demands under § 2709 are issued in the form of national security letters ("NSLs"), which constitute a unique form of administrative subpoena cloaked in secrecy and pertaining to national security issues. The statute bars all NSL recipients from ever disclosing that the FBI has issued an NSL."

[39] 31 U.S.C. §§5311–5314, 5316–5324. See P. Schroth, "Bank confidentiality and the war on money laundering in the United States", (1994) 42 *American Journal of Comparative Law* (supp.) 369.

[40] Directive 95/46/EC of the European Parliament and of the Council of 24 October, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. L.281, 23 Nov., 1995.

[41] An unofficial English translation of this law is available at http://www.privacyexchange.org/japan/PIPATrans.doc. See generally A. Westin and V. van Gelder, "Special issue on consumer privacy in Japan and the new national Privacy Law", (2003) 10 *Privacy & American Business*, No. 8, available at http://www.ey.com/global/download.nsf/US/Japanese_Consumer_Privacy_Law/$file/P&ABJapanSpecialIssue.pdf and http://www.privacyexchange.org/pab_japanissue.pdf. A valuable source of information in this area, including the texts of the Personal Information Protection Act and other relevant laws in Japanese and English, is the Japan Privacy Resource, http://www.privacyexchange.org/japan/japanindex.html.

[42] European Union, Treaty Establishing a Constitution for Europe, 29 Oct., 2004, not yet in force, available (in 21 languages) at http://europa.eu.int/constitution/index_en.htm.

[43] Article II-8 reads:

> "**Protection of personal data**
> 1. Everyone has the right to the protection of personal data concerning him or her.
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it [*sic*] rectified.
> 3. Compliance with these rules shall be subject to control by an independent authority."

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In article 31 of the UN Convention,[44] the interference with bank secrecy is limited to seizure and confiscation of the proceeds and instrumentalities of crimes of corruption. However, this touches on one of the flaws of the UN Convention, namely its failure to make clear that such confiscation can occur only after conviction, although it may be necessary to seize and protect the goods prior to conviction.

It is always easier to focus on a single problem than to balance the sometimes conflicting demands of modern life. Sadly, article 17 of the AU Convention focuses only on removing an obstacle to the fight against corruption, much as a rogue prosecutor may see such niceties as the rules of evidence only as an obstacle to conviction of the enemies of society. The only limit explicitly recognized by article 17 is that information protected by bank secrecy shall not be used "for any purpose other than the proceedings for which that information was requested, unless with the consent of the Requested State Party" (paragraph 2), which seems to allow the two states, acting in concert, to use the information for any purpose.

In addition, paragraph 4 provides:

> "State Parties commit themselves to enter into bilateral agreements to waive banking secrecy on doubtful accounts and allow competent authorities the right to obtain from banks and financial institutions, under judicial cover, any evidence in their possession."

The Portuguese and Arabic for "doubtful accounts" are simply "contas duvidosas" and المصرفية المشكوك الحسابات [*suspicious* accounts], but the French clarifies this somewhat as "les comptes alimentés par des fonds de provenance douteuse", once more raising the question how much of what is found in one language should be read into the others.

Let us hope each of these bilateral agreements narrows the vague and undefined term "doubtful accounts" sufficiently to prevent the issuance of a general fishing licence, to be used in the personal data of anyone whose account an official characterizes as "doubtful"; or, better, that this provision is repaired—to include strict judicial control over the use of confidential banking information—before the AU Convention is ratified.

Accounting requirements for the public sector only

After the astonishing ambition of so many clauses in the AU Convention, it is disappointing to reach article 5(4), which contains the only mention of

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[44] Article 31(1) of the UN Convention reads:

> "1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
>
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
> (b) Property, equipment or other instrumentalities used in *or destined for use in* offences established in accordance with this Convention."

Emphasis added. The UN Convention's lamentable failure to state explicitly that property may not be confiscated until the owner's guilt has been proved is exacerbated by the words I have italicized, so that one who has been convicted of nothing—perhaps even accused of nothing—could be deprived of goods not even alleged to have been used in any crime.

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accounting, and find that it is limited to the public sector, requiring that State Parties:

> "Adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services."

The most important feature of the United States Foreign Corrupt Practices Act of 1977[45] is not its anti-bribery provisions, but its addition of subsection 13(b)(2) to the 1934 Securities Exchange Act,[46] requiring effective corporate governance with regard to management's control over transactions. A key point is that this requirement is not limited to matters involving corruption or bribery, although it is probably the most effective legal weapon against corruption in the United States. Whether by choice or through failure to understand the differences between corporations in the United States and companies or corporations elsewhere, however, the counterpart of this provision in the OECD Convention[47] was not drafted in such a way as to convey clearly the concept of internal controls and management accounting, with the result that the OECD countries have been able to claim they have always been in compliance and do nothing.[48] The Inter-American Convention made the accounting provisions for the private sector optional[49] and the AU Convention omits them entirely—a very odd choice for an organization that makes such a point of private sector involvement. The one bright spot in the private-sector accounting area is that the UN Convention does include some useful, mandatory provisions in its article 12(c).

Conclusion

The English, Portuguese and Arabic versions of the AU Convention are technically unsatisfactory and inconsistent with each other and the French.

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[45] Pub. L. 95–213, 91 Stat. 1494 (1977), codified as amended at 15 U.S.C. §§78m(b), (d)(1), (g)–(h), 78dd-1, 78dd-2, 78dd-3, 78ff; amended by Foreign Corrupt Practices Act Amendment of 1988 (part of Omnibus Trade and Competitiveness Act of 1988), Pub. L. 100–418, 102 Stat. 1107, 1415 (1988), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105–366, 112 Stat. 3302 (1998).

[46] 15 U.S.C. §78m(b)(2).

[47] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 Dec., 1997, entered into force 15 Feb., 1999, OECD/DAFFE/IME/BR(97)16/FINAL (18 Dec., 1997), 37 I.L.M. 1 (1998).

[48] On the points in the three preceding sentences, see P. Schroth, "Fostering informed and responsible management: the failure of the corruption treaties' provisions on accounting and controls", (2003) 17 *Research in International Business and Finance* 313.

[49] Article III(10) of the Inter-American Convention, above, n. 23, reads (with emphasis added):

> **"Preventive measures**
> For the purposes set forth in Article II of this Convention, the States Parties *agree to consider* the applicability of measures within their own institutional systems to create, maintain and strengthen:
> * * *
> 10. Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts."

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Africa deserves much better. All four texts should be revised and made consistent with each other.

Defects in redaction, however, are not all that is wrong with the AU Convention: this article identifies important problems ranging from infringement of the human right to be presumed innocent until proven guilty and failure to protect the right of privacy in personal data relating to bank accounts to an approach to private–private corruption that is so nebulous as to be incomprehensible.

An African convention against corruption is an excellent idea, particularly because the UN Convention has serious flaws. Unfortunately, this excellent idea has been so poorly executed that it would be better to re-draft it before ratification than to face its many problems in litigation and international disagreements for decades to come.

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