

INTERNATIONAL LAW AND THE FIGHT AGAINST BUREAUCRATIC CORRUPTION IN AFRICA

John Mukum Mbaku

TABLE OF CONTENTS

I. GENERAL INTRODUCTION	662
II. OVERVIEW AND DEFINITION OF CORRUPTION	663
A. Introduction	663
B. Corruption as a Universal and Pervasive Concept	665
C. An Overview of Corruption	667
III. TYPOLOGIES OF CORRUPTION	676
A. Alam's Four Classes of Corruption	676
1. Cost-Reducing Corruption	676
2. Cost-Enhancing Corruption	677
3. Benefit-Enhancing Corruption	678
4. Benefit-Reducing Corruption	678
B. Beneficial and Harmful Corruption	679
C. Systemic versus Opportunistic (Individualized) Corruption	681
D. Grand Corruption and Petty Corruption	682
E. The Dynamics of Corruption	685
IV. THE IMPACT OF CORRUPTION ON AFRICAN ECONOMIES	688
A. Introduction	688
B. Can Corruption Enhance the Participation of the Private Sector in Public Policy?	691
C. Corruption as a Way to Enhance Domestic Investment	696
D. Corruption as a Tool to Improve Political Participation	698
V. THE GLOBAL NATURE OF CORRUPTION	700
A. Introduction	700
B. Advances in the Fight Against Global Corruption since the Early-1990s	705
1. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	706
2. Progress in the Implementation of the OECD Convention	708
3. Other International Anti-Corruption Conventions	712
VI. FRAMING THE PROBLEM	724
VII. THE U. S. FOREIGN CORRUPT PRACTICES ACT (FCPA)	731
A. Introduction	731
B. The Provisions of the Foreign Corrupt Practices Act	735
C. The Substantive Provisions of the FCPA	740

D. The FCPA and the Criminalization of Corrupt Behaviors.....	741
VIII. INTERNATIONAL LAW AND THE FIGHT AGAINST CORRUPTION IN AFRICA ..	742
A. Introduction	742
B. Fighting Corruption in the Public Sector	743
C. The FCPA and African Efforts to Control Corruption	747
IX. OTHER INTERNATIONAL LEGAL INSTRUMENTS.....	750
A. Introduction	750
B. The Extradition of Suspects	751
C. The Recovery of Assets	754
D. Legally Constraining Corporations and their Agents Operating in African Countries	759
X. CONCLUSION	761

I. GENERAL INTRODUCTION

Today, corruption is one of Africa's most intractable problems. It is a major constraint to inclusive economic growth and development in the continent. This article critically analyzes the role that international law can play in helping African countries more effectively deal with corruption, especially that which concerns the bribery of the continent's public officials. Specifically, international law can help African countries fight corruption by (1) providing them with additional legal mechanisms that the African countries can use in their efforts to locate and retrieve accused criminals from abroad; (2) helping African countries locate and retrieve resources that have been corruptly or illegally obtained from the African economies and stashed or invested in foreign bank accounts or real property; and (3) imposing legal constraints on multinational corporations that participate in international business transactions, including those carried out on or with the continent.

In the sections that follow, I introduce corruption as a universal and pervasive concept, examine its various typologies, provide a working definition for it, and take a critical look at its overall impact on African economies. Then, I introduce and examine the global nature of corruption and briefly review some of the public policies that have been adopted in many countries—primarily the Organisation for Economic Co-operation and Development (OECD) countries—to deal with the bribery of foreign public officials in international business transactions. Specifically, I examine various international anti-corruption conventions, including the United Nations Convention Against Corruption (UNCAC). Since the research question concerns how international law can help African countries deal with corruption in their public sectors, I provide a detailed analysis of two important legal instruments—the United States' Foreign Corrupt Practices Act (FCPA) and the UNCAC—and show how they can provide African countries with the legal assistance that they need to deal more effectively with

certain aspects of corruption in their respective public sectors. Finally, I provide policy recommendations, which we believe can help and enhance the ability of African governments to engage international law, as they seek ways to deal more fully with the bribery of their public officials, in particular, and with corruption, generally.

II. OVERVIEW AND DEFINITION OF CORRUPTION

A. Introduction

Corruption—which, in one way or another, has been part of human interaction from time immemorial—remains one of the most important constraints to the creation of wealth and economic development in Africa. Throughout history, all economies, regardless of location, have been affected by some form of corruption. However, corruption has affected some economies more than others.¹ The nature and the extent of the impact that corruption has on various societies, economies, and political systems is determined, to a large extent, by the nature of each society's existing laws and institutions.² If, for example, a country's institutional arrangements guarantee the rule of law, and civil servants and politicians (i.e., state custodians) are adequately constrained by the law, then corruption and other forms of impunity will be minimized; impact on the economy and its inhabitants will be quite minimal.³ If, on the other hand, the rule of law⁴ is

¹ See generally POLITICAL CORRUPTION: A HANDBOOK (Arnold J. Heidenheimer et al. eds., 1989) (providing a comparative examination of corruption over time and between political and economic systems); ROUTLEDGE HANDBOOK OF POLITICAL CORRUPTION (Paul M. Heywood ed., 2014) (providing a comprehensive study of corruption across countries and time); JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2010) [hereinafter MBAKU, CORRUPTION IN AFRICA] (arguing, inter alia, that corruption has emerged as one of the most important constraints to economic growth and development in post-independence Africa).

² John Mukum Mbaku, *Enhancing Africa's Fight Against Corruption: The Role of International Law*, 3 GLOBAL BUS. L. REV. 9, 11 (2012) [hereinafter Mbaku, *Enhancing Africa's Fight*] (examining, inter alia, the role that international law can play in enhancing the ability of African countries to fight corruption).

³ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 151–78.

⁴ For millennia, social scientists and legal scholars have struggled with defining the “rule of law.” British jurist and legal scholar, Albert Venn Dicey, is believed to have provided the foundation for modern definitions and conceptualizations of the rule of law. In a scholarly monograph published in 1885, Professor Dicey argued that the rule of law must embody the following three critical principles: (1) the law is supreme; (2) all citizens are equal before the law; and (3) the rights of individuals must be established through court decisions. See ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–201 (London, MacMillan & Co. ed., 1885).

In presenting the 6th lecture in honor of Sir David Williams at the Center for Public Law, Rt. Hon. Lord Bingham of Cornhill KG sought to define the rule of law.

not a characteristic of the country's system of governance, corruption and other forms of opportunism are most likely to be pervasive and would effectively constrain the creation of wealth and economic growth and development.⁵

Thomas Bingham, Rt. Hon. Lord, House of Lords, Sixth Sir David Williams Lecture: The Rule of Law (2006), <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>. He stated that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts." *Id.* A critical part of Lord Bingham's definition of the rule of law is that "the law is superior, applies equally, is known and predictable, and is administered through a separation of powers." Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293, 301 (2009). Professor Stein provides a definition for the rule of law that incorporates all the principles that have historically been associated with the concept of the rule of law. *Id.* at 302. He states that a society that is governed by the rule of law should exhibit the following characteristics: "1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power. 2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily. 3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors. 4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession. 5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases." *Id.* See also TOM BINGHAM, THE RULE OF LAW 5 (2010) (elaborating on a definition for the rule of law). The Rt. Hon. Lord Bingham of Cornhill was, at the time of his death on September 11, 2010, one of the most distinguished judges in the United Kingdom. During his time of service as a jurist and legal scholar, Lord Bingham occupied three of the most important and top legal positions in the UK's legal system—Master of the Rolls (1992-1996); Lord Chief Justice (1996-2000); and Senior Law Lord (2000-2008). See generally JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979) (discussing further the rule of law and arguing, inter alia, that there are certain procedural values that cannot be separated from the law and that these values form the law's internal morality, and that one must be cognizant of some of the problems and issues associated with conformity to the rule of law). Accord see generally Brian Tamanaha, *A Concise Guide to the Rule of Law* (St. John's Legal Stud. Res. Paper Series, Paper No. 07-0082, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051 (discussing additional treatments of the rule of law); Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, in DEMOCRACY & RULE OF LAW PROJECT (Carnegie Endowment for International Peace, Rule of Law Ser. No. 55, 2005); PROMOTING THE RULE OF LAW: A PRACTITIONER'S GUIDE TO KEY ISSUES AND DEVELOPMENTS (Lelia Mooney ed., 2013).

⁵ For a thorough discussion of the impact of corruption on the creation of wealth and economic growth, with specific reference to Africa, see generally MBAKU, CORRUPTION IN AFRICA *supra* note 1; CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES (Kempe R. Hope, Sr. & Bornwell C. Chikulo eds., 2000) [hereinafter LESSONS FROM COUNTRY]; ECONOMIC PERFORMANCE IN THE MIDDLE EAST AND NORTH AFRICA: INSTITUTIONS, CORRUPTION AND REFORM (Serdar Sayan ed., 2009); JOSEPH PATRICK GANAHL, CORRUPTION, GOOD GOVERNANCE, AND THE AFRICAN STATE: A CRITICAL

B. Corruption as a Universal and Pervasive Concept

Throughout history, the word “corruption” has been used to describe a variety of human behaviors. In ancient Greece, for example, Aristotle argued that

there are three kinds of constitution, or an equal number of deviations, or, as it were, corruptions of these three kinds The deviation or corruption of kinship is tyranny. Both kingship and tyranny are forms of government by a single person, but . . . the tyrant studies his own advantage . . . the king looks to that of his subjects.⁶

Professor Carl J. Friedrich⁷ has argued that corruption is “deviant behavior associated with a particular motivation, namely that of private gain at public expense.”⁸ According to Friedrich,⁹ corruption occurs

Whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards, such as the expectation of a job in the future, induced to take actions which favor whoever provides the reward and thereby damage the group or organization to which the functionary belongs, more specifically the government.¹⁰

ANALYSIS OF THE POLITICAL-ECONOMIC FOUNDATIONS OF CORRUPTION IN SUB-SAHARAN AFRICA (2012).

⁶ ARISTOTLE, THE POLITICS OF ARISTOTLE 373 (Ernest Barker ed. trans., 1946).

⁷ Carl J. Friedrich, *Corruption Concepts in Historical Perspectives*, in POLITICAL CORRUPTION: A HANDBOOK, *supra* note 1, at 15.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* While the behaviors and activities of the office or power holder may create both monetary and non-monetary benefits that accrue directly to the person or persons bribing the civil servant or politician, it is also the case that such benefits may actually be intended for or received by family members (including extended family members), friends, business associates, or other acquaintances of the person bribing the state custodian (i.e., civil servants and politicians). *Id.* at 207. In Africa, for example, it is often the case that a private entrepreneur would bribe a power holder (e.g., a civil servant or political elite) in order to secure government benefits (e.g., a scholarship to study abroad, a subsidized loan) for a family member, or to provide his village with a health clinic, a paved road, or school at public expense. *See, e.g.*, M. Shahe Emran, A. Islam & F. Shilpi, *Admission Is Free Only if Your Dad Is Rich!: Distributional Effects of Corruption in Schools in Developing Countries*, (World Bank Policy Research, Working Paper No. 6671, 2013), <http://documents.worldbank.org/curated/en/878161468331786396/pdf/WPS6671.pdf>; WORLD BANK, AFRICA DEVELOPMENT INDICATORS 2010: SILENT AND LETHAL—HOW QUIET CORRUPTION UNDERMINES AFRICA’S DEVELOPMENT EFFORTS (2010). Civil servants and political elites, especially those who engage in grand corruption, are also known to appropriate large quantities of public resources for the benefit of their extended families,

Many societies, however, have viewed corruption from a much broader perspective, as is evident in the proclamation by Lord Acton that “all power tends to corrupt and absolute power corrupts absolutely.”¹¹ Although Lord Acton’s dictum can be used to describe the impunity that is pervasive throughout the public sectors of many countries in Africa, it more appropriately fits the “moral depravity which power [particularly unconstrained power] is believed to cause in men [and women]; they no longer think about what is right action or conduct, but only about what is expedient action or conduct.”¹² This approach to corruption, however, is rooted specifically in Western Christian philosophy and is informed by its impact on the moral values that are professed by these societies.

In studying and analyzing corruption, one must distinguish between the broader concept referred to as “institutional decay”¹³ and the much narrower one of “bureaucratic corruption”—the latter is usually defined as the misuse of a public office or position by a civil servant or political elite for the personal benefit of the office holder. In the developed market economies, such as the United States, Canada, and many northern European countries, it is possible to find instances in which civil servants and political elites have either behaved with impunity or engaged in behaviors that were considered by the laws of the country to be corrupt. It would be a stretch, however, to conclude that the institutional structures of these countries are undergoing some form of decay.¹⁴ Yet, it is quite clear that former US President Richard Nixon’s subversion of the Constitution of the United States and his abuse of the powers of his office—the now famous, Watergate Affair—in an effort to undermine his political opponents, the Democrats, and secure another term in office, severely threatened the US political system and could have led to institutional decay had it not been for the effective

which may include a whole village or ethnocultural group. *See generally* MBAKU, CORRUPTION IN AFRICA, *supra* note 1.

¹¹ Friedrich, *Corruption Concepts in Historical Perspectives*, *supra* note 7, at 16.

¹² *Id.*

¹³ *See generally* NIAL FERGUSON, THE GREAT DEGENERATION: HOW INSTITUTIONS DECAY AND ECONOMIES DIE (2014) (examining institutional decay and showing how the latter can lead to economic stagnation and geopolitical decline); NATASHA M. EZROW & ERICA FRANTZ, FAILED STATES AND INSTITUTIONAL DECAY: UNDERSTANDING INSTABILITY AND POVERTY IN THE DEVELOPING WORLD (2013) (examining the concept of “failed states” and illustrating the impact that institutional decay has on political instability); MINXIN PEI, FROM REFORM TO REVOLUTION: THE DEMISE OF COMMUNISM IN CHINA AND THE SOVIET UNION (1998) (examining massive political and economic changes in the Soviet Union and the People’s Republic of China and the transition from communism in both countries); CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL (1996) (examining how international conventions designed to enable and uphold the sovereignty of states have been subverted by post-independence rulers to enhance their ability to monopolize power and remain in office indefinitely).

¹⁴ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 12.

intervention of the country's independent press and the judiciary branch of government.¹⁵

President Nixon's "moral depravity" failed to trigger institutional decay in the United States because of the effectiveness and robustness of the country's laws and institutions—specifically, an independent judiciary, a professional and neutral military, an independent media, well-constrained local and national police forces, and most importantly, an active, robust, and well-informed civil society.¹⁶

C. An Overview of Corruption

Any review of the social science and legal literature would discover several definitions for corruption, the bulk of which contain terms and expressions such as "bribery," "patronage," "state capture," "abuse or perversion of public office for private gain," "nepotism," and "privatization of the state."¹⁷ In the 1950s and 1960s, as most former colonies around the world celebrated their existence as independent and sovereign nations, a number of economists and other social scientists undertook studies to determine why the economies of these new countries were unable to create the wealth that was needed to deal fully and effectively with high levels of poverty and material deprivation. Some of these studies were devoted to an examination of bureaucratic corruption, which was considered an important constraint to economic growth and development. One such study was undertaken by David H. Bayley.¹⁸ In this study, he argued that "[c]orruption, then, while being tied particularly to the act of bribery, is a general term covering misuse of authority as a result of considerations of personal gain, which need not be monetary."¹⁹

¹⁵ *Id.*

¹⁶ See generally LARRY BERG ET AL., CORRUPTION IN THE AMERICAN POLITICAL SYSTEM (1976); FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1994); MICHAEL A. GENOVESE, THE WATERGATE CRISIS (1999); DALE ANDERSON, WATERGATE: SCANDAL IN THE WHITE HOUSE (2006); WATERGATE REMEMBERED: THE LEGACY FOR AMERICAN POLITICS (Michael A. Genovese & Iwan W. Morgan eds., 2012); CORRUPTION AND AMERICAN POLITICS (Michael A. Genovese & Victoria A. Farrar-Myers eds., 2010).

¹⁷ See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 14–15; *Civil Law Convention on Corruption: An Explanatory Report*, COUNCIL OF EUROPE (Nov. 4, 1999), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce45> (elaborating various remedies for victims of corruption, but also providing a definition for corruption); KOLAWOLE OLANIYAN, CORRUPTION AND HUMAN RIGHTS LAW IN AFRICA (2014) (providing, inter alia, a legal definition for corruption that acknowledges that corruption per se is a violation of human rights).

¹⁸ David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719 (1966).

¹⁹ *Id.* at 720.

The definition of corruption proffered by Bayley²⁰ speaks directly to what the literature calls “bureaucratic corruption,” which is understood as a mechanism that is designed specifically “to secure additional [usually extralegal] income or privileges for the bureaucrat (the corrupted) and help the entrepreneur [or business owner] (the corrupter) improve the profitability of his or her enterprise.”²¹ Herbert H. Werlin,²² who conducted extensive studies of corruption in Ghana in the 1970s, defined corruption as the “diversion of public resources to nonpublic purposes.”²³ The civil servant or politician, in Werlin’s²⁴ definition of corruption, engages in extralegal activities to increase his official compensation package; he or she directly appropriates public resources (monetary and non-monetary) for his or her private or personal use.²⁵

²⁰ *Id.*

²¹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 13. It is important to note here that it is not only the business owner who usually seeks to corrupt the bureaucrat or other public sector employee, including politicians. Ordinary citizens may also attempt to corrupt public workers in order to either minimize the costs of various laws and regulations on their ability to organize their private lives or to enhance their ability to have access to various public goods and services. If, within a country, state custodians (e.g., civil servants and political elites) are not well-constrained by the law, they may act capriciously and arbitrarily in carrying out their assigned duties, for example, in the allocation of public goods and services. Thus, individuals and groups within the country who fear marginalization may be forced to pay bribes to public bureau managers or their agents in order to improve their access to public goods and services and minimize further marginalization. Young school graduates seeking employment in the public sector may also bribe bureau managers in an effort to enhance their ability to secure jobs in the civil service. *See generally id.*

²² Herbert H. Werlin, *The Consequences of Corruption: The Ghanaian Experience*, 88 POL. SCI. Q. 71 (1973) [hereinafter Werlin, *Consequences of Corruption*]; Herbert H. Werlin, *The Roots of Corruption: The Ghanaian Enquiry*, 10 J. MOD. AFR. STUD. 247 (1972).

²³ Werlin, *Consequences of Corruption*, *supra* note 22, at 73.

²⁴ *Id.*

²⁵ *See* VICTOR T. LEVINE, POLITICAL CORRUPTION: THE GHAN CASE (1975) (providing a detailed examination of the nature of corruption in post-independence Ghana, with special emphasis on the extralegal activities of the country’s ruling elites); J. CLARK LEITH, GHANA (1974) (examining, *inter alia*, the pervasiveness of corruption in the post-independence Ghanaian economy). In many African countries, the process described by Werlin often involves the embezzlement of the public resources that have been placed under the control of a given civil servant or politician, usually for the individual’s personal use or that of his relatives and friends—such relatives could include the extended family, which in some countries, can involve entire villages or ethnocultural groups. *See generally* MBAKU, CORRUPTION IN AFRICA, *supra* note 1. In some cases, the civil servant may actually “privatize” his or her public office and transform it into a source of income and wealth for himself or herself and his or her extended family. *See id.* at 15. *See also* DAVID J. GOULD, BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD: THE CASE OF ZAIRE (1980) (examining the pervasiveness of corruption in Mobutu’s Zaire (now Democratic Republic of Congo) and how the country’s civil servants and political elites were able to illegally appropriate public resources for their own private use). In a study of

The abuse of public office for private gain, including the illegal appropriation of public resources for private use in African countries can take place at any level of the public sector—from the humble attendant at a public restroom to the presidency of the country. While the janitor or attendant at a public restroom may be able to appropriate a few items (e.g., toilet paper, hand soap, and other cleaning supplies) to sell on the street, a minister within the government—who has the legal authority to procure equipment and supplies for his or her ministry—can illegally secure enough materials (e.g., cars, fine wines, furniture, and other items) to sell to private contractors for enormous sums of money.²⁶ It is often the case that a physician who works at a public hospital may actually secure enough medical supplies through his official position to establish a private clinic in his house.²⁷ Once such a clinic is established, the physician could refer wealthy patients to the private clinic for superior care. Such a doctor would spend as little time as possible at the public hospital, preferring instead to spend time taking care of paying patients at his private clinic—the latter, of course, would continue to secure its supplies from the public hospital, usually at no cost to the dishonest physician. Paying patients, of course, would be attracted to the private-clinic alternative because of the extremely poor quality of service offered at public hospitals and clinics.

Throughout Africa, pharmacists, physicians, nurses, and other medical staff, who steal resources (e.g., medicines and equipment) from public hospitals to stock their private clinics or sell in the open market, may create artificial shortages for life-saving drugs and equipment at state-owned hospitals. Patients would either be sent away for lack of the resources to treat them or forced to seek expensive treatment at private clinics owned and operated by the same individuals paid to take care of these patients at the public hospitals. This type of corruption has been uncovered in many African countries. It represents an important threat

Zaire carried out in 1989, David J. Gould and Tshiabukole B. Mukendi determined that Zaire's military officers routinely appropriated, for the officers' own personal use, resources that had been assigned to the troops under the officers' command. David J. Gould & T. B. Mukendi, *Bureaucratic Corruption in Africa: Causes, Consequences and Remedies*, 12 INT'L J. PUB. ADMIN. 427 (1989). Commenting about Mobutu's government, Gould and Mukendi stated as follows: "the whole bureaucratic structure has been converted into an instrument of self-advancement and enrichment by top officials. President Mobutu himself has acknowledged that corruption is probably the biggest Zairian sickness. On several occasions, he has made explicit references to abuses such as the case of army officials who divert for their personal profit the military supplies intended for frontline soldiers, misuse of judicial machinery for avenging disputes, selective justice depending on one's wealth and status, smuggling of some exportable products such as coffee and diamonds and the non-repatriation of profits made on them, monthly salary payments to fictitious public officials and teachers, and massive evasion of import duties (by firms which have ties with the ruling elites). Rough estimates suggest that between 60% to 70% of the annual national budget disappears from the official circuit." *Id.* at 429–30.

²⁶ See generally Nantang Jua, *Cameroon: Jump-starting an Economic Crisis*, 21 AFR. INSIGHT 162 (1991) (describing this practice in Cameroon).

²⁷ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 15.

to both the health and human rights of many people, especially the poor, the politically unconnected, and historically marginalized groups (e.g., ethnic and religious minorities).²⁸

In a study of corruption and political development, J. S. Nye²⁹ defined corruption as:

Behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behaviors as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).³⁰

The definition of corruption proffered by Professor Nye³¹ directly addresses the subversion (by civil servants and political elites) of a country's standing laws and differs from the other definition, which addresses primarily the misuse or exploitation of one's public office for personal gain. It has been argued³² that the exploitation of a public office for personal gain does not depend on whether the act is legal or not.³³ Although most corrupt activities are illegal in most countries,³⁴ some practices are actually legal.³⁵ As an example, Meagher and

²⁸ See, e.g., Jua, *supra* note 26; Pius Agbenorku, *Corruption in Ghanaian Healthcare System: The Consequences*, 3 J. MED. & MED. SCI. 622 (2012) (showing that corruption is pervasive throughout the entire healthcare system in Ghana and that it is a major constraint to the effective delivery of services, especially to the poor); THE GOVERNANCE OF DAILY LIFE IN AFRICA: ETHNOGRAPHIC EXPLORATIONS OF PUBLIC AND COLLECTIVE SERVICES (Giorgio Blundo & Pierre-Yves Le Meur eds., 2008) (describing, inter alia, the pervasiveness of corruption in the African economies, including, especially in these countries' healthcare systems, and how it affects everyday life for most citizens); ROGER TANGRI & ANDREW M. MWENDA, THE POLITICS OF ELITE CORRUPTION IN AFRICA: UGANDA IN COMPARATIVE AFRICAN PERSPECTIVE (2013) (examining impunity by Africa's elites and how it affects the delivery of public services, including public health care services).

²⁹ Joseph S. Nye, *Corruption and Political Development: A Cost-benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967).

³⁰ *Id.* at 419 (internal citations omitted).

³¹ *Id.*

³² See, e.g., Patrick Meagher & M. A. Thomas, *A Corruption Primer: An Overview of Concepts in the Corruption Literature*, in THE IRIS DISCUSSION PAPERS ON INSTITUTIONS AND DEVELOPMENT 04/06 (Ctr. for Institutional Reform and the Informal Sector, 2004), http://anti-corruption.org/pmb321/pmb/opac_css/doc_num.php?explnum_id=127.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Thomas³⁶ cite the case of Uganda where incumbent politicians are legally permitted to use “all the resources of their public office in their own re-election efforts.”³⁷

Carl J. Friedrich³⁸ argues that a more effective way to understand corruption is to frame or couch it in terms of “private gains” secured at the expense of the “public interest.”³⁹ Accordingly, Friedrich⁴⁰ argues that

[t]he pattern of corruption may therefore be said to exist whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards, such as the expectation of a job in the future, induced to take actions which favor whoever provides the reward and thereby damage the group or organization to which the functionary belongs, more specifically the government.⁴¹

This approach to corruption⁴² emphasizes the impact that venality in the public sector has on the public interest and hence, forces researchers to take note of the activities of civil servants and politicians, as well as various political coalitions. In the African countries, one might want to recognize the ethno-regional or ethno-cultural groups that emerged in the post-independence period to dominate politics, especially at the central or federal level.⁴³ Finally, it is also important to be cognizant of the many interest groups, which have attempted to

³⁶ *Id.*

³⁷ Meagher & Thomas, *supra* note 32, at 2.

³⁸ Friedrich, *supra* note 7, at 15.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ As examples, one can consider the Americo-Liberians in Liberia who dominated political economy in the country from independence in 1847 to 1985; the Francophones in Cameroon who have dominated government and economy in the country since unification in 1961; and the domination of Nigerian politics since independence by the Hausa-Fulani coalition. See SAMUEL K. NGAIMA, SR., *FACTORS IN THE LIBERIAN NATIONAL CONFLICT: VIEWS OF THE LIBERIAN EXPATRIATES* (2014) (arguing that more than 140 years of domination of political economy by the Americo-Liberian group, to the exclusion of virtually all indigenous groups, was partly responsible for the civil wars that devastated the country, beginning in the mid-1980s); EMMANUEL FRU DOH, *AFRICA'S POLITICAL WASTELAND: THE BASTARDIZATION OF CAMEROON* (2008) (analyzing the destruction of the potential for genuine economic and human development, as well as national integration and nation building, in Cameroon under the regimes of Ahmadou Ahidjo and Paul Biya); OKECHUKWU OKEKE, *HAUSA-FULANI HEGEMONY: THE DOMINANCE OF THE MUSLIM NORTH IN CONTEMPORARY NIGERIAN POLITICS* (1992) (examining the extent to which the Hausa-Fulani group has dominated politics and governance in modern Nigeria).

subvert rules, even in democratic countries, to redistribute income and wealth in their favor and that of their benefactors, foreign and domestic.⁴⁴

As argued by Jacob van Klaveren,⁴⁵ the corrupt civil servant or politician considers his or her public office as a form of “business, the income of which he [or she] will . . . seek to maximize.”⁴⁶ Consequently, the civil servant’s compensation package “does not depend on an ethical evaluation of his usefulness for the common good but precisely upon the market situation and his talents for finding the point of maximal gain on the public’s demand curve.”⁴⁷ A bureaucrat’s total compensation package is made up of (1) the salary set by the government for his services and other associated benefits, and (2) all other income and benefits generated through the civil servant’s engagement or participation in outside activities.⁴⁸

Furthermore, if “bureaucrats are able to earn more income from external sources (i.e., from interest groups seeking government transfers or relief from government regulation) than from their regular employment, they may pay more attention to the demands of interest groups than to the needs of society as a whole.”⁴⁹ If corruption is endemic, civil servants—who are duty-bound to implement government regulations and national policies—may instead devote their efforts to illegal partnerships in order to enhance the ability of the

⁴⁴ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 18. *See also* Friedrich, *supra* note 7, at 15–16. It is important to note that in democratic political systems, political coalitions and interest groups may engage in various forms of opportunism that are considered legal under the laws of the country in question. For example, such groups may engage in lobbying and the payment of campaign contributions. *See, e.g.*, ROBERT G. BOATRIGHT, INTEREST GROUPS AND CAMPAIGN FINANCE REFORM IN THE UNITED STATES AND CANADA (2011) (examining, *inter alia*, the influence that interest groups and political coalitions exert on US and Canadian political systems through campaign contributions). Of course, these groups may also attempt to bribe public office holders to gain favors from the latter—for example, the groups may pay bribes to legislators to enact legislation that is favorable to enterprises owned by these groups or their members. *See, e.g.*, *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974) (upholding the conviction of a lobbyist on three counts of bribery of a US Senator—Daniel B. Brewster. The lobbyist had bribed the Senator in order to influence legislation that was before the U.S. Senate for consideration).

⁴⁵ Jacob van Klaveren, *The Concept of Corruption*, in *POLITICAL CORRUPTION: A HANDBOOK*, *supra* note 1, at 25.

⁴⁶ *Id.* at 26.

⁴⁷ *Id.*

⁴⁸ MBAKU, CORRUPTION IN AFRICA, *supra* note 1. Outside engagement by a civil servant may include legal activities (e.g., performing services for a private firm, or individual on Saturday or Sunday, or other time when the civil servant is not required, or expected to report to work and perform his official duties) or illegal activities (i.e., soliciting and accepting bribes from business owners in exchange for helping these enterprises evade compliance with government regulations, including minimizing the payment of taxes owed). *See id.*

⁴⁹ John Mukum Mbaku, *Bureaucratic Corruption as Rent-Seeking Behavior*, 38 KONJUNTURPOLITIK 247 (1992).

entrepreneurial class to evade state laws governing business operations.⁵⁰ Of course, civil servants do not perform these services out of the goodness of their hearts or in an effort to improve productivity in the economy. They engage in this form of political opportunism in order to extract extralegal income for themselves—that is, in exchange for using their public positions to help entrepreneurs minimize the burden of government regulations on their enterprises, these civil servants are paid extralegal income.⁵¹

Nathaniel H. Leff⁵² argues that corruption is “an extralegal institution used by individuals or groups to gain influence over the actions of the bureaucracy.”⁵³ The presence or existence of corruption in an economy, argues Leff,⁵⁴ “indicates only that these groups participate in the decision-making process to a greater extent than would otherwise be the case.”⁵⁵ In the 1960s, Leff⁵⁶ was among several development economists⁵⁷ who argued that corruption can actually improve access to political and economic markets. Specifically, they argued that corruption can be used to help many people who have been historically marginalized and pushed to the periphery; through the payment of bribes, for example, such people can gain access to both the economy and the political process. The evidence from virtually all African countries, however, shows that “despite high levels of corruption, there does not appear to have been any significant improvement in popular participation in most of these societies.”⁵⁸ The evidence seems to suggest instead that corruption, throughout most of the post-independence period, has enhanced the ability of certain individuals and groups to accumulate enormous fortunes for themselves, as well as for several inefficient but “politically influential businesses to remain in operation indefinitely.”⁵⁹

⁵⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 17.

⁵¹ *Id.*

⁵² Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8 (1964).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ They included D. H. Bayley and J. S. Nye. See Bayley, *supra* note 18; Nye, *supra* note 29.

⁵⁸ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 17. See also LESSONS FROM COUNTRY, *supra* note 5. Perhaps, more important is the fact that despite high levels of corruption, some individuals and groups have dominated and controlled governance and political economy in some countries for many years. For example, in Cameroon, a country where corruption is pervasive and has been so since reunification in 1961, the country has had only two presidents—Ahmadou Ahidjo (1961–1982) and Paul Biya (1982–present). See generally CAMEROON: THE STAKES AND CHALLENGES OF GOVERNANCE AND DEVELOPMENT (Tangie Nsoh Fonchingong & John Bobuin Gemandze eds., 2009) (examining factors contributing to the failure of effective governance and development in Cameroon).

⁵⁹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 17.

In Africa, the masses see corruption as a major constraint to their ability to organize their private lives and create wealth for themselves.⁶⁰ For example, “a poor street hawker, who lives on the urban periphery and struggles on a daily basis to earn enough money to take care of his family, sees corruption as an institution that prevents him from engaging in various productive activities that enhance his welfare and that of his family.”⁶¹ Within many urban centers in Africa, a street hawker who manages to secure all the government permits required for him to engage in his trade must still have to pay bribes to the corrupt government officials, who may harass him by questioning the legality of those same permits. Such government agents may include, but are not limited to, officials from the police, health ministry, public works, foreign trade, treasury, customs and excise, and even the immigration service (who purport to check the immigration status of the street entrepreneur). Continuous and incessant harassment of law-abiding but economically and socially disadvantaged individuals represents an important obstacle to the profitable operation of small-scale enterprises within the urban center.⁶²

⁶⁰ See, e.g., Aislinn Laing, *South Africans March to Call Time on Mass Government Corruption*, TELEGRAPH (Sept. 30, 2015), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/11902575/South-Africans-march-to-call-time-on-mass-government-corruption.html>; Remi Adekoya, Opinion, *The Awful Legacy of Africa's Top-Level Corruption is a Culture of Mistrust*, GUARDIAN (Sept. 3, 2014), <https://www.theguardian.com/commentisfree/2014/sep/03/africa-top-level-corruption-culture-mistrust-ebola-crisis>. See also John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role and Rule of Law*, 38 BROOK. J. INT'L L. 959 (2013) (examining, inter alia, the critical role played by an economic system that is based on the rule law (i.e., it is relatively free of corruption) in wealth creation and economic growth) [hereinafter Mbaku, *Providing a Foundation*].

⁶¹ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 3.

⁶² See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (arguing that the success of the capitalist mode of production in the West and its failure in other parts of the world is determined by the nature of the institutional arrangements in those countries). In many African countries, for example, extremely weak and dysfunctional laws and institutions, especially those, which do not adequately constrain the state, enhance the ability of civil servants and politicians to behave with impunity and engage in various growth-inhibiting activities (e.g., corruption and rent seeking). *Id.* The result is that many of these African countries are not able to create the wealth that they need to deal effectively with poverty and high rates of material deprivation. *Id.* As a consequence, many poor citizens remain extremely frustrated with governments that are impervious to their pain. *Id.* In fact, Tunisian street vendor, Tarek al-Tayeb Mohamed Bouazizi, whose self-immolation provided the impetus to the Tunisian Revolution, which began on December 17, 2010, is said to have made the ultimate sacrifice in order to protest his treatment at the hands of corrupt municipal officials. See Mbaku, *Providing a Foundation*, *supra* note 60, at 1041.

Many Africans believe that these behaviors, carried out by civil servants and politicians, do not totally reveal the extent of corruption in their economies. For example, Sadig Rasheed⁶³ states that

[w]hile these are perhaps the most flagrant aspects of the plight [i.e., corruption], such a perception does not do justice either to the manifold ways in which corruption manifests itself or to the motives and driving forces behind corrupt behavior. Aside from outright bribery, patronage, nepotism, embezzlement, influence peddling, use of one's position for self-enrichment, bestowing of favors on relatives and friends, moonlighting, partiality, absenteeism, late coming to work, abuse of public property, leaking and/or abuse of government information and the like are all part of the manifestation of corrupt behavior.⁶⁴

Some scholars⁶⁵ argue that defining corruption as "the use of public office for private gain" invariably restricts or binds the concept to the activities of state custodians (e.g., civil servants and politicians).⁶⁶ Similarly, "A broader, more inclusive definition, particularly one that takes into consideration the activities of private, non-state actors, would be especially useful for the study of corruption in, and its consequences on, African economies."⁶⁷ Hence,

activities such as the embezzlement of funds from a private enterprise, insider trading, degradation of the environment (especially if firm management makes no effort to clean-up the pollution and restore the environment to its original state), and any general misuse of entrusted power for personal gain, should all be included in the definition of corruption.⁶⁸

Although students of the political economy of African countries have usually placed emphasis on corruption in the public sector, it is important to note that corrupt activities within the private sector are equally insidious and have virtually the same negative impact on economic and human development as those in the public sector.⁶⁹

⁶³ Sadig Rasheed, *Corruption, Ethics, and Accountability in Africa: Toward a Responsive Agenda for Action*, in CORRUPTION, DEMOCRACY AND HUMAN RIGHTS IN SOUTHERN AFRICA 43 (Ayodele Aderinwale ed., 1995).

⁶⁴ *Id.* at 44.

⁶⁵ See, e.g., MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 19.

⁶⁶ *Id.*

⁶⁷ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 19.

⁶⁸ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 20.

⁶⁹ *Id.* at 19.

III. TYPOLOGIES OF CORRUPTION

In the last several decades, economists, legal experts, and social scientists have developed typologies to classify and analyze corruption. This section provides an overview of these typologies in order to show how such a scheme can help us understand and appreciate the nature of corruption and its impact on African economies.

A. Alam's Four Classes of Corruption

In 1989, Professor M. Shahid Alam⁷⁰ developed a typology to study corruption that identifies four types of corruption. These are: (1) cost-reducing; (2) cost-enhancing; (3) benefit-reducing; and (4) benefit-enhancing corruption.⁷¹ Below, I will briefly examine each type.

1. Cost-Reducing Corruption

Cost-reducing corruption is a specific scheme developed by bureaucrats to enhance their ability to extract extralegal income from business enterprises. Using the discretion granted as part of a public job, a civil servant can reduce or eliminate the tax owed the state by a business enterprise,⁷² exempt the enterprise from compliance with various government regulations, and provide the enterprise's owners or managers favorable access to government services. In carrying out these activities, the overarching objective is to minimize the costs of government activities on the enterprise and enhance the ability of the business to maximize economic profit. The business owner rewards the civil servant who is performing these important—although illegal—services with a percentage of the cost savings. The “cost saving may be shared between the official and the agent”⁷³ (i.e., the business owner) and “[i]n many cases, the civil servant's share

⁷⁰ M. Shahid Alam, *Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment*, 48 AM. J. ECON. & SOC. 441, 442–43 (1989).

⁷¹ *Id.*

⁷² One way to achieve this is to undervalue the enterprise's annual income, inflate its costs and hence, allow the enterprise to, on paper, produce virtually no taxable income. For example, in a study of revenue flows in African mining, John Jacobs reports that “[f]or tax purposes, businesses have an interest in under-reporting revenue and over-reporting expenses to decrease their overall tax bill.” John Jacobs, *An Overview of Revenue Flows from the Mining Sector: Impacts, Debates and Policy Recommendations*, in *MODES OF GOVERNANCE AND REVENUE FLOWS IN AFRICAN MINING* 36 (Bonnie K. Campbell ed., 2013).

⁷³ Alam, *supra* note 70. See also MBAKU, *CORRUPTION IN AFRICA*, *supra* note 1, at 21.

of the ill-gotten gains is pre-determined based on a mutually-agreed upon formula.”⁷⁴

This corruption scheme is quite pervasive throughout several African economies and is employed routinely by many civil servants to secure extralegal income for themselves.⁷⁵ In addition, many ruling elites and coalitions have used this scheme to protect the enterprises of their supporters and benefactors as a way to secure support for the regime and enhance its security.⁷⁶

2. Cost-Enhancing Corruption

Another way in which civil servants can garner extralegal income for themselves is by engaging in cost-enhancing corruption in which, for example, civil servants can extort illegal payments from individuals seeking access to public goods and services. When there is excess demand for a public good or service and the government is unwilling or unable to increase supply, this scheme can easily be carried out.⁷⁷ The civil servant has an opportunity to extract the rent created by what is essentially a permanent shortage. Under this scheme, the civil servant can either force consumers to pay for a public good or service that has already been purchased using tax revenues or pay a price that approximates the free market price for a good or service that is supposed to be made available to consumers at an extremely subsidized (below market) price.⁷⁸

The money extorted from consumers of public goods and services is not placed in the national treasury to become part of government revenues. Instead, the money goes only to the corrupt civil servant. Where government intervention in private exchange creates artificial monopolies (e.g., the regulation of import trade), the manager in charge of the bureau that grants import licenses, can extract

⁷⁴ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 20.

⁷⁵ See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1; Mbaku, *Enhancing Africa's Fight*, *supra* note 2; LESSONS FROM COUNTRY, *supra* note 5 (providing, inter alia, evidence of the existence of cost-reducing corruption in several countries in Africa).

⁷⁶ See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1 (detailing, inter alia, the different ways in which ruling coalitions in Africa have used corruption to generate support for incumbent regimes).

⁷⁷ Alam, *supra* note 70, at 442.

⁷⁸ *Id.*; see also Sara Allin et al., *Paying for “Free” Health Care: The Conundrum of Informal in Post-Communist Europe*, in GLOBAL CORRUPTION REPORT 63 (2006) (describing and lamenting on corruption in the health care systems of many post-communist European countries, with special emphasis on the informal payments, which individuals who go to public hospitals to seek treatment must pay the hospital staff in order to receive services). Note, of course, that such extortion of payments from patients for health care services that are already paid for by tax revenues, is not unique to post-communist Europe. This phenomenon is quite common in public hospitals and clinics in Africa. See generally Agbenorku, *supra* note 28; GOVERNING HEALTH SYSTEMS IN AFRICA (Martyn Sama & Vihn-Kim Nguyen eds., 2008) (examining, inter alia, corrupt practices in the delivery of health care services in many African countries).

part of the monopoly profits associated with the permit.⁷⁹ Finally, the bureaucrat can engage in illegal takings of private property for his own personal use, by, for example, engaging in non-authorized taxing of economic activity.⁸⁰

3. Benefit-Enhancing Corruption

In virtually all countries, government agencies administer programs that transfer resources (usually in monetary terms) to private citizens. These programs range from retirement funds to scholarships for students to study abroad. The civil servants who are responsible for administering these programs can illegally transfer more resources to a beneficiary than the latter is legally entitled to receive. In this type of corruption, called benefit-enhancing corruption,⁸¹ the civil servant can profit by allowing the recipient to lie about his or her actual needs (i.e., a student who is granted a scholarship to study abroad can inflate the budget, lie about the number of years needed to complete the course of study, etc.) all with the acquiescence of the civil servant in charge of administering the scholarship program.

But what is the motivation of the civil servant to participate in this deceitful scheme? Self-enrichment, nepotism, or political patronage are possibilities, as well as the civil servant simply being granted a portion of the intentional overpayment to the recipient.⁸² This type of corruption is used regularly by many of the continent's governing regimes to transfer income and wealth to their supporters and benefactors and also to groups that have developed enough violence potential to threaten regime security.⁸³

4. Benefit-Reducing Corruption

Civil servants seeking ways to enrich themselves can illegally appropriate government benefits that are due other citizens and make them their own. This type of corruption, called benefit-reducing corruption, is quite common and pervasive throughout African economies, especially given that civil servants usually are better informed about government benefits programs than their fellow citizens, including legally owed benefits.⁸⁴ For example, the manager of a

⁷⁹ See generally JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 131–35 (2004) [hereinafter MBAKU, INSTITUTIONS AND DEVELOPMENT] (examining, inter alia, how civil servants in immediate post-independence Ghana were able to use the import-permitting process to extract extralegal income for themselves).

⁸⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1. See also Alam, *supra* note 70, at 442.

⁸¹ Alam, *supra* note 70, at 442–43.

⁸² *Id.* at 443; MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 21.

⁸³ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 21.

⁸⁴ *Id.*; Alam, *supra* note 70, at 443.

government-funded scholarship program may pack the funds in an interest-bearing account at a local or even foreign bank, delay disbursement of the funds, and subsequently appropriate the interest earned for his private use. Similarly, the head of a military battalion may steal some of the supplies and equipment allocated to his unit and sell them in the open market and keep the proceeds for himself. In the case of a hospital, a staff member (usually a nurse, pharmacist, or physician) can illegally appropriate resources and equipment from the hospital and use them to establish a private clinic in his house, from which he can earn extra money by treating patients who are willing to pay—to make this work, the health care worker would intentionally deliver poor services at the public hospital or make it known to patients that they would receive superior and more effective services if they visit his private clinic. Of course, the corrupt hospital staff member can sell the illegally appropriated public resources in the free market and pocket the money.⁸⁵

B. Beneficial and Harmful Corruption

In the 1950s and 1960s, as many European colonies in Africa gained independence and initiated the process of economic development, some development economists and political scientists⁸⁶ argued that although corruption is generally detrimental to the creation of wealth and economic growth, some forms of the practice can actually be beneficial to the economy.⁸⁷ Following the

⁸⁵ See, e.g., Taryn Vian, *Corruption in Hospital Administration*, in GLOBAL CORRUPTION REPORT, *supra* note 78, at 48, 50. Usually, the corrupt doctor or nurse would establish the private clinic with medical supplies and equipment looted from the public hospital where he works. In a study of corruption in health care systems, Maureen Lewis determined that in Ethiopia, “[d]rugs tend to be a commonly ‘leaked’ product given that it can fetch a higher price in the private market. In Ethiopia users and providers explained in focus groups the rampant stealing of public sector drugs, their resale in the private market and the common dealings in contraband medicines.” Maureen Lewis, *Governance and Corruption in Public Health Care Systems* 21 (Ctr. For Glob. Dev., Working Paper No. 78, 2006), http://www1.worldbank.org/publicsector/anticorrupt/Corruption%20WP_78.pdf. She also determined that “[t]he average leakage rate for drugs in Uganda was estimated at 78%, ranging from 40 to 94% across 10 public facilities.” *Id.* at 22. Then, he would intentionally downgrade the quality of services at the public hospital and, at the same time, encourage the obviously unhappy patients to come to his private clinic for “higher” or “better-quality” care. See, e.g., Vian, *supra*, at 68. A doctor or nurse engaged in this type of corruption would usually spend “only a fraction of the working-day performing services at the public hospital and devote the rest of the day to working at his private clinic.” Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 21 n.63. Although the doctor does not provide the public hospital with a full-day’s work, he or she is still paid a full compensation package—salary and benefits. *Id.*

⁸⁶ For example, David H. Bayley, Joseph S. Nye, and Nathaniel H. Leff. See Bayley, *supra* note 18; Nye, *supra* note 29; Leff, *supra* note 52.

⁸⁷ See generally Bayley, *supra* note 18; Nye, *supra* note 29; Leff, *supra* note 52.

tradition of these earlier scholars, David Osterfeld⁸⁸ argued that corruption can either be *beneficial* or *harmful* to activities in the private sector. Osterfeld⁸⁹ termed those activities of civil servants that “facilitate, improve, and enhance competitive exchange”⁹⁰ beneficial or expansive corruption. According to proponents of this type of corruption, it is expected to effectively eliminate bureaucratic bottlenecks within the economy, improve competition and efficiency and greatly enhance wealth creation and economic growth. Osterfeld⁹¹ states that when the government intervenes in the economy (that is, in private exchange), such activities can adversely affect mutually beneficial private exchange, instead of enhancing it, and stunt economic growth.⁹² Through expansive corruption, however, business owners can rid the economy of virtually all “the regulation-induced obstacles to voluntary free exchange that can significantly increase the costs of operating in the formal sector.”⁹³ In other words the latter can be used effectively to eliminate bureaucratic bottlenecks, which otherwise would hinder engagement, by entrepreneurs, in productive activities. Thus, expansive corruption can be used to improve the functioning of economic markets and promote growth and development.⁹⁴

⁸⁸ DAVID OSTERFELD, *PROSPERITY VERSUS PLANNING: HOW GOVERNMENT STIFLES ECONOMIC GROWTH* (1992).

⁸⁹ *Id.*

⁹⁰ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 23. *See also* OSTERFELD, *supra* note 88, at 208–209.

⁹¹ OSTERFELD, *supra* note 88.

⁹² *Id.* at 208–09.

⁹³ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 22.

⁹⁴ MBAKU, *INSTITUTIONS AND DEVELOPMENT*, *supra* note 79, at 23–24. In discussing expansive or beneficial corruption, especially with respect to the African economies, it is important to note that many civil servants actually intentionally and deliberately impose various bottlenecks where none existed before with the expectation that entrepreneurs, afraid that these bottlenecks would increase their transaction costs, would be willing to bribe the regulators to have them removed. In their study of corruption in Africa, Bertha Osei-Hwedie and Kwaku Osei-Hwedie determined that “when bottlenecks are created in the administration [i.e., government] within the sectors dealing with the public, they become a source of corruption.” Bertha Z. Osei-Hwedie & Kwaku Osei-Hwedie, *The Political, Economic, and Cultural Bases of Corruption in Africa*, in *CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES*, *supra* note 5, at 44, 52, 63. They also argue that “[t]he kleptocrat has no concern with correcting market failures *per se* and views the regulatory system as a source of rents. Thus, regulations and licensing requirements may be imposed that have no justification other than to create a bottleneck that firms will pay to avoid.” *Id.* at 63. As argued by Mbaku, “such artificially-imposed bottlenecks render the public policy process, in general, and the delivery of public goods and services, in particular, extremely slow, forcing those who desire access to these services to bribe the bureaucracy in order to eliminate delays and minimize chances that a demander of public services would be faced with the ubiquitous ‘come back tomorrow’ or ‘come back next week’ answer.” Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 22 n.69.

There is no question that the classification of corruption as expansive and beneficial is nothing but a repackaging of the “beneficial corruption” argument advanced in the 1950s and 1960s regarding the role of corruption in economic growth in the economies of many developing countries, including those in Africa. At the time, it was argued that certain types of corruption could actually be used to significantly improve and enhance both political and economic participation, particularly for dispossessed and marginalized groups and in the process, improve economic growth and development.⁹⁵

Harmful or restrictive corruption, according to Osterfeld,⁹⁶ can severely limit opportunities for individuals to engage in mutually-beneficial private exchange. Thus, this type of corruption is considered a major constraint to economic growth and development.⁹⁷

C. Systemic versus Opportunistic (Individualized) Corruption

In some countries, corruption is systemic, in others, individualized.⁹⁸ Within an economic system with systemic corruption, those who serve in the public sector (e.g., civil servants and politicians) are not effectively constrained by the law: they are able to behave with impunity and engage in various forms of corrupt activities to maximize their self-interest and/or those of their family members and friends. State institutions (e.g., police, judiciary, legislature, and the electoral system) have been compromised and are no longer able to perform their constitutionally mandated functions effectively and the country has degenerated into a venal society “in which access to profitable opportunities in the economy is being sold by corrupt civil servants and politicians.”⁹⁹ Given that within such economies—those that have degenerated into venal societies—counteracting institutions are no longer capable of making certain that citizens’ behavior conforms to the law, the rule of law has ceased to exist.¹⁰⁰ Within such economies, “corruption has become institutionalized, well-organized and endemic.”¹⁰¹ In addition, “[i]ndividuals, groups or enterprises seeking access to government services must bribe the gatekeepers—that is, civil servants and politicians.”¹⁰²

In their study of such a venal society—Mobutu’s Zaire (now Democratic Republic of Congo)—Gould and Mukendi¹⁰³ determined that institutions of the state, such as the judiciary and the police, no longer functioned to protect the

⁹⁵ See generally Bayley, *supra* note 18, at 719–29.

⁹⁶ OSTERFELD, *supra* note 88, at 212–17.

⁹⁷ *Id.*

⁹⁸ Meagher & Thomas, *supra* note 32.

⁹⁹ MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 79, at 24.

¹⁰⁰ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2.

¹⁰¹ *Id.* at 23.

¹⁰² MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 79, at 24.

¹⁰³ Gould & Mukendi, *supra* note 25.

fundamental rights of all citizens or enhance proper functioning of the economy. Instead, the state had been privatized and its organs were being used to serve the interests of politically connected individuals and groups and anyone who was willing and able to pay the requested bribes.¹⁰⁴ Gould and Mukendi¹⁰⁵ concluded that within Mobutu's Zaire, "the whole bureaucratic structure [had] been converted into an instrument of self-advancement and enrichment by top officials."¹⁰⁶ They also noted that the country's head-of-state, Mobutu Sese Seko, was totally unmoved by or even concerned with the diversion of "supplies intended for frontline soldiers" for the use of their officers; the "misuse of judicial machinery for avenging private disputes, selective justice depending on one's wealth and status, smuggling of some exportable products such as coffee and diamonds and the non-repatriation of profits made on them, monthly salary payments to fictitious public officials and teachers, and massive evasion of import duties (by firms that have ties with the ruling elites), etc."¹⁰⁷

Where corruption is individualized, the state has not been captured and privatized and its laws and institutions turned into instruments for private capital accumulation. Within such an economy, corrupt state custodians, acting as individuals, search for ways to subvert existing laws in order to extract extralegal income for themselves. A junior hospital staff member, may (without the permission, knowledge, or acquiescence of his or her superiors) demand and accept bribes from patients before they receive necessary care. These types of individual effort to subvert the laws would not usually compromise or severely damage the country's health care system. Nevertheless, should the corrupt practices of such junior staff in the public hospitals become widespread, immediate action must be taken to minimize harm to the health care system and avoid seriously damaging the integrity of the national health care system.¹⁰⁸

Today, individualized corruption has become quite pervasive throughout most countries in Africa as evidenced by the stubborn persistence of such bureaucratic behaviors as "embezzlement of public resources; extortion, by civil servants, of bribes from individuals and groups seeking government services; absenteeism, and regularly coming late to work or leaving work before the official 'quitting time,' but receiving full pay; smuggling; and several other types of white-collar crimes."¹⁰⁹

D. Grand Corruption and Petty Corruption

Corruption has also been classified as either grand or petty. Grand corruption is an expression that is generally used to refer to the extralegal

¹⁰⁴ *Id.* at 429–30.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 79, at 24.

¹⁰⁹ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 23.

activities of high-ranking civil servants and politicians that involve relatively large sums of money. Petty corruption, however, describes corrupt activities of low-level state custodians and usually involves relatively small amounts of money.¹¹⁰ Arvind K. Jain¹¹¹ defines grand corruption as “the acts of the political elite by which they exploit their power to make economic policies.”¹¹² As argued by Jain,¹¹³ “politicians [in a democratic political system] are supposed to make resource allocation decisions based solely upon the interests of their principal—the populace.”¹¹⁴ In carrying out this constitutionally mandated function, these ruling elites must seriously consider and “balance the interests of the various segments of society as well as their own desire to remain in power.”¹¹⁵ Instead of performing his duties as prescribed by law, the corrupt civil servant or politician would act with impunity and engage in various forms of capriciousness and arbitrariness to maximize his private interests at the expense of society as a whole.¹¹⁶

Petty corruption, which some researchers also call “bureaucratic corruption,”¹¹⁷ involves “the corrupt acts of the appointed bureaucrats in their dealings with either their superiors (the political elite) or with the public.”¹¹⁸ Examples of petty corruption abound in the African economies. For example, individuals and business firms seeking access to services may be forced to pay bribes in order to receive services. Generally,¹¹⁹ “the bribe is paid either to ensure that the payor receives the service (to which he is legally entitled), or to remove

¹¹⁰ *Id.*

¹¹¹ Arvind K. Jain, *Corruption: A Review*, 15 J. ECON. SURVEYS 71 (2001).

¹¹² *Id.* at 73.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ In designing and implementing public policies, for example, these opportunistic and corrupt political elites usually opt for projects, which have the potential to significantly enhance their ability to receive extralegal income for themselves. Public projects in this genre are usually referred to as “white elephants”—that is, projects that generate a lot of political and personal benefits to the civil servants and political elites, but have virtually no social benefits. An example of such a project is the Basilique Notre Dame de la Paix de Yamoussoukro (Our Lady of Peace Basilica), initiated and constructed by the former president of Côte d’Ivoire, Félix Houphouët-Boigny, at the cost of about 300 million USD. It is one of the largest Roman Catholic churches in the world and is capable of seating up to 7,000 people and costs about 800,000–1,000,000 USD per year to maintain. See CYRIL K. DADDIEH, *HISTORICAL DICTIONARY OF CÔTE D’IVOIRE (THE IVORY COAST)* 105 (2016). Hence, if a project offers excellent opportunities for these politicians to enrich themselves and their families, they would adopt it even if it is unlikely to generate any benefits for society at large. See generally JOHN MUKUM MBAKU, *INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE* (1997) [hereinafter MBAKU, *REFORM IN AFRICA*]; MBAKU, *INSTITUTIONS AND DEVELOPMENT*, *supra* note 79; MBAKU, *CORRUPTION IN AFRICA*, *supra* note 1.

¹¹⁷ Jain, *supra* note 111, at 75.

¹¹⁸ *Id.*

¹¹⁹ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2.

bottlenecks in the bureaucratic process and enhance the ability of the payor to access the government services, or to allow an individual who is not legally entitled to receive a public service to do so.”¹²⁰

The designation of “petty” does not mean that petty corruption’s impact on the economy and citizenry is minor or benign. In most African economies, petty corruption is a major constraint to the ability of most people to organize their private lives and engage in various productive activities to improve their welfare. It is especially detrimental to the lives of the urban poor, individuals who, as a result of political and economic circumstances, have been pushed to the urban periphery. These people must bribe the bureaucracy on a daily basis in order to have access to welfare-enhancing and, in many instances, life-saving services, which may include clean water, shelter, basic health care, food, and police protection.¹²¹

In a study of corruption in Nigeria completed in 2000, John Erero and Tony Oladoyin¹²² described in great detail the daily experiences of most Nigerians with this insidious institution called corruption. They state as follows:

At the counter of any police station in Nigeria, there is usually a boldly written notice to the effect that ‘BAIL IS FREE.’ However, no one can be released from police custody without parting with some amount of money. The policeman at the counter will demand money for writing materials with which they claim they will enter the case, whether a complainant or an accused. At another level if a policeman effects an arrest, the first thing he or she demands is ‘chop money’ from the suspect. At the level of the interrelationship between the commuter drivers and the police, the situation is a pathetic one. The police of all categories—anti-crime, mobile, or traffic wardens—openly demand and take bribes even in the presence of passengers. The amusing but sad dimension here is that these police officers in Nigeria even give change. For instance, where a driver does not have the required bill, say a 10 currency note and he gives out a 50, the policeman at the check point, will give back 40 in change without any sense of shame. It is that bad now in Nigeria.¹²³

¹²⁰ *Id.* at 24.

¹²¹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 110. *See also* John Erero & Tony Oladoyin, *Tackling Corruption Epidemic in Nigeria*, in LESSONS FROM COUNTRY, *supra* note 5, at 280 (examining the impact of petty corruption on the welfare of the poor, with specific emphasis on Nigeria).

¹²² *Id.*

¹²³ *Id.* Throughout West Africa, the expression “chop money” is used to mean the money that a husband gives his wife for the purpose of purchasing household items, which include especially food. In the urban centers, chop money usually refers to money given to the wife by the husband to buy not just food, but also to meet various household expenses.

It is important for Africans to recognize the fact that the law provides citizens with the tools to organize their private lives (e.g., start and run a business for profit; purchase and dispose of property; help them resolve private conflicts, etc.). If civil servants and political elites engage in corruption and other forms of opportunism (i.e., they subvert the country's standing laws) to extract extralegal income for themselves, many citizens will find it very difficult to function on a daily basis, or engage in activities to improve their quality of life.

E. The Dynamics of Corruption

Many scholars¹²⁴ have argued that one reason African policymakers have not been able to deal fully and effectively with corruption is that they do not understand the dynamics of this insidious institution. Meagher and Thomas,¹²⁵ for example, argue that "the dynamics of corruption are not well understood, and relatively little [research] work has been done in this area."¹²⁶

Social scientists¹²⁷ have argued that corruption, and its extent in a country, is "determined by the balance between economic and political power, as well as the degree of autonomy enjoyed by national elites and the extent to which

The word "chop" is a verb in Pidgin English that means "to eat." Within the corruption literature, the word "chop" means to illegally appropriate someone else's money for another's private use. For example, the head of a government agency "chops" the public's money, which means that he or she has illegally appropriated public funds for his or her own private use. Also, a doctor at a public hospital can extort "chop money" from a patient who is seeking services from the doctor and his staff. A police officer patrolling the streets may also demand "chop money" from motorists, supposedly to help feed himself and his family. In doing so, he is likely to argue that his official compensation package is not enough to take care of his basic needs and those of his family. Thus, in his opinion, he is justified in seeking the extralegal payments. Throughout Africa, many high-ranking civil servants and political elites, all of whom are well-paid and provided with extremely generous compensation packages, still behave with impunity and demand bribes from people who come before them seeking public goods and services. Perhaps, more important is the fact that many of these civil servants and politicians still willingly engage in corrupt activities, specifically in grand corruption. Thus, one must dismiss the argument that African civil servants engage in corrupt activities in an effort to subsidize relatively inadequate legal wages and salaries and meet necessary obligations to their families. This, of course, appears to be an excuse made by apologists for corruption and politicians or policymakers who are unwilling to undertake the institutional reforms needed to fully constrain the state and prevent the type of opportunism that has become endemic in many countries throughout the continent. See generally MBAKU, INSTITUTIONS & DEVELOPMENT, *supra* note 79; MBAKU, REFORM IN AFRICA, *supra* note 116.

¹²⁴ See, e.g., Meagher & Thomas, *supra* note 32.

¹²⁵ *Id.*

¹²⁶ *Id.* at 18.

¹²⁷ See, e.g., Michael Johnston, *Public Officials, Private Interests, and Sustainable Democracy: When Politics and Corruption Meet*, in CORRUPTION AND THE GLOBAL ECONOMY 61 (Kimberly Elliott et al. eds., 1997).

the people can have access to these officials.”¹²⁸ If a country’s governing process is characterized by the rule of law, its political elites may be relatively autonomous but they would not be able to act with impunity because they are fully constrained by the law.¹²⁹ Within a country characterized by such institutional arrangements, citizens are usually granted relatively unfettered access to the government, as well as to its civil servants and political elites; economic freedom or the right to freely engage in exchange and contracting is constitutionally guaranteed; and corruption and other forms of opportunism (e.g., rent seeking) are minimized.¹³⁰ However, if there is an imbalance, which may involve the loss of autonomy by political elites or the abrogation of economic freedom, the political system can be destabilized and opportunities created for corruption to become pervasive. An imbalance in the system can be caused, for example, by a military coup and the subsequent establishment of an authoritarian system in which all policymakers lose their autonomy and must serve as prebends to a strong and imperial central executive or through the loss of economic freedom. Nevertheless, equilibrium can be restored through institutional reforms that return the country to democracy and a resource allocation system that guarantees economic freedom.

Michael Johnston¹³¹ has studied the dynamics of corruption and has, in the process, produced four typologies, which are sub-divided into “moderate corruption scenarios” and “high corruption scenarios.”¹³² According to Johnston’s¹³³ classification, moderate corruption scenarios consist of (1) interest group bidding¹³⁴ and (2) patronage machines.¹³⁵ Interest-group bidding, Johnston¹³⁶ argues, is found in countries that have (i) bureaucracies and political

¹²⁸ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 26.

¹²⁹ The existence of the rule of law implies that those who serve in government (i.e., civil servants and politicians) are fully constrained by the law and hence, cannot act with impunity or, if they do, would be dealt with fully by the judicial system. As argued by Sidharth Chauhan with respect to the rule of law in India, “[t]he ideal of the ‘rule of law’ implies that lawmakers should be subjected to the laws which they create, just as they would bind other citizens.” Sidharth Chauhan, *Legislature: Privileges and Process*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 290, 292 (S. Choudhry et al. eds., 2016). Note, of course, that the existence of the rule of law implies that the “[t]he law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.” Stein, *supra* note 4, at 302. Thus, one would expect that in a country whose governing process is characterized by the rule of law, corruption would be minimized.

¹³⁰ See generally Helder Ferreira de Mendonça & André Oliveira da Fonseca, *Corruption, Income, and Rule of Law: Empirical Evidence from Developing and Developed Economies*, 32 BRAZILIAN J. POL. ECON. 305 (2012); Mbaku, *Providing a Foundation*, *supra* note 60, at 959.

¹³¹ Johnston, *supra* note 127.

¹³² *Id.* at 70–72.

¹³³ *Id.*

¹³⁴ *Id.* at 70–71.

¹³⁵ *Id.* at 73–74.

¹³⁶ Johnston, *supra* note 127, at 70–71.

systems that are relatively accessible to the citizens; and (ii) well-developed and robust private sectors, which are characterized by competitive exchange. In such countries, individuals and interest groups expend resources to seek political influence, a process that results in the corruption of the political elite.¹³⁷

Patronage machines, on the other hand, are found in countries with a relatively poorly-developed private sector and a domineering political sector—the latter usually provides educated and highly skilled individuals with more opportunities for self-enrichment than the relatively weak and poorly-resourced private sector. In addition, in this type of economy, the political elites form a fairly autonomous class. These factors usually combine to produce within each of these economies, extremely high levels of organized corruption.¹³⁸

In Johnston's¹³⁹ classification, high corruption scenarios are elite hegemony and fragmented patronage. Elite hegemony, Johnston¹⁴⁰ argues, is found in political systems characterized by (1) well-entrenched elites; (2) limited political competition; and (3) institutional arrangements that do not adequately constrain the state and hence, political elites are able to engage in various forms of opportunism (e.g., corruption) to enrich themselves at the expense of their fellow citizens.¹⁴¹ Within such an economy, it is common for political elites to sell access to the government, primarily but not exclusively, and to entrepreneurs, in an effort to generate extralegal income for themselves.¹⁴²

Fragmented patronage can be found in political societies with "fragmented, politically insecure elites who build personal followings using material rewards."¹⁴³ Within these types of political societies, the elites do not seek to build broad-based political parties with a national following, but depend primarily on "personal followings" to secure and retain their public positions.¹⁴⁴ In these societies, argues Johnston,¹⁴⁵ some of the corruption may be linked to "intimidation and violence."¹⁴⁶

These corruption typologies can be found in virtually all African countries. It is often the case that political economy in an African country may be characterized by more than one type of corruption typology. Hence, before the government designs and implements any anti-corruption program, it is necessary that detailed studies be conducted in order to fully understand the nature of corruption in the country. Armed with knowledge about the different types of corruption typologies that exist within the country, the government can then

¹³⁷ *Id.* at 71.

¹³⁸ *Id.* at 73–74.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Johnston, *supra* note 127, at 71–73 tbl.2.

¹⁴² *Id.*

¹⁴³ *Id.* at 71.

¹⁴⁴ *Id.* at 73.

¹⁴⁵ *Id.*

¹⁴⁶ Johnston, *supra* note 127, at 73.

articulate and promulgate an anti-corruption policy that is holistic enough to encompass all the various typologies of corruption.

IV. THE IMPACT OF CORRUPTION ON AFRICAN ECONOMIES

A. Introduction

Many social scientists and legal scholars have studied the impact of corruption on political, economic, and human development in Africa.¹⁴⁷ These robust debates on the role of corruption in development have produced two schools of thought. One school argues that corruption is one of the most important constraints to economic and human development in the continent: “corruption enhances inefficiency in the public services, stunts entrepreneurship and the creation of wealth, and generally has a negative impact on social, political, and economic development.”¹⁴⁸ According to this school, corruption can also impede the ability of the country to promote and enhance peaceful coexistence. For example, if some groups (e.g., minority ethnic and religious groups) believe that corrupt public policies, designed and implemented by the extant government, are marginalizing them, they may resort to violent and destructive mobilization to minimize further marginalization and improve opportunities for participation. This is most likely to occur if existing institutional arrangements do not provide sufficient legal mechanisms for citizens to seek relief from government tyranny or improve participation in economic and political processes.¹⁴⁹

¹⁴⁷ See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1 (providing, inter alia, an overview of the impact of corruption on African economies and detailing ways to cleanup corruption); LESSONS FROM COUNTRY, *supra* note 5 (presenting a series of essays on how corruption affects development in Africa generally and in selected countries, in particular); GOULD, *supra* note 25 (examining the impact of corruption on the economy of Zaire/Democratic Republic of Congo); LEVINE, *supra* note 25 (examining the impact of corruption on political and economic development in the immediate post-independence period in Ghana); LA CRIMINALISATION DE L'ÉTAT EN AFRIQUE (Jean-François Bayart et al. eds., 1997) (examining the criminalization of state structures in Africa and placing specific emphasis on the privatization of state institutions; development of public policy based primarily on plundering; the growth of private arms and other instruments of violence; and the evolvement of the State into an instrument of organized criminal activities); CORRUPTION AND THE CRISIS OF INSTITUTIONAL REFORMS IN AFRICA (John Mukum Mbaku ed., 1998) (presenting a series of essays that examine the various dimensions of corruption in Africa, its impact on African economies, and how to minimize it).

¹⁴⁸ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 87.

¹⁴⁹ Of course, in any country, when individuals or groups believe that public policies are either marginalizing them or placing them in a competitively disadvantaged political or economic position, they can use existing legal avenues to seek relief from their government. See Mbaku, *Providing a Foundation*, *supra* note 60, at 1002. In 2003, for example, after petitioning the government of the Republic of Cameroon for relief from what they argued was impunity and tyranny directed at them by the central government in Yaoundé, the Anglophones of Cameroon took their case to the African Human and

Openness and transparency in government communications are important to inter-group relations and peaceful coexistence. First, unless the process of making laws is open and transparent, many groups (especially those which, through public policies, have been pushed to the economic and political periphery) are likely to view national laws and institutions as instruments of plunder, designed to keep the disadvantaged groups in perpetual bondage. However, if the process of making and implementing laws is open and transparent, all groups within the country, including those who did not actively participate in the process,

Peoples' Rights Court in Banjul, The Gambia. See Nicodemus F. Awasom, *Towards Historicizing the Ossification of Colonial Identities in Africa: The Anglophone/Francophone Divide in Postcolonial Cameroon*, in SOCIETY, STATE AND IDENTITY IN AFRICAN HISTORY 47, 62 (Bahru Zewde ed., 2008). In addition, such groups can increase their participation in the political process, seek to present members of their group as candidates for public office, and thereby gain greater representation in government and the public policy making process. For example, in South Africa, the Africans who fought against the apartheid system did so, inter alia, to effect political reform and transform governance. The two important pillars of the struggle were "equality and the right to political participation" for all ethnocultural groups. African groups believed that the most effective way for them to minimize their marginalization by the white-minority government was full and effective political participation. See MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL & CULTURAL CRITIQUE 140 (2002). Basically, these groups can use the political process to significantly improve their participation in the public policy process and significantly minimize the feeling of marginalization. Unfortunately, in many African countries, avenues for citizens who are either marginalized or feel they are to improve their political participation, usually do not exist, or if they do, they do not function effectively. See, e.g., AFRICAN YOUTH AND THE PERSISTENCE OF MARGINALIZATION: EMPLOYMENT, POLITICS, AND PROSPECTS FOR CHANGE (Danielle Resnick & James Thurlow eds., 2015) (arguing, inter alia, that despite the recent improvements in African economic performance, the youth remain totally marginalized, driven to the economic and political periphery, and unable to find opportunities for self-actualization). Part of the problem comes from the fact that many governments in these countries lack openness and transparency, and hence it is very difficult for marginalized and deprived groups to determine how public policies are designed and implemented and why certain policies are preferred over others. In a study of human rights in Africa, K. Olaniyan determined that "[l]ack of access to information by citizens also affects the transparency of public services and the management of the state's wealth and resources, which in turn undermines public confidence and trust in the government." OLANIYAN, *supra* note 17, at 226. Hence, there is always suspicion among some ethnocultural groups that government exists exclusively to serve the needs and interests of the groups that dominate and control it and that the marginalization of outside groups is the rule and not the exception. Such feelings of subservience were felt by virtually all Africans in South Africa during the time of apartheid—they were totally agreed that the system of white supremacy, which was promoted by the apartheid government, had one overarching objective: to force Africans to serve the needs of the country's European population. See generally MARTIN MEREDITH, MANDELA: A BIOGRAPHY (2010) (explaining, inter alia, Mandela's denunciation of the twin evils of racial discrimination and the system of minority rule in South Africa and how the apartheid government had brought the law into contempt).

would be quite aware of how the laws were designed and why certain laws were chosen over others.

Second, it is important to recognize that opacity or the lack of openness in government encourages and facilitates corruption and other growth-inhibiting behaviors (e.g., rent seeking). Gerring and Thacker¹⁵⁰ argue that “[o]penness and transparency, which we may understand as the availability and accessibility of relevant information about the functioning of the polity, is commonly associated with the absence of corruption. Since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).”¹⁵¹

If the public sector engages in open and transparent communication, corruption and other forms of political opportunism are severely reduced. Of course, effective transparency and openness must involve making certain that information about government actions is provided to the people and undertaken in such a way that that information is provided in a manner that is easily accessible to the people who need and use the information. While placing government information on Internet websites can significantly improve transparency, in most African countries only people who live in the urban centers actually have access to the Internet. Perhaps more important is the fact that most Africans are illiterate in the official languages of their countries—French in the former French and Belgium colonies, English in the former British colonies, Spanish in the former Spanish colonies, and Portuguese in the former Portuguese colonies. Hence, the adoption of a technology to enhance and improve openness and transparency must be context-specific—that is, the ability of the consumers of the information to effectively use the technology must be considered as a factor in determining adoption. Of course, the language in which the information would be disseminated should be given top priority.¹⁵²

The second school argues that corruption can be used effectively to “grease the wheels” of a bureaucracy “that is traditionally rigid and unresponsive and make it more flexible and responsive to the needs of the productive sector.”¹⁵³ Corruption can be used to “remove major bottlenecks in the bureaucracy, significantly improve its efficiency and ability to manage the economy and direct development.”¹⁵⁴

¹⁵⁰ John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 B. J. POL. S. 295 (2004).

¹⁵¹ *Id.* at 316.

¹⁵² See also Mbaku, *Providing a Foundation*, *supra* 60.

¹⁵³ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 87.

¹⁵⁴ *Id.*

B. Can Corruption Enhance the Participation of the Private Sector in Public Policy?

Some scholars¹⁵⁵ have argued that corruption can be used to enhance the participation of the private sector in the public policy process—that is, the design and implementation of government policies. The two most important sectors of any economy are the private sector, which is the foundation for the creation of wealth, and the public sector, which is expected to maintain law and order and engage in other activities to enhance the ability of the private sector to create wealth.¹⁵⁶ Specifically, the public sector provides the social overhead capital (e.g., roads, including farm-to-market roads, schools, especially at the elementary and secondary levels, hospitals, including especially dispensaries, etc.) that enhances the ability of the private sector to engage in productive activities and create wealth.

In order for public sector activities to benefit the private sector and enhance the ability of the latter to create wealth, these activities must complement and not duplicate or replace those undertaken by entrepreneurs or other private sector agents. But how can one be certain that government activities would complement and not replace those of the entrepreneurial class? An effective way to ensure complementarity is to provide the entrepreneurial class with the facilities to participate fully and effectively in the making and implementing of public policies. However, if the private sector is not allowed to participate in the public policy process, then the input of a very important stakeholder in the creation of wealth will be made unavailable to policymakers, and economic policies are unlikely to contribute positively to economic growth and development. In fact, if political elites are allowed to have a monopoly on policy design and implementation, they are likely to act opportunistically and promote policies that benefit them and provide opportunities for self-enrichments instead of those that enhance the ability of the private sector to create the wealth that the country needs to fight poverty and improve human conditions.¹⁵⁷

Some scholars have argued that in many countries, including those in Africa, public policy does not place emphasis on economic growth and the

¹⁵⁵ See generally Bayley, *supra* note 18; Leff, *supra* note 52; Nye, *supra* note 29.

¹⁵⁶ See generally SCOTT A. HIPSHER, *THE PRIVATE SECTOR'S ROLE IN POVERTY REDUCTION IN ASIA* (2013) (arguing, inter alia, that the most effective way to deal with poverty is to provide an enabling environment for private companies and individuals to create wealth); LOIS STEVENSON, *PRIVATE SECTOR AND ENTERPRISE DEVELOPMENT: FOSTERING GROWTH IN THE MIDDLE EAST AND NORTH AFRICA* (2010) (examining, among other things, the development of the private sector and the critical role that it plays in economic growth in selected North African and Middle Eastern countries); George Psacharopoulos & Nguyen Xuan Nguyen, *The Role of Government and the Private Sector in Fighting Poverty*, WORLD BANK TECHNICAL PAPER NO. 346 (1997) (detailing the roles played by the public and private sectors in the fight against poverty).

¹⁵⁷ See generally MBAKU, *INSTITUTIONS AND DEVELOPMENT*, *supra* note 79 (examining, inter alia, the critical role played by the private sector in the development and implementation of public policies).

creation of wealth.¹⁵⁸ State custodians (i.e., civil servants and political elites) may be interested primarily in maintaining the status quo and promoting policies that enhance their ability to maintain a monopoly on power and extract extralegal income for themselves. Within such an institutional environment, the custodians of the state would be quite hostile to the participation of the private sector in public policy making. As argued by Leff,¹⁵⁹ such hostility towards the productive sector can be especially severe in those economies in which most business owners are either ethnic or religious minorities, or aliens.¹⁶⁰

A country's civil servants and political elites may also be hostile to the entrepreneurial class for fear that a viable private sector could result in the establishment of a new and alternative center of power that could later challenge the incumbent regime's monopoly on power. Given these circumstances, Leff¹⁶¹ and other proponents of so-called "beneficial corruption" argue that corruption can be used to improve the relationship between state custodians and the private sector so that the latter can be granted greater access to the public policy process.

First, it is argued that if enterprise owners are granted improved access to the government, they can participate in and influence public policy making—such policies will reflect the values of the private sector and enhance investment in productive activities. Second, corruption can be used to make the bureaucracy an important advocate and promoter of wealth-creating activities, which have been designed by the private sector, effectively minimizing the chances that public regulatory activities would unnecessarily interfere with entrepreneurship or increase transaction costs for business owners. Thus, entrepreneurs who bribe bureau managers should be able to easily "obtain import, investment, and production licenses, foreign exchange, credit and other services, which they need to facilitate wealth creation."¹⁶² In other words, once paid the appropriate bribes, civil servants can be made more willing to team-up with the private sector to promote growth-enhancing public policies. According to Bayley,¹⁶³ "[t]he opportunity for corruption may actually serve to increase the quality of public servants."¹⁶⁴ If, as Bayley¹⁶⁵ argues further, civil servants are seriously undercompensated (especially when compared to pay-scales for their counterparts in the private or productive sector), a civil servant might seek work outside the public sector in an effort to garner a compensation package that is equivalent to his opportunity cost. However, argues Bayley,¹⁶⁶ a civil servant who is willing and eager to serve the public might be encouraged and convinced to do so if it is made clear to him and he believes that he can complement his compensation

¹⁵⁸ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 88.

¹⁵⁹ Leff, *supra* note 52.

¹⁶⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 88.

¹⁶¹ *Id.* at 88.

¹⁶² *Id.* at 89.

¹⁶³ Bayley, *supra* note 18.

¹⁶⁴ *Id.* at 728.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

package through corruption.¹⁶⁷ Thus, concludes Bayley,¹⁶⁸ “in developing nations [corruption] is an indispensable means of reconciling insufficient wage rates with the claims of traditional society operating through extended family and clan ties.”¹⁶⁹

In the immediate post-independence period, the argument that corruption could be used to get public sector workers to cooperate more freely with the private sector and make certain that government policies actually enhance, instead of stunting, entrepreneurial activities, was a popular justification for the pervasiveness of bureaucratic corruption.¹⁷⁰ According to this argument, newly-independent countries in Africa paid their public workers wages that were considered extremely low and were not enough to support the worker and his extended family. At this time in the evolution of these countries, it was argued that “unless the civil servant was permitted to supplement his income with bribes and thus, enhance his ability to meet his various obligations, he was unlikely to remain in the public sector and continue to serve the people.”¹⁷¹ Unfortunately, many African governments were unable to increase compensation packages for their public workers because of limited public revenues and the fact that each country faced many economic problems, including high rates of poverty, massive unemployment, especially among urban youth, and the need to provide the evolving economy with badly needed social overhead capital (e.g., farm-to-market roads, schools, health care centers, and water-treatment plants).¹⁷²

At this time, many development economists, eager to promote rapid economic growth and development in the new African countries, began to advocate corruption as a way to minimize bureaucratic intransigence and enhance the ability of civil servants to lead the fight against poverty and material deprivation.¹⁷³

As any part of the analysis of corruption in post-independence Africa, it is important to assess whether corruption has actually enhanced the participation of the private sector in the design and implementation of public policy. In other words, it would be informative and policy-relevant to determine if corruption has turned the public sector into a more willing partner in economic growth and development as predicted by many economists in the immediate post-independence period. Even after taking into consideration all the institutional changes that have taken place in African countries since the pro-democracy movements that emerged in the continent beginning in the late-1980s, most civil services in Africa remain extremely “rigid, unresponsive to the needs of the private sector, and continue to be one of the most important obstacles to wealth

¹⁶⁷ *Id.*; See also MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 89.

¹⁶⁸ Bayley, *supra* note 18.

¹⁶⁹ *Id.* at 728.

¹⁷⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 89.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Bayley, *supra* note 18; Leff, *supra* note 52; Nye, *supra* note 29.

creation and economic growth.”¹⁷⁴ In Cameroon and Nigeria, for example, civil servants remain “very arrogant and recalcitrant, enforce the laws in a selective and capricious manner, favoring those who bribe them, conduct the public’s business in secret (instead of maintaining transparency in their operations), and do not bother to seek the private sector’s input for the design of public policies.”¹⁷⁵ In fact, in performing their duties, many civil servants in many African countries are still committed to their self-enrichment instead of promoting national goals, which include promoting economic growth and development.

Thus, while corruption remains pervasive throughout many African countries today,¹⁷⁶ access to the bureaucracies of these countries has not improved significantly since the 1950s and 1960s when many of them emerged from colonial rule.¹⁷⁷

Additionally, as claimed by Bayley,¹⁷⁸ if corruption in the developing countries, including those in Africa, was expected to serve as “indispensable means of reconciling insufficient wage rates with the claims of traditional society,” then one would have expected the following developments to come with increased modernization in African countries. First, the significant improvements in civil service compensation that have occurred in African countries as a result of economic growth in the post-independence period should have reduced bureaucratic corruption and made the civil service more receptive to the needs of the private sector. For example, since the oil price increases of the mid-1970s,¹⁷⁹ Cameroon and Nigeria have earned significant amounts of revenues from the export of oil. These windfalls have allowed these countries to significantly improve compensation packages for public workers. Nevertheless, despite the improvements in civil service pay levels, corruption remains pervasive in these countries.

¹⁷⁴ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 90.

¹⁷⁵ *Id.*

¹⁷⁶ Of the 40 most corrupt countries in the world, as determined by research conducted by Transparency International, the Berlin-based nongovernmental organization that studies global corruption, 18 (45%) of these countries are located in Africa. *Corruption Perceptions Index 2014 Results*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/cpi2014/results> (last visited Apr. 1, 2015).

¹⁷⁷ See generally FATIMA DIALLO & RICHARD CALLAND, ACCESS TO INFORMATION IN AFRICA: LAW, CULTURE AND PRACTICE (2013) (arguing that many obstacles remain as Africans seek access to public information).

¹⁷⁸ Bayley, *supra* note 18, at 728.

¹⁷⁹ See generally SARAH AHMAD KHAN, NIGERIA: THE POLITICAL ECONOMY OF OIL (1994) (examining, inter alia, the impact of oil revenues on the private and public sectors in Nigeria); MICHAEL PEEL, A SWAMP FULL OF DOLLARS: PIPELINES AND PARAMILITARIES AT NIGERIA’S OIL FRONTIER (2011) (examining, inter alia, the impact of oil production on various sectors of Nigerian society, including especially the public sector); STÉPHANE COSSÉ, STRENGTHENING TRANSPARENCY IN THE OIL SECTOR IN CAMEROON: WHY DOES IT MATTER (2006) (examining, inter alia, the importance of transparency to the effective management of oil revenues in the Cameroon economy).

Second, there have been significant social and economic changes in African countries during the last sixty years. Many of these changes have come as a result of rapid industrialization and urbanization, as well as improvements in opportunities for education and human capital formation. One result of these changes has been the emergence of a modern urban elite with cultural and customary practices significantly different from those of their village and relatively less educated kinfolks. Most members of this urban elite have adopted Western cultural practices and have, to a certain extent, abandoned certain aspects of their traditional cultures and customs. Thus, while the extended family remains the foundation and cornerstone of the cultures of many African communities, "it has become smaller, approximating especially in the urban areas, the immediate or nuclear family."¹⁸⁰

These social and economic changes should have had a significantly negative impact on corruption and other forms of political opportunism. Unfortunately, corruption levels in many African countries have not fallen. Research has revealed that many of these modern urban elites, a significant proportion of whom are employed in the public sector, engage in corrupt activities, not necessarily to meet their obligations to their ethnic communities (i.e., their extended families), but to support conspicuous consumption and extravagant approaches to living adopted during their years of studies at colleges and universities in the West. Throughout most African countries, high-ranking civil servants and political elites use their public offices as important sources of extralegal income to satisfy their personal appetites for extravagant and decadent living.¹⁸¹

Although corruption in African countries has offered a few politically connected individuals with the opportunity to amass large fortunes for themselves, it has constrained transition to democracy-enhancing governing processes. It has stunted the development of robust private sectors that would have spearheaded the creation of the wealth needed to effectively fight poverty and material deprivation and improve national living standards. One especially important consequence of the pervasiveness of corruption in African countries is that many highly inefficient enterprises have been able to remain operational indefinitely due to corruption—these enterprises have been protected by the bureaucracy in exchange for bribes and other illegal payments from their owners. In the process, such highly inefficient business enterprises have consumed resources that could have been used efficiently to create the wealth needed to underwrite genuine human development.¹⁸²

¹⁸⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 91.

¹⁸¹ *Id.*

¹⁸² *Id.*

C. Corruption as a Way to Enhance Domestic Investment

Shortly after the African colonies began to gain independence, development economists argued that corruption could be used to “help economic development by making possible a higher rate of investment than would otherwise be the case.”¹⁸³ According to Bayley,¹⁸⁴ “Corruption, whether in the form of kickbacks or of payments originating with the briber, may result in increased allocations of resources away from consumption and into investment.”¹⁸⁵ According to Bayley,¹⁸⁶ civil servants are a group of people who are highly educated, have relatively higher skills than the average citizen, and are privy to more information about investment opportunities in the economy than their fellow citizens. Hence, as argued by Bayley,¹⁸⁷ civil servants may have a much higher propensity to invest in entrepreneurial activities than other members of the society, including those who pay bribes to them. Thus, transferring resources to civil servants through corruption should result in higher levels of investment and economic growth.¹⁸⁸

The decision by an individual to invest or engage in entrepreneurial activities is usually made in the midst of significant risk and uncertainty. In countries where public sector workers, specifically civil servants, have more information about domestic economic conditions generally—and government regulatory programs in particular, than the cross-section of the population—the prospective investor faces significant economic risks. In addition to these economic risks, the investor must also consider the political environment, which in many African countries have been pervaded by relatively high levels of opportunism, ethnic-induced violence, and military coups. Many of these activities, including especially military coups, have resulted in high levels of political instability, which have rendered the environment for investment highly unpredictable and risky.¹⁸⁹ As argued by Leff,¹⁹⁰ “[b]y enabling entrepreneurs to control and render predictable this important influence on their environment, corruption can increase the rate of investment.”¹⁹¹

Social scientists¹⁹² have also argued that corruption can be used to significantly improve the environment for innovation in the domestic economy and enhance economic growth. An entrepreneur who sets out to innovate or create knowledge faces many challenges and competition from relatively established business interests and may find it very difficult to bring his innovation

¹⁸³ Leff, *supra* note 52, at 10.

¹⁸⁴ Bayley, *supra* note 18, 728.

¹⁸⁵ *Id.* at 728.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 95.

¹⁹⁰ Leff, *supra* note 52, at 11.

¹⁹¹ *Id.*

¹⁹² See, e.g., Leff, *supra* note 52.

into the marketplace. Corruption, these social scientists argue,¹⁹³ can be used by the creator of new knowledge to secure the protection that he needs to successfully bring his innovation into the market. According to Leff,¹⁹⁴ “graft may enable an economic innovator to introduce his innovations before he has had time to establish himself politically.”¹⁹⁵

The relevant question here is whether corruption has enhanced innovation in African countries during the last several years. There does not exist any research that supports the hypothesis that corruption has enhanced innovation in African countries. As argued by Mbaku,¹⁹⁶ “[m]ost members of Africa’s bloated, parasitic and highly inefficient bureaucracies, who during the last fifty years have accumulated enormous personal fortunes through engagement in corrupt activities, have not, as predicted, evolved into a viable entrepreneurial class.”¹⁹⁷

In the 1960s, it was generally believed that if scarce resources were channeled into the hands of each African country’s bureaucrats (who were better educated, generally more informed than their fellow citizens, and had a higher propensity to invest), they would significantly increase investment in the productive sector, leading to the creation of the wealth that each country needed to deal with poverty and material deprivation. Unfortunately, most African countries have not been able to develop robust and viable indigenous entrepreneurial classes and, as a result, the private sectors of many of these countries are still dominated by foreign interests.¹⁹⁸

In a study of corruption in Ghana, Victor T. LeVine¹⁹⁹ determined that most of the resources accumulated by civil servants through corruption were either invested overseas or used to maintain an extravagant lifestyle. Instead of investing these resources in developing the productive capacity needed to create jobs and enhance economic growth, most of these civil servants used the money to satisfy their demands for European goods. In the former French colonies, for example, many civil servants were obsessed with fine French wines and other expensive consumables from France.²⁰⁰ LeVine²⁰¹ also found out that even in the rare case in which civil servants were able to invest their ill-gotten gains in the domestic economy, most of those resources were not devoted to productive pursuits, but to schemes to further defraud the government and illegally extract additional income for themselves.²⁰²

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 11.

¹⁹⁵ *Id.*

¹⁹⁶ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 96.

¹⁹⁷ *Id.* at 96.

¹⁹⁸ *Id.*

¹⁹⁹ LEVINE, *supra* note 25.

²⁰⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 96.

²⁰¹ LEVINE, *supra* note 25.

²⁰² *Id.*

Throughout Africa today, most of the civil servants and political elites who engage in “grand corruption” are well known for taking the proceeds of their corrupt activities to foreign economies; most of these resources are either invested in foreign real estate in the developed countries or placed in numbered accounts in Switzerland and other offshore locations.²⁰³ While there are myriad reasons why individuals may prefer to invest their savings overseas instead of putting them in the local or domestic economy, the most important (particularly for corrupt civil servants and politicians) is “the desire . . . to establish a foreign sanctuary, which can be used to escape prosecution when and if the perpetrator falls out of favor with the incumbent ruling coalition or his corrupt activities are exposed and he becomes a liability to the government.”²⁰⁴

D. Corruption as a Tool to Improve Political Participation

Development economists,²⁰⁵ who have argued that corruption can be beneficial, claim that bribing civil servants and political elites can pave the way for heretofore marginalized groups and communities to participate more fully and effectively in both political and economic markets. According to Bayley,²⁰⁶ “A person with money who is ideologically opposed to the regime or who dislikes the personnel at the top, may nonetheless be able to make the repugnant system work for him by means of illicit influence. He is not entirely alienated.”²⁰⁷

The issue of corruption in African economies cannot simply be couched in terms of political insiders on the one side and relatively rich but politically alienated individuals and groups on the other. According to Bayley,²⁰⁸ the latter group can, through corrupt payments, secure entry into the ruling circle, which in many African countries, also controls the system of resource allocation. In many African countries, including even those with relatively mature democratic political systems, political parties and hence, ruling coalitions, are still built on ethno-regional or ethno-cultural foundations. The elites who control the ruling coalition are not likely to admit individuals from other ethno-cultural and religious groups within the country simply in exchange for money. Improved participation of historically marginalized groups in political and economic markets in many African countries has not been achieved through corruption; instead, institutional

²⁰³ See, e.g., CAPITAL FLIGHT FROM AFRICA: CAUSES, EFFECTS, AND POLICY ISSUES (S. Ibi Ajayi & Léonce Ndikumana eds., 2015) (examining, inter alia, the causes of capital flight from Africa, including that derived from corrupt activities).

²⁰⁴ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 96.

²⁰⁵ See generally Bayley, *supra* note 18, at 719; Leff, *supra* note 52; Nye, *supra* note 29.

²⁰⁶ Bayley, *supra* note 18.

²⁰⁷ *Id.* at 729.

²⁰⁸ *Id.*

reforms, made possible either through civil war²⁰⁹ or through peaceful negotiations, have been the path to improved participation.

Of course, in most African countries, those individuals and groups that are marginalized politically and economically usually do not have the resources to bribe the bureaucracy in order to improve their chances of gaining access to the economy or the political system. There is no evidence to support the argument—at least in the case of the African countries—that corruption has helped improve economic and political participation for historically marginalized groups (e.g., women, ethnic and religious minorities, rural inhabitants, and the urban poor).²¹⁰ Instead, what corruption has done is to enhance the ability of a few politically connected individuals and groups to maintain relatively high standards of living while the rest of the citizens swelter in extremely high levels of poverty and material deprivation.²¹¹ Perhaps more important is that “ruling elites have used corruption to compromise the integrity of their opponents, destroy any political power that these competitive elites had, and enhance the ability of the incumbent to continue to monopolize national political space.”²¹²

In his study of South Africa’s apartheid system, Stephen Ellis²¹³ determined that the racially-based government had used corruption extensively to finance its efforts to destroy the African National Congress and other anti-apartheid groups and efforts. In the process, the government was quite successful

²⁰⁹ Examples include Liberia and Sierra Leone. *See generally* BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT—THE NUREMBERG DECLARATION ON PEACE AND JUSTICE (Kai Ambos et al. eds., 2009) (examining, inter alia, how to provide legal mechanisms to enhance peace and justice following violent conflict or political repression); ADEKEYE ADEBAYO, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE AND GUINEA-BISSAU (2002) (examining, inter alia, efforts to restore peace to West Africa following brutal civil wars and other forms of political repression). In the case of peaceful negotiations, the demise of apartheid and the transformation of South Africa into a democratic state beginning in 1994, is a good example. *See generally* PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (1998) (providing a detailed, but non-technical, analysis of the demise of the racially-based governmental system in South Africa and the emergence of a democratic governance system); NELSON MANDELA, LONG WALK TO FREEDOM (2013) (providing a detailed account—from a personal point of view—of the struggle against apartheid in South Africa and the eventual liberation of the country).

²¹⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 100.

²¹¹ *Id.* at 100–01.

²¹² *Id.* at 101.

²¹³ *See generally* Stephen Ellis, *Africa and International Corruption: The Strange Case of South Africa and Seychelles*, 95 AFR. AFF. 166 (1996); SEUMAS MILLER, THE MORAL FOUNDATIONS OF SOCIAL INSTITUTIONS: A PHILOSOPHICAL STUDY (2010) (examining, inter alia, how the apartheid government in South Africa corrupted many social institutions); JAMIE FRUEH, POLITICAL IDENTITY AND SOCIAL CHANGE: THE REMAKING OF THE SOUTH AFRICAN SOCIAL ORDER (2003) (arguing, inter alia, that corruption was quite pervasive in both the private and public sectors during the time of apartheid in South Africa).

in undermining the effectiveness of groups opposed to white supremacy and the policy of apartheid.²¹⁴

V. THE GLOBAL NATURE OF CORRUPTION

A. Introduction

Although the struggle to deal with corruption at the global level has been ongoing for many years, it became more organized after the end of the Cold War.²¹⁵ After the collapse of the Soviet Union and the subsequent demise of socialism in Eastern Europe, trade and other economic issues emerged to define the East-West relationship.²¹⁶ With significant increase in the volume of global trade, as well as increases in interactions between countries and regions of the world, many policymakers and business executives began to recognize the global nature of corruption and the need to approach its eradication from an international perspective.²¹⁷ Today, corruption is no longer viewed by many economies as a domestic problem, caused primarily by socio-political interaction. Instead, corruption is viewed as one involving agents of international trade, such as transnational or multinational companies.²¹⁸

Some evidence of the recognition by many economies of the transnational nature of corruption is the emergence of many international

²¹⁴ Ellis, *supra* note 213.

²¹⁵ The expression “Cold War” is generally used to refer to the state of tension, both military and political, that existed between the two most important global power blocs—the Western Bloc (whose military alliance is the North Atlantic Treaty Organization—NATO), led by the United States, and the Eastern Bloc (whose military alliance is the Warsaw Pact), led by the Soviet Union, after World War II. The Cold War is generally believed to have lasted from 1947 to 1991, following the collapse and subsequent disintegration of the Soviet Union and the eventual demise of many socialist regimes in Eastern Europe. *See generally* JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (2005) (providing a comprehensive account of the global confrontation between the West and East, which came to be referred to as the Cold War); CAROLE K. FINK, *COLD WAR: AN INTERNATIONAL HISTORY* (2014) (providing an examination of the Cold War from an international perspective); MARTIN WALKER, *THE COLD WAR: A HISTORY* (1993) (showing, *inter alia*, how the Cold War shaped today’s global economy).

²¹⁶ *See generally* SYLVIA OSTRY, *THE POST-COLD WAR TRADING SYSTEM: WHO’S ON FIRST?* (1997); BARRY J. EICHENGREEN, *TRANSATLANTIC ECONOMIC RELATIONS IN THE POST-COLD WAR ERA* (1998) (providing an overview of the post-Cold War global trading system).

²¹⁷ *See generally* CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 127 (analyzing global efforts to fight corruption, with emphasis on anti-corruption conventions such as the OECD convention outlawing the bribery of public officials in international business transactions).

²¹⁸ *See, e.g.*, DAVID HEAD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999) (examining, *inter alia*, the role of the multinational corporation in the emergence of the global economy).

governmental and non-governmental organizations that are either devoted almost exclusively to the study of corruption and how to eradicate it or have made corruption cleanups an important policy priority.²¹⁹ In addition to considering corruption as a major constraint to economic growth and development,²²⁰ many actors in the international economy see it as distorting economic incentives and making it very difficult for some countries to attract the investment that they need to enhance growth and development.²²¹ In fact, many African countries—considered extremely corrupt by the international investment community—have not been able to attract the foreign investment funds that they need to subsidize domestic savings and develop the necessary capacity to create wealth.²²² Without

²¹⁹ Some of these organizations adopted the UN Convention against Corruption on October 31, 2003; the Organization of American States adopted the Inter-American Convention Against Corruption which on March 29, 1996; Transparency International (a non-governmental organization which was organized by former World Bank official, Peter Eigen and other colleagues and based in Berlin, with offices in virtually all countries, has emerged as one of the most important entities fighting global corruption today); World Bank (which in recent years has taken an active part in fighting global corruption, especially in contracting—the bank produces the Worldwide Governance Indicators, which provide researchers, policymakers and other interested persons and institutions with data/information on six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption); Organization for Economic Cooperation and Development (OECD) adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which went into force on February 15, 1999; the African Union, adopted the AU Convention on Preventing and Combating Corruption on July 11, 2003; and the United States of America enacted the Foreign Corrupt Practices Act in 1977 (in the aftermath of the Watergate imbroglio). Interpol, the world's largest international police organization, also fights corruption and other international criminal activities. See MALCOLM ANDERSON, *POLICING THE WORLD: INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE COOPERATION* (1989) (examining the need for international cooperation in fighting drug-trafficking and terrorism and the important role played by Interpol in promoting and facilitating such cooperation). In 2010, Her Majesty's Government in the UK passed the Bribery Act 2010 (c.23). See MONTY RAPHAEL, *BLACKSTONE'S GUIDE TO THE BRIBERY ACT 2010* (2010) (providing an overview of the UK Bribery Act).

²²⁰ Paolo Mauro, *The Persistence of Corruption and Slow Economic Growth*, (IMF Working Paper No. 1, 2004) (showing, empirically, the relationship between corruption and slow economic growth); *GOVERNANCE, CORRUPTION, & ECONOMIC PERFORMANCE* (George T. Abed & Sanjeev Gupta eds., 2002) (presenting, inter alia, several studies on the role of corruption in economic performance).

²²¹ See, e.g., EXTERNAL DEBT AND CAPITAL FLIGHT IN SUB-SAHARAN AFRICA (S. Ibi Ajayi & Mohsin S. Khan eds., 2000) (examining, inter alia, the causes of capital flight in sub-Saharan Africa and identifying corruption as a major cause of such flight); LÉONCE NDIKUMANA & JAMES BOYCE, *AFRICA'S ODIUS DEBTS: HOW FOREIGN LOANS AND CAPITAL FLIGHT BLED A CONTINENT* (2011) (examining, inter alia, the extent of capital flight from sub-Saharan Africa and its causes, which include high levels of bureaucratic corruption).

²²² FOREIGN DIRECT INVESTMENT: SIX COUNTRY CASE STUDIES (Yingqi Annie Wei & V. N. Balasubramanyam eds., 2004) (providing a detailed analysis of the determinants of

the latter, these countries cannot deal fully and effectively with poverty and material deprivation.

Why has the international community become so interested in the elimination of corruption? Beginning in the late-1980s and early-1990s, there was a global push for transition to democratic governance, with specific emphasis on transparency and openness in government communications.²²³ Citizens of many countries, including those in Africa, were no longer willing to tolerate government impunity, political incompetence, and public venality. Throughout this period in Africa, many people, especially the young, took to the streets to demonstrate for necessary reforms to their countries' political systems in order to provide institutional arrangements capable of effectively protecting their fundamental rights.²²⁴ As part of the struggle to transition their countries to democratic governance, Africans demanded an immediate end to corruption. Thus, since the late-1980s, there has been a shift in many countries in favor of "more open, transparent, and participatory governance structures."²²⁵

When the Cold War ended in the early-1990s, trade and other economic issues became the most important pre-occupation of the global order. This economic interdependence has led to the globalization of corruption.²²⁶ As argued by Glynn, Kobrin, and Naím,²²⁷ there are three changes that have contributed to the globalization of corruption. First, increased economic integration at the global level has significantly increased the chances that corruption originating in one region of the world would spread and affect economic and political activities in other regions of the world.²²⁸ In fact, the forced insolvency of the now-defunct Bank of Credit and Commerce International (BCCI), due to corruption perpetuated by its officers, had a significantly negative impact on the economies of many countries around the world.²²⁹ Many African countries lost significant amounts of public funds, which had been invested with BCCI.²³⁰

Second, since the turn of the century, advancements in communication and information technology have significantly changed the global financial

foreign direct investment in China, India, Ireland, Malaysia, Mexico and sub-Saharan Africa, and showing that corruption and inefficient labor markets are major constraints on the ability of sub-Saharan African countries to attract foreign investment).

²²³ See, e.g., THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (examining, inter alia, Africa's transition to democracy).

²²⁴ See, e.g., *id.*

²²⁵ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 118. See also P. Glynn, S. Kobrin & M. Naím, *The Globalization of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 127, at 7.

²²⁶ Glynn, Kobrin & Naím, *supra* note 225.

²²⁷ *Id.* at 12.

²²⁸ *Id.*

²²⁹ See, e.g., Nikos Passas, *I Cheat Therefore I Exist? The BCCI Scandal in Context*, in EMERGING GLOBAL BUSINESS ETHICS 75 (W. M. Hoffman ed., 1994).

²³⁰ See generally MARTIN BROWNBRIDGE ET AL., BANKING IN AFRICA: THE IMPACT OF FINANCIAL SECTOR REFORM SINCE INDEPENDENCE (1998).

architecture and made it easier for people to move money from one economy to another—quite often without the knowledge of domestic regulators. Electronic networks for funds transfers, which now include smart phones, provide mechanisms for corrupt civil servants and politicians to easily transfer funds across national borders. Many anti-corruption crusaders in Africa argue that “the ease with which funds can be transferred to Europe or the Caribbean from different parts of the world implies that corrupt civil servants can effectively hide their extralegal income from the public, making it virtually impossible for such funds to be recovered in the event of conviction.”²³¹ Nevertheless, some policing agencies have kept up with rapid changes in technology and are able to fully monitor most fund transfer traffic; such technology can actually help in the fight against transnational corruption.²³²

Third, the end of the Cold War significantly reduced conflict between the East and the West and produced new alliances and initiatives directed specifically at fighting corruption, especially in trade and investment. While increased globalization has exacerbated corruption, it has also provided legal mechanisms that can be used to fight it.²³³ As argued by Glynn, Kobrin, and Naím,²³⁴ “[t]he final engine of change in the current global environment is the emergence of several concrete, coordinated international efforts at anti-corruption reform. Over the past half-decade, a remarkable number of governmental and nongovernmental international bodies have acted or called for action on corruption.”²³⁵

In 1988, about 100 governments passed the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and effectively committed themselves to criminalize money laundering²³⁶ and lift “the secrecy barriers to its detection.”²³⁷ In 1989, at an economic summit in Paris, the world’s major industrial countries (G7) formed the Financial Action Task Force (FATF)²³⁸ and charged it with developing policies to combat money laundering. In 2001, the

²³¹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 118–19.

²³² *Id.*

²³³ Glynn, Kobrin & Naím, *supra* note 225, at 25. For example, increased levels of globalization have provided more opportunities for collaboration between governments and or law enforcement agencies, including the relatively easy exchange of information that can significantly enhance the fight against global corruption.

²³⁴ *Id.* at 15.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ The FATF currently consists of 34 member jurisdictions and 2 regional organizations, representing most of the major financial centers of the world. The two organizations are the European Commission and the Gulf Cooperation Council. See NICHOLAS RYDER, FINANCIAL CRIME IN THE 21ST CENTURY: LAW AND POLICY 1 (2011); Yee-Kuang Heng & Kenneth McDonagh, *Financial Action Task Force*, in HANDBOOK OF GOVERNANCE AND SECURITY 475 (James Sperling ed., 2014). The FATF is also known by its French name, *Groupe d'action financière* or GAFI. See GAFI, <http://www.fatf-gafi.org/fr/pages/aproposdugafi/> (last visited Apr. 10, 2015).

FATF's mission was expanded to include the fight against the financing of terrorism.

Beginning in the early-1990s, there was a significant increase in global corruption, and in response, "the international anticorruption agenda greatly broadened and accelerated."²³⁹ Many intergovernmental agencies became directly involved in the fight against global corruption. In November 1994, for example, the United Nations organized a conference on organized and cross-border crime and its participants produced what came to be known as the Naples Declaration—through the latter, all 138 member countries pledged to increase domestic efforts to fight corruption. They also agreed to become more cooperative at the international level in the fight against drug trafficking and the various types of cross-border criminal activities.²⁴⁰

In 1995, many civil society organizations became involved in the fight against corruption. One such organization was the World Economic Forum (WEF), an organization whose membership is made up of the chief executive officers of the world's major corporations. The WEF called on public and private sectors throughout the world to join the fight against corruption.²⁴¹

At the January 1995 meeting of the WEF, the latter established the Davos Group and charged it with the job of studying the problem of global corruption and making suggestions on how to deal with it. The Davos Group was established as an informal "association of high-level international business executives, law-enforcement officials, and experts—including Interpol Secretary General Raymond Kendall and Siemens AG Chairman Hermann Franz."²⁴²

In the aftermath of the Watergate Affair in the United States, the US Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977 to criminalize the payment of bribes to foreign public officials by US multinational companies and their agents.²⁴³ The FCPA was amended in 1988 and 1998. The FCPA and the amendments will be discussed fully later in this article. In 1994, the Organization for Economic Cooperation and Development (OECD) recommended that member states take effective measures "to deter, prevent, and combat bribery of public officials" in connection with international business transactions.²⁴⁴

²³⁹ Glynn, Kobrin & Naím, *supra* note 225, at 16.

²⁴⁰ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 121. *See also* Glynn, Kobrin & Naím, *supra* note 225, at 16.

²⁴¹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 121. *See also* Glynn, Kobrin & Naím, *supra* note 225, at 16; Stephen J. Kobrin, Moises Naím & Patrick Glynn, *Corruption Goes Global, and So Has to Be the Riposte*, N.Y. TIMES (Mar. 29, 1995), <http://www.nytimes.com/1995/03/29/opinion/29iht-edkob.html>. Kobrin, Naím, and Glynn note that in the early-1990s, the world was awash with corruption—governments in Brazil, Italy, and Japan had fallen because of corruption, and in some of these countries, high-ranking officials had been sent to jail for their complicity in corrupt activities. *Id.*

²⁴² Glynn, Kobrin & Naím, *supra* note 225, at 16.

²⁴³ Foreign Corrupt Practices Act 15 U.S.C. § 78dd-1–dd-3 (2016).

²⁴⁴ Catherine Yannaca-Small, *Battling International Bribery*, 192 OECD OBSERVER 16 (1995).

B. Advances in the Fight Against Global Corruption since the Early-1990s

On April 11, 1996, the OECD adopted the Recommendation on the Tax Deductibility of Bribes Paid to Foreign Public Officials.²⁴⁵ The document made the following recommendations:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.²⁴⁶

In April 1997, the OECD Committee on Fiscal Affairs (CFA) noted that the payment of bribes by Western-based multinational companies to government officials in the countries in which these companies were seeking to do business had emerged as an important problem in an increasingly interdependent post-Cold War global economy.²⁴⁷ According to the CFA, not only does bribery distort economic incentives and greatly hinders competition in the economy, it, and other forms of corruption, negatively affect the welfare of the citizens of many countries.²⁴⁸ In the process, bribery and other forms of corruption undermine the confidence and trust that citizens have in their government, as well as making it relatively difficult for these countries to attract the investment needed to promote economic growth and development.²⁴⁹

The OECD first officially became interested in the fight against international corruption with the enactment of the 1994 Recommendation on

²⁴⁵ Organization for Economic Co-operation and Development (OECD), *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, C(96)27/FINAL (Apr. 17, 1996) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdrecommendationonthetaxdeductibilityofbribestoforeignpublicofficials.htm> (adopted by the Council session 873 [C/M(96)8/PROV]).

²⁴⁶ *Id.*

²⁴⁷ See, e.g., OECD, *The Fight Against Bribery and Corruption*, (2000), <http://www.oecd.org/governance/ethics/1918235.pdf> [hereinafter OECD, *Fight Against Bribery*].

²⁴⁸ *Id.*; MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 122.

²⁴⁹ MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 122. See also OECD, *Fight Against Bribery*, *supra* note 247.

Bribery in International Transactions. Following study and deliberation, the OECD countries, and five nonmember countries (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic), adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on November 21, 1997.²⁵⁰ The organization also adopted the (OECD) Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).²⁵¹ On December 17, 1997, the Convention was signed by 33 delegates at a meeting in Paris. Below, we provide an overview of the Convention.

1. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention entered into force in 1999, providing the multilateral organization with the wherewithal to attack an important aspect of global corruption—the bribery of foreign public officials in international business transactions. The OECD Convention’s “overall purpose . . . is to prevent bribery in international business transactions by requiring countries to establish the criminal offense of bribing a foreign public official, and to have in place adequate sanctions and reliable means for detecting and enforcing the offence.”²⁵² In addition, the OECD Convention also provides “non-criminal rules for prevention, overall transparency and co-operation between countries” and requires all member-states to “deny the tax deductibility of such bribes.”²⁵³

The OECD Convention takes a holistic approach to the fight against bribery in international business transactions—it considers both the *demand* and *supply* sides of bribery. Essentially, every act of bribery involves the briber (supply side) and the receiver of the bribe, in this case, the public official (the demand side). In the case of the bribery of foreign public officials in international business transactions, the multinational enterprises and their agents are usually the bribers or suppliers of bribes while the foreign public officials (and their agents) are the demanders or recipients of the bribes paid.

However, it is important to note that public officials can also be initiators or suppliers of bribes. One example of this is the scandal involving allegations that Salt Lake Olympic Organizing Committee (SLOC) officials bribed members of the International Olympic Committee (IOC) in order to win the rights to host

²⁵⁰ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (Nov. 21, 1997), <https://www1.oecd.org/corruption/oecdantibriberyconvention.htm> [hereinafter OECD, *Convention*].

²⁵¹ See OECD, *Commentaries on Convention on Combating Bribery of Public Officials in International Business Transactions*, (Nov. 25, 1997) <http://www.justice.gov/criminal/fraud/fcpa/docs/combabribe2.pdf>.

²⁵² OECD, *Fight Against Bribery*, *supra* note 247. See also OECD, *Convention*, *supra* note 250.

²⁵³ OECD, *Convention*, *supra* note 250.

the 2002 Winter Olympics in Salt Lake City. Before SLOC successfully bid to host the 2002 Winter Olympics, it had made four unsuccessful attempts. In 1998, several members of the IOC were accused of having been bribed by SLOC during the latter's successful bid. These allegations forced the IOC to implement several changes to its procedures and fire some of its members, though all were later acquitted of criminal charges.²⁵⁴

The OECD's Financial Action Task Force on Money Laundering (FATF) specifically addresses activities dealing with the proceeds of bribery—the FATF's main function is to fight money laundering.²⁵⁵ Of course, the OECD countries have acknowledged the fact that they cannot fight global corruption without the assistance and cooperation of other countries. Thus, the OECD has made significant efforts (since it became actively involved in the fight against the bribery of public officials in international business transactions) in developing relations with non-member countries in order to more effectively coordinate various anti-corruption programs. In fact, the OECD has established a Center for Co-operation with Non-Members (CCNM), which develops and implements anti-corruption programs and engages non-member countries in the struggle to rid international business transactions of bribery and other corrupt activities.²⁵⁶ Specifically, the OECD carries out its anti-corruption programs through two of its most important development institutions—the Development Assistance

²⁵⁴ See, e.g., Jere Longman, *Olympics: Leaders of Salt Lake Olympic Bid Are Indicted in Bribery Scandal*, N.Y. TIMES (July 21, 2000), <http://www.nytimes.com/2000/07/21/sports/olympics-leaders-of-salt-lake-olympic-bid-are-indicted-in-bribery-scandal.html>; Alicia C. Shepard, *An Olympian Scandal: How a Local TV News Story in Salt Lake City Led to the Disclosure of Far-Reaching Corruption in the Way Olympic Sites are Chosen*, AM. JOURNALISM REV. (Sept. 30, 2000), <http://ajrarchive.org/article.asp?id=505>; STEPHEN R. WENN ET AL., TARNISHED RINGS: THE INTERNATIONAL OLYMPIC COMMITTEE AND THE SALT LAKE CITY BID SCANDAL (2011) (providing a rigorous examination of the Salt Lake City Olympic bidding scandal and of the IOC presidency of Juan Antonio Samaranch); MATTHEW BURBANK ET AL., OLYMPIC DREAMS: THE IMPACT OF MEGA-EVENTS ON LOCAL POLITICS (2001) (examining the impact of high-profile sporting events, such as the Olympic games, on local politics, with specific emphasis on three U.S. cities—Atlanta, Los Angeles, and Salt Lake City); JOHN GRASSO ET AL., HISTORICAL DICTIONARY OF THE OLYMPIC MOVEMENT (2015).

²⁵⁵ See generally FATF, <http://www.fatf-gafi.org/pages/aboutus/> (providing more information on the OECD's Financial Action Task Force) (last visited Apr. 15, 2015); FATF, THE FINANCIAL WAR ON TERRORISM: A GUIDE BY THE FINANCIAL ACTION TASK FORCE (2004); KRIS HINTERSEER, CRIMINAL FINANCE: THE POLITICAL ECONOMY OF MONEY LAUNDERING IN A COMPARATIVE CONTEXT (2002); DANIEL ADEOYÉ LESLIE, LEGAL PRINCIPLES FOR COMBATING CYBERLAUNDERING (2014); PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING (2004); NICHOLAS RYDER, FINANCIAL CRIME IN THE 21ST CENTURY: LAW AND POLICY (2011); WILLIAM H. BYRNES & ROBERT J. MUNRO, MONEY LAUNDERING, ASSET FORFEITURE AND RECOVERY AND COMPLIANCE: A GLOBAL GUIDE (2015).

²⁵⁶ OECD, *Fight Against Bribery*, *supra* note 247.

Committee (DAC) and the Development Center, both of which are involved in promoting economic and human development around the world.²⁵⁷

2. Progress in the Implementation of the OECD Convention

Since the OECD made its first recommendations regarding the fighting of international corruption, many member-states have revised their national laws and enacted new ones and criminalized the payment of bribes to foreign public officials. Additionally, many of these countries have either passed laws or issued new regulations that specifically disallow the tax deductibility of bribes paid to foreign public officials. On December 6, 1996, Norway enacted legislation effectively disallowing the deductibility of bribes paid to foreign private persons or public officials.²⁵⁸ In January 1997, laws that disallow the deduction of money paid as bribes and other expenses by Dutch companies in connection with illegal activities went into effect in The Netherlands.²⁵⁹

²⁵⁷ See, e.g., OECD, THE DAC GUIDELINES: STRENGTHENING TRADE CAPACITY FOR DEVELOPMENT (2001) (providing more information on the DAC); OECD, DEVELOPMENT CO-OPERATION REPORT 2004: EFFECTS AND POLICIES OF THE MEMBERS OF THE DEVELOPMENT ASSISTANCE COMMITTEE (2005); PERSPECTIVES ON EUROPEAN DEVELOPMENT COOPERATION: POLICY AND PERFORMANCE OF INDIVIDUAL DONOR COUNTRIES AND THE EU (Paul Hoebink & Olave Stokke eds., 2005). See also RICHARD WOODWARD, THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (2009) (providing background on the Development Center).

²⁵⁸ U.S. DEPT. OF COM. & INT'L TRADE ADMIN., ADDRESSING THE CHALLENGES OF INTERNATIONAL BRIBERY AND FAIR COMPETITION 2001: THE THIRD ANNUAL REPORT UNDER SECTION 6 OF THE INTERNATIONAL ANTI-BRIBERY FAIR COMPETITION ACT OF 1998, 34–36 (2001) [hereinafter U.S. DEPT. OF COM. & INT'L TRADE ADMIN., ADDRESSING THE CHALLENGES]. See also INT'L BUS. PUBS. (USA), NETHERLANDS BUSINESS LAW HANDBOOK, VOL. 1: STRATEGIC INFORMATION AND BASIC LAWS (2012); HUGH J. AULT ET AL., COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS (2010).

²⁵⁹ U.S. DEPT. OF COM. & INT'L TRADE ADMIN., *supra* note 258, at 84. Note, however, that The Netherlands' "relevant tax laws do not expressly deny the tax deductibility of bribes to foreign public officials. *Id.* Instead, deductibility is denied only where there has been a conviction by a Dutch court or a settlement upon payment of a fine, etc., with the Dutch prosecutor to avoid prosecution." *Id.* When the law went into effect, the bribery of foreign public officials was not illegal in The Netherlands. *Id.* It was hoped, however, that criminal laws in The Netherlands would eventually be changed to make the bribery of foreign public officials a criminal offense. *Id.* On February 9, 2001, "the Council of Ministers approved the intention of the State Secretary of Finance to prepare a bill amending the fiscal treatment of bribes. If enacted, the new law will provide that tax officials can refuse the deduction of certain expenses where they are reasonably convinced based on adequate indicators that the expenses consist of paid bribes, thus removing the requirement of a conviction." U.S. DEPT. OF COM. & INT'L TRADE ADMIN., *supra* note 258, at 84. In April 2006, the government of the Netherlands enacted tax legislation in line with the OECD-Recommendation on the non-tax deductibility of bribes. See, e.g., OECD, *Update on the Tax Legislation on the Tax Treatment of Bribes to Foreign Public Officials*

Prior to 1999, German tax law allowed the tax deduction of bribes paid to foreign public officials. These bribes were only disallowed “if either the briber or the recipient had been subject to criminal penalties or criminal proceedings which were discontinued on the basis of discretionary decision by the prosecution.”²⁶⁰ However, on March 24, 1999, the German Parliament adopted legislation that effectively “eliminated these conditions and denied the tax deductibility of bribes.”²⁶¹ France, Denmark, and Portugal soon took similar actions and enacted legislation outlawing the tax deductibility of bribes paid to foreign public officials. By the end of 1998, many other countries had either already started working on legislation to outlaw the tax deductibility of bribes or were considering doing so. Ireland, however, argued that bribes paid to foreign public officials were not deductible in principle.²⁶²

The Irish Revenue Commissioners argued that it was not likely that “the conditions for deductibility could ever be met in practice in Ireland. Therefore, Ireland has not considered it necessary to introduce specific legislation to deny a deduction.”²⁶³ In South Korea, the government argued that bribes paid to foreign public officials are not considered business expenses under national laws and hence, there was no need to consider the matter of deductibility.²⁶⁴ In Japan, the government argued that bribes paid to foreign public officials are considered “entertainment expenses” under national laws and are generally not deductible.²⁶⁵ In Italy, while a law passed in 1994 made “gains from illicit sources taxable,”²⁶⁶ it did not affect the nondeductibility of bribes and, as a result, bribes paid to foreign public officials are still not deductible.²⁶⁷

In the United Kingdom, several laws criminalize the payment of bribes to foreign public officials. For example, under §577A of the Income and Corporations Tax Act 1988, “the U.K. does not allow deductions for any bribe if that bribe is a criminal offense, contrary to the Prevention of Corruption Acts.”²⁶⁸ The British Government has also declared that the “Prevention of Corruption Acts apply to bribes to foreign public officials.”²⁶⁹ In addition, the British Government declares, “If any part of the offense is committed in the U.K.—for example the offer, the agreement to pay, the soliciting, the acceptance, or the payment itself—such action would violate the Prevention of Corruption Acts and would then not

in *Countries Parties to the OECD Anti-bribery Convention*, (2011), <https://www.oecd.org/tax/crime/41353070.pdf> (last visited July 30, 2016).

²⁶⁰ U.S. DEPT. OF COM. & INT’L TRADE ADMIN., *supra* note 258.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ U.S. DEPT. OF COM. & INT’L TRADE ADMIN., *supra* note 258.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

qualify for tax relief. In addition, UK tax laws also deny relief for all gifts and hospitality given, whether or not for corrupt purposes.”²⁷⁰

On April 8, 2010, Royal Assent was received by “An Act to make provision about offenses relating to bribery; and for connected purposes,” which is generally referred to as the UK Bribery Act 2010.²⁷¹ The new law, which entered into force on July 1, 2011, was designed to achieve two important objectives: (1) update and modernize UK law on bribery, including the bribery of foreign public officials; and (2) to conform with the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.²⁷² In its assessment of the UK Bribery Act 2010, Transparency International²⁷³ stated that “[i]t is now among the strictest legislation internationally on bribery. Notably, it introduces a new strict liability offense for companies and partnerships of failing to prevent bribery.”²⁷⁴

The UK Bribery Act 2010 deals only with bribery²⁷⁵ and creates four key offenses—two general bribery offenses and two others:

- General bribery offenses²⁷⁶
 - Offenses of bribing another person²⁷⁷
 - Offenses related to being bribed²⁷⁸
- Bribery of foreign public officials²⁷⁹
- Failure of commercial organizations to prevent bribery²⁸⁰

²⁷⁰ U.S. DEPT. OF COM. & INT’L TRADE ADMIN., *supra* note 258.

²⁷¹ Bribery Act 2010, c. 23 (U.K.), <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

²⁷² OECD, *Convention*, *supra* note 250.

²⁷³ Transparency International is an international non-governmental organization, with headquarters in Berlin that is dedicated exclusively to the study of global corruption. *See generally* TRANSPARENCY INTERNATIONAL, <https://www.transparency.org> (last visited Apr. 17, 2015). It has subsidiaries in many countries around the world. *Id.*

²⁷⁴ *The Bribery Act*, TRANSPARENCY INTERNATIONAL UK, <http://www.transparency.org.uk/our-work/business-integrity/bribery-act> (last visited Apr. 17, 2015). *See also* Bribery Act 2010, c. 23, § 7 (U.K.).

²⁷⁵ It is not concerned with “fraud, theft, books and record offenses, Companies Act offenses, money laundering offenses or competition law.” *See The Bribery Act 2010: Quick Start Guide*, UK MINISTRY OF JUSTICE, <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf> (last visited Apr. 17, 2015).

²⁷⁶ Bribery Act 2010, c. 23, § 1 (U.K.).

²⁷⁷ *Id.*

²⁷⁸ *Id.* § 2

²⁷⁹ *Id.* § 6

²⁸⁰ *Id.* § 7; *See also* ANTI-BRIBERY AND CORRUPTION GUIDANCE: PRACTICAL GUIDANCE FOR THE BANKING SECTOR IN COMPLYING WITH THE BRIBERY ACT 2-10 AND MEETING FCA OBLIGATIONS, BRITISH BANKERS’ ASSOCIATION (BBA) (2014), <https://www.bba.org.uk/policy/financial-crime/anti-bribery-and-corruption/anti-bribery-and-corruption-guidance/> [hereinafter ANTI-BRIBERY AND CORRUPTION GUIDANCE].

In line with the OECD Anti-Bribery Convention,²⁸¹ the UK Bribery Act 2010 establishes a distinct crime of “bribery of foreign public officials.”²⁸² The offense of bribing a foreign public official covers only “the offering, promising and giving of bribes and not the acceptance of them.”²⁸³ This section of the UK Bribery Act²⁸⁴ has an intent requirement: the person who is giving the foreign public official the bribe must intend to “obtain a business or a business advantage.”²⁸⁵ Nevertheless, “unlike the general bribery offences in Sections 1 and 2, there is no requirement to show that there has been ‘improper performance.’”²⁸⁶ Section 5 defines foreign public official: a foreign public official is an individual who “(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), (b) exercises a public function—(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organization.”²⁸⁷

The UK Bribery Act grants UK courts “wide jurisdiction . . . over individuals and corporates, even if they are foreign nationals or are incorporated outside the UK.”²⁸⁸ Under various provisions of the Act, “even if all the actions²⁸⁹ in question take place overseas, they still constitute an offence under the Bribery Act if the person (natural or legal) performing them is a British national or ordinary resident in the UK, a body incorporated in the UK or a Scottish partnership.”²⁹⁰

The United States was among the first industrial countries to recognize and criminalize the bribery of foreign public officials in international business transactions. This was accomplished through the passage of the Foreign Corrupt Practices Act (FCPA).²⁹¹ Since the passage of the FCPA in 1977, US officials have worked with their counterparts in other countries to encourage and cajole them to enact similar laws. For example, the US State Department has engaged in negotiations with the OECD, the Organization of American States (OAS), and the United Nations, in order to galvanize support for global and regional compacts to fight international corruption.²⁹²

²⁸¹ OECD, *Convention*, *supra* note 250.

²⁸² Bribery Act 2010, § 6.

²⁸³ ANTI-BRIBERY AND CORRUPTION GUIDANCE, *supra* note 280, at 8.

²⁸⁴ That is, Section 6 (§6).

²⁸⁵ ANTI-BRIBERY AND CORRUPTION GUIDANCE, *supra* note 280, at 8.

²⁸⁶ *Id.*

²⁸⁷ Bribery Act 2010, § 5.

²⁸⁸ ANTI-BRIBERY AND CORRUPTION GUIDANCE, *supra* note 280, at 10.

²⁸⁹ That is, the actions that constitute an offense of bribery as defined in Sections 1, 2, and 6 of the Act. Bribery Act 2010, §§ 1, 2, 6.

²⁹⁰ ANTI-BRIBERY AND CORRUPTION GUIDANCE, *supra* note 280, at 10.

²⁹¹ Foreign Corrupt Practices Act 15 U.S.C. §§ 78dd-1–dd-3 (2016).

²⁹² See, e.g., MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 124.

3. Other International Anti-Corruption Conventions

Today, there exist several international and regional anti-corruption conventions besides the OECD Convention. On March 29, 1996, at the Organization of the American States' third plenary session, the regional entity adopted the Inter-American Convention Against Corruption.²⁹³ It came into force on March 6, 1997. On October 31, 2003, the UN General Assembly passed Resolution 58/4 creating the UN Convention Against Corruption (UNCAC).²⁹⁴ In doing so, the UN General Assembly outlined the purposes of the Convention as follows:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.²⁹⁵

The United Nations hoped that the Convention would serve as a "comprehensive international legal instrument against corruption."²⁹⁶ Accordingly, the Convention provides ways and mechanisms to deal with all aspects of corruption, as well as deal with both the demand and supply sides of corruption.²⁹⁷ The UN, however, intended for the Convention to be concerned primarily with *prevention, criminalization, and enforcement*.²⁹⁸ Aware that an effective fight against global corruption requires the cooperation and participation of the domestic legal systems of States Parties, the Convention imposes specific mandatory duties on all States Parties.²⁹⁹ According to Article 5, "[e]ach State Party *shall*, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of

²⁹³ Organization of American States, *Inter-American Convention Against Corruption*, B-58 (Mar. 29, 1996), <https://www.oas.org/juridico/english/treaties/b-58.html>.

²⁹⁴ United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UN Convention Against Corruption].

²⁹⁵ *Id.* at 146.

²⁹⁶ John Mukum Mbaku, *The International Dimension of Africa's Struggle Against Corruption*, 10 ASPER REV. INT'L BUS. & TRADE L. 35, 58 (2010) [hereinafter Mbaku, *The International Dimension*].

²⁹⁷ UN Convention Against Corruption, *supra* note 294, at 146–85.

²⁹⁸ Chapter II covers "preventive measures"; Chapter III covers "criminalization" and "enforcement." See UN Convention Against Corruption, *supra* note 294; Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L. J. 691, 707 (2007).

²⁹⁹ Mbaku, *The International Dimension*, *supra* note 296, at 58. See also UN Convention Against Corruption, *supra* note 294, at 148.

law, proper management of public affairs and public property, integrity, transparency, and accountability.”³⁰⁰

Throughout Africa, many domestic legal systems do not have the capacity to deal fully and effectively with corruption. One important contributing factor to the failure of many of these legal systems to function effectively is the fact that they lack judicial independence and existing laws and institutions do not adequately constrain civil servants and political elites (i.e., state custodians),³⁰¹ and hence, the latter can easily engage in corruption and other forms of opportunism (i.e., rent seeking).³⁰² The UNCAC imposes a mandate on States Parties to “take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.”³⁰³ Studies of African political economy show that civil servants³⁰⁴ and political elites are among the most corrupt members of the citizenry.³⁰⁵

The UNCAC recognizes the critical role that civil society and its organizations can play in the fight against corruption.³⁰⁶ The Convention, thus, mandates that each State Party take action to enhance the ability of civil society to participate effectively and fully in “the design and implementation of policies against corruption.”³⁰⁷

Openness and transparency in government communication are very important for controlling corruption. As argued by Gerring and Thacker,³⁰⁸ “[s]ince corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corruption actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).”³⁰⁹ The UNCAC specifically instructs States Parties to “take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making process, where appropriate.”³¹⁰ The Convention then goes on to prescribe specific measures that States Parties should put in place in order to enhance

³⁰⁰ UN Convention Against Corruption, *supra* note 294, at 148 (emphasis added).

³⁰¹ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 25.

³⁰² Mbaku, *The International Dimension*, *supra* note 296, at 41.

³⁰³ UN Convention Against Corruption, *supra* note 294, at 151.

³⁰⁴ Civil servants include the police, members of the judiciary, including judges and magistrates, and the various bureau managers and the people who serve in these bureaus.

³⁰⁵ See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1; LESSONS FROM COUNTRY *supra* note 5.

³⁰⁶ UN Convention Against Corruption, *supra* note 294, at 145, 152–53 (discussing participation of society).

³⁰⁷ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 55; UN Convention Against Corruption, *supra* note 294, at 152–53.

³⁰⁸ Gerring & Thacker, *supra* note 150.

³⁰⁹ *Id.* at 316.

³¹⁰ UN Convention Against Corruption, *supra* note 294, at 151.

transparency and openness in government communications. These measures include, *inter alia*:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
- (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.³¹¹

In order to improve the environment for corruption control at the national level, the UNCAC “criminalizes certain specific behaviors, including bribery, embezzlement, sale of one’s office, and other forms of extralegal or illicit enrichment.”³¹²

Cooperation at the global level, especially between national governments, is very important for the fight against international corruption. In the approach to global corruption adopted by the UNCAC, international cooperation must be considered an integral part of any successful effort to combat this insidious institution called corruption.³¹³ According to Article 43 of the Convention:

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

The UNCAC also provides States Parties with specific schemes or mechanisms to deal with corruption. These include, *inter alia*, (1) *extraditions* (of individuals who have fled the relevant jurisdiction to escape prosecution for any of the offenses covered by the Convention and that are punishable under the extraditing country’s domestic law);³¹⁴ and (2) *mutual legal assistance* in

³¹¹ *Id.*

³¹² Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 55; UN Convention Against Corruption, *supra* note 294, at 154–57.

³¹³ UN Convention Against Corruption, *supra* note 294, 164.

³¹⁴ *Id.* at 164–66.

“investigations of and proceedings in civil and administrative matters relating to corruption.”³¹⁵

The emphasis of the UNCAC on asset recovery is considered critical to the fight against corruption, especially in Africa, where a significant amount of public resources have been looted by corrupt public servants and “invested” in foreign economies.³¹⁶ As stated in Article 51 of the UNCAC, “[t]he return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”³¹⁷

The UNCAC considers asset recovery so important that it devotes an entire chapter to it.³¹⁸ Foreign economies, such as those of highly developed countries (e.g., the United States and the European Union) and those of countries with offshore banking facilities (e.g., Switzerland) are an important part of global corruption. In fact, many of the top-level African civil servants and political elites who engage in grand corruption in African countries often use the United States, the European Union, and various offshore banking locations (especially in Switzerland) as the preferred destination for their ill-gotten gains.³¹⁹ If international law can enhance the ability of affected African countries to successfully recover the stolen assets, this could “send a message to prospective political opportunists in African countries that even if they successfully plunder their economies, they are not likely to enjoy the proceeds of their extralegal activities in peace somewhere in the Westernized industrialized countries.”³²⁰

³¹⁵ *Id.* at 164.

³¹⁶ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 60; UN Convention Against Corruption, *supra* note 294, at 173.

³¹⁷ UN Convention Against Corruption, *supra* note 294, at 173.

³¹⁸ *Id.* at 173–78. Chapter V (Asset recovery) is devoted to elaborating on provisions for the successful “[p]revention and detection of the transfer of the proceeds of crime,” *id.* at art. 52; “[m]easures for direct recovery of property,” *id.* at art. 53; “[m]echanisms for recovery of property through international cooperation in confiscation,” *id.* at art. 54; “[i]nternational cooperation for purposes of confiscation,” *id.* at art. 55; “[s]pecial cooperation,” *id.* at art. 56; “[r]eturn and disposal of assets,” *id.* at art. 57; establishment of a “financial intelligence unit” which would be responsible for “receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions,” *id.* at art. 58; and “[b]ilateral and multilateral agreements and arrangements,” *id.* at art. 59.

³¹⁹ See generally TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT (2004), https://issuu.com/transparencyinternational/docs/2004_gcr_politicalcorruption_en/1?e=2496456/2106435 [hereinafter CORRUPTION REPORT 2004]. According to Transparency International, for example, Mobutu Sese Seko, who ruled Zaire (now Democratic Republic of Congo) from 1965 to 1997, embezzled as much as U.S. \$5 billion from the national economy and either hid the money in offshore accounts or invested it in real property in the developed market economies. *Id.* at 13 tbl.1.1, 100. Gen. Sani Abacha, who ruled Nigeria from 1993 to 1998, stole between U.S. \$2 billion and \$5 billion from the Nigerian economy, most of it from proceeds of oil exports, and “invested” virtually all of it abroad. *Id.* at 13 tbl.1.1, 101–02.

³²⁰ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 56.

The UNCAC also establishes a “Conference of the States Parties to the Convention” (the Conference)³²¹ and charges it with the duty of enhancing the achievement of the Convention’s objectives.³²² In addition, the Conference is also tasked with reviewing and promoting the implementation of the Convention.³²³ The Conference must periodically review “the implementation of [the] Convention by its States Parties”³²⁴ and offer “recommendations to improve [the] Convention and its implementation.”³²⁵ The overall objective of the Conference is to insure that the UNCAC functions effectively as a legal mechanism to deal with global corruption.³²⁶

The UNCAC’s main objective is to minimize and perhaps effectively help eradicate what has emerged as the most important constraint to economic and political development in many countries in the world today: corruption.³²⁷ Corruption is a well-entrenched institution in many African economies, creating perverse economic incentives, stunting entrepreneurial activities, and creating a lot of problems for peaceful coexistence.³²⁸ Although destroying the institution of corruption appears quite difficult and costly, failure to eliminate corruption from the African economies can impose significant negative consequences for Africa and its peoples.³²⁹ Of course, one of the most important reasons why eradicating corruption from the African economies is likely to be quite difficult and expensive is that the governing “elites in these countries are the direct beneficiaries of the ‘corruption enterprise’”³³⁰—these entrenched elites are likely to use their public positions to undermine any government or civil society efforts to cleanup corruption.

In many African countries, the institutions that are expected to fight corruption and promote democratic living (e.g., the police and judiciary system) are themselves pervaded by high levels of corruption and hence are not capable of contributing positively to an effective struggle against corruption. The failure of many domestic counteracting agencies in African countries to contribute positively to corruption cleanups can compromise the ability of national governments to cooperate with the UNCAC in dealing fully and effectively with global corruption.³³¹ In addition, many African countries do not have viable

³²¹ UN Convention Against Corruption, *supra* note 294, at 181.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 182.

³²⁵ *Id.*

³²⁶ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 54.

³²⁷ *Id.* See also UN Convention Against Corruption, *supra* note 294, 146.

³²⁸ See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1.

³²⁹ *Id.* at 87–115.

³³⁰ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 57.

³³¹ *Id.*

private media to investigate and report on the activities of public officials accused of complicity in corruption.³³²

Of course, some African governments may feel that increased cooperation with external actors (notably those from countries that had previously colonized them) could be seen as exposing their countries to further subjugation by their former colonizers. From a regime survival point of view, African political regimes, many of which continue to suffer legitimacy problems, fear that cooperation with international actors could negatively affect national sovereignty and threaten regime survival. The fear is that the process of cooperating with foreign governments, as well as international public and private organizations, could allow outside actors to interfere with domestic political, economic, and social policies and force the African government to surrender information that could be used to undermine regime stability and survival.³³³

On July 11, 2003, at a meeting in Maputo, Mozambique, the African Union Convention on Preventing and Combating Corruption (AU Convention)³³⁴ was adopted. It entered into force on August 5, 2006. In setting out to design and adopt a convention to fight corruption, the African countries were “[c]oncerned about the *negative effects of corruption and impunity* on the political, economic, social, and cultural stability of the African States and its devastating effects on the economic and social development of the African peoples.”³³⁵ Specifically, the provisions of the AU Convention were expected to greatly enhance the ability of domestic legal systems in African countries to fight corruption and create an environment that promoted wealth creation and economic growth. To help achieve these objectives, the AU Convention specifically targets (1) prevention of corruption; (2) criminalization of corruption; and (3) international cooperation.

³³² See, e.g., Gerald Businge, *Using New Media to Fight Corruption*, 2 UGANDA MEDIA REV. 12 (2011). Also of importance in this issue is the section called Project Briefs. Pay specific attention to: (1) *Journalists as Bearers and Promoters of Human Rights*, at page 46; *Bracing Journalists to Fight Corruption in Uganda*, at page 47; *Kampala Declaration on Journalists as Bearers and Promoters of Rights*, at page 48.

³³³ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 57.

³³⁴ African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 [hereinafter AU Convention]. The AU Convention reflects principles that had been developed in an earlier period and which the States Parties—that is, the African countries that became Signatories to the Convention—believe “undergird governance in the continent in the twenty-first century.” Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 59. These principles include: “1. Respect for democratic principles and institutions, popular participation, the rule of law and good governance. 2. Respect for human and peoples’ rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments. 3. Transparency and accountability in the management of public affairs. 4. Promotion of social justice to ensure balanced socio-economic development. 5. Condemnation and rejection of acts of corruption, related offences and impunity.” AU Convention, *supra* note 334, at 7.

³³⁵ AU Convention, *supra* note 334, at 5–6 (emphasis added).

These emerged as the principal instruments to fight the insidious institution of corruption within the African economies.³³⁶

The AU Convention imposes specific duties on both private and public actors within the African economies in order to help minimize engagement, by various actors, in corrupt activities. For example, with respect to corruption in the public service, the AU Convention declares as follows:

States Parties commit themselves to:

1. Require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service.
2. Create an internal committee or a similar body mandated to establish a code of conduct and to monitor its implementation, and sensitize and train public officials on matters of ethics.
3. Develop disciplinary measures and investigation procedures in corruption and related offences with a view to keeping up with technology and increase the efficiency of those responsible in this regard.³³⁷

With respect to corruption in the private sector, the AU Convention states:

States 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.³³⁸

³³⁶ *Id.* at 7–16.

³³⁷ *Id.* at 9. Note that while such conventions as the AU Convention create rights and duties, those rights and duties are granted as between those States that are parties to the conventions and/or are bound by them. Hence, the AU Convention's provisions apply only to those African countries, which are Signatories to the Convention. As of this writing, the following countries in Africa have not signed the Convention, ratified it, and deposited it with the appropriate UN office: Botswana, Central African Republic, Cape Verde, Egypt, Eritrea, and Tunisia. Angola, Guinea-Bissau, Guinea, Mauritania, Mauritius, Somalia, São Tomé & Príncipe, Sudan (Republic of), and Swaziland have signed the Convention but have not yet ratified and deposited it with the UN. Of 53 countries in Africa, 45 have signed, 34 have ratified, and 34 have deposited the treaty with the UN and hence are States Parties to the Convention. *See generally Status of Ratification of the Convention on Corruption*, AFRICAN UNION ADVISORY BD. ON CORRUPTION, <http://www.auanti-corruption.org/auac/about/category/status-of-the-ratification> (last visited Sept. 16, 2016).

³³⁸ AU Convention, *supra* note 334, at 10.

Within the political systems that were emerging in African countries in the post-Cold War era, civil society and its various organizations (e.g., the free press and churches) were expected to play a significant part in the fight against corruption and other growth-inhibiting behaviors, especially in the public sectors—these organizations were expected to check on the government and prevent the latter’s custodians from acting with impunity and engaging in various forms of opportunism, including corruption.³³⁹ The AU Convention thus mandates that States Parties undertake to “[c]reate an enabling environment that will enable civil society and the media to *hold governments to the highest levels of transparency and accountability in the management of public affairs*.”³⁴⁰

The AU Convention has various criminalization provisions in which it specifically defines “acts of corruption and related offenses,”³⁴¹ establishes the “acts of corruption and related offenses”³⁴² over which each State Party has “jurisdiction,”³⁴³ and lists all the criminal offenses that are “associated with and implicate corruption.”³⁴⁴ In Article 4, the AU Convention delineates specific behaviors that are considered corrupt. For example, “acts of corruption” include:

(a) the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions; (b) the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.³⁴⁵

³³⁹ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 60.

³⁴⁰ AU Convention, *supra* note 334, at 10 (emphasis added).

³⁴¹ *Id.* art. 4(1).

³⁴² *Id.* According to art. 13(1), “Each State Party has jurisdiction over acts of corruption and related offences when: (a) the breach is committed wholly or partially inside its territory; (b) the offence is committed by one of its nationals outside its territory or by a person who resides in its territory; and (c) the alleged criminal is present in its territory and it does not extradite such person to another country. (d) when an offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.” *Id.* at 11.

³⁴³ *Id.* at 11.

³⁴⁴ Mbaku, *The International Dimension*, *supra* note 296, at 29–30.

³⁴⁵ AU Convention, *supra* note 334, at 7.

Paragraphs (a) and (b) of the AU Convention's Article 4 show that the Convention criminalizes both the demand for and supply of corruption. Also, the Convention criminalizes "any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party."³⁴⁶ The AU Convention also criminalizes efforts to sell one's position of authority—whether the position is in the public or private sector—for private gain.³⁴⁷ The AU Convention criminalizes:

(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, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.³⁴⁸

As Article 4(1)(f) of the AU Convention indicates, the benefit derived from the sale of one's position of authority need not accrue to or be enjoyed by the person actually performing the corrupt act; the influence need not actually be exerted, and if exerted, it need not produce the "intended result" for a justiciable action to arise.³⁴⁹ The AU Convention also criminalizes other behaviors that fall under the umbrella of the word "corruption." These include "illicit enrichment,"³⁵⁰ "the use or concealment of proceeds derived from any of the acts referred to in this Article,"³⁵¹ and participation in various capacities in a series of inchoate crimes, which include "conspiracy"³⁵² and "attempt."³⁵³

The States Parties believe that a successful war against corruption must take cognizance of the problem of money laundering since the latter actually enhances the carrying out of corrupt activities, especially those committed by high

³⁴⁶ *Id.* at 8.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ AU Convention, *supra* note 334, at 8.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* An individual can participate as "a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article." *Id.*

ranking civil servants and politicians.³⁵⁴ Dealing effectively and fully with money laundering is considered so critical to the fight against corruption that the AU Convention devotes a full chapter of the Convention to measures against it. The concept “money laundering” is defined as:

The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.³⁵⁵

The AU Convention criminalizes all corrupt activities, whether they occur in the private or public sector.³⁵⁶ A “public official” is defined as “any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy.”³⁵⁷

In terms of “enforcement,” the AU Convention has two distinct, yet interconnected, parts—domestic and international. Within the domestic arena, the AU Convention specifically requires that each State Party provide itself with “legislative and other measures” to improve the country’s ability to fight corruption.³⁵⁸ It is important to note here that the AU Convention uses both permissive and “mandatory” language in some of its provisions.³⁵⁹

³⁵⁴ AU Convention, *supra* note 334. Many senior civil servants and political elites in the African economies tend to engage in what is referred to as “grand corruption,” which involves the embezzling of large sums of money from the public treasury. These opportunistic public servants are usually eager to transfer these ill-gotten gains abroad where they can be out of the reach of their national governments. Hence, they seek to avail themselves of ways to “launder” these funds and make it difficult for their governments to track the stolen monies. *See generally* Humphrey P. B. Mushi, *Fighting Money Laundering: The Challenges in Africa* (Inst. For Sec. Studies, Paper No. 152, 2007), <https://www.issafrica.org/uploads/Paper152.pdf> (examining the challenges faced by African governments as they seek ways to minimize money laundering and the illegal activities that support this industry); Prince Bagenda et al., *Profiling Money Laundering: In Eastern and Southern Africa* (Institute for Security Studies Monographs No. 90, Dec. 2003), <https://issafrica.org/uploads/Mono90.pdf> (examining the incidence of money laundering in the Eastern and Southern African Anti-Money-Laundering Group (ESAAMLG)—Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe).

³⁵⁵ AU Convention, *supra* note 334, at 9.

³⁵⁶ *See id.* at 7–8, 10.

³⁵⁷ *Id.* at 6.

³⁵⁸ *Id.* at 8. According to the AU Convention, States Parties “undertake” to “adopt legislative and other measures” to criminalize the behaviors. *See id.* art. 4(1) (listing all of the behaviors criminalized). Additionally, States Parties “undertake” to strengthen their domestic legal systems to enhance the ability of the latter to adequately regulate foreign

Transparency and openness are very important to a successful fight against corruption. Hence, the AU Convention mandates that States Parties “shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offenses.”³⁶⁰ Because civil society and its organizations are expected to take an active part in the fight against corruption, it is important that they be provided full and effective access to necessary information, especially that which is produced by the government and its organs. The AU Convention devotes Article 12 to an elaboration of the role of “civil society and media” in the continent’s struggle against corruption.³⁶¹

During most of the post-independence period in Africa, many countries have struggled with rule of law issues—they have not been able to provide their economies with institutional arrangements that guarantee the rule of law.³⁶² The AU Convention is aware of the need for many African countries to strengthen their legal and judicial systems and make certain that each person accused of complicity in corrupt activities is given a fair trial. Specifically, the Convention states that:

Subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and Peoples’ Rights and any other relevant international human rights instrument recognized by the concerned States Parties.³⁶³

How successful a country is at cleaning up corruption and other criminal activities is determined, to a great extent, by the nature of that country’s legal and judicial system. However, given the fact that corruption has become a global issue, one cannot ignore the role that can (and must) be played by the international community. A significant amount of the money secured from the African economies tends to end up in offshore accounts in countries such as Switzerland

enterprises that operate within their territories. Finally, States Parties “undertake” to “maintain and strengthen independent anti-corruption authorities or agencies.” AU Convention, *supra* note 334, at 8.

³⁵⁹ For example, while Article 6 states that “States Parties *shall* adopt such legislative and other measures as may be necessary to establish as criminal offenses” *Id.* at 9 (emphasis added). Article 5 uses more permissive language when it states that “State[s] Parties *undertake to*.” *See id.* at 8–9 (emphasis added).

³⁶⁰ *Id.* at 10.

³⁶¹ *Id.* at 10–11.

³⁶² *See generally* Mbaku, *Providing a Foundation*, *supra* note 60.

³⁶³ AU Convention, *supra* note 334, at 11. *See also* THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE 1986–2006 (Malcolm Evans & Rachel Murray eds., 2nd ed. 2008) (examining the extent to which the charter has been implemented in various African countries the impact on the right to a fair trial).

or is invested in real property in the developed countries.³⁶⁴ Thus, the cooperation of the international community is critical to any successful corruption cleanup program in Africa. For, without such cooperation, it is not likely that the African country involved would be able to recover the large amounts of money stolen from its economy by corrupt civil servants and politicians and “invested” abroad. In addition, these African countries may not be able to bring individuals implicated in corrupt activities back home to stand trial. Hence, the AU Convention provides for “extradition,”³⁶⁵ “confiscation and seizure of the proceeds and instrumentalities of corruption,”³⁶⁶ and “Cooperation and Mutual Legal Assistance.”³⁶⁷

International cooperation, which is a very important element of the global struggle against corruption, must involve not only States Parties, but also non-signatory states as well. Article 19³⁶⁸ addresses “international cooperation” and makes certain that any person involved in corrupt activities cannot escape prosecution by seeking refuge in countries that are not States Parties to the Convention.³⁶⁹ To enhance inter-governmental “cooperation and mutual legal assistance” in the fight against corruption, each State Party shall designate a national authority or agency that “shall be responsible for making and receiving the requests for assistance and cooperation referred to in this Convention.”³⁷⁰

As part of the effort to enhance cooperation between African countries, the AU Convention has set up an Advisory Board on Corruption,³⁷¹ consisting of

³⁶⁴ See, e.g., Lou Kilzer & Andrew Conte, *Africa's Wealth Floods Offshore as Corrupt Leaders, Corporations Use Banks to Hide Fortunes*, TRIBLIVE (Oct. 20, 2012), <http://triblive.com/home/2787113-74/countries-money-nigeria-developing-bonny-island-stanley-africa-gas-ibori#axzz3YA4zoeVw>. See also LEVINE, *supra* note 25 (arguing, inter alia, that most civil servants and political elites engaging in corrupt activities in African countries, especially Ghana, usually place their ill-gotten gains in foreign economies, away from their own governments and legal systems); MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 96–97.

³⁶⁵ AU Convention, *supra* note 334, at 11–12.

³⁶⁶ *Id.* at 12. In addition, the AU Convention mandates that States Parties must not use their bank secrecy laws or regulations to make it really difficult for other States Parties, which are seeking information either to recover stolen assets or to prosecute and bring to justice those individuals alleged to have engaged in corrupt activities within their economies, to perform their duties. *Id.* at 12–13. Article 17 also mandates that the “[r]equesting State Party shall not use any information received that is protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless with the consent of the Requested State Party.” *Id.* at 13.

³⁶⁷ *Id.*

³⁶⁸ AU Convention, *supra* note 334, at 13–14.

³⁶⁹ See *id.*

³⁷⁰ *Id.* at 14.

³⁷¹ *Id.*

eleven members³⁷² whose main function is to “monitor the implementation and proper functioning of the Convention.”³⁷³

While the AU Convention’s Article 19 provides for collaboration in order to “criminalise and punish the practice of secret commissions and other forms of corrupt practices in international trade transactions,”³⁷⁴ it might be difficult for African countries to secure such international cooperation on the basis of Article 19 alone. For example, when the corrupt activity is one that involves a legal or natural person located in the United States (e.g., a US-based multinational company, subject to the FCPA), the African country is likely to find cooperation from the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) more forthcoming if the alleged corrupt act is also an offense under the FCPA. Similarly, if the request for legal assistance and cooperation involves a UK-based legal or natural person, the British government is most likely to cooperate if the alleged corrupt act is an offense under the UK Bribery Act. Of course, an African country can also seek international cooperation by invoking provisions of the UN Convention Against Corruption (UNCAC). Thus, the study of international conventions, such as the UNCAC and certain legislative acts that have significant international implications, such as the United States’ Foreign Corrupt Practices Act and the UK Bribery Act, is critical to a full understanding of how to deal with the impact of international corruption on the African economies. The following sections, then, examine the FCPA and various international conventions that deal with the bribery of foreign public officials in international business transactions.

VI. FRAMING THE PROBLEM

This article primarily explores the bribery of foreign public officials in international business transactions. It adopts a definition for bribery that is informed by practices in Africa, as well as the UK Bribery Act 2010 and the US FCPA. Bribery can be defined as “giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so.”³⁷⁵

³⁷² *Id.* at 14.

³⁷³ Mbaku, *The International Dimension*, *supra* note 296, at 66. *See also* AU Convention, *supra* note 334, at 8–9. Unfortunately, the AU Convention does not address the critical issue of sanctions against States Parties that violate any of the Convention’s provisions.

³⁷⁴ AU Convention, *supra* note 334, at 13.

³⁷⁵ *The Bribery Act 2010: Quick Start Guide*, *supra* note 275. Chapters 1–6 of the UK Bribery Act 2010 provide more detailed definitions of the concept “bribery.” *Id.* Chapter 6 is devoted to elaborating “[b]ribery of foreign public officials.” *Id.*

In a June 18, 2013 Wall Street Journal³⁷⁶ article, Rachel Louise Ensign and Christopher M. Matthews³⁷⁷ reported that African Barrick Gold PLC,³⁷⁸ which operates a gold mine in the North Mara Region of Tanzania,³⁷⁹ had made 400,000 USD in cash payments to public officials in Tanzania. In the words of an anonymous tipster, the money was paid to these officials in order to “influence African Barrick’s business interests in Tanzania.”³⁸⁰ The company, however, denied the cash payments were bribes to government officials and argued that the funds had been expended for legitimate business purposes.³⁸¹ In the Wall Street Journal article, the authors also reported that an investigation by the law firm of Steptoe and Johnson LLP had found that the company and its parent³⁸² had “acted appropriately in all instances, in accordance with Tanzanian, US, and UK law.”³⁸³ The company then went on to argue that it had cut back on making cash payments to public officials and that it only did so because its business activities are located in a region of Tanzania with limited banking infrastructure.

However, according to US government officials, large cash payments (such as those made to the Tanzanian officials) raise a red flag, even when not necessarily illegal.³⁸⁴ As stated by the DOJ and the SEC in their guide to the FCPA, “The most obvious form of corrupt payment is large amounts of cash.”³⁸⁵ The two US government agencies go on to state that “[i]n some instances, companies have maintained cash funds specifically earmarked for use as bribes.”³⁸⁶ As examples, the FCPA Resource Guide³⁸⁷ cites the case of a US issuer with headquarters in Germany, which “disbursed corrupt payments from a corporate ‘cash desk’ and used off-shore bank accounts to bribe government

³⁷⁶ Rachel Louise Ensign & Christopher M. Matthews, *Barrick Gold Unit is Accused of Bribery in Africa*, WALL ST. J. (June 18, 2013), <http://www.wsj.com/articles/barrick-gold-unit-is-accused-of-bribery-in-africa-1403134228>.

³⁷⁷ *Id.*

³⁷⁸ African Barrick Gold PLC is a subsidiary of Toronto-based Barrick Gold Corporation. *See id.*

³⁷⁹ Tanzania is divided into thirty geo-political and administrative regions and Mara Region is one of them, with its capital at Musoma. *Id.* In the 2012 national census, the Mara Region’s population was determined to be 1,743,830. *Id.* The region is nearly 700 miles from the country’s main commercial center—metropolitan Dar es Salaam. Ensign & Matthews, *supra* note 376.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² The parent is Barrick Gold Corporation, Toronto, Canada. *Id.*

³⁸³ *Id.*

³⁸⁴ Ensign & Matthews, *supra* note 376. The US officials are from the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), which have the legal authority to enforce the Foreign Corrupt Practices Act (FCPA). *See, e.g.*, U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 15 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter FCPA RESOURCE GUIDE].

³⁸⁵ FCPA RESOURCE GUIDE, *supra* note 384, at 15.

³⁸⁶ *Id.* at 15.

³⁸⁷ *Id.*

officials to win contracts.”³⁸⁸ Also, the FCPA Resource Guide continues, “a four-company joint venture used its agent to pay \$5 million in bribes to a Nigerian political party. The payments were made to the agent in suitcases of cash (typically in \$1 million installments), and, in one instance, the trunk of a car when the cash did not fit into a suitcase.”³⁸⁹

According to the Wall Street Journal article,³⁹⁰ the person who had anonymously reported the alleged African Barrick Gold PLC bribery case indicated that he or she had planned to contact the DOJ and SEC and make a similar report under the FCPA,³⁹¹ which specifically outlaws the payment of bribes to foreign public officials in international business transactions. Since the shares of Barrick Gold are traded on the NY Stock Exchange, the company and its subsidiaries are subject to the FCPA.

Barrick Gold Corporation is a Canadian company and Canada, a member of the OECD and a State Party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,³⁹² has also enacted an anti-bribery law aimed at criminalizing the payment of bribes to foreign public officials.³⁹³ As a Canadian company, Barrick Gold and its subsidiaries (which include African Barrick Gold PLC) are subject to Canada’s Corruption of Public Officials Act (S.C. 1998, c. 34).³⁹⁴ Both African Barrick Gold PLC and parent company, Barrick Gold Corporation, have vehemently denied the accusations directed at them by anonymous whistle-blowers that the companies had engaged in illegal activities involving the bribing of public officials in Tanzania in connection with African Barrick Gold’s North Mara

³⁸⁸ *Id.* See also Complaint, SEC v. Daimler AG, No. 10-cv-473 (D. D.C. Apr. 1, 2010).

³⁸⁹ FCPA RESOURCE GUIDE, *supra* note 384, at 15 (footnotes omitted). See also Complaint, SEC v. Halliburton Co., No. 09-cv-399 (S.D. Tex. Feb. 11, 2009); Criminal Information, United States v. Kellogg Brown, No. 09-cr-71 (S.D. Tex. Feb. 6, 2009).

³⁹⁰ Ensing & Matthews, *supra* note 376.

³⁹¹ Foreign Corrupt Practices Act § 78dd-1-dd-3.

³⁹² OECD, *Convention*, *supra* note 250, at 12.

³⁹³ Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.). The law’s official (long) title is An Act Respecting the Corruption of Foreign Public Officials and the Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to Make Related Amendments to Other Acts. See *id.* The act of bribing a foreign public official is defined as follows: “3. (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official (a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.” *Id.* § 3.

³⁹⁴ Corruption of Foreign Public Officials Act § 3

mine.³⁹⁵ Apparently, Barrick Gold Corporation has not been charged either by the US government under the FCPA³⁹⁶ or the Canadian government under the Corruption of Foreign Public Officials Act.³⁹⁷ Nevertheless, African Barrick and its parent company, Barrick Gold Corporation, have acknowledged that payments, especially made in cash, to foreign public officials, even for legitimate expenses, can give the appearance of illegality, and hence, are working to reform their accounting systems so that they strictly comply with Tanzanian, US, and UK laws, as well as those of any other country that they operate in.³⁹⁸

In South Africa, 83% of people questioned in a recent survey believed that the police were the most corrupt institution in the country,³⁹⁹ and 30% of them stated that they had paid a bribe to a member of the judiciary.⁴⁰⁰ A Pretoria businessman who was interviewed as part of the Times LIVE (Johannesburg) article on South African attitudes towards bribery,⁴⁰¹ did not believe that there was anything wrong with bribing public officials with R250,000 in order to obtain a government contract worth R5,000,000.⁴⁰² According to Transparency International's Global Corruption Barometer, "54 percent of the people of South Africa said corruption is getting worse."⁴⁰³ The Times LIVE survey revealed that

³⁹⁵ See, e.g., *African Barrick Denies Unlawful Payments to Officials in Tanzania*, REUTERS (June 19, 2014), <http://www.reuters.com/article/2014/06/19/african-barrick-corruption-idUSL2N0P01FK20140619> [hereinafter *African Barrick Denies*]. The companies were responding to an article published in The Wall Street Journal in which African Barrick Gold PLC was accused of paying 400,000 USD in bribes to Tanzanian government officials in connection with the company's mining operations in the North Mara region. *Id.*; see also Ensign & Matthews, *supra* note 376.

³⁹⁶ A search of U.S. legal databases does not show any outstanding or resolved legal actions by either the SEC or the DOJ against Barrick Gold Corporation under the Foreign Corrupt Practices Act §§ 78dd-1–dd-3.

³⁹⁷ A search of Canadian legal databases does not show any outstanding or resolved legal actions by the Canadian government against Barrick Gold Corporation under the Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.).

³⁹⁸ See generally Ensign & Matthews, *supra* note 376; *African Barrick Denies*, *supra* note 395.

³⁹⁹ Sipho Masombuka, *South Africa: Where Bribery is a Way of Life*, TIMES LIVE (July 10, 2013), <http://www.timeslive.co.za/thetimes/2013/07/10/south-africa-where-bribery-is-a-way-of-life>.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* The "R" in R250,000 stands for *Rand*, South Africa's currency. The Rand is also the common currency for the Common Monetary Area (CMA) between South Africa, Swaziland, and Lesotho. Namibia, which became a member of the CMA at independence in 1990, withdrew in 1993 when it introduced its own currency—the Namibian dollar—in 1993. Nevertheless, the Namibian dollar is at par with the South African Rand.

⁴⁰³ *South Africa: A Mandate to Tackle Corruption*, TRANSPARENCY INT'L (May 6, 2014), http://www.transparency.org/news/feature/south_africa_a_mandate_to_tackle_corruption. See also Iris Wielders, *Perceptions and Realities of Corruption in South Africa*, AFROBAROMETER, BRIEFING PAPER NO. 110 (Jan. 2013), <http://afrobarometer.org/publications/bp110-perceptions-and-realities-corruption-south-africa>.

74% of South Africans believe that civil servants and politicians are the most corrupt people in the country and the ones most likely to demand and receive bribes from both citizens and non-citizens seeking access to government services.⁴⁰⁴

According to research carried out by Transparency International on global bribery,⁴⁰⁵ “[o]ne person in four has paid a bribe to a public body in the last year [2012].”⁴⁰⁶ The country, which had the highest percentage of respondents “admitting to having paid a bribe”⁴⁰⁷ was 84% and this was found in Sierra Leone.⁴⁰⁸ Of the nine countries⁴⁰⁹ with the highest reported bribery rates, eight (or 89%) were found in Africa. According to the survey, the countries that have the lowest reported bribery rates are Denmark, Finland, Japan, and Australia, which all have reported bribery rates of 1%.⁴¹⁰

Throughout the world, certain public institutions are considered most susceptible or prone to corruption, especially bribery. Among 105 countries surveyed, Transparency International⁴¹¹ determined that the *political elite* (51%), *judges* (36%), and the *police* (20%) are considered by citizens as the most corrupt public institutions and the ones most likely to ask for or accept a bribe.⁴¹² At the other end, religious organizations and business enterprises were considered by respondents as the least corrupt entities.⁴¹³

⁴⁰⁴ See Masombuka, *supra* note 399.

⁴⁰⁵ *Map: Which Country Pays the Most Bribes?*, BBC NEWS (July 9, 2013), <http://www.bbc.com/news/business-23231318> [hereinafter *Which Country Pays*].

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* These countries are Sierra Leone (84%), Liberia (75%), Yemen (74%), Kenya (70%), Cameroon (62%), Libya (62%), Mozambique (62%), Zimbabwe (62%), Uganda (61%). All of these countries, except Yemen, are in Africa. See *Which Country Pays*, *supra* note 405. Of course, it is important to note that Africa is not necessarily the most corruption-prone region in the world. In fact, according to Transparency International’s Corruption Perceptions Index 2014, Eastern Europe and Central Asia actually tie with sub-Saharan Africa with a score of 33—Western Europe, with a score of 65, is the least corrupt region of the world. *Corruption Perceptions Index 2014 Results*, *supra* note 176. Of course, it is important to note that corruption, especially bribery, has become such an integral part of daily life in African countries, that ordinary citizens find it very difficult to organize their private lives because of the need to bribe public officials in order to engage in even the most basic of activities (i.e., to register a marriage at the local city hall (*Hôtel de ville*)). Despite its apparent pervasiveness, a survey conducted by Afrobarometer, determined that only 26% of respondents reported actually paying bribes in the year prior to the survey, while 74% said they did not pay a bribe. See Christine Mungai, *To Give or Not to Give: Why do Some Africans Pay Bribes and Others Don’t?*, MAIL & GUARDIAN AFR. (Jan. 25, 2015), <http://mgafrika.com/article/2015-01-21-why-do-some-africans-pay-bribes-and-others-dont>.

⁴¹⁰ *Which Country Pays*, *supra* note 405.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

Some researchers differentiate between “grand bribery” and “petty bribery.”⁴¹⁴ Peiffer and Rose⁴¹⁵ state that “[g]rand bribery refers to the large sums paid to national politicians and high-ranking civil servants to obtain contracts for capital-intensive projects.”⁴¹⁶ In many countries, these projects include the provision of social overhead capital such as bridges; roads; hospitals; schools, including colleges and universities; military equipment (e.g., helicopters and fighter jets); and other critical infrastructure for economic growth and development. In many African countries, grand bribery is also pervasive in contracts for the exploitation of natural resources, notably oil and gas.⁴¹⁷ Since all these projects are capital intensive, only business enterprises that have the necessary physical and human capital to, for example, recover petroleum deposits deep in the earth, or build bridges, as well as the resources needed to pay the bribes requested by the civil servants and political elites, are able to secure these procurement contracts.⁴¹⁸ Most citizens in African countries do not have the resources to engage in this type of corruption—the main supply-side players in grand bribery are most likely to be multinational companies, which have the capacity to carry out the projects, as well as the resources to pay the requested bribes.⁴¹⁹

Most citizens, Peiffer and Rose⁴²⁰ argue, engage primarily in “retail corruption”⁴²¹ or petty bribery, which involves paying relatively small sums of money to low-level civil servants who are responsible for allocating such services as health care, education, clean water, and police protection. While grand bribery usually involves large sums of money, petty or retail bribery involves only small sums of money. Nevertheless, it should not be dismissed as inconsequential because it (1) affects a relatively large part of the population; (2) impacts primarily poor, highly marginalized and deprived individuals and groups; and (3) can prevent these groups from having access to welfare-enhancing (e.g., basic health care, primary education, clean water) and life-saving (i.e., police protection) services.⁴²²

The subject matter of the present study, however, is grand bribery, specifically that which concerns payments made to public officials by foreign corporations seeking, in general, more favorable political and economic

⁴¹⁴ Caryn Peiffer & Richard Rose, *Why Do Some Africans Pay Bribes While Others Africans Don't?* 5 (AfroBarometer Working Paper No. 148, 2014), <http://afrobarometer.org/sites/default/files/publications/Working%20paper/Afropaperno148.pdf>.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *See id.* at 4–5.

⁴¹⁸ *Id.* at 5.

⁴¹⁹ Peiffer & Rose, *supra* note 414, at 5.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *See generally* MBAKU, CORRUPTION IN AFRICA, *supra* note 1 (arguing, inter alia, that the study of corruption, including the petty type, must consider the impact it has on the poor and highly deprived citizens).

conditions for their enterprises within the countries in question, and in particular, access to and favorable terms for, government procurement contracts. While most developed countries have criminalized the payment of bribes to foreign public officials in international business transactions,⁴²³ most African countries do not have laws that specifically address this particular form of corruption. In order for the African countries to deal fully and effectively with grand bribery, specifically the type associated with the bribery of their public officials by multinational companies, they need to secure the cooperation of the international community. This must be looked at from three perspectives—first, globalization has made corruption, including bribery, an economic and political problem that can only be dealt with effectively through inter-governmental cooperation; second, the bulk of the suppliers of the resources in cases of grand bribery are multinational corporations located primarily outside Africa;⁴²⁴ and third, most of Africa's high-ranking civil servants and political elites—the people who receive the bribes paid by foreign companies⁴²⁵—usually place the money that they receive from bribes in foreign bank accounts or use them to purchase real property abroad. Quite often, the civil servant or politician accused of corruption would exit the jurisdiction and seek refuge abroad, forcing the African country to seek the help of the international community in extraditing and returning him or her home to face trial. Even if the accused civil servant does not leave the country and is actually tried and convicted of complicity in corrupt activities, the country may still not be able to locate and retrieve the monies accumulated through corruption since they are most likely held in offshore accounts or invested in real property abroad. Hence, international cooperation is required in order for the African country to either extradite suspects who have fled abroad to avoid prosecution or to locate and repatriate the proceeds of corruption, which have been stashed away in foreign banks and financial institutions.⁴²⁶

This article analyzes how the US FCPA 1977 and the UNCAC⁴²⁷ can help in Africa's fight against corruption generally and grand bribery in particular.

⁴²³ See, e.g., Bribery Act 2010, c. 23 (U.K.); Foreign Corrupt Practices Act 15 U.S.C. §§ 78dd-1–dd-3; OECD, *Convention*, *supra* note 250.

⁴²⁴ Although these corporations may have subsidiaries in African countries, the latter usually do not have the legal capacity to fully prosecute officers (or their agents) of these corporations who are accused of complicity in grand bribery. The developed countries where these corporations are located, on the other hand, have the legal resources to bring these enterprises and their officers to justice for their complicity in the bribing of public officials in African countries.

⁴²⁵ These bribes are usually paid to public officials to secure favorable operating environments (e.g., to exempt the foreign corporation from local regulations) or to secure government contracts. The anti-bribery laws of many developed countries (e.g., the UK Bribery Act of 2010, the OECD Convention, and the US Foreign Corrupt Practices Act) provide a more exhaustive list.

⁴²⁶ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 71–72.

⁴²⁷ Foreign Corrupt Practices Act §§ 78m, 78dd-1–dd-3, 78ff.

VII. THE U. S. FOREIGN CORRUPT PRACTICES ACT (FCPA)

A. Introduction

The early-1970s were fraught with political activities that threatened the integrity of the US system of government and led to a revival of scholarly interest in political corruption. One of the most important of those activities was the Watergate Affair,⁴²⁸ which broke out in the nation's capital in the summer of 1972. The constitutional crisis created by the Watergate Affair provided interest in political corruption not only to academic scholars but also to legislators—the latter, notably members of the US Congress, engaged in efforts to pass legislation to address different aspects of corruption.⁴²⁹

At this time, lawmakers in the United States were also interested in corporate corruption, specifically that associated with the bribery of foreign public officials by US multinational corporations in order to secure and retain business in

⁴²⁸ The Watergate Affair started with the arrest of five political operatives suspected of illegally breaking into the Democratic National Committee headquarters at the Watergate complex in Washington, D.C. on June 17, 1972. By many accounts, the Watergate Affair created a constitutional crisis in the United States that was second only to the Civil War that ravaged the American Republic more than a century ago. The Watergate Affair resulted in the first resignation of a sitting president in the history of the country. *See generally* KEITH W. OLSON, *WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA* (2003) (providing a relatively accessible overview of the key events in this important period in American political history); DALE ANDERSON, *WATERGATE: SCANDAL IN THE WHITE HOUSE* (2006) (providing a critical overview of the break-in at the Democratic Party headquarters at the Watergate office complex in Washington, DC, the effort by President Richard Nixon's aides to cover it up, investigations by the independent press, actions by the U.S. Congress and the Judicial branch, and the eventual resignation of President Nixon); CHARLES COLSON, *KINGDOMS IN CONFLICT: AN INSIDER'S CHALLENGING VIEW OF POLITICS, POWER, AND THE PULPIT* (1988) (providing an insider's view of the Watergate Affair and its aftermath). Charles Colson, who later became an evangelical Christian leader, was, during the Watergate Affair, Special Counsel to Richard M. Nixon, President of the United States. Jonathan Aitken argues that although Colson's "involvement in Watergate was major in terms of its political immorality," it was, however, "minor in terms of its criminal illegality." JONATHAN AITKEN, *CHARLES W. COLSON: A LIFE REDEEMED* 147 (2005). He goes on to say that Colson was a "significant contributor to the creation of the climate in which Watergate could happen." *Id.*

⁴²⁹ *See* LARRY L. BERG, HARLAN HAHN & JOHN RICHARD SCHMIDHAUSER, *CORRUPTION IN THE AMERICAN POLITICAL SYSTEM* (1976) (providing a historical perspective of corruption associated with the Watergate Affair, and an important and critically influential study of political corruption related to the Watergate Affair). *See also* LARRY SABATO, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* (1996) (arguing that despite post-Watergate legislation, political corruption remains a serious problem in the American political system); JAY COST, *A REPUBLIC NO MORE: BIG GOVERNMENT AND THE RISE OF AMERICAN POLITICAL CORRUPTION* (2015) (lamenting what he believes is widespread corruption in the American political system, a process that has effectively turned the country into a "special interest democracy").

various countries around the world.⁴³⁰ The SEC was tasked with investigating alleged bribery of foreign public officials by US-based multinational corporations. When it completed its work, more than 400 US corporations had admitted to making “questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties.”⁴³¹ The SEC investigation revealed that the “abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties.”⁴³²

The SEC investigation into the bribery of foreign public officials by US multinational corporations also revealed the universal nature of corruption—the latter was determined to be a phenomenon that pervaded virtually all economies, developed and developing, and had emerged as an important constraint to the effective functioning of the international economy. The SEC investigators indicated to US policymakers that dealing with global corruption required international cooperation and “multi-national responses.”⁴³³ The US Congress responded to the report presented by the SEC investigative team quickly and swiftly and in 1975, the US Senate passed a resolution calling for the development of international codes of conduct that forbade “bribery, indirect payments, kickbacks, unethical political contributions and other such disreputable activities.”⁴³⁴ The US Senate argued that widespread corruption, specifically the payment of bribes to public officials, distorted market incentives and created “unfair, unjust, and unreasonable conditions of competition in world trade and

⁴³⁰ See, e.g., Mbaku, *The International Dimension*, supra note 296, at 52.

⁴³¹ U.S. DEP’T OF JUSTICE & U.S. DEP’T OF COM., FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS, <http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf> [hereinafter ANTIBRIBERY PROVISIONS] (last visited Aug. 28, 2016); see also U.S. SEC. & EXCH. COMM’N, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, (Comm. Print 1976) <https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf>.

⁴³² *Id.*; See also Peter W. Schroth, *The United States and International Bribery Conventions*, 50 AM. J. COMP. L. SUPP. 593, 595–96 (2002) [hereinafter Schroth, *International Bribery Conventions*]. Schroth studies several reports that had been presented by the foreign officials that had been bribed by the U.S. multinational corporations. *Id.* These included reports submitted by the then Prime Minister of Japan, Tanaka Kakuei, Prince Bernhard of The Netherlands, and the Prime Minister of Italy, Giovanni Leone. *Id.* at 595. See generally U.S. SEC. & EXCH. COMM’N, 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, (Comm. Print 1976); H.R. REP. NO. 95-640, at 4 (1977). See also Peter W. Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws Against Corruption*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 83 (2003) [hereinafter Schroth, *African Treaties and Laws Against Corruption*].

⁴³³ Schroth, *International Bribery Conventions*, supra note 432, at 596.

⁴³⁴ S. Res. 265, 94th Cong. (1975) (enacted). See also Memorandum Establishing the Task Force on Questionable Corporate Payments Abroad, 1 PUB. PAPERS 237 (Mar. 31, 1976).

commerce⁴³⁵ and that these practices had to be outlawed by participating countries in global trade in order not to place US firms at a competitive disadvantage.⁴³⁶

In a memo dated March 31, 1976, US President Gerald Ford named Commerce Secretary Elliot Richardson to head the cabinet-level Task Force on Questionable Corporate Payments Abroad ("Richardson Task Force").⁴³⁷ The Richardson Task Force recommended that "[a] treaty is required to assure that all nations, and the competing firms of differing nations, are treated on the same basis"⁴³⁸ in international business transactions. The US government subsequently launched a campaign to convince other countries to adopt policies criminalizing the bribing of foreign public officials in international business transactions.⁴³⁹

The US advice was favorably received by many countries and regions of the world. For example, in 1975, the Organization of American States (OAS) adopted a resolution condemning "in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprises; any demand for or acceptance of improper payments by any public or private person, as well as any act contrary to ethics and legal procedures."⁴⁴⁰ Other multilateral organizations enacted similar resolutions.⁴⁴¹ Unfortunately, these resolutions did not provide any enforcement or monitoring mechanisms and, in addition, attempts by the United States to get the international community to develop and adopt "a code which would outlaw illicit payments in the area of international trade"⁴⁴² were greeted by the international community with "deafening silence."⁴⁴³

Realizing that it might have to wait for many decades for the international community to finally adopt a convention outlawing the bribery of foreign public officials in international business transactions, the US Congress

⁴³⁵ S. Res. 265, 94th Cong. (1975) (enacted).

⁴³⁶ *Id.*

⁴³⁷ Memorandum Establishing the Task Force on Questionable Corporate Payments Abroad, 1 PUB. PAPERS 237 (Mar. 31, 1976).

⁴³⁸ Memorandum from Elliot Richardson, U.S. Sec'y of Commerce, to Sen. William Proxmire, Chairman, Comm. on Banking, Housing, and Urban Affairs 22 (June 11, 1976) (on file with the Gerald R. Ford Presidential Library).

⁴³⁹ See, e.g., Organization of American States (OAS), *Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises*, Permanent Council, CP/Res. 154 (167/75) (July 10, 1975).

⁴⁴⁰ *Id.* at 1328.

⁴⁴¹ For example, in December of 1975, the General Assembly of the United Nations passed a resolution condemning the "corrupt practices of transnational and other corporations, their intermediaries and others involved" G.A. Res. 3514 (XXX) (Dec. 15, 1975).

⁴⁴² Seymour Rubin, *International Aspects of the Control of Illicit Payments*, 9 SYRACUSE J. INT'L L. & COM. 315, 319-20 (1982). Professor Rubin was, at the time, the U.S. Representative to the UN Commission on Transnational Corporations.

⁴⁴³ *Id.* at 320.

proceeded with efforts to enact legislation criminalizing such practices.⁴⁴⁴ Thus, in 1977, the US Congress amended the Securities and Exchange Act of 1934 and enacted the FCPA,⁴⁴⁵ and it was signed into law by President Carter on December 19, 1977.⁴⁴⁶

The main function of the FCPA is to criminalize the bribery of foreign public officials by persons⁴⁴⁷ subject to US jurisdiction. The FCPA is designed to attack the bribery of foreign public officials by persons subject to US jurisdiction in two ways: (1) “the anti-bribery provisions . . . prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business[;]”⁴⁴⁸ and (2) “the accounting provisions . . . impose certain record keeping and international control requirements on issuers, and prohibit individuals and companies from knowingly falsifying an issuer’s books and records or circumventing or failing to implement an issuer’s system of internal controls.”⁴⁴⁹ Since it was enacted in 1978, the FCPA has been amended twice, in 1988 and 1998. The 1998 amendment was undertaken after the US ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and designed to put the FCPA in conformity with the provisions of the OECD Convention.

⁴⁴⁴ Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78m(b), m(d)(1), m(g)–m(h), 78dd-1–dd-3, 78ff (1998)); amended by the Foreign Corrupt Practices Act Amendment of 1988, Pub. L. 100-418, 102 Stat. 1107, 1415 (1988) (part of the Omnibus Trade and Competitiveness Act of 1988), and International Anti-Bribery and Fair Competition Act of 1988, Pub. L. 105-366, 112 Stat. 3302 (1998).

⁴⁴⁵ Foreign Corrupt Practices Act 15 U.S.C. § 78dd-1–dd-3 (2012). *See also* Sarah Bartle et al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265 (2014).

⁴⁴⁶ Each year, legal scholars provide a concise summary of the law, which is published in the American Criminal Law Review and the latest is a piece on foreign corruption. *See generally* Bartle et al., *supra* note 445. Since 1979, a Foreign Corrupt Practices Act Reporter has been published. It collects and publishes materials, including commentary, related to the Foreign Corrupt Practices Act including the statute itself, its legislative history, and amendments. *See generally* 1 FOREIGN CORRUPT PRACS. ACT REP. (Thompson Reuters). *See also* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS, 2D EDITION (2010) (one of the most accessible books written on the FCPA).

⁴⁴⁷ “Person” under the FCPA includes “natural” and “legal” persons. The anti-bribery provisions of the FCPA apply to three categories of *persons* and *entities*: (1) “‘issuers’ and their officers, directors, employees, agents, and shareholders; (2) ‘domestic concerns’ and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.” FCPA RESOURCE GUIDE, *supra* note 384, at 10.

⁴⁴⁸ *Id.* at 19.

⁴⁴⁹ *Id.*

B. The Provisions of the Foreign Corrupt Practices Act

As designed by the Congress of the United States, the Foreign Corrupt Practices Act (FCPA) was supposed to perform certain well-specified tasks, including, most importantly, regulating the way US “persons”⁴⁵⁰ conducted their international business transactions. Given the fact that investigations by the SEC in the aftermath of the Watergate Affair had revealed that more than 400 US corporations had paid millions of dollars as bribes to foreign public officials in an effort to obtain and/or retain business,⁴⁵¹ the US Congress hoped that the new law would help “restore public confidence in the integrity of the American business system.”⁴⁵² Specifically, the FCPA was designed to criminalize and fight the bribery of foreign public officials in international business transactions.⁴⁵³ The FCPA has two major and interrelated components, namely, (1) compliance and (2) penalties (civil and/or criminal).⁴⁵⁴

The FCPA’s “compliance” component establishes standards for record-keeping⁴⁵⁵ while the “penalties” component criminalizes certain foreign practices of US multinational firms.⁴⁵⁶ The provisions of the FCPA apply to specifically defined categories of US legal and natural persons defined in the statute as “issuers,”⁴⁵⁷ “domestic concerns,”⁴⁵⁸ and “persons other than issuers or domestic concerns.”⁴⁵⁹

The FCPA, however, does not specifically define the word “issuer.” Nevertheless, the way the word is used in the statute clearly indicates that it refers to legal or natural persons who have issued or own “a class of securities registered pursuant to section 781 of this title.”⁴⁶⁰ The statute, however, defines the expression “domestic concern.”⁴⁶¹ The term “domestic concern” means:

⁴⁵⁰ Both *natural* and *legal* persons. The law was amended in 1998 to also cover “foreign firms and persons who take any act in furtherance of such corrupt payment while in the United States.” ANTIBRIBERY PROVISIONS, *supra* note 431, at 2.

⁴⁵¹ See, e.g., Schroth, *African Treaties and Laws Against Corruption*, *supra* note 429; Schroth, *International Bribery Conventions*, *supra* note 432.

⁴⁵² ANTIBRIBERY PROVISIONS, *supra* note 431, at 2.

⁴⁵³ *Id.* The FCPA prohibits the bribery of foreign public officials in international business transactions involving U.S. legal and natural persons and certain foreign issuers of securities, as well as (since 1998), “foreign firms and persons who take any act in furtherance of such corrupt payment while in the United States.” *Id.*

⁴⁵⁴ See generally Foreign Corrupt Practices Act §§ 78dd-1–dd-3, 78m, 78ff.

⁴⁵⁵ *Id.* § 78m(b).

⁴⁵⁶ *Id.* § 78dd-1(a)(1)–(3).

⁴⁵⁷ *Id.* § 78dd-1.

⁴⁵⁸ *Id.* § 78dd-2.

⁴⁵⁹ Foreign Corrupt Practices Act § 78dd-3.

⁴⁶⁰ *Id.* § 78dd-1(a). Various authorities confirm this definition. First, the U.S. Attorney General’s guidance concerning the Department of Justice’s enforcement policy with respect to the FCPA of 1977 defines an issuer as “a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC.” ANTIBRIBERY PROVISIONS, *supra* note 431, at 3. Second, this

- (A) any individual who is a citizen, national, or resident of the United States; and
- (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.⁴⁶²

The FCPA defines “persons other than issuers and domestic concerns” as “any person other than an issuer that is subject to section 30A of the Securities and Exchange Act of 1934 or a domestic concern”⁴⁶³ who is doing business or engaged in business transactions in the territory of the United States, regardless of the methods utilized in these transactions.⁴⁶⁴

Under the provisions of the FCPA, only “issuers” are legally required to maintain “the record-keeping standards.”⁴⁶⁵ Issuers must keep records of all their foreign transactions and such records must be maintained according to or in accordance with standards prescribed by the FCPA.⁴⁶⁶ Specifically, any person⁴⁶⁷

definition of an “issuer” has been confirmed in several judicial decisions. *See, e.g.*, *U.S. v. Kay*, 359 F.3d 738, 762 (5th Cir. 2004).

⁴⁶¹ Foreign Corrupt Practices Act § 78dd-2(h)(1).

⁴⁶² *Id.*

⁴⁶³ *Id.* § 78dd-3(a).

⁴⁶⁴ The “territory of the United States” includes all 50 states, the District of Columbia—the federal capital territory—the various U.S. territories, possessions, and commonwealths. LINDA THOMPSON, *EXPLORING THE TERRITORIES OF THE UNITED STATES* (2014); ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (1989). The word “commonwealth” is used by four U.S. states in their official names. These are Kentucky, Massachusetts, Pennsylvania, and Virginia. Historically, the U.S. Government created “territories” to provide a governing structure for newly-acquired land during the time the borders of the United States were still evolving—examples include the Utah and Nevada territories. Most of these former territories eventually became states after attaining statehood. Others, however, became independent countries and these include the Federated States of Micronesia, Marshall Islands, and Palau. Nevertheless, these “countries” remain closely associated with the United States and under the Compact of Free Association (CFA), their citizens have access to the U.S. Healthcare system and several other public services. In addition, citizens of the CFA countries can work freely in the United States and the United States remains responsible for the defense of these countries. Other territories have acquired special status within the United States and these include Puerto Rico, Guam, Northern Marianas, U.S. Virgin Islands and American Samoa. For all intents and purposes, the citizens of these countries are also U.S. citizens. *See generally* JOHN F. GRABOWSKI, THOMAS G. AYLESWORTH, PATRICIA A. GABOWSKI, AND VIRGINIA L. AYLESWORTH, *U.S. TERRITORIES AND POSSESSIONS: PUERTO RICO, U.S. VIRGIN ISLANDS, GUAM, AMERICAN SAMOA, WAKE, MIDWAY, AND OTHER ISLANDS, MICRONESIA* (1992).

⁴⁶⁵ Foreign Corrupt Practices Act § 78m(b)(2)(A)-(B).

⁴⁶⁶ *Id.*

who is designated under the law as an “issuer” must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁴⁶⁸ In addition, every issuer must “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—”⁴⁶⁹

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.⁴⁷⁰

International bribery or bribery in international business transactions is criminalized by the FCPA for all three categories of natural and legal (or juridical) persons.⁴⁷¹ For any US national engaged in international business transactions, the most important part of this law is the one that defines and elaborates on what is unlawful conduct.⁴⁷² The section that defines what “unlawful” is, is identical for all three categories or classes of natural and legal persons and reads as follows:

It shall be unlawful . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.⁴⁷³

In order for a party to violate any of the provisions of the FCPA, the accused must approach and interact with any individual within the three categories

⁴⁶⁷ That is, a natural *or legal* person.

⁴⁶⁸ Foreign Corrupt Practices Act § 78m(b)(2)(A).

⁴⁶⁹ *Id.* § 78m(b)(2)(B).

⁴⁷⁰ *Id.* § 78m(b)(2)(B)(i)-(iv).

⁴⁷¹ Foreign Corrupt Practices Act §§ 78dd-1–dd-3. The statute grants each category of persons its own section: “issuers,” *id.* § 78dd-1 [Section 30A of the Securities & Exchange Act of 1934]; “domestic concerns,” *id.* § 78dd-2; “persons other than issuers and domestic concerns,” *id.* § 78dd-3. All three sections have identical language. *See generally id.* § 78m.

⁴⁷² Foreign Corrupt Practices Act § 78dd-1(a), -2(a), -3(a).

⁴⁷³ *Id.* § 78dd-1(a). The language in section 78dd-1(a) is identical to that in both section 78dd-2(a) & 78dd-3(a).

of persons designated by the statute—“foreign official”; “foreign political party or official thereof or any candidate for foreign political office”; and third persons who might be acting as an intermediary or agent “while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.”⁴⁷⁴

The Congress of the United States designed the FCPA specifically to fight bribery of foreign public officials by certain well-defined US persons in international business transactions.⁴⁷⁵ Thus, penalties can attach only in the case where the “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to pay, or authorization of the giving of anything of value”⁴⁷⁶ is for the purpose of:

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.⁴⁷⁷

Under the FCPA, accused persons are provided with two affirmative defenses, namely:

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country;⁴⁷⁸ or
(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—⁴⁷⁹

⁴⁷⁴ *Id.* § 78dd-1(a), -2(a), -3(a).

⁴⁷⁵ These are “issuers”, “domestic concerns”, and “persons other than issuers and domestic concern.” *See generally* *Id.* §§ 78dd-1-dd-3 (providing further elaboration).

⁴⁷⁶ *Id.* § 78dd-1(a).

⁴⁷⁷ Foreign Corrupt Practices Act § 788dd-1(a)(1)(A)–(B).

⁴⁷⁸ *Id.* § 788dd-1(c)(1).

⁴⁷⁹ *Id.* § 788dd-1(c)(2).

(A) the promotion, demonstration, or explanation of products or services;⁴⁸⁰ or (B) the execution or performance of a contract with a foreign government or agency thereof.⁴⁸¹

The FCPA also imposes both *civil* and *criminal* liabilities for violations of any of its provisions, by any natural or legal person who is subject to the authority of the statute.⁴⁸² If the government—that is, the DOJ—proves that the violation of any provision of the statute was “willful,” the offending party may, in addition to paying a fine, suffer imprisonment of up to twenty years.⁴⁸³

The US Congress placed enforcement of the FCPA in the hands of the US Attorney General and the SEC. In its enforcement activities, the SEC only imposes civil penalties and only in situations that involve securities.⁴⁸⁴ The Attorney General, however, has significantly broader powers to enforce the provisions of the FCPA and deal with those who violate the statute. The Attorney General can also issue opinions⁴⁸⁵ and guidelines,⁴⁸⁶ seek injunctive relief,⁴⁸⁷ “administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation.”⁴⁸⁸

Of critical importance to the fight against international corruption, especially that which deals with the bribery of foreign public officials, is the fact that the Attorney General has been granted power by the FCPA to investigate and bring criminal charges against any person⁴⁸⁹ alleged to have violated any of the provisions of the FCPA.⁴⁹⁰ The Government, through the SEC and the DOJ, can hold violators of the FCPA civilly and criminally liable. In addition, the government can impose additional punishments on persons convicted of violating the provisions of the FCPA.⁴⁹¹ For example, the government can prohibit such a convicted *person* from doing business with the government or any of its

⁴⁸⁰ *Id.* § 788dd-1(c)(2)(A).

⁴⁸¹ *Id.* § 788dd-1(c)(2)(B).

⁴⁸² Foreign Corrupt Practices Act §§ 788dd-2(g), -3(e), 78ff.

⁴⁸³ The statute uses such language as “[a]ny person who willfully violates any provision of this chapter”; “any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement”; “shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both.” *Id.* § 78ff(a). See also Snider & Kidane, *supra* note 298, at 703; Bartle et al., *supra* note 445.

⁴⁸⁴ The term “security” or “securities,” as used in the FCPA, is defined by the Securities Act of 1933. 15 U.S.C. § 77b(a)(1).

⁴⁸⁵ Foreign Corrupt Practices Act § 78dd-1(e).

⁴⁸⁶ *Id.* § 788d-1(d).

⁴⁸⁷ *Id.* § 788d-2(d).

⁴⁸⁸ *Id.* § 788d-2(d)(2).

⁴⁸⁹ As used here, “person” is as defined in the statute.

⁴⁹⁰ Foreign Corrupt Practices Act §§ 788dd-1–dd-3.

⁴⁹¹ FCPA RESOURCE GUIDE, *supra* note 384, at 69–71.

agencies,⁴⁹² debar such a party from receiving an export license—that is, the guilty party can lose its export privileges,⁴⁹³ and the government can impose such other penalties as provided for by law.⁴⁹⁴ Additionally, the guilty person may be subject to cross-debarment by multilateral development banks (MDBs), such as the World Bank, the African Development Bank, and others.⁴⁹⁵

Finally, the DOJ can make certain that all payments made in violation of the FCPA do not qualify as deductible business expenses under US tax laws.⁴⁹⁶ This is in line with the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁴⁹⁷

C. The Substantive Provisions of the FCPA

Although fighting corruption is an objective of the FCPA, the law's main emphasis is on fighting the bribery of foreign public officials in international business transactions.⁴⁹⁸ The “anti-bribery provisions of the FCPA make it unlawful for a US national (or certain foreign issuers of securities) to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.”⁴⁹⁹ To minimize the involvement of US “persons” in international corruption, the FCPA imposes certain duties on individuals and entities who are most likely to breach the provisions of the FCPA. Although studies of or conversations on the FCPA are usually dominated by the anti-bribery provisions, it is important to recognize that the “accounting and record-keeping” provisions, however, “constitute a more potent mechanism that has implications far greater than simply deterring improper payments to foreign officials.”⁵⁰⁰ These provisions, that is, the accounting and record-keeping provisions, affect not only the issuers’⁵⁰¹ global practices but also “directly affect domestic practices, including practices wholly unrelated to the making of improper inducements in foreign settings.”⁵⁰² If a natural or legal

⁴⁹² *Id.* at 70.

⁴⁹³ *Id.* at 71.

⁴⁹⁴ *Id.* at 69–71.

⁴⁹⁵ *Id.* at 70–71.

⁴⁹⁶ FCPA RESOURCE GUIDE, *supra* note 384, at 49.

⁴⁹⁷ OECD, *Convention*, *supra* note 250, at 28.

⁴⁹⁸ FCPA RESOURCE GUIDE, *supra* note 384, at 2; Foreign Corrupt Practices Act §§ 78dd-1–dd-3.

⁴⁹⁹ ANTIBRIBERY PROVISIONS, *supra* note 431, at 2.

⁵⁰⁰ DEMING, *supra* note 446, at 21.

⁵⁰¹ *Id.* at 43. The “accounting and record-keeping” provisions apply to the transactions of issuers and those of their “majority-owned foreign subsidiaries and their officers, directors, employees, and agents acting on behalf of an issuer.” *Id.*

⁵⁰² *Id.* at 41.

person fails to comply with the requirements of the accounting and recordkeeping provisions, they may be subjected to criminal prosecution.⁵⁰³

D. The FCPA and the Criminalization of Corrupt Behaviors

The FCPA's anti-bribery provisions criminalize "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" by an issuer.⁵⁰⁴ Specifically, the "person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person."⁵⁰⁵ The FCPA, however, does not require that the corrupt act actually succeed. All that is required for there to be a violation of the law is that there be an "offer or promise of a corrupt payment" by an issuer or his agent to a foreign public official.⁵⁰⁶

Although the FCPA does not refer specifically to a "mens rea" requirement, the Act nevertheless frequently uses words and expressions that are related to "mens rea" such as "knowingly" and "corruptly."⁵⁰⁷ In its reference to the accounting and record-keeping requirements of § 78m(b)(2), the FCPA states that "[n]o person shall *knowingly* circumvent or *knowingly* fail to implement a system of internal accounting controls or *knowingly* falsify any book, record, or account described in paragraph (2)."⁵⁰⁸ In its decision in *United States v. Kay*,⁵⁰⁹ the US Court of Appeals for the Fifth Circuit held that "[c]ongress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage."⁵¹⁰ An intent element is thus anticipated in the FCPA.

It has been argued by some scholars⁵¹¹ that African countries can "make use of the already developed jurisprudence of the FCPA, including the definition

⁵⁰³ Foreign Corrupt Practices Act 15 U.S.C. § 78m(b)(4)-(5). Criminal liability, however, only attaches to natural and legal persons who "knowingly circumvent" or "knowingly fail to implement" a system of accounting controls, or "knowingly falsify any book, record, or account described in paragraph (2)." *Id.* § 78m(b)(5). See also DEMING, *supra* note 446, at 43.

⁵⁰⁴ Foreign Corrupt Practices Act § 78dd-1(a). Note that an issuer is "a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC." ANTIBRIBERY PROVISIONS, *supra* note 431, at 3.

⁵⁰⁵ ANTIBRIBERY PROVISIONS, *supra* note 431, at 3.

⁵⁰⁶ *Id.*

⁵⁰⁷ Mbaku, *The International Dimension*, *supra* note 296, at 71.

⁵⁰⁸ Foreign Corrupt Practices Act § 78m(b)(5) (emphasis added).

⁵⁰⁹ *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

⁵¹⁰ *Id.* at 755.

⁵¹¹ Snider & Kidane, *supra* note 298.

of mens rea offered under Liebo⁵¹² to deal with corruption, especially that related to the bribery of their public officials. The next section will examine how the FCPA and other international laws can help African countries fight corruption, including the bribery of their public officials.

VIII. INTERNATIONAL LAW AND THE FIGHT AGAINST CORRUPTION IN AFRICA

A. Introduction

Corruption remains one of Africa's most important developmental challenges. As determined by several researchers,⁵¹³ "Africa loses an estimated 25% of its GDP to corruption, roughly US \$148 billion."⁵¹⁴ Professor PLO Lumumba, the Director of Kenya's Anti-Corruption Commission (KACC), puts corruption-related losses to African economies at 40% of GDP.⁵¹⁵ According to Antonio Maria Costa, Executive Director of the United Nations Office on Drugs and Crime,⁵¹⁶ Nigeria lost 400 billion USD to corrupt activities between 1960 and 1999.⁵¹⁷ The UN official then went on to lament the fact that these scarce resources could have been used to increase spending on projects that advance the human condition. For example, the 400 billion USD "could have translated into millions of vaccinations for children; thousands of kilometers of roads; hundreds of schools, hospitals and water treatment facilities that never came to be."⁵¹⁸ In countries such as Nigeria, then, the national losses from corruption represent a very significant portion of the GDP—these resources are pilfered by unscrupulous civil servants and politicians and either stashed away in foreign bank accounts or "invested" in real property outside the country, mostly in the developed economies.⁵¹⁹

⁵¹² *Id.* at 722 (referencing generally *United States v. Liebo*, 923 F. 2d 1308 (8th Cir. 1991)).

⁵¹³ See generally Ndiva Kofele-Kale, *Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT'L L. REV. 697 (2006).

⁵¹⁴ *Id.*

⁵¹⁵ See *40% of African Annual GDP Lost to Corruption Say Experts*, SUDAN TRIBUNE, (Aug. 20, 2010), <http://www.sudantribune.com/spip.php?article35935>. Professor Lumumba was giving a keynote address at a two-day symposium, organized by the Nairobi-based Education Center for Women in Democracy (ECWD), with assistance from the Commonwealth Foundation, and focused on development and rights issues in the East African countries of Kenya, Tanzania and Uganda. *Id.*

⁵¹⁶ See *Nigeria's Corruption Busters*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/frontpage/nigerias-corruption-busters.html> (last visited Sept. 13, 2016).

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*; See also CORRUPTION REPORT 2004, *supra* note 319, at 13 tbl.1.1.

According to a report produced by the African Union (AU) in 2002, corruption costs the continent more than 148 billion USD each year and significantly increases the costs of goods, resulting in less investment in productive capacity.⁵²⁰ Most of these scarce resources, pilfered from poor African countries, are taken by perpetrators of these corrupt activities to the developed countries, which in 2008 sent sub-Saharan Africa “development aid” of just 22.5 billion USD.⁵²¹ Given the extraordinary bleeding of the African economies through corruption and other illicit or opportunistic behaviors, it is important that development policy include an effective corruption cleanup program. Such an anti-corruption program must be made the top public policy issue in all countries in the continent. While corruption control and elimination are domestic issues, success will require the cooperation and assistance of the international community.

B. Fighting Corruption in the Public Sector

One of the most important areas for concern in African economies is the public sector, the purpose of which is, inter alia, to provide an enabling environment for entrepreneurial activities and wealth creation.⁵²² However, civil servants and politicians in many countries on the continent (especially those with significant endowments of natural resources) are highly susceptible to corrupt payments from multinational companies seeking to secure or retain local business.⁵²³ Thus, for these African countries, corruption cleanup programs must take into consideration the need to minimize the corrupting influences of foreign companies on public officials. An effective corruption control program must be able to carefully monitor and minimize the activities of both domestic and foreign suppliers of corruption.⁵²⁴

One of the most important foreign suppliers of corruption in the continent is the multinational company, which is seeking to influence public officials in order to have access to either government contracts or conduct

⁵²⁰ Elizabeth Blunt, *Corruption ‘Costs Africa Billions’*, BBC NEWS (Sept. 18, 2001), <http://news.bbc.co.uk/2/hi/africa/2265387>.

⁵²¹ OECD, *Development Aid at Its Highest Level Ever in 2008*, (Mar. 30, 2009) <http://www.oecd.org/development/developmentaidatitshighestleveleverin2008.htm>.

⁵²² MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 79, at 121–22. The government, for example, can use its regulatory powers to “provide a worker-friendly environment for the country’s labor resources; enhance entrepreneurial effort in order to maximize wealth creation; provide entrepreneurs and investors with reliable and predictable information; minimize the abuse of monopoly and monopsony power; and generally improve macroeconomic performance and the allocation of resources.” *Id.*

⁵²³ RONALD J. BURKE AND CARY L. COOPER, RESEARCH COMPANION TO CORRUPTION IN ORGANIZATIONS 184 (2009) (arguing, inter alia, that “[t]he most common forms of corruption in Africa is bribery, tax evasion, and accounting irregularities involving multinational companies (MNCs) and the government officials in these host countries.”)

⁵²⁴ See generally Mbaku, *Enhancing Africa’s Fight*, *supra* note 2.

business within the country, which may include exploitation and development of natural resources.⁵²⁵ Although many African countries have significantly improved their national legal and judicial systems during the last several decades,⁵²⁶ these countries still do not have the capacity to deal fully and effectively with corruption, especially that associated with the bribery of their public officials by foreign enterprises. In their efforts to control the corrupting activities of foreign companies, the African countries can benefit significantly from the assistance of many foreign institutions, such as the FCPA and the UNCAC.

One such international institution that can make a difference to the corruption control effort in the continent is the US FCPA. The FCPA,⁵²⁷ as discussed, criminalizes the bribery of foreign officials in international business transactions by US “issuers, domestic concerns, and other non-US persons and entities, as well as their officers, directors, employees, and agents, from corruptly offering or giving anything of value to foreign officials to obtain or retain business.”⁵²⁸ Since the FCPA’s enactment, the United States has made significant progress in enforcing this statute and compelling compliance.

Demas⁵²⁹ argues that there have been “five key trends”⁵³⁰ in the enforcement of the FCPA since its enactment in 1977. First, in recent years, the US government has adopted a relatively aggressive approach to the enforcement of the FCPA and has been “imposing larger penalties and bringing a growing number of actions against individuals.”⁵³¹ Second, the US government has increased its “jurisdiction over the activities of non-US companies with operations

⁵²⁵ See, e.g., TANGRI & MWENDA, *supra* note 28 (examining, inter alia, the contributions of foreign companies to public sector corruption in Africa, with specific reference to the case of Uganda).

⁵²⁶ For example, both Ghana and post-apartheid South Africa now have legal systems that are characterized by significant levels of judicial independence. See generally, Jonathan Klaaren, *Transformation of the Judicial System in South Africa*, 2012-2013, 47 GEO. WASH. INT’L L. REV. 481 (2015); Mark S. Kende, *Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers*, 23 TRANSNAT’L L. & CONTEMP. PROBS. 35 (2014); Justice Modibo Ocran, *Nation Building in Africa and the Role of the Judiciary*, 28 N. ILL. U. L. REV. 169 (2008); H. Kwesi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239 (2006).

⁵²⁷ See Foreign Corrupt Practices Act 15 U.S.C. §§ 78dd-1–dd-3, 78ff.

⁵²⁸ Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT’L L. REV. 315, 330 (2011).

⁵²⁹ *Id.*

⁵³⁰ *Id.* at 332.

⁵³¹ *Id.*; See also Philip Urofsky & Danforth Newcomb, *FCPA Digest Reports Increased Prosecution of Individuals, Emphasis on Industry Compliance*, SHEARMAN & STERLING LLP (Mar. 29, 2010), <http://www.mondaq.com/unitedstates/x/330394/White+Collar+Crime+Fraud/Recent+Trends+And+Patterns+In+The+Enforcement+Of+The+Foreign+Corrupt+Practices+Act>.

that touch upon the United States.”⁵³² Third, officials at the DOJ and SEC have continued to “encourage companies to disclose possible misconduct and to cooperate with law enforcement authorities in FCPA investigations,”⁵³³ a process that is expected to enhance the enforcement of the Act and minimize international corruption, including that in Africa. Fourth, cooperation among law enforcement agencies and institutions globally has increased significantly, especially after the events of September 11, 2001⁵³⁴ in the United States. Finally, the United States provides opportunities for offending businesses to reform themselves.⁵³⁵

During the last several decades, the US Government has significantly increased its enforcement activities against firms operating in various parts of the world, but particularly so, against US-based multinationals engaged in business operations in Africa. For example, during 2010, the US Government settled five important bribery cases with US-based companies engaged in various transactions in Africa.⁵³⁶ Specifically, the DOJ reached settlements with companies that had been accused of bribing officials of various African governments in order to obtain or retain business:

(1) On Monday March 1, 2010, the U.S. DOJ announced that “BAE Systems plc (BAES) [had] pleaded guilty . . . in U.S. District Court in the District of Columbia to conspiring to defraud the United States by impairing and impeding its lawful functions, to make false statements about its Foreign Corrupt Practices Act (FCPA) compliance program”—the BAE was accused of bribing public officials in South Africa in order to secure a contract to sell arms to the Government of the Republic of South Africa.⁵³⁷

⁵³² Demas, *supra* note 528, at 332.

⁵³³ *Id.*

⁵³⁴ In the early morning of September 11, 2001, nineteen (19) terrorists affiliated with the Islamic extremist group al-Qaeda, used hijacked planes as projectiles to attack various targets in the United States, notably, the World Trade Center in New York City and the Pentagon complex in Washington, D.C. The attacks caused the deaths of nearly 3,000 people, as well as significant property damage. *See generally* DON BROWN, *AMERICA IS UNDER ATTACK: SEPTEMBER 11, 2001: THE DAY THE TOWERS FELL* (2011); WILLIAM DUDLEY, *THE ATTACK ON AMERICA, SEPTEMBER 11, 2001* (2002); CAROLYN GARD, *THE ATTACK ON THE PENTAGON ON SEPTEMBER 11, 2001* (2002); LAUREN TARSHIS, *I SURVIVED THE ATTACKS OF SEPTEMBER 11TH, 2001* (2001); WILBORN HAMPTON, *SEPTEMBER 11, 2001: ATTACK ON NEW YORK CITY* (2011).

⁵³⁵ Demas, *supra* note 528, at 333.

⁵³⁶ *Id.*

⁵³⁷ Press Release, U.S. Dep’t of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine* (Mar. 1, 2010) <http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>. *See also* David Leigh & Rob Evans, *BAE Accused of £100m Secret Payments to Seal South Africa Arms Deal*, *GUARDIAN* (Dec. 5, 2008), <http://www.theguardian.com/world/2008/dec/06/bae-arms-trade>.

(2) On April 1, 2010, the U.S. DOJ announced that it had reached a settlement with Daimler AG and three of its subsidiaries to resolve FCPA investigations.⁵³⁸ The company and its subsidiaries agreed to pay a combined fine of U.S. \$185 million.⁵³⁹

(3) On June 28, 2010, the U.S. DOJ announced that it had reached a settlement with Technip S.A. to resolve FCPA-related charges. The company agreed to pay U.S. \$240 million in criminal penalties.⁵⁴⁰

(4) On November 4, 2010, the U.S. DOJ announced that it had reached a settlement with a global freight forwarding company and five oil companies and their subsidiaries to resolve FCPA investigations. The entities had agreed to pay U.S. \$156 million in criminal penalties.⁵⁴¹

(5) Finally, on December 27, 2010, the U.S. DOJ announced that it had reached a settlement with Alcatel-Lucent S.A. and three subsidiaries to resolve pending FCPA investigations against these entities.⁵⁴²

These penalties were assessed by the US Government against these companies for their complicity in the bribing of public officials in many countries, including several in Africa. For example, Alcatel-Lucent S.A. and its subsidiaries were accused of making “millions of dollars in improper payments to foreign officials for the purpose of obtaining and retaining business in Costa Rica, Honduras, Malaysia and Taiwan. In addition to the improper payments, Alcatel-Lucent also admitted that it violated the internal controls and books and records provisions of the FCPA related to the hiring of third-party agents in *Kenya*,

⁵³⁸ Press Release, U.S. Dep’t of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties: Combined Criminal and Civil Penalties of \$185 Million to be Paid (Apr. 1, 2010), <http://www.justice.gov/opa/pr/daimler-ag-and-three-subsidiaries-resolve-foreign-corrupt-practices-act-investigation>.

⁵³⁹ *Id.*

⁵⁴⁰ Press Release, U.S. Dep’t of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), <http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million>.

⁵⁴¹ Press Release, U.S. Dep’t of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties (Nov. 4, 2010), <http://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>.

⁵⁴² Press Release, U.S. Dep’t of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), <http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt>. The companies had agreed to pay more than 137 million USD to resolve all the alleged violations of FCPA provisions. *See id.*

Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda and Mali.”⁵⁴³ Through these enforcement actions, the US Government collected more than one billion USD in penalties.⁵⁴⁴

US enforcement efforts have also reached businesses engaged in activities in Nigeria⁵⁴⁵ and Egypt.⁵⁴⁶ In 2007, the US Government settled four additional cases involving companies that had been accused of bribing public officials in Rwanda, Senegal, Angola, and Nigeria.⁵⁴⁷

All these enforcement activities by the DOJ and the SEC augur well for the fight against the corruption of public officials in African countries. While it is true that the job of cleaning up corruption in Africa is the responsibility of each government, activities of international actors, such as the DOJ and the SEC, can significantly enhance the process.

C. The FCPA and African Efforts to Control Corruption

Throughout the continent, anti-corruption efforts are directed primarily at dealing with individuals, mostly in the public sector,⁵⁴⁸ who accept or ask⁵⁴⁹ for

⁵⁴³ *Id.*

⁵⁴⁴ Demas, *supra* note 528, at 333. BAE paid 400 million USD; Daimler paid 185 million USD; Technip paid 240 million USD; Alcatel-Lucent paid 137 million USD; and a global freight company and five oil and gas service companies paid 156 million USD. *See, e.g., id.* at n.88 & 93.

⁵⁴⁵ *See, e.g.,* Information as to Richard T. Bistrong at 10–12, *United States v. Bistrong*, No. 1:10-cr-00021-RJL (D.D.C. Jan 21, 2010), 2010 WL 11184755 (reciting the agreement to pay kickbacks to Nigerian government officials in order to facilitate the sale of law enforcement equipment). *See also* Press Release, U.S. Dep’t of Justice: Office of Pub. Affairs, German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty (Dec. 11, 2013) <http://www.justice.gov/opa/pr/german-engineering-firm-bilfinger-resolves-foreign-corrupt-practices-act-charges-and-agrees>.

⁵⁴⁶ Payment of Foreign Bribes, Litigation Release No. 21063, 95 SEC Docket 2768 (May 29, 2009) <https://www.sec.gov/litigation/litreleases/2009/lr21063>.

⁵⁴⁷ *See* Press Release, U.S. Sec. & Exch. Comm’n, SEC Institutes Settled Enforcement Action Against Bristow Group of Improper Payments to Nigerian Government Officials and Other Violations 201 (Sept. 26, 2007), <https://www.sec.gov/news/press/2007/2007-201.htm>; *see also* Press Release, U.S. Dep’t of Justice, Paradigm B.V. Agrees to Pay \$1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), http://www.justice.gov/archive/opa/pr/2007/September/07_crm_751.html; *see also* U.S. Dep’t of Justice, Two Former Executives of Itxc Corp Plead Guilty and Former Regional Director Sentenced in Foreign Bribery Scheme (July 27, 2007), http://www.justice.gov/archive/opa/pr/2007/July/07_crm_556.html; *see also* Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order 77 (Apr. 26, 2007), <https://www.sec.gov/news/press/2007/2007-77.htm>.

⁵⁴⁸ These are usually civil servants and politicians.

corrupt payments, as well as civil servants and politicians who directly and illegally appropriate public resources.⁵⁵⁰ In fact, most investigations of cases of embezzlement in Africa are usually directed at politicians and civil servants who are suspected of stealing public funds and are instigated by African or foreign governments, as well as foreign and domestic non-governmental organizations.⁵⁵¹

In the global fight against corruption, the US government, through the FCPA, has provided significant leadership. In Africa, for example, the DOJ has successfully prosecuted several corporations for complicity in the bribery of public officials⁵⁵² in Nigeria.⁵⁵³ From legal actions involving Nigeria alone, the DOJ had, by 2012, imposed and collected nearly \$2 billion worth of fines.⁵⁵⁴

⁵⁴⁹ This is usually referred to as the “demand” side of corruption. The business firms and their agents who bribe Africa’s public officials are said to be the suppliers of corruption and are hence, said to be on the supply side of corruption.

⁵⁵⁰ It is true that some corruption cases involve, as defendants, individuals and businesses that either bribe or attempt to bribe government officials in order to secure differential treatment by the latter in the distribution of public goods and services and/or in the enforcement of government regulations. *See generally* MBAKU, CORRUPTION IN AFRICA, *supra* note 1 (examining, inter alia, the various typologies of corruption in Africa).

⁵⁵¹ *See, e.g.,* Anne Look, *Investigations Underway into Corruption and Embezzlement in West Africa*, VOICE OF AMERICA (Dec. 5, 2012), <http://www.voanews.com/content/west-Africa-corruption-investigation/1558980.html> (reporting investigations orchestrated by the Government of Senegal, various NGOs, and the Government of France into the wealth of sitting politicians (and their families) in Equatorial Guinea, Gabon, and the Republic of Congo).

⁵⁵² According to the Organisation for Economic Co-operation and Development (OECD), “foreign public officials” include members of the legislative, executive, and judicial branches of government, whether appointed or elected; any individual who is legally empowered to perform a public function (e.g., head of a government parastatal); and any agent or official of a public international organization. *See* OECD, *Fight Against Bribery*, *supra* note 247.

⁵⁵³ By 2012, the US Department of Justice, exercising its jurisdiction under the FCPA, had been engaged in at least 35 enforcement matters arising out of the sub-Saharan African region alone. *See* Herbert A. Igbunugo, *Emerging Markets of Sub-Saharan Africa & the U.S. Foreign Corrupt Practices Act: A Cautionary Tale*, IGBUNUGO PARTNERS INT’L LAW FIRM, PLLC 10-25 (Mar. 2012), <http://igbanugolaw.com/wp-content/uploads/2015/02/Emerging-Markets-of-SSA-and-The-FCPA-A-Cautionary-Tale.pdf>. Although most of these actions involved Nigeria, this is due primarily to the fact that Nigeria is a major market for US firms, especially those involved in the various aspects of the oil and gas industry, as well as multinational companies headquartered in other developed countries, but whose shares or securities are traded in US markets.

⁵⁵⁴ On April 16, 2013, the US Department of Justice announced that it had reached an agreement with the Parker Drilling Company to resolve an FCPA investigation. *See* Press Release, U.S. Dep’t of Justice: Office of Pub. Affairs, Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay \$11.76 Million Penalty (Apr. 16, 2013), <http://www.justice.gov/opa/pr/parker-drilling-company-resolves-fcpa-investigation-and-agrees-pay-1176-million-penalty>. The US Department of Justice had brought action against the Parker Drilling Company, alleging that the company had made payments to an “intermediary, knowing that the payment would be used to corruptly influence the decision

While the bribery of foreign government officials in international business remains an important problem for the global economy, the continuing efforts of the US Government, through the FCPA,⁵⁵⁵ continue to have a very positive impact. The definition of who falls under the FCPA has enhanced the ability of the DOJ to have significantly broad discretion to prosecute a significant number of

of a Nigerian government panel reviewing Parker Drilling's adherence to Nigerian customs and tax laws." *Id.* On January 17, 2012, the US Department of Justice announced that it had reached an agreement with Marubeni Corporation to settle FCPA violations. *See* Press Release, U.S. Dep't of Justice: Office of Pub. Affairs, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), <http://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546>. The company had agreed to pay a fine of \$54.6 million to settle action taken against it by the Department of Justice for complicity in the payment of bribes to Nigerian government officials. *Id.* On April 6, 2011, the US Department of Justice announced that it had reached an agreement with the JGC Corporation to resolve FCPA violations—the company had agreed to pay a criminal penalty of \$218.8 million. *See* Press Release, Dep't of Justice: Office of Pub. Affairs, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), <http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188>. The company had been charged with complicity to bribe Nigerian government officials. *Id.* In making the announcement, Principal Deputy Assistant Attorney General Mythili Raman of the Justice Department's Criminal Division declared as follows: "The approximately \$1.5 billion in criminal and civil penalties that have been imposed on the members of the joint venture far exceed their profits from the scheme. Foreign bribery is a serious crime, and as this case makes clear, we are investigating and prosecuting it vigorously." *Id.*

⁵⁵⁵ On December 11, 2009, the US Department of Justice brought action against several defendants in the US District Court for the District of Columbia for conspiracy to violate the FCPA. *See* Jason Ryan, *FBI Sting Nabs Firearms Execs in Las Vegas in Bribery Case*, ABC NEWS (Jan. 19, 2010), <http://abcnews.go.com/Politics/fbi-sting-firearms-executives-arrested-bribery-investigation/story?id=9606388>. The case, *United States v. Goncalves, et al.* ("The African Gun Sting Case"; Court Docket No. 09-CR-335-RJL), involved an undercover sting operation which the US Federal Bureau of Investigation (FBI) had carried out in 2010 at a Las Vegas gun show convention. The FBI had created a fictitious arrangement to provide security equipment and weapons to outfit the presidential guard of a small African country. The arrangement included a \$1.5 million bribe to be paid the country's minister of defense. Through the scheme, the FBI arrested 22 men and women, all of whom were at the time in the military and law enforcement equipment industry, and charged them with conspiracy to bribe the minister of defense of the Republic of Gabon (République du Gabon) and therefore, violate provisions of the FCPA. However, on February 23, 2012, Judge Richard Leon dismissed the indictments and called the prosecution "a long and sad chapter in the annals of white collar criminal enforcement." Richard L. Cassin, *Feds Drop Case Against Final Africa Sting Defendants*, FCPA BLOG (Mar. 27, 2012), <http://www.fcpcblogger.com/blog/2012/3/27/feds-drop-case-against-final-africa-sting-defendants.html>. Despite what appears to have been a major setback for the DOJ, the FCPA remains a relevant and important tool in the fight against international corruption. The DOJ's failure in the African Gun Sting Case can be seen as a learning opportunity that can help DOJ staffers more effectively approach and tackle FCPA violations.

the multinational corporations that operate in Africa, including even those which are not headquartered in the United States.⁵⁵⁶

IX. OTHER INTERNATIONAL LEGAL INSTRUMENTS

A. Introduction

Although the responsibility for cleaning up corruption in each African country rests with the government and people of that country, the international nature of several forms of corruption⁵⁵⁷ mandates that these countries secure the cooperation of various international actors. The need for African countries seeking ways to eradicate domestic corruption to seek the cooperation of the international community arises from the “globalization of corruption”⁵⁵⁸ and the fact that “a significant proportion of Africa’s civil servants and political elites, who engage in corrupt activities, especially of the grand type, usually invest their ill-gotten gains overseas.”⁵⁵⁹

⁵⁵⁶ For example, non-US companies can come under the jurisdiction of the FCPA if their securities are listed in the United States. Since 1998, the FCPA also applies to “foreign firms and persons who take any act in furtherance of . . . a corrupt payment while in the United States.” ANTIBRIBERY PROVISIONS, *supra* note 431. Note that the United States, as used here, includes the 50 States that constitute the United States, and its 16 territories (e.g., Puerto Rico, Guam, Northern Mariana Islands, US Virgin Islands, and American Samoa).

⁵⁵⁷ For example, the bribery of public officials in African countries by corporations is based outside the continent and their agents. There is also the fact that a lot of the money corruptly accumulated by African political and economic elites is often transferred abroad and “invested” in foreign banks or used to purchase other forms of investment assets in the developed countries. Peter Anassi, in his analysis of corruption in Kenya, argues that “[o]ne thing we know for sure is that, when leaders have accumulated their ill-gotten loot, they normally hide and bank them in foreign banks.” PETER ANASSI, CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE 182 (2005). Capital flight in Africa has been linked to corruption and many researchers and development economists have argued that in order for there to be successful return of the funds lost to African economies through capital flight, these countries would have to significantly reduce domestic corruption. The argument is that even if the resources taken abroad, either legally or illegally, are successfully returned to the economies of origin in Africa, they are likely to be returned abroad unless these countries can clean up corruption and provide themselves with governance systems that are characterized by transparency, accountability, and adherence to the rule of law. *See generally* S. IBI AJAYI & LÉONCE NDIKUMANA, CAPITAL FLIGHT FROM AFRICA: CAUSES, EFFECTS, AND POLICY ISSUES (2014) (arguing, *inter alia*, that repatriation of looted African funds back to the continent can only be successfully undertaken if African countries clean up domestic corruption); INT’L MONETARY FUND, EXTERNAL DEBT AND CAPITAL FLIGHT IN SUB-SAHARAN AFRICA (S. Ibi Ajayi & Mohsin S. Khan eds., 2000) (arguing, *inter alia*, that corruption is one of several “plausible” explanations for capital flight).

⁵⁵⁸ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 71.

⁵⁵⁹ *Id.*

Quite often, the civil servant or political elite who has illegally appropriated public funds and stored them abroad dies or flees overseas and the country is then forced to seek the aid of the international community to locate, secure, and return those funds to the affected national treasury.⁵⁶⁰ Members of the international community, hence, using their various legal instruments,⁵⁶¹ can assist African countries in fighting and eradicating corruption by providing governments in these countries with the necessary legal assistance (and other forms of aid) to (1) extradite suspects who have fled their home countries and settled abroad in order to avoid being prosecuted for their corrupt actions; (2) locate and return all corruptly acquired funds to their rightful owners; and (3) legally constrain the ability of multinational firms to engage in corrupt activities, including the bribery of foreign government officials, in international business transaction.

B. The Extradition of Suspects

When an individual accused or convicted of engagement in corrupt activities in an African country flees the jurisdiction⁵⁶² and seeks refuge abroad,⁵⁶³ the African country must seek to first, find the person, and then, bring him or her back home to face trial for his complicity in the alleged corrupt activities. Most African countries usually do not have the capacity to engage in what can be relatively expensive repatriation proceedings and hence, they must seek the

⁵⁶⁰ Sani Abacha, the military dictator who ruled Nigeria for five years after a coup in 1993, is said to have stolen as much as 4.3 billion USD from the public treasury and transferred the monies to European banks. See David Smith, *Switzerland to Return Sani Abacha's 'Loot' Money to Nigeria*, THE GUARDIAN (Mar. 18, 2015), <http://www.theguardian.com/world/2015/mar/18/switzerland-to-return-sani-abacha-loot-money-to-nigeria>. Since his death in June 1998, while still in office, the Nigerian Government has been trying to recover the money that he allegedly stole from the country. Recently, Switzerland announced that it would transfer 380 million USD to Nigeria, under the supervision of the World Bank, being part of the money that Nigerian authorities argue was stolen by the late dictator and stashed away in European banks, including those in Switzerland. See Smith, *supra*. Another African country that is still searching for money stolen by its former leaders and “invested” abroad, primarily in European banks, is the Democratic Republic of Congo (for money allegedly stolen by Mobutu Sese Seko, former dictator of Zaire/DRC). See generally PETER YORK, *DICTATOR STYLE: LIFESTYLES OF THE WORLD'S MOST COLORFUL DESPOTS* (2006) (arguing, inter alia, that the people of the Democratic Republic of Congo have not yet been able to locate the large sums of money stolen and stashed abroad by their former leader, Mobutu).

⁵⁶¹ For example, look at the FCPA, or the UK Bribery Act of 2010.

⁵⁶² “Jurisdiction,” as used here, includes all the geographic areas that are legally subject to the control of the country’s political authorities and thus, includes the entire country.

⁵⁶³ “Abroad” refers to geographic areas that are not part of the country of record and hence, are outside the control of the country’s political authorities. In the case of African countries, a person accused of engagement in corrupt activities can escape to a country in Africa, Europe, or any other part of the world.

cooperation and assistance of the international community in order to effectively undertake both the search for and extradition of the alleged corrupt person. The United Nations Convention Against Corruption⁵⁶⁴ can provide African countries that are seeking to secure and repatriate their nationals (or any other accused criminals) who have fled the jurisdiction and settled abroad in order to escape prosecution, several legal mechanisms to assist them in their extradition efforts.⁵⁶⁵

Article 43 of the UNCAC provides legal avenues for African countries⁵⁶⁶ to secure the cooperation of States Parties in their efforts to bring home accused persons who have fled abroad to escape prosecution. The assistance that States Parties may offer each other under Article 43 includes using national legal systems to assist in criminal investigations.⁵⁶⁷ According to Article 43(1):

States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider *assisting each other* in investigations of and proceedings in civil and administrative matters relating to corruption.⁵⁶⁸

Thus, an African country that is searching for the whereabouts of a citizen (or other accused) who has fled the jurisdiction in order to avoid being held responsible for his or her alleged participation or complicity in corrupt activities, can invoke the provisions of Article 43 as a way to secure the cooperation and assistance that it needs from other States Parties to carry out an effective investigation and secure and extradite the accused person or persons back to the relevant jurisdiction.

But what is the nature of international cooperation? According to Article 43(2):

In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offense within the same category of offense or denominate the offense by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offense under the laws of both States Parties.

⁵⁶⁴ UN Convention Against Corruption, *supra* note 294.

⁵⁶⁵ *Id.* at 164–73.

⁵⁶⁶ The Convention applies to all countries, including those in Africa, which are States Parties to the Convention. *See id.* at 164.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.* (emphasis added). Note the language employed by Article 43(1)—“shall consider assisting” as opposed to “shall assist” and thus, “requested countries” have significant discretion in deciding whether to render assistance or not.

Article 43(2) significantly enhances the ability of a requesting African country to seek and secure the cooperation and assistance of other States Parties, including those in Africa, in investigating crimes committed in their jurisdictions by accused individuals who later flee to the jurisdictions of the requested States Parties. While Article 43 speaks only to “cooperation” and “assistance” related to “investigations” and “proceedings” in corruption, Article 44 speaks directly to “extradition.”⁵⁶⁹ Article 44 shall:

apply to the offenses established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offense for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.⁵⁷⁰

A requesting country can avail itself of the provisions of Article 44 only when and if the offenses that it is investigating are those “established in accordance with [the] Convention”⁵⁷¹ and where “the person who is the subject of the request for extradition is present in the territory of the requested State Party.”⁵⁷² Additionally, the criminal offense for which the country is seeking extradition must be a punishable offense under the laws of both the requesting and requested countries—that is, the laws of both States Parties.⁵⁷³ Although these three elements⁵⁷⁴ must be present or met before Article 44 can apply, the requesting party or country can still receive a favorable reply to its request even if the offense for which the requesting country is seeking extradition is not punishable under the laws of the requested State Party.⁵⁷⁵ Paragraph 2 of Article 44 makes this possible:

Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a

⁵⁶⁹ The title of article 44 is “Extradition.” *See id.*

⁵⁷⁰ UN Convention Against Corruption, *supra* note 294, at 164.

⁵⁷¹ *Id.*

⁵⁷² *Id.* Note that, as used in the UN Convention, “requesting country” means the country that is making the request for help in locating and extraditing the alleged criminal and “requested country” is the country in which the subject of the investigation (i.e., the escaped alleged criminal) currently resides.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.* The three elements are: (1) the offenses being investigated are among offenses established in accordance with the Convention; (2) the subject of the request is present in the territory of the requested State Party; and (3) the criminal offense in question is one that is punishable under the laws of both States Parties. *See* UN Convention Against Corruption, *supra* note 294, at art. 44.

⁵⁷⁵ *Id.*

person for any of the offenses covered by this Convention that are not punishable under its own domestic law.⁵⁷⁶

Article 44, which consists of 18 paragraphs, deals exclusively with various scenarios under which a State Party may seek the extradition, not only of its citizens who are alleged to have engaged in criminal activities and have fled overseas to avoid prosecution, but also of nationals or residents of the requested State Party who are alleged to have committed criminal offenses or are alleged to be complicit in criminal activities in the jurisdiction of the requesting State Party.⁵⁷⁷

There is always the fear that in their zeal to prosecute people for their alleged involvement in criminal activities, the government may use the law to oppress various individuals and groups within its jurisdiction. Article 44 provides for the protection of individuals who suffer prosecution solely on account of their “sex, race, religion, nationality, ethnic origin or political opinions.”⁵⁷⁸ Additionally, if “compliance with [the request to extradite] would cause prejudice to that person’s position for any one of these reasons”⁵⁷⁹ [i.e., the reasons stated in paragraph 15], then the obligation to extradite would not apply.

C. The Recovery of Assets

The return to Africa of assets illegally taken out of the continent and “invested” in foreign economies, including those that were accumulated through corrupt means, is an essential part of the effort by African countries to deal with corruption. The UNCAC also considers the return of assets to their rightful owners as an important part of the effort to combat corruption globally.⁵⁸⁰ If the corruption cleanup program of any African country is to succeed, “the country must be able to use all resources available to it to prosecute those alleged to have committed corrupt acts, get those who are convicted of corruption to pay restitution, and where appropriate, recover all assets corruptly obtained by the convicted felon, including those assets stored in foreign locations.”⁵⁸¹

Asset recovery is considered by the UNCAC to be so important to the global fight against corruption that an entire chapter is devoted to it.⁵⁸² In the first article of Chapter V,⁵⁸³ the Convention states as follows: “The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance

⁵⁷⁶ *Id.*

⁵⁷⁷ *See generally id.* at 164–66.

⁵⁷⁸ *Id.* at 166.

⁵⁷⁹ UN Convention Against Corruption, *supra* note 294,

⁵⁸⁰ *Id.* at 173.

⁵⁸¹ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 73 (footnotes omitted).

⁵⁸² UN Convention Against Corruption, *supra* note 294, at 173–78.

⁵⁸³ *Id.* at 173.

in this regard.”⁵⁸⁴ In order to help countries (i.e., States Parties) recover assets corruptly extracted from their economies, the UNCAC offers to assist these countries in various areas. For example, the Convention assists States Parties in the “[p]revention and detection of transfers of proceeds of crime.”⁵⁸⁵ Article 52’s provisions complement the Convention’s “[m]easures to prevent money-laundering.”⁵⁸⁶ To assist States Parties both prevent, as well as detect the transfer of corruptly acquired resources from the local economy to off-shore havens, the UNCAC mandates that

[w]ithout prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.⁵⁸⁷

Few African economies currently have the resources and capacity to mount ongoing investigations to monitor, detect, and prevent the illegal transfer of assets from their economies to foreign destinations. The provisions of Article 52(1), if adhered to by the requested State Party, that is the one in which the stolen assets or the accused person currently reside, can enhance the ability of the African countries to fight corruption.⁵⁸⁸

⁵⁸⁴ *Id.*

⁵⁸⁵ *See generally id.* at 174–75.

⁵⁸⁶ *See generally id.* at 153–54.

⁵⁸⁷ UN Convention Against Corruption, *supra* note 294, at 174.

⁵⁸⁸ When Mobutu died in 1997, it was estimated that he had stashed away as much as 5 billion USD, embezzled from the economy of the Democratic Republic of Congo (then called Zaire) in foreign banks. Nigeria’s military ruler from 1993 until his death in 1998, Gen. Sani Abacha, is alleged to have stolen between 2–5 billion USD from the Nigerian economy and transferred it to foreign banks. CORRUPTION REPORT 2004, *supra* note 319, at 13 tbl.1.1. Although it is common knowledge in Nigeria and the DRC that the leaders of these countries embezzled large sums of money from their national treasuries while in power, the citizens of these countries do not know exactly how much money was actually stolen or where this money is located. These countries, however, have not given up the search. On March 17, 2015, Switzerland announced that \$380 million of some of the money looted by Abacha from the Nigerian economy had been found and would be returned to Nigeria with the help of the World Bank. *See Smith, supra* note 560.

The UNCAC also provides States Parties with “[m]easures for direct recovery of property.”⁵⁸⁹ According to Article 53,

Each State Party shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and
- (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

If an African country determines that resources looted from its economy (these could include resources that have been directly and illegally appropriated or those that have been corruptly obtained) have been transferred to State Party X and currently reside there, the afflicted country can initiate legal action in State Party X to recover the resources. Through the legal action, the aggrieved country can “establish title to or ownership of [the] property”⁵⁹⁰ and if the legal action is successful, State Party X’s courts would order the convicted persons to “pay compensation to the African country, or in the case where the African country is seeking recovery of assets, to have those assets handed over to the African country” (i.e., the aggrieved party).⁵⁹¹

The UNCAC provides “[m]echanisms for recovery of property through international cooperation in confiscation.”⁵⁹² Under the provisions of Article 54(1)(a), “[e]ach State Party, in order to provide mutual legal assistance pursuant to Article 55 of this Convention with respect to property acquired through or involved in the commission of an offense established in accordance with this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party.”⁵⁹³ Article 54’s main objective is to guarantee international cooperation by providing the wherewithal

⁵⁸⁹ UN Convention Against Corruption, *supra* note 294, at 175.

⁵⁹⁰ *Id.*

⁵⁹¹ Mbaku, *Enhancing Africa’s Fight*, *supra* note 2, at 75. *See also* UN Convention Against Corruption, *supra* note 294, at 175.

⁵⁹² UN Convention Against Corruption, *supra* note 294, at 174–75.

⁵⁹³ *Id.* at 175.

for “mutual legal assistance”⁵⁹⁴ in recovering assets taken illegally from the economies of States Parties.⁵⁹⁵ Under this provision, then, an African country that is “armed with a legitimate order of confiscation or seizure of property (or to freeze property) stolen from its economy and transferred abroad, can present that order to a competent judiciary authority in the economy of the State Party in which the property is currently located, for action.”⁵⁹⁶

Article 54⁵⁹⁷ mandates that the State Party in which the looted property is located should provide the requesting party with “the necessary legal assistance to ‘freeze the property’ pending resolution of its ownership through the courts, or transfer title and hence, the property, to the requesting country, where ownership has been duly established by a competent court of law, either in the requesting or requested State Party.”⁵⁹⁸

The UNCAC provides avenues for “[i]nternational cooperation for purposes of confiscation.”⁵⁹⁹ Specifically,

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

The provisions of Article 55(1), together with other articles of the UNCAC, provide critical legal avenues for aggrieved States Parties to seek and

⁵⁹⁴ *Id.*

⁵⁹⁵ Such resources include those which, although transferred abroad through legitimate means, were illegally or corruptly extracted from the African economies.

⁵⁹⁶ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 75. See also UN Convention Against Corruption, *supra* note 294, at 175–76.

⁵⁹⁷ UN Convention Against Corruption, *supra* note 294, at 175–76.

⁵⁹⁸ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 76.

⁵⁹⁹ See generally UN Convention Against Corruption, *supra* note 294, at 176–77.

secure the cooperation of other States Parties in retrieving property stolen or illegally taken out of the former.⁶⁰⁰

The UNCAC does provide for other forms of cooperation⁶⁰¹ and assistance in the “return and disposal of assets,”⁶⁰² and international cooperation for

the purpose of preventing and combating the transfer of proceeds of offenses established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions.⁶⁰³

Articles 51-58 of the UNCAC provide the wherewithal for various types of international cooperation. That cooperation is designed to help aggrieved States Parties meet certain well-defined objectives and these include enhancing the ability of these countries to (1) legally determine if resources that have been corruptly sourced from their economies have been taken abroad; (2) determine if other illegally obtained resources have been transferred abroad; (3) seek the identity of individuals responsible for making such transfers; (4) ascertain the foreign location of the resources and the individuals responsible for transferring them there; and (5) find ways to recover these resources and bring them back home.⁶⁰⁴

⁶⁰⁰ Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 77.

⁶⁰¹ UN Convention Against Corruption, *supra* note 294, at 177. Under the provisions of Article 56, each State Party must provide “information on proceeds of offenses established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.” *Id.*

⁶⁰² *See generally* UN Convention Against Corruption, *supra* note 294, at 177–78. According to this article, “[p]roperty confiscated by a State Party pursuant to Article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.” *Id.* at 177.

⁶⁰³ *Id.* at 178.

⁶⁰⁴ *See generally id.* at 173–78. *See also* Mbaku, *Enhancing Africa's Fight*, *supra* note 2, at 77.

D. Legally Constraining Corporations and their Agents Operating in African Countries

The FCPA⁶⁰⁵ imposes several legal constraints on US legal and natural persons involved in international business transactions and these include those undertaken in African countries. In this section, I briefly highlight the main provisions of the Act that speak directly to the corruption of foreign public officials in international business transactions.⁶⁰⁶ The FCPA's prohibitions apply specifically to "issuers," "domestic concerns," and "persons other than issuers or domestic concerns."⁶⁰⁷ These natural and legal persons are prohibited by the Act from undertaking or taking part in certain types of business practices—anyone or entity falling in the category of persons listed above is prohibited by the FCPA from bribing "any foreign official, . . . any foreign political party or official thereof or any candidate for foreign political office" in order to secure or retain business.⁶⁰⁸

The constraints on US corporations and their agents involved in international business transactions severely minimize their ability to engage in corrupt practices, including the bribing of public officials in African countries. While the number of legal actions taken by the US DOJ under the FCPA and the fines collected have been quite significant and continue to rise,⁶⁰⁹ some scholars have noted that the DOJ has faced major setbacks in some of its FCPA prosecutions.⁶¹⁰ These scholars cite to *United States v. Goncalves* (the so-called African Gun Sting case) in which the government failed to convict any of the defendants at trial.⁶¹¹ Despite what appears to be a setback, the FCPA remains an important legal tool to minimize corruption and help create a much more competitive global marketplace.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)⁶¹² also prohibits the bribery of foreign public officials in international business transactions. According to Article 1 of the OECD Convention,

⁶⁰⁵ Foreign Corrupt Practices Act 15 U.S.C. §§ 78dd-1–dd-3.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.* §§ 78dd-1(a)(1)–(2).

⁶⁰⁹ Nellie R. Dunderdale, Note, *The Influence of Corruption on the Developing World: the Foreign Corrupt Practices Act, International Commerce and Africa*, 33 PITT. J. L. COM. 261, 274 (2015).

⁶¹⁰ *Id.*

⁶¹¹ *Id.* Note that some defendants were acquitted and some pled guilty. However, on February 22, 2012, Judge Leon of the US District Court for the District of Columbia, dismissed the indictments with prejudice for Amaro Goncalves and 15 co-defendants, effectively quashing the earlier convictions and setting all 22 defendants free. See Igbanugo, *supra* note 553, at 9, 10.

⁶¹² OECD, *Convention*, *supra* note 250, at 13.

[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

In a separate document titled “OECD Guidelines for Multinational Enterprises,”⁶¹³ the OECD further elaborates the constraints imposed on multinational enterprises operating in the international economy. For example, in Section VII of the guidelines, the OECD states as follows: “Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion.”⁶¹⁴

By 2015, many members of the OECD had enacted legislation (1) making the bribery of foreign public officials in international business transactions a criminal offense punishable by domestic law; and (2) denying tax deductibility to bribes paid to foreign public officials.⁶¹⁵

The United States remains the global leader in the fight against international corruption, particularly that which involves the bribery of foreign public officials in international business transactions, especially when one considers the significant successful prosecutions achieved under the FCPA since it came into being in 1977.⁶¹⁶ Developed countries, such as the United Kingdom, which have a long history of providing leadership in international business transactions, however, have not been able to provide the same type of leadership in the international anti-corruption movement. There is hope, however, that passage of the UK Bribery Act 2010 (which came into force on July 1, 2011) could provide Her Majesty’s Government with the wherewithal to begin providing some leadership in the struggle to eradicate global corruption.⁶¹⁷ Unfortunately, the UK judicial system has not yet developed any significant jurisprudence on the

⁶¹³ OECD, *OECD Guidelines for Multinational Enterprises*, 47 (May 25, 2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

⁶¹⁴ *Id.*

⁶¹⁵ In these countries, bribery and other forms of corruption were already criminal offenses under domestic law. The passage of new laws or the amending of existing ones simply brought under domestic law the bribery of foreign public officials in international business transactions and made such behavior illegal. Some OECD members, such as the United Kingdom, also passed specific anti-bribery laws. The United Kingdom passed its Bribery Act in 2010. *See* Bribery Act 2010, c. 23 (U.K.).

⁶¹⁶ *See, e.g.,* Kimberly Anne Elliott, *Corruption as an International Policy Problem*, in *POLITICAL CORRUPTION: CONCEPTS & CONTEXTS* 909 (Arnold J. Heidenheimer & Michael Johnstons eds., 2002).

⁶¹⁷ *Id.*

enforcement of this act. So, it is too early to determine the extent to which the UK Bribery Act would affect Africa's efforts to deal with the bribery of their public officials in international business transactions or other forms of corruption.⁶¹⁸

X. CONCLUSION

Today, corruption remains one of the most intractable problems in Africa. In discussing the UK Bribery Act 2010, the Government of the UK states that "[b]ribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted."

The concerns of the Government of the UK regarding bribery directly relate to African countries. Throughout the continent, bribery and other forms of corruption have created social and economic problems and hampered the ability of governments to improve the quality of life for their citizens. Thus, it is important for all African countries to deal fully and effectively with corruption in all its forms, and this includes especially the bribery of their public officials by foreign corporations trying to secure or retain business.

Given the global nature of corruption, an effective program to eradicate it can benefit significantly from international law. Each African country must engage in institutional reforms to provide itself with a governing system that guarantees the rule of law—that is, one characterized by a separation of powers with checks and balances, including an independent judiciary. The latter is not only critical to the effective control of corruption, but it is also necessary in any efforts by African countries to solicit and secure the assistance of international law. In order for African countries to benefit from international law in their efforts to fight corruption, they must have legal and judicial systems that have the capacity and wherewithal to provide a fair trial in criminal corruption proceedings, as well as engage productively with the international community. For if African

⁶¹⁸ Early this year (2016), a UK court convicted businessman Peter Chapman for bribing an unnamed public official in Nigeria in order to secure a "multi-million-euro" contract for the benefit of an Australian manufacturing firm that Mr. Chapman had managed. *See, UK Court Convicts Businessman for Bribing Nigerian Officials*, PUNCH (May 13, 2016), <http://punchng.com/uk-court-convicts-businessman-bribing-nigerian-officials/>. In February 2012, former governor of Delta State in Nigeria, pleaded guilty to 10 offenses related to corruption and conspiracy to launder funds at Southwark crown court in London and was sentenced to 13 years in jail. *See* Mart Tran, *Former Nigerian State Governor James Ibori Receives 13-Year Sentence*, THE GUARDIAN (UK) (Apr. 17, 2012), <https://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced>; *Nigeria: UK Conviction a Blow Against Corruption: Nigerian Politician Stole Millions, Laundered Fortune Overseas*, HUM. RTS. WATCH (Apr. 17, 2012), <https://www.hrw.org/news/2012/04/17/nigeria-uk-conviction-blow-against-corruption>.

countries are unable to develop the necessary capacity to secure the cooperation and assistance of international legal institutions in the struggle against corruption, they would fail to benefit from international law's expertise in dealing with global corruption, including the bribery of foreign public officials in international business transactions.

The aid offered by international law can provide African countries with significant benefits. First, international law can help African countries secure individuals accused of engagement in corrupt activities who have escaped abroad to avoid prosecution. Returning accused individuals to face justice at home would not only help an African country improve its domestic legal system, but would also serve as a warning to citizens and other residents of the country that if they engage in similar activities, they would also be prosecuted. In addition, prosecuting criminals in the jurisdiction in which the alleged crimes were actually committed can enhance the role played by the judicial system in controlling corruption, maintaining law and order, and helping improve adherence to the rule of law.

Second, international law can help African countries locate and repatriate all monies that have been taken out of the country illegally, including the proceeds of corrupt activities held in foreign bank accounts. Poverty is a major problem for all African countries—these countries do not have enough resources to fight poverty and improve the living conditions of citizens. Yet, every year, significant amounts of money are corruptly taken out of each African country and “invested” abroad, out of the reach of domestic economies. Returning these resources to Africa can help build necessary capacity for creating jobs and generating wealth that can be used to fight poverty and improve the living conditions of many citizens. For example, as determined by Transparency International, Mobutu stole as much as 5 billion USD⁶¹⁹ from the impoverished economy of Zaire (now Democratic Republic of Congo). There is no evidence that the money has ever been found and returned to the country. Yet this money could have been used to provide the social overhead capital (e.g., roads, bridges, hospitals and other healthcare facilities, schools, and electricity-generating plants) needed to develop the country.

Of course, the ability of each African country to utilize the repatriated resources effectively for development would depend on the quality of each country's governance architecture; where there is a governing system characterized by adherence to the rule of law, the returned monies are more likely to be used in ways that generate social benefits instead of being misappropriated again. Nevertheless, even if these countries currently do not have the necessary governmental capacity to promote effective public policies, the returned resources can be used to significantly improve national institutions and develop the necessary capacity.

Third, international law can legally impose constraints on all legal and natural persons within their jurisdictions that participate in international business

⁶¹⁹ CORRUPTION REPORT 2004, *supra* note 319.

transactions, including those carried out or undertaken in African economies. For example, the US FCPA criminalizes the bribery of foreign public officials in international business transactions. In addition, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions prohibits the bribery of foreign public officials in international business transactions. In recent years, many developed countries, including members of the OECD, have enacted legislation criminalizing the bribery of foreign public officials in international business transactions.

Today, multinational companies headquartered in the highly developed countries are so powerful that they pose a threat to the governments of many poor countries, including those in Africa. In fact, with the enormous profits that these companies earn from engaging in international business transactions, they can easily bribe public officials in the African countries and undermine the functioning of these governments. Thus, the legal constraints imposed on these companies by their national governments (e.g., the US FCPA and the UK Bribery Act) can go a long way in minimizing the ability of the multinational companies to corrupt public officials in African countries. In addition, such constraints can also help Africa's fight against corruption.

Fourth, regarding extradition of accused individuals who have escaped abroad to avoid prosecution (as well as the repatriation of monies illegally taken out of the African economies) the UNCAC provides different legal mechanisms that can be utilized by African countries to aid them in their efforts to locate and return to their jurisdiction, accused individuals who have escaped and now reside abroad. The UNCAC also provides African countries with legal mechanisms to prevent and detect the proceeds of criminal activities.⁶²⁰ Of course, maintaining "international peace and security," as well as cooperating in solving, and coordinating the solution of, international economic and social problems, are major objectives of the United Nations.⁶²¹ Helping African and other countries deal with corruption falls directly within the purview of these objectives.

Fifth, in recent years, transnational terrorism has risen as a major problem not only to security in many countries, including the developed industrial economies, but also to global trade. Corruption, especially that involving public officials, can help in the financing of terrorism and terrorist activities.⁶²² Some researchers and policymakers have argued that there is a mutually reinforcing relationship between corruption and terrorism and that corruption compromises

⁶²⁰ See generally UN Convention Against Corruption, *supra* note 294. Of specific relevance are articles 2, 23, 31, 37, 46, 52, 55, 62, and 63.

⁶²¹ *What We Do*, UNITED NATIONS, <http://www.un.org/en/index.html> (last visited Aug. 1, 2016).

⁶²² See generally LOUISE I. SHELLEY, *DIRTY ENTANGLEMENTS: CORRUPTION, CRIME, AND TERRORISM* (2014) (examining, inter alia, the relationship between corruption and terrorism); LESLIE HOLMES, *TERRORISM, ORGANIZED CRIME AND CORRUPTION: NETWORKS AND LINKAGES* (2007) (arguing, inter alia, that a strong linkage exists between corruption and terrorism).

global security.⁶²³ Given the linkage between corruption, especially of public officials, and transnational terrorism, and the impact of the latter on the developed countries, as well as global trade, it would benefit the international community significantly to aid African countries in their struggle to eradicate bribery and other forms of corruption.

Finally, all countries can benefit tremendously from a global economy in which business acumen and expertise and not corrupt practices, determine the profitability of firms. Corruption usually creates perverse economic incentives and places on the competitive disadvantage those firms that are unable or unwilling to engage in the practice. In fact, the Richardson Task Force,⁶²⁴ appointed in 1976 to investigate questionable corporate payments abroad, recommended that an international convention be negotiated and signed to provide for a more competitive international business environment, one free of corruption. Thus, helping African countries minimize the bribery of their public officials would not only create a more competitive business environment for all firms, regardless of their origins, but would also enhance global peace and contribute to the creation of a more productive global community.



⁶²³ See CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER (Robert I. Rotberg ed., 2009) (arguing, *inter alia*, that corruption compromises global security).

⁶²⁴ See *supra* text accompanying note 434.