

# The Effectiveness of the African Union's Anti-Corruption Mechanisms and the Commitment to 2030 and 2063 Development Agendas

LUPWANA JEAN JACQUES KANDALA and FRANK MOFFAT

**Abstract:** Africa loses more than \$50 billion annually through illicit financial outflows, and most countries have remained over-dependent on resources supplied by development partners. Efforts to address these impediments are mainly focused on reducing outflows and ensuring development resources remain within the continent. This article builds on traditional anti-corruption mechanisms and explores processes that support strategic litigation. We find opportunities to use both the merged and yet-to-be-operationalized African Court of Justice and Human Rights (AfCJHR) and the African Court on Human and Peoples' Rights (AfCHPR). The analysis aims to understand the normative frameworks of corruption both as a human rights violation and a crime of the most concern to the international community. A synopsis of various legal instruments, case laws, and legal studies attest to an international pronouncement or acceptance that corruption amounts to a crime of most concern to the international community (international crime) and corruption is not a victimless crime. Although not yet recognized as an international crime, the normative character in binding international treaties justifies the international acceptance that corruption is a heinous crime. They also reveal that anti-corruption mechanisms at the national and regional levels, with a few exceptions, have been very disappointing. Many of these anti-corruption agencies face operational constraints which make them relatively ineffective. Human rights mechanisms, particularly a strong reliance on the African Court on Human and Peoples' Rights or its successor in the yet-to-be-operationalized African Court of Justice and Human Rights jurisdiction could contribute to creating greater transparency and accountability in dealing with corruption. This would ensure strategic litigations of perpetrators of corruption who defy national justice systems to have no chance to escape the regional accountability system. This is possible, if member states reaffirm their commitments under Articles 5 (1, d& 3) and 34(6) of the Protocol establishing the African Court on Human and Peoples Rights and Article 8 (3) of the African Court of Justice and Human Rights is ratified.

**Keywords:** Corruption, development agendas, Human rights, African Courts

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## Background

The normative character of socioeconomic rights, including the right to health and well-being, to education, and to housing are reinforced through the adoption of development agendas, namely Agenda 2030 and 2063 of the United Nations and the African Union, respectively.<sup>1</sup> Building on the Millennium Development Goals, these post-2015 Agendas have a strong reference to the principle of sustainable development in using natural resources and the promotion of socio-economic and human rights. They urge member states to end *inter alia* poverty in all its forms; achieve food security and promote sustainable agriculture; ensure healthy lives and promote well-being for all; and ensure inclusive and equitable quality education. They also represent a landmark achievement for socioeconomic rights advocacy around the world and guide more sustainable development globally. Accordingly, the SDGs and their targets are found in the objective and purpose of many important international treaties in the field of human rights and sustainable development.<sup>2</sup> However, ensuring realization of these agendas requires that resources remain and be available within the continent or with member states. Unfortunately, lack of resources and abuse of public funds for private gain paint a dark picture of the potential for these development programs.

The link between corruption and the depletion of resources is well established. The United Nations Organization on Drugs and Crime attested that corruption is the “single greatest obstacle to economic and social development around the world.”<sup>3</sup> Corruption is not a victimless crime, for it deprives the people of education, health services, stability, job opportunities, food, and water in areas that most need these resources. The Committee on the Rights of the Child in a case involving Kenya stated:

Depleted natural resources would have been available (if they had not been stolen) for essential public functions and an array of services, including health, education, and welfare. This was essential for the realization of economic, social, and cultural rights of all Kenyans and one would say including civil, and political rights too.<sup>4</sup>

In the same vein, the Human Rights Council and the African Commission constantly make numerous recommendations to member states aiming at preventing and suppressing corruption. Particularly, the African Commission on Human and People's Rights firmly believes that corruption is incompatible with states' obligations to respect, ensure respect, promote, and fulfil human rights. It is in this regard that the South African Constitutional Court warned that corruption is antithetical to the founding values of the South African constitutional order, stating:

Endemic corruption threatens the injunctions that government must be accountable, responsive and open and that public administration must not only be held to account but must be governed by a high standard of ethics, efficiency and must use public resources in an economically and effective manner.<sup>5</sup>

The impact of corruption is devastating to good governance, the rule of law, development, and the realization and enjoyment of all human rights. Likewise, the link between corruption and armed conflicts is alarming. Corruption has caused instability, civil war, and natural disasters in many countries.<sup>6</sup>

Africa loses more than \$50 billion annually through illicit financial outflows, and most, if not all countries have remained over-dependent on resources supplied by development

partners.<sup>7</sup> These outflows are of serious concern, given that many countries failed to meet the Millennium Development Goals during the target period ending in 2015, and efforts to address these impediments are mainly focused on reducing outflows and ensuring development resources remain within the continent for the realization of socioeconomic and human rights of people. Indices on governance from public and private institutions are encouraging as some African countries have taken positive steps in establishing anti-corruption agencies.<sup>8</sup> However, many observers are still skeptical about Africa winning the fight against corruption as many of these anti-corruption agencies face operational constraints, which make them relatively ineffective. This paradox arose when the African Union (AU) dedicated 2018 as the 'African Union year of winning the fight against corruption: a sustainable path to Africa's transformation.' The commitment is timely not only because corruption is pervasive but also more importantly for achieving "An integrated, prosperous, and peaceful Africa, driven by its citizens and representing a dynamic force in the international arena."<sup>9</sup>

Embedded into the Pan-African ideology of "The African Renaissance," the AU's *Agenda 2063: The Africa We Want* provides a robust framework for addressing past injustices and the realization of political, social, and economic transformation of the African continent. To that end, Agenda 2063 sets out multiple aspirations, including that of a prosperous, peaceful, integrated continent with good governance, democracy, and respect for human rights, justice, and the rule of law, whose development is people-centred, an Africa with a strong cultural identity, and an influential global partner.

Agenda 2063 promotes sustained investments in socio-economic rights, including the right to education by ensuring universal early childhood and higher education development; the right to housing by promoting access to affordable decent housing; and the right to health through the provision of basic services including nutrition, water, and sanitation. From the adoption of the Programme of Action of the International Conference on Population and Development (ICPD) in 1994 to the adoption of Sustainable Development Goals in 2015, these development goals continue to be reemphasized.

As a way towards Africa 2063, member states established accountability and transparency (ACTA) measures, including the adoption of bilateral and multilateral treaties to criminalize and reinforce national laws against corruption.<sup>10</sup> While these commitments may be sincere, their implementation, as well as compliance by member states to respect, protect and fulfil their obligations, requires implementing the ACTA measures. Otherwise, resources meant to deliver socio-economic rights and development can go to waste, thus compromising human lives. Given the gaps that exist between compliance with formal commitments and their implementation, several other efforts are underway. Starting in the 1990s, the Financial Action Task Force's (FATF) framework developed into an effective mechanism for combatting money laundering and terrorist financing. FATF's identification of high-risk and non-cooperative jurisdictions is largely credited with forcing both FATF member and non-member countries to change their anti-money laundering systems, stopping entities from the identified jurisdictions from engaging in certain financial transactions.<sup>11</sup>

A core understanding in previous studies is the focus on human rights mechanisms as a response to corruption, recognizing a link between corruption and human rights violations.<sup>12</sup> Lack of participation and transparency, violations of the right to fair trial, the right to an

effective remedy, and the right to information, among others have also enabled corruption, and such practices have become rampant in many countries.<sup>13</sup> In the same vein, the UN's special mechanisms have acknowledged the negative impact of corruption on human rights. Particularly, the UN Committee on Economic, Social, and Cultural Rights recognized that corruption constitutes a barrier to the fulfilment of rights protected under the Covenant and required member states to take appropriate measures.<sup>14</sup> The Committee on the Rights of the Child has repeatedly called upon member states to address corruption as an impediment to the realization of the rights and welfare of the child.<sup>15</sup> On their part, the Committee on the Elimination of All Forms of Discrimination Against Women and the Committee on Migrant Workers raised the issue of corruption in relation to violence against women.<sup>16</sup>

More important is the appointment in 2003 of a special rapporteur on corruption and its impact on the full enjoyment of human rights.<sup>17</sup> The Committee established that linking corruption and human rights creates new opportunities for monitoring and litigation. In 2017, the Human Rights Council adopted a resolution to outline frameworks and mechanisms available to address corruption's negative impact on human rights.<sup>18</sup> Particularly, the resolution required member states to comply with their obligations under international law, including the need for cooperation and coordination at national, regional, and international levels. It invited the Office of the High Commissioner for Human Rights and UN Office on Drugs and Crime to direct their work to deepen understanding on the nexus between corruption and human rights, encouraging the Human Rights Council to consider the issue of corruption within its respective mandates. As far as human rights are concerned, corruption has a high impact on human development and the realization of the SDGs. Goal 16 requires states to commit to ACTA measures through substantial reduction of corruption and bribery in all forms by 2030.

The growing literature on the role and effectiveness of human rights mechanisms in fighting corruption and protecting and promoting human rights is encouraging. However, it does not focus on how strategic litigations before the AfCHPR, or its successor the African Court of Justice and Human Rights (AfCJHR), provide a great opportunity and a mechanism to deal with corruption. Thus, the relevance of this undertaking is to conduct a non-empirical inquiry into how African leaders prescribe the fight against corruption and foresee the success of the development agendas. The article, therefore, builds on previous findings on how compliance with human rights mechanisms may lead the fight against corruption.

## Method

A non-empirical research method relies on the analysis of ordering and arranging legal instruments, case laws, and legal institution studies through rational deduction or legal perception. The study analyzes articles 5 (1,d & 3), 34 (6), and 8 (3) of the AfCHPR and the AfCJHR which require state members to make a declaration accepting the jurisdiction of the court by allowing individuals or relevant NGOs accredited to the AU or its organs, to submit cases to the Courts and consider it as the basis of the state's compliance with their obligations.

The study also considers the human rights and international criminal jurisdictions of both Courts as an opportunity for strategic litigations.<sup>19</sup> The complementary relationship between the AfCHPR and the African Commission on Human and Peoples Rights as well as its successor the AfCJHR are explored. Examining the nexus between the two Courts on one hand and between

the two courts and other entities such as individuals and civil society organizations (CSOs) with observer status also strengthens the argument in support of strategic litigations before the African Courts. If member states commitments under the above articles are sincere then perpetrators of corruption who escape national jurisdictions would have no chance of escaping the regional human rights and criminal systems. This is because individuals and CSOs will be allowed to submit cases or disputes relating to the interpretation of AU treaties, particularly the Convention on Prevention and Combatting Corruption. Individuals and CSOs can raise or submit any questions of international law, and matters or facts which, if established would constitute a breach of an obligation to a state party and any nature or extent of the reparation to be made for the breach of an international obligation.

Bearing in mind the urgent need for the ratification of both the Protocol on the Statute of the AfCJHR and its amendments, our research anticipates that the connection between the Court and other entities provides a platform for the Court to assert its jurisdiction over corruption as a crime of most concern to the international community. Unlike its successor, the AfCHPR can assert its jurisdiction over any human rights issues, including corruption. The dictum of the AfCHPR in previous cases constitutes a step ahead of the models of strategic litigations that are required to promote greater accountability. The study also relied on the literature on corruption as well as the AU Convention on Preventing and Combatting Corruption (AUCPCC) to analyze the effectiveness of the AU commitment and national anti-corruption mechanisms on the realization of post-2015 agendas.

## Results

The AU anti-corruption mechanisms rely on national human rights approaches, including the adoption of national legal frameworks for civil and criminal prosecutions to instill respect for the rule of law and good governance into the popular consciousness. Despite the sincerity of their commitment through the ratification of the AUCPCC, particularly the requirements under Article 16 (3) for member states to adopt legislative measures that must empower competent authorities to confiscate, seize, and administer the proceeds of corruption, the study reveals the need for comprehensive and harmonized anti-corruption legislation as well as sharing of national best practices to promote good governance.

The study also points out a lack of focus on international human rights mechanisms, particularly a lack of reference to the AfCHPR and its successor the AfCJHR for strategic litigation of a heinous and international crime such as corruption. The study notes the AUCPCC references both to the African Charter on Human and Peoples Rights and the African Commission on Human and Peoples Rights. The AUCPCC requires the AfCHPR to fight corruption and impunity and to propose appropriate legislative measures. Such a reference suggests that member states must adopt national measures to empower their national authorities to exercise jurisdiction.

Reliance on national mechanisms is not new. The USA's mechanisms for fighting and combatting corruption are rooted in criminal and administrative approaches. Most of the mechanisms or approaches established in African countries face financial and capacity challenges due to the inability of the governments to provide adequate budget allocation and to retain skilled people in public service. In addition to the operational constraints, there are

foreseeable concerns related to legal, institutional, and practical challenges (the lack of cooperation and coordination among the various agencies), which makes them relatively ineffective.

Despite its reliance on national, instead of regional accountability mechanisms, the AUCPCC recognizes corruption as the greatest source and an enabler of both illicit financial flows (IFFs) and state capture in Africa. It calls for mutual legal assistance and encourages member states to assert jurisdiction over acts of corruption and related offences whether committed wholly or partially within their territories, whether the crime is committed by their nationals outside or by a national of another state residing in their territories. Article 13 of the AUCPCC recognizes member states' power to assert their jurisdiction or prosecute the perpetrators of corruption without considering the national and territorial connection with the crime. In other words, the requirement under this article has a universal jurisdiction element, which applies to the prosecution of heinous crimes and entails individual responsibility of the perpetrators irrespective of the locality of the crime or the nationality of the perpetrator.<sup>20</sup> Although ambiguous in its formulation, i.e. which states must prosecute, universal jurisdiction constitutes a mandatory enforcement mechanism for the prosecution and punishment of perpetrators of international crimes.

Corruption is not yet recognized as an international crime. However, the crime of corruption affects the interests of the international community as a whole and threatens the development, peace, and security of humankind, thus arguably an international crime. Also, that Article 13 of the AUCPCC contains an element of universal jurisdiction, which is a mandatory mechanism for the prosecution of international crime, reinforces the argument that corruption must be treated as such. The AUCPCC also expresses the need to ensure respect for human dignity and to promote economic, social, and political rights. These aspirations are anchored in the 1994 Cairo Agenda for Action Relaunching Africa's Socio-Economic Transformation, and the 1996 African Commission Plan of Action against Impunity. These policies opine the observance of principles of good governance, human rights, democratization, and popular participation of African people in governance processes. Such a reference also reinforces the view that corruption is a human rights violation and must be dealt with as such.

## Discussion

Our analysis suggests that reliance on national human rights approaches to fight corruption is not new and is not without lags. Many countries, including the USA, have succeeded in adopting legal frameworks that allow civil prosecutions in the tracing, freezing, and repatriating of stolen assets pending criminal prosecutions of offenders.<sup>21</sup> Administrative approaches or civil prosecutions present various benefits when done by independent and impartial institutions. One is that they serve as a deterrent for those who stash illicit gains abroad and constitute an effective path for the reallocation of resources to the beneficiaries.

Thus, while accountability provides a foundation for dismantling institutions and discrediting leaders that have promoted crimes, civil prosecutions ultimately aim at freezing, administering, recovering, and where possible, repatriating the proceeds of corruption. Both criminal and civil proceedings are advised. However, the latter is more prominent because it focuses on the proceeds of corruption and their repatriation, which may help to rebuild the

social fabric pending the prosecution of the perpetrators. Moral theories raise concerns about the administration of frozen assets, once repatriated, in the country where they were stolen.<sup>22</sup> The concern is whether they should be placed under the administration of the same institutions that contributed to or facilitated corruption. One will suggest that frozen assets should not be returned to the same national institutions which facilitated their diversion. Rather, they should be kept in an escrow bank, such as a development bank, and be redirected, where possible, if the needs arise. In addition to the above concerns related to the ineffectiveness of national anti-corruption mechanisms, there are national legal and practical challenges, which means that reliance on national efforts or human rights mechanisms alone will not be effective against corruption. International or regional mechanisms offer an opportunity to ensure the accountability of leaders who defy national systems. Reliance on regional accountability mechanisms implies understanding the norm's legal status prohibiting corruption. That corruption in most cases may not be recognized as an international crime only adds to uncertainty on the legal evolution of a norm under international law.

Debates on the legal evolution of a norm under international law are based on philosophical and methodological views that look at the sources, content, evidentiary elements, and value-oriented goals of the norms.<sup>23</sup> This means that a legal norm, that has or creates a positive capacity or is universally accepted and aimed at the preservation of fundamental human rights, can be considered as an international norm. However, such views lack scholarly accepted agreement as several factors have drawn legal attention. They include lack of methods to ascertain the existence of an international norm or assess its significance and determine its elements as well as a priority over other competing or conflicting norms or principles of international law.<sup>24</sup> A scholarly agreement must determine not only the principles of legal evolution of a legal norm or how a given norm may ascend to the level of an international norm but also determine the implication and consequences of its application.

Such a debate only adds to the level of uncertainty because certain customary international norms, including those related to aggression, genocide, crimes against humanity, war crimes, piracy, slavery, slave-related practices, and torture are already part of international crimes. These raise no debate because sufficient legal basis exists to ascertain that they are indeed from the same source.<sup>25</sup> More prominent is that international *opinion Juris* recognizes these crimes as such. Thus, international recognition or pronouncement is expressing such views.<sup>26</sup> This includes the pronouncement of various international and regional court decisions and international treaties. These treaties have been ratified by many if not all states which justify their recognition as universally accepted norms aiming at preserving fundamental human rights norms. As far as the legal status of a norm prohibiting corruption is concerned, the normative character of corruption as a crime has generated obligations and rights for state parties.<sup>27</sup>

Corruption is increasingly recognized as a threat to achieving the sustainable development agenda and enjoying human rights.<sup>28</sup> Its norm is made operational in binding international treaties, thus forming part of international law and policy in the field of international crimes. The norms prohibiting corruption have widely emerged in various international and national legal instruments of environmental, economic, and social character, including court decisions at international and national levels, and are accepted as a global norm.<sup>29</sup> Their normative character

in international law has generated rights and obligations such as the obligation to adopt legislations, establish national anti-corruption agencies, confiscate, seize the proceeds, and prosecute perpetrators for member states.

Likewise, these principles play a significant role in the interpretation and application of human rights and guide the development of laws and policies toward social, environmental, and economic objectives.<sup>30</sup> Such assumptions imply that the norm prohibiting corruption generates international legal obligations, for which states may be liable or engaged in their responsibility for breaching an international obligation. Thus, because of the international pronouncement supporting such views, principles of good government and the norm prohibiting corruption set out a solid footing for the definition of legal obligations of states for corruption and can serve a useful purpose in claiming reparation under international law. If such a view can be accepted, then the norm prohibiting corruption is universally accepted. Thus, the international pronouncement is enough to justify the status of an international crime of corruption.

Such an acceptance will determine the nature of the obligations imposed on state members. Generally, any international crime imposes upon member states certain obligations, including to enact legislation, to investigate or search, to prosecute or to hand over for trial to another state concerned, and if found guilty, to punish.<sup>31</sup> These obligations are set in various customary international and conventional laws and extend from the duty to respect and ensure respect for the rights, and the duty to fulfil and promote the provision of international treaties.<sup>32</sup> They require the creation or maintenance of an atmosphere of frameworks by ensuring the effective interplay of laws and regulations.

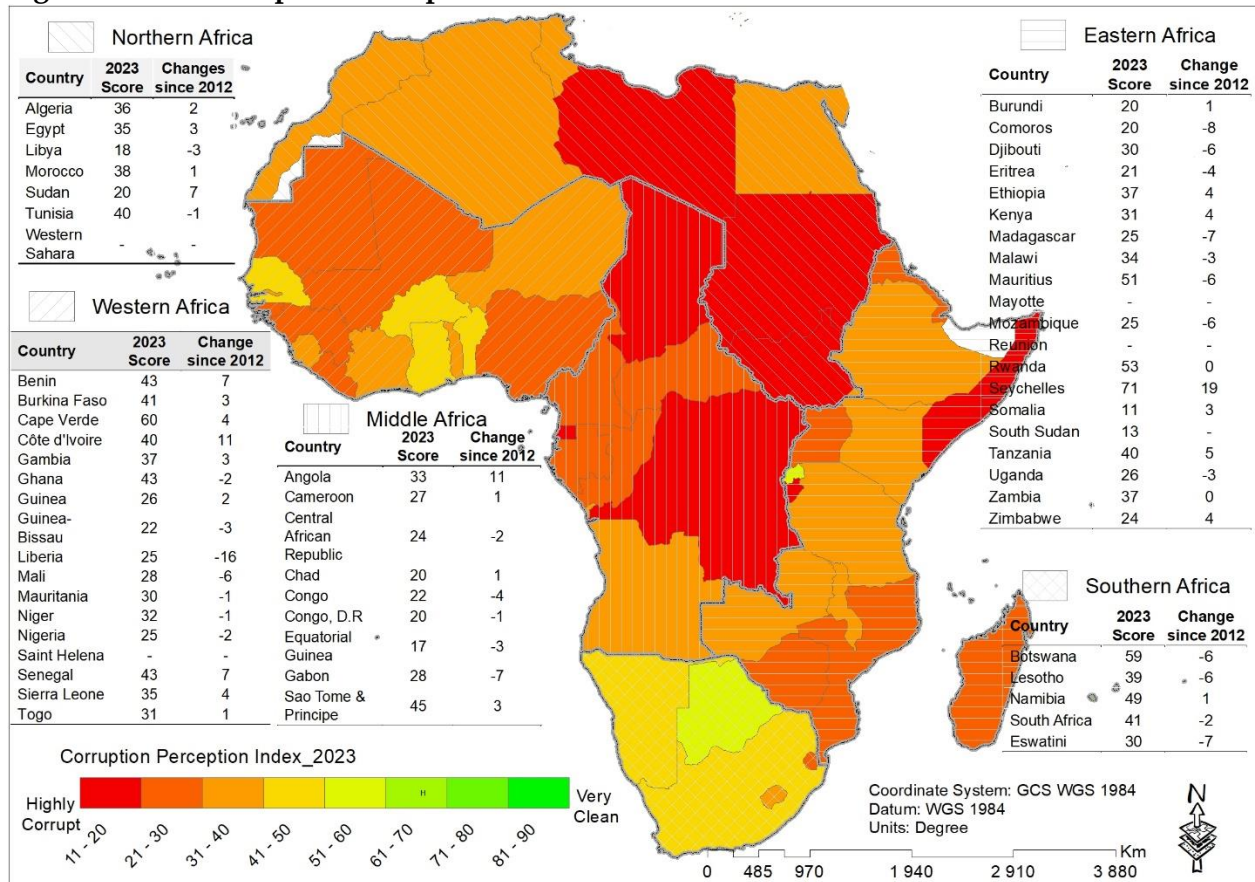
### **National Impediments and International Opportunities for Dealing with Corruption**

The AUCPCC characterizes corruption as a public and private issue. Unlike Transparency International, it defines corruption as the acts and practices which constitute the offences of corruption. These acts and practices include solicitation, acceptance, offering, granting, diversion, use or concealment of proceeds, participation as principal or co-principal, and or the instigator of corruption. Figure 1 provides the 2023 perceptions of corruption index, illustrating how corruption thrives in different regions of the African continent and the associated changes since 2012. The available data on changes in perceptions index scores shows that 28 countries (53%) across the different regions either have not changed or regressed in their perceptions index since 2012.

Liberia's corruption perception index score recorded the highest drop towards highly corrupt. This corroborates with findings by Afrobarometer on Liberia's perceived corruption in key public institutions. Furthermore, in 2023, 48 African countries had a corruption perceptions index score below 50, which indicates serious corruption issues. These extremes have been termed "cancerous proportions" and "AIDS of democracy."<sup>33</sup> This demonstrates an outcry of failure in African governments and weakening mechanisms to keep corruption in check.



Figure 1: 2023 Corruption Perception Index in Africa.



Source: Authors, based on 2023 Transparency International data.<sup>34</sup>

Member states have the obligation to enact appropriate legislation, whether it exists or not, and they must empower their national authorities to assert jurisdiction or extradite. Particularly, the Convention enjoins member states to assert jurisdiction regardless of the perpetrator's nationality or the location of the crime. Article 13 states that: "Each state party has jurisdiction over acts of corruption and related offences...when committed wholly or partially inside its territory or...committed by its national outside its territory or...committed by a person who resides in its territory or...when the alleged criminal is present in its territory and does not extradite...when offences, although committed outside...affect...its vital interests or...impacts on the state party..." The reference to "each state party," "crime committed wholly and partially," as well as "inside or outside its territory, national or a national or another state reside or present in its territory" is used as a plea for universal jurisdiction in cases of acts of corruption or related offences.<sup>35</sup>

Universal jurisdiction constitutes a mandatory enforcement mechanism for the prosecution of international law crimes or crimes of the most concerned to the international community.<sup>36</sup> Without universal jurisdiction, there would be no way to hold perpetrators of international crimes accountable for their actions. It is a crucial mechanism that ensures justice is served and helps prevent future atrocities. By mandating the prosecution of individuals who commit acts of corruption and related offences, regardless of their nationality and location, the AUCPCC sends

a clear message that these acts hurt and impact the interest of many, if not all, states and must be regarded as crimes of most concern to the whole international community. As an international treaty, the AUCPCC expresses the view that it is member state duty to uphold this fundamental pillar of international law and ensure that justice is served for victims.

That corruption is a crime of most concern to the international community requires member states to adopt legislative measures that must empower competent authorities to cooperate, confiscate, seize, and administer the proceeds of corruption, and prosecute the perpetrators. The requirement to adopt legislative measures pertains to an important paradox and is subject to national legislative confirmation. These requirements are mandatory for any international treaty's purpose, particularly in seizing and recovering the proceeds of corruption. Dugard wisely states that: "...most states, including South Africa, will not try a person for an international crime unless the conduct has been criminalised under national law."<sup>37</sup> Dugard relays two objections for a state not to exercise jurisdiction over an international crime. The first is based on the legal principle *nullum crimen sine lege, nulla poena sine lege*, (no crime without a law, no sanction without a law) and the second on the requirement of national legislative confirmation even where customary international law forms part of the country's law. The obligation to promote the provision of international treaties is one of the substantive obligations engendered by customary and conventional international laws. These obligations extend from the duty to enact national laws and investigate to the obligation to punish or extradite.

How states accept international law under their national systems depends on whether they are following a monist or dualist approach.<sup>38</sup> Traditionally, while adopting an implementing law or transforming international law is a precondition for its application in a dualist state, monist countries accept international law into domestic instruments without the need for transformation. Nowadays, except for self-executing treaties, membership of any international treaty sanctioning international crimes means that member states must enact national legislation, regardless of whether such a state is wedded to a monistic or dualistic approach. De Wet succinctly explains how self-executing treaties constitute an exception not only in South Africa but elsewhere. She notes that: "non-self-executing treaties...only become part of South African law once ratified and incorporated by means of legislation. Self-executing treaties pose an exception in this regard, as they become automatically operational once ratified."<sup>39</sup>

Combined with the challenges raised by constitutional requirements for the acceptance of international laws in domestic systems, there are challenges posed in the practice of states, often known as the 'selective approach'. Achieving the arrest and surrender of state officials through cooperation has been very difficult to obtain. These challenges paint a dark picture of a successful national accountability system and predict how member states will continue to defy efforts to arrest corrupt officials or request for seizing and recovery of the proceeds of corruption. Currently, the main problems that seem to distress the recovery or seizing of proceeds of corruption are a lack of national legislation and appropriate mechanisms to enforce the provisions of international treaties.

Generally, international law seems to avoid the issue of establishing an international enforcement mechanism. Rather, the direction seems to be the imposition upon states of the duty to prosecute under municipal law or to extradite.<sup>40</sup> This is referred to as a methodological choice, where the international system steers away from substantive international criminal law

in favor of adjective (complementary) international criminal law.<sup>41</sup> Likewise, the urge to pursue oppressors or stop gross human rights violations is always against states' willingness to expend their resources. With few exceptions—including the USA which has shown commitment to seizing or recovering the assets of foreign leaders who steal public funds and, where appropriate, return that money to the country where it was stolen through the Kleptocracy Asset Recovery Initiative—many states have been reluctant to intervene or stop human rights violations.<sup>42</sup> Examples include the looting of the Democratic Republic of Congo's natural resources by those in positions of power and their international multinational allies, which continues to impoverish the people of the DRC and cause wars that have claimed the lives of millions of people under the watch of the international community.<sup>43</sup>

### **African Union Institutional and Accountability Challenges**

Efforts to fight corruption in Africa are a primary task of national institutions, and the AUCPCC faithfully relies on inter-state cooperation.<sup>44</sup> The effectiveness of such mechanisms raises concerns in the context of a continent deeply rooted in impunity and lack of judicial independence. These insights are undoubtedly useful in advising how the AUCPCC must cautiously guide member states in the fight against corruption rather than rely on the adjective international approach of interstate cooperation. Despite the use of adjective mechanisms, the commitment to fight corruption seems sincere as Article 12 of the AUCPCC also recognizes civil society's role to hold governments accountable. However, such recognition would have been more effective if CSOs were fully protected from attacks by autocratic governments who do not want to be held accountable for human rights violations and seek to create a culture of impunity by weakening national and international accountability mechanisms. Already, many CSOs operate in fear, and activists are constantly intimidated and receive death threats, which means not much can be expected unless critical changes occur regarding how CSOs are viewed by member states.

Likewise, AU attempts to limit the independence of the African Commission on Human and Peoples' Rights (ACHPR) may only worsen the shrinking space of CSOs. Particularly, the adoption of the AU Executive Council Decision 1015 increases restrictions and barriers for CSO access to the AU Human Rights System. The ACHPR was established as a treaty body entrusted with the mandate *inter alia* to promote human rights and accountability for serious human rights violations perpetrated by state actors. Such a mandate and independence cannot be limited to 'functional' independence nor can the AU to ignore its institutional independence as well as the commissions' independence, which they have enjoyed since the establishment of the ACHPR as a Charter body in 1998. This is an alarming setback not only limiting the ACHPR as a monitoring mechanism but also the work of CSOs and other bodies that forge accountability before the ACHPR.

By requesting the ACHPR revise criteria for NGO observer status and dictating to the ACHPR on how to establish accreditation of NGOs, the Executive Council decision constitutes a setback on steps already made by the ACHPR in recognition and promotion of fundamental human rights. If successful, this will undermine the implementation of many other AU instruments, including the AUCPCC that recognizes the role of CSOs in holding governments accountable. Prominent international opinions view the AU's position towards its institutions

and CSOs as a paradox. On one hand, the AU empowers civil society and calls for their involvement in forging accountability, and on the other hand, it limits their access to regional human rights mechanisms. Civil society and whistleblowers have played critical roles in corruption cases, allowing prosecutions even in a foreign country.<sup>45</sup> Shrinking the civic space will have several implications in ensuring national accountability of perpetrators, as states are always reluctant to bring cases of their officials before another jurisdiction.

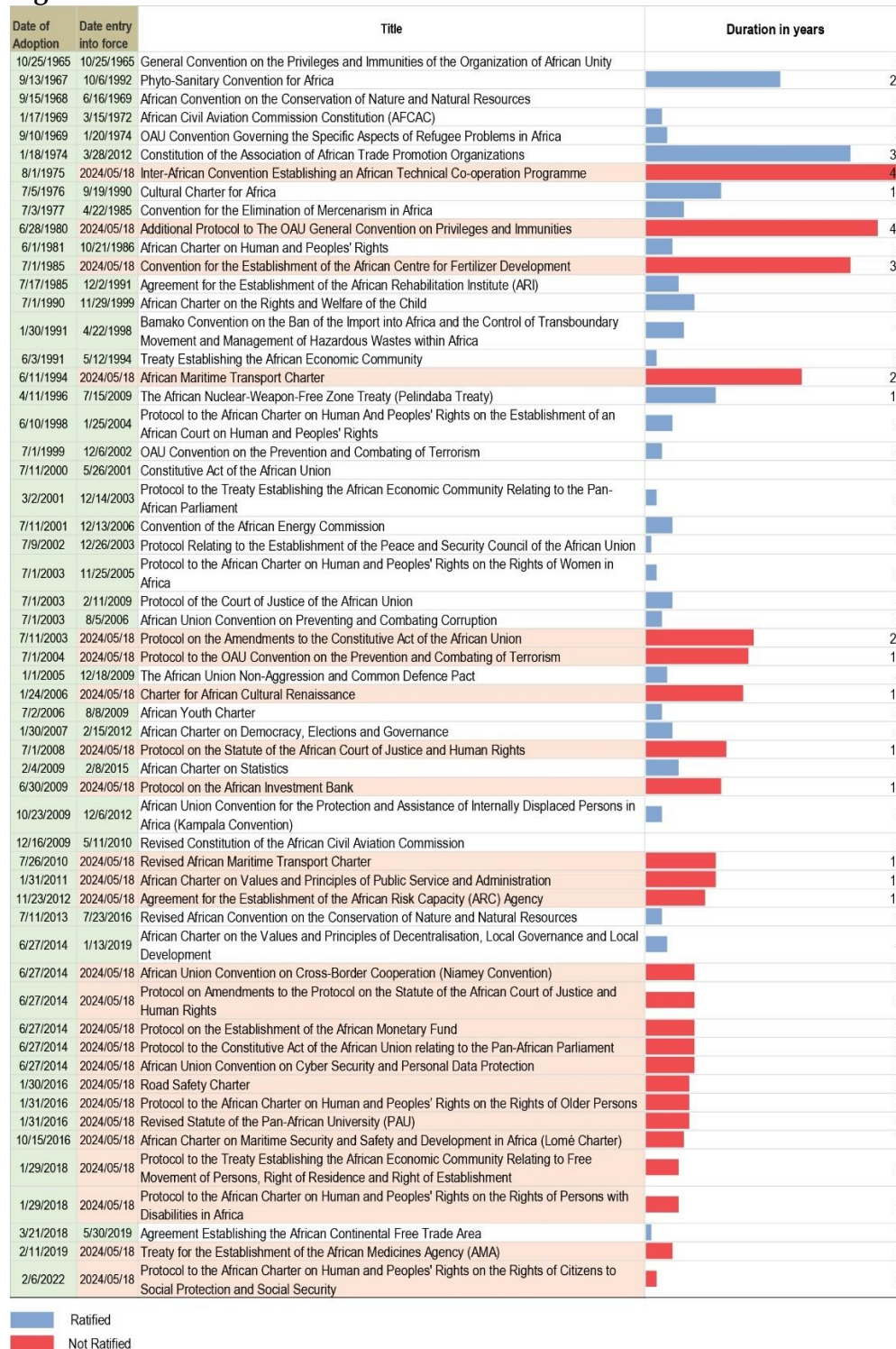
In addition to this AU attitude towards CSOs, the chaotic ratification of its own instruments makes compliance realistically impossible as illustrated in figure 2. Of more than seventy legal instruments covering a range of issues—including human rights, good governance, transport, culture, and politics—except the fourteen statutes which only require a signature, only thirty-five have entered into force. For example, the Constitution of the Association of African Trade Promotion Organizations took 38 years (1974 -2012) to be ratified. The Phyto-Sanitary Convention for Africa mechanism took 25 years (1967- 1992). More alarming is the fact that some treaties are still waiting for ratification after almost forty-eight years. Thus, the ratification of treaties by member states is a long-standing issue with only a few exceptions, including the exceptional ratification of the African Continental Free Trade Agreement (AfCFTA). This aspect of the AU undermines many human rights principles, including the principle of accountability so dear in the context of corruption as a crime with extra-territorial impacts.

### **Corruption and the Realization of Global and African Agendas**

The decision by the Economic Commission for Africa (ECA) to establish the High-Level Panel on Illicit Financial Flows from Africa was driven by the foreseeable failure of many African countries to meet the Millennium Development Goals by 2015. This concern induced the need to ensure Africa's accelerated and sustained development by relying as much as possible on its own resources.<sup>46</sup> Except for a few countries that took positive steps towards achieving the MDGs with assistance from external donors, many states need resources for clean energy, food security, and poverty alleviation. This means member states will not achieve their targets under the 2030 Agenda for United Nations Sustainable Development and the 2063 African Agenda for Africa Renaissance without development assistance.

These two post-2015 development agendas have given the world a clear vision that recognizes the importance of focusing on some crucial measurements of global prosperity.<sup>47</sup> As they focus on ensuring human dignity, equality, and equity, developing countries will have to use alternative tools, relying more on their resources including trade and taxes, to lift themselves and achieve post-2015 development goals. The 2016 UN report stresses that corruption poses significant harm it cripples the economy of developing countries in many ways. Afrobarometer's 2021/2023 survey ranks corruption as the 11<sup>th</sup> most pressing problem that must be dealt with by African governments.<sup>48</sup> This includes discouraging investment, diversion of resources for public infrastructure, and subverting development programs and plans at various scales.<sup>49</sup>

Figure 2



Source: Own creation based on extracted AU data<sup>50</sup>

Reports on illicit financial flows (IFFs) show that Africa continues to lose more than 50 billion annually in IFFs.<sup>51</sup> Put differently, the retention of capital generated in Africa for the realization of post-2015 agendas and the development of infrastructure in support of rapid urbanization is important. An effective mechanism would not only change the balance between the volume of domestic and foreign capital required for sustained African development but also ensure equitable capital transfer between rich and poor regions. The fight against corruption is, therefore, not only a means to the radical reduction of illicit capital outflows but also to produce a strategically critical new balance between domestic and foreign capital to finance the post-2015 Development Agendas. The possibilities beyond the MDGs are based on the commitment that when taking actions to fight corruption, states must respect, promote, and consider their human rights obligations, including the prosecution of perpetrators.

Figure 3: Corruption and impediments to the Africa We Want



Source: authors

Likewise, the recognition of principles of international law on sustainable development is a prerequisite. These principles include the need to ensure that resources are not depleted but rather concentrating on promoting harmonization between socio-economic issues and environmental protection.<sup>52</sup> Such views have increased in recent years and are noted among the objectives of sustainable development, which has taken a multidisciplinary approach, while its governing norms have gradually expanded in various policies and areas of international economic and environmental law.<sup>53</sup> Thus, because of its firm status in treaty law and its frequent application in decisions of international courts and tribunals, the principle has become central to the discussion on human rights and international law.<sup>54</sup>

### Reliance on Regional Accountability Mechanisms

Article 13 of the AUCPCC recognizes the power of a member state to set jurisdiction over corruption, whether committed wholly or partially within its territory or by a national outside its territory. The principle of extra-territoriality and its predecessor universal jurisdiction, apply to the prosecution of heinous crimes.<sup>55</sup> These entail individual responsibility of the perpetrators, irrespectively of the location of the crime or the nationality of the perpetrator.<sup>56</sup> The application of both principles constitutes a great departure from the principle of state sovereignty in that they recognize states power to assert jurisdiction outside their borders.<sup>57</sup>

A more pragmatic approach to dealing with corruption in Africa would be a strong reliance on both the African Court on Human and People's Rights and the yet-to-be-operational African Court of Justice and Human Rights. These courts have provisions on the "interpretation and the application of the African Charter...or any other legal instrument relating to human rights, ratified by the States Parties."<sup>58</sup> Reference to the interpretation and application of the African Charter or any other legal instruments relating to human rights reinforces the idea of the complementary relationship between both Courts and the African Commission on Human and Peoples Rights. The African Commission's protective mandate reaffirms "adherence to principles of human and people rights, freedoms, and duties contained in the declarations, conventions, and other instruments adopted by the African Union."

Having established a complementary relationship between the Courts and the Commission, African member states acknowledge the pivotal role that both can play in "strengthening the commitment of the African Union to promote sustained peace, security, and stability on the continent and to promote justice and human and people rights as well an aspect of their effort to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of the United States of Africa."<sup>59</sup> In other words, the commitment to promote political and socio-economic integration and development is dear to African member states. Regional human rights mechanisms provide an opportunity to ensure that perpetrators of corruption who defy national justice systems will have no chance to escape the regional accountability systems. If member states are sincere in their commitment, which is not always the case, the AfCHPR can assert jurisdiction on corruption as a human rights violation while its successor the AfCJHR can exercise both jurisdictions as a human rights violation and an international crime.<sup>60</sup>

Whether as a human rights violation or an international crime, member states need to reaffirm their commitments under Articles 8 (3), 30 (f), and 5 (1,d & 3) and 34 (6) of the Protocol on the Statute of the African Court of Justice and Human Rights and Protocol establishing the African Court on Human and People's Rights, respectively to make declarations recognizing the jurisdiction of the Courts to receive applications from individuals and NGOs with observer status before the African Commission on Human and People's Rights.<sup>61</sup> However, recent statements from both Benin and Cote d'Ivoire—who joined Tanzania and Rwanda to withdraw their Declaration under Article 34 (6)—paint a dark picture of the willingness of member states to uphold regional and continental commitments.<sup>62</sup> Particularly, this series of withdrawals puts a stop to direct access for individuals and relevant NGOs to the Court. Likewise, it manifests the unwillingness to recognize the power of regional institutions or human rights mechanisms and

abide by human rights commitments in the region. The attitude of African member states toward the AfCHPR or its judicial decisions is not new.<sup>63</sup>

Unlike African member states' attitude toward the Court decisions, the Inter-American Court has gained a reputation because member states comply with court orders.<sup>64</sup> The African Court must continue to ensure compliance with decisions to avoid losing its reputation. In the absence of a strong enforcement mechanism, nothing great can be achieved in the context of fighting corruption.<sup>65</sup> The refusal to ratify the Protocol on the Statute of the African Court of Justice and Human Rights and the Protocol on Amendments to the Protocol on the establishment of the Statute of the African Court of Justice and Human Rights is distressing. Both Protocols suffer from a lack of implementation for over ten years and in the fight against corruption reliance on international jurisdictions and mechanisms is critical.

## Conclusion

Corruption is an enduring problem that devastates the enjoyment, availability, quality, and accessibility of human rights. It undermines the functioning and legitimacy of institutions and processes, the rule of law, and good governance. These impacts are more remarkable in countries with a pattern of human rights violations, particularly in disadvantaged communities as they have limited alternatives and rely more on public goods and services. Corruption defies efforts to ensure respect for states' obligations freely agreed upon under international and regional human rights instruments. Its effects are severe in the lives of African peoples and efforts for the continent's development. The commitment to fight corruption must translate into tangible actions, including widespread ratification of the AU instruments, particularly the AUCPCC, the amended AU Protocol on the African Court of Justice, and declarations of Article 34 (6) to allow the individual access to justice before regional mechanisms for the protection and promotion of human rights. Regional human rights mechanisms—e.g. the ECOWAS Court—should also adhere to or adjust their jurisdiction to hear cases on corruption. Thus, this article provides a synopsis of the importance of regional accountability, particularly the African Court on Human and Peoples' Rights and other regional courts in the fight against corruption by looking into the nature of corruption as a human rights violation.

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## Notes

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<sup>6</sup> Robert 2020.

<sup>7</sup> Mbeki 2013, p. 89.

<sup>8</sup> Transparency International 2020, p. 3.

<sup>9</sup> African Union 2015, p. 6.

<sup>10</sup> USA 2014.

<sup>11</sup> Johnston et al. 2023, p 106.

<sup>12</sup> Factor 2015, p. 633.

<sup>13</sup> Puras 2017, p. 137.

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<sup>56</sup> Cherif Bassiouni 2003, p. 27.

<sup>57</sup> Vander Vyver 1999.

<sup>58</sup> African Union Convention on Preventing and Combating Corruption (AUCPCC) 2006.

<sup>59</sup> African Union Convention on Preventing and Combating Corruption (AUCPCC) 2006.

<sup>60</sup> Agwu 2014, p. 35.

<sup>61</sup> Africtivistes 2020.

<sup>62</sup> University of Pretoria Centre for Human Rights 2020. The statement from the Republic of Cote d'Ivoire on 29 April 2020 states that "the African Court of Justice has undermined the Sovereignty and Ivorian justice system."

<sup>63</sup> Naldi 2009, p. 310.

<sup>64</sup> Pasqualucci 2008, p. 299.

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