Ending Corruption in Africa Through United Nations Inspections

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STUART S. YEH

Econometric evidence suggests that corruption has a strong corrosive effect on economic growth, especially in African countries.¹ This article reviews evidence suggesting that checks on corruption in the form of domestic laws and institutions have been ineffective in Africa, suggesting a need to consider an international treaty that would establish an African Commission Against Corruption (ACAC), involving United Nations inspectors appointed to investigate and prosecute corruption. A range of evidence reviewed in this article suggests that pressure from constituents as well as international organizations could ultimately be effective in compelling African leaders to sign this type of protocol.

The first section of this article reviews literature suggesting that a lack of effective checks and balances against corruption is the primary factor undermining the rule of law, the protection of human rights and economic growth in sub-Saharan Africa. The second section reviews the experiences of Uganda, Tanzania and Hong Kong in fighting corruption, and draws three conclusions on how to end corruption in Africa. The third section describes a scheme involving independent ACAC inspectors who could assist local prosecutors in combating corruption, and the fourth concludes the article with an analysis suggesting how African leaders might be induced to sign an international agreement permitting the work of independent inspectors.

A lack of effective checks and balances

Historically, the IMF and the World Bank have traced poor economic growth in sub-Saharan Africa to misguided dirigisme—the practice of directing economic activity through central planning—and have tied structural adjustment conditions to their loans in an attempt to restructure African economies in the mould of

western industrialized countries.² Thus, senior IMF and World Bank directors and economists favour privatization, structural adjustment, economic liberalization and democratization as the most effective means to remove the distortions introduced by government, minimize opportunities for corruption and maximize economic growth in countries previously characterized by dirigisme.³ A strong private sector is expected to demand governmental accountability and economic reform, and strengthened civil institutions are expected to institute checks and balances. These improvements in governance are, in turn, expected to lay the foundation for vibrant economic competition, an efficient business sector and strong economic growth. Direct prosecution of corruption is viewed as helpful but tangential to the core problem of dirigisme. In this view, corruption will fade away with time as the role of government is reduced and the private sector and civil society grow stronger.

In contrast, prominent African political economists identify the core problem as uncontrolled corruption—the abuse of governmental power for personal gain—rather than dirigisme, and explain that the preoccupation with dirigisme is itself misguided and leads to counterproductive policy prescriptions.⁴ These scholars suggest that corruption in Africa has its origin in colonial practices, has been deeply ingrained as a self-reinforcing, self-perpetuating institution, and has fundamentally captured governmental institutions in sub-Saharan countries in a way that insulates corrupt practices from ordinary reforms. Colonial administrators dismantled traditional checks and balances in order to centralize power in their own hands and the hands of a small number of local chiefs, colonial appointees and acculturated elites shaped by the colonial educational system. Local chiefs became accustomed to the exercise of absolute rule without judicial restraint, as long as they enjoyed the confidence of the colonial administrator. Thus, colonial practices institutionalized favouritism, self-aggrandizement and despotic rule, essentially training African elites in the methods of favouritism, the exercise of unbridled power and personal enrichment.

After independence, the transfer of this power to African heads of state had disastrous results. Africa’s ruling elites quickly discovered that they could use their combined economic and political power to direct economic activity, enrich themselves, reward political supporters, punish political rivals and crush opposition to their rule. Political supporters were rewarded with government positions that permitted them to invent bureaucratic hurdles and then extract

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*International Affairs* 87: 3, 2011

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artificial licence charges and fees to expedite requests through the bureaucracy, effectively throttling economic activity. The power to direct economic activity and to dispense government positions allowed ruling elites to extract rents, build personal fortunes and dispense patronage to buy political support. The economic and political power invested in African heads of state was systematically abused for personal gain in one state after another, resulting in enormous personal fortunes.

Thus, Africa’s dilemma is that ‘The centralization of both economic and political power turns the state into a pot of gold that all sorts of groups compete to capture. Once captured, power is then used to amass huge personal fortunes, to enrich one’s cronies and tribesmen, to crush one’s rivals, and to perpetuate one’s rule in office.’5 The ruling elite take over and subvert every key institution of government: the civil service, judiciary, military, media and banking. Key positions in these institutions are handed over to the president’s tribesmen, cronies and loyal supporters. As a result, meritocracy, rule of law, property rights, transparency and administrative capacity vanish. Suspicious of plots to overthrow them, the elite fill strategic positions in the police and military with personally loyal relatives and fellow tribesmen. Economic reforms that would strip out state controls and eliminate scarcity are opposed because the controls are the source of the rents that are extracted by the ruling elites. Since political defeat could mean exile, imprisonment, starvation and the confiscation of all property and wealth, ruling elites refuse to relinquish or share political power. Those who are excluded from power resort to violence, insurgency and civil war.

The source of the problem of corruption in Africa, then, is the colonial policy of dismantling traditional checks and balances on the power of rulers. Colonial governments used their power to extract wealth from their colonies, then upon independence transferred this power to African rulers, who have since abused it on a grand scale: ‘With no effective restraints on government behavior, corruption became widespread.’6 The primary catalyst for corruption is a lack of accountability among the ruling elite, who use their monopoly on unchecked discretionary power for personal economic and political gain: ‘It is through this stranglehold that corruption thrives, for it is through this stranglehold that all decision-making occurs and patronage is dispensed.’7 Corruption persists because ‘public officials have no fear of being held accountable for their actions’.8 Despite public outrage, ‘corruption in Africa has reached cancerous proportions’.9 Elites have turned state institutions into instruments for self-enrichment; thus, ‘corruption … has become, in almost all African countries, a common and routine element of the functioning of the administrative and para-administrative apparatus, from top to bottom’,10 leading to enormous losses in state revenue—in some cases as much as 60 per cent. Corruption in Africa is ‘pandemic’, ‘a way of life’, and remains one

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5 Ayittey, Africa unchained, p. 48.
7 Hope, From crisis to renewal, p. 104.
8 Hope, From crisis to renewal, p. 109.
9 Hope, From crisis to renewal, p. 127.
of the continent’s most enduring institutions.\textsuperscript{11} Corruption is not only caused by a lack of checks and balances but also serves to prevent the emergence of the institutional reforms necessary to create checks and balances. In the majority of African countries, corruption pervades the institutions that normally provide such checks and balances: the police, the judiciary and the legal system. Thus, it is not possible to rely on those institutions to fight corruption.

Elites sabotage the development of transparent, participatory, democratic accountability structures in order to preserve their lucrative monopolies on governmental services and privileges. Though some hold free elections, African leaders continue to resist IMF reforms that would undermine the patrimonial system that keeps them in power, and have delayed and reshaped reform policies in ways that make them less threatening and, in some cases, even profitable, as in the case where state assets are ‘privatized’ at fire sale prices to the president’s cronies, with hefty fees going to government ministers.\textsuperscript{12} Thus, democratization, privatization and IMF-style reforms are not panaceas and do not necessarily provide checks and balances against the abuse of governmental power. On the contrary, ‘the control of corruption … is a fundamental condition for the sustainable transition to a market-oriented economy’.\textsuperscript{13} Barro summarized the evidence and concluded that:

Even if a poor country could beat the odds and sustain democratic institutions, there is no reason to believe that this accomplishment would help much in the quest to escape poverty … An increase in democracy is less important than an expansion of the rule of law as a stimulus for economic growth and investment. In addition, democracy does not seem to have a strong role in fostering the rule of law. Thus, one cannot argue that democracy is critical for growth because democracy is a prerequisite for the rule of law … If a poor country has a limited amount of resources to accomplish institutional reforms, then they are much better spent in attempting to implement the rule of law … Even if democracy is the principal objective in the long run, the best way to accomplish it may be to encourage the rule of law in the short run.\textsuperscript{14}

The persistence of Africa’s problems despite democratization, privatization and IMF reforms is puzzling except when viewed as the logical outcome of a lack of checks and balances. Recurring fiscal and balance of payments crises are predictable consequences of the corruption, uncontrolled expenditures and rent-seeking which drain revenue from government coffers, causing revenue to lag behind expenditures. A continued lack of transparency, accountability and honest, highly efficient civil servants may be understood as the logical outcome when ruling elites are permitted, through a lack of checks and balances, to use patronage networks to stay in power and, therefore, take every opportunity to subvert good governance. The continued pursuit of disastrous economic policies that would normally be disciplined by their consequences may be understood as the logical outcome when

\textsuperscript{11} Hope, \textit{From crisis to renewal}, p. 100.


\textsuperscript{13} Hope, \textit{From crisis to renewal}, p. 12.

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massive amounts of foreign aid provide the resources that allow ruling elites to sustain those policies. Without checks and balances, aid is wasted and aid donors unwittingly undermine true reform, the development of strong institutions and the rule of law.

On this view, corruption is the core problem underlying Africa’s poverty. What is required is a powerful institution to restore checks and balances against corruption, ensure the rule of law and protect human rights. Only then will economic liberalization and privatization be effective in producing sustained economic growth. From this perspective, IMF and World Bank policies that focus on economic liberalization and privatization, without vigorous investigation and prosecution of corruption, are simply inadequate and will not achieve the desired results.

Lessons from Uganda, Tanzania and Hong Kong

This section reviews the experiences of Uganda, Tanzania and Hong Kong in fighting corruption, and draws three conclusions. First, in Africa, the establishment of domestic anti-corruption agencies has not been sufficient to fight corruption because those institutions do not operate independently of African leaders. Second, in Hong Kong, the establishment of investigators operating independently of domestic leaders rapidly reversed endemic corruption. Third, ending corruption in Africa requires the establishment of inspectors who are independent of domestic leaders.

Uganda

Since the 1960s Ugandan laws have provided police and prosecutors with the legal power to deal with corruption. The Prevention of Corruption Act 1970 calls on the Directorate of Public Prosecutions (DPP) to investigate and prosecute corruption and bribery, and authorizes the DPP to search, seize, arrest and interrogate suspects. The Office of Inspector General of Government (IGG) was established in 1987 with extensive powers to deal with corruption and human rights abuses. A code of conduct was established for all civil servants, requiring leaders to make annual disclosures of their income, assets and liabilities to the IGG. However, despite the establishment of extensive anti-corruption laws, codes of conduct and potentially powerful agencies, a joint World Bank/Transparency International review team found that corruption remains rampant at all levels of Ugandan society. A consistent pattern of corruption and unethical practice permeates the judicial system, with judges failing to apply the full power of the law with vigour.

The failure to apply existing laws and powers to prosecute corruption is not due to a lack of public support: the review team noted significant public support for


Sedigh and Ruzindana, ‘The fight against corruption in Uganda’.

International Affairs 87: 3, 2011
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more vigorous prosecution. Rather, failure stems from inadequate checks and balances to counter the influence of the president and loyal elites. The review team made several recommendations, including the rotation of judges throughout the East African region in order to isolate them from political pressures, and the establishment of an agency similar to the Independent Commission Against Corruption (ICAC) in Hong Kong that would be insulated from political pressure, with extensive powers to investigate and prosecute corruption at all levels of government. In contrast, the Ugandan IGG is appointed by and serves at the pleasure of the president; this substantially weakens its authority to investigate and prosecute corruption that may involve the president and loyal elites.

Tanzania

Corruption is endemic in Tanzania, again despite the existence of anti-corruption laws and institutions. Civil servants are prohibited from giving or accepting personal benefits or gifts. The 1971 Prevention of Corruption Act, amended in 2002, increased the fines for violations and stiffened penalties from seven to ten years’ imprisonment. The Office of Controller and Auditor General has authority to audit accounts, appropriations and spending to ensure compliance with government rules and regulations and sound accounting practices. The Permanent Commission of Inquiry (PCI) has authority to investigate acts involving arbitrary arrest, negligence or omission in the performance of duties, improper use of discretionary powers, nepotism, decisions made with malice or unreasonable delay, and unjust or oppressive decisions. Tanzania’s Prevention of Corruption Bureau (PCB) has extensive powers to investigate and prosecute corruption in the civil service and parastatals, including the power to enter and search premises and to arrest suspects. Despite this legal and institutional capacity to fight it, corruption has reached epidemic proportions, especially in the Ministry of Finance (which collects taxes), parastatal banks, customs, traffic police, magistrates’ courts, immigration, the Ministry of Lands Office and the Dar es Salaam City Council (which allocates land and processes title deeds).

Competitive multiparty elections brought President Benjamin Mkapa to power in 1995. He immediately initiated a number of reforms, including the Public Leadership Code of Ethics Act, which required new cabinet ministers as well as top civil servants to declare their assets and sign a code of ethics, and stipulated that any property or asset acquired by a public official after the initial declaration of assets and not attributable to income, gift or loan would be deemed to have been acquired in breach of the code, unless proved otherwise.

Despite these changes, all political parties and many candidates for public office have been tainted by corruption, and bribery of potential voters remains widespread. In 1996 President Mkapa appointed a commission to examine the

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17 Sedigh and Ruzindana, ‘The fight against corruption in Uganda’.
problem. The commission’s report stated that the laws on corruption were full of loopholes and the public institutions charged with wiping out corruption, including the judiciary, were themselves corrupt. The report prompted significant changes. It did not, however, lead to reforms that would make the PCB entirely independent of the executive branch by placing it under the authority of parliament. Instead, the PCB is located within the office of the president of Tanzania, its director general is appointed by the president, and it is accountable only to the president.19 Similarly, the PCI is appointed by the president, operates at the pleasure of the president, and depends entirely on the president for actions on its recommendations. Likewise, the Office of Controller and Auditor General is compromised: it is underfunded and its budget is subject to executive approval.

Experience in Tanzania, as in Uganda, suggests that domestic anti-corruption agencies cannot be effective when they lack independence and are dominated by the executive branch of the national government. There is a need instead to establish a powerful anti-corruption agency with complete independence from the executive branch. Hong Kong’s experience suggests that this change can make the fight against corruption effective.

Hong Kong

Prior to the anti-corruption campaign initiated in 1974, syndicated corruption in Hong Kong ‘existed in a primal state’, where ‘corruption infected not only the police, a classic source, but all government departments that provided any opportunity for its occurrence’.20 At that time, the eradication of corruption in Hong Kong seemed as hopeless a quest as the eradication of corruption in Africa does today. Yet, within a few short years, Hong Kong achieved ‘spectacular success’ in arresting corruption to the point where it now scores higher than Germany, Belgium and the United States on Transparency International’s corruption perceptions index,21 and consistently higher than the average for OECD countries on eleven measures of governance, including freedom from corruption.22 Hong Kong is now one of the five richest economies in the world.23 This is directly attributable to a bureaucratically clean, predictable, investment-friendly environment.24

The key to Hong Kong’s success was the establishment in 1974 of the ICAC, which quickly proved to be embarrassingly successful.25 The ICAC was established

19 Sedigh and Muganda, ‘The fight against corruption in Tanzania’.
24 Weder and Brunetti, ‘Another tale of two cities’.
25 Bertrand E. D. de Speville, ‘The experience of Hong Kong, China, in combating corruption’, in Stapenhurst
as an independent agency dedicated to fighting corruption, free from political interference, separate from the police force and the civil service, with adequate funding and resources. Salaries are high, attracting highly qualified individuals, and selection criteria are stringent. Once hired, staff are subject to a strict disciplinary code and anti-corruption checks by an internal monitoring group. As a consequence, the ICAC attracts and retains dedicated, highly competent individuals. The ICAC is authorized to prevent suspects from disposing of their property; to seek court orders preventing suspects from leaving Hong Kong; to examine bank accounts and safe deposit boxes; to require suspects to provide details of their finances; to search their premises; and to pursue any related offenses that are revealed during an investigation. The authority of the ICAC is backed by potent laws against corruption. In particular, civil servants who possess unexplained property or maintain a standard of living in excess of that which can be financed by their official salaries are considered to be guilty of corruption unless they can provide a satisfactory explanation to the court as to how the wealth was acquired.

Since the transfer of sovereignty in 1997, the ICAC commissioner is appointed by the State Council of the People’s Republic of China, on the recommendation of the chief executive of Hong Kong. Prior to the transfer, the ICAC commissioner and deputy were appointed by the governor of Hong Kong. The commissioner reported to the governor and appointed all other staff. While this reporting structure is very similar to that of Uganda’s IGG and Tanzania’s PCB, the ICAC has complete operational independence. An obvious question is why the ICAC is able to operate independently and is more effective than either the IGG or PCB in fighting corruption. An important difference is that Hong Kong’s chief executive lacks the all-encompassing political and economic power possessed by African presidents. Thus he cannot simply roll back or undermine anti-corruption campaigns in the same way that President Kabba engineered the reversal of reform strategies and countermanded dismissals of corrupt government officials in Sierra Leone, or in the way the head of Zambia’s anti-corruption task force was purged after his zealous investigation of former President Frederick Chiluba.

African leaders have delayed and reshaped reform policies in ways that undermine the effectiveness of those policies. This does not imply that corruption is culturally ingrained or that all African leaders are untrustworthy. African leaders happen to be embedded in systems where they are endowed with tremendous economic and political power, with few checks and balances against that power. If checks and balances within African states are missing—in large part, because of the legacy of colonial rule—a logical implication is that the international community bears responsibility for creating, funding and implementing an appropriate agency that would provide checks and balances against government power and would perform a role analogous to Hong Kong’s ICAC.

and Kpundeh, eds, *Curbing corruption*.
An African Commission Against Corruption

Hong Kong’s experience suggests that a truly independent anti-corruption commission, with the same powers as the ICAC, can be extremely effective in fighting corruption. However, the experiences of Uganda and Tanzania suggest that African leaders are far too powerful to permit the establishment of truly independent anti-corruption commissions within their domestic governmental arrangements. The implication is that there is a need for the international community to establish and support an African Commission Against Corruption (ACAC), with powers analogous to the powers of Hong Kong’s ICAC, to investigate corruption and refer cases to local prosecutors. Only an international institution can be truly independent of powerful African presidents and loyal elites. The challenge is to craft an institution that performs the role of Hong Kong’s ICAC but addresses concerns about national sovereignty and effectively elicits the consent and compliance of African governments.

Securing consent and compliance

Participation in a pan-African version of the ICAC would ultimately require the approval and support of African leaders, who presumably would resist the idea. However, domestic pressure from constituents and international pressure from powerful organizations such as the IMF, World Bank, UN and African Union (AU) can ultimately compel leaders to sign treaties that would otherwise be unpalatable, the alternative being to risk removal at the next election. It is this pressure that can make a leader willing to sign an unpalatable treaty.

There are numerous examples of international treaties that have been signed by African leaders because of pressure from constituents and international organizations. In each case, these laws compel African leaders to comply with restrictions on their ability to act in corrupt ways. Significantly, 43 African leaders or their representatives have already signed the United Nations Convention Against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC). Both are international laws committing the signatories to create and enforce domestic laws against corruption and to extend mutual cooperation in investigating and prosecuting corruption.

Significantly, 30 African nations have signed, and their parliaments have ratified, the Rome Statute of the International Criminal Court (ICC; for the complete list, see table 1). The Rome Statute created an international body of criminal investigators and endowed them with the same broad powers to conduct independent investigations on domestic territory that are envisioned for UN inspectors under an ACAC. The primary difference is that the Rome Statute focuses on crimes of war, aggression, genocide and crimes against humanity, whereas the UN inspectors would focus on corruption. However, crimes of war, aggression, genocide and crimes against humanity also involve the misuse of governmental power, often for personal gain, and thus constitute an extreme form of corruption. The Rome Statute compels African leaders to submit themselves and loyal
Table 1: African parties to the Rome Statute of the International Criminal Court

<table>
<thead>
<tr>
<th>Country</th>
<th>Date ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burkina Faso</td>
<td>30 November 1998</td>
</tr>
<tr>
<td>Senegal</td>
<td>2 February 1999</td>
</tr>
<tr>
<td>Ghana</td>
<td>20 December 1999</td>
</tr>
<tr>
<td>Mali</td>
<td>16 August 2000</td>
</tr>
<tr>
<td>Lesotho</td>
<td>6 September 2000</td>
</tr>
<tr>
<td>Botswana</td>
<td>8 September 2000</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>15 September 2000</td>
</tr>
<tr>
<td>Gabon</td>
<td>20 September 2000</td>
</tr>
<tr>
<td>South Africa</td>
<td>27 November 2000</td>
</tr>
<tr>
<td>Nigeria</td>
<td>27 September 2001</td>
</tr>
<tr>
<td>Central African Republic</td>
<td>3 October 2001</td>
</tr>
<tr>
<td>Benin</td>
<td>22 January 2002</td>
</tr>
<tr>
<td>Mauritius</td>
<td>5 March 2002</td>
</tr>
<tr>
<td>Niger</td>
<td>11 April 2002</td>
</tr>
<tr>
<td>Democratic Republic of Congo</td>
<td>11 April 2002</td>
</tr>
<tr>
<td>Uganda</td>
<td>14 June 2002</td>
</tr>
<tr>
<td>Namibia</td>
<td>20 June 2002</td>
</tr>
<tr>
<td>Gambia</td>
<td>28 June 2002</td>
</tr>
<tr>
<td>United Republic of Tanzania</td>
<td>20 August 2002</td>
</tr>
<tr>
<td>Malawi</td>
<td>19 September 2002</td>
</tr>
<tr>
<td>Djibouti</td>
<td>5 November 2002</td>
</tr>
<tr>
<td>Zambia</td>
<td>13 November 2002</td>
</tr>
<tr>
<td>Guinea</td>
<td>14 July 2003</td>
</tr>
<tr>
<td>Congo</td>
<td>3 May 2004</td>
</tr>
<tr>
<td>Burundi</td>
<td>21 September 2004</td>
</tr>
<tr>
<td>Liberia</td>
<td>22 September 2004</td>
</tr>
<tr>
<td>Kenya</td>
<td>15 March 2005</td>
</tr>
<tr>
<td>Comoros</td>
<td>18 August 2006</td>
</tr>
<tr>
<td>Chad</td>
<td>1 January 2007</td>
</tr>
<tr>
<td>Madagascar</td>
<td>14 March 2008</td>
</tr>
</tbody>
</table>

elites to independent investigators with the power to arrest, detain, try and convict them in a court of law. Thus, the Rome Statute establishes a precedent whereby domestic sovereignty is surrendered in cases where government officials place themselves above the law. Importantly, it was not necessary to rely on voluntary acquiescence by African leaders to achieve adherence to the Rome Statute: pressure from constituents and the international community forced those leaders to sign the treaty or risk removal at the next election.
The key to this breakthrough was that the Rome Convention created a public litmus test of the willingness of African leaders to sign an international treaty establishing the ICC. African leaders evidently found that the pressure to sign overcame any concerns they had about the challenge to their power and domestic sovereignty. The same process by which the Rome Statute was established provides a model for establishing a UN inspectorate through a similar public litmus test. The UN General Assembly established a committee that drafted the ICC Statute, which was subsequently adopted by 120 states in 1998 and ratified by 111 by March 2010. The same process could be pursued to establish a UN inspectorate. Table 2 compares key features of the ICC and the proposed ACAC, suggesting that the ICC provides a suitable model and precedent for all the powers that are envisioned for UN inspectors.

Thus, there is ample reason to think that African leaders could be compelled to sign a protocol that would expand the scope of the UNCAC, create the ACAC and, upon ratification, create the legal duty to comply with investigations led by UN inspectors that would accompany ratification. Failure to sign such a protocol would open an African leader to an electoral challenge at the next election. Opponents would almost certainly cite the failure as a clear indication that the incumbent condones corruption and is unwilling to abide by an international treaty designed to fight it aggressively. It is unlikely that an incumbent could survive this challenge since corruption is a perennial issue that often decides elections in Africa.

Public outrage regarding corruption creates enormous pressure to create laws and institutions that restrict it. Until now, however, incumbents have been able to escape serious reforms because changes have always been limited to domestic initiatives that they are able to circumvent. Only an international treaty, akin to the Rome Statute, can compel African leaders to choose between the establishment of an independent force of UN inspectors and the likelihood of electoral defeat.

There is ample evidence that African leaders can be pressured to sign laws establishing institutions that are empowered to investigate misconduct by government officials. Significantly, 26 African countries have already created institutions, such as the Ombudsman in Malawi and the Public Complaints Commission in Nigeria, that investigate citizens’ complaints regarding government officials. About 30 African countries have created dedicated anti-corruption agencies modelled on Hong Kong’s ICAC. The creation of these institutions, whose role is similar to that proposed for UN inspectors, resulted from either the election of a reform-oriented president or pressure from reform-oriented civil groups seeking to install checks and balances to counter official misconduct. The popularity and growth of these institutions throughout Africa suggest that it may be difficult even for reluctant African leaders to resist pressure to sign a protocol permitting UN inspections.


27 Adamolekun, ‘On the transferability of governance institutions’.
Table 2: Comparison of International Criminal Court and proposed African Commission Against Corruption

<table>
<thead>
<tr>
<th>ICC</th>
<th>ACAC</th>
</tr>
</thead>
<tbody>
<tr>
<td>UN General Assembly establishes committee that drafts ICC Statute, leading to adoption by 120 nations in 1998 and ratification by 111 nations by March 2010</td>
<td>Same process</td>
</tr>
<tr>
<td>Signature and ratification creates legal duty to comply</td>
<td>Same</td>
</tr>
<tr>
<td>Compels full cooperation by state parties</td>
<td>Same</td>
</tr>
<tr>
<td>Authority to make determinations of non-cooperation</td>
<td>Same</td>
</tr>
<tr>
<td>Prosecutor has complete independence; shall not seek or act on instructions from any external source</td>
<td>Same</td>
</tr>
<tr>
<td>Prosecutor shall be person of high moral character</td>
<td>Same</td>
</tr>
<tr>
<td>Prosecutor appoints staff investigators</td>
<td>Same</td>
</tr>
<tr>
<td>Prosecutor and staff enjoy immunity from prosecution under local law</td>
<td>Same</td>
</tr>
<tr>
<td>Salaries and expenses paid by state parties, UN funds and contributions</td>
<td>Same</td>
</tr>
<tr>
<td>Prosecutor endowed with investigative and prosecutorial powers</td>
<td>Only investigative powers</td>
</tr>
<tr>
<td>Independent court with power to convict and imprison</td>
<td>No court; no power to convict</td>
</tr>
<tr>
<td>Power to arrest, convict, imprison, impose fines and render property forfeit</td>
<td>Power to arrest</td>
</tr>
<tr>
<td>Power to conduct on-site investigations, make arrests, gather evidence, take statements and testimony, prevent absconding, conduct wiretaps and surveillance (where permitted), without cooperation of state parties</td>
<td>Same</td>
</tr>
<tr>
<td>Power to compel state party to execute arrests and surrenders</td>
<td>Same</td>
</tr>
<tr>
<td>Power to compel state party to prosecute the accused</td>
<td>Same</td>
</tr>
<tr>
<td>Power to enter into agreements to facilitate cooperation of states and persons</td>
<td>Same</td>
</tr>
<tr>
<td>Power to take steps to preserve evidence</td>
<td>Same</td>
</tr>
<tr>
<td>Crimes of war, aggression, genocide, crimes against humanity</td>
<td>Corruption only</td>
</tr>
<tr>
<td>Crimes involving corruption of justice, including bribery, retaliation, intimidation of witnesses or court officials</td>
<td>Included</td>
</tr>
<tr>
<td>Criminal responsibility for those who order, solicit, induce, aid or abet a crime</td>
<td>Same</td>
</tr>
<tr>
<td>Jurisdiction where crime is committed in state, or accused is national of state, that is party to the Statute</td>
<td>Same</td>
</tr>
</tbody>
</table>
At the same time, widespread acknowledgement that the effectiveness of domestic anti-corruption institutions has been undermined by the executive branch is likely to generate acceptance of the idea of creating independent UN inspectors and of forcing African leaders to choose either to sign a protocol permitting such inspections or to face likely removal from office at the polls.

Hathaway’s theory of international law may be applied to the question why African leaders might commit themselves to an international agreement establishing an ACAC.28 Central to Hathaway’s theory is the recognition that state behaviour is the result of complex interactions between political players at the domestic level. These players respond to an array of conflicting incentives and pressures from many quarters: the electorate; interest groups; powerful elites, including appointed and elected officials; legislators; the legal and judicial system,

including police, prosecutors and anti-corruption units; the media and public perceptions created by the media; competitors and potential successors; tribal kin; multinational corporations; international financial institutions, including the IMF and the World Bank; the UNCAC; the AUCPCC; Transparency International; and other international organizations.

In general, patrimonial networks create incentives and pressures to resist an anti-corruption commission, while international corporations, international financial institutions, conventions against corruption, Transparency International, the media, the electorate, the G8 countries, and honest members of law enforcement bodies and the legal system may be expected to support the accountability that would be exerted by an independent ACAC. Thus, an African leader’s likely commitment to a future ACAC depends on a complex calculation of the political benefits and costs. For example, a corrupt leader might judge that the media, IMF and World Bank would turn against him—that it would be politically costly and that the electorate would oust him at the next election—if he did not sign an agreement permitting investigations under the auspices of an ACAC. Since African leaders routinely compete for electoral support on the basis of promises to fight corruption, history suggests that support for an ACAC would be likely to become a prominent election issue, forcing the incumbent as well as his challengers to declare their support for this type of anti-corruption measure.

There is also another reason why African leaders may commit their countries to an ACAC. African leaders, acknowledging the failure of public institutions that have been captured by elites to serve narrow personal interests, resulting in corruption, a lack of accountability and poor governance, have agreed to subject their countries to peer review. The African Peer Review Mechanism (APRM) is being used to assess the performance of African countries with regard to compliance with the Declaration on Democracy, Political, Economic and Corporate Governance approved by the AU summit in July 2002. This declaration commits the member states of the AU to improve accountability and governance, to ‘undertake to combat and eradicate corruption’ and to participate in the APRM process. The significance of this commitment to the APRM process is that it suggests how and why African countries might embrace changes that improve accountability and governance, perhaps including intrusive ACAC inspections.

By July 2008 29 countries had formally joined the APRM by signing the memorandum of understanding: Algeria, Angola, Benin, Burkina Faso, Cameroon, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Republic of Congo, Rwanda, Sao Tome e Principe, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Togo, Uganda and Zambia. By April 2009 ten countries had been peer reviewed.

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Through the peer review assessments, African countries have agreed to fight corruption, strengthen their institutions, adopt market-oriented policies, respect human rights and the rule of law, and spend more on the needs of the poor. These commitments have been reinforced by the commitment of G8 countries, through the G8 Africa Action Plan, to provide substantial financial support through trade, aid, investment and debt relief. For example, the Millennium Challenge Account (MCA), funded by an annual increase of US$1 billion in US development aid, will be disbursed on the basis of performance criteria including the control of corruption, accountability and government effectiveness. Furthermore, it is expected that private capital flows will be attracted by APRM member commitments that will reduce the risk of investing in Africa. Thus there are substantial tangible benefits of participating in the APRM process and abiding by peer review team recommendations. African leaders who refuse to abide by those recommendations will cause their countries to lose valuable aid and investment. The resulting adverse publicity would serve as electoral fodder for opposition candidates and increase their chances of unseating corrupt incumbents.

Thus the APRM process provides a powerful mechanism that could pressure African leaders, even corrupt leaders, to agree to visits by international inspectors sanctioned by the UN and the AU through the creation of an ACAC—if this was recommended by an APRM review team. Refusal of such a recommendation, or attempts to delay or undermine ACAC inspectors, would trigger adverse publicity that would threaten valuable MCA aid and private capital investment, and present an easy target for opposition candidates. Once ACAC inspectors were permitted to conduct inspections, they would provide the ammunition needed by prosecutors to root out corruption across each branch and at every level of government. The APRM provides the leverage that could open the door to ACAC inspectors, who would then vigorously prosecute corruption.

Surveys of African citizens routinely find strong support for the fight against corruption and new leaders are frequently elected on the basis of promises to fight corruption. Thus, it should not be difficult to make commitment to participate in an ACAC an election issue that would compel incumbents and opposition candidates to declare their support publicly. Failure to follow through on these commitments would risk public censure and loss of office. Significantly, a recent natural experiment tested the effect of an anti-corruption programme in Brazil and found that a one standard deviation increase in mayoral corruption, disclosed through random audits of municipal expenditures and posted on the internet, reduced the likelihood that an incumbent mayor would be re-elected by 25 per cent. The creation of an ACAC that published reports regarding corrupt practices might be expected to have a similar influence on elections in Africa.

32 Hope, ‘Toward good governance and sustainable development’.
33 Hope, ‘Toward good governance and sustainable development’.
34 Stapenhurst and Kpundeh, eds, Curbing corruption.
35 Frederico S. Finan, ‘Political patronage, corruption, and local development’, PhD diss., University of California, 2006. The natural experiment compared mayors who participated in the anti-corruption programme with mayors who did not participate; however, mayors were not randomly assigned to the programme.
The East Asian experience suggests that peer pressure is effective in eliciting commitments by member countries to perform the required corrective actions. States are much more inclined to comply with stipulations when they know their implementation is being monitored. Compliance with the APRM process confers international recognition, raises the domestic legitimacy of governments and increases the political risk attached to corrupt practices. Thus there is ample reason to think that African leaders may feel pressured to agree to intrusive ACAC inspections, if recommended by an APRM review team, and reason to think that leaders would either comply with inspectors or face severe erosion of public and international support.

The implementation of ACAC inspections conducted by truly independent, competent UN inspectors may be expected to have the same salutary effect that was achieved in Hong Kong, where the initial corps of inspectors drew heavily upon the body of experienced British criminal investigators. Until the advent of the ICAC, Hong Kong’s police force was notoriously corrupt. The introduction of the ICAC ensured, for the first time, that no corrupt policeman could feel safe from exposure. There would be no tip-off of a raid, inspection or investigation, and no chance to hide or destroy evidence. The calculus of the benefits and costs of corruption changed dramatically.

In the same way, independent ACAC investigators could ensure that corrupt police, prosecutors, judges and staff of anti-corruption units never feel safe from exposure. By exposing every member of the law enforcement community, every prosecutor, every judge and every investigator in an anti-corruption unit to the threat of investigation, independent investigators serve to deter corruption in the institutions that should in fact fight corruption. Police are compelled to collect evidence, prosecutors are compelled to present evidence, and judges are compelled to cite evidence, or risk investigation and prosecution themselves for favouritism and corruption. When faced with the prospect of incarceration, it becomes much easier for potentially corrupt police, prosecutors and judges to turn down bribes and to behave ethically. At the same time, it becomes easier for honest police, prosecutors and judges to advance themselves through competent work. By deterring corruption and crime among crimefighters, independent investigators multiply the effectiveness of their own efforts to fight crime.

While numerous African countries have established anti-corruption units, so far they lack the necessary independence from strong African leaders to be effective. It is apparent that any successful anti-corruption unit must be international and thus completely independent of influence from corrupt leaders. A second prerequisite is the endowment of independent investigators with strong enforcement powers that are adequate to the task of fighting corruption. A third prerequisite is the establishment of procedures that maximize the probability

that honest members of the law enforcement and legal systems can overcome the predations of dishonest members working in consort with criminal attempts to hide and destroy evidence and subvert justice.

A draft protocol would empower the UN to create an African Commission Against Corruption to investigate allegations of corruption.38 The preamble justifies the protocol by citing articles 3, 10, 13, 43, 46, 48 and 62 of the UN Convention Against Corruption, which provide the legal basis for augmenting the capabilities of the police, law enforcement and anti-corruption agencies in developing countries, and for using UN resources to do so, in order to combat corruption. Furthermore, the convention provides the legal authority for law enforcement personnel of member states to act on behalf of the law enforcement personnel of a requesting state. Specifically, article 46 of the convention specifies that parties to the convention ‘shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings’ in relation to corruption-related offences, including:

(a) taking evidence or statements from persons;
(b) effecting service of judicial documents;
(c) executing searches and seizures, and freezing assets;
(d) examining objects and sites;
(e) providing information, evidentiary items and expert evaluations;
(f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
(g) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
(h) facilitating the voluntary appearance of persons in courts or administrative bodies of the requesting state party;
(i) any other type of assistance that is not contrary to the domestic law of the requested state party;
(j) identifying, tracing and freezing proceeds of crime in accordance with the provisions of the Convention Against Corruption;
(k) recovering assets, in accordance with the provisions of the Convention Against Corruption.

Finally, article 62 of the convention created a mechanism that could be used to fund the proposed ACAC through contributions by the World Bank, IMF, parties to the convention and the G8 countries, which have already agreed to commit substantial financial resources to fight corruption and ensure accountability and government effectiveness through the G8 Africa Action Plan.

Thus, legal authority and a funding mechanism have already been established that would permit the creation of a UN-funded ACAC, the use of ACAC inspectors to augment the capabilities of the police, law enforcement and anti-corruption agencies in developing countries, and the employment of inspectors and law enforcement personnel of member states, through the ACAC, to act on behalf

of the law enforcement personnel of a requesting state to conduct investigations, involving all of the powers enumerated in article 46, listed above. What is needed is not the legal authority, but a UN protocol that spells out the details of how this would work in practice. Thus the draft proposal is framed as a protocol that supplements the UN Convention Against Corruption.

The draft protocol specifies procedures. Any individual may submit an allegation of corruption. After receiving a request for an investigation, the ACAC, under the auspices of the UN Commission on Crime Prevention and Criminal Justice, shall review the merits of, and prioritize, each request. The Commission shall designate a UN inspector who shall lead and supervise every aspect of the investigation, ensuring that the investigation is conducted in a manner that respects and abides by the laws and law enforcement procedures of the state where the investigation is conducted. Inspectors, their staff and their surrogates are to be held harmless and indemnified against potential liability with regard to the laws of the state where the investigation is conducted, but their conduct and the propriety of all investigations shall be monitored by an Operations Review Committee, whose members shall be nominated by signatories to the protocol. The Operations Review Committee shall refer cases of criminal misconduct by inspectors or their surrogates for prosecution under the laws and judicial system of the state where the inspectors or surrogates hold citizenship.

UN inspectors shall exercise their powers on production of a written authorization showing their identity and position, together with a document indicating the subject matter and purpose of the on-the-spot check, inspection or investigation. Individuals served with these documents shall be required to comply under the same terms as would be required by the police, law enforcement and anti-corruption units of the state where the investigation is conducted. Failure to comply shall have the same consequences as failure to comply with investigations by the police, law enforcement and anti-corruption units of the state where the investigation is conducted. Under the draft protocol, inspectors may, without advance notice:

(a) conduct on-the-spot inspections on the premises of potential witnesses and suspects who may have knowledge or involvement, direct or indirect, regarding the irregularity in question;
(b) interrogate potential witnesses and suspects who may have knowledge or involvement, direct or indirect, regarding the irregularity in question;
(c) seize and impound travel documents to prevent the flight of suspects;
(d) arrest and detain suspects who may have knowledge or involvement, direct or indirect, regarding the irregularity in question, until the suspects are charged in accordance with the law enforcement procedures of the jurisdictional state and handed over to the law enforcement authorities of the jurisdictional state, or for a period not to exceed 14 days;
(e) seize evidence, including electronic files, that is relevant to the irregularity in question;
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(f) copy relevant documents;
(g) conduct surveillance, including wiretapping and electronic surveillance, that is necessary to collect evidence regarding the irregularity in question;
(h) freeze assets and prevent the flight of assets obtained through corruption, until the completion of legal proceedings;
(i) undertake any other actions consistent with the laws and law enforcement procedures of the state where the investigation is conducted, as needed.

Where witnesses or suspects resist an on-the-spot check, inspection, interview or investigation, the police, law enforcement and anti-corruption units of the state where the investigation is conducted, acting in accordance with national rules, shall give UN inspectors such assistance as they need to allow them to discharge their duty in carrying out an on-the-spot check, inspection, interview or investigation. It shall be for the police, law enforcement and anti-corruption units of the state where the investigation is conducted to take any necessary measures, in conformity with national law, to enforce cooperation. In cases where an inspector believes that adequate and timely assistance has not been provided by the requisite police, law enforcement, judicial and anti-corruption units, the inspector may file a request for censure by the Commission on Crime Prevention and Criminal Justice. The commission shall review the request and may subpoena evidence and/or interview witnesses. The commission shall make a determination, by a majority vote, to approve or disapprove the motion for censure no later than 21 days after receiving a request for censure.

Under the draft protocol, the World Bank and IMF shall develop and implement a system of reducing aid and credits in response to the magnitude and frequency of acts of non-cooperation with UN inspectors and their surrogates. Parties to the protocol agree to abide by the judgment of the Commission on Crime Prevention and Criminal Justice with regard to the magnitude and frequency of any acts of non-cooperation, and with regard to the commission's recommendations for implementing reforms of the police, law enforcement, judicial and anti-corruption units of the state where the investigation is conducted.

Under the draft protocol, inspectors shall hand over disposition of each case to the appropriate prosecuting authority upon completion of the investigation. Each inspector shall submit reports to the commission every 30 days following assignment to an investigation, until the investigation is completed and the case is handed over to the appropriate prosecuting authority. When the case is handed over to the prosecuting authority, copies of the final report shall be submitted to:

(a) the commission;
(b) the complainant;
(c) the appropriate prosecuting authority;
(d) the appropriate court; and
(e) Transparency International.
The purpose of this provision is to ensure that the reports are not ignored through the machinations of corrupt officials. The state where the investigation is conducted shall provide Transparency International with updates regarding the disposition of the case every 30 days, until the case is dismissed by the appropriate prosecuting authority or court, or a final verdict is reached by the appropriate court. Upon dismissal of the case or upon a final verdict, the state shall provide Transparency International with a final report, to be published online. Transparency International shall publish updates regarding the disposition of the case every 30 days, until the case is dismissed by the appropriate prosecuting authority or court, or a final verdict is reached by the appropriate court. Transparency International shall publish a final online report regarding the disposition of the case by the appropriate prosecuting authority or court, along with the prosecuting authority’s final report, (a) upon dismissal of the case, (b) upon a final verdict or (c) 60 days following submission of the final investigation report to the authorities described above, whichever occurs first.

The reports and all supporting documents shall constitute admissible evidence in administrative or judicial proceedings of the member state in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.

Conclusion

The draft protocol described above would effectively provide an independent means of investigating corruption, and would do so under the existing legal authority of the UN according to the provisions of the Convention Against Corruption. Under the protocol, any individual could submit a request for an investigation. The UN Commission on Crime Prevention and Criminal Justice, through the ACAC, would assess the validity of each charge and would provide a check against politically motivated investigations. Importantly, the ACAC would have the authority to investigate counterclaims that a given investigation was politically motivated. The ACAC would serve as an independent arbiter of conflicting charges of corruption. The ACAC would have the authority to conduct multiple investigations simultaneously to sort out conflicting claims, and would have the authority to recommend charges against multiple parties.

At the same time, trials would be conducted by domestic courts, unless crimes were to be referred to the ICC. Thus, the ACAC would have no power to convict, sentence and imprison (other than the temporary detention of suspects before they are handed over for trial). This separation of powers has been effective in Hong Kong in ensuring that the powers of investigation are not abused. At the same time, the lack of power to convict and sentence is a potential weakness that could be exploited by corrupt African leaders. However, any interference with prosecutions and the courts would itself be a major crime subject to investigation as an act of corruption. Repeated instances would be brought to the attention...
of the international community through ACAC reports filed with Transparency International, and this could be expected to have an adverse effect on Transparency International and APRM ratings, triggering financial sanctions by donors, the World Bank and the IMF, flight of foreign investment, adverse publicity through the media, and erosion of electoral support that could unseat corrupt incumbents.

While it may seem unlikely that merely investigating corruption can stop it, this is exactly what happened in Hong Kong. The Hong Kong ICAC did not have the power to convict, sentence or imprison suspects, yet was very successful in halting corruption. The presence of independent investigators has a powerful effect on corrupt officials across all branches of government. When officials know that their telephones may be tapped, that any meeting might be recorded and that any colleague may provide evidence to prosecutors, the scope for corruption is drastically reduced. However, this is only the case when there is a truly independent body of inspectors who are perceived as incorruptible. This is what is needed in Africa; but it has yet to be established by the international community.

Perhaps the greatest challenge is that of inducing African leaders to approve a protocol that threatens their authority. However, the act of signing a law to fight corruption is not a purely voluntary act. If it were, there would be few laws or agencies to fight corruption anywhere in the world, because few leaders would voluntarily approve the creation of a law or agency that threatens their authority. The existence of effective anti-corruption laws and agencies in western countries is the consequence of concerted public pressure to fight corruption, rather than voluntary acquiescence by benevolent leaders.

While western governments are relatively clean, this was not always the case. Government corruption was endemic in sixteenth- and seventeenth-century England and in America during the late nineteenth and early twentieth centuries. Public pressure for reform ultimately forced political leaders to adopt checks and balances against corruption. Thus, the fact that effective checks and balances currently exist in western countries is not an indicator that western leaders are more benevolent than African leaders, only that pressure in western countries has been exerted more effectively, and at an earlier period, to restrict the freedom of western leaders to misuse power.

There is substantial evidence that African leaders can be pressured to sign anti-corruption laws that restrict their authority. African leaders have signed the UNCAC, the AUCPCC, the laws establishing 30 dedicated African anti-corruption agencies, the Rome Statute establishing invasive investigative powers, and the agreement to subject their countries to invasive APRM reviews, with recommendations that are tied to MCA funding as well as the willingness of the


40 Hoogenboom, ‘Did Gilded Age scandals bring reform?’; Peck, ‘The British case’.
G8 countries to provide concessionary trade, aid, investment and debt relief agreements. All of these laws restrict the authority of domestic leaders. In the case of the Rome Statute, domestic leaders who commit certain crimes are now subject to arrest, trial and imprisonment under the authority of the independent prosecutor of the ICC, who operates independently of the authority of domestic leaders. These laws must necessarily have been signed into law by African leaders, despite their resistance. The explanation of how this has come about involves pressure from constituents who are fed up with corruption, along with pressure from powerful international agencies such as the IMF, World Bank, African Union and UN that compels leaders to sign laws that they may perceive as unpalatable.

A recent book-length analysis found that international non-governmental agencies (NGOs) created a powerful coalition and were influential in obtaining passage and ratification of the Rome Statute. Organizations such as Amnesty International were particularly effective because of the recognition by domestic leaders that these organizations could mobilize voters, thereby threatening the survival of any leader opposed to the statute. NGOs such as Amnesty International set the terms of the debate, framed the passage of the statute as a moral issue, and compelled domestic leaders to adopt the statute or face public condemnation. NGOs initially focused on securing signatures to the statute rather than full ratifications, because signatures had few immediate consequences. As a result, signatures were obtained from 120 nations by 17 July 1998. This overwhelming endorsement immediately created pressure to ratify the treaty. To lobby for ratification, international NGOs coordinated their actions with local NGOs that had direct access to local political leaders in domestic executive and legislative branches. By obtaining early ratifications from a coalition of nations that favoured the statute, pressure was brought to bear on those that were reluctant; they then became more willing to ratify because their neighbours were doing so. For example, one of those that held out against ratification longest, Uganda, ratified the treaty on 14 June 2002, as a direct result of pressure from other governments, human rights NGOs and humanitarian relief organizations to improve Uganda’s record on human rights. Ugandan government officials believed that this action would improve the country’s reputation within the international community and would maintain international support for concessions regarding aid, trade and debt relief.

Thus, the process through which NGOs influenced the passage of the Rome Statute provides a roadmap for obtaining passage of the proposed protocol to the UNCAC. Importantly, it is not necessary to rely on purely voluntary acquiescence by African leaders. Instead, passage would be obtained through a coordinated international effort, involving influential international organizations and pressure exerted through the APRM. Framed as a moral issue, signature and ratification of this protocol would provide a litmus test for African leaders who would be compelled to support the protocol or risk public condemnation and loss of office.

42 Struett, The politics of constructing the International Criminal Court.