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THE PROBLEM OF PRIVATE-TO-PRIVATE CORRUPTION

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ABSTRACT

Corruption has huge detrimental effects, and private-to-private corruption contributes hugely to this detriment. Its consequences match those of public corruption, particularly in the contemporary world, when private entities not only are becoming more influential but also increasingly are engaged in the dispensing of public functions. Hence, to give more muscle to the war against corruption and for it to bear some fruit, proper attention should be given to confronting corruption within the private sector. Criminalisation is one of the pivotal tools in this regard. This paper explicates the regulation of private-to-private corruption under key international anti-corruption instruments which are relevant in the African context. It also discusses the criminalisation of private sector corruption by the Statute of the African Court of Justice and Human and Peoples' Rights.

1 INTRODUCTION

It is not to be doubted that corruption has deleterious effects on any given nation in a myriad of ways. Alas, there is no model method successfully to vanquish kleptocrats and crack down on the scourge of corruption.[1] A legal framework that criminalises

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1 See UNODC (2012) *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2ed) New York: United Nations at v.

corrupt conduct is one of the prominent — and necessary — mechanisms in the fight against corruption. Historically, corruption was not taken seriously at the international level. Certainly, the international community made no palpable effort to fight corruption in the public sector, let alone the private sector. Corruption was considered a domestic issue to be dealt with by individual states. The historical pendulum has swung. Today, corruption is perceived as a global problem[2] and some 11 major international anti-corruption legal instruments have been adopted. The campaign to combat corruption internationally reached a major milestone with the adoption of the United Convention against Corruption in 2003.

Needless to say, corruption can be and is committed routinely in both the private and public sectors. However, private sector corruption, also known as private-to-private corruption, has not been given the attention it deserves, unlike its public sector counterpart.[3] This asymmetry does not mean that private-to-private corruption is "less widespread, less harmful and less worth combating than private-to-public corruption".[4] The aim of this paper is to explore the notion of private-to-private corruption in the context of the contemporary global anti-corruption offensive, with a focus on Africa. In this regard, the primary question is whether the problem of private-to-private corruption has been addressed adequately by the leading anti-corruption instruments.

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2 The corrupt acts exposed by the release of the Panama Papers and the revelation of serious corruption within FIFA attest to the enormity of the problem. See International Consortium of Investigative Journalists "The Panama Papers", available at *https://panamapapers.icij.org/* (visited 20 July 2017); Transparency International (2016) *Global Corruption Report: Sport* available at *https://www.transparency. org/news/feature/global_ corruption_report_sport* (visited 20 July 2017); BBC (2015) "Fifa Corruption Crisis: Key Questions Answered", available at *http://www.bbc.com/news/world-europe-32897066* (visited 20 July 2017).

3 Carr I (2007a) "Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?" 15 *European Journal of Crime, Criminal Law & Criminal Justice* 121-153 at 131.

4 Argandoña A (2003) "Private-to-Private Corruption" 47(3) *Journal of Business Ethics* 253-267 at 254. See also Murthy NRN (2009) "Tackling Corruption in Business: Profitable and Feasible" in Transparency International *Global Corruption Report: Corruption and Private Sector* Cambridge: Cambridge University Press at xix; Heine G & Rose TO (2003) "Private Commercial Bribery — A Comparison of National and Supranational Structures" *Max Planck Institute Project Report* at 3-4; Burger ES & Holland M (2009) "Private-Sector Incentive for Fighting International Corruption" in Eicher S (ed) *Corruption in International Business: The Challenge of Cultural and Legal Diversity* Surrey: Ashgate Publishing Limited at 163-164; Transparency International (2009) "The Scale and Challenge of Private Sector Corruption" in Eicher S (ed) *Corruption in International Business: The Challenge of Cultural and Legal Diversity* Surrey: Ashgate Publishing Limited at 3.

2 THE MEANING OF CORRUPTION

It is a commonplace that there is no single, authoritative, comprehensive and universally accepted definition of corruption.[5] This absence of consensus and the consequent unevenness in defining corruption are attributed to legal, criminological and political problems.[6] Moreover, because corruption takes a variety of forms, it hardly is possible to formulate a generic definition which embraces all the species and peculiarities of problem.[7] In this regard, Tanzi notes that "like an elephant, while it may be difficult to describe, corruption is generally not difficult to recognise when observed".[8] For this reason, most of the international anti-corruption instruments have refrained from defining corruption. Whereas it may be fair and natural to expect these instruments to adopt at least a working definition of corruption, they do not do so, instead providing lists of acts or forms of corruption.[9] Notable exceptions here are the African Union Convention on Preventing and Combating Corruption and the Southern African Development Community Protocol against Corruption. Their definitional articles will be considered later.

The definition given by World Bank illustrates well the classic notion of corruption as "the abuse of public office for private gain".[10] The authoritative *Black's Law Dictionary* tells us that corruption encompasses "depravity, perversion, or taint; an impairment of integrity, virtue, or moral principle; especially the impairment of a public official's duties by bribery".[11] Signficantly, both these definitions exclude private

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5 Babu RR (2006) "The United Nations Convention against Corruption: A Critical Overview" *Social Science Research Network* 1-32 at 4; Martin A (2011) "Implementation as the Best Way to Tackle Corruption: A Study of the UNCAC and the AUC 2003" 7 *Surrey Law Working Paper* 4-22 at 5, available at: *http://ssrn.com/abstract=1776025* (visited 25 July 2017).

6 See Martin (2011) at 5. See also Carr I (2007b) "Corruption, Legal Solutions and Limits of Law" 3(3) *International Journal of Law in Context* 227-255 at 231; Gyimah-Brempong K (2002) "Corruption, Economic Growth and Income Inequality in Africa" 3 *Economics of Governance* 183–209 at 186-87.

7 See Carr (2007a) at 131.

8 Tanzi V (December 1998) "Corruption around the World: Causes, Consequences, Scope, and Cures" 45(4) *IMF Staff Papers* 559-594 at 564, available at https://www.imf.org/external/Pubs/FT/staffp/1998/12-98/pdf/tanzi.pdf (visited 20 July 2017).

9 See Carr (2007a) at 131; Carr (2007b) at 232; Boersma M (2008) "Catching the 'Big Fish'? A Critical Analysis of the Current International and Regional Anti-Corruption Treaties" *Social Science Research Network* 1-42 at 31.

10 Ofosu-Amaah WP *et al* (1999) *Combating Corruption: A Comparative Review of Selected Legal Aspects of State Practice and Major International Initiatives* Washington DC: IBRD/World Bank at 2.

11 Garner BA (ed) (2004) *Black's Law Dictionary* at 1047. See also Girling J (1997) *Corruption, Capitalism and Democracy* Oxford: Routledge at 1.

sector corruption from their ambit. Indeed, the private sector variety does not fit into most of the conventional definitions of corruption.

Nonetheless, for a successful fight against corruption, it is not only advisable but also indispensable to incorporate private sector corruption within the definitional compass. The definitional sidelining of private sector corruption indicates that in the past the anti-corruption campaign paid attention mainly, if not solely, to the public sector. The neglect of the private sector inevitably renders the arsenal of anti-corruption weapons incomplete, if not effete. Thus, a wider definition, which transcends the conventional focus on the public sector and embraces the private sector, will be of paramount importance in fighting the destructive impact of corruption. In this regard, the definition of corruption adopted by Transparency International, namely, "the abuse of entrusted power for private gain"[12] is particularly instructive. From this definition, it is apparent that "entrusted power" includes not only the power conferred upon public officials but also that conferred upon all private persons or entities. Thus, abuse of entrusted power by individuals or legal persons in the private sector is regarded also as corruption by Transparency International, and correctly so. The abuse of entrusted power takes numerous forms, ranging from bribery and embezzlement, through favouritism and conflicts of interests, to trading in influence, trading information, abuse of functions and illicit enrichment. The Transparency International definition serves as the working definition of corruption for the purposes of this essay.[13]

3 PRIVATE SECTOR CORRUPTION

Private-to-private corruption is perpetrated by private sector actors within the private sector. Hence, in order to understand this form of corruption, one has to appreciate the nature of the private sector itself. In this regard, the definition of the private sector

12 Transparency International (2007) *Global Corruption Report: Corruption and Judicial Systems* at xxi. See also Organisation for Economic Co-operation and Development (2008) "Corruption: A Glossary of International Standards in Criminal Law" at 21-22, available at *http://www.oecd.org/daf/anti-bribery/corruptionglossaryofinternationalcriminalstandards.htm* (visited 20 July 2017).

13 For critical perspectives see Chinhamo O & Shumba G "Institutional Working Definition of Corruption" *Southern African Working Paper Series* ACT/1/2007/WPS 1-7 at 5, available at http://archive.kubatana.net/docs/demgg/act-sa_definition_of_ corruption_080731.pdf (visited 27 July 2017); Warren ME (2004) "What Does Corruption Mean in a Democracy?" 48(2) *American Journal of Political Science* 328-343.

provided by the African Union Convention on Preventing and Combating Corruption is helpful. It stipulates that:

> Private sector means the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government.[14]

From this definition, it follows that private sector corruption is an abuse of entrusted power within and/or between the economic zones under the ownership of private entities. It is known also as private-to-private corruption because both the corrupter and corruptee are private entities or individuals. Private sector corruption, like public sector corruption, can take a variety of forms, including bribery, embezzlement, trading in influence, trading information, abuse of power and favouritism.[15] Like its public sector counterpart, private sector corruption has severely damaging consequences for the development and good governance of affected countries. Especially in today's borderless and globalised liberal economy, the adverse effects of corruption will be felt acutely in almost every part of the world. In a word, corruption, in both its public and private aspects, knows no boundaries. The same may be said of its injurious impact.

Several factors facilitate corruption in the private sector. In particular, the ongoing privatisation of state-owned enterprises creates generous opportunities for corruption.[16] It has been argued that:

> Privatisation can result in a diminution of corrupt practices by shifting the emphasis of an operation from an amorphous and opaque public sector to the transparent discipline of the private sector's pursuit of profit. Privatisation reduces corruption: Managers of companies make decisions that ultimately have to satisfy owners instead of public officials; government assets for whom no one claims accountability cease to exist.

14 Art 1 of the AU Convention.

15 Argandoña (2003) at 256.

16 See Carr (2007a) at 234; Webb P (2005) "The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?" 8 *Journal of International Economic Law* 191-229 at 212-213; Carr I (2006) "The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions*?"* 3 *Manchester Journal of International Economic Law* 3-44 at 22.

> Once privatisation is completed, independent businesses can conduct their affairs without government interference.[17]

However, such optimism is misplaced. The privatisation of the public entrains the transfer of the conditions promoting public sector corruption into the private sector. The point is that erstwhile public institutions and agencies which have been privatised can become easily a new breeding ground for corruption. In this regard, Argandoña observes judiciously that:

> privatisation of many publicly owned companies has shifted onto the private sector problems that previously were seen as belonging exclusively to the area of private-to-public corruption. In fact, the distinction between private-to-public and private-to-private corruption is increasingly coming to be seen as irrelevant.[18]

What is more, multinational corporations have become increasingly influential and are now in a position to manipulate at will commercial transactions in a corrupt manner in order to secure profitable business.[19] The world top hundred economic entities in 2015 included 69 multinational corporations, such as Walmart, State Grid, China National Petroleum, Exxon Mobil and Ford Motors,[20] whose revenue exceeds that of a number of countries. Corruption by such big actors within the private sector needs to be addressed by the anti-corruption instruments if corruption in general is to be resisted and rooted out. Nowadays, any purported material differences between private and public sector corruption have been negated by the increasing privatisation of public functions. Argandoña's point is well made.

Certainly, private-to-private corruption can no longer be treated differently from private-to-public corruption. The argument that private sector corruption is not as opprobrious as public sector corruption or that it does not qualify as corruption

17 Organisation for Security and Co-operation in Europe (2004) *Best Practices in Combating Corruption* Vienna: OSCE at 127.

18 Argandona (2003) at 254. See also Babu (2006) at 18; Webb (2005) at 213.

19 See Carr (2006) at 22.

20 Walmart was ranked 10th, followed by the Chinese State Grid and National Petroleum at 14 and 15 respectively. See Green D (2016) "The World's Top 100 Economies: 31 Countries; 69 Corporations" World Bank, available at *https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corp orations* (visited 16 July 2017); Global Justice Now (2016) "10 Biggest Corporations Make More Money than Most Countries in the World Combined", available at *http://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined* (visited 16 July 2017). See also "Fortune Global 500" (2017), available at *http://fortu ne.com/global500* (visited 10 August 2017).

proper cannot withstand scrutiny. Under the impact of latter day socio-economic developments, any distinctions between private and public sector corruption have been rendered purely formal. In a word, private-to-private corruption and private-to-public corruption are opposite sides of the same debased coin. Hence, the law needs to confront the former with the same commitment and vigour as it does the latter. Criminalisation is a key component of the legal response to corruption. If public sector corruption is a crime, there appears to be no defensible reason, given their contemporary convergence, why private sector corruption should not be a crime also. Admittedly, criminalisation is not in and of itself the ultimate solution to the problem of corruption, whether private-to-public or private-to-private, but it is one of the necessary elements of any anti-corruption toolkit.

A comprehensive discussion of all the anti-corruption instruments which address private-to-private corruption is beyond the scope of this paper. The sequel thus considers the approach taken to private sector corruption by those instruments which matter most in the African context, namely, the United Nations Convention against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AU Convention) and the Southern African Development Community Protocol against Corruption (SADC Protocol). It also discusses those provisions of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) which address private sector corruption. Reference is had to the other anti-corruption instruments where necessary or appropriate.

4 UNITED NATIONS CONVENTION AGAINST CORRUPTION

UNCAC is the first truly universal, comprehensive and binding anti-corruption legal instrument. It was adopted by the UN General Assembly on 31 October 2003 and entered into force on 14 December 2005.[21] At the time of writing, it had a membership of 182 states parties.[22] In other words, most members of the UN are also states parties to UNCAC. The general obligations incurred by states parties to the Convention

21 See "UNCAC Signature and Ratification Status", available at https://www.unodc.org/unodc/en/corruption/ratification-status.html (visited 21 January 2018).

22 For the full list of states parties, see "UNCAC Signature and Ratification Status", available at https://www.unodc.org/unodc/en/corruption/ratification-status.html (visited 21 January 2018).

encompass four main spheres. They are prevention of corruption,[23] criminalisation of corruption,[24] anti-corruption co-operation[25] and asset recovery.[26] Some of the obligations with respect to these four pillars are mandatory whereas others are permissive. This variability has prompted one writer to observe, aptly, that under UNCAC some forms of corruption are "more equal than others".[27] Most of the optional provisions, which have been identified as a weakness of UNCAC, are the result of political compromise, the price paid to secure ratification of the Convention by states with diverse and competing interests.[28]

Be that as it may, the prevention and criminalisation provisions of UNCAC explicitly address private sector corruption. It should be noted, though, that during the negotiation process of UNCAC, one of the issues that raised intense debate was corruption in private sector.[29] The representatives of the EU, Latin American and Caribbean states argued vigorously for the criminalisation of bribery and embezzlement in the private sector as necessary for a successful fight against corruption.[30] Unsurprisingly, the USA vehemently opposed this approach, contending that private-to-private corruption was not an offence under its law.[31] The USA also argued that the criminalisation of private sector corruption would amount to unnecessary interference in purely private sector transactions.[32] In the end, as a means of striking a compromise between the two sets of polarised interests, most of the provisions on private sector corruption emerged as non-mandatory, imposing on states parties an obligation to consider legislating against it as opposed to an obligation to legislate against it.

23 Chapter II of UNCAC.
24 Chapter III of UNCAC.
25 Chapter IV of UNCAC.
26 Chapter V of UNCAC.
27 Boersma (2008) at 32.
28 See Boersma (2008) at 32; Carr (2006) at 22.
29 See Carr (2006) at 22; Webb (2005) at 213-214.
30 Webb (2005) at 214; Schroth (2007) at 31. See also Martin (2011) at 11; UNODC (2010) "*Travaux Preparatoires* of the Negotiations for the Elaboration of UNCAC" at 127-133.
31 Webb (2005) at 214.
32 Webb (2005) at 214.

4.1 Prevention

As stipulated in Article 1 of UNCAC, one of the prime conventional objectives is to strengthen measures to prevent corruption. Article 12 of UNCAC is dedicated to the pursuit of this objective in relation to the private sector. In this regard, UNCAC requires states parties to take measures to prevent private-to-private corruption.[33] However, this obligation is subject to a reservation in favour of domestic law, in that states parties are enjoined to take preventive measures in respect of the private sector only if such measures are in conformity with the fundamental principles of their domestic law.[34] The same article provides an illustrative list of preventive measures that states parties may implement. They include measures to promote transparency among private entities, to prevent conflicts of interests, to prevent misuse of procedures and to promote co-operation between law enforcement agencies and the private sector.[35]

Importantly, states parties are obligated to take preventive measures to enhance accounting and auditing standards in the private sector.[36] In this connection, it has been observed that:

> Such standards provide transparency, clarify the operations of private entities, support confidence in the annual and other statements of private entities, and help prevent as well as detect malpractices.[37]

Indeed, UNCAC goes so far as to specify the various accounting stratagems which states parties must prohibit in the private sector. These include reliance upon off-the-books transactions and accounts, use of non-existent expenditure and false documents, and premature destruction of accounting records.[38] States parties are obligated also to proscribe the tax deductibility of bribes in the private sector.[39] If anything, this requirement confirms the rifeness of private-to-private corruption and the need to confront it seriously.

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33 Art 12(1) of UNCAC. See also Kofele-Kale N (2006) *The International Law of Responsibility for Economic Crimes* Burlington: Ashgate Publishing at 199; Argandoña A (2007) "The United Nations Convention against Corruption and Its Impact on International Companies" 74(4) *Journal of Business Ethics* 481-496 at 488.

34 Art 12(1) of UNCAC.

35 Art 12(2) of UNCAC. For a general discussion of prevention in the private sector see UNODC (2012) at 37-41.

36 Art 12(3) of UNCAC.

37 UNODC (2012) at 39.

38 Art 12(3) of UNCAC.

39 Art 12(4) of UNCAC.

As an indication of its commitment to preventing private-to-private corruption, UNCAC requires states parties to sanction private sector entities appropriately for non-compliance with the aforementioned preventive measures. It provides for three forms of sanctions, namely, civil, administrative and criminal. The criminalisation of non-compliance thus is possible but not prescribed. States parties are free to choose any or all of the designated sanctions as befits the instance of non-compliance. But, whatever sanction is chosen, it should be effective, proportional and dissuasive in relation to the contravention in question.[40]

As noted above, Article 12 of UNCAC governs the obligations of states parties to take measures to prevent corruption in private sector. From its wording, it is apparent that Article 12, save for paragraph two, is framed in mandatory terms (in that states parties "shall take" preventive measures), subject to a reservation in favour of domestic law. The mostly "hard" nature of the obligations of states parties to prevent private sector corruption and the sanctions for non-compliance are to be welcomed. The reservation in favour of domestic law may operate as an escape hatch, but only for those states parties which seek actively to evade their conventional obligations in this regard.

4.2 Criminalisation

Of the eight core corruption crimes established by UNCAC,[41] only two — bribery and embezzlement — are singled out as applicable to the private sector. UNCAC requires that states parties consider legislation to criminalise these two forms of private-to-private corruption "when committed intentionally in the course of economic, financial or commercial activities".[42] It is not clear why only these two forms of corruption, and not others, such as trading in influence and illicit enrichment, have been identified thus. Perhaps it is because these two forms are the most prevalent in the private sector, or because the other forms are perceived to occur primarily in the public sector. Be that as it may, UNCAC provides the minimum threshold for the criminalisation of private-to-private corruption, and states parties may elect to criminalise other forms of corruption in private sector also.

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40 Art 12(1) of UNCAC.

41 The crimes are bribery, embezzlement, trading in influence, abuse of function, illicit enrichment, laundering the proceeds of corruption, concealment and obstruction of justice. They encompass all the inchoate offences committed in pursuit of the main crime. See Arts 15-28 of UNCAC.

42 Arts 21 & 22 of UNCAC.

4.2.1 *Bribery in the Private Sector*

Both the active[43] and passive[44] sides of bribery, committed "in the course of economic, financial or commercial activities" are addressed by UNCAC. In Article 21(a), active or supply side bribery in the private sector is defined as:

> The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Like all criminal offences, bribery is composed of an *actus reus* and *mens rea*, which elements are considered in more detail below.

The *actus reus* of an offence is essentially the unlawful conduct, together with its appurtenances, committed by the perpetrator. From the definition given above, the *actus reus* of active bribery in the private sector may be broken down into the three material elements. The prime such element is the "promise, offering or giving" with which the definition commences. Although the Convention does not define these terms, they evidently are intended to address all the variants of conduct which may fit the definition of active bribery. In this regard, there is no difference whatsoever between their meaning in relation to public sector bribery and private sector bribery. The notion of promising, as Kubiciel explains, "indicates the relevant intention to bribe, whether or not the donor has the resources to provide the undue advantage or actually intends to hand over the bribe".[45] By contrast, the concept of offering "inherently encompasses the signalisation of readiness by the active briber to give the undue advantage at any moment," and the idea of giving "covers the transfer or granting of the undue advantage".[46] Collectively, the promise, offering or giving of an undue advantage by the briber to "any person who directs or works, in any capacity, for a private sector entity" constitutes the conduct requirement of active private sector bribery. As specified in Article 21(a) of UNCAC, such promise, offering or giving need not be made directly to the bribee; it can be made through intermediaries.

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43 See Art 21(a) of UNCAC. See also UNODC (2012) at 64-65 & 85-86; Kofele-Kale (2006) at 200; Webb (2005) at 204-206.

44 See Art 21(b) of UNCAC. See also UNODC (2012) at 64-65 & 86.

45 Kubiciel M (2009) "Core Criminal Law Provisions in the United Nations Convention against Corruption" 9 *International Law Review* 139-55 at 146. See also UNODC (2012) at 85-86; OECD (2008) at 26.

46 Kubiciel (2009) at 146. See also Council of Europe (1999) *Explanatory Report to the Criminal Law Convention on Corruption* note 36; UNODC (2012) at 83.

The second material element of the *actus reus* is the undue advantage which has to be promised, offered or given to a member of the private sector. The undue advantage is the object of the unlawful conduct performed by the perpetrator and refers to that which is not part of the legitimate income, assets or entitlements of the bribee. It may be corporeal or incorporeal, pecuniary or non-pecuniary.[47] Also, such undue advantage need not be for the benefit of the bribee but can be directed at any other person with whom the bribee has some affiliation.

Thirdly, the conduct relating to the undue advantage must be aimed at inducing the bribee "to act or refrain from acting", in breach of his or her duties, for the benefit of the briber. The ultimate purpose of the bribe is to enhance or maintain the position of the briber. Thus, the offering, promising or giving of the undue advantage must be linked to the bribee, as a private sector operative, acting or omitting to act in favour of the briber.

The *actus reus* of active private sector bribery has to be accompanied by the requisite *mens rea*. The state of mind of the perpetrator at the time of the crime has to conform to that specified in the definition of the crime. Here UNCAC is unequivocal. The *mens rea* of all the core corruption crimes, including bribery, is identified expressly as intention.[48] Accordingly, the mental element of active private sector bribery is the intentional commission of the material ingredients of the crime. UNCAC does not specify the form of intention required for corruption, which implies that any form of intention will suffice.[49] Significantly, the general *mens rea* provision of UNCAC allows for the mental element of corruption to be inferred from objective factual circumstances.[50]

To sum up, active bribery in the private sector is the intentional promising, offering or giving, directly or indirectly, of an undue advantage to a person who works, in any capacity, in a private sector entity, in order for such person to act or refrain from acting in favour of the briber. It is the side of private sector bribery which is concerned with the briber doing that which is required to elicit from the bribee conduct which is partial to the interests of the briber.

47 UNODC (2012) at 85. See also OECD (2008) at 34-36.
48 Arts 21 & 28 of UNCAC.
49 The standard forms of intention are *dolus directus, dolus indirectus* and *dolus eventualis*.
50 Art 28 of UNCAC. See also UNODC (2012) at 86.

The obverse of active private sector bribery is passive or demand side private sector bribery.[51] In this connection, UNCAC urges states parties to consider criminalising:

> The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.[52]

As indicated above, the *mens rea* for passive bribery and active bribery is the same, that is, intentional commission of the material elements comprising the *actus reus*. These material elements approximate closely those of active bribery discussed above. The material element which is unique to passive bribery is the solicitation or acceptance of the undue advantage. Again, UNCAC does not define these terms, but the *Explanatory Report to the Council of Europe Criminal Law Convention on Corruption* advises that solicitation would incorporate all unilateral acts in terms of which one person requests another, explicitly or implicitly, for payment of some kind to have designated conduct performed or omitted. Furthermore, since the offence turns on the solicitation itself, it does not matter whether the requested payment is made or not.[53] Acceptance, as the alternative to solicitation in passive bribery, may be understood as consent to receive the benefits of the undue advantage or actual receipt of the undue advantage.[54] From this, it follows that passive bribery in the private sector is the request for or receipt of an undue advantage, directly or indirectly, by a person working for a private sector entity as an inducement to perform or refrain from performing some act in violation of his or her duties, for the benefit of the briber.

In some cases, it might be difficult to distinguish active from passive bribery, because a single act can satisfy both forms. Certainly, a private sector functionary who demands a bribe from another private sector functionary is being decidedly active within the conspectus of passive bribery. Be that as it may, UNCAC exhorts states parties to criminalise both active and passive bribery in the private sector. There is here a notable difference in the approach of the Convention to public and private

51 Art 21(b) of UNCAC.
52 Art 21(b) of UNCAC.
53 CoE (1999) note 41. See also Kubiciel (2009) at 147; OECD (2008) at 27.
54 CoE (1999) note 42. See also Kubiciel (2009) at 147.

sector bribery, both active and passive, despite their quite similar contents. The difference consists in the nature of the obligation imposed on states parties. It is apparent from the wording of the relevant provisions[55] that, whereas the obligation of states parties to criminalise public sector bribery is mandatory, the corresponding obligation with respect to the criminalisation of bribery in the private sector is permissive. Put simply, states parties are not obligated to criminalise private-to-private bribery. As suggested earlier, this difference hardly is defensible in the socio-economic conditions of the contemporary world.

4.2.2 Embezzlement in the Private Sector

Besides bribery, UNCAC also seeks to regulate embezzlement in the private sector.[56] To this end, the Convention provides that:

> Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.[57]

Unlike bribery, which involves two parties, embezzlement is a single-party corruption offence. A person who works in a private entity satisfies the material elements of the offence unilaterally by diverting the property entrusted to him for his personal benefit or for the benefit of another person. The required mental element is *dolus* or intention.

As with bribery, embezzlement in the private sector has to be committed "in the course of economic, financial or commercial activities". The obligation to criminalise private sector embezzlement under the Convention is hortatory, which contrasts sharply with the binding obligation to criminalise public sector embezzlement. In the light of the arguments presented in §3 above, this difference ought not to survive scrutiny.

55 See Arts 21, 15 & 16 of UNCAC.
56 Art 22 of UNCAC. See also UNODC (2012) at 87.
57 Arts 22 & 2(d) of UNCAC.

4.2.3 Summation

Under UNCAC, states parties are required, for the most part, to adopt specific measures to prevent private-to-private corruption. UNCAC also encourages them to adopt legislative measures to criminalise bribery and embezzlement in the private sector. The conventional appeal to criminalise bribery and embezzlement goes beyond commission of the offence by principal offenders, to include preparation or attempt to bribe or embezzle, as well as participation in these offences as an accomplice, assistant or instigator.[58] In addition, states parties must establish criminal, civil or administrative liability for participation by legal persons in the conventional offences, including private sector bribery and embezzlement, and such liability must be "without prejudice to the criminal liability of the natural persons who have committed the offences".[59] Further, states parties are required to criminalise the laundering of the proceeds of private sector bribery and embezzlement.[60] And, interestingly, states parties are obligated to have a legal framework which enables victims to claim compensation for damage (both pecuniary and non-pecuniary) resulting from private sector corruption.[61]

However, as mentioned earlier, most of the conventional obligations relating to private-to-private corruption are optional. Each state party can elect whether or not to criminalise acts of corruption in the private sector. This has to be seen as a deficiency which can have negative ripple effects for the fight against corruption by creating regulatory loopholes as regards the private sector. If, today, the differences between public sector corruption and private sector corruption are non-material, the obligation to criminalise the latter no longer ought to be non-mandatory.

58 Arts 21, 22 & 27 of UNCAC.

59 Art 26 of UNCAC.

60 Art 22 of UNCAC.

61 Arts 22, 23 & 35 of UNCAC. A similar provision for private sector bribery is contained in Art 3 of the CoE Civil Law Convention on Corruption.

5 AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The AU Convention is the primary continental anti-corruption instrument. It was adopted on 11 July 2003 and entered into force on 5 August 2006. It has been ratified by a majority of the AU members states.[62] The AU Convention aims to prevent and combat corruption not only in the public sector but also in the private sector, as is evident from both its preamble and objectives.[63]

The AU Convention enunciates three broad categories of obligations in respect of private-to-private corruption. Firstly, states parties commit to taking legislative and other measures necessary to prevent corruption in the private sector.[64] Unlike the UNCAC approach to prevention, this is not a compulsory obligation, as the provision is framed in the non-mandatory language of an undertaking.[65] And the provision is not as elaborate as its UNCAC counterpart.

Secondly, states parties assume responsibility for criminalising certain forms of corruption. As with UNCAC, the AU Convention addresses both active and passive bribery in the private sector, and classifies as corruption:

> the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.[66]

The language of the private sector bribery provisions in UNCAC and the AU Convention is strikingly similar. Regrettably, so too is the nature of the obligation imposed upon states parties. Under the AU Convention, states parties merely "undertake to" adopt

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62 Thus far, 38 of the 55 AU member states have ratified the AU Convention. The status list of the AU Convention is available at *https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption* (visited 20 July 2017).

63 Arts 1 & 2 of the AU Convention. See also Schroth PW (2005) "The African Union Convention on Preventing and Combating Corruption" 49(1) *Journal of African Law* 24-38 at 31-32; Udombana NJ (2003) "Fighting Corruption Seriously? Africa's Anti-Corruption Convention" 7 *Singapore Journal of International & Comparative Law* 447–488 at 448-449.

64 See Art 11 of the AU Convention. See also Olaniyan K (2004) "Introductory Note to African Union: Convention on Preventing and Combating Corruption" 43(1) *International Legal Materials* 1-4 at 3.

65 See Mbaku JM (2010) "The International Dimension of Africa's Struggle against Corruption" 10 *Asper Review of International Business & Trade Law* 35-78 at 62.

66 Art 4(1)(e) of the AU Convention. See also Kofele-Kale (2006) at 187-91; Webb (2005) at 202-203.

measures to criminalise bribery in the private sector,[67] indicating that the obligation is permissive. Again, as with UNCAC, private sector bribery is spared definitive criminalisation under the AU Convention.

In contradistinction to UNCAC, under which trading in influence is confined to the public sector, the AU Convention extends this form of corruption to the private sector, in both its active and passive versions.[68] The same may be argued for illicit enrichment, which the AU Convention defines as:

> the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.[69]

The reference in this definition to "any other person" suggests that it is meant to encompass illicit enrichment in both the public and private sectors. However, states parties to the AU Convention are required to do no more than commit to criminalising such trading in influence and illicit enrichment. In other words, as we have seen with other corruption offences, it is not compulsory for states parties to declare private sector trading in influence and illicit enrichment to be corruption crimes in their domestic law. The AU Convention simply gives them the legal basis to do so, if they wish.

Surprisingly, and unlike UNCAC, the AU Convention does not confront embezzlement in the private sector. Whereas states parties undertake to criminalise public sector embezzlement,[70] there is no provision which even encourages them to criminalise its private sector counterpart. This omission well may be an expression of the perceived differences between private-to-public and private-to-private corruption. However, that does not prevent states parties from exercising their sovereign authority to decree embezzlement in the private sector a corruption offence, since the conventional provisions establish only the minimum threshold for criminalisation.

Like UNCAC, the AU Convention obligates states parties to criminalise the laundering of the proceeds of corruption.[71] This provision would apply only to such corrupt conduct in the private sector as has been criminalised by states parties. Further, states parties to the AU Convention undertake to render criminal any form of

67 Arts 4(1)(e) & 5 of the AU Convention.
68 Arts 4(1)(f) & 5 of the AU Convention.
69 Arts 1, 4(1)(g) & 5 of the AU Convention.
70 Art 4(1)(d) of the AU Convention.
71 Art 6 of the AU Convention.

participation in private sector corruption, as well as attempt, collaboration or conspiracy to commit such corruption.[72]

Finally, it should be noted that whereas the *actus reus* of each private sector corruption crime is apparent from its definition, nowhere in the AU Convention is the required *mens rea* of any of the corruption crimes identified. This implies that it is within the remit of each state party to determine the mental element of each corruption crime. Generally, the mental element of an offence may take the form of intention or negligence. However, it is hard to imagine that any corruption offence, including those in the private sector, could be committed negligently.

6 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY PROTOCOL AGAINST CORRUPTION

The SADC Protocol was adopted in August 2001 and has been in force since July 2005.[73] It begins to address private sector corruption already in its preamble, by recording that states parties carry a responsibility to "hold corrupt persons in the public and private sectors accountable". In Article 1, corruption is defined to include:

> bribery and any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others.

And Article 2 sets out the three purposes of the SADC Protocol, all of which seek to "prevent, detect, punish and eradicate corruption in the public and private sectors".

Article 4(2) of the SADC Protocol is dedicated to the prevention of private sector corruption, specifying that:

> Each State Party shall adopt such legislative and other measures under its domestic law to prevent and combat acts of corruption committed in and by private sector entities.

The provision is expressly mandatory and reflects the seriousness with which the SADC Protocol approaches private sector corruption. However, it also is a non-prescriptive

72 Art 4(1)(i) of the AU Convention.

73 SADC Protocol available at *http://www.sadc.int/files/7913/5292/8361/ Protocol_ Against_Corruption 2001.pdf* (visited 12 June 2017).

provision, leaving it the states parties to decide upon which "legislative and other measures" to adopt in order to prevent private-to-private corruption.

As to the criminalisation of private-to-private corruption, the SADC Protocol breaks with UNCAC and the AU Convention in requiring that:

> Each State Party shall adopt the necessary legislative or other measures to establish as criminal offences under its domestic law the acts of corruption described in Article 3.[74]

In particular, Article 3 of the SADC Protocol obligates states parties to criminalise active and passive bribery in the private sector, active and passive trading in influence in the private sector, and laundering of the proceeds of such corruption.[75] In addition, it requires states parties to criminalise any form of participation in any attempt, collaboration or conspiracy to commit such private sector corruption.[76]

The comments made in §5 above regarding the *actus reus* and *mens rea* under the AU Convention apply, *mutatis mutandis*, to the SADC Protocol. The most notable feature of the SADC Protocol, which distinguishes it starkly from UNCAC and the AU Convention, is that its provisions on the prevention and criminalisation of corruption in the private sector are peremptory. At the very least, states parties to the SADC Protocol must adopt legislative and/or other measures to prevent and punish certain forms of corruption in the private sector.[77]

74 Art 7(2) of the SADC Protocol.

75 Arts 3(1)(e), 3(1)(f), 3(1)(g), 3(1)(h) & 7(2) of the SADC Protocol.

76 Art 3(1)(h) of the SADC Protocol.

77 It is opportune to note here that:

- the approach taken by the SADC Protocol to the criminalisation of private sector corruption is replicated, for the most part, in the Economic Community of West African States Protocol on the Fight against Corruption. See Arts 6(1)(c)-(d), 6(2), 6(5)(a)-(b) & 6(6);
- the CoE Criminal Law Convention on Corruption requires the criminalisation of active and passive private sector bribery, the laundering of proceeds from such bribery, and the aiding and abetting of such bribery. See Arts 7, 8, 13 & 15; and
- the EU Framework Decision on Combating Corruption in the Private Sector obligates states parties to criminalise active and passive bribery in the private sector, as well as the instigation, aiding and abetting of such bribery. See Arts 2 & 3.

7 PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

Under the AU system, there are two courts: the African Court on Human and Peoples' Rights, which was established by the 1998 Protocol to the Banjul Charter;[78] and African Court of Justice, which was established by the AU Constitutive Act.[79] In 2008, with a view to establishing one continental court, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol). The idea was to merge the abovementioned two Courts and to create an African Court of Justice and Human Rights. The Merger Protocol is yet to enter into force.[80]

In June 2014, at Malabo in Equatorial Guinea, the 25th Ordinary Session of the AU Assembly of Heads of State and Government adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The Malabo Protocol expanded the jurisdiction of the proposed African Court of Justice and Human and Peoples' Rights (African Court), by adding a criminal section to the planned general affairs and human rights sections.[81] Like the Merger Protocol, the Malabo Protocol requires 15 ratifications to enter into force.[82] At the time of writing, no African state had ratified the Malabo Protocol.[83]

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78 Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (June 1998). It entered into force in January 2004. The status list of the Protocol is available at *https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_ african_charter_on_human_and_peoplesrights_on_the_estab.pdf* (visited 20 July 2017).

79 Art 5 of the Constitutive Act of the African Union (2000).

80 Protocol on the Statute of the African Court of Justice and Human Rights (2008), available at *https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights* (visited 15 July 2017). Article 9 requires 15 ratifications for the Protocol to come into force. Thus far, only six countries have ratified, namely, Benin, Burkina Faso, Liberia, Libya, Mali and Congo. The status list of the Protocol is available at *https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african _court_of_justice_and_human_rights.pdf* (visited 15 July 2017).

81 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014), available at *https://au.int/en/treaties* (visited 15 July 2017). The Statute of the African Court is appended to the Malabo Protocol. In the Malabo Protocol, the name of the merged Court with the expanded sections is changed to the African Court of Justice and Human and Peoples' Rights. See Arts 1 & 8 of Malabo Protocol.

82 Art 11 of the Malabo Protocol.

83 Nine countries have signed the Malabo Protocol. They are Benin, Chad, Congo. Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, and Sao Tome and Principe. For the status list of the Malabo Protocol, see *https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights* (visited 15 July 2017).

The criminal division of the African Court is intended to have subject matter jurisdiction over 14 crimes.[84] Promisingly, corruption features among the crimes over which the African Court will adjudicate if and when it becomes operational.[85] The Statute of the African Court criminalises several acts of grand corruption, that is, acts of corruption which are "of serious nature affecting the stability of a state, region or the Union".[86] Put otherwise, acts of petty corruption appear to be excluded from the subject matter jurisdiction of the African Court. Furthermore, unlike the anti-corruption instruments considered above, the Statute of the African Court does not require or leave it to states parties to criminalise the designated acts of corruption.[87] Instead, the Statute is self-executing, summarily deeming the listed acts of corruption to be criminal offences in the domestic law of states parties.[88] In other words, the Statute itself criminalises the conduct it identifies as corrupt and such criminalisation is enforceable judicially, with no further legislative action needed from states parties to prosecute and punish perpetrators.

Interestingly, the Statute of the African Court also criminalises certain acts of corruption in the private sector. Thus, Article 28I(e) establishes as an offence:

> The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.

This provision criminalises both active and passive bribery in the private sector. Neither the Malabo Protocol nor the Statute of the African Court spells out what the private sector denotes. However, given that Article 28I(e) of the Statute of the African Court is a linguistic facsimile of Article 4(1)(e) of the AU Convention, it may be accepted that the former endorses the definition of the private sector contained in Article 2 of the latter. Article 28I(e) of the Statute of the African Court also replicates

84 These are genocide, war crimes, crimes against humanity, the crime of unconstitutional changes in government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploration of natural resources and aggression. See Art 28A of the Statute of the African Court.

85 Arts 28A & 28I of the Statute of the African Court.

86 Art 28I(1) of the Statute of the African Court.

87 Needless to say, states parties may domesticate the crimes that are included in the Statute of the African Court. In fact, since the African Court is complementary to domestic courts, states parties are enjoined indirectly to criminalise the listed acts of corruption.

88 Arts 28A & 28I of the Statute of the African Court.

the language of Article 3(1)(e) of the SADC Protocol. Indeed, the Statute of the African Court is closer to the SADC Protocol than to the AU Convention as regards the criminalisation of private sector bribery.

The concern of the Statute of the African Court with private-to-private corruption continues in Article 28I(f), which deems to be criminal:

> The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

Article 28I(f) is aimed at trading in influence in both the public and private sectors. It proscribes such trading in influence in both its active and passive aspects. In this regard, the Statute of the African Court is on all fours linguistically with Article 4(1)(f) of the AU Convention and Article 3(1)(f) of the SADC Protocol. Again, however, the Statute of the African Court is substantively more akin to the SADC Protocol than the AU Convention in the criminalisation of trading in influence in the private sector.

In addition, the Statute of the African Court declares unexplained wealth or illicit enrichment in the private sector to be a corruption offence. Article 28I(1)(g) criminalises illicit enrichment generally and Article 28I(2) stipulates that:

> For the purposes of this Statute "Illicit enrichment" means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.

As with the AU Convention, the phrase “any other person” in this definition indicates that the Statute of the African Court has extended the criminalisation of illicit enrichment from the public to the private sector.

The Statute of the African Court also deems as criminal the laundering of the proceeds of all the designated acts of corruption, including private-to-private bribery, trading in influence and illicit enrichment.[89] Since corporate criminal responsibility is recognised under the Statute,[90] the African Court can exercise jurisdiction over both

89 See Arts 28I(1)(h) & 28Ibis of the Statute of the African Court.
90 Art 46C of the Statute of the African Court.

natural and legal persons in the private sector. The Statute does not criminalise embezzlement or misappropriation of entrusted property in the private sector. It mirrors the AU Convention in this regard.[91] This is regrettable, because the misuse of resources in a private sector which increasingly is responsible for public welfare, more often than not will have grievous consequences for the public and the nation at large. The Statute of the African Court ought to have criminalised embezzlement in the private sector as it has done in the public sector.

Notwithstanding the flaws and challenges of the Statute of the African Court, its direct criminalisation of corruption, including certain forms of private-to-private corruption, and its jurisdictional empowerment of the African Court to adjudicate such corruption offences is a progressive move from a continental perspective. What remains to be seen is whether, if and when the African Court becomes operational, it will exercise its judicial power effectively and efficiently.

8 CONCLUSION

Like its the public sector correlate, private sector corruption entails "the abuse of entrusted power for private gain". In today's globalised economy, which is dominated increasingly by powerful multinational corporations, corruption in the private sector needs to be confronted in order to eradicate or, at least, reduce its pernicious impact on development and the public weal. As appears from the aforegoing discussion, the anti-corruption instruments considered do contain provisions directed at preventing and criminalising acts of corruption in the private sector.

The attention given by the various instruments to the problem of private-to-private corruption is both necessary and admirable. It is lamentable, however, that this attention is somewhat fractured and contradictory across the corpus of international anti-corruption law. There is want of an integrated and uniform approach to the problem. Corruption in the private sector is a major challenge and needs to be tackled with the full force of the law. In a word, states parties to the various anti-corruption instruments ought to be obligated to take the measures needed to prevent, prosecute and punish private-to-private corruption.

Worryingly, this is not the approach taken by the two major instruments considered above. Most of the provisions of UNCAC and the AU Convention which are devoted to private sector corruption are framed in permissive terms. States parties

91 See §5 above.

have discretion about declaring such corrupion to be criminal. As we have seen, some of regional anti-corruption instruments require the criminalisation of private sector corruption in varying degrees, and commendably so. This unevenness well may be a consequence of the persistent debate concerning the supposed differences between private-to-public and private-to-private corruption. However, this same unevenness has to bring a smile to the face of any perpetrator of the latter. A house divided is a house embattled. If any headway is to be made in the international fight against private sector corruption, the inconsistencies spanning the anti-corruption instruments have to be remedied urgently.