THE APPLICATION OF UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC) IN DOMESTIC JURISDICTION

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INTRODUCTION

One of the major challenges confronting different States is corruption. Corruption affects all facets of life and transcends national boundaries. It accounts for the underdevelopment of most States.¹ Before the 1990s, there was little or no effort at international level aimed at preventing and combating the menace of corruption. The development of international anti-corruption efforts and law was piecemeal. Thus, one of the greatest achievements at the international level in this regard was the coming into force of United Nations Convention against Corruption (UNCAC) in 2005. UNCAC was intended to represent an agreement of States Parties aimed at addressing the threat and scourge of corruption, and till date, is the only comprehensive international standard setting anti-corruption instrument. It offers a wide range of measures covering the four key anti-corruption pillars: preventive, criminalisation and law enforcement, asset recovery and international cooperation. It is a metaphor for international consensus on the devastating effects of corruption and the need to prevent and combat corruption.

However, the optimism and excitement that followed the coming into force of UNCAC is gradually waning due to the challenge of its application in domestic jurisdiction. There are two principles that regulate the application of UNCAC in domestic jurisdiction. This paper interrogates these principles and their implications in the effectiveness of UNCAC. The paper argues that the principle of transformation is a hindrance and limitation to the application of UNCAC in domestic jurisdiction and recommends ways of overcoming this limitation.

DEFINITION OF CORRUPTION

There is no acceptable definition of corruption. However, there exist different definitions by scholars, institution and anti-corruption legal instruments. The divergent definitions are reflections of the purposes and the types of corruption which the scholars, institutions and legal instruments are addressing. According to Commonwealth Expert Group on Good Governance and the Elimination of Corruption ‘corruption is generally defined as abuse of public office for private gain’. Similarly, Nye defines corruption as the ‘deviation from duties of public role because of private (personal, close family, private clique), pecuniary or status gain’. These two definitions are focused on public sector corruption. Many scholars tend to limit the definition of corruption to public sector because of its prevalence in the sector. However, this definition is limited in coverage because it does not cover private sector corruption. Addressing this gap, Transparency International (TI) offers a more comprehensive definition of corruption. TI defines corruption ‘as the abuse of entrusted power for private gain’. This definition covers any person both in the private and public sectors with entrusted power, who misuses the entrusted power or unlawfully enriches himself or herself. There is the descriptive approach. Modern anti-corruption instruments adopt description approach in defining corruption mainly to avoid excluding conduct that falls within corrupt practices. Thus, UNCAC has no specific definition of corruption; rather, it requires each State Party to adopt legal measures to establish corruption offences and lists the conducts that should be criminalised in Articles 15 to 25. Therefore, corruption is an abuse of entrusted power and position which the law proscribed.

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4 This is corruption in the public sector as distinct from private sector corruption.
5 Corruption occurring purely in the private sector.
7 Southern African Development Community (SADC) Protocol against Corruption adopts this approach. Article 1 defines corruption to ‘include bribery or 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’.
8 Article 15 of UNCAC.
TYPES OF CORRUPTION

Broadly, there are two types of corruption. They are grand and petty corruption. Grand corruption is also known as high level or political corruption. It is grand because it involves the massive looting of resources or abuse of entrusted position by high ranking officials for their personal gain. According to Rose-Ackerman, ‘grand corruption involves a small number of powerful players and large sums of money.’ Two identifiable features of grand corruption as rightly identified in the above definitions are the deliberate and massive stealing of public resources and the involvement of persons occupying the highest level of position of trust. Another feature is that it is rampant and thrives where the contract is highly technical and complicated. This is because the technicality of the contract makes the likelihood of being able to question the transaction limited.

On the other hand, petty corruption denotes corrupt practices involving low level officials and little sums or favour in public and private sectors. It is used often to distinguished grand corruption. However, the above distinction between petty and grand corruption is not absolute. There may be instances where low level official may be involved in massive looting and high official involved in little sums. Other forms of corruption such as bribery, embezzlement, extortion, abuse of office fall within the above broad classification. Preventing and combating both grand and petty corruption require the adoption and implementation of an effective legal instrument.

HISTORY AND DEVELOPMENT OF UNCAC

The earlier attention to the issue of corruption at international forums was piecemeal, and it began only in the late 1970s. At the United Nations level, the first step was the adoption by United Nations General

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9 Report of Anti-Corruption Working Group of the Society of Advanced Legal Studies, ‘Banking on Corruption, the Legal Responsibility of those who Handle the Proceeds of Corruption,’ February 2002 defines grand corruption as a term used ‘to describe cases where massive personal wealth is acquired from States by senior officials using corrupt means.’ TI defines grand corruption as ‘acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good’: Available at www.transparency.org/cpi2011/in_detail accessed 12 December 2017.


12 This will include the President, Vice President, Governors, Deputy Governors, Senate President, Speakers of House of Representatives and the State Houses of Assembly, the Chief Justice of Nigeria and Chief Justice of the States, multi-national companies, lobbying groups, large media houses, politicians and other high-level officials.

13 The trend towards an international anti-corruption legal framework began with the US Foreign Corrupt Practices Act of 1977. This was followed by the Latin American regional conventions in 1996, the Organisation for
Assembly (UNGA) of Resolution 3513 in 1975 condemning all corruption practices including bribery. This resolution also emphasised the right of States to take legal action within their jurisdictions against transnational corporation using the domestic law of the state and requested the Economic and Social Council (ECOSOC) to include the issue of illicit foreign payment in its work.\(^\text{14}\) This request led to the establishment of Commission on Transnational Corporations (CTC) by the Economic and Social Council. The CTC was an intergovernmental body with the primary aim of preparing Code of Conduct for Transnational Corporations to be adopted by United Nations.\(^\text{15}\) This move was motivated by the needs to tackle corruption, provide stability, confidence and transparency in international transactions. These needs formed the mandates of the CTC. The CTC in discharging its responsibility established an Ad Hoc Intergovernmental Working Group on Problem of Corrupt Practices.\(^\text{16}\) It was the working group that drafted the proposed code of conduct. In 1978 the working group became a Committee on International Agreement on Illicit Payment. The Committee agreed on a draft text which was sent to CTC for inclusion in the code. The draft code was not adopted, but the approach and the text were reflected in later international and regional anti-corruption instruments.\(^\text{17}\)

In 1996, the United Nation General Assembly adopted a Declaration against Corruption and Bribery in International Transaction.\(^\text{18}\) Although, this declaration reflected on issues dealt with by earlier working group, it lacked binding effect. In 1996, the United Nations General Assembly adopted the Code of Conduct for Public Officials, and the code has been adopted by most States in addressing the issues of integrity in public sector.\(^\text{19}\)

In 2000, the United Nations General Assembly adopted the United Nations Convention against Transnational Crime (UNCTOC).\(^\text{20}\) This was adopted in recognition of the close link between corruption and organised crime, and the realisation that the organised criminal group can use corrupt practice to

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\(^\text{15}\) Ibid.

\(^\text{16}\) UNGA Resolution 3514 (XXX) of 15 December 1975.

\(^\text{17}\) Nicholls *et al.*, (n 14).388.

\(^\text{18}\) By Resolution 51/191 of 16 December 1996.

\(^\text{19}\) See Resolution 51/59 of 12 December 1996.

\(^\text{20}\) Also known as Palermo Convention was adopted by the UNGA in its resolution 55/25 of 15 November 2000 and opened for signature in Palermo, Italy, from 12 to 15 December 2000. It entered into force 29 September 2003.
facilitate their activities.\textsuperscript{21} The adoption of UNCTOC was believed to provide the long awaited effective tools and the necessary legal framework for international cooperation in combating the evil of corruption. However, the convention had limited impact because it was not focussed mainly on corruption.\textsuperscript{22} It was not surprising when in 2000 the UN General Assembly by a resolution noted that another effective international legal framework against corruption independent of UNCTOC was desirable.\textsuperscript{23} Again, an Ad Hoc committee was constituted to negotiate the new instrument. These steps signalled the commencement of the negotiation of the first global anti-corruption instrument that focused mainly on the issue of corruption.

In 2001, the preparatory work on UNCAC was concluded, and negotiation commenced in early 2002.\textsuperscript{24} UNCAC was adopted by the UNGA on the 31 October 2003.\textsuperscript{25} The adoption was motivated by the need for a harmonised and consistent anti-corruption measures. The signing took place in Merida, Mexico following the offer by the government of Mexico to the UNGA to host high level signing conference and the approval by UNGA.\textsuperscript{26} UNCAC was signed by 95 States at Merida conference Mexico in December 2003. On the 15\textsuperscript{th} of September 2005 Equador became the thirtieth State to ratify the convention, and on the 14\textsuperscript{th} December 2005 in line with Article 68 of UNCAC, the convention came into force.\textsuperscript{27} As at September 2017, 182 States are parties to the convention.\textsuperscript{28} The purpose of UNCAC as captured in Article 1 are:

\begin{itemize}
\item[(a)] To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
\end{itemize}

\textsuperscript{21} Therefore, Article 9 require states to the extent appropriate and consistent with its legal system to adopt legislative, administrative and other effective measures to promote integrity and to prevent, detect, and punish corruption of public officials. States are required to provide for the independence of the authorities and to remove inappropriate influence on their actions.

\textsuperscript{22} Nicholls \textit{et al.}, (n 14).

\textsuperscript{23} See Resolution 51/61 of December 2000.

\textsuperscript{24} The negotiation was at the 7\textsuperscript{th} session of the Ad Hoc Committee held on the 21 January to 1 October 2002 and 120 countries participated in the negotiation.

\textsuperscript{25} It was adopted by a plenary meeting of the 58\textsuperscript{th} Session of the United Nations General Assembly on 31 October 2003 by UNGA Resolution 58/4 of 31 October 2003.

\textsuperscript{26} See UNGA Resolution 59/169.

\textsuperscript{27} Article 68 provides that the convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization; United Nations, Treaty Series, vol. 2349, 41; Doc. A/58/422.

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
(c) To promote integrity, accountability and proper management of public affairs and public property.

Three useful documents have been produced to aid the understanding and interpretation of UNCAC. These are United Nations Technical Guide to the Convention (UN Technical Guide), United Nations Legislative Guide for the Implementation of the Convention (UN Legislative Guide) and the Interpretative Note for the Official Record of the Negotiation of UNCAC (UN Interpretative Note). Despite the usefulness and value of these documents, there is no reference made to them in the UNCAC text.

UNCAC PROVISIONS

UNCAC acknowledges and builds on earlier anti-corruption conventions and instruments. It has 71 provisions that cover prevention, criminalisation and law enforcement, international

30 Available at https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf accessed 10 October 2015. The legislative guide shows the reasoning that led to the adoption of the provision.
31 Doc A/58/422/Add.1 Available at https://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf accessed 10 October 2015. The interpretative notes provide clarifications, explanations and definitions of terms used in the convention. For instance, paragraph 2 indicates that ‘executive’ is understood to encompass the military branch, where appropriate. Paragraph 3 indicates that the term ‘office’ is understood to encompass offices at all levels and subdivisions of government from national to local. In States where sub-national governmental units (for example, provincial, municipal and local) of a self-governing nature exist, including States where such bodies are not deemed to form a part of the State, ‘office’ may be understood by the States concerned to encompass those levels also. Paragraph 5 indicates that the term ‘foreign country’ includes all levels and subdivisions of government, from national to local.
32 Its preamble acknowledges the work carried out by other international and regional organisations in this field, including the activities of the African Union, the Council of Europe, the Customs Cooperation Council (also known as the World Customs Organisation), the European Union, the League of Arab States, the OECD and the Organisation of American States. The multilateral instruments to prevent and combat corruption, including, inter alia, the Inter-American Convention against Corruption, adopted by the Organisation of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the OECD on 21 November 1997, the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, and the AUCPCC, adopted by the Heads of State and Government of the African Union on 12 July 2003, welcoming the entry into force on 29 September 2003 of the United Nations Convention against Transnational Organized Crime.
cooperation and asset recovery pillars. It also covers technical assistance and information exchange, and mechanism for the implementation of the convention.

Preventive pillar: This is provided in Chapter II of UNCAC, covering Articles 5 to 14. Preventive anti-corruption pillar is an umbrella phrase used as coverage of all anti-corruption measures, policies and practices aimed at cutting off corruption before it roots. It entails the enactment and the implementation of legislation and administrative regulations and measures that choke off corrupt practices.33

Criminalisation and law enforcement pillar: This is provided in Chapter III of UNCAC, covering Articles 15 to 42. This pillar has two arms: Criminalisation and law enforcement. Criminalisation focuses on the elaboration of the offence of corruption by establishing a range of acts or conduct as offences. The second arm of the pillar is on mechanisms and measures for the enforcement of corruption offences. Thus, the fusion of criminalisation and law enforcement into one pillar34 is to emphasis their inseparability. Law enforcement covers investigation, prosecution and sanction as well as other relating measures that make law enforcement effective in corruption cases.

International cooperation pillar: This is the focus of Chapter IV. The chapter covers Articles 43 to 50. The measures under this pillar are extradition and mutual legal assistance (MLA) measures. Extradition provides measures for the surrender of a fugitive corrupt person to the requesting State. The mutual legal assistance is used to offer assistance in the investigation and gathering of evidence in corruption cases from a requested Stateto a requesting State.

Asset recovery pillar: This is the focus in chapter V and it covers Articles 51 to 59. The measures under this pillar are tracing/investigation, freezing/seizing and confiscation of assets as well as management of recovered assets. It provides measures for identification, preservation and deprivation of corrupt person of their illicit assets. The aim is to take away proceeds of corruption from corrupt persons.

Technical assistance and information exchange: Chapter VI covers Articles 60 to 62 and addresses the issues of technical assistance and information exchange between and among State Parties.

34 Chapter III of UNCAC.
Mechanism for implementation: Chapter VII covers Articles 63 to 71 and it sets out the mechanism for implementation of the convention. It provides for the Conference of the States Parties to the Convention to improve the capacity of and cooperation between States Parties to achieve the objectives outlined in UNCAC and to promote and review its implementation.35 Also, it ‘obligates each State Party to take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its domestic law, to ensure the implementation of its obligations under the Convention’.36

APPLICATION OF UNCAC IN DOMESTIC JURISDICTION

The paper has established above that 182 States have ratified UNCAC. However, treaty ratification37 is quite different from implementation and legislative approval.38 The legislative approval is the process leading to treaty implementation.39 There are two principles under the international law that regulate the application and implementation of a treaty within a domestic jurisdiction. They are the principles of incorporation and transformation.40 The principle of incorporation is championed by the monist school of thought. The monist posits that international law and domestic law are the same and therefore once a State ratifies a treaty, such treaty automatically forms part of her domestic law.

On the other hand, the principle of transformation is championed by the dualist school of thought. The dualist sees international law as distinct from domestic law and therefore requires the enactment of any treaty into the domestic law before the provisions of such treaty can apply to her domestic jurisdiction. In effect, the provisions of UNCAC are only applicable in States like United

35 Article 63(1) of UNCAC.
36 Article 65(1) of UNCAC.
37 This is an act of the executive by which a state communicates to other parties (State Parties) of the state’s intention to be bound by the treaty: A B Oyebode, Of Norms, Values and Attitude: The Cogency of International Law (University of Lagos Press 2012) 34. Article 2(1)(b) of the Vienna Convention on Law of Treaties 1969 defines ratification to 'mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.
38 Legislative approval is also called domestication of treaty, which is the transformation by enactment of a treaty into domestic law, thereby opening the door for implementation: ibid. States ‘comply with international law by passing laws and enforcing those laws’: Shima Baradaran, Michael Findley, Daniel Nielson and J C Sharman, ‘Does International Law Matter’ (2013) The Minnesota Law Review 745-837, 747.
39 This is the process of giving treaties the force of law within a State and may mean ‘the execution or fulfilment of the obligations arising from treaties concluded by States’: A B Oyebode, Treaty Making and Treaty Implementation in Nigeria: An Appraisal (Lagos, Bolabay Publications, 2003) 322.
40 Ibid.
Kingdom and Nigeria that adopts the transformation principle, to the extent that the UNCAC’s provisions are enacted into law by the legislature. Granted that States are bound to implement treaties in good faith, in compliance with the *panta sunt servanda* maxim and not to defeat the object and purpose of a treaty before it comes into force,\(^{41}\) that is the extent to which international law goes as the implementation is left to the State’s discretion.\(^{42}\) Therefore, apart from the fact that the UNCAC is not self-executing,\(^{43}\) in a State that applies transformation principle, there is a further requirement of enactment of the provisions of the treaty by the State’s legislature before the treaty can have the force of law in such State. This is a limitation to the application of UNCAC in domestic jurisdiction.

**ADDRESSING THE LIMITATION**

States Parties where the principle of transformation is applicable regarding the application of treaty in domestic jurisdiction should amend their constitution or any relevant law regulating the application of treaty in such state to provide for the principle of incorporation. The principle of incorporation principle will make the provision of UNCAC applicable to such State without the requirement for domestication.

To amend the relevant laws to provide for the principle of transformation, a strong political will of the political leaders in the States that apply the principle of transformation is required. UNGA should engage these States to see the importance of harmonisation and consistency in applying and implementing anti-corruption measures. Such steps will represent a genuine commitment of these leaders.

Also, grand corruption should be elevated to a crime against humanity that should be prosecuted by the international community at the International Criminal Court (ICC).

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\(^{42}\) A B Oyebode, *Of Norms, Values and Attitude: The Cogency of International Law* (University of Lagos Press 2012)

\(^{43}\) This means that ‘they (conventions) require enabling acts before they can function inside a country and bind domestic courts’: Arnone and Borlini (n 13) 311.
CONCLUSION
This paper examined the concept of corruption and its typologies, the history and development of UNCAC, the application of UNCAC in domestic jurisdiction. It identified the principle of transformation as an impediment to the application of UNCAC in domestic jurisdiction and recommends the adoption of the principle of incorporation, strong political will and elevation of grand corruption to crime against humanity in addressing the limitation. This will ensure the harmonisation and consistency of anti-corruption measures globally.
REFERENCES

BOOKS


ARTICLES


**LEGAL INSTRUMENTS**

• Organisation for Economic Cooperation and Development (OECD) Convention 1997
• Southern African Development Community (SADC) Protocol Against Corruption
• The Latin American Regional Conventions 1996
• United Nations Convention Against Corruption (UNCAC) 2005
• US Foreign Corrupt Practices Act 1977
• Vienna Convention on Law of Treaties 1969

**WEBSITE**

• www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf accessed 10 October 2015. The