TOWARD A NORMATIVE CONSENSUS AGAINST CORRUPTION:

Legal Effects of the *Principles to Combat Corruption in Africa*

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INTRODUCTION

In February 1999, eleven African countries adopted a set of twenty-five principles as a framework for combating corruption in Africa, and in the continent's dealings with the outside world.[1] The negotiations were held under the auspices of the Global Coalition for Africa (GCA), a Washington-based intergovernmental policy forum dedicated to building consensus on development policy and priorities among African governments and their partners in development. The principles, referred to here as the "Anti-corruption Principles," address corruption in international business transactions, and in development assistance to Africa.

The "Anti-corruption Principles" followed on the heels of anti-corruption efforts in other regions of the world, particularly as they relate to the international business transactions. Notable efforts in this regard include the Inter-American Convention Against Corruption, concluded by Member States of the Organization of American States in 1996, and the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in

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1. The eleven participants were: Benin, Botswana, Ethiopia, Ghana, Malawi, Mali, Mozambique, Senegal, South Africa, Tanzania, and Uganda. Some of Africa's partners in development including Canada, Denmark, France, The Netherlands, Switzerland, United Kingdom, the United States, and the Organization for Economic Cooperation and Development (OECD) were present during the negotiations. *See* Global Coalition for Africa, Past Activities, 25 Principles to Combat Corruption, *at* http://www.gca-cma.org/epastact.htm.

International Business Transactions that was adopted in 1997.[2] Earlier, the United Nations General Assembly adopted a Declaration against Corruption and Bribery in International Commercial Transactions.[3]

In this paper, I argue that since the 1970s, the international community has engaged in a discourse over corruption and its effects on the international economy and national societies. In some regions of the world, this discourse generated sufficient common understandings of the relationship between economies and corruption, and gave rise to legal norms to combat corruption. Both the OECD and Inter-American Conventions are outcomes of this set of discursive processes. On the other hand, except for their involvement with the processes within the United Nations General Assembly and the Centre for Transnational Corporations, African countries failed to take a regional initiative to combat corruption before 1997. That year, the issue was addressed as the main theme of the GCA Policy Forum in Maputo, Mozambique.[4] Since then, a specific African discourse on corruption is identifiable, taking place under the auspices of the GCA, and culminating in the adoption of the Anti-corruption Principles. More recently, efforts to fight corruption in Africa commenced at the sub-regional level. In May 2001, West African Ministers of Justice issued a Declaration in Accra, Ghana, calling upon the Secretariat of the Economic Community of West African States (ECOWAS) to elaborate a comprehensive Protocol on Corruption.[5] The Ministerial Declaration recognized the significance of the issue when it stated "corruption is not only a criminal issue but

2. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter OAS Convention]. The Convention was signed by 21 Latin American Countries, as well as the United States and Canada in 1996. It entered into force on March 20, 1997. *See also* the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18 1997, Arg.-Braz.-Bulg.-Chile-Slovk., 37 I.L.M. 1 [hereinafter OECD Convention].

3. G.A. Res. 51/191, U.N. GAOR, 51st Sess., reprinted in 36 I.L.M. 1043 (1997). The United Nations concern with corruption goes back to 1974 with the establishment of the Center for Transnational Corporations (CTC), which was intended, *inter alia,* to negotiate a Code of Conduct on Transnational Corporations. As part of this process, an Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices was established in 1976, and renamed in 1978 as the Committee on an International Agreement on Illicit Payments. The Committee agreed on a draft International Agreement, which was forwarded to ECOSOC and the CTC for inclusion in the Code of Conduct, but was not adopted. The draft U.N. Code of Conduct on TNCs was also not adopted. *See Draft U.N. Code of Conduct on Transnational Corporations*, U.N. Commission on Transnational Corporations, 17th Sess., Annex, U.N. Doc. E/C.10/6 (1982), *reprinted in* 22 I.L.M. 192 (1983).

4. *See* 1997 Political Committee Meeting, Maputo, Mozambique, *at* http://www.gca-cma.org/epoli.htm (last visited Feb. 23, 2000). The issue had surfaced earlier in 1995 at the Global Coalition for Africa Meeting in Maastricht, Switzerland.

5. The Guardian (Lagos), *Ecowas Justice Ministers Move Against Corruption* (June 5, 2001), *at* http://allafrica.com/stories/200106050180.htm (last visited Feb. 23, 2000).

also impacts on the dynamics of national and international development that deserve collective solution . . .."[6]

It is my argument that the discourse on corruption within the United Nations, and the various regional organizations, has generated shared understandings of the negative impacts of corruption on the economic and development objectives of nations and people. It also illustrates the emergence of an international normative consensus against corruption. This consensus represents the emerging *opinio juris sive necessitatis* of the international community, thus, the beginning of the process of formation of a customary international law on corruption. Remarkably, the processes associated with the development of the African Anti-corruption Principles involved participation by an array of actors including states, international organizations, non-governmental organizations, and individuals. Arguably, this inclusive process engendered a perception of legitimacy, which, in turn, explains the increasing influence of the Anti-corruption Principles.[7]

Thus, by adopting the Anti-corruption Principles, African countries have joined the process of formation of an emergent customary norm. The implication of this situation is that if African countries fail to conclude a Convention Against Corruption as envisaged by Principle 25 of the Anti-corruption Principles, the current emerging *opinio juris,* together with supporting State practice, could form the basis of a regional customary law on corruption.[8] As such, governments would be under an obligation to take domestic measures to prevent their nationals (including legal persons), from engaging in corrupt activities in their dealings with officials of other countries.

Despite this argument, it is suggested that a regional convention on corruption would be the preferable regulatory option for Africa. Yet,

6. The Guardian (Lagos), *Ecowas Justice Ministers Move Against Corruption* (June 5, 2001), *at* http://allafrica.com/stories/200106050180.htm (last visited Feb. 23, 2000).

7. *See* discussion *infra* at notes 34-38 and accompanying text as well as notes 85-102 and accompanying text. The concepts of perceived legitimacy and process fairness are borrowed from Thomas M. Franck. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990); *See also* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 25 (1995).

8. The International Court of Justice in the Asylum Case laid down the idea of a regional custom. The Court stated the requirements of this type of custom as follows:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. . . . The rule invoked . . . [must be] in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to [one] State and a duty incumbent on the[other] State.

Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20). *See also* Rights of Passage over Indian Territory (Port. v. India) 1960 I.C.J. 6 (Apr. 12), *see infra* note 451 and accompanying text.

even a convention would have little practical effect if African nations do not put in place adequate institutional and legal mechanisms at the domestic level to fight corruption. The lesson to be learned is that an effective strategy against corruption would require linkages between mutual operation of institutional and legal mechanisms at both the regional and national levels. There is no doubt that much depends on the effectiveness of domestic implementation measures such as: (1) the reform of many criminal laws or the enactment of new legislation that could be effectively enforced; (2) reform of public institutions to introduce greater accountability in the public sector; (3) political leadership that is more than rhetorically committed to fight corruption; (4) a general public that is intolerant of fleece, an engaging civil society to probe and reveal cases of corrupt practices; (5) an enabling environment for the free expression of public opinion; and (6) an independent judiciary. In effect, in many ways adherence to the rule of law is crucial to effectively fight corruption.[9]

DEFINITION AND HYPOTHESIS

There is broad agreement that corruption is the "abuse of public office for private gain."[10] This definition focuses on the public or

9. Edward Kwakwa, *Regulating the International Economy: What Role for the State?, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 227, 242 (Michael Byers ed., 2000).

10. Daniel Kaufmann, *Corruption: The Facts*, FOREIGN POL'Y, June 22, 107, 114 (1997); *See also* Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?, at* http://www.worldbank.org/wbi/governance/pdf/wei.pdf. This definition is shared by many organizations, including the World Bank and Transparency International. *See* WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: PROGRESS AT THE WORLD BANK SINCE 1997 16 (2000), *available at* http://www.worldbank.org/publicsector/anticorrupt/helpingcountries.pdf (last visited Apr. 20, 2002); *See also* JEREMY POPE, TRANSPARENCY INTERNATIONAL SOURCE BOOK 2000-CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM 13 (2000), *available at* http://www.transparency.org/sourcebook/sourcebook.pdf.zip (last visited Apr. 20, 2002). A similar definition is inferable from the Global Coalition for Africa's 1997 policy statement on corruption. *See* Policy statement, Global Coalition for Africa, Corruption and Development in Africa, GCA/PF/N.2/11/1997, *available at* http://www.gca-cma.org/epfdoc97.htm (last visited Feb. 28, 2002) [hereinafter GCA]. The same definition is implied by the OECD and the OAS Conventions. *See* W. PAATI OFOSU-AMAAH ET AL., COMBATING CORRUPTION: A COMPARATIVE REVIEW OF SELECTED LEGAL ASPECTS OF STATE PRACTICE AND MAJOR INTERNATIONAL INITIATIVES 70-75 (1999). W. Paati Ofosu-Ammah and his coauthors offer a more elaborate, but less inclusive, definition of corruption centered around the notion of bribery. Based on a study of major legal systems of the world that address corruption, they conclude that an act of corruption is consummated:

> whenever a public officer or other agent accepts or solicits a bribe, or any person gives or promises a bribe to such a public officer or other agent; provided . . . that the purpose of the bribe is to serve as a reward to the public officer or agent for an act that he has done or refrained from doing in the exercise of his functions, or as an inducement designed to ensure that the

governmental sphere, particularly, on the extent to which government involvement in the national economy provides opportunities for public officials to engage in rent-seeking behavior, often at the expense of government policy and public welfare. However, the definition does convey the misleading impression that corruption is unidirectional, rather than a two-way phenomenon. Every act of corruption involves at least two parties. Public officials are in many cases on the demand side, but their crime is no less than those, who pay bribes, or offer and induce the acceptance of other special treatment.[11]

The focus on the public sector corruption is nonetheless justified by statistical evidence, which, *inter alia*, demonstrates a correlation between the extent of the government involvement in the economy, and the amount of corruption. For example, the results of a 1996 survey of two thousand enterprises across forty-nine countries showed a higher incidence of corrupt practices in countries with more regulatory and bureaucratic requirements for business.[12] In addition, there is evidence that the more administrative discretion officials enjoy in approving regulatory requirements such as the issue of permits, licenses, or grants of the fiscal exemptions to business, the more the likelihood of corruption.[13] According to Wei:

> The more discretion government officials have over the operation of business or lives of citizenry, the more likely corruption would occur and flourish . . . labyrinthine government regulations create fertile grounds for government officials to extract rents, whereas an economy where government's role is minimal is less likely to breed corruption.[14]

It is true that the exercise of official discretion could in many respects be abused leading to corruption. Common sense, therefore, dictates that public policy must seek to limit the extent of administrative discretion officials enjoy, so as to reduce opportunities for abuse. However, while this may provide a strong case for streamlining the role of the state in the economy in certain cases, and for the privatization of inefficient and monopolistic state enterprises, the state continues to have important socio-economic roles to play in poor developing countries, especially those in Africa.[15] In the area of

> public officer or agent does, or refrains from doing any act, in the exercise of his functions.

OFOSU-AMAAH ET AL., *supra* note 10, at 63.

11. *See infra* text accompanying note 24 for a discussion of the role of the international economic processes in increasing corruption in developing countries.

12. Kaufman, *supra* note 10, at 119. His calculations were based on data compiled by the World Economic Forum's *Global Competitiveness Report 1996*.

13. *See* GCA, *supra* note 10.

14. *See* Wei, *supra* note 10, at 16.

15. *See* Kwakwa, *supra* note 9 (for a discussion on the continuing relevance of the state in governing the international economy, especially in developing countries); *See also*

corruption, the state, represented by political leadership and public sector elite, continues to have a crucial leadership role to play. Thus, instead of disengagement of the state from the economy, what Africa needs are more responsible and accountable governments, and a public sector committed to advancing the national socio-economic agenda. Greater public-sector responsibility and accountability will contribute not only to economic development, but also to the fight against corruption.

Having said that, it must be noted that improper exercise of public authority is not the only explanation for corruption in Africa. Other factors include the structure of public services, particularly the systems of recruitment, promotion, and compensation. In many African countries, recruitment and promotion processes are distorted in favor of friends, family, and political allies. There is little doubt that this has had a negative effect on the quality and capacity of manpower that end up in official positions. Moreover, the levels of remuneration are so poor compared to the private sector, that many officials are tempted to make up for the shortfall by demanding bribes before discharge of their official functions, for the issue of regulatory permits, or for the offer of government construction and procurement contracts. Inadequate or inefficient legal structures for the investigation, detection and prosecution of corrupt practices also contribute to the upsurge of this menace.

Consequently, a meaningful anti-corruption strategy in Africa will require a mix of administrative restructuring and legal reform measures. These reforms could be complemented by honest political leadership dedicated to the fight against corruption, and through programs of public education so as to develop an "anti-corruption sensibility" among the general population.[16] Among other factors, exemplary leadership and civil society pressure have been credited with the success of anti-corruption efforts in Hong Kong, Singapore, Uganda and Botswana.[17]

In his study of the development problems in Nigeria, Umez recognized that previous studies had proffered three main explanations

Oscar Schachter, *The Erosion of State Authority and its Implications for Equitable Development, in* INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 31 (Friedl Weiss et al. eds., 1998).

16. On political leadership at the national level, *see* Augustine Ruzindana, *The Importance of Leadership in Fighting Corruption in Uganda*, *in* CORRUPTION AND THE GLOBAL ECONOMY 133-145 (Kimberly Ann Elliot, ed., 1997). On the importance of exemplary leadership at the local government level, *see* ROBERT KLITGAARD, ET AL., CORRUPT CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION (2000) (narrating.the experiences of former Mayor Ronald Maclean-Abaroa of the city of La Paz, Bolivia). I use the phrase 'anti-corruption sensibility' to describe a general aversion to corruption on the part of the citizenry.

17. *See* GCA, *supra* note 10, at 22-24.

for that country's lack of development: (1) the colonial legacy explanation; (2) the corrupt leadership hypothesis; and (3) the authoritarian regimes argument.[18] In his view, although these explanations are part of the picture, they do not tell the whole story. For Umez, a more profound and compelling explanation for Nigeria's development problems is the prevalent value system, which "glorifies and endorses corrupt and illegal means as necessary, normal, and sufficient means to ends."[19] Consequently, that value system ought to be addressed in any assessment of Nigeria's development problems, and must be reflected in any sustainable strategy to address those problems. The importance of public education to the eradication of the "prevalent value system," and its replacement by anti-corruption sensibility among the population, cannot be overemphasized.

The question of the prevalent value system in Nigeria raises the broader issue of the relationship between traditional practices of hospitality or gift giving and corruption. In many African cultures, gifts are an integral part of norms of hospitality and represent symbols of appreciation.[20] This noble tradition of gift giving has unfortunately been used as an excuse for corrupt payments to developing country officials mainly by Northern business concerns on the pretext that it is normal business practice within the recipient cultures.[21] Nothing, of course, is further from the truth. Corruption is not a part of any culture anywhere, definitely not in Africa. General Olusegun Obasanjo, two-time President of Nigeria, has drawn a fundamental distinction between African cultural norms of hospitality and gift-giving on one hand, and the deliberate manipulation of that practice for selfish personal enrichment.[22] Thus, while it is true that in many African

18. BEDFORD N. UMEZ, THE TRAGEDY OF A VALUE SYSTEM IN NIGERIA: THEORIES AND SOLUTIONS (1999).

19. *Id*. at 37-45.

20. *See* GCA, *supra* note 10, at 6.

21. *See* Jeremy Pope, *Containing Corruption in International Transactions-The Challenge of the 1990s, in* ISSUES IN GLOBAL GOVERNANCE: PAPERS WRITTEN FOR THE COMMISSION ON GLOBAL GOVERNANCE 71 (1995).

> . . . Now when you're talking about kickbacks, you're talking about something that's illegal in this country, and that, of course, you wouldn't dream of doing . . .. But there are parts of the world I've been to where we all know it happens. And if you want to be in business, you have to do - not something that is morally wrong . . .. In many countries in the world the only way in which money trickles down is from the head of the country who owns everything. Now that's not immoral or corrupt. It is very different from our practice. *Id*. (quoting the views of former British Cabinet Minister Lord Young over BBC radio).

22. *Id*. at 72 (quoting a Letter from Gen. Olusegun Obasanjo to the *Financial Times* of London (Oct. 14 1994)):

> In the African concept of appreciation and hospitality, a gift is a token; it is not demanded; the value is in the spirit of the giving, not the material worth. The gift is made in the open for all to see, never in secret. Where a gift is

countries wealth and social status are uncritically accepted, even in situations where the persons' earnings are demonstrably inconsistent with their lifestyle, there is no basis for the assertion that corruption is morally or legally permissible in these societies.

In addition to the domestic factors, the international economic processes have also played a role in the increasing corruption in developing countries. The globalization of the international economy has facilitated greater movement of persons and capital across borders. Multinational investors, mainly from developed countries, frequently pay bribes to officials of developing countries in order to win government contracts, licenses, permits, and concessions. They argue that such bribes are necessary to speed approval processes, and in some cases, to secure market presence, which would otherwise be secured by the less efficient and less scrupulous competitors.[23] What is more, home states of multinational investors have bought these arguments. Except for the United States, which outlawed bribery of foreign officials since 1977, other OECD countries not only allowed illicit payments by investors, but also made such payments tax deductible.[24] There is little doubt that this state of affairs encouraged investors to pay, and developing country officials to demand and receive bribes.[25] In light of the above, the ratification and implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, is significant.[26]

> excessive it becomes an embarrassment, and is returned. . .. If anything, corruption -as practiced by exporters from the North as well as by officials in the South- has perverted positive aspects of this age-old tradition.

23. *See* Kaufmann, *supra* note 10, at 115-117 (stating the 'speed money' and 'grease the wheels' theses and a demonstration of their weaknesses); *See* World Bank, World Development Report 1997: The State in a Changing World 103, *at* http://www.worldbank.org (last visited Apr. 20, 2002) (refuting the "speed money" argument); *See also* Transparency International, TI Source Book 2000, (2000), *available at* http://www.transparency.org/sourcebook/index.html (last visited Mar. 8, 2002) (rejecting the claim that corruption leads to efficient resource allocation).

24. Foreign Corrupt Practices Act, 15 U.S.C.S § 78dd-1 (2001).

25. Patrick Glynn et al., *The Globalization of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 7-27 (Kimberly Ann Elliot, ed., 1997) (especially at 16, where they make the following point: "Many developed states not only legally permit such bribery but also permit firms to deduct such bribes as a legitimate business expense. This is not only a widespread and pernicious instance of corruption but also a practice by which the industrial nations, in effect, encourage and contribute to corruption in the developing world.")

26. Article 1 of the Convention criminalizes bribery of foreign public officials, Article 2 provides for liability of legal persons, and Article 3 provides sanctions including "effective, proportionate and dissuasive criminal penalties," and the seizure and confiscation of the proceeds of bribery, or property equivalent thereto. Article 8 calls on States to adopt within the framework of their laws and regulations, accounting and auditing standards, and financial statement disclosures, "to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures . . . for the purpose of bribing

Having identified the factors that broadly explain the rise in corruption in developing countries, it is pertinent to outline its effects on the developing country's economy, and society. As already noted, one of the early arguments proffered as a justification for corruption in countries with excessive bureaucratic and regulatory requirements, is that the bribery of officials works to "speed the wheels of commerce," and so has an overall positive effect on the economy, because it facilitates more investment.[27] This "grease the wheels" or "speed money" thesis has now been largely discredited. Empirical research has shown that bribery of officials to secure government approval for business, operates both as an adverse incentive to potential investors, and does not really speed up the approval process.[28] On the contrary, survey data from two thousand four hundred firms, in 58 countries, show that those corporate managers, who pay more bribes, on average, spend more time negotiating with their conspirators in government, than managers that pay fewer bribes.[29] Kaufmann cites the case of a senior Indian civil servant who not only failed to speed the approval process for the company that bribed him, but also offered his services to rival businesses to slow the process down for them.[30] The implication is that the "speed money" hypothesis is clearly flawed.

With respect to its effects on the economy, there is evidence that investors view bribery as a private tax on their investment, and tend to shy away from jurisdictions with high rates of "private taxation."[31] In other words, bribery increases the transaction costs of doing business in particular jurisdictions. The effect has been lower inflows of foreign investment to countries with high rates of corruption. Indeed, Mauro's analysis shows a negative correlation between the amount of corruption and the level of investment in a country.[32] It further shows that a country that improves its standing on the corruption index by one standard deviation (on a scale of 0 to 10, where 0 is the most corrupt

foreign public officials or of hiding such bribery." *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, arts 1-3, 8 S. TREATY DOC. NO. 105-43, 1997 U.S.T. LEXIS 105. While a liberal interpretation of this provision may require Parties to outlaw tax deductibility, the provision as it stands, falls short of the expected express requirement to prohibit tax deductibility of illicit payments.

27. David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 WESTERN POLITICAL QUARTERLY 719 (1966) (arguing that corruption has positive effects on developing economies).

28. *See* Wei, *supra* note 10, at 13-14.

29. *See id*. at 14.

30. *See* Kaufmann, *supra* note 10, at 117.

31. Paulo Mauro, *Why Worry About Corruption?, in* ECON. ISSUES at 6 (Int'l Monetary Fund, Economic Issues, No. 6), *available at* http://www.imf.org/external/pubs/ft/issues6/issue6.pdf (last visited Apr. 20, 2002)..

32. *See id*. at 9 (where he writes that " Regression analysis indicates that the amount of corruption is negatively linked to the level of investment and economic growth, that is to say, the more corruption, the less investment and the less economic growth.")

and 10 the least corrupt), will experience an increase in its rate of investment by about four percentage points.[33] Similarly, Wei examined data of foreign investment flows from fourteen source countries to forty-one host countries in the 1990s, and concluded that there was clear evidence that corruption discourages foreign investment.[34] Using a number of statistical corruption indices (to rank countries according to their levels of corruption), the author concluded that if, for example, India was to reduce its corruption level to that of Singapore (in a ranking where Singapore was perceived to be the least corrupt country), the effect would be equivalent to reducing its rate of corporate tax by up to 22 percent.[35]

Corruption has also been found to slow economic growth. In his study referred to earlier, Mauro further concluded that the improvement by one standard deviation in a country's corruption index would translate to an annual growth rate of over half a percentage point in per capita Gross Domestic Product (GDP).[36] It is important to note that in both the Mauro and Wei studies, the statistical relationship between corruption and Foreign Direct Investment (FDI) and economic growth is valid across all regions.[37] Thus, even though the locus of their research is not Africa, their conclusions remain significant, and have important implications for African countries.

One of the causes of corruption identified earlier is the structure of developing country public services, particularly their selection and promotion processes, as well as their low wage scales. In addition to distorting the human resource capacity, this factor has led to distortions of both public policy and government expenditure. Corruption-prone public servants often customize government policies in developing countries to facilitate receiving bribes or other illicit payments, rather than in accordance with the needs and aspirations of the people. Thus, government policy and expenditure are prioritized towards capital-intensive infrastructure, defense, and cognate "supply-type" contracts that offer opportunities for rent-seeking and kickbacks, instead of socially desirable and needed health, education, and public welfare projects.[38] Moreover, even these projects are often delivered in substandard quality, necessitating further expenditure within a short period of time on either maintenance, or new projects.[39] The result is

33. Paulo Mauro, *Why Worry About Corruption?, in* ECON. ISSUES at 6 (Int'l Monetary Fund, Economic Issues, No. 6), *available at* http://www.imf.org/external/pubs/ft/issues6/issue6.pdf (last visited Apr. 20, 2002).

34. *See* Wei, *supra* note 10, at 9.

35. *See id*. at 6-7, 10.

36. *See* Mauro, *supra* note 31, at 9.

37. *See* Kaufmann, *supra* note 10, at 120.

38. *Id.* at 118.

39. Vito Tanzi & Hamid Davoodi, CORRUPTION, PUBLIC INVESTMENT, AND GROWTH 7, 8, 15, 17-18, 20 (Int'l Monetary Fund Working Paper, No. 97/139, 1997), *available at*

that the living conditions of the poor in these already poor societies worsen, with little opportunity for advancement.

Corruption has also resulted in a significant diversion of public funds, from both internal revenue, and external development assistance. Figures for Gambia for the early 1990s estimate that "customs and tax revenues amounting to 8-9 percent of GDP were foregone, largely as result of corruption."[40] In 1994-95 fiscal year, revenues in Tanzania were reported to have dropped dramatically as a result of corruption by revenue officials.[41]

The above research has important policy and legal implications for Africa. Lagging behind most regions of the world in terms of flows of FDI and the rate of economic growth, and leading the world in rates of poverty, disease, unemployment, and general lack of development, Africa is the region that can least afford the economic costs of corruption. For Africa, the fight against corruption deserves similar attention and priority as accorded to other issues that threaten the development of the continent such as HIV/AIDS, environmental degradation, poverty, war, and undemocratic governance. In other words, it is an imperative development challenge. The GCA has put this point succinctly, "Corruption in Africa is a development issue." African countries cannot bear the costs of corruption, which impedes development and minimizes the ability of governments to reduce poverty. For these reasons, effectively addressing corruption in African countries has become a development imperative."[42]

FACING THE CHALLENGE: THE GCA ADDRESSES CORRUPTION IN AFRICA

The issue of corruption first surfaced in GCA deliberations in 1995, when several delegates brought it up at the 1995 Plenary Session of the Organization held in Maastricht.[43] It quickly gained prominence, and there was agreement that it should be given more attention within the GCA.[44] As a result, it was assigned as the main subject of the 1997 GCA Policy Forum held in Maputo, Mozambique.[45] Initial efforts were directed at reducing bribery in the international procurement, especially in donor-financed projects and contracts.[46] For this purpose, a new GCA initiative was launched with a three-pronged approach: (1)

http://www.imf.org/external/pubs/ft/wp/wp97139.pdf (last visited Oct. 1997); *See also* Kaufmann, *supra* note 10, at 118; *See* Wei, *supra* note 10, at 11; Mauro, *supra* note 31, at 10, 11.

40. *See* GCA, *supra* note 10, at 11.
41. *See* Jeremy Pope, *supra* note 10, at 15.
42. GCA, *supra* note 10, at 2.
43. *See id*. at 1.
44. *Id*.
45. GCA, *supra* note 10, at 2.
46. *Id*. at 2.

African Heads of State would prohibit their officials from receiving bribes from international procurement contracts; (2) the heads of international companies bidding on contracts would certify that their servants and agents were barred from offering or paying bribes; andd (3) international financial institutions would be requested to include "no bribery" clauses in contracts that they finance.[47]

In order to maintain momentum, the GCA embarked on an inclusive and participatory process of consensus building that saw input from African and international non-governmental organizations, African parliamentarians, governments, and development partners. In addition to bribery in procurement contracts, the issues for debate were also broadened to include corruption in development assistance and in international business transactions generally.[48] The broad-based participation was due to a realization on the part of the GCA and the participating governments that a successful anti-corruption strategy will require broad coalitions among African governments, civil society and the international community. It was this process that culminated in the 1999 Washington meeting at which the Anti-corruption Principles were announced.[49]

At a recent GCA Policy Forum held in Abuja, Nigeria, attended by twenty-three African governments, including three heads of state, development partners, parliamentarians, mayors, non-governmental organizations, and the private sector, most participants expressed their agreement with the Anti-corruption Principles and expressed the willingness of their respective governments to endorse and implement them.[50] It is my argument that the adoption of the principles, as well as subsequent follow-up and endorsement by governments, demonstrates an emerging normative consensus that may provide the basis for the development of regional customary law on corruption.[51] When the

47. *Id*. There is no indication of the extent to which this initiative has been successfully implemented.

48. GCA, *supra* note 10, at 3.

49. Global Coalition for Africa, Corruption, Collaborative Frameworks to Address Corruption, *at* http://www.gca-cma.org/ecorrup.htm#1098 (last visited Feb. 23, 1999) [hereinafter Principles to Combat Corruption].

50. Global Coalition for Africa, Meetings, Report on the 2000 Policy Forum, *at* http://www.gca-cma.org/epolicy.htm (last visited Feb. 21, 2002). The Policy Forum, which was attended by the author, was held from October 19 to 21 in Abuja. The African countries represented were Benin, Botswana, Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Malawi, Mali, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Tunisia, Uganda, and Zambia. Among the development partners in attendance were Belgium, Canada, Denmark, France, Japan, Netherlands, Norway, Sweden, Switzerland, United Kingdom, and the United States. Also present were the World Bank, the IMF, the European Commission, and the UNDP. *See* Global Coalition for Africa 2000 Policy Forum List of Attendees (on file with author).

51. On the requirements of local custom at international law, *See* Rights of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 (Apr. 12). "The Court sees no reason

regional consensus is considered along with legal developments in other parts of the world, particularly, among the OECD and OAS states, the result is arguably the emergence of international customary law on corruption. In the next section, I will discuss the requirements for the formation of a rule of custom in the international law.

CUSTOM AS A SOURCE OF LAW

Under Article 38 of the Statute of the International Court of Justice, the principal sources of international law are listed as conventions, custom, and general principles of law.[52] The Article also provides that judicial decisions and the teachings of the most qualified publicists are subsidiary sources of the international law.[53]

While the validity of the above categories as sources of international law cannot be gainsaid, a sophisticated understanding of the process of contemporary international law making, reveals that the Article is inadequate in important respects. First, the provision was negotiated and concluded by a small, largely homogenous group of Western countries.[54] Since the end of the Second World War, the structure of the international legal order has changed significantly, with a new majority of developing countries with widely varying priorities and challenges from those of the western powers. This new dynamic called for a corresponding evolution of the law making process.[55] Attempts by the new States to effect this change in

why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States. . ."; *See also* Asylum, *supra* note 8, and accompanying text.

52. Statute of the International Court of Justice (59 Stat. 1055 1945), U.S.T.S. 993, art. 38.

53. *Id.*

54. S*ee* KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 1-5 (1993) (a useful account of the negotiating history of this provision, especially the role of what she calls "the Great Power Jurists"). The Advisory Committee of Jurists that was appointed by the Council of the League of Nations to prepare the establishment of the Permanent Court of International Justice were appointed in an independent, personal capacity. By "Great Power Jurists" the author means jurists from the powerful industrialized countries like the United States, the United Kingdom, France, and Italy, who exercised no mean influence during the negotiation and drafting of the Statute.

55. The most candid expression of this situation was made by Michael Reisman in the context of a discussion on the legal status of soft law:

> The rapid growth of soft law and complaints about it are, in large part, a concern of developed countries. Part of it has to do with the deep dissatisfaction that we feel at the shift of power within formal lawmaking arenas, in which we are in a numerical minority. We discover that many of these fora make law we do not like. This law, we insist derisively, is soft. This may be a valid complaint, but those who are making this soft law also have a valid complaint. From their perspective, customary law, which we would consider very hard, is in fact law that is created primarily because of the great power that we in the industrial world exercise over others. There

international law making were largely resisted by the West.[56] Secondly, alongside the emergence of new states, there has also been a proliferation of international organizations, non-governmental organizations, and other non-state actors, most of them playing significant roles in influencing international lawmaking.[57] As Toope has commented:

> . . . the latter part of the twentieth century has been marked by the emergence of a wider variety of actors seeking to shape the evolution of international law. It may now be safely argued that international organizations, international non-governmental organizations, groups claiming self-determination, individuals, and even "epistemic communities" shape international law through their influence within institutionalized processes of discussion. . ..[58]

> are really two sides to the controversy over soft law. It is important when we criticize it, to appreciate that there are others on the other side of the mirror who are looking at it quite differently.

See W. Michael Reisman, A Hard Look at Soft Law, Remarks at the Annual Meeting of American Society of International Law, (Apr. 20-23, 1988), *in* A.S.I.L. PROC. at 377.

56. The most prominent example of this was the developing country argument that resolutions and declarations of the United Nations General Assembly are potentially creative of international law. It was in pursuance of this argument that the instruments of the New International Economic Order (NIEO) were said to lay down new customary rules. These instruments were the United Nations Declaration on a New International Economic Order, the Charter of Economic Rights and Duties of States, and the Declaration on Permanent Sovereignty over Natural Resources. Together, they were also argued to have laid the foundation for the customary law right to development. These arguments were strongly opposed, and ultimately muted by most western countries, who clung to the traditional conception of international prescription laid down in Article 38 of the ICJ Statute.

57. Stephen J. Toope, *Redefining Norms for the 21st Century, in* CAN. COUNCIL ON INT'L L. PROC. 191, 197 (1995). The work of the United Nations and its Specialised Agencies, and that of the International Union for the Conservation of Nature (IUCN) in the environmental field could be cited as examples. The IUCN not only influences the international agenda for environmental lawmaking, it has on several occasions, either solely, or with other organisations, provided soft law instruments and draft treaties for negotiation by states. Examples include the 1980 *World Conservation Strategy,* which was revised and renamed in 1991 as *Caring for the Earth: A Strategy for Sustainable Living*. It prepared an *Earth Charter* that was intended for, but not adopted by the 1992 UNCED Conference. Either singly, or in collaboration with other organizations, the IUCN worked on the following treaties: the 1971 Convention on Wetlands of International Significance Especially as Waterfowl Habitat (RAMSAR), the 1972 World Heritage Convention, the 1973 CITES Convention, the 1979 Migratory Birds Convention, and the 1992 Biodiversity Convention. The Global Coalition for Africa provides a similar forum for international discourse on issues of development facing Africa. On the role of non-state actors in international economic governance, *See* Anne-Marie Slaughter, *Governing the Global Economy through Government Networks, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177-205 (Michael Byers, ed., 1999).

58. Toope, *supra* note 57, at 197; *See* Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORGANIZATION 3, 377-403

Handl also supports the view that states no longer enjoy exclusive competence in international lawmaking, "[a] statist view of international law . . . is difficult to reconcile with a multitude of nonstate transnational actors who, as a sophisticated legal process analysis would show, now have had a significant impact on international law."[59]

Having said the above, the inadequacies of Article 38 need not delay us further. This paper has a more limited objective than a deconstructionist attack on traditional sources doctrine. Other scholars have ably done that, and the interested reader may refer to them.[60] Since the principal argument of this paper is that the conclusion of the Anti-corruption Principles marks the beginning of the process of formation of a regional customary law on corruption, I will focus on the requirements for a rule of customary international law to exist.

Under subparagraph 1 (b) of Article 38, custom must be evidenced in a "general practice accepted as law."[61] Thus, two elements must be present in order for a rule of law to qualify as one of customary law: there must be general *state practice*, together with a conviction on the part of states that such practice is required by law - the *opinio juris sive necessitatis*.[62] It is the latter element that distinguishes legally relevant custom from mere habit, usage, social practice, or public policy.[63] In other words, *opinio juris* is what confers on state practice what Toope has called a distinct "concept of legal normativity."[64] In the *Asylum Case*, the International Court of Justice described the

(1989); *See also* Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts to Protect the Stratospheric Ozone*, 46 INT'L ORGANIZATION 1, 187-224 (1992) (discussing the role of epistemic communities in international environmental lawmaking).

59. Gunther F. Handl, A Hard Look at Soft Law, Remarks at the Annual Meeting of the American Society of International Law (Apr. 20-23, 1988), *in* A.S.I.L. PROC. at 373; *See also* K.C. Wellens & G.M. Borchardt, *Soft Law in European Community Law*, 14 EUR.L.REV. 267 (1989).

60. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 298 (1990); *See also* Philip Allott, *Language, Method and the Nature of International Law*, 1971 BRIT.Y.B.INT'L L 79; *See also* Toope, *supra* note 57.

61. Statute of the International Court of Justice, *supra* note 52.

62. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 130 (1999) [hereinafter BYERS]; *See also* WOLFKE, *supra* note 54, at 41-45.

63. ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW, 27 (9th ed. 1993). They draw the following distinction:

> "A *custom* is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right. On the other hand, a *usage* is a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right." *Id*.

64. *See* Toope, *supra* note 57, at 195.

requirements of custom as "a constant and uniform usage, accepted as law."[65] These requirements have now been accepted as applicable to general customs as well.[66]

Similarly, in the *North Sea Continental Shelf Cases*, the Court, in considering whether State practice since the conclusion of the 1958 Geneva Convention on the Continental Shelf, had been such as to amount to a new rule of customary international law said:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[67]

The two-pronged requirement has been eloquently referred to as the "bipartite conception of customary international law."[68] Several writers have criticized this bipartite conception. Byers refers to it as a "chronological paradox" requiring that when states create new customary rules, their acts must be based on a prior belief that those rules already exist.[69] In his view, this conception would make it impossible for new customary rules to develop.[70] Wolfke calls it a "reverse sequence," arguing that "one cannot accept what does not yet exist."[71] She points out that the element of acceptance does not necessarily have to come *after* the practice; the two could, and do often happen simultaneously.[72] For Akehurst, the traditional approach seems to require that states must believe that something is "*already* law before it *can become* law."[73] In the words of D'Amato, "if we can say that a state is acting in accordance with its conviction that it is acting in conformity with prevailing international law, then by implication we already know what that international law is . . . if we know the law,

65. *See* Asylum, *supra* note 8 and accompanying text.

66. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 233 (1971) [hereinafter CONCEPT OF CUSTOM].

67. North Sea Continental Shelf (Austl. v. Fr., N.Z. v. Fr.) 1969 I.C.J. 3, 35 (Feb. 20).

68. *See* BYERS, *supra* note 62, at 130.

69. *Id.*

70. *See id*. at 131.

71. *See* WOLFKE, *supra* note 54, at 64.

72. *See* WOLFKE, *supra* note 54, at 64.

73. Michael Akehurst, *Custom as a Source of International Law*, 1974-75 BRIT.Y.B. INT'L L. 32 (emphasis added).

then there is no further need to cite the "evidence" of the state's actual practice in conformity with that law."[74] In addition to the sequencing problem, subparagraph 1(b) also turns the order of things on its head, for it is practice that is evidence of custom, and not the other way round.

While there seems to be an agreement on the state practice and *opinio juris* as constitutive elements of customary international law, there is little consensus on the character of each element. At one end of the spectrum are a group of scholars who argue that only the positive *acts* of States count as state practice, and not their statements, claims, or other verbal postulates.[75] At the other end, are those who adhere to a broader conception of state practice to include not only positive acts, but also failures to act, statements, treaty ratifications, negotiating positions as evidenced in *travaux préparatoires,* votes for or against resolutions, and declarations in international fora.[76] Both the International Court of Justice and the International Law Commission seem to support this more inclusive view of state practice.[77]

A middle ground could also be identified. According to Byers, the inclusive conceptualization of state practice to include both acts and statements would make it difficult to determine whether the psychological element of custom exists in any given situation.[78] From the perspective of the "inclusionists," the only evidence of *opinio juris*

74. *See* D'AMATO, *supra* note 66, at 73.

75. The leading proponent of this theory of state practice is Anthony D'Amato. In 1971, D'Amato wrote *inter alia,* that:

> . . . in their disputes with their counterparts, national decision-makers manifest a preference for having their *acts* cited against them rather than their prior statements or expressions of will. For a State may say many things; it speaks with many voices . . . But a State can act in only one way at one time, and its unique actions, recorded in history, speak eloquently and decisively."

D'AMATO, *supra* note 66, at 51. For other adherents to this restrictive view of state practice, *see* WOLFKE, *supra* note 54; *See also* Anglo-Norwegian Fisheries, 1951 I.C.J. 3, 199 (Dec. 18) (J. Read).

76. *See* Akehurst, *supra* note 73, at 10; *See also* Ian Brownlie, Comparative Approaches to the Theory of International Law, Remarks at the Annual Meeting of American Society of International Law (Apr. 9-10, 1986), *in* A.S.I.L. PROC. at 154, 156 (where he implicitly refers to D'Amato and Wolfke's view as "Rambo" superpositivism, and noting that they are in a minority on the issue).

77. In the Asylum Case, the Court relied both on 'official views' (statements) and treaty ratifications (acts) in coming to a conclusion whether the alleged rule of customary law existed. In the Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 200 (Aug. 27), the Court relied on diplomatic correspondence as evidence of state practice. The International Law Commission's (ILC) position is that treaties, decisions of international and national tribunals, national laws, diplomatic correspondence, and the opinions of national legal advisers are all possible forms of State practice. *See* [1950] 2 Y.B. Int'l L.Comm'n 368-372.

78. *See* BYERS, *supra* note 62, at 136.

available will, at the same time, be State practice, despite the requirement of a separate psychological element to distinguish legally relevant from irrelevant State practice.[79] The result, in Byers' view, is "an epistemological circle, which renders one or the other element of customary international law redundant."[80] It is to avoid this epistemological circle that he suggests a different conception of *opinio juris* as a shared understanding among states about the legal relevance or irrelevance of state practice.[81]

With the possible exception of the New Haven School and the work of Thomas Franck, many early scholars relied on *opinio juris* to distinguish legally relevant from irrelevant *specific rules*.[82] On the other hand, Byers focused on the *process* of customary law formation.[83] As process, Byers argues that customary law involves a "collective knowledge" or a set of shared understandings.[84] Viewed from that perspective, "*opinio juris* may then be understood as being those shared understandings which enable States to distinguish between legally relevant and legally irrelevant State practice."[85]

79. *Id*.

80. *Id*.

81. *Id*. at 148.

82. Propounded by Harold Lasswell and M.S. McDougal, and developed by W. M. Reisman and his associates, the New Haven School is also process oriented. They view international lawmaking as a constitutive process of international decision involving the communication of three messages: 'policy content' (the prescription), 'authority signal' (basis of legitimacy to prescribe), and 'control intention' (the power to enforce or make effective). The New Haven School recognizes that lawmaking involves the interaction of states and non-state actors. *See* Myres S. McDougal et al., *The World Constitutive Process of International Decision*, 19 J. LEGAL EDUC. 253 (1966-67); Myres S. McDougal and W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, (1980) Yale Studies in Public Order, 249; *see* W. Michael Reisman, International Lawmaking: A Process of Communication, Address at the Annual Meeting of American Society of International Law (Apr. 24, 1981), *in* A.S.I.L. PROCS., at 101; *see also* W. Michael Reisman, The View from the New Haven School of International Law, (Apr. 2, 1992), *in* A.S.I.L. PROC., at 118. Thomas Franck also distinguishes between substantive and procedural fairness in international law, arguing that the latter is determined by meeting the requirements of process legitimacy, which, according to him, are determinacy, symbolic validation, coherence and adherence. *See* Franck *supra* note 7.

83. *See* BYERS, *supra* note 62, at 148.

84. *Id*.

85. *Id*. at 150. Byers makes the following compelling critique of the traditional position on *opinio juris:*

> *Opinio juris,* when defined in terms of a belief on the part of States that they are acting in accordance with pre-existing or simultaneously developing legal rules, does not seem particularly helpful, either as a practical tool for determining the existence of customary rules, or as an explanation of how those rules arise. In contrast, shared understandings appear to be most significant in the domain of the *process* of law creation rather than at the level of individual rules. It is the process of customary international law which best represents the conjunction of behavioral regularities and convergent expectations. *Id.*

Byers' use of shared understandings to discuss the emergence of *opinio juris* is both novel and insightful. However, he largely leaves the reader to speculate on how such understandings come into existence. This may in part be explicable on the basis of his reliance on three realist assumptions about international relations: (1) that states are the predominant actors at the international level; (2) that consent is the only basis upon which states can be bound by rules of international law; and, (3) that states act more or less out of self-interest which they promote through applications of power.[86] This emphasis on statism and on consent as the basis of state obligation is the evidence of positive law thinking on Byers' work. His invocation of shared understandings differs from their use by constructivist international relations scholars for whom shared understandings emerge from practical reasoning and the use of rhetoric among states and other international actors in the course of international relations. The concept goes back to the Aristotelian notion of *topoi* (commonplaces), which serve as seats of argument for the development of further norms.[87]

A process approach to the problem of customary international law is both attractive and useful. For present purposes, it enables the analysis to proceed without having to determine whether particular acts or statements should be considered as state practice, whether a rule must be expressly claimed to be of a norm-creating character, or that it must be *articulated* as such in order to qualify as a rule of customary law.[88] Rather than focusing on the legal status of specific rules, the analysis proceeds from the point of view of the process of customary law formation. As it is argued in detail later, both the legitimacy and influence of legal rules are significantly conditioned by the processes through which they come into existence.[89]

A Note on State Practice[90]

There is large and growing evidence of state practice in support of

86. *Id*. at 13-14.

87. FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 39 (1989) (discussion on shared understandings and their historical connection to Aristotle); *See also infra* text accompanying note 116.

88. On the concept of *articulation, see* D'AMATO, *supra* note 66, at 73-82. According to his theory, for a putative rule to qualify as customary norm, every act must be backed up by an *"articulation"* of international legality. Thus, articulation is the psychological element that qualifies specific instances of state practice as customary law. This theory while elegant, has limitations, the most obvious being that rules of customary law often develop without any express ascription of legality to them. In other words, *opinio juris* need not be express, it could take the form of a latent or underlying consensus.

89. *See supra* note 26.

90. This section is based extensively on W. PAATI OFOSU-AMAAH ET AL, *see supra* note 10.

anti-corruption measures in Africa. Some of these measures go back to the period immediately following decolonization, and form a part of the newly independent states' efforts to set their economies on the path to growth. A review of domestic anti-corruption measures reveals two main legal strategies. First, many countries have enacted specific anti-corruption legislation that typically provides for the establishment of a governmental agency with powers of investigation, prevention and prosecution of corruption.[91] Provision is also made for declarations of assets and business interests by political leaders and other public servants, as well as issues of self-dealing and conflicts of interest.[92] For example, the Kenyan law not only set up the Anti-Corruption Authority with powers of investigation and prosecution, but also provided for security of tenure and freedom of political interference for the head of the Authority.[93]

Secondly, other countries have included anti-corruption provisions in their national constitutions. The 1992 Constitution of Ghana probably represents the most comprehensive approach.[94] The Constitution requires the State to "take steps to eradicate corrupt practices and the abuse of power."[95] All public servants must declare their assets and liabilities to the Auditor-General upon their appointment, to update such declarations every four years, and at the end of their term of office.[96] Such declarations are admissible evidence before a court of law or other tribunal. Any property contained in the declaration that is not attributable to a legitimate source, is presumed to be acquired in contravention of the constitution.[97] Finally, Chapter 24 of the Constitution provides a comprehensive code of conduct for public officials in Ghana.[98]

91. *See* Kenya's Prevention of Corruption Act 1965 (established the Anti-Corruption Agency); Uganda's Leadership Code (Act No.8) of 1991; Tanzania's Public Leadership Code of Ethics (No. 13) of 1995; *See also* Mozambique's Ethics Law 1998.

92. *See* Constitution of the Federal Government of Nigeria, Schedule 5, Part 1, (1999), *at* http://nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm (which provides a code of conduct for public officers). Under the code, officers are prohibited from placing themselves in a position where their personal interests would conflict with their official duties or responsibilities; several senior public servants including the President and his Cabinet, Commissioners of State governments, and members of the National Assembly, are prohibited from holding external bank accounts; public servants are prohibited from receiving gifts in the course of their duties, except where they can prove that such gifts were of a customary nature, given on special occasions. Moreover, sections 149, 152, and 185 of the Constitution require various government officials to declare their assets before assuming office).

93. W. PAATI OFOSU-AMAAH ET AL, *supra* note 10, at 44.

94. Constitution of the Fourth Republic of Ghana (1992), *available at* http://www.ghanareview.com/Gconst.html.

95. *Id*. at art. 35.8.

96. *Id*. at art. 286(1).

97. *Id*. at art. 286(4).

98. *See* W. PAATI OFOSU-AMAAH ET AL, *supra* note 10, at 12. They cite Article 284 (on

Constitutionally guaranteed anti-corruption provisions can also be found in the 1995 Constitution of Uganda which utilizes the concept of trusteeship as the basis of the relationship between public officials and the general public.[99] Thus, public officers are accountable to the people for the discharge of their official functions, and the State shall take "all lawful measures . . . to expose, combat, and eradicate corruption and abuse or misuse of power" by public officials.[100]

The common feature of these anti-corruption drives is the establishment of specific institutions to deal with corruption at the domestic level.[101] On a less positive note, what is also common among most of them is that the laws and institutions have not succeeded in eradicating, or in some cases even reducing, corruption in public office. While both Uganda and Botswana are hailed as African success stories in the fight against corruption[102] and General Obasanjo's second rule in Nigeria have been credited with making progress in a society where corruption has been historically endemic,[103] African countries have little else to show for their fight against corruption. The most recent evidence of this can be found in Transparency International's Corruption Perceptions Index (CPI) for 2001, which revealed that five of the ten countries perceived as being the most corrupt in the world, can be found in Sub-Saharan Africa including some of the apparent success

general conflicts of interest), and 286 (5) prohibiting officials of public corporations or authorities from serving as Chairmen of the Governing Boards of such bodies. The provision applies to the President and all Members of Cabinet and Parliament, the Speaker and his Deputy, the Chief Justice and Judges of the Superior Court of Judicature, Ambassadors, and other senior civil servants. For a full listing, *see* Constitution of Ghana, *supra* note 94, at art. 286(5); *See also* W. PAATI OFOSU-AMAAH, ET AL, *supra* note 10, at 88-89.

99. Constitution of Uganda, Article XXVI (1995), *at* http://www.government.go.ug/constitution (last visited Feb. 8, 2002).

100. *Id*. at art. XXVI (iii); *See also* W. PAATI OFOSU AMAAH ET AL, *supra* note 10, at 12.

101. Kenya established her Anti-Corruption Authority since 1965; in Tanzania the Prevention of Corruption Act (1993) made provision for the establishment of the Prevention of Corruption Bureau; in Ghana the Serious Fraud Office Act (1993) established the Serious Fraud Office; in Botswana the Corruption and Economic Crime Act set up the Directorate of Corruption and Economic Crime; and in Malawi, the Corrupt Practices Act (1995) also established the Anti-Corruption Bureau.

102. GCA, s*upra* note 10, at 21-22.

103. Tunku Abdul Aziz, Vice Chairman of Transparency International, Speaking in Malaysia, June 2001:

> Relief from the IMF and increases in aid funding are evidence that the poor ranking of Nigeria in the CPI is recognized internationally as an inheritance that cannot be overturned in the space of one or two years. The Nigerian administration has also made great strides in its quest to recover funds looted by the late dictator Sani Abacha.

Press Release, Transparency International, The Corruption Perceptions Index 2001 Ranks 91 Countries 2-3 (June 27, 2001), *available at* http://www.transparency.org/cpi/2001/cpi2001.html (last visited Mar. 7, 2002).

stories.[104] While the CPI may not be the most accurate measure of corruption, (for example it does not reflect campaign finance contributions) it does indicate that for developing countries especially those in Africa, the problem is broader than corruption *simpliciter*; the misuse of public trust and confidence that has become characteristic of African leaders and public sector employees, is in reality a governance problem that needs to be addressed in a holistic, rather than spectoral manner.

As I argued in the first part of this paper, legislative and institutional reform measures alone are insufficient to eradicate corruption in Africa. Political leaders, civil servants, the press, civil society, and the general public all have important and increasingly complementary roles to play. Apparently, political leadership and public support were crucial for the relative success of the anti-corruption efforts in both Botswana and Uganda.[105] Yet, unless governmental structures are reformed to introduce greater responsibility and accountability, and the rule of law is entrenched as the fundamental norm of behavior in African societies, corruption will continue to eat away at the very fabric of our societies.

Moreover, as African countries become increasingly integrated in their economies, and into the larger global economy, single-state efforts to combat what is in effect a global problem, are unlikely to be very successful. The massive movement of investment capital across national boundaries means that there are increasing opportunities for public officials to benefit from corrupt payments. It equally provides an opportunity for regional and international cooperation to fight corruption, particularly in international business transactions. Corruption provides another issue area for which the Westphalian conception of state sovereignty poses a challenge to the need for cooperation among states. It requires a merger of sovereignties across regional and international levels in the common interests of all countries and people. Arguably it is of common concern to all nations.[106]

104. *See* Press Release, *supra* note 103, at 3-4. Under this year's CPI, Botswana ranked as Africa's least corrupt country, with Tanzania, Cameroon, Kenya, Uganda, and Nigeria being perceived as the five most corrupt countries respectively. This year's index also shows that many of the 55 countries that scored less than 5 were also among the poorest in the world. The CPI measures perceived public sector corruption i.e., among public officials and politicians. Countries are allocated a score ranging from 10 to 0, the higher score indicating the least degree of perceived corruption.

105. *See* GCA, s*upra* note 10, at 22-23.

106. The principle of 'common concern of humanity' came in as a counterpoise to 'state sovereignty' on the basis of which international society was organized since the Peace of Westphalia in 1648. It recognizes that even though states are sovereign and equal and enjoy exclusive competence over matters within their territorial jurisdiction, there are certain matters for which the whole international community has an interest in

For these reasons, it is my suggestion that in addition to the consensus reflected in the Anti-corruption principles, an African Convention on Corruption could provide the legal basis for regional cooperation to combat corruption within the continent, as well as serve as a mechanism for cooperative efforts with other regions of the world. Such regional and international cooperation is consistent with the global nature of the corruption problem.

BEYOND CUSTOM: TOWARD HORIZONTAL PROCESSES OF NORMATIVE DEVELOPMENT

Adopting a process approach to the development of the international legal norms, it is my argument that customary norms emerge from the interaction of States in the international society, and between States and non-state actors like international organizations, non-governmental organizations, and even individuals.[107] The distinct features of this interactive approach are, first, a multiplicity of actors participating in the process of norm generation alongside states.[108] Second, international legal norms emerge from a variety of fora of interaction (both formal and informal), in contrast to the hierarchical

preserving. In their advisory opinion in Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, the International Court of Justice placed international laws prohibiting aggression, genocide, slavery, and racial discrimination among the category of obligations that were owed to the international community as a whole - they are *erga omnes* obligations. More recently, the common concern principle has been most commonly invoked in the field of environmental protection. The 1992 Biodiversity and Climate Change Conventions both provide that the preservation of the world's biodiversity as well as protection of the world's climate system, are common concerns of humanity. *See* Convention on Biological Diversity, June 5, 1992, 31 I.L.M 818, 822 (preamble); *see also* Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, 851 (preamble); *see* Gabcikovo-Nagymaros (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25) (the International Court cited with approval the view of the International Law Commission that safeguarding the earth's ecological balance is an essential interest of all states). For commentary on the principle of the common concern, *see* ALEXANDRE C. KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW, 22-24 & 250-254 (2d ed. 2000).

107. This explanation of the customary process is in some respects analogous to that of the New Haven School referred to above, *supra* note 82. The New Haven School recognizes that states are no longer the exclusive participants in international lawmaking, which includes "participants formally endowed with decision competence . . . and all those other actors who, though not endowed with formal decision competence, may nonetheless play important roles in influencing decisions." Thus it is from the interaction of these multiple participants, that international law emerges. *See supra* note 82.

108. *See* Toope, *supra* note 57, at 197:

> . . . the latter part of the twentieth century has been marked by the emergence of a wider variety of actors seeking to shape the evolution of international law. It may now be safely argued that international organizations, international non-governmental organizations, groups claiming self-determination, individuals, and even 'epistemic communities' shape international law through their influence within institutionalized processes of discussion. . . .

structures of courts, legislatures and executives within the domestic sphere.[109] Third, law emerges from processes of institutional discourse, what Brunnée and Toope call "institutionally shaped rhetorical practices, and acceptances of reasoned argument."[110] An interactional explanation of normative development reveals that there exists a large body of international legal norms for which compliance is not explicable on the basis of the existence of a sanction or other coercive force. Consistent with the horizontal nature of international society, and the dearth of centralized decision-structures on the domestic law model, alternative explanations must be sought for the persuasive power of such legal norms.

Inspired by the work of Lon Fuller, Brunnée and Toope argue that the influence of legal norms is a function of their perceived legitimacy.[111] Legitimacy in turn is induced by adherence to an "internal morality" of rules, and to weak tests of "external morality."[112] In proposing an interactional theory of international law, they emphasize key elements of normative development at the international level. First is the mutually generative character of international legal norms, i.e. the involvement of an array of state and non-state actors in the development of norms, as well as the mutual construction of actors and the institutions within which actors socialize.[113] This element

109. *See* McDougal & Reisman, *supra* note 82, at 26. "The situations of interaction and communication are both official and non-official, organized and unorganized. The organized situations include familiar diplomatic, parliamentary diplomatic, parliamentary, adjudicative, and executive arenas and all situations are characterized by differing degrees of institutionalization, temporal duration, geographic range, and expectations of crisis." *See also* Reisman, *supra* note 82, at 122.

110. Jutta Brunnee & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 51 (2000) [hereinafter "*International Law and Constructivism*"].

111. Brunnee & Toope, *Supra* note 110, at 51-52 ("Law is "authoritative", but only when it is mutually constructed and, for that reason, legitimate").

112. The concepts of internal and external morality come from Fuller. He laid down eight tests of internal morality applicable to both individual rules and legal systems. They are generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility, constancy over time, and congruence of official action with underlying rules. There is no requirement that all these tests must be present in conjunction in order to meet the requirement of legitimacy. While the tests of internal morality relate to the manner of bringing rules into existence, and to their application (i.e. processes), external morality relates to the substantive ends that law seeks to achieve, for example fairness, equality and justice. Fuller also seems to imply that legality is primarily a function of internal morality, i.e. that the pursuit of substantive outcomes would only make sense once the existence of law is ascertained through adherence to internal morality. In view of the pervasive interaction of ends and means implicit in interactionist thought, law that adheres to internal morality would invariably also meet the requirements of external morality. The upshot is that the tests of legality remain primarily those of internal morality. The foregoing is based on the reading of Fuller contained in *International Law and Constructivism*, *supra* note 110, at 54-57.

113. *See International Law and Constructivism*, *supra* note 110, at 48. It is partly

distinguishes the interactional model from hierarchical explanations of international lawmaking. By arguing that law is the product of social engagement by a multitude of actors in a variety of formal and informal settings, interactionism provides a more appropriate depiction of processes of normative development at international law than both positivism and the policy science approach.[114] Interactionism also provides justification for recognition of the increasing influence of non-state actors, whether corporations, non-governmental organizations, issue-oriented groups, epistemic communities, government networks, or individuals in international lawmaking.[115]

The second element of the interactional theory is the role of rhetorical knowledge in generating "behavioral expectations" or "shared understandings" that serve as seats of argument for the development of further norms.[116] This element recognizes what Fuller calls the

through this mutual conditioning of actors and structures that interaction is said to affect not only behavior, but also actor identity. In the process of socialization, actors utilize rhetorical knowledge as an instrument of persuasion. It is largely through processes of socialization, and the employment of reasoning by analogy (rhetoric), that shared understandings emerge from actor interaction. Institutions in which such socialization takes place, therefore, serve as centers of learning by states and other actors.

114. The "Policy Science approach," more commonly known as the New Haven School of international law, also recognizes that law emerges from patterns of interaction among a diversity of actors including those 'formally endowed with decision competence', as well as those not so endowed, and that there are various sites of normative interaction, both formal and informal. As is apparent from the foregoing discussion, interactionists share these same non-hierarchical conceptions of normative development in international law. However, whereas the New Haven School is instrumentalist in orientation - the pursuit of human dignity being its ultimate objective- the interactional model does not seek to promote any particular value system. On the contrary, it calls for the incorporation of 'plural cultural influences' into the evolution of legal norms. On more specific differences between interactionism and the New Haven School, *see International Law and Constructivism*, *supra* note 110, at 24-25. For a non-exhaustive list of sources on the New Haven School, *see supra* note 82. For a critique of the New Haven School, *see* Phillip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990); *See also* Toope, *supra* note 57.

115. Toope, *supra* note 57, at 197; On the role of government networks, *see* Slaughter, *supra* note 57.

116. On the notion of law as rhetoric, and of legal reasoning as a particular aspect of practical reasoning *see* KRATOCHWIL, *supra* note 87, at 39. Kratochwil also makes reference to the Aristotelian concept of '*topos*' or '*topoi*' (commonplaces) in the context of practical reasoning. In what he calls a 'discourse on grievances', *topoi* operate in several choice situations including instances of both political and legal decision-making. In the former context, they operate as 'seats of argument', helping to identify starting-points, and in building consensus. In the context of legal reasoning/argument, rules of procedure and evidence (juridical *topoi*) serve as basis for exclusion of facts and items of proof, and as aids to judicial decision-making. It is worth noting, as Brunnée and Toope did, that Kratochwil's analysis is limited to the context of judicial lawmaking. Hence, despite his express disavowal of legal positivism, the structure of his analysis shows a strong positivistic underpinning. *See also* Friedrich V. Kratochwil, *How Do Norms Matter?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 35 (Michael Byers ed., 1999). *See also* Toope, *supra* note 57, and

'entrepreneurial' character of lawmaking: that is, that the development of law and legal systems is an ongoing, hence incomplete, project.[117] As such, legal development straddles along a continuum from the pre-legal or "contextual" stage to binding normativity.[118] Legal principles or interstitial norms serve as important instruments of change and development in this continuum.[119]

The implication of adherence to an internal morality, and particularly the element of mutual generation, is that by involving a diverse set of actors in the development of legal norms, actors develop a sense of ownership of emergent norms. This quality of acceptance in turn introduces a perception of legitimacy. Rules that are perceived as legitimate thus exercise a compliance pull of their own.[120]

It is here that the interactionist theory meets with the work of Thomas Franck. In proposing a theory of legitimacy at international law, Franck posited that legitimacy is "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being or operates in accordance with generally accepted principles of right process."[121] The elements of this process legitimacy are determinacy, symbolic validation, coherence, and adherence.[122] These elements generally merge into the interactionist

accompanying text.

117. *See International Law and Constructivism*, *supra* note 110, at 45-57; *contra* Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Generation Changing?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW at 209 (Michael Byers ed., 1999), [hereinafter *Politics*], arguing that the international legal system is 'practically complete'. *See also* FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, *supra* note 7, at 4-6, arguing that international law has entered a post-ontological era, a mature and complex legal system that provides for all types of relationships and interactions at the international level. I suppose that both Lowe and Franck would not deny that despite its practical completeness and maturity, international law remains an evolving phenomenon.

118. Jutta Brunnee & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26 (1997) (explaining regime evolution as a continuum from the pre-legal or "contextual" stage, to binding normativity).

119. On the role of interstitial norms as agents of change and development in international law, *see* Vaughan Lowe, *Sustainable Development and Unsustainable Arguments, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19-37 (Alan Boyle & David Freestone eds., 1999); *See also Politics*, *supra* note 117, at 207-226. Lowe's argument however limits the role of interstitial norms to the context of judicial decision-making, arguing that the principle of sustainable development operates in the context of judicial decision to reconcile the operation of primary norms where the latter are likely to conflict in their application. This restriction to judicial decision, is evidence of positive law influence on Lowe's thesis.

120. *See* THE POWER OF LEGITIMACY AMONG NATIONS, *supra* note 7, at 16.

121. *Id.*

122. For an accessible treatment of each of these elements, *see* FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, *supra* note 7, at 25-46.

tests of internal morality.[123] However, whereas for Franck, legitimacy is an attribute of right process, tests of internal morality as propounded by Fuller and applied by the interactionists, "are genuinely moral, not mere desiderata of coherence or logical soundness."[124] Thus for the interactionists, law's ends and means stand in a relationship of "pervasive interaction." Mutual generation, as a process value, introduces greater acceptance of norms by participants in the process of normative generation, and increases their commitment to substantive outcomes.[125] In effect, for both Franck and the interactionsists, the method by which norms come into existence has a bearing on their influence in international society. For the former, norms that meet the tests of process legitimacy exercise a compliance pull of their own.[126] For the latter, when the tests of internal morality are met, norms will be perceived as legitimate and would attract "their own adherence."[127]

While not seeking to apply their respective theses, my arguments are influenced by some elements of both process legitimacy and interactional theory. In particular, I adhere to the view that inclusive processes of normative generation have a bearing on the degree of compliance with, or influence of a norm. I argue that as an international organization, the GCA provided a forum for institutionalized discourse and interaction of African governments and a variety of actors on the issue of corruption in Africa. That discursive process led to the adoption of the Anti-corruption Principles. The traditional sources doctrine would categorize the Principles as a non-binding (soft-law) instrument. Whatever their characterization under sources doctrine, the adoption of the principles represents the starting-point on a continuum of normative development that may culminate in the emergence of a customary law on corruption in Africa, or the adoption of a regional convention to combat corruption, or both. In their present form, the Principles could be viewed either as shared understandings among African governments and other actors involved in their development, as an emerging *opinio juris,* or as representing the pre-legal or contextual stage of normative development in this issue area.[128]

123. The only difference appears to be Frank's requirement of "symbolic validation." *See International Law and Constructivism*, *supra* note 110, at 53.

124. *See International Law and Constructivism*, *supra* note 110, at 53.

125. *International Law and Constructivism*, *supra* note 110

126. *See* FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, *supra* note 7, at 26.

127. *See International Law and Constructivism*, *supra* note 110, at 56.

128. I do not claim that these pre-legal categorizations are always mutually exclusive or chronological. Michael Byers for example, has suggested that in view of the difficulties inherent in the concept of *opinio juris* and to avoid an 'epistemological circle', *opinio juris* should be properly understood as shared understandings which enable states to distinguish between legally relevant and legally irrelevant state practices. *See* BYERS, *supra* note 62, at 148. Brunnée and Toope also suggest that under an interactionist view,

Hence even in their present state, the Anti-corruption Principles are not without normative value. They could provide inspiration to governments to adopt anti-corruption legislation at the domestic level, provide the basis for negotiation of a regional Convention on Corruption thus contributing to the progressive development of international law, serve as an instrument of moral suasion for public officials, corporations, and international organizations, and a tool in the arsenal of civil society in providing a check against governmental excess and the abuse of power.

INCLUSIVE PROCESSES OF NORM BUILDING: NEGOTIATING THE ANTI-CORRUPTION PRINCIPLES

The African Anti-corruption Principles were the outcome of a diffuse discursive process that brought together States, international organizations, non-governmental organizations, the private sector, and individuals. As part of the preparations for the 1997 GCA Policy Forum, African Non-Governmental Organizations (NGOs) met in Nairobi, Kenya, and adopted a Statement for submission to States when they meet at the Policy Forum.[129] The NGO Statement recognized that corruption erodes the moral fabric of society, that it is a violation of the social and economic rights of people, and undermines development.[130] It expressly called on African States to co-operate in the adoption of a regional Anti-corruption Convention, and to take effective domestic measures to fight against corruption.[131] Among the measures suggested are the establishment of anti-corruption commissions with power to investigate and prosecute cases of corruption, the maintenance of judicial independence and adherence to the rule of law, reform and restructuring of African public services and improvement of their terms of service, streamlining the role of government in the economy, and transparency in government procurement and contracting procedures.[132] The fact that a number of

the existence of law should be measured by the influence it exerts, and not by a rule's provenance from any given hierarchical source. Thus, 'sources of law' could be understood as shared understandings which could be invoked depending on their adherence to tests of internal, and to a limited degree, external morality. *See International Law and Constructivism*, *supra* note 110, at 65.

129. *See* Global Coalition for Africa, GCA Collaboration with the Civil Society, NGOs, Parliamentarians, the Private Sector and Others, Statement of African NGOs on Corruption, *available at* http://www.gca-cma.org/engo.htm (last visited Mar. 19, 2002) (the NGOs met from 23-28 October 1997 in Nairobi, Kenya. The GCA Policy Forum was held from 1-2 November 1997, in Maputo, Mozambique).

130. Global Coalition for Africa, GCA Collaboration with the Civil Society, NGOs, Parliamentarians, the Private Sector and Others, Statement of African NGOs on Corruption, *available at* http://www.gca-cma.org/engo.htm (last visited Mar. 19, 2002)

131. *Id.*

132. *Id.*

these recommendations found their way into the Anti-corruption Principles illustrates the influence the NGO statement had on the deliberations of the States.[133]

In addition to the separate NGO meeting held in Nairobi, non-state actors also participated in all GCA Policy Forums that addressed the issue of corruption. As already indicated, this was the case with the meetings held in Maputo in 1997, and in Abuja in 2000.[134] The Anti-corruption Principles not only resulted from this diffusive discursive process, but the involvement of a diverse group of stakeholders in GCA deliberations has continued to give legitimacy to the principles.

In the Anti-Corruption Principles, African States expressed concern about the effects of corruption on the social, economic and political foundations of nations, as well as on their socio-economic development and poverty alleviation efforts.[135] It was recognized that an effective anti-corruption strategy would require a combination of domestic measures, and regional and international collaboration.[136]

At the domestic level, several measures are necessary to create an enabling environment for the fight against corruption. These include political will and leadership that is itself committed to the ideal of a corruption-free society, good governance and the institutionalization of democratic rule,[137] the rule of law and independence of the judiciary,[138] civil service reform,[139] as well as re-evaluation of the role of the State in the economy.[140] It is only against this background that specific anti-corruption measures like the establishment of anti-corruption agencies,[141] and the enactment of anti-corruption legislation can be effective.[142] In addition, governments would need to put in place an enabling legal and administrative environment that permits input from non-state actors like NGOs, the free-press, and individuals. For these reasons, the Anti-corruption Principles make provision for the participation of the public and of civil society in anti-corruption programs,[143] and for rights of access to information about corruption through, *inter alia,* protection of press freedom.[144]

133. *See* Principles to Combat Corruption in Africa, *supra* note 49.

134. *See* Principles to Combat Corruption in Africa, *supra* note 49.

135. *Id.* at preamble.

136. *Id.* at principles 13-17, 19-25. *See also* GCA, *supra* note 10, at 1.

137. *See* Principles to Combat Corruption in Africa*, supra* note 49, at preamble.

138. *Id*. at principle 17.

139. *Id*. at principle 6.

140. Principles to Combat Corruption in Africa*, supra* note 49, at principle 3. *See also* the discussion on p. 6 *supra,* on the continuing relevance of the state in developing economies, particularly those in Africa.

141. *See Principles to Combat Corruption in Africa, supra* note 49, at principle 13.

142. *Principles to Combat Corruption in Africa, supra* note 49, at principle 4.

143. *Id.* at principles 15 and 16.

144. *Id*. at principle 18.

The interaction of states and non-state actors in the process of developing the Anti-corruption Principles exemplifies the contemporary dynamic that the process of normative evolution in international law is no longer the exclusive domain of States. When one adopts a conception of norms that analyses their legitimacy not on the potentiality of enforcement, but on the inclusiveness of the process of normative creation, it becomes apparent that a norm generated through broad-based participation of various international actors commands greater persuasive power and a greater potential for successful implementation.[145] According to Brunée and Toope, "[r]ules are persuasive and legal systems are perceived as legitimate when they are rooted in thick acceptance by the citizenry. . ."[146] Arguably, it is the inclusive process that characterized the development of the Anti-corruption Principles that explains their increasing endorsement by African States.[147]

CONCLUSION

The burden of this paper has been to argue that there is an emerging normative consensus against corruption among Africa States. This consensus resulted from a distinctive African discourse on corruption that took place under the auspices of the Global Coalition for Africa, with participants drawn from a number of African governments and non-governmental actors, as well as Africa's development partners. I argued that the inclusiveness of this discursive process engendered a perception of legitimacy that in turn explains the increasing popularity of the Anti-corruption Principles. Arguably, the Anti-Corruption Principles represent an emerging *opinio juris* among African states that may evolve into rules of customary law. In the alternative, they could be viewed as shared understandings among African states and other participants in the discursive process about the corruption issue, or as the pre-legal or contextual stage of normative development in this issue area. Whichever way they are characterized, what is important is that the Principles represent the starting point of a continuum of normative development. The end point of this continuum may be either the crystallization of the norms contained in the Principles into customary rules or, the adoption of a treaty as envisaged by the negotiators of the Principles.

Having said that, it must be emphasized that the adoption of a

145. *See* Toope, *supra* note 57, at 198.

146. *See International Law and Constructivism*, *supra* note 110, at 51.

147. It is noteworthy that within a period of three years (1997-2000), the number of African countries that endorsed the principles increased from eleven to twenty-three. *See* Collaboration to Combat Corruption (February 26-7, 2001), *available at* http://www.gca-cma.org/ecorrup.htm#0201 (last visited Mar. 19, 2002).

regional anti-corruption treaty has obvious advantages for Africa and should be the objective of regional cooperation in this area. A treaty will permit the express criminalization of corruption, especially in international business transactions and development assistance. In this respect, it could form the basis not only of the international responsibility of states, but also of personal criminal responsibility of individuals and corporations. Secondly, a treaty could make provision for regional and international cooperation in the fight against corruption. Provisions relating to mutual legal assistance in the investigation and prosecution of offenders, as well as extradition of criminals, could all be the subject of an international agreement between states. Furthermore, a regional treaty could make provision for confiscation and forfeiture of the proceeds of corruption; especially in situations where such proceeds or their beneficiaries are located in other jurisdictions. Such treaty provisions would complement the fight against corruption at the national level. For example, despite its relative success in fighting corruption locally, the Government of Botswana has encountered difficulty in corruption cases where the subject matter of the crime (either the criminal or the funds) is located outside its borders.[148]

Provisions in an anti-corruption convention could also be a stimulus for African governments to put in place within their domestic legal systems, foundational elements of a viable anti-corruption environment such as provisions for civil society participation, a free press, an independent judiciary, and the protection of sources of corruption information. Moreover, the adoption of a treaty will perform signaling functions to national public officials, international investors, and the general public that African states have both the political will and the legal muscle to stamp out corruption in Africa, and thus contribute to the development an 'anti-corruption sensibility' in the continent.

148. *See* GCA, *supra* note 10, at 22.