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The African Union Convention on preventing and combating corruption versus the United Nations Convention Against Corruption

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The African Union Convention on preventing and combating corruption versus the United Nations Convention Against Corruption

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The UN corruption convention against corruption was adopted on October 31, 2003 in New York. It came into force on December 14, 2005 and was ratified by Morocco on May 09, 2007 and published in the official gazette on January 17, 2018.

The African Union convention on preventing and combating corruption was adopted in 2003. It has not been ratified by Morocco yet. The process for so doing has already been initiated, insofar as the ratifying Act was approved by the council of ministers on October 10, 2018, pending passage thereof by the Parliament. The AU convention is deemed of the utmost interest to Morocco as a freshly reinstated member state of the Union which, besides, proclaimed 2018 the anti-corruption year.

We will try below to bring out similarities and differences between both conventions (1). Thereafter we will draw a comparison of some offenses (2) and preventive measures (3) : how each convention approaches them and how the Moroccan law addresses them. By way of conclusion, we will discuss the interest for Morocco to ratify a second anti-corruption convention.

1. Introducing conventions

↘ 1.1. Overview

The UN convention is lengthy and thereby less accessible than otherwise possible, as the critique goes. Yet a crystal-clear and well articulated layout makes it tremendously user-friendly. The convention is made up of seven chapters :

I. General provisions (articles 1 thru 4)
II. Preventive measures (articles 5 thru 14)
III. Criminalization and law enforcement (articles 15 thru 42)
IV. International cooperation (article 43 thru 50)
V. Asset recovery (articles 51 thru 59)
VI. Technical assistance and information exchange (articles 60 thru 62)
VII. Mechanisms for implementation (articles 63 & 64)
VIII. Final provisions (articles 65 thru 71)

The AU convention, on the other hand, is much shorter with only 22 articles. It features no academic subdivision and is amenable to a sum of stand-alone articles :

Article 1 - Definitions
Article 2 - Objectives
Article 3 - Principles
Article 4 - Scope of application
Article 5 - Legislative and other Measures
Article 6 - Laundering of the proceeds of corruption
Article 7 - Fight against corruption and related offenses in the public service
Article 8 - Illicit enrichment
Article 9 - Access to information

Article 10 - Funding of political parties
Article 11 - Private sector
Article 12 - Civil society and Media
Article 13 - Jurisdiction
Article 14 - Minimum Guarantees of a fair trial
Article 15 - Extradition
Article 16 - Confiscation and seizure of proceeds and instrumentalities of corruption
Article 17- Bank secrecy
Article 18 - Cooperation and mutual legal assistance
Article 19 - International cooperation
Article 20 - National authorities
Article 21 - Relationship with other agreements
Article 22 - Follow-up mechanism

It is difficult to draw parallels between the two conventions, as the UN convention is much lengthier with 77 articles, some of which are quite long-winded. This, in and of itself, is a two-sided coin. Being so detailed makes the convention more complete. Yet, being lengthy and replete with recommendations makes it hardly accessible.

Conversely, the AU convention is shorter and more accessible. Yet, it may readily be criticized for not being as rigorously constructed as necessary. A case in point is the lack of chapter classification amenable to synthetic views and topic differentiation: preventative measures, punitive measures, international cooperation, etc. Therefore, the reader is bound to make himself a classification of the various recommendations included therein, which makes such a comparison a demanding exercise.

As regards corruption offenses that states must criminalize, we may single out a dissimilarity between the two conventions. According to the AU conventions, all offenses listed must be criminalized. The UN convention, however, draws a distinction between the offenses that must be criminalized versus those that should be made criminal.

Notwithstanding dissimilarities, which are significant indeed, are embedded in both conventions the same obligations for the States Parties , be that offenses to be punished or preventive measures to be implemented.

↘ 1.2. Objectives

The objectives laid down at the outset of each convention (article 1 of the UN convention and article 2 of the AU convention) are quite similar:
- strengthen measures conducive to preventing and battling corruption;
- enhance international cooperation.

The African convention, nonetheless, features markedly among its objectives enjoyment of economic rights. Yet, unlike the UN convention, it makes no mention of asset recovery.

↘ 1.3. Offenses covered in both conventions

1.3.1. The African Union convention

The offenses that the convention provides for are listed in article 4 titled "scope of application." The latter identifies nine corruption possibilities :

- a), b) and c) define passive and active corruption cases,
- d) addresses embezzlement of public funds,
- e) covers private sector-specific corruption,
- f) attends to trading in influence,
- g) tackles illicit enrichment,
- h) provides for the possibility of benefiting or concealing gains from the offenses listed above,
- i) defines participation, intermediation, instigation and complicity even after the fact in one of the offenses listed above.

Besides, article 6 recommends criminalizing laundering of corruption proceeds whereof it provides a detailed definition whereas article 8 addresses illicit enrichment which is defined in article 1.

According to subparagraph 1.i., article 4, **participation, co-action, instigation, complicity in an offense before or after the fact, attempting or conspiring to commit one of the corruption offenses laid down in the convention** must also be punished. Abiding by these provisions might be regarded problematic, as some states may argue that they run counter to their criminal legislation. In other words, foreseeing complicity after the fact might clash with some countries' criminal laws which provide that complicity is citable only prior to and/or while committing the offense. Likewise, punishing the act of conspiring in order to commit a corruption crime presupposes the existence of a corruption-related conspiracy offense, which might have a knock-on effect on freedoms.

1.3.2. The United Nations convention

The offenses enshrined in the convention are listed and defined in chapter 3 titled : criminalization, detection, punishment.

As per the UN convention, some offenses must be criminalized, whereas others are left to the discretion of States Parties .

A. OFFENSES THAT STATES PARTIES MUST CRIMINALIZE

These are :

- Bribery of national public officials (article 15),
- Bribery of foreign public officials and officials of public international organizations (article 16),
- Embezzlement, misappropriation or other diversion of property by a public official (article 17),

- Laundering of proceeds of crime (article 23),
- Obstruction of justice (article 25).

B. OFFENSES THAT STATES PARTIES SHOULD CRIMINALIZE

Whereas the convention provides, regarding the set of offenses above, that : "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses…", the wording thereof becomes milder when it comes to other offenses "Each State Party shall consider adopting such legislative measures…". Using the verb "consider" implies that these provisions are meant to be words of encouragement rather than binding stipulations.

The offenses that should be criminalized are :

- Trading in influence (article 18)
- Abuse of functions (article 19)
- Illicit enrichment (article 20)
- Bribery and embezzlement of property in the private sector (articles 21 & 22)
- Concealment (article 24).

Precise definitions are provided of each one of these offenses, whether the ones that must be enforced as such or the others that are mere recommendations.

Still in the vein of criminalization, the following articles provide for liability of legal persons, and sanctions to be enforced as a result of participation as an accomplice and attempt. Yet, to ensure that the convention prescriptions do not conflict with States Parties ' criminal law provisions, the convention specifies that "each State Party may provide in accordance with its domestic law" (for example, see article 27 on participation and attempt).

OFFENSES FORESEEN IN BOTH CONVENTIONS (COMPARATIVE TABLE)

African Union Convention	United Nations Convention
Active bribery, article 4 a	Bribery of national public officials (article 15)
Passive bribery, article 4 b	Bribery of foreign public officials and officials of public international organizations (article 16)
Abuse of functions (article 4 c)	Abuse of functions (article 19)
Active and passive corruption in the private sector, (article 4 e)	Bribery and embezzlement of property in the private sector (recommendation) (articles 21 & 22)
Illicit enrichment, (article 4 g)	Illicit enrichment (recommendation) (article 20)
Diversion of property (article 4 d)	Embezzlement, misappropriation or other diversion of property by a public official , (article 17)
Trading in influence (article 4 f)	Trading in influence (recommendation), (article 18)
Concealment (article 4 h)	Concealment (recommendation) (article 24)
Participation and attempt (article 4 i)	Participation and attempt (article 27)
Money laundering (article 6)	Laundering of proceeds of crime (article 23)
	Obstruction of justice (article 25)

↘ 1.4. Preventive measures in both conventions

1.4.1. The African Union convention

the AU convention has not dedicated a specific chapter to preventive measures. However, upon carefully reading the convention, one may realize that it, too, provides for several preventative measures.

- Out of the eight measures set forth in article 5, three are preventative in nature:
  - strengthen controls unto foreign companies (5-2),
  - establish independent anti-corruption authorities (5-3),
  - create public finance accounting and auditing systems (5-4),
  - promote population education and awareness-raising over the fight against corruption (5-7).
- Article 7 is entirely dedicated to prevention :
  - Declaration of assets by public officials (7-1),
  - Establishing a code of conduct for public officials (7-2),
  - Developing disciplinary measures and efficient investigation procedures by increasing the efficiency of those in charge thereof (7-3),
  - Ensuring transparency, equity and efficiency in managing tendering procedures in the public service (7-4),
  - Ensuring transparency, equity and efficiency in managing hiring procedures in the public service (7-4).
- Article 9 is devoted to:
  - access to information.
- Article 10 covers :
  - le financement des partis politiques.
- Article 11 sets forth:
  - the measures to be implemented in the private sector.
- Article 12 provides for
  - Civil society engagement.

1.4.2. The United Nations convention

The preventative measures set forth in the UN convention are encapsulated in one dedicated chapter with fourteen articles :

- article 5 : preventive anti-corruption policies and practices
- article 6 : preventive anti-corruption body or bodies
- article 7 : public sector
- article 8 : codes of conduct for public officials

- article 9 : public procurement and management of public finances
- article 10 : public reporting
- article 11 : measures relating to the judiciary and prosecution services
- article 12 : private sector
- article 13 : participation of society
- article 14 : measures to prevent money laundering.

PREVENTIVE MEASURES IN BOTH CONVENTIONS (COMPARATIVE TABLE)

United Nations convention against corruption	African Union convention on preventing and combating corruption
- article 5 : preventive anti-corruption policies and practices	
- article 6 : preventive anti-corruption body or bodies	article 5-3 : establishing independent anti-corruption authorities (5-3)
- article 7 : public sector	article 7-4 : ensuring transparency, equity and efficiency in the hiring procedures in the public service
- article 8 : codes of conduct for public officials	article 7-2 : implementing a code of conduct for public officials
- article 9 : public procurement and management of public finances	article 7-4 : ensuring transparency, equity and efficiency in the tendering procedures
- article 10 : public reporting	article 9 : access to information
- article 11 : measures relating to the judiciary and prosecution services	Article 7-3 : developing disciplinary and investigation procedures by increasing the efficiency of those in charge of such investigations
- article 12 : private sector	article 11 : measures to be implemented in the private sector.
- article 13 : participation of society	article 12 : civil society engagement
- article 14 : measures to prevent money laundering.	No single article is dedicated to preventing money laundering. However, article 17 on bank secrecy may be construed as a measure to prevent laundering.

As far as offenses and preventive measures, one may state safely that both conventions set forth more or less the same measures with unequal levels of detail and precision, as evidenced in the tables above.

A few dissimilarities may be singled out, though. For instance, it is worth noting that the UN convention only recommends enforcing some offenses, whereas the AU convention deems all the offenses mandatorily enforceable by States Parties . It is also noteworthy that such declaration of assets by officials as explicitly laid down in the AU convention (article 7-1) is nowhere to be found in the UN convention. Conversely, the latter devotes en entire article to public procurement (article 9 : public procurement and management of public finances) while the African convention barely mentions it in a mere subparagraph (article 7, subparagraph 4 : ensuring transparency, equity and efficiency in the management of the tendering procedures). Additionally, while both conventions make a

sizable room for the private sector and civil society, these happen to take pride of place in the UN convention, which is natural since the AU is much shorter.

At last, several passages in both conventions have been worded in general terms, which leaves the door open to a wide range of interpretations. The bright side to this is that civil society may claim a bigger part. However, a more specific wording underscores the juridical nature of the text thereby making the convention even more legally binding for the States Parties . This is all the more true for such States as Morocco which give precedence to ratified and enacted conventions over domestic laws[1].

2. Some offenses in both conventions and in the Moroccan law

↘ 2.1. Money laundering

2.1.1. UN convention versus AU convention

Below are, side by side, such provisions pertaining to money laundering as enshrined in both conventions.

1 The 2011 Constitution's preamble provides that Morocco shall undertake : "to give international conventions which It has duly ratified, within the the bounds of the Constitution and laws of the Kingdom, without prejudice to its unalterable national identity, upon publication of such conventions, precedence over domestic legislation, and thereby shall amend the relevant domestic legal provisions accordingly".

African Union convention	United Nations convention
Article 6 : Laundering of the proceeds of corruption States Parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences: a. The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action; b. The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences; c. The acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences.	**Article 23 : Laundering of proceeds of crime** 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally: a) i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offense to evade the legal consequences of his or her action; ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; b) Subject to the basic concepts of its legal system : i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and coun- selling the commission of any of the offenses established in accordance with this article. 2. For purposes of implementing or applying paragraph 1 of this article : a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offenses; b) Each State Party shall include as predicate offenses at a minimum a comprehensive range of criminal offenses established in accordance with this Convention; c) For the purposes of subparagraph b) above, predicate offenses shall include offenses committed both within and outside the jurisdiction of the State Party in question. However, offenses committed outside the jurisdiction of a State Party shall constitute predicate offenses only when the relevant conduct is a criminal offense under the domestic law of the State where it is committed and would be a criminal offense under the domestic law of the State Party implementing or applying this article had it been committed there; d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations; e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offenses set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offense.

- The acts constituting money laundering are almost identically defined in both conventions, save for two differences :

- acquisition, possession or use of property, knowing that they are the proceeds of corruption, are systematically punishable as per the AU convention. However, according to the UN convention, they are punishable as long as they do conflict with the basic concepts of the legal system of the State Party.
- only the UN convention explicitly provides for participation and attempt as they relate to money laundering subject, once more, to the basic principles of the legal system of the State Party.

- One may also point out the difference between articles' titles:
  Article 6 of the African Union convention is titled "laundering of the proceeds of corruption", providing unequivocally for "corruption action or related offenses", which makes it incumbent upon States Parties to punish laundering of all and any corruption action, be it an offense or a felony.

The United Nations convention uses the more general term of "crime", as evidenced in the title of article 23 relevant to this matter : "laundering of proceeds of crime". If restrictively interpreted, one may conclude that only felonies are prosecutable under this article.

Besides, the term "crime" may refer to many more offenses. This is reflected in points 2-a) and 2-b) of article 23 of the UN convention, which provide that each State Party shall seek "**to apply paragraph 1 of this article to the widest range of predicate offenses**", established in accordance with the convention ; and "**to include as predicate offenses at a minimum a comprehensive range of criminal offenses established in accordance with the convention**".

The following points refer to laundering-specific international jurisdiction rules, whereby States Parties are duty-bound to notify the Secretary-General of the United Nations of any amendment of legislation relating to these matters. Such special provisions are warranted by this offense, often international in nature.

Last but not least, under the last subparagraph, a State Party, subject to its own legal system, may not prosecute on grounds of laundering the perpetrators of the predicate offense. To put it simply, charges of laundering proceeds of corruption may not be pressed against perpetrators of corruption, given that they will be prosecuted on grounds of corruption per se.

Such provisions, which are part of point 2 of article 23, are nowhere to be found in the African Union convention.

It is also noteworthy that the **United Nations Convention against Transnational Organized Crime** (aka Palermo Convention dated December 12, 2000) , which Morocco ratified on September 20, 2002 and published on page 265 of the official gazette on February 19, 2004, includes provisions, namely article 6, on criminalizing laundering of proceeds of crime.

B. PREVENTION

Unlike the African Union convention, article 14 of the United Nations convention sets forth measures to prevent laundering. Nonetheless, article 17 of the AU convention on bank secrecy may be viewed as a laundering preventive instrument. Indeed, under this article, bank account records may be requisitioned on account of a corruption trial. Likewise, according to the same article, States Parties cannot cite bank secrecy to refuse to cooperate.

2.1.2. In the Moroccan domestic law

A. LAUNDERING CRIMINALIZATION AND LAW ENFORCEMENT

Up until 2003, there were no sanctions against money laundering. In 2003, in the aftermath of terrorist attacks, a counterterrorism Act fed into the criminal procedure code a few more articles on tracking capital which may be suspected of being related to terrorism. But it wasn't until 2007 that a piece of legislation dedicated to money laundering was adopted, published and enacted. It was supplemented on two later occasions[2].

The criminal code first defines the facts constituting money laundering :

Article 574-1 Shall constitute money laundering, when committed intentionally and knowingly :

- The acquisition, possession, use, conversion, transfer or movement of property or the proceeds thereof so as to conceal or disguise the true nature or the illicit source of such property, for the benefit of the perpetrator or any other person or entity when such property is the proceeds of one of the offenses set forth in 574-2 below ;
- The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds is of one of the offenses foreseen in 574-2 ci-dessous.
- Aiding and abetting any person involved in the commission of one of the offenses laid down in article 574-2 below to evade the legal consequences of his or her action ;
- Helping, by any means, legalize the illicit origin of such property or proceeds thereof as derived from the commission of one of the offenses in article 574-2 below, and which may have benefited the perpetrator directly or indirectly ;
- Participation in and counseling retention, investment, concealment, conversion or transfer of direct or indirect proceeds of one of the offenses laid down in article 574-2 below."

The following article (574-2) spells out the offenses to which apply the definitions set forth in article 474-1. It lists, among others : **bribery, misappropriation, trading in influence and embezzlement of public and private funds**. Are also listed concealment of the proceeds of a felony or offense, breach of trust, fraud, robbery and extortion, insider trading, etc.

Laundering is an offense punishable, when committed by natural persons, by imprisonment from two to five years and a fine from 20 000 to 100 000 dirhams, and when committed by legal persons, by a fine ranging between 500 000 and 3 000 000 dirhams, without prejudice to the penalties to which their managers and executives may be sentenced on such counts.

The sentence may be doubled in some cases of recidivism.

2 - Act n° 13-10 enacted by royal decree n° 1-11-02 dated 20 January 2011 (Bulletin officiel dated 24 January 2011, p. 158) and Act n° 145-12 enacted by royal decree n° 1-13-54 dated 2 May 2013, (Bulletin officiel dated 16 May 2013 p. 1935).

Besides, should a money laundering sentence be rendered, there shall ensue, without prejudice to the rights of good faith third parties, utter confiscation of any object or property, that was used or was supposed to be used in the commission of the offense, or the monetary equivalent or thereof. The proceeds of the offense are also confiscated.

The persons guilty of money laundering are also liable for one or several of the following additional penalties :

- Dissolution of the legal person ;
- Publicizing, by all appropriate means, res judicata sentencing decisions at the expense of convicts.

What's more, the perpetrator of money laundering may be banned temporarily or definitively from engaging, directly or indirectly, in one or several such professions, activities or arts as may have been pursued while committing the offense.

Yet, Act n° 45-05, in addition to criminalizing money laundering, also seeks to prevent it.

B. PREVENTING LAUNDERING

Chapter II of the Act is dedicated to preventing money laundering. It specifies the subjects that are legally bound to be vigilant handling money laundering and to promptly report any case of that sort. The list, which has been expanded upon amendment in 2011, is a long one : Bank Al-Maghrib (central bank), financial institutions and related bodies, offshore banks and holding companies, finance companies, money transfer companies, currency exchange offices, insurance and reinsurance companies, financial asset managers, brokerage firms, auditors, external accountants and tax consultants, independent legal professionals participating on behalf of their clients in a financial transaction, casino operators or managers, real estate brokers, gem and precious metal dealers, service providers entitled to start up, organize and provide domicile to businesses.

The subjects listed above are thus duty-bound to be watchful when to it comes to their clients' identity and line of business. They must collect all information needed to identify their usual or occasional clients and proceed with no transaction unless their identity has been verified. Likewise, they are bound to set in motion a monitoring system to ensure that legal obligations are duly fulfilled. Last bu not least, any suspicious laundering-driven transaction, whose payer's or payee's identity is dubious, must be reported as such to a "Financial intelligence processing Unit." No confidentiality may be opposed to deny this unit any information or record.

The financial intelligence processing unit is mandated most notably to collect and process intelligence connected to money laundering, to initiate investigations by its duly qualified staff, and to recommend such legislative reform as it may deem necessary.

Since the Unit's officers are not vest with the authority to arrest, the intelligence collected, should it raise a red flag about a suspicious activity that's likely to constitute an offense, must be referred to the public prosecutor at the trial court of Rabat.

The financial intelligence processing unit was set up by cabinet decree in December 2018 and inducted into office in 2009. The Chair of the Unit is appointed by the head of government, with all departments concerned with m money laundering being represented therein (finance, justice, interior, police, gendarmerie, customs, tax authorities, securities ethics commission, currency exchange office).

C. MATCHING CONVENTION PRESCRIPTIONS

The Moroccan legislation for preventing and suppressing money laundering in full keeping with the prescriptions of UNCAC and the African Union convention. Thus, it seems solid enough to battle efficiently such a plague. Besides, FATF, after dropping Morocco off its black lists, stated in its 2013 report : "FATF is very pleased about the notable progress which Morocco has made in improving its LBC/FT regime, and indicates that Morocco has put in place the legislative and regulatory system requisite to meeting its commitments as per the action plan to address the strategic deficiencies identified by FATF in February 2010. Therefore, Morocco has been moved out of FATF's monitoring process which seeks to achieve compliance with LBC/FT worldwide..."[3]

However that may be, figures released by the financial intelligence processing unit show very few suspicious activity reports. It's latest report, dating back to 2015, states that the Unit was referred 318 suspicious activity reports (SAR) related to money laundering and terrorism funding, adding the total number up to 1185 since the Unit's inception in 2009. The number of SARs submitted by the relevant bodies climbed from 213 in 2013 to 305 in 2014 and then up to 318 in 2015. Overall, 98% of the suspicious activity reports are about money laundering, the remainder being related to terrorism funding.

In light of these low figures, one may state safely that rooting out money laundering is truly far from complete, all the more so that a fair chunk of the Moroccan economy is still informal.

For the record, if the financial intelligence processing unit has been so forthcoming about the number of suspicious activity records, it has remained silent about the amounts involved and the investigations' outcomes.

3 - http://www.fatf-gafi.org/fr/pays/a-c/argentine/documents/ameliorer-conformite-octobre-2013.html

↘ 2.2. Illicit enrichment

2.2.1. Illicit enrichment in both conventions

The African Union Convention	The United Nations Convention
Article 1 – definition : Illicit enrichment : The significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income. **Article 8 - Illicit enrichment** 1. Subject to the provisions of their domestic law, States Parties undertake to adopt necessary measures to establish under their laws an offense of illicit enrichment. 2. For States Parties that have established Illicit enrichment as an offense under their domestic law, such offense shall be considered an act of corruption or a related offense for the purposes of this Convention 3. Any State Party that has not established illicit enrichment as an offense shall, in so far as its laws permit, provide assistance and cooperation to the requesting State with respect to the offense as provided in this Convention.	**Article 20 : Illicit enrichment** *Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offense, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.*

Upon parsing comparatively the terms used, we realize that both conventions actually provide for criminalization of illicit enrichment, yet do not necessarily get States Parties strictly committed to it. As a matter of fact, the same restriction is to be found in both conventions. The AU convention provides that "**subject to the provisions of their domestic law, States Parties shall undertake to...**" whilst the UN convention stipulates that "**subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures...**"

One may seek to understand such reservations. Establishing as an offense such enrichment as may be difficult to explain reasonably begs a set of questions :

- Who is entitled to determine the illicit nature of such and such enrichment and thereby decide to prosecute ?
- Who is to provide proof that it is illicit? If we consider that the burden of proof is incumbent upon the prosecuting party, then it is imperative to provide evidence on the source of enrichment: misappropriation, bribery, breach of trust... Should this be the case, criminalization of illicit enrichment becomes useless.
- If we consider that the party, charged with illicit enrichment, is to provide proof to the contrary, then we disregard presumption of innocence, which is the bedrock of any criminal procedure deemed to be respectful of freedoms and liberties. According to that principle, **any person charged with a criminal offense is presumed innocent until legally proven guilty over the course of a fair public trial featuring all defense guarantees**[4].

4 - Universal Human Rights Declaration, article (article 11-1), and the Covenant on civil and political rights (article 14-2). Presumption of innocence is also enshrined in the Moroccan constitution : "presumption of innocence and a fair trial are guaranteed rights" (article 23, subparagraph 4è).

2.2.2. Illicit enrichment in the Moroccan law

In 2015, the criminal code was to be overhauled thereby criminalizing illicit enrichment in the following terms :

Article 256-7 : "Shall be guilty of illicit enrichment and punishable by imprisonment two months up to two years and a fine of 5 000 to 50 000 dirhams, any public official who, upon entering his or her office, showed an unreasonable significant increase in his or her assets with respect to his or her lawful income, and which he or she is unable to prove as legitimately gained".

This draft was discarded. Instead, another lighter version of the criminal code, far from an overhaul, would introduce, a year later, some amendments, foremost among which is criminalization of illicit enrichment as follows :

Article 256-8 : "*Shall be guilty of illicit enrichment and punishable by imprisonment one year up to five years and a fine of 5 000 to 50 000 dirhams, any public official who, upon entering his or her office, showed an unreasonable significant increase in his or her assets, or in the assets of his or her underage children, with respect to his or her lawful income, and which he or she is unable to prove as legitimately gained.*

Upon conviction, the court may order asset confiscation pursuant to article 42 of the criminal code".

According to the press, this draft might have been changed during a cabinet meeting so as to drop off imprisonment and to prosecute only public officials that are duty-bound to declare their assets, should they show an unreasonable significant increase in their assets or in those of their minor children, with respect to their lawful declared assets.

Presently, the bill supposed to amend and supplement the criminal code has not been passed yet. It seems that provisions on illicit enrichment are in the way.

3. Some preventive measures in both conventions and the Moroccan law

As we explained above, both conventions set forth measures intended to prevent corruption. Two of them will be the focus of our study : funding political parties and protecting witnesses, victims and whistleblowers.

↘ 3.1. Funding political parties

3.1.1. In both conventions

The AU convention dedicates a whole article to funding political parties. It explicitly bars them from getting funds gained "through illegal and corrupt practices". Conversely, the UN convention fails to tackle this matter head-on. However, article 7 on the public sector addresses indirectly it through the obligation of holding transparent elections.

The African Union convention	The United Nations convention
Article 10 : Funding political parties : Each State Party shall adopt legislative and other measures to : a. Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and b. Incorporate the principle of transparency into funding of political parties.	**Article 7 : public sector** 2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office. 3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

3.1.2. In the Moroccan law

Funding political parties is governed by the Organic Statute no 29-11 dated 22 October 2011, relevant to political parties, amended and supplemented in 2015 by the Organic Statute no 33-15[5]. This piece of legislation spells out the terms whereby political parties may be annually subsidized by the government, and occasionally scrutinized by the competent authorities, should they break the rules governing the use of public funds.

As regards parties' finances, under the law, parties are barred from foreign funding, and duty-bound to keep books and records in accordance with the relevant regulations. Likewise, they are to settled the annual accounts and have them certified by a chartered accountant registered with the Association of Chartered Accountants. All accounting records must be kept for ten years. The political parties subsidized by the government for holding and running their conventions are required to provide proof that subsidies granted were used, as per the regulations, for the purpose initially stated. The same is true for subsidies granted on account of election campaigns.

As far as auditing, the Court of Auditors is mandated, pursuant to article 147 of the Constitution, to audit parties' accounts and thereby verify to what extent they have honestly disbursed government subsidies. To this effect, upon auditing political parties' accounts for fiscal years 2013 and 2014, the Court of Auditors recently released a report which brings to the fore a number of irregularities, violations and improprieties caused by some of the parties. The Court's report states that "certain parties failed to sufficient documentary evidence over observations made on the submitted accounts, certification of accounts, compliance with the accounting principles, and honest management of receipts and expenses".

↘ 3.2. Protecting corruption witnesses and whistleblowers

3.2.1. In both conventions

Both conventions provide for protection of corruption witnesses and whistleblowers.

The African Union convention provides for :

5 - enacted by royal decree no 1-15-89 dated 16 July 2015. Bulletin officiel no 6410 dated 5 November 2015.

- protection of informants protection (art. 2, subparagraphs 5 & 6). Informant is quite a general term that encompasses witnesses, victims and experts.
- penalties against informants found guilty of false or malicious testimony or deposition (article 5, subparagraph 7).

Comparatively, the United Nations convention is much more specific :

- Just like AU convention, it sets forth measures intended to protect witnesses, experts, victims and their relatives against bullying and reprisals (art. 32, subparagraphs 1 and 4- art. 33)
- But it also makes some room for measures seeking to facilitate reporting by public officials of acts of corruption which they may detect while discharging their duties (art. 8)
- No explicit penalty for false testimony or malicious reporting is provided. Yet, this is implicit in the phrase "good faith reporting". Besides, false testimony and malicious reporting are embedded in all criminal laws, which makes any special mention of this kind of reporting pointless.

The African Union convention	The United Nations convention
Article 5 : States Parties undertake to : ... 5) Adopt legislative and other measures to protect informants and witnesses in corruption and related offenses, including protection of their identities ; 6) Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals. 7) Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offenses.	**Article 8 : ...** 4) Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions. **Article 32 :** 1) Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offenses established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them. ..... 4) The provisions of this article shall also apply to victims insofar as they are witnesses. **Article 33 :** Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention.

3.2.2. In the Moroccan Law

In 2011, Act n° 37-10[6] was passed to supplement the criminal procedure code thereby introducing provisions serving the purpose of protecting victims, witnesses, experts and whistleblowers.

6 - Act n° 37-10 amending and supplementing Act n° 22-01 on criminal procedure with respect to protection of victims, witnesses, experts and whistleblowers as regards bribery, embezzlement, trading in influence offenses an others, enacted by royal decree n° 1-11-164 dated 17 October 2011, Bulletin officiel n° 5988 dated 20 October 2011.

The protective measures in the Act are :

- examination conducted by the investigating judge or the public prosecutor,
- Withholding the identity of the witness or the expert from the case file and related records,
- Stating a fake identity in the case file and related records,
- Indicating the police precinct address rather than that of the witness or the expert,
- Providing a special phone number to call the police from when facing danger,
- Wiretapping upon consent in writing from the person concerned,
- Physically protecting witnesses and experts and their relatives using security forces.

Such measures are not limited to the ones listed above, as the last subparagraph of article 82-7 provides that if these measures prove insufficient, any other measure for effective protection may be taken by a substantiated decision.

For the record, such protection is intended for victims, witnesses, experts and whistleblowers.

Such measures as laid down in Act 37-10 may be ordered by:

- the Crown Prosecutor,
- the Crown Prosecutor-General,
- the investigating judge,
- the trial judge,

as and when needed during the prosecution.

On balance, such legislative measures as embedded in this Act do match these serious crimes as the perpetrators of which may use threat, violence and blackmailing to avoid being uncovered and thereby duly convicted. They are best suited to high-profile corruption cases with large amounts involved so much so that intimidating or blackmailing witnesses becomes a high risk.

However, these measures are not fit for purpose when it comes to petty graft that is rife across the public sector. By and large, public officials or business employees, who report cases of bribery, embezzlement or influence peddling, seldom do they face repercussions, much less their relatives. But if they bring into the open information they learned while at work, then they might fail to gain credence in the first place if such information points at people in "powerful positions". Should they manage to gain an audience, the odds are that repercussions would be less direct and more insidious. In other words, their career would go haywire for years on end, as they might experience reassignment, delayed promotion, unpaid bonus and countless other recurrent problems at work.

Besides, as we pointed it out before, such protection proves insufficient as the whistleblower, should his statements and good faith fail to be ascertained, becomes indictable for false testimony, and likely to be sentenced to five up to ten years in prison, if his testimony is about a felony. In the case of an offense, the prison sentence may range between two and five years. This is harsh and somewhat outlandish. In actual fact, the whistleblower only reports such misdeeds to the authorities. He does not make a deposition per se in accordance with criminal procedure code. Therefore, if the crime, which he reports, fails to be established for lack of evidence, he should not be prosecuted on grounds of false testimony, but rather for malicious reporting which incurs a lesser sentence. Furthermore, as long as evidence cannot be produced (or will not be produced as a result of corruption or nepotism), it is more than likely that the whistleblower's bad faith will be inferred from such lack of proof.

As a matter of fact, the African Union convention provides for penalties against informants who are found guilty of false testimony or malicious reporting. But any law incorporating such penalties ought to be extremely cautious in order not to dissuade those, who witness acts of corruption, from reporting them lest they be unable to back their allegations with judicial evidence. One first step to be contemplated down this path would be to grant the whistleblower anonymity, and to let a sufficiently powerful investigating body test the seriousness of such statements. Regrettably, the latter could have been inserted into the organizational chart of the new anti-corruption authority[7](still pending induction into office)...

It goes without saying that the provisions pertaining to informants/whistleblowers are far from sufficient. What's more, the law, which sets the bar so high, requires more means and resources than currently available to the judiciary today, in order to be effectively enforced. Actually, to our knowledge, it is NOT enforced.

Conclusion

This comparison brings into focus only the preventive measures enshrined in both conventions. It deliberately leaves out procedural matters and international cooperation, both of which are much more sophisticated and not easily fathomable.

Regrettably, when it comes to international cooperation, the issue of asset recovery is barely mentioned in the African Union convention. This is all the more problematic for numerous developing countries that bribery among leaders and high-ranking officials has taken a serious toll on their resources. Conversely, it is given pride place in the UN convention. It dedicates a whole chapter (chapter V, articles 51 to 59) to this matter which it defines as "*a fundamental principle of the convention whereby States Parties shall accord one another the widest measure of cooperation and assistance in this regard*". As per the UNODC[8], the convention's provisions on this matter are the result of

7 - Act n° 113-12, instituting the new anti-corruption authority, was enacted on 09 June 2015 and published in Bulletin officiel dated 20 August 2015. As of yet, neither the Chair nor the members have been appointed for the authority to start operation .

8 - UNODC fact sheet : https://www.unodc.org/pdf/highlights_F.pdf

a strong demand on the part of South countries. An agreement was reached only after tough negotiations as "*it was necessary to strike a balance between, on the one hand, the countries' claim to such illicit assets and, on the other hand, the legal and procedural safeguards of countries which assistance is sought from*".

Surprisingly enough, the issue is hardly raised in a subparagraph of article 19 in the AU convention, which refers to international cooperation in hazy and non-binding terms : (19-3 : "*encourage all countries to take legislative measures to prevent corrupt public officials from enjoying ill-acquired assets by freezing their foreign accounts and facilitating the repatriation of stolen or illegally acquired monies to the country of origin*").

By way of conclusion, one may ask the last question to know whether or not it was useful to ratify two conventions tackling the same topic of battling corruption. But, for intellectual convenience, one may start with sizing up the actual impact of ratifying an international convention.

In principle, treaties' provisions are binding for the States that have ratified them. This is evidenced by article 26 of the Vienna Convention on the Law of Treaties : "Each treaty in force is binding upon the parties to it and must be performed by them in good faith"[9]. Yet, in practice, this stipulation does not always entail full performance on the part of States. As a matter of fact, no one can coerce a State into applying the provisions of a convention that it has ratified, but to stress the need for it to act in good faith, which is a fundamental in international lawl.

Indeed, embedded in any international convention is a follow-up mechanism which is in no way binding.

The review mechanism for the UN Convention was set up upon adoption of the terms of reference at the third Conference of States Parties , held in Doha in 2009[10]. Such terms of reference spell out the terms and conditions for UNCAC implementation peer review domestically, with an oversight body named the implementation review Group.

As far as the AU convention, follow-up rests with the Advisory Board on corruption which the African Union set up in accordance with article 22, most of all, "*to submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of this convention*".

As with all international conventions, the procedure at hand, without belaboring details about follow-up mechanisms, is admittedly likely to encourage, and only encourage, States to implement conventions. Should a State fail to meet any given standard in the convention, the only sanction it may fall under would come, at best, in the form of disapproval from the relevant follow-up body and from its own civil society.

9 - Vienna Convention on the Law of treaties dated 22 May 1969, which Morocco ratified on September 26, 1972.

10 - https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_F.pdf

However, implicit in ratifying a convention is a definite advantage for the State concerned : outlining the scope of obligations that it underwrites, and clearly defining the ways and means needed to fulfill them. This is a sort of a roadmap for the signatory State and a platform of demands which civil society may leverage.

Yet, any government may easily adopt the convention-prescribed laws to look in compliance. These will still need to be drafted in such a way as to be actually effective. In fact, this is not always the case. To so illustrate, two recent examples come to mind about laws passed in Morocco to meet outwardly the UN anti-corruption convention requirements. Now then, those turned out to be "empty shells", far from meeting any prescriptions. There was first, in 2015, an Act establishing the anti-corruption authority (literally call the Central Authority for Integrity and for preventing and combating corruption). This body is sorely lacking all it takes to be an effective institution: no independence, limited prerogative, no civil society participation... Another more recent instance, in 2018, about a law on the right to information is worthy of our interest. As per Transparency Morocco's communiqué, "*the latter gives the impression of being a piece of legislation which, in lieu of governing implementation of article 27 of the Constitution that provides for the right to access information, seeks rather to codify inaccessibility to such a right*".

Last but not least, should there be satisfactory laws, they would still need to be implemented. Now, it would be stating the obvious to raise the issue of inapplicability of the law. In Morocco, this issue has reached alarming proportions.

Overall, as far as the anti-corruption endeavor goes, the foregoing furnishes sufficient rationale for putting into perspective the significance of ratifying an international convention, let alone two same-topic conventions, the prescriptions of which, albeit worded differently, happen to broadly overlap. Be that as it may, one may be so pleased to note that the process of the African Union convention is underway, regardless of whether or not this will yield some progress down the path of battling corruption. Nevertheless, after the reinstatement of Moroccan as a member of the African Union, such a ratification will definitely be of utmost political and international importance.

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