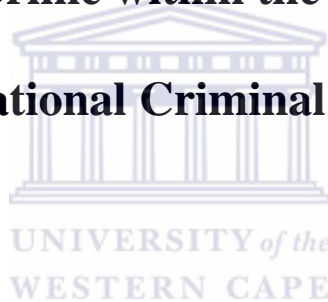


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Corruption as a Crime within the Jurisdiction of the International Criminal Court?



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CHAPTER 1: INTRODUCTION

Due to the relative lack of success of the fight against corruption on a national level in many countries, there is widespread recognition that international cooperation could be an important tool in the fight against corruption.¹ International legal instruments aiming to combat corruption have increased significantly both on the regional and global level in the last 20 years.² In spite of the notable quantitative increase of legal instruments, the existing international legal framework against corruption has considerable flaws and has largely failed to end *impunity especially for corruption by high-level State officials*. A new instrument in the fight against this type of corruption could be to bestow jurisdiction for the crime of corruption upon the ICC.

1.1. Research questions

- Is the existing international legal framework adequate for fighting grand corruption?
- Should the ICC have de lege ferenda jurisdiction *ratione materiae* over the crime of corruption?

1.2. Literature review

As regards the first research question, in the early days of this research, there was only one report³ published by an NGO called U4 which contained a political economic analysis of the United Nations Convention against Corruption (UNCAC). Later, an article on UNCAC's deterrent effect in regards to grand corruption was published by Daniel and Maiton, which focused on case studies.⁴ A thorough legal analysis however has not been completed, and appears to be warranted.

¹ Preamble (4) UNCAC; Preamble (2) Council of Europe Civil Law Convention on Corruption.

² Bacio Terracino J *The International Legal Framework against Corruption* (2012) 47 et seq.

³ U4 'Can UNCAC address grand corruption? A political economy analysis of the UN Convention against Corruption and its implementation in three countries' (2011).

⁴ Daniel T & Maiton J 'Is the UNCAC an effective deterrent to grand corruption?' in Horder J & Allridge P (eds) *Modern Bribery Law – Comparative Perspectives* (2013) 294 et seq.

As far as the second research question is concerned, a few authors have explored whether corruption is or should be considered a crime under international law.⁵ Kofele-Kale was the first to give scholarly attention to corruption from the perspective of international criminal law.⁶ Boersma has more recently examined whether it is possible to conceptualise certain forms of corruption as a crime under international law.⁷ Further, a piece by Starr deals with international criminal prosecutions of corruption as one potential strategy for overcoming the current ‘crisis focus’ of international criminal law. However, the paper relies exclusively on the prosecution of corruption as a crime against humanity.

This research paper will examine whether the ICC should de lege ferenda be accorded jurisdiction in respect of the crime of corruption. Through this approach, the paper will contribute to the existing literature on corruption that argues in favour of an elevation of corruption to a crime under international law and, in addition, will proffer a specialised mechanism for addressing the problem.

1.3. Chapter outline

The paper will begin with an elaboration of the understanding and suitable limitations of the notion of corruption for the purpose of the study (Chapter 2). Thereafter, Chapter 3 analyses to what extent existing international anti-corruption law is able to adequately address and fight grand corruption. This analysis is indicated, since a thorough discussion on whether the ICC should deal with the crime of corruption necessarily presupposes knowledge of current shortcomings, flaws and challenges. The subsequent chapter is dedicated to exploring the question of whether the ICC can, under the current Rome Statute, exercise jurisdiction over some forms of corruption. Should this be the case, the question of an expansion of the ICC’s

⁵ Bantekas I ‘Corruption as an International Crime and a Crime against Humanity: An Outline of Supplementary Criminal Justice Policies’ (2006) 4 *Journal of International Criminal Justice* 466 et seq.; Starr S ‘Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations’ (2007) 101 *Northwestern University Law Review* 1257 et seq.

⁶ Kofele-Kale N ‘Patrimonicide: The International Economic Crime of Indigenous Spoliation’ (1995) 28 *Vanderbilt Journal of Transnational Law* 45 et seq.

⁷ Boersma M *Corruption: A Violation of Human Rights and a Crime Under International Law?* (2012).

jurisdiction could not even arise. Alternatively, the question would be whether the ICC should have *express* jurisdiction over the crime of corruption or over additional forms of corruption. Subsequently, in Chapter 5, the paper discusses whether the ICC, firstly, can and, secondly, should *de lege ferenda* have jurisdiction over the crime of corruption. It then outlines in Chapter 6 rough guidelines for potential elements of the crime of corruption within the jurisdiction of the ICC. Chapter 7 concludes by summarising the substantial findings and providing an outlook on the political feasibility of the inclusion of the crime of corruption within the Rome Statute.



CHAPTER 2: NOTION OF CORRUPTION

This chapter specifies the meaning of the notion of corruption within the research paper.

There is no single, uniformly accepted definition of corruption. The varied approaches by differing disciplines⁸ and the complexity of the phenomenon of corruption have led to a myriad of definitions. Even legal instruments, i.e. national law⁹ as well as international conventions¹⁰, prevalently limit themselves to criminalise certain corrupt behaviours without defining the notion of corruption itself. The research paper does not aim at contributing to the search for the ‘true definition of corruption’, which as Moodie has written, ‘is like the pursuit of the Holy Grail, endless, exhausting and ultimately futile...’¹¹ However, there is a need for a *working definition* for the purpose of the paper. This need not be sufficiently precise to comply with the requirements of the principle of legal certainty, but may serve to clarify the scope of the phenomenon dealt with within the paper. The starting point shall be the far-reaching definition used by Transparency International – the most influential and prominent global NGO aimed at combating corruption: ‘the abuse of entrusted power for private gain’.¹² This definition covers abuse of power in both the public as well as the private sector. With such a broad definition, the mere claim for jurisdiction of the ICC over the crime of corruption may admittedly seem to be very progressive and arguably audacious. Against this background, one could suggest that a restrictive approach to the definition of corruption appears warranted. Hence, for the purpose of this study, the term ‘corruption’ is to be limited

⁸ For instance, lawyers, criminologists, economists, political and social scientists and anthropologists deal with corruption. Given their respectively different methodology and different starting points, they beget different definitions.

⁹ See, e.g., § 331 et seq. German Criminal Code.

¹⁰ This is particularly true for UNCAC. Only Article 1(2) SADC Protocol Against Corruption provides for an extensive definition.

¹¹ Moodie GC ‘On Political Scandals and Corruption’(1980) 15 *Government and Opposition* 209 citing Williams RJ ‘The Problems of Corruption: A Conceptual and Comparative Analysis’ (paper delivered to a Public Administration Committee Conference in York, 1976) 2. This quote is borrowed from Bacio Terracino (2012) 8.

¹² See <http://www.transparency.org/whatwedo> (accessed 26 October 2013).

in two respects: the paper will only deal with corruption committed by public officials and is further restricted to the typology of grand as opposed to petty corruption.

2.1 Limitation to the public sector

The working definition of corruption for the purposes of this study is limited to corruption committed by public officials. By implication, the research paper will not deal with corrupt practices occurring solely within the private sector and not address, in the case of bribery, the private briber. The reasons for this limitation are as follows: First, the limitation to the public sector reflects the more traditional approach to corruption¹³, whereas the concept of corruption in the private sector is a rather recent one which remains controversial. Indeed, a vast number of scholars¹⁴ and the World Bank¹⁵ apprehend corruption still today as limited to the public sector. Likewise, existing international legal instruments aimed at combating corruption focus predominantly on public sector corruption.¹⁶ Though the pivotal role played by private actors in the commission of corruption should not be disregarded, more often than not private companies involved in such cases originate from jurisdictions with well-functioning criminal justice systems that can deal appropriately with such cases. Therefore the focus on the demand or taking-side¹⁷ of corruption, as far as two-sided forms of corruption are concerned, is appropriate.

¹³ Ouzounov NA 'Facing the Challenge: Corruption, State Capture and the Role of Multinational Business' (2004) 37 *Journal of Marshall Law Review* 1186. This approach can be traced back as far as 1931, Babu 'The United Nations Convention Against Corruption: A Critical Overview' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891898 (accessed 26 October 2013).

¹⁴ See, e.g., Jain AK 'Corruption: A Review' (2001) 15 *Journal of Economic Surveys* 73; Amundsen I *Political Corruption: An Introduction to the Issues* (1999) 2 et seq. available at <http://www.cmi.no/publications/1999/wp/wp1999-7.pdf> (accessed 26 October 2013).

¹⁵ See <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> (accessed 26 September 2013).

¹⁶ Bacio Terracino (2012) 22 et seq. In particular, the hortatory nature of the provisions on corruption in the private sector in Articles 21 and 22 UNCAC indicate that the broad concept of corruption including the private sector is not generally accepted.

¹⁷ The supply side concerns the offering of a bribe, whereas the demand side refers to its acceptance or request; Article 15(a), (b) UNCAC.

2.2 Limitation to grand corruption

One of the most famous typologies of corruption analysed in anti-corruption research is that of grand¹⁸ and petty corruption, although no international or national legal instruments provides expressly for this distinction. Thus, there is no legal definition for the term ‘grand corruption’, with the effect that the concept and its prerequisites remain controversial.¹⁹

2.2.1 Qualitative element: powerful high-level authority

Originally,²⁰ the level of authority where corruption takes place has exclusively determined the distinction between grand and petty corruption. Whilst grand corruption takes place at the *policy formulation end of politics*, thus at the highest levels of political authority, petty corruption, also labelled as bureaucratic or administrative corruption, occurs in the public administration, at the *implementation end of politics*. For instance, payments to mid- and low-level government officials, such as police or immigration officers, demanding bribes constitute petty corruption. Beyond controversy, high-level authorities encompass prominent figures such as heads of States, heads of governments and ministers. However, the precise scope of high-level authority remains subject to debate.²¹

2.2.2 Quantitative element: large-scale corruption

Increasingly, authors focus also on quantitative aspects to draw a line between grand and petty corruption.²² Typically, grand corruption is committed on a large scale and involves

¹⁸ The term ‘grand corruption’ was first used by Moody-Stuart in *The Good Business Guide to Bribery* (TI 1994). He defined it as ‘the misuse of public power by heads of State, ministers, and top officials for private pecuniary profit.’; Jayawickrama N ‘Corruption - A Violation of Human Rights?’ available at <http://resources.transparency.bg/download.html?id=219> (accessed 26 October 2013).

¹⁹ On the differentiation between grand and petty corruption, see Mashali B ‘Analyzing the relationship between perceived grand corruption and petty corruption in developing countries: case study of Iran’ (2012) 78 *International Review of Administrative Sciences* 777 et seq.

²⁰ Moody-Stuart (note 18) based his concept merely on the hierarchy of the perpetrator who commits corruption.

²¹ It is, for instance, unclear whether corrupt acts by heads of governments on a provincial or local level can constitute grand corruption. Furthermore, it is unsettled whether friends and families of public officials should be included and if so, how this group can be precisely defined.

²² Society of Advanced Legal Studies Anti-Corruption Working Group *Banking on Corruption: The Legal Responsibilities of those who handle The Proceeds of Corruption* (2000) 11 available at http://sas-space.sas.ac.uk/4297/1/SALS_Banking_on_Corruption.pdf (accessed 26 October 2013); Palmer R ‘Combating Grand Corruption in Africa: Should it be an international crime?’ available at

large values.²³ For the purpose of this paper, the term grand corruption indeed necessitates such large-scale dimension and the involvement of large values.²⁴ Quantitatively negligible acts of corruption, even if committed by high-level officials, are beyond the ambit of this paper. However, the precise quantitative border between petty and grand corruption is extremely difficult to draw.²⁵ To name a specific amount of money would appear arbitrary; the circumstances of the individual case, such as local purchasing power, may ultimately be decisive in determine whether a certain value is sufficient to justify the categorisation of the act as grand corruption.

2.2.3 Distinguishing grand corruption from kleptocracy

Closely related to grand corruption, but still significantly different, is the concept of kleptocracy. Etymologically, this neologism is composed of the Greek terms 'klepto', i.e. to steal, and 'kratos', i.e. rule and means 'rule by thieves or by looters'²⁶. Thus, the term does not describe a certain manifestation of corruption, but the form of a political system. Political leaders of kleptocracies are arguably the example par excellence of perpetrators of grand corruption. In alignment with the existing structures of international criminal law, this paper focuses on the specific individual corrupt conduct of grand corruption and does not aspire to argue that the leading of a certain political system is to be criminalised. Just as international criminal law does not criminalise the establishment or leading of a dictatorship, but rather specific acts which amount to genocide or crimes against humanity, the political system of

<http://www.osisa.org/openspace/global/combating-grand-corruption-africa-robin-palmer> (accessed 10 May 2013).

²³ According to Salbu SR 'A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery' (2000) 33 *Cornell International Law Journal* 663, the dimension of size is the most obvious difference.

²⁴ For a concurring view, see Iqbinedion SA 'A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders Under the United Nations Convention Against Corruption' (2009) 6 *Manchester Journal of International Economic Law* 58 and Graham T 'Legal and Other Issues Raised by Grand Corruption' (2000) 7 *Journal of Financial Crime* 324. Some authors, however, emphasise that the level of authority where corruption takes place remains the only pivotal criterion, see, e.g., Boersma (2012) 29.

²⁵ Indeed, the existing literature has been unable to draw a sharp line between petty and grand corruption. Only Salbu (2000) proposes a fix line of US\$ 1,000. However, this appears arbitrary, as the author himself recognises.

²⁶ Boersma (2012) 29.

kleptocracy cannot convincingly be subject to a study on individual international criminal accountability for corruption.²⁷

2.2.4 Justification for this limitation

The limitation on grand corruption can be justified for the following two reasons.

2.2.4.1 More severe consequences of grand corruption

First, cases of petty corruption are typically less pernicious than acts amounting to grand corruption. The greater the magnitude of the corrupt act, the greater are its consequences. The *higher severity of ramifications* of instances of grand corruption warrants the exclusion of the category of petty corruption from the ambit of the paper. At the same time, the severity of the damage which can be caused by (systemic) petty corruption shall not be disregarded. The focus of the paper on grand corruption must not be misunderstood as dismissal of the importance of petty corruption. A case study in Iran has shown that the higher the perceived grand corruption is, the higher the level of petty corruption.²⁸ Indeed, a convincing argument can be made that corruption at the highest level has a contagious impact on lower level bureaucrats.²⁹ The occurrence of grand corruption can cause a political culture which tolerates corruption and ‘invites’ low-level bureaucrats to commit corrupt acts as well. By the same token, if grand corruption is fought effectively, this would most likely have *positive effects for the fight against corruption on the lower levels* as well.³⁰ Thus, the endeavour to hold the high-level perpetrators of grand corruption, the infamous ‘big fish’, accountable, most likely leads to an *increase of credibility of anti-corruption efforts* aimed at combating petty corruption.

²⁷ But see Eboe-Osuji C ‘Kleptocracy: A Desired Subject of International Criminal Law That Is in Dire Need of Prosecution by Universal Jurisdiction’ in Ankumah EA & Kwakwa EK (ed) *African Perspectives on International Criminal Justice* (2005) 121 et seq. Admittedly, the crime of apartheid refers to a specific political regime; however, the Rome Statute defines apartheid in Article 7(2)(h) as inhumane acts committed in the context of and with the intention with the intention of maintaining that regime.

²⁸ Mashali (2012) 784 et seq.

²⁹ Amundsen (1999) 5.

³⁰ Ouzounov (2004) 1189 with further references.

2.2.4.2 Higher Degree of Universality of Condemnation of Grand Corruption

Secondly, the focus on grand corruption makes it more likely that the reasoning of this paper does not expose itself to the potential criticism of ignorance towards different cultures³¹ which may draw the line between innocuous and perfectly legal customs and criminal petty corruption in slightly different ways. Whilst gift-giving or acts of hospitality may or may not constitute a criminal act of corruption in different national jurisdictions, in cases of grand corruption, local social particularities are unlikely to lead to differing moral or legal assessments. Grand corruption cases encompass corrupt behaviours, the unlawful and criminal character of which is generally accepted, irrespective of the cultural context of the conduct in question. Thus, cases of grand corruption are unlikely to be dismissed as related to local custom or differing social norms. The potential claim for the jurisdiction of the ICC necessitates imperatively such a consensus across various countries and cultures.

2.3 Provisional result

Thus, for the purpose of this research paper, corruption is understood in a restrictive way: the large-scale abuse of public power for private gain committed by high-level public authorities or, more succinctly, grand corruption in the public sector.

³¹ On the controversial issue whether the definition of corruption should indeed take into consideration certain cultural particularities or not see Rothstein B & Torsello D *Is Corruption understood differently in different Cultures?* (2013) available at http://www.qog.pol.gu.se/digitalAssets/1443/1443545_2013_5_rothstein_torsello.pdf (accessed 26 October 2013).

CHAPTER 3: THE EXISTING INTERNATIONAL LEGAL FRAMEWORK FOR GRAND CORRUPTION

This chapter analyses to what extent the presently existing international anti-corruption law is able to adequately address and fight grand corruption. First, it gives a short overview of the development of international anti-corruption framework. Thereafter, it addresses the most striking legal shortcomings and deficiencies as to criminalisation, jurisdiction, immunities, asset recovery and enforcement and monitoring of international obligations which may potentially be remedied by an inclusion of the crime of grand corruption into the Rome Statute. Lastly, the chapter assesses the factual effectiveness of existing law in combating grand corruption.

3.1 Overview

For most of the 20th century, the phenomenon of corruption and the fight against it had been understood as a merely *domestic issue* reserved to national sovereignty.³² Only the last two decades, especially the end of the 1990s, have witnessed a rapid and impressive development of a multitude of international anti-corruption instruments³³ and the emergence of an international anti-corruption consensus that ultimately culminated in the adoption of UNCAC in 2003.³⁴ The following analysis focuses primarily on UNCAC, given its special significance in the international fight against corruption as the only legally binding universal anti-corruption instrument with almost global validity as well as the most far-reaching

³² Low LA *The United Nations Convention Against Corruption: The Globalization of Anticorruption Standards* (2006) 1 available at <http://www.stepto.com/assets/attachments/2599.pdf> (accessed 26 October 2013). The only remarkable exception was the US legislation called Foreign Corrupt Practices Act (FCPA) of 1977 which aimed specifically at curbing bribery of foreign public officials by US companies and thus had an international dimension.

³³ For a tabular overview, see Carr I 'Corruption, legal solutions and limits of law' (2007) 3 *International Law in Context* 247 et seq.

³⁴ Kubiciel M 'Core Criminal Law Provisions in the United Nations Convention Against Corruption' (2009) 9 *International Criminal Law Review* 139 et seq.

instrument.³⁵ It is worth noting here that UNCAC does not *expressly* target grand corruption and treats grand corruption no differently from petty corruption.³⁶

3.2 Criminalisation

UNCAC— unlike the OECD Convention³⁷ – goes well beyond defining corruption as bribery, the most traditional manifestation of corruption, by *prohibiting numerous forms of corruption*, particularly diversion, but also trading in influence, abuse of functions, and illicit enrichment.³⁸ Thus, UNCAC also encompasses large-scale embezzlement and theft of funds directly from public treasuries, which are frequent modalities of grand corruption.³⁹ Furthermore, Article 2 UNCAC explicitly encompasses all public officials, bureaucrats, judges, and politicians alike *irrespective of their seniority*, whether appointed or elected. Thus, UNCAC employs a broader understanding of public officials including also high-level officials, such as, for instance, heads of States or heads of governments. Insofar as this is the case, it must be said that the criminalisation provisions in Chapter III UNCAC generally cover potential instances of grand corruption. However, *substantial flaws* must be highlighted: First, the criminalisation of passive bribery of national public officials and diversion by public officials is mandatory⁴⁰, whereas State Parties are merely required to *consider* the criminalisation of the demand side of bribery of

³⁵ Low (2006) 3.

³⁶ However, UNCAC expresses in section 3 of its preamble concern about quantitatively vast cases, namely ‘cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States’ and thus makes a reference to the phenomenon of grand corruption. One may also refer to section 7 and 8 of the preamble, see Webster ME ‘Fifteen Minutes of Shame: The Growing Notoriety of Grand Corruption’ (2008) 31 *Hastings International and Comparative Law Review* 811.

³⁷ The OECD Convention is limited to active bribery of foreign public officials (Article 1).

³⁸ Article 17 et seq. UNCAC.

³⁹ Kofele-Kale N ‘The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law’ (2000) 34 *The International Lawyer* 157 et seq. In the Sani Abacha case, for instance, embezzlement of public funds through (direct) access to the Central Bank was a common feature, see Bacio Terracino (2012) 277.

⁴⁰ For the sake of completeness, it may be noted that Article 23 UNCAC on money-laundering and Article 25 UNCAC on obstruction of justice are mandatory as well.

foreign public officials⁴¹. Secondly, what all presently existing anti-corruption conventions have in common is that the criminalisation of certain acts of corruption still takes place on a national level.⁴² Hitherto, the crime of corruption is a so-called treaty crime⁴³, in other words part of *transnational criminal law*⁴⁴ and subject of so-called ‘*suppression*’ conventions.⁴⁵ These conventions oblige States to prohibit certain conduct under national law, whereas crimes under international law impose criminal responsibility directly upon individuals without requiring the intervention of domestic law⁴⁶. There has been no consensus thus far regarding the criminalisation of certain acts of corruption on the international level independently from domestic law; criminalisation remains, even though induced by international law, a domestic concern.

3.3 Jurisdiction

Given that grand corruption instances frequently feature a transnational element⁴⁷, the issue of criminal jurisdiction is of considerable importance to effective combat against grand corruption. Article 42(1) UNCAC only *requires* mandatorily States Parties to establish so-called *territorial jurisdiction*, that is to say jurisdiction over corruption offences when committed in its territory.⁴⁸ Besides that, UNCAC merely *encourages* States Parties to establish jurisdiction in other constellations. For instance Article 42(4) UNCAC *permits* a

⁴¹ In instances of transnational corruption, UNCAC sets the priority in favour of tackling the supply side through extra-territorial legislation. Prosecuting the demand side would – except for questionable trials in absentia – require the rather unlike presence of the foreign public official in question and involve legally complex issues of jurisdiction and immunity, see Brunelle-Quraishi ‘Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis’ (2011) 1 *Notre Dame Journal of International and Comparative Law* 113.

⁴² Boersma (2012) 98.

⁴³ The term ‘treaty crime’ is somewhat confusing, since core crimes can also be subject to a special treaty besides being part of customary international law, see Genocide Convention and Geneva Conventions.

⁴⁴ Boister N ‘Transnational Criminal Law?’ (2003) 14 *European Journal of International Law* 953 et seq.

⁴⁵ For an opposing view, advocating that corruption is already today a crime under international law, Kofele-Kale N *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* 2 ed (2006) 255.

⁴⁶ Werle G *Principles of International Criminal Law* 2 ed (2009) para 114..

⁴⁷ For the transnational character of grand corruption cases, see 5.3.4.

⁴⁸ It should be noted, however, that the obligation to establish territorial jurisdiction in Article 42(1) UNCAC applies to the mandatory criminal offence of *laundering proceeds of corruption* (Article 23 UNCAC) as well. Thus, States Parties hosting proceeds of corruption, whether stashed away in bank accounts or invested in assets, such as real estate, are legally vested to prosecute the subsequent offence of money laundering.

custodial State to exercise jurisdiction over offences committed by a fugitive offender on its territory. Yet, UNCAC does not *require* States to establish jurisdiction over fugitive foreign public officials. Lastly, UNCAC does not lay the legal foundation for applying *universal jurisdiction*⁴⁹, that is to say jurisdiction over cases which do not feature any immediate link to the State exercising its jurisdiction, for severe instances of grand corruption.⁵⁰

In conclusion, UNCAC restricts itself to require *exclusive jurisdiction on victim States*, regardless of its potentially lacking political will or non-existing factual capacity. If the national system fails to do justice for its own perpetrators of grand corruption, in all probability their conduct goes, in the current legal framework, unpunished.⁵¹

3.4 Immunities

Since grand corruption cases inherently involve high-level public officials, the usually associated privilege of criminal immunity has often proven to be one of the *main legal obstacles* to effectively prosecute grand corruption both in the victim State as well as in third States and has indeed in many instances led to impunity.⁵² Thus, a thorough analysis of the existing law on immunity for corruption offences is indicated.

⁴⁹ According to the *Princeton Principles on Universal Jurisdiction*, universal jurisdiction is ‘criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction’, see *Princeton Principles on Universal Jurisdiction* 2001.

⁵⁰ Admittedly, Article 42(3) UNCAC in conjunction with Article 44(11) UNCAC contains an obligation to either extradite or prosecute (*aut dedere aut judicare*). However, the scope of this obligation is considerably limited to cases where extradition is denied solely on the ground that the person in question is a national of the requested State Party. Furthermore, this rule presupposes an extradition request. Thus, the application of this jurisdiction is heavily qualified. Therefore, Bacio Terracino’s assertion that UNCAC ‘creates a treaty based quasi-universal jurisdiction over corruption’ is ambiguous, Bacio Terracino (2012) 178. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) ICJ Rep 2002 20 et seq. 68 para 41 points out the difference to pure universality.

⁵¹ Iqbinedion (2009) 65 goes as far as to claim that the jurisdictional provision ‘wittingly or unwittingly legitimises offenders’ impunity.’

⁵² Bacio Terracino (2012) 195.

3.4.1 UNCAC

UNCAC addresses in Article 30(2) only the issue of immunity at the *national level* deriving from national law⁵³ which thwart criminal trials against national public officials before domestic courts. This follows from the wording ‘immunities [...] accorded to *its* [the State Party’s] public officials’ (emphasis added). Unfortunately, UNCAC follows a rather soft approach on this essential jurisdictional impediment: Article 30(2) UNCAC requires merely an appropriate balance between any immunities on the one hand and the possibility of effective law enforcement on the other hand and thus leaves States Parties considerable discretion.⁵⁴ This provision is weakened further by the reservation in favour of domestic law, especially constitutional principles.⁵⁵

3.4.2 General public international law

UNCAC does not aim at modifying the existing public international law on immunities, as far as the crime of corruption is concerned. Public international law provides for both (functional) immunity *ratione materiae* and (personal) immunity *ratione personae*.⁵⁶

3.4.2.1 Immunity *ratione materiae*

All public agents irrespective of their rank enjoy immunity *ratione materiae* which is a limited immunity only for public acts committed within the context of their official duties, as opposed to private acts, since only then can these acts be imputed to the State.⁵⁷ The crucial and highly

⁵³ For Europe, see the overview on the existing immunity laws and the crime of corruption by Hoppe T ‘Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe’ (2011) 5 *Vienna Journal on International Constitutional Law* 538 et seq.

⁵⁴ Chaikin D ‘Policy and Legal Obstacles in Recovering Dictator’s Plunder’ (2005) 17 *Bond Law Review* 31; Low (2006) 13 speaks of ‘almost unfettered discretion’. On the implementation up to now, see Implementation Review Group CAC/COSP/IRG/2013/7.

⁵⁵ Article 30(2) UNCAC itself provides for this reservation. Article 30(9) UNCAC reiterates the priority of domestic law. Furthermore, It is particularly regrettable that UNCAC does not explicitly require States Parties to limit immunity from criminal prosecution for corruption offences to the duration of the public official’s tenure in office, see Carr I ‘The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?’ (2006) 3 *Manchester Journal of International Economic Law* 36.

⁵⁶ Cassese A *International Criminal Law* 2 ed (2008) 303 et seq.

⁵⁷ After all, exactly this imputation justifies the need for functional immunity, since State sovereignty and inter-State relations are only at stake where there is an act of a State. A criminal trial over a conduct which can be imputed to a State leads – at least indirectly – to a judgment on the conduct by a foreign State; Marsch AC

controversial question is therefore whether corruption offences are to be qualified as public acts which are imputable to the State or rather a conduct committed in a personal capacity. In this regard, there is – due to very little and inconsistent State practice – no settled legal clarity as to the status quo of customary international law.⁵⁸ The traditional, conservative understanding of public international law emphasises both the interests in protecting State sovereignty and the value of functioning inter-State relations for the international community and would thus answer the question on immunity for corruption offences in the affirmative. However, a more progressive approach would ultimately prioritise an effective fight against corruption over the aforementioned legitimate interests and thus deny immunity.⁵⁹ Since the jurisprudence of the International Court of Justice (ICJ) seems to follow a rather conservative understanding of immunities in general,⁶⁰ it can be assumed that in the potential case in which State A brings a suit against another State B before the ICJ on the grounds of a criminal prosecution of a public official of State A before a national criminal court in State B,⁶¹ the Court is likely to maintain an immunity-friendly attitude and to find a violation of the rights of State A under international law.

Strukturen der internationalen Korruptionsbekämpfung. Wie wirksam sind internationale Abkommen? (2010) 239 et seq.

⁵⁸ Likewise, existing national jurisprudence on this matter is inconsistent and a clear line is not discernible, see Chaikin (2005) 31 et seq.; Marsch (2010) 240 with further references.

⁵⁹ Cautiously in this direction, Commonwealth Secretariat, Report of the Commonwealth Working Group on Asset Repatriation para 22: ‘The Commonwealth, as a group of 53 States, could through its recommendations and actions perhaps encourage a movement in international law so that in future the exception to functional immunity might well be applicable to corruption offences.’

⁶⁰ See, for instance, ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) ICJ Rep 2002 3. As regards immunities of the State itself as opposed to immunities of its officials, more recently ICJ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment) ICJ Rep 2012 143 para 106 ‘[i]mmunity cannot . . . be made dependent on a balancing exercise’.

⁶¹ In September 2012, Equatorial Guinea indeed filed a case against France at the ICJ because of an alleged violation of immunity, after France had issued a warrant of arrest for Teodorin Obiang, Equatorial Guinea’s President’s son. Shortly after Teodorin Obiang became subject of the proceedings in France, he was appointed second vice President. As far as can be seen, France has not consented in the proceeding pursuant to Article 38(5) of the Rules of the Court, without which the Court cannot exercise its jurisdiction, see ICJ Press Release No 2012/26, <http://www.icj-cij.org/presscom/files/6/17096.pdf>. (accessed 26 October 2013), Willsher K ‘France issues arrest warrant for son of Equatorial Guinea president’ *The Guardian* 13 July 2012 available at <http://www.theguardian.com/world/2012/jul/13/france-arrest-warrant-equatorial-guinea> (accessed 26 October 2013).

3.4.2.2 Immunity *ratione personae*

Immunity *ratione personae*, which covers any conduct, thus unambiguously including corruption offences, is temporally limited to the official's tenure in office. It also only applies to 'certain holders of high-ranking office in a State, such as the Head of State, the Head of Government and Ministers of Foreign Affairs'⁶². Thus, these serving high-level officials can clearly not be criminally prosecuted before foreign national courts for corruption charges while in office.⁶³ After leaving office, they enjoy immunity *ratione materiae* for official acts, like any ordinary public official.⁶⁴

3.1.1 Concluding remarks on immunities

In conclusion, UNCAC does not address adequately the – admittedly complex – issue of immunities.⁶⁵ By making a reservation in favour of domestic law and thus creating a considerable loophole for States Parties, UNCAC fails to ensure that immunities are limited to the minimum amount necessary for the performance of the public official's functions.

3.5 Asset recovery provisions

The return of assets is, according to Article 51 UNCAC, a 'fundamental principle' and a primary objective of the convention.⁶⁶ UNCAC goes beyond comprehending asset recovery as a tool which is complementary to criminal prosecution, in the aftermath and on the basis of a criminal conviction. UNCAC provides for *non-conviction based asset recovery*⁶⁷ as an *alternative* to criminal prosecution in situations where the latter is for whatever reason not

⁶² ICJ *Arrest Warrant of 11 April 2000* ICJ Rep 2002 20 et seq.

⁶³ See Article 2 of the self-evidently non-binding resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law adopted by the Institut de Droit International in 2001; Marsch (2010) 238.

⁶⁴ For former Heads of State, the resolution by the Institut de Droit International rejects immunity, see Article 13(2) sentence 2: 'Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.'

⁶⁵ For a concurring view, Low (2006) 13.

⁶⁶ COSP UNCAC Resolution 1/4 (2006) considerations para 1. According to the travaux préparatoires, the expression 'fundamental principle' has no legal consequences on the other more specific provisions of Chapter V, A/58/422/Add.1 para 48.

⁶⁷ Article 54(1)(c) UNCAC. On non-conviction based asset forfeiture, see Greenberg TS et al. *Stolen Asset Recovery: A Good Practices Guide for Non-conviction Based Asset Forfeiture* (2009).

feasible.⁶⁸ In this regard, asset recovery can therefore be understood as the second-best solution: If no criminal trial is possible, than at least economical restoration of the status quo ante; if criminal impunity, than at least civil accountability.

3.5.1 Implicit acknowledgment of grand corruption by UNCAC

Chapter V UNCAC, which deals with asset recovery, is of eminent practical importance particularly in instances of grand corruption involving very large amounts of money.⁶⁹ By contrast, in instances of petty corruption, proceeds of the crime are most likely to be spent immediately by the respective public official, given its rather small amount. Perpetrators of grand corruption on the other hand tend to hide their enormous proceeds in foreign jurisdictions usually seeking to prevent the detection of and attempting to secure the spoils of corrupt acts. Against this background, it is fair to argue that Chapter V UNCAC shows the drafters' awareness of the phenomenon of grand corruption. By devoting a whole chapter to asset recovery, of which use will most likely be made of in practice only in instances of grand corruption, UNCAC implicitly addresses grand corruption in its operative part as opposed to the reference in the preamble.⁷⁰

3.5.2 Challenges and obstacles

Asset recovery, being a relatively recent field of international law, continues to face a myriad of *legal challenges*, originating in particular from the involvement of various jurisdictions.⁷¹

⁶⁸ In the context of grand corruption, national security, namely the danger of a coup d'état, may be a reason why the leaders of the previous regime can de facto not be put on trial in the respective home country. For the example of Marcos of the Philippines, see Chaikin D 'Controlling Corruption by Heads of Government and Political Elites' in Larmour P & Wolanin N (eds) *Corruption and Anti-Corruption* (2001) 110.

⁶⁹ Vlassis D 'The United Nations Convention against Corruption: Overview of its Contents and Future Action' (2005) 66 *Resource Material Series* 121. Admittedly, the wording does not provide for a certain threshold of value of the assets, see UNCAC Secretariat 'Innovative Solutions to Asset Recovery' (2007) 5: 'asset recovery is not limited to cases of grand corruption.' However, given the complexity, length, costs and cumbersomeness of asset recovery processes, asset recovery for cases involving small amounts would be highly ineffective and is therefore de facto rather unlikely.

⁷⁰ In its preamble, UNCAC refers to the phenomenon of grand corruption, however, without using the term 'grand corruption', see note 37.

⁷¹ COSP UNCAC Resolution 3/3 (2009) considerations para 3; UNCAC Secretariat 'Innovative Solutions to Asset Recovery' (2007) 3. See also, for the challenges Egypt has faced in requests for mutual legal assistance for asset recovery in the aftermath of the demise of Mubarak, Permanent Mission of Egypt to the United Nations 'Note verbale dated 7 October 2011' 4 et seq.

In addition, it is important to note that processes of asset recovery do not – despite the legal provisions in Chapter V UNCAC – happen in a political vacuum, but typically have significant political dimensions and may thus face various *political obstacles*: First, the requested State Party may have doubts about the political legitimacy of the new government in the requesting State Party. In particular, no requested States Party will seriously be willing to squander futile resources on asset recovery if confiscated assets would eventually be returned to a subsequent government which faces pervasive corruption allegations. Secondly, and more fundamentally, in order to be started in first place the process of asset recovery presupposes, as a matter of principle, the *political will* of the victim State to request other States for cooperation.⁷² Furthermore, a lack of capacity especially in poorer States Parties can be a *factual obstacle* to the recovery of proceeds of corruption in an internationally accepted manner.⁷³

3.5.3 Concluding remarks on asset recovery

Practice has shown that Chapter V UNCAC is a promising anti-corruption tool⁷⁴ tailored primarily to instances of grand corruption. It should be noted, however, that the strong endorsement by scholarship for this chapter tends to underrate the fundamental assumption of

⁷² Current examples of lack of political will to recover assets are the Democratic Republic of the Congo, Haiti, Equatorial Guinea, Gabon and Congo Brazzaville; see Daniel T & Maiton J (2013) 316 et seq. Admittedly, Article 56 UNCAC provides for the (non-mandatory) possibility of States Parties to take measures without prior request. However, this provision is to be understood as an exception and necessitates that the State Party acting considers that ‘the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party...’. Thus, in the clear absence of political will in the victim State, this provision is no convincing legal base for adopting unilateral measures.

⁷³ Technical assistance provisions in Chapter VI UNCAC are designed to address and remedy this obstacle. In this regard, the Stolen Asset Recovery (StAR) Initiative, a unique joint World Bank-United Nations Office on Drugs and Crime (UNODC) partnership, is worthwhile mentioning, see <http://star.worldbank.org/star/> (accessed 26 October 2013).

⁷⁴ Currently, in the aftermath of the uprisings in the Arab world, often referred to as ‘Arab spring’, much effort has been and is still being made to repatriate money stashed away above all in bank accounts in Switzerland and the UK by the former Heads of States, such as Ben Ali of Tunisia, Hosni Mubarak of Egypt and Gadhafi of Libya. The final results still remain to be seen. Allegedly, Switzerland froze assets of Mubarak and 18 of his associates only 30 minutes after Mubarak stood down, see El Masry S ‘A daunting mission: Getting back Egypt’s stolen assets’ *Daily News Egypt* 10 April 2013 available at <http://www.dailynewsegypt.com/2013/04/10/a-daunting-mission-getting-back-egypts-stolen-assets/> (accessed 26 October 2013). According to TI, the amount of money and assets frozen by financial centres like Switzerland, Canada, the US and UK in the aftermath of the Arab Spring totals at least US\$50 billion, see http://www.transparency.org/news/feature/clamping_down_on_kleptocrats (accessed 26 October 2013).

UNCAC that victim States of grand corruption would take action.⁷⁵ Without action on the side of the victim State, Chapter V runs the risk of becoming a dead letter.

3.6 Enforcement and Monitoring

Regarding enforcement and monitoring of States Parties' obligations under UNCAC, the convention lacks legal 'teeth', especially as far as grand corruption is concerned.⁷⁶

3.6.1 No binding enforcement mechanism on international level

In the drafting process, there was no consensus on establishing an international organ with jurisdiction over natural persons charged with the crime of corruption.⁷⁷ By the same token, UNCAC does not provide for international mechanisms to hold a government accountable in case it fails to effectively enforce the obligation to fight corruption and to prosecute grand corruption.⁷⁸ Thus, UNCAC lacks binding enforcement measures at the international level.⁷⁹

3.6.2 Monitoring the implementation of UNCAC

During the third Conference of States Parties in Doha in 2009, States Parties agreed to fulfil the mandate originating in Article 63(7) UNCAC in practice by establishing a Mechanism for the Review of Implementation of UNCAC.⁸⁰ The mechanism consists of a review of all States Parties by the *governmental* experts of two other States Parties, resulting in a country report, the publication of which remains within the discretion of the reviewed States Party.⁸¹ A visit to the State being reviewed is only possible upon its agreement;⁸² there are no investigatory

⁷⁵ Daniel T & Maiton J (2013) 322.

⁷⁶ Proposals to establish a stronger implementation mechanism did not gain sufficient support, Webb (2005) 220 et seq.

⁷⁷ Article 63 UNCAC establishes the Conference of States Parties (COSC). However, the COSC is no judicial organ and lacks the power to create a criminal tribunal, see Carranza R 'Plunder and Pain: Should Transnational Justice Engage with Corruption and Economic Crimes' (2008) 2 *The International Journal of Transitional Justice* 328.

⁷⁸ Article 66(2) UNCAC provides for the competence of the ICJ. However, only obligations owed to other States Parties may give rise to a claim before the ICJ. Lack of compliance with the obligation to prevent and combat grand corruption within the State itself would not entitle another State Party to request the ICJ to state a violation of UNCAC provisions, see Bacio Terracino (2012) 312 et seq.

⁷⁹ Boersma (2012) 98.

⁸⁰ COSP UNCAC Resolution 3/1 (2009).

⁸¹ COSP UNCAC Resolution 3/1 (2009); Terms of reference for the Mechanism for the Review of Implementation of UNCAC paras 18, 33, 37 et seq.

⁸² Terms of reference for the Mechanism for the Review of Implementation of UNCAC para 29.

powers allocated to the reviewing States Parties. Thus, States Parties who fail to properly implement and consistently enforce UNCAC have nothing to fear. The existing mechanism indeed largely fails to ensure that States Parties implement UNCAC. The effectiveness of the review mechanism will, in the absence of any compulsory measure, largely depend on the voluntary cooperativeness of States Parties.⁸³

3.6.3 Concluding remarks on enforcement and monitoring

For want of effective international enforcement and monitoring instruments, enforcement of the provisions of UNCAC largely remains a *domestic issue*. The degree of compliance with the existing duties under UNCAC continues to depend heavily on the *political will* of the State concerned, which is typically absent in cases of grand corruption. This can potentially lead to a *high degree of selectivity* of efforts to combat corruption. Criminal prosecutions for the crime of corruption of political opponents of the government or low-ranking officials may be used as a fig leaf to detract attention from grand corruption cases.⁸⁴ Ironically, UNCAC relies on those high-level officials who commit the crime to enforce the criminalisation of corruption.⁸⁵ This fact makes it likely that perpetrators of grand corruption can, by virtue of their positions of power, escape criminal prosecution at the domestic level and enjoy *de facto* immunity.

3.7 Legal reality: effectiveness of the international legal framework

Since corruption is typically a consensual crime, characterised by secrecy and collusion⁸⁶, mostly without an apparent or direct victim,⁸⁷ much corruption goes unreported and will

⁸³ As Prof. Mark Pieth put it eloquently, UNCAC's soft monitoring system is a 'platform for corrupt elites' which 'allows everybody to feel good and to look good'; lecture at UWC, Cape Town, South Africa on 17 October 2013.

⁸⁴ Mbaku JM *Corruption in Africa: Causes, Consequences and Cleanups* (2007) 145; Daniel T & Maiton J (2013) 304 with reference to Nigeria.

⁸⁵ Even more ironically, some of these high-level public officials even sat at the negotiating table and were able to influence the (limited) scope of mandatory obligations under UNCAC, see U4 (2011) 22.

⁸⁶ It goes without saying that this is only true of two-sided forms of corruption, such as bribery. Once the corrupt deal is fulfilled, neither the briber nor the bribee has an interest in denouncing the corrupt act, since both are guilty of the crime of corruption.

never be revealed. Therefore it is extremely difficult, if not impossible, to quantify the magnitude of corruption⁸⁸ in any meaningful way and also to measure empirically success or failure of the existing legal framework in addressing grand corruption. To merely focus on the number of investigations and ultimately criminal convictions⁸⁹ as an indicator for success or failure would neglect to sufficiently take into account the deterrent effect of criminalisation. In the absence of empirical evidence, a reliable assessment of how effective the existing legal framework is in combating grand corruption can in fact not be made. However, for recent efforts relating to asset recovery for proceeds originating from grand corruption,⁹⁰ numerous media reports and publications by NGOs indicate that grand corruption is still today being committed with (criminal) impunity⁹¹; the number of hitherto undetected cases remains a matter of speculation.



⁸⁷ At any rate, as a rule, immediately identifiable victims are not present at the scene of the crime and the costs to individual members of society are hard to measure. This does not mean, however, that corruption is a victimless crime, see Vlassis D 'The United Nations convention against corruption: a successful example of international action against economic crime' (2012) 15 *Temida* 62. Carr I 'Corruption (2007) 244 identifies 'humanity' as victim of corruption.

⁸⁸ On the challenge how to measure corruption, see Sampford C et al. (ed) *Measuring Corruption* (2006).

⁸⁹ For the the recent examples of criminal convictions for corruption charges against the former heads of State, see Burt JM 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations' (2009) 3 *The International Journal of Transitional Justice* 384 et seq. (Fujimori of Peru), Kortam H 'Mubarak trial postponed' *Daily News Egypt* 14 September 2013 available at <http://www.dailynewsegypt.com/2013/09/14/mubarak-trial-postponed-2/> (accessed 26 October 2013) (Mubarak of Egypt), Adetunji J 'Ben Ali sentenced to 35 years in jail' 20 June 2011' *The Guardian* 20 June 2011 available at <http://www.guardian.co.uk/world/2011/jun/20/ben-ali-sentenced-35-years-jail> (accessed 26 October 2013) (Ben Ali of Tunisia). Indeed, about the half of all criminal indictments of heads of States between 1990 and 2008 were based on charges of financial crimes, namely corruption; Lutz EL & Reiger C 'Introduction' in Lutz EL & Reiger C (ed) *Prosecuting Heads of State* (2009) 12 et seq. In Latin America, there have been more corruption-related investigations than investigations for human rights crimes, Roht-Arriaza N in Lutz EL & Reiger C (ed) *Prosecuting Heads of State* (2009) 61.

⁹⁰ See the overview of international action to freeze assets belonging to former heads of State, their entourage and certain State entities under their control in FATF, Report Laundering the Proceeds of Corruption (2011) 51 et seq.

⁹¹ See, for instance, Mohammed U 'Corruption in Nigeria: A Challenge to sustainable Development in the Fourth Republic' (2013) 9 *European Scientific Journal* 118 (Nigeria); See also Open Society Justice Initiative *Corruption and Its Consequences in Equatorial Guinea*, A Briefing Paper, 2010 available at <http://www.opensocietyfoundations.org/publications/corruption-and-its-consequences-equatorial-guinea> (accessed 26 October 2013) (Equatorial Guinea); See U4 'Chasing kleptocrats' loot: Narrowing the effectiveness gap' (2012) 21: 'Kleptocracy remains common, and impunity for those engaged in such crimes is still the norm'. See also the grand corruption case inventory of 2011 in FATF Report Laundering the Proceeds of Corruption (2011) 47 et seq.

3.8 Concluding remarks on the existing international legal framework for grand corruption

UNCAC's remarkable accomplishment was to put corruption on the global agenda in an unprecedented way and to create awareness of the evils of corruption. However, the analysis has shown that UNCAC is in several respects insufficient and thus *fails to deliver an adequate framework* for bringing perpetrators of grand corruption to justice.⁹² The crux of the matter is that UNCAC *assumes that States will take action* in instances of grand corruption. This assumption is often as close to reality as to expect a burglar to surrender to the police by himself and to return the stolen goods.⁹³ In reality, the police must investigate upon receiving notice by the victim, i.e. the owner or lawful possessor of the burgled good. In instances of grand corruption, however, political leaders may very well be in the position to impede any investigations, especially if the domestic judiciary is prone to corruption itself and lacks independence. Whilst the burgled citizen can call the police for help, the victim nation of grand corruption may not have an independent and effective institution to address. Given the existing law on jurisdiction and immunities, prosecutions of grand corruption by States other than the victim State, i.e. for instance by the home State of a foreign company involved in a corruption scheme or the State in which money is stashed away in bank accounts, are unlikely to be an alternative to domestic prosecutions. Furthermore, there is no international institution that could step in and bring justice to victims.

In conclusion, if national systems fail, UNCAC may fail to deliver surrogate remedies and leaves open an accountability gap. Ten years after the adoption of UNCAC, it is time to contemplate pursuing new progressive paths in order to ensure effective enforcement of the

⁹²It shall not be disregarded that the scope of UNCAC is obviously limited by the need to reach international consensus. It is rather unlikely that a better negotiation result could have been obtained back in 2003; U4 (2011) 23.

⁹³This comparison was adopted by Daniel T & Maiton J (2013) 322.

UNCAC provisions and to facilitate actual accountability of those high-level officials who evade justice by virtue of their power over national criminal justice systems.



CHAPTER 4: THE ICC AND GRAND CORRUPTION DE LEGE LATA

De lege lata, there is no express individual criminal responsibility for the crime of corruption under international law. Hitherto, the crime of corruption does not merit specific mention in any statute in force⁹⁴ of an international criminal court or tribunal. This chapter examines whether, despite the absence of specific mention in the Rome Statute, the ICC can *de lege lata* exercise jurisdiction over some forms of corruption.

4.1 Conceptualising grand corruption as one of the existing core crimes

4.1.1 Grand corruption as a crime against humanity

Several scholars⁹⁵ and representatives of civil society⁹⁶ have argued that a case could be made for grand corruption to fulfil the prerequisites of crimes against humanity, namely the act of ‘extermination’⁹⁷ or, more importantly, the category of ‘[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’⁹⁸ Mostly, corruption scenarios in developing countries are referred to, in order to support the argument. As much as high-level officials squander millions or even

⁹⁴ However, see Article 28A(1)(8), Article 28I AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 15 May 2012.

⁹⁵ Bantekas (2006) 466 et seq.; Starr (2007) 1257 et seq.; Acquah-Gaisie GA ‘Curbing Financial Crime among Third World Elites’ (2005) 8 *Journal of Money Laundering Control* 379; Harms BC ‘Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption’ (2000) 33 *Cornell International Law Journal* 202.

⁹⁶ The Nigerian NGO Socio-Economic Rights and Accountability Project (SERAP) formally petitioned the Office of the Prosecutor of the ICC in April 2008 to ‘examine and investigate whether the systemic/grand corruption in Nigeria amounts to a crime against humanity within the jurisdiction of the International Criminal Court ...’, see <http://serap-nigeria.org/seraps-paper-the-international-anti-corruption-conference-bangkok-thailand/> (accessed 26 October 2013) para 49. SERAP filed another petition in April 2012, this time limited to a specific fuel subsidy scheme, see <http://serap-nigeria.org/6bn-fuel-subsidy-loot-international-criminal-court-asked-to-punish-indicted-officials/> (accessed 26 October 2013). As far as can be seen, neither the OtP nor SERAP have made comments on the outcome of these petitions, which is why it must be assumed that both petitions are part of the 26 Article 15 communications in relation to the situation in Nigeria, which had been, according to the OtP, manifestly outside the jurisdiction of the Court; see http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx (accessed 26 October 2013). In this regard, see also the Facebook group ‘Corruption Is A Crime Against Humanity’ <https://www.facebook.com/CorruptionIsACrimeAgainstHumanity> (accessed 26 October 2013).

⁹⁷ Article 7(1)(b) Rome Statute.

⁹⁸ Article 7(1)(k) Rome Statute.

billions of US\$, the argument runs, corrupt acts can result in citizens being pauperised, starved and even subjected to physical harm. Thus, it can be argued that grand corruption leads to extreme poverty and extreme poverty kills.⁹⁹

The significant merit of this approach is that it is based on recourse to the current provisions of the Rome Statute without necessitating cumbersome and politically difficult amendment procedures. The potential legal shortcomings and pitfalls have been widely discussed elsewhere, which is why the paper confines itself to depicting the selected crucial aspects without thorough examinations of all elements of the crime.¹⁰⁰

As regards the act of ‘extermination’, grand corruption may in a given case fulfil the requirement of ‘intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine’, according to Article 7(2)(b) Rome Statute. It is theoretically conceivable that extreme instances of grand corruption, in particular embezzlement of goods essential for survival such as food or medicines, indeed lead to the deprivation of basic needs of citizens and may ultimately cause deaths. However, given the multi-causal reasons of (lethal) poverty, it will hardly ever be possible to provide *evidence of causality* between a specific corrupt act and deaths of citizens.

The variant of ‘[o]ther inhumane acts’, for which an act causing, even mediately¹⁰¹, ‘great suffering or serious injury to body or to mental or physical health’¹⁰² and ‘similar to any other act referred to in article 7’¹⁰³ is sufficient, appears much more promising. Certain acts of grand corruption can potentially meet the standard of the aforementioned *actus reus*.¹⁰⁴

However, the greatest legal hurdle and linchpin of the case appears to be the requisite *mens*

⁹⁹ Starr (2007) 1284.

¹⁰⁰ For an exhaustive analysis, see Boersma (2012) 320 et seq.

¹⁰¹ Starr (2007) 1301 et seq. with reference to Kittichaisaree K *International Criminal Law* (2001) 127.

¹⁰² Article 7(1)(h) Rome Statute.

¹⁰³ See Elements of Crimes for Article 7(1)(k) of the Rome Statute.

¹⁰⁴ It is to be noted that crimes against humanity, especially acts of apartheid, imprisonment and persecution, do not necessarily presuppose physical violence.

rea contained in the default provision Article 30 Rome Statute¹⁰⁵, the interpretation of which has been controversial in scholarship¹⁰⁶ as well as within the ICC¹⁰⁷. In the ICC's first trial judgment of 2012, a restrictive interpretation prevailed such that the wording 'will occur' in Article 30(2)(b) Rome Statute as opposed to 'may occur' excludes the concept of *dolus eventualis*; Article 30 Rome Statute is limited to first and second degree of *dolus directus*.¹⁰⁸ Applying these yardsticks, in most grand corruption cases the requisite *dolus directus* is not present, or in any event, cannot be proven.¹⁰⁹ Usually, perpetrators of grand corruption will not intend, but only acquiesce to inflict, the 'great suffering or serious injury to body or to mental or physical health' as a mere ancillary effect of her or his corrupt conduct.¹¹⁰ Rather, they intend to enrich themselves or associated third persons. Hence, at least as a general rule, mens rea in the form of *dolus directus* with regards to inflicting 'great suffering or serious injury' is not met.

In conclusion, based on the majority view of the hitherto existing Trial Chamber jurisprudence as to the mens rea requirements¹¹¹, neither Article 7(1)(b) nor Article 7(1)(k)

¹⁰⁵ This obstacle arises as well as regards the act of 'extermination'.

¹⁰⁶ Elewa Badar M 'The Mental Element In The Rome Statute Of The International Criminal Court: A Commentary From A Comparative Criminal Law Perspective' (2008) 19 *Criminal Law Forum* 473 et seq.; Werle G & Jessberger F "'Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 52 with further references; Werle (2009) para 409 et seq.

¹⁰⁷ ICC *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber I 29 January 2007 (hereafter ICC *Lubanga* Decision on the Confirmation of Charges) para 349 et seq. including *dolus eventualis* in Article 30 Rome Statute; then deviating and excluding *dolus eventualis* ICC *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, Pre-Trial Chamber II 15 June 2009 para 360 which was confirmed by ICC *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber 14 March 2012 (hereafter ICC *Lubanga* Judgment) para 1011

¹⁰⁸ ICC *Lubanga* Judgment para 1011. As far as can be seen, this interpretation has not yet been either validated or dismissed by the ICC Appeals Chamber; the most recent transcript of the Appeals Chamber in this matter dates back to October 2010, see http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/transcripts/appeals%20chamber/Pages/Index.aspx (accessed 26 October 2013). Critically, however, ICC *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber II 18 December 2012, concurring opinion of Judge Christine Van den Wyngaert para 38: 'reliance on 'risk' as an element under Article 30 of the Statute is tantamount to accepting *dolus eventualis* dressed up as *dolus directus* second degree.'; Ohlin JD 'Bombshell Acquittal at the ICC' available at <http://www.liebercode.org/2012/12/bombshell-acquittal-at-icc.html> (accessed 26 October 2013); Liefänder TR 'The *Lubanga* Judgment of the ICC: More than just the First Step?' (2012) 1 *Cambridge Journal of International and Comparative Law* 204 et seq.

¹⁰⁹ At least, this is so, unless the ICC decides to modify its interpretation of Article 30 Rome Statute.

¹¹⁰ Boersma (2012) 337.

¹¹¹ ICC *Lubanga* Judgment para 1011.

Rome Statute is an adequate and sound legal base for prosecuting most cases of grand corruption. Under *lex lata*, conceptualising and prosecuting corruption as a crime against humanity can in most cases not withstand legal scrutiny.

4.1.2 Grand corruption as a war crime

Several war crimes, as listed in Article 8 Rome Statute, such as the appropriation or seizure of specific property¹¹² or impeding relief supplies¹¹³, have an economic dimension. It is thus theoretically conceivable that, if committed on a grand scale, these war crimes may in a given case simultaneously be tantamount to grand corruption. However, this option of the ICC to address grand corruption is very limited in its scope: grand corruption must be committed in the context of an (international or non-international) *armed conflict*¹¹⁴ and the *targeted objects are strictly limited*¹¹⁵; in particular, property belonging to persons on the perpetrator's own side is no protected object.¹¹⁶ Therefore, grand corruption as a war crime remains a very *special and rare case*; most instances of grand corruption will not be covered.

4.2 Other options for the ICC to address grand corruption

Historical cases, arguably most prominently Augusto Pinochet,¹¹⁷ as well as present trials before the ICC provide evidence that grand corruption and the commission of core crimes frequently go hand in hand. Dictatorial regimes tend to be *both* 'brutal and corrupt'.¹¹⁸ To name but a few, Al Bashir, current President of Sudan¹¹⁹, Gbagbo, former President of Côte

¹¹² Article 8(2)(a)(iv), Article 8 (2)(b)(xiii), Article 8(2)(e)(xii) Rome Statute.

¹¹³ Article 8(2)(b)(xxv) Rome Statute.

¹¹⁴ On the nexus between the individual act and the armed conflict, see Werle (2009) para 1001 et seq.

¹¹⁵ Werle (2009) para 1149 et seq.

¹¹⁶ Werle (2009) para 1152.

¹¹⁷ US, Senate Executive Report 109-25, 109th Congress 1st Session (2005) available at <http://www.gpo.gov/fdsys/pkg/CPRT-109SPRT20278/html/CPRT-109SPRT20278.htm> (accessed 26 October 2013); Kofele-Kale N 'Change or the Illusion of Change: The War Against Official Corruption in Africa' (2006) 38 *George Washington International Law Review* 723 et seq.; STAR 'Augusto Pinochet' available at <http://star.worldbank.org/corruption-cases/node/18468> (accessed 26 October 2013). Another prominent example is Fujimori of Peru, see note 94.

¹¹⁸ Carranza R (2008) 310. This is, by way of example, also true for the South-African apartheid regime, see van Vuuren H *Apartheid grand corruption: Assessing the scale of crimes of profit from 1976 to 1994* (2006).

¹¹⁹ According to WikiLeaks information, Al Bashir embezzled allegedly US\$ 9 billion, see Simons M 'Prosecutor Confirms Accusation Against Sudan Leader' *New York Times* 1 January 2011 available at

d'Ivoire¹²⁰, and Muammar Gaddafi, the late ruler of Libya¹²¹, face, or have faced corruption allegations, in addition to the criminal charges for crimes within the jurisdiction of the ICC. Frequently, high-level public officials abuse their political power not only to commit core crimes but at the same time to enrich themselves by committing grand corruption. The proceeds of grand corruption can also be essential for facilitating the commission of core crimes.¹²² Without financial backing, many core crimes could not be committed.¹²³ The ICC can address this interrelation in the following two ways: prosecuting grand corruption as assistance to the commission of core crimes and elucidating the financial background of core crimes during the criminal trial. These options will be discussed in turn.

4.2.1 Grand corruption as assistance in the commission of core crimes

To the extent that proceeds of grand corruption are used to finance the commission of core crimes, prosecution for assistance in the commission of the crime¹²⁴ is one option for the ICC to deal with corruption, under *lex lata*. Yet, this option may turn out to be of little practical relevance for two reasons: First, given the limitation of perpetrators of grand corruption to high-level officials, in many instances, the one who has the power to commit grand corruption may also commit the core crime as a perpetrator under Article 25(3)(a) Rome Statute, irrespective of his or her financial contribution to the commission of the crime. The higher

<http://www.nytimes.com/2011/01/02/world/africa/02wikisudan.html?pagewanted=all& r=1&> (accessed 26 October 2013).

¹²⁰ Willsher K 'Ousted president Laurent Gbagbo charged in Ivory Coast' *The Guardian* 19 August 2011 available at <http://www.theguardian.com/world/2011/aug/19/ivory-coast-charges-laurent-gbagbo> (accessed 26 October 2013); STAR 'Lauren Gbagbo' available at <http://star.worldbank.org/corruption-cases/node/18537> (accessed 26 October 2013).

¹²¹ Peachey P 'Leaked cables reveal Gaddafi's iron grip on corrupt regime' *The Independent* 24 February 2011 available at <http://www.independent.co.uk/voices/commentators/paul-peachev-leaked-cables-reveal-gaddafis-iron-grip-on-corrupt-regime-2223980.html> (accessed 26 October 2013).

¹²² For instance, the Sierra Leone Truth and Reconciliation Commission revealed that corruption and bad governance were the prime causes of the armed conflict in the context of which a vast number of core crimes had been committed. Schabas W 'A Synergetic Relationship: The Sierra Leone Truth And Reconciliation Commission And the Special Court for Sierra Leone' (2004) 15 *Criminal Law Forum* 11. See on the relation between corruption and the occurrence and duration of armed conflict, Le Billon P 'Buying Peace or Fuelling War: The Role of Corruption in Armed Conflicts' (2003) 15 *Journal of International Development* 413 et seq.

¹²³ On the other hand, the availability of resources originating from grand corruption can have the effect of maintaining impunity from prosecution for the commission of core crimes before national courts, unless the ICC steps in and exercises its jurisdiction, see Carranza (2008) 312.

¹²⁴ Article 25(3)(c) Rome Statute explicitly states that providing the means for the commission of a crime is one form of assistance.

level of individual responsibility for the commission of the core crime as a perpetrator would then render the responsibility for aiding and abetting legally moot¹²⁵. Secondly, if the grand corrupter's role is indeed limited to aiding and abetting the commission of the core crime, he or she may not necessarily be someone who 'bears the greatest responsibility'. This would be necessary, however, for being prosecuted before the ICC, according to the Office of the Prosecutor's policy of focused investigations and prosecutions.¹²⁶

4.2.2 Addressing the financial background of existing core crimes

Arguably most importantly, the ICC can address the phenomenon of grand corruption to the extent that it examines the background circumstances of the commission of the crimes subject to the trial, and reveals how the commission of core crimes had been financed.¹²⁷ Ultimately, the financial background of alleged crimes may be mentioned in the judgment as part of the factual overview.¹²⁸

4.3 Concluding remarks on de lege lata options

As argued above, criminal prosecutions for grand corruption based on the charge of crimes against humanity, are, as a rule, not feasible. Except for a few war crimes provisions which may cover some rare instances of grand corruption, the ICC has, under *lex lata*, no jurisdiction over the crime of corruption. Relying on the current language of the Statute, the ICC lacks legal powers to close the accountability gap left open by UNCAC. Yet, after all, the ICC can indeed shed light on corrupt practices insofar as they finance and enable the

¹²⁵ It is still unsettled how to deal with a multiplicity of forms of criminal responsibility. Yet, it does not appear legally convincing to convict a perpetrator of the crime for the commission as well as for assistance to his or her own crime.

¹²⁶ OtP, Prosecutorial Strategy 2009-2012 (2010) para 19.

¹²⁷ Indeed, the OtP emphasises the importance of financial information as evidence to prove the role of those most responsible and to assist in reparations to victims; OtP, Prosecutorial Strategy 2009-2012 (2010) para 34. Tejan-Cole A 'Don't bank on prosecuting grand corruption as an international crime' available at http://www.osisa.org/sites/default/files/dont_bank_on_prosecuting_grand_corruption_as_an_international_crime_-_abdul_tejan-cole.pdf (accessed 26 October 2013) calls for the ICC to 'take seriously the investigation of the financial aspects of alleged atrocities.'

¹²⁸ This could be more or less comparable to how the Trial Chamber I investigated and ultimately described the political, social and historical background of the conflict in Ituri and the Hema-Lendu conflict in its ICC *Lubanga* Judgment para 70 et seq.

commission of core crimes and can thereby raise awareness for the harmfulness of corruption.

With that being said, a discussion on whether the ICC can and should de lege ferenda have jurisdiction over grand corruption is warranted.



CHAPTER 5: THE ICC AND GRAND CORRUPTION DE LEGE FERENDA

This chapter will firstly argue that it is conceivable to confer the ICC jurisdiction over grand corruption as so-called treaty crime, even in the absence of consensus to elevate grand corruption to a crime under international law. The core of this chapter is a discussion of potential advantages of and objections to such an amendment to the Rome Statute.

5.1 Feasibility: The Rome Statute's openness to new crimes

The establishment of the ICC can be traced back to an initiative of 1989 by Trinidad and Tobago which requested the UN General Assembly 'to address the question of establishing an international criminal court ... with jurisdiction over persons ... engaged in illicit trafficking in narcotic drugs across national frontiers ...'¹²⁹ Subsequently, the negotiation process shifted gradually¹³⁰ but fundamentally in another direction. In Rome, the negotiators opted notoriously – for various reasons¹³¹ – for limiting the jurisdiction of the ICC to 'the most serious crimes of concern to the international community as a whole', in other words the well-known four core crimes. Thus, ultimately, Trinidad and Tobago failed with its endeavour to include drug trafficking¹³² which is a transnational or treaty crime, just as the crime of corruption under *lex lata*, to the jurisdiction of the ICC.¹³³ It should be noted, however, that

¹²⁹ UN Doc. A/RES/44/39 (1989).

¹³⁰ On the development, Sunga LS *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) 206 et seq. Still in Rome, State delegates called for the inclusion of treaty crimes, see, for instance, the remark by the Libyan delegate, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June -17 July 1998, Volume II para 82.

¹³¹ Especially, the newly established institution shall not be too ambitious and break new ground, as far as the jurisdiction *ratione materiae* is concerned, but rather rely on crimes under international law universally recognised by customary international law. For the sake of attaining universal support, the jurisdiction should be rather limited, see Report of the Commission to the General Assembly on the Work of its Forty-Eighth Session, (1996) Yearbook of the International Law Commission Vol. II 16 et seq.

¹³² Interestingly, Trinidad and Tobago also failed with its proposal to include including 'state theft' as a crime against humanity; Marsch (2010) 228.

¹³³ By the same token, proposals to confer jurisdiction over the crime of terrorism to the ICC failed to gain sufficient support.

the Rome Conference nevertheless acknowledged these proposals by adopting Resolution E as part of its Final Act which

‘[r]ecommends that a Review Conference pursuant to Article 123 of the Statute of the International Criminal Court consider ... drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.’¹³⁴

The amendment proposal was reaffirmed once more prior to the first Review Conference in 2010¹³⁵, but failed to gain support, inter alia, against the background that resources were focused on defining the crime of aggression¹³⁶. Despite this the proposals remain on the agenda of the Working Group on Amendments¹³⁷. In conclusion, the Rome Statute’s drafting history and subsequent amendment controversies show that the inclusion of so-called treaty crimes, which are not penalised under customary international law, into the Rome Statute has been a serious consideration, albeit a controversial¹³⁸ one which has hitherto been unsuccessful. Therefore, the inclusion of the crime of corruption – as it had indeed been envisaged by the Commonwealth¹³⁹ – is at least theoretically *feasible*, regardless of whether corruption can be conceptualised as a crime under international law. If this is indeed the case, the proposal to include grand corruption within the jurisdiction of the ICC would face far less

¹³⁴ UN Doc. A/CONF.183/10 (1998).

¹³⁵ Trinidad and Tobago – supported by Belize – proposed a significant limitation to acts ‘pos[ing] a threat to the peace, order and security of a State or region’, see Article 5 (2) of the proposed amendment; ICC-ASP/8/43/Add.1 (2009) Annex VI.

¹³⁶ ICC-ASP/10/32 (2011) para 5.

¹³⁷ The Working Group on Amendments was established by the 8th Assembly of States Parties, ICC-ASP/8/Res.6. Trinidad and Tobago continues to fight for the inclusion of drug crimes, see Rambachan S, Minister of Foreign Affairs of Trinidad and Tobago, Statement at the Opening Ceremony of the Caricom Regional Seminar, 16 May 2011 available at [http://www.foreign.gov.tt/site_media/media/attachments/2011/05/18/Statement - ICC Openinng Ceremony.pdf](http://www.foreign.gov.tt/site_media/media/attachments/2011/05/18/Statement_-_ICC_Openinng_Ceremony.pdf) (accessed 26 October 2013).

¹³⁸ The pros and cons of inclusion of treaty crimes have been discussed extensively elsewhere, Boister N ‘The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics’ (1998) 3 *Journal of Armed Conflict Law* 27 et seq. An essential argument against their inclusion is the assumption that national jurisdictions accompanied by international co-operation are better suited to deal with these crimes.

¹³⁹ Commonwealth Secretariat (2005) Recommendation Nr. 9.

obstacles¹⁴⁰ and could more likely attract consensus among States Parties, since the inclusion of treaty crimes would considerably modify the nature of the Court and indeed necessitate answering many (especially jurisdictional) open questions¹⁴¹. However, there is, from a legislative point of view, no compelling reason to force a specific criminal conduct to fit into the existing core crimes for being subject to amendment.

5.2 Legitimacy of international prosecution by the ICC

Apart from the question of theoretical feasibility, it must be clarified whether international prosecutions of the crime of corruption by the ICC are indeed legitimate.

5.2.1 Criteria of the Rome Statute

As has been argued, States Parties are free to confer jurisdiction over treaty crimes to the ICC, if they have the political will to do so. Reasons of expediency or practical need would, in principle, suffice to legitimise an amendment of the Rome Statute.¹⁴² And yet, an even stronger case in favour of an amendment can be made if it can be argued that instances of grand corruption can indeed fulfil the criteria that existing core crimes have in common. According to the current Rome Statute the mandate of the ICC is limited to ‘the *most serious crimes of concern to the international community as a whole*’¹⁴³ which ‘threaten the *peace*,

¹⁴⁰ For instance, it appears debatable whether at all and if so under which conditions certain treaty crimes can amount to one of ‘the most serious crimes of concern to the international community as a whole’ (Article 5 Rome Statute, Preamble (4) Rome Statute). The potential lack of double-criminality may necessitate a modification of various provisions of the statute; Report on the Working Group on Amendments, ICC-ASP/10/32 para 22. See further, Broomhall B *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (2003) 38 et seq. on a potentially necessary amendment to Article 22 Rome Statute.

¹⁴¹ For instance: Is the inclusion possible as substantive provision or is there need for an additional international treaty which provides for the criminalisation of the crime of corruption? Or is the international consensus on criminalising corruption in UNCAC sufficient? Is this only the case for UNCAC States Parties? Is a referral by the Security Council or by a non-State Party possible? See, on the underlying ambiguity of the substantive or jurisdictional nature of the R provisions defining crimes in the Rome Statute, Milanović M ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’ (2011) 9 *Journal of International Criminal Justice* 25 et seq.

¹⁴² Such amendment would amount to using the ICC as an international enforcement mechanism for national prohibitions without creating a new crime entailing individual responsibility directly under international law; Broomhall B *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law* (2003) 37.

¹⁴³ Preamble (4), Article 5 Rome Statute.

*security and well-being of the world*¹⁴⁴ (emphasis added). These notions, as Broomhall argues, ‘elude easy and perhaps any definition’¹⁴⁵ which makes an argument in either direction per se contestable.¹⁴⁶

5.2.2 Application of the criteria

The assertion that grand corruption can be a *concern to the international community as a whole*, may appear bold at first glance, given that the immediate and direct repercussions usually are a financial loss for the public budget of the victim State only. Digging deeper and taking into account the *mediate and indirect consequences* of grand corruption, it becomes apparent that the case can indeed be made that corruption can affect the international community as a whole.¹⁴⁷

Grand corruption is often blamed for a myriad of evils in the world, such as, inter alia, political instability¹⁴⁸, armed conflict¹⁴⁹, terrorism¹⁵⁰ and poverty¹⁵¹. Further, corruption is deemed to undermine legitimacy and efficiency of governing institutions, to jeopardise the rule of law and to be a major obstacle to achieving development goals¹⁵². Even though studies have indeed indicated a correlation between corruption and all these phenomena, precise causalities remain relatively untested.¹⁵³ However, in the author’s opinion, both political and

¹⁴⁴ Preamble (3) Rome Statute.

¹⁴⁵ Broomhall (2003) 44.

¹⁴⁶ Ultimately, it is up to States to determine whether these criteria are fulfilled; Broomhall (2003) 39.

¹⁴⁷ See, for instance, Hartelius J & Borgenhammar E ‘Corruption as a threat to international security and conflict resolution: A systems approach to preventing and stopping corruption’ (2011).

¹⁴⁸ Mauro P ‘Corruption and Growth’ (1995) 110 *Quarterly Journal of Economics* 705.

¹⁴⁹ Le Billon (2003) 413 et seq.

¹⁵⁰ Thachuk K ‘Corruption and International Security’ (2005) 25 *The SAIS Review* 143 et seq.

¹⁵¹ Eigen, Chair of TI: ‘Corruption is a major cause of poverty as well as a barrier to overcoming it’, see http://www.transparency.org/research/cpi/cpi_2005 (accessed 26 October 2013).

¹⁵² The World Bank has identified corruption as the ‘single greatest obstacle to economic and social development’, see <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTEMPowerment/0,,contentMDK:20312308~isCURL:Y~menuPK:543262~pagePK:148956~piPK:216618~theSitePK:486411,00.html> (accessed 26 October 2013).

¹⁵³ Often, corruption is rather a symptom than the cause. Needless to say that correlation does not prove causation.

economic consequences¹⁵⁴ of grand corruption can be used to argue in favour of the legitimacy of international criminal prosecutions.

5.2.2.1 Political consequences: enabling commission of core crimes

Instances of grand corruption can lead to *political instability*¹⁵⁵ within a State which may in turn be the pre-condition for *armed conflict*¹⁵⁶ and the commission of existing core crimes. It is generally recognised that countries which are affected by grand corruption are likely to experience political and/or ethnic conflict, which is often even violent.¹⁵⁷ Furthermore, many armed conflicts, especially in Africa, have shown evidence that corruption prolongs ongoing conflicts.¹⁵⁸

On the other hand, history has shown that grand corruption can be crucial for *sustaining authoritarian regimes* which are responsible for serious human rights violations amounting to *crimes against humanity*.¹⁵⁹ The survival of an authoritarian regime, the argument runs, depends on the commission of grand corruption by its political leaders. Fighting grand corruption thus could be said to equate to shortening the lifespan of authoritarian regimes inclined to commit core crimes to defend and sustain their power.

Given the merely *mediate link* to the harrowing consequences of *existing core crimes*, international criminal prosecution of grand corruption means ‘to get down to the root of the trouble’. By fighting grand corruption, the ICC would tackle a phenomenon which enables and furthers the commission of core crimes. Hence, international criminal prosecutions of the

¹⁵⁴ These consequences are undoubtedly interrelated.

¹⁵⁵ Atuobi SM ‘Corruption and State Instability in West Africa: An Examination of Policy Options’ (2007) available at <http://www.readbag.com/reliefweb-sites-reliefweb-int-files-resources-9bd8a1f729ceb5b8c125746c0049d740-kaiptc-dec2007> (accessed 26 October 2013); ‘The United Nations Office for West Africa (UNOWA) considers ‘actual or even perceived massive corruption’ as one of the factors that increases ‘the vulnerability of States to coup d’état and render a coup almost unavoidable’. From a positivistic point of view, this threat is expressed in preamble (3) UNCAC.

¹⁵⁶ Le Billon (2003) 424 concludes convincingly that ‘[c]orruption is ... not in itself a sufficient or even necessary factor in the outbreak of armed conflicts.’

¹⁵⁷ UN Doc. A/CONF.203/6 (2005) para 26 et seq.

¹⁵⁸ See, for instance, the conflict in the Democratic Republic of the Congo, S/2001/357 (2001).

¹⁵⁹ For example the Peruvian Fujimori regime, Burt (2009) 387.

crime of grand corruption are ultimately aimed at preventing genocide, crimes against humanity and war crimes.

Thus, a fairly strong case can be made that by contributing to the commission of ‘the most serious crimes of concern to the international community as a whole’ grand corruption itself threatens – admittedly only indirectly, but sufficiently – the peace, security and well-being of the world itself, which legitimises international prosecution by the ICC.

5.2.2.2 Economic consequences: rampant poverty

Economically, if committed on a very large scale involving millions or even billions of US\$, instances of grand corruption, can, if committed in capital-poor countries, potentially *destroy whole national economies* with the foreseeable result of rampant poverty. Particularly illustrative is the topical case of the oil- and gas-rich west African State Equatorial Guinea, where the President and his son allegedly embezzled hundreds of millions of US\$¹⁶⁰, while the population continued to live in desperate poverty¹⁶¹.

Grand corruption misallocates public funds away from public services that are desperately needed by the poor in order to assure basic health care and education and towards either projects prone to corruption or directly towards the private fortune of high-level public officials. Resources which could have been invested in the most basic, sometimes even life-saving services, are instead accumulated and stashed away in foreign bank accounts for the private use of the perpetrators of grand corruption. Thus, in poor States, corruption can mediate the deaths of many.

¹⁶⁰ In the US alone, the revised complaint indicates that the President’s son spent US\$ 315 million on real estate and luxury goods between 2004 and 2011, see United States District Court for the Central District of California, *United States of America v. One White Crystal-Covered “Bad Tour” Glove and Other Michael Jackson Memorabilia; Real Property Located on Sweetwater Mesa Road in Malibu, California; One 2011 Ferrari 599 GTO*. See also Open Society Justice Initiative *Corruption and Its Consequences in Equatorial Guinea*, A Briefing Paper, 2010 available at <http://www.opensocietyfoundations.org/publications/corruption-and-its-consequences-equatorial-guinea> (accessed 26 October 2013).

¹⁶¹ Over 60 per cent live on less than US\$ 1 a day, see Open Society Justice Initiative *Corruption and Its Consequences in Equatorial Guinea* 3; UN Human Development Index Rank (2013): 136 out of 187 countries, <http://hdrstats.undp.org/en/countries/profiles/GNQ.html> (accessed 26 October 2013).

These economic consequences of grand corruption, the argument runs, are *outrageous injustices* which deserves the condemnation of the so-called international community, just as in the case of the existing core crimes¹⁶², regardless of whether the political consequences of grand corruption facilitate the commission of existing core crimes.

5.2.3 Concluding remarks on legitimacy of international prosecution by the ICC

In conclusion, it is not compelling, but nor is it unreasonable, to argue that, despite the absence of proof of clear causalities, normatively a case can be made that the aforementioned political and economic consequences can turn grand corruption into one of the ‘most serious crimes of concern to the international community as a whole’. This in turn legitimises particularly international criminal prosecutions of grand corruption.¹⁶³

5.3 Advantages of internationalisation of criminal prosecution

Immediate access to law enforcement agencies capable of effectively executing arrest warrants and practical expediency, e.g. better availability of witnesses, better access to evidence and easier participation of victims, make national courts in the State where the crime had been committed generally the most convenient and most obvious place for the conduct of criminal trials.¹⁶⁴ However, national criminal justice systems may suffer various shortcomings and deficiencies which may, at least to some extent, be remedied by the following advantages of international criminal prosecutions.

¹⁶² As Ocheje PD ‘Refocusing International Law on the Quest for Accountability in Africa: The Case Against the “Other” Impunity’ (2002) 15 *Leiden Journal of International Law* puts it: ‘The magnitude of theft by African leaders and the living conditions of most Africans would undoubtedly shock the collective conscience of the world.’ Acquah-Gaisie (2005) 379: ‘Large-scale corruption causes the death of infants, devastation by diseases such as AIDS and malaria, denial of a decent education – results as serious as the repercussions of armed conflict.’

¹⁶³ Whether grand corruption will be one day a crime under international law entailing direct individual criminal responsibility and subject to universal jurisdiction, is, in the absence of a treaty, a matter of State practice and *opinio iuris*, see Cassese A *International Law* 2 ed (2005) 157.

¹⁶⁴ Supreme Court of Israel *Attorney-General of the Government of Israel v. Eichmann*, 29 May 1962, (1986) 36 *International Law Report* 302. Besides that one may argue that national prosecutions can contribute to re-establish confidence in the national criminal justice system and to strengthen the rule of law.

5.3.1 Legal argument: no de jure immunity

In the existing international anti-corruption law, as has been elaborated above, high-level public officials enjoy in most instances de jure immunity both from the jurisdiction of their own national courts provided by domestic law and from the jurisdiction of a third State arising from international law¹⁶⁵ By contrast, Article 27(2) Rome Statute affirms that immunity regardless of whether deriving from domestic or international law is no obstacle to prosecution before the ICC. It is indeed one of the essential achievements of international criminal law, first applied in practice in the post-World War II Nuremberg¹⁶⁶ and Tokyo¹⁶⁷ trials, to overcome the obstacle of immunities deriving from official capacity which can be used by the most powerful actors within a State to escape justice before domestic courts.¹⁶⁸ Thus, internationalisation of criminal prosecution appears particularly warranted, where the national prosecutors' hands are tied due to de jure immunity for high-level officials.¹⁶⁹

5.3.2 Political argument: less politicisation

Politically powerful public officials working in the highest echelons of a State may exercise their influence on the prosecutor to impede an indictment or alternatively on the judge adjudicating the case to hand down a decision of acquittal or to impose a far too lenient sentence which does not reflect the seriousness of the crime. Furthermore, frequently, grand corruption is committed in a political environment in which also the judiciary is highly prone to corruption. A corrupt national judiciary lacking genuine independence of political interference most likely renders the national fight against grand corruption impossible and can result in de facto immunity.¹⁷⁰

¹⁶⁵ See above 3.4.

¹⁶⁶ Article 7 Charter of the International Military Tribunal (Nuremberg Charter).

¹⁶⁷ Article 6 Charter of the International Military Tribunal for the Far East (Tokyo Charter).

¹⁶⁸ However, this achievement is being challenged by the recent resolution of the African Union; AU Press Release No 177/2013 available at <http://www.au.int/en/sites/default/files/PR-%20177Extarordinary%20Summit%20on%20ICC-%2011-10-13-F.pdf> (accessed 26 October 2013).

¹⁶⁹ This is a further argument in favour of the limitation to high-level officials, see above 2.2.4.

¹⁷⁰ See Starr (2007) 1291.

By contrast, a politically influenced Prosecutor and biased or corruptible judges at the ICC are by far less likely, since they normally have ‘no ... political axe to grind’¹⁷¹ in the particular State concerned. Vulnerability to political pressure and political manipulation of the actors at the ICC cannot be ruled out entirely¹⁷², but appears to be an unrealistic scenario. A lesser degree of politicisation of criminal trials before the ICC may enable a more fair and independent proceeding as well as lead to better credibility of the judgment and is therefore an important advantage of international criminal prosecutions.¹⁷³

5.3.3 Moral argument: deterrence effect

The purpose of prosecuting grand corruption before the ICC is not so much retribution as *moral stigmatisation* of corruption, as is true for international criminal prosecutions in general.¹⁷⁴ A criminal trial before the ICC implies a strong *moral condemnation* and *universal disapproval* of acts of grand corruption and creates a powerful message that the so-called international community does not tolerate corruption with tremendous repercussions. Grand corruption can no longer be dismissed as a peccadillo; impunity for grand corruption is no longer accepted.¹⁷⁵

The basic assumption and hope is that this special stigma has a strong deterrent effect not only on *individual* (potential) *perpetrators* who may thus take the possibility of criminal prosecution by the ICC into account in their cost-benefit analysis. In addition to that, this

¹⁷¹ Cassese A ‘Reflections on International Criminal Justice’ (1998) 61 *The Modern Law Review* 7.

¹⁷² Organs of international criminal justice do not act in a political vacuum either; the President of the Court Judge Song put it as follows: ‘The Court is a judicial institution operating in a highly political environment.’, see Moreno-Ocampo L, ICC Prosecutor, Keynote Address, Council on Foreign Relations, 4 February 2010 6 available at <http://www.cfr.org/courts-and-tribunals/prepared-remarks-luis-moreno-ocampo-prosecutor-icc/p21375> (accessed 26 October 2013).

¹⁷³ The argument of less politicization may to a lesser extent also be applied to highly politicised domestic corruption trials after an overthrow of a regime in a transitional phase. These trials are often accused of not taking fair trial rights particularly seriously, but serving a political agenda, namely to fulfil the purpose of legitimizing the new regime and even to try to divert the public by shortcomings of the new regime, as recent trials against former heads of States in the aftermath of the ‘Arab Spring’ evidence.

¹⁷⁴ Cassese A ‘International Criminal Justice Mechanisms: are they really so needed in the present world community?’ lecture at London School of Economics, 13 November 2000 15 available at www.lse.ac.uk/humanRights/articlesAndTranscripts/Casseelse.doc (accessed 26 October 2013).

¹⁷⁵ ICTY *The Prosecutor v. Kupreškić et al.*, Judgment of 14 January 2000, Trial Chamber para 848: ‘[A]nother relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes...’ (emphasis added).

special stigma may also make *foreign companies*, as potential bribers, and *international banks*, as potential hiding places for the proceedings of corruption, which may both be concerned about their reputations, and thus more cautious with whom and under what conditions they do business. The resulting preventive impact should not be underestimated, since without the involvement of foreign companies and banks most instances of grand corruption could not be committed. Even if the ICC fails to enforce its warrant of arrest and the accused cannot be captured, the mere indictment can potentially already prevent the accused from committing further acts of grand corruption, since aforementioned international economic actors will be very keen to not be associated with the political leader indicted by the prosecutor of the ICC. This in turn dries up potential sources of bribes and limits tremendously the options of hiding places for the proceeds.¹⁷⁶ In this regard, the ICC could *interfere with ongoing grand corruption cases and effectively stop further wrong*.

In conclusion, the special stigma associated with international criminal prosecutions has the potential to make a decisive contribution to the fight against grand corruption.

5.3.4 Practical argument: cooperation with States Parties

Lastly, a practical argument in favour of internationalisation of criminal prosecutions can be advanced: International criminal courts, and more particularly the ICC, are *better equipped to investigate crimes* which are not limited to the territory of one State, but *cross various State borders*, as a consequence of which witnesses are based in different countries and gathering of evidence necessarily requires cooperation by various States.¹⁷⁷ To the extent that the concerned States are States Parties to the Rome Statute, they are under the obligation to ‘cooperate fully with the Court in its investigation and prosecution of crimes’¹⁷⁸ which is why the prosecutor of the ICC can arguably investigate cross-border crimes more easily than his or

¹⁷⁶ Starr (2007) 1288.

¹⁷⁷ Cassese (2008) 439 makes this point in favour of international criminal justice in general.

¹⁷⁸ See the general rule in Article 86 Rome Statute; the specific situations are set out in the following articles in Part 9 of the Statute.

her domestic counterparts, which all too often face various obstacles and little cooperativeness when requesting mutual legal assistance.¹⁷⁹

In fact, most instances of grand corruption have such a transnational character: either the origin of the money can give grand corruption an international dimension, in particular if the briber is, as is often the case, a foreign multi-national company; or alternatively the hiding place of the proceeds of grand corruption, which are often transferred into private accounts located in foreign jurisdictions, renders the crime a cross-border crime.

5.3.5 Concluding remarks on advantages of internationalisation of criminal prosecutions

As a matter of course, internationalisation of criminal prosecutions is no panacea for the fight against impunity for *any* crime. Yet, it has been argued that internationalisation of criminal prosecution of grand corruption can indeed remedy several *legal and political deficiencies* intrinsic to national systems of criminal justice. In particular, where the concentration of power in certain persons within a State is the greatest, the more likely— due to de jure or de facto immunity – is the failure of the national systems of criminal justice to (effectively) do justice, and the more warranted and necessary are international criminal prosecutions. This shows that the limitation of a potential crime of corruption to high-level officials is pertinent and sound. In addition, moral and practical arguments speak in favour of internationalisation of criminal prosecutions of grand corruption.

5.4 Legal framework of the ICC: appropriate for fight against corruption?

The general advantages of internationalisation of criminal prosecutions aside, the specific legal framework of the ICC is to be analysed as to its appropriateness for fighting grand

¹⁷⁹ However, it must be noted that the ICC Prosecutor ultimately also depends on the willingness of States Parties to comply with their obligations to cooperate, as the current situation in Kenya evidence. The Prosecutor has no legal powers to force cooperation. The Court may refer the matter for further action to the Assemble of States Parties, see ICC ‘Understanding the International Criminal Court’ available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 26 October 2013).

corruption. Two aspects will be discussed in turn: the jurisdictional ambit of the ICC and the ICC's capacity to bring adequate justice to victims.

5.4.1 Appropriate Jurisdiction: only in the absence of national efforts

The principle of complementarity,¹⁸⁰ according to which international jurisdiction does not replace, but simply supplements national jurisdiction, is a particularly adequate response to the major shortcoming of existing anti-corruption law, namely the assumption that States would necessarily take action in instances of grand corruption. Only in situations in which this basic assumption proves to be erroneous and the State concerned fails – for want of either ability or willingness – to investigate and prosecute instances of grand corruption, would a case be admissible before the ICC. In the absence of political will in the victim State to hold perpetrators of grand corruption accountable, the ICC Prosecutor may initiate a proceeding *proprio motu*.¹⁸¹ Thus, it is fair to argue that the jurisdictional provisions of the ICC are particularly apt to close the 'accountability gap', which only appears if the national system fails. In addition, it can be hoped that the complementarity principle will de facto incentivise States to create effective domestic remedies for grand corruption cases in order to avoid the surrender of their own nationals to the ICC.

5.4.2 Appropriate financial provisions and remedy for victims

Furthermore, there are several provisions in the Rome Statute, which are particularly suited to fighting grand corruption and delivering justice to victims of economic crimes.

As soon as a warrant of arrest or summons has been issued, the Pre-Trial Chamber can request States take 'protective measures', such as the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, for the purpose of

¹⁸⁰ Article 17 Rome Statute.

¹⁸¹ As long as grand corruption is not recognised as a crime under international law, it will be hard to argue that impunity for grand corruption entitles the Security Council under Chapter VII UN Charter to refer a situation to the ICC, pursuant to Article 13(b) Rome Statute.

forfeiture, in particular for the ultimate benefit of victims.¹⁸² Thereafter, the Rome Statute is not limited to imprisonment as applicable penalty, but encompasses fines¹⁸³ and ‘forfeiture of proceeds, property and assets derived directly or indirectly from [the] crime [the defendant got convicted for]’ as conceivable penalties¹⁸⁴. Once the defendant is tried and convicted, the Court can order the transfer of assets collected through fines or forfeiture into the Trust Fund for Victims¹⁸⁵ which may then implement awards of reparations.¹⁸⁶

Albeit drafted for the existing core crimes, all these provisions can be of utter importance and are arguably even more appropriate in proceedings based on charges of grand corruption. For victims of the crime of grand corruption pecuniary compensation is a particularly adequate remedy, since the economic nature of the remedy corresponds with the nature of the crime, whereas victims of the existing core crimes may conceive money as inappropriate ‘blood money’ and even as insulting.¹⁸⁷ Compared to the existing core crimes, in the case of grand corruption, pecuniary compensation has the potential to undo to a much greater extent the harm caused. The return of assets looted by corrupt officials to the country of origin may make a considerable contribution to the welfare of its citizens and thus may even have a more noticeable and a more concrete impact on citizens of the victim State than the criminal verdict itself. Moreover, in cases of grand corruption which involve per definitionem considerable

¹⁸² Article 57(3)(e) in conjunction with Article 93(1)(k) Rome Statute. For example, in the issuance of an arrest warrant for Thomas Lubanga, these provisions were made use of, ICC *The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, Pre-Trial Chamber I 10 February 2006 para 141. The Pre-Trial Chamber has identified in para 36 the reparation scheme provided for in the Rome Statute as ‘one of the Statute’s unique feature’ and as ‘key feature’. In the case of Gaddafi, Italy seized assets valued at US\$ 1.5 billion upon request by the ICC, see AFP ‘Harley Davidson among seized Gaddafi assets: Italy seizes family assets valued at \$1.5bn, including stakes in Juventus and UniCredit, following request from ICC.’ *Al Jazeera* 29 March 2012 available at <http://www.aljazeera.com/news/europe/2012/03/201232916563443501.html> (accessed 26 October 2013).

¹⁸³ Article 77(2)(a) Rome Statute. Pursuant to Rule 146 (1) of the Rules of Procedure and Evidence, the Court shall give due consideration to the financial capacity of the convicted person.

¹⁸⁴ Article 77(2)(b) Rome Statute.

¹⁸⁵ The establishment of the Trust Fund for Victims is based on Article 79 (1) Rome Statute and COSP UNCAC Resolution 6 (2012); see <http://www.trustfundforvictims.org/> (accessed 26 October 2013).

¹⁸⁶ Article 79(2) Rome Statute; see also Rule 98 of the Rules of Procedure and Evidence. Alternatively, the Court can, pursuant to Article 75(2) Rome Statute, theoretically also issue an order against the convicted person to pay appropriate reparations directly to victims. However, in cases of grand corruption, victims can, if at all, not be identified without further ado.

¹⁸⁷ Starr (2007) 1295 et seq.

amounts of money, it is much more likely that these provisions are in fact relevant in practice and money is indeed distributed to the victims.

The ICC's legal powers to freeze and forfeit assets can remedy many of the shortcomings in the current system of inter-State asset recovery procedures identified above¹⁸⁸: effective asset recovery will in cases of grand corruption no longer depend on the presence of political will in the victim State; asset recovery will arguably no longer founder on a lack of human, technical, and material capacity. In addition, States hosting assets deriving from grand corruption will most likely be more willing to cooperate with the ICC than with the government of the victim State, since a transfer to the Trust Fund for Victims would not face the abovementioned political obstacles.¹⁸⁹ These advantages are particularly relevant in instances where the victim nation is still governed by a corrupt regime, since in these instances successful asset recovery and ultimately legitimate use of the assets recovered are highly unlikely.

In conclusion, the ICC is particularly vested with legal powers to overcome several shortcomings of UNCAC, as far as asset recovery is concerned, and to deliver a meaningful remedy to victims of grand corruption.

5.5 Trivialisation of the ICC or coherent expansion of international criminal law?

One may argue that the incorporation of the crime of grand corruption in the Rome Statute harbours the risk of trivialising the ICC and of reducing the ICC's standing and reputation¹⁹⁰, since the crime of grand corruption may appear far less blameworthy than the existing core crimes which usually involve the direct spilling of blood, whereas corruption is occasionally –

¹⁸⁸ See above 3.5.2.

¹⁸⁹ See above 3.5.2. However, if assets are located in the victim State itself which is unwilling or unable to fight grand corruption, the ICC can do very little, as the situation of Kenya evidences, in which Kenya failed to comply with the request to identify and freeze assets of the four Kenyans suspects, pursuant to Article 93(1)(k) Rome Statute; see the legally untenable stance adopted by Kenya's Attorney General Githu Muigai, <http://www.capitalfm.co.ke/news/2013/01/freezing-of-assets-for-icc-suspects-premature-muigai/> (accessed 26 October 2013).

¹⁹⁰ This concern was raised by some participants at the Rome Conference with regards to the inclusion of drug crimes, Schloenhardt A 'Transnational Organised Crime and the International Criminal Court: Developments and Debates' (2005) 24 *University of Queensland Law Journal* 117.

unjustly¹⁹¹ – even referred to as ‘victimless’ crime. It would be correct to argue that traditionally international criminal law has hitherto focused on situations of organised violence and on violations of political and civil rights¹⁹², which in turn explains the widespread reluctance to put grand corruption on an equal footing with genocide, crimes against humanity, war crimes and crimes of aggression.

However, the following aspects indicate that the inclusion of grand corruption would not necessarily lead to a systematic inconsistency within the Rome Statute. Firstly, existing international criminal law does, even if rarely, encompass *conduct which is not necessarily violent*, such as, for instance, apartheid or persecution¹⁹³, both sub-categories of crimes against humanity. Hence, the absence of physical violence is not completely foreign to international criminal law and is thus no compelling systematic argument against the inclusion of grand corruption.

Secondly, the historic origins of international criminal law lie in *State-sponsored crimes*; and still today, State involvement is the rule.¹⁹⁴ Grand corruption – as defined within this research paper and thus limited to the public sector – indeed requires *per definitionem* the involvement of public officials working in the highest echelons of a State. The *abuse of State power* is pivotal for the commission of both the majority of existing core crimes and the crime of grand corruption. In the case of the latter, abuse of public power is integral to the working definition within this paper. Hence, it is fair to argue, from a point of view of criminal phenomenology, that the State-sponsored character of grand corruption renders the inclusion of the crime into the Rome Statute coherent.

¹⁹¹ Vlassis (2012) 62.

¹⁹² According to Werle (2009) para 375, the connection to such context of organised violence is what makes an ordinary crime a crime under international law. Starr (2007) 1258 calls this a ‘crisis focus’.

¹⁹³ At least this is so under customary international law, whereas the Rome Statute requires a connection with any other act listed in Article 7(1) Rome Statute; Werle (2009) 898.

¹⁹⁴ Werle G & Burghardt B ‘Do Crimes Against Humanity Require the Participation of a State or a ‘State-like’ Organization?’ (2012) 10 *Journal of International Criminal Justice* 1161.

Lastly, the current Rome Statute focuses admittedly on *violations of political and civil rights*, whereas discrete *economic crimes* resulting in poverty and causing the violation of social and economic rights are not (yet) covered by the Rome Statute. In this regard, the inclusion of grand corruption appears indeed alien to the present system of the ICC. Yet, here, too, socio-economic concerns are not completely foreign to the Rome Statute, since war crimes (Article 8 Rome Statute) include various conducts violating social and economic rights, such as starvation of civilians, albeit only in the context of armed conflict.¹⁹⁵ Furthermore, critics increasingly challenge the existing privilege of civil and political rights over social and economic rights and demand that international criminal law should progressively address socio-economic abuses as well.¹⁹⁶ An expansion of the jurisdiction to the economic crime of grand corruption could be a first step in this direction and would reflect a modern holistic¹⁹⁷ understanding of protection of human rights which acknowledges the strong interdependence of both generations¹⁹⁸ of human rights.

In conclusion, commentators may very well be reluctant to accept the reasoning of this paper, due to the concern that including economic crimes, in principle, would *water down the Rome Statute*. However, a fairly strong argument can be made that the ICC's jurisdiction over the

¹⁹⁵ Van den Herik L *Economic, Social, and Cultural Rights - International Criminal Law's Blind Spot?* (2013) 9 et seq. available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274653 (accessed 26 October 2013); Schmid E 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) 71 *Heidelberg Journal of International Law* 523 et seq.

¹⁹⁶ For instance, Skogly SI 'Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?' (2001) 5 *The International Journal of Human Rights* 58 et seq. argues that 'focusing on civil and political rights only is an arbitrary distinction for the victims of atrocities'. Also the discourse of transitional justice is increasingly in flux: Only recently, transitional justice started to address accountability for economic crimes generally and corruption more particularly; see, for instance, Carranza R (2008) 310 et seq., Laplante LJ 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 *The International Journal of Transitional Justice* 331. In practice, the recently published report by the Truth, Justice and Reconciliation Commission in Kenya reflects this tendency, Report Volume IIB 343 et seq. available at http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238 (accessed 26 October 2013).

¹⁹⁷ See UNHCR 'Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?' available at <http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx>. (accessed 26 October 2013).

¹⁹⁸ Political and civil rights are often referred to as 'first generation' rights as opposed to 'second generation' social, economic and cultural rights, see Vasak K 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights' (1977) 30 *UNESCO Courier* 29.

crime of grand corruption would – in spite of its arguably lesser degree of blameworthiness – be a *coherent expansion* of international criminal law.

5.6 Overload of the ICC due to limited resources

Limited resources and capacities¹⁹⁹ of the ICC militate, prima facie, blatantly against any expansion of its jurisdiction.²⁰⁰ In this respect, it should be noted, first of all, that limited resources of the ICC require a limitation of a potential jurisdiction over grand corruption to *the most serious cases*.²⁰¹ Secondly, in purely arithmetical terms, prosecuting grand corruption cases involving billions of US\$ can potentially be economically advantageous for the victim nation, if there is a reasonable *chance to repatriate large part of the assets*. Thirdly, the inclusion of grand corruption to the Court's jurisdiction can be understood as a *strong political signal* which may even have a deterrent impact and further the fight against corruption, without a single case brought to trial before the ICC. Irrespective of these deliberations, limited financial and material means of the ICC remain indeed a valid argument against any extension of the mandate of the ICC.

5.7 Concluding remarks on the ICC and corruption de lege ferenda

Admittedly, jurisdiction for the ICC over the crime of corruption is, as a matter of course, no 'miracle cure' in the fight against grand corruption. But the preceding arguments indicate that such inclusion can *usefully complement* the myriad efforts to tackle corruption and has much to commend it. Extending the jurisdiction of the ICC to grand corruption would *close various gaps* in the existing international legal framework. It has the potential to deter important economic players from doing business with notoriously corrupt leaders and stop corrupt activities. Moreover, the ICC would be able to hold powerful leaders responsible for the most

¹⁹⁹ The first eleven years of existence of the ICC have evidenced that its capacity is limited to investigate and to prosecute very few cases only. Given that after more than ten years there has still not been a single final conviction, the previous practice and performance of the ICC has left many observers rather disappointed. The only trial chamber judgment in the Lubanga case is currently still on appeal.

²⁰⁰ UN Doc. A/AC.249/1 para 72: 'drug trafficking [is] ... 'of such a quantity as to flood the court'.

²⁰¹ The Rome Statute indeed already contains a gravity threshold: Article 17(1)(d) and Article 53(1)(b) of the Rome Statute all provide the prosecutor with discretionary powers to not investigate cases which are 'not of sufficient gravity to justify further action by the Court'.

egregious acts of grand corruption when national institutions fail. Lastly, the ICC's jurisdiction over grand corruption can make a considerable contribution to the repatriation of proceeds of corruption which are urgently needed for the victims of grand corruption.



CHAPTER 6: GUIDELINES FOR A POTENTIAL CRIME OF GRAND CORRUPTION

The question of how to define the elements of a potential crime of grand corruption remains. Further research needs to be done to determine precise contours of a crime of grand corruption. This paper does not aim to propose the concrete wording of a potential crime. However, the following issues and guidelines can be addressed.

1. Only a very *restrictively and carefully defined* crime of grand corruption limited to the most egregious acts can, on the one hand, fulfil the requirements of the principle of *nullum crimen sine lege*²⁰² and, on the other hand, offer a reasonable prospect of being accepted by States Parties and of ultimately being agreed upon.
2. It is to be decided whether grand corruption is included as a *sub-category of crimes against humanity*²⁰³ or as a *discrete crime*. The former variant would ensure a particularly high degree of consistency with the existing core crimes, since the chapeau of Article 7 Rome Statute would require the presence of the contextual element²⁰⁴ ‘widespread or systematic attack directed against any civilian population’. The latter variant would indeed require further research to elaborate a specific and appropriate contextual element for the crime of grand corruption and may insofar be better suited to take into consideration the specificities of economic crimes.
3. A *clear demarcation* between grand corruption as a crime within the jurisdiction of the ICC and ‘ordinary’ corruption which is to be dealt with by the national criminal justice systems is

²⁰² See Werle (2009) para 104.

²⁰³ For instance, the then Minister of Justice & Constitutional Affairs of the Republic of Kenya Kiraitu Murungi, at the 11th International Anti-Corruption Conference in South Korea, argued that grand corruption should *de lege ferenda* be a crime against humanity, ‘When Corruption Is A Crime Against Humanity’ available at http://iacconference.org/documents/11th_iacc_plenary_When_Corruption_Is_A_Crime_Against_Humanity.doc (accessed 26 October 2013): ‘Because corruption has inflicted untold pain and suffering on our people and should be condemned by humanity. Indeed, corruption for many of us falls in the same league as rape, torture, genocide and other crimes against humanity that rob us of our most essential dignity.’

²⁰⁴ See Werle (2009) paras 375, 792.

essential. The foregoing line of reasoning to legitimise the internationalisation of criminal prosecution, namely the effect of *promoting the commission of existing core crimes* on the one hand and the *exceptional economic consequences*, necessitates a sound limitation of the elements of a potential crime to situations where these effects in fact occur or at least threaten to occur. It is necessary that such a limitation excludes instances of corruption in which a mere distortion of free competition is at stake. This can be achieved through the inclusion of a *threshold element* such as conceivably ‘causing considerable prejudice to the national public budget’ or ‘causing a considerable prejudice to the national economy’.²⁰⁵ Another option is to be guided by the proposal by Trinidad and Tobago which intended to limit the ICC’s jurisdiction over drug trafficking to acts ‘pos[ing] a threat to the peace, order and security of a State or region’²⁰⁶. The challenge for the drafters in this regard will be to satisfy the requirements of the principle of legality.²⁰⁷ At first glance such threshold element seems to be discriminatory, since only cases involving public officials in economically weak and poor States will in all likelihood ever meet these criteria, and thus could render the proposed crime a crime for ‘third world leaders’ only. However, such an element is consistent: the decisive factor for the involvement of the ICC should ultimately be the suffering of victims – either as victims of the existing core crimes or of rampant poverty caused by grand corruption. Indeed, misappropriation of the exact same amount of money may in fact have very different repercussions in different economic circumstances: misappropriation of US\$ 1 billion in Equatorial Guinea may indeed amount to a crime which legitimises internationalisation of criminal prosecution, whereas misappropriation of US\$ 1 billion out of the State coffers of the United States remains an ordinary economic crime which is to be investigated and prosecuted by the US national criminal justice system.

²⁰⁵ Alternatively, drafters may be guided by the Preamble (3) UNCAC which speaks of ‘vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States’.

²⁰⁶ See note 141.

²⁰⁷ See Broomhall (2003) 35 et seq.

4. It is to be decided which *forms of corruption* are encompassed. Passive bribery and diversion enjoy a mandatory character under UNCAC and are thus arguably the least controversial forms of corruption for which a consensus would be most likely and moreover, these forms do cover most instances of grand corruption.

5. While this paper argues in favour of a limitation of potential perpetrators to the *powerful high-level officials*, closer analysis is warranted to determine precisely this circle of potential perpetrators. In this regard it must also be clarified, whether persons beyond the circle of potential perpetrators, such as persons involved in the laundering of the proceeds of grand corruption, can be held liable for secondary participation in the commission of the crime.



CHAPTER 7: CONCLUSION

This paper concludes by giving a short résumé of substantial findings and by providing an outlook on the political feasibility of the matter of this paper. It intends to consider how likely it is for States to ultimately make the *political* decision to bestow jurisdiction on the ICC for the crime of grand corruption.

1.1. Résumé

Chapter 2 has elaborated the notion of corruption for the purposes of this paper and restricted the ambit of the concept to grand corruption in the public sector.

Thereafter, Chapter 3 has pointed out several significant shortcomings and deficiencies of the existing international legal framework for grand corruption. It has been argued that due to legal and factual reasons perpetrators of grand corruption may very well escape national criminal justice. The chapter has concluded that, if national systems fail to tackle grand corruption, UNCAC will fail to deliver surrogate remedies and leaves open an accountability gap.

Chapter 4 has then shown that, under the Rome Statute as of now, the ICC lacks legal powers to close the accountability gap left open by UNCAC – except for some very limited special cases. Nevertheless the ICC can shed light, the paper suggests, on corrupt practices insofar as they are interrelated with the commission of core crimes.

Chapter 5 has argued that it is conceivable to confer the ICC jurisdiction over treaty-based crimes. Irrespective of whether the crime of grand corruption can be conceptualised as a crime under international law, it can be subject to amendment. Thereafter, it has been argued that international prosecutions of the crime of grand corruption by the ICC can essentially be legitimised on the basis of two deliberations: first, the strong nexus to the commission of the existing core crimes and secondly, the disastrous economic consequences leading to poverty and ultimately causing considerable suffering. The subsequent discussion has evidenced the following:

- (a) The manifold advantages of internationalisation of criminal prosecutions in general apply in particular to prosecutions of the crime of grand corruption.
- (b) Also the specific legal framework of the ICC is particularly apt for dealing with grand corruption cases.
- (c) The inclusion of grand corruption is not so much a trivialisation of the ICC and alien to the existing system as a progressive and coherent amendment.

By contrast, the risk of overloading the ICC and current challenges the ICC faces may speak against a hasty inclusion of the crime.

Lastly, the previous chapter has shown that many questions as to the elements of a potential crime of grand corruption within the jurisdiction of the ICC still remain unanswered and warrant further research.

1.2. Outlook

Whether the crime of grand corruption will ever find its way into the Rome Statute is completely uncertain. Given that grand corruption has still not reached the same condemnation as the existing core crimes – despite deserving it – achieving the necessary two-thirds majority at a meeting of the Assembly of States Parties or at a Review Conference²⁰⁸ and ultimately achieving the ratification by States Parties is, as matters stand today, arguably not so much a realistic scenario for the near future as it is political wishful thinking. Considering the current harsh criticism from many African States challenging the ICC's legitimacy, the time may not yet be ripe for the ICC to enter legally uncharted and politically controversial territory.

However, two potential *causes for optimism* may be identified: First, with reference to the crime of aggression, many scholars and representatives of States had considered a consensus on the definition of the crime as completely unrealistic and yet the first Review Conference in

²⁰⁸ Article 121(3) Rome Statute.

2010 has proven these pessimists to be wrong in the end. In this context, however, it must be remembered that Article 5(2) Rome Statute (old version) contained an express mandate to define the crime of aggression and to set out the conditions for exercising jurisdiction over the crime, whilst the fundamental decision to grant the ICC jurisdiction over the crime of aggression had already been made in Rome in 1998. Therefore, the success story of the consensus obtained on the crime of aggression cannot directly be compared with the obstacles of the inclusion of an entirely new crime.

Secondly, the rapid and impressive genesis of international anti-corruption law may offer another reason for optimism. When Transparency International was founded 20 years ago as a small organisation with the aim to ‘stop corruption and promote transparency, accountability and integrity’²⁰⁹, bribing foreign officials was in many European countries still tax-deductible and thus even ‘government-sponsored’. At that time, it must have been completely illusory for the founders of Transparency International to predict the uprising of the global anti-corruption consensus culminating in a legally binding universal convention. It is similarly unknown what the international anti-corruption law will look like 20 years from now. Perhaps the ICC would have convicted the first perpetrators of grand corruption by then.²¹⁰ However, it must be pointed out that the US government was instrumental in placing corruption on the international agenda, initially in the 1990s in order to remedy a competitive disadvantage resulting from its pioneering role with the adoption of the FCPA. In the last century the US government played a crucial role in urging States to sign and ratify UNCAC, this time strongly motivated by the desire to combat terrorism²¹¹, since corruption can indeed potentially promote terrorism. For an amendment to the Rome Statute, however, a similar

²⁰⁹ See http://www.transparency.org/whoweare/organisation/mission_vision_and_values (accessed 26 October 2013).

²¹⁰ Indeed, in its Strategy 2015, TI goes beyond its aim to raise awareness of the damaging effects of corruption and aims at tackling impunity for corruption, see Transparency International ‘Strategy 2015’ available at http://www.transparency.org/files/content/ourorganisation/TI_Strategy_2015.pdf (accessed 26 October 2013).

²¹¹ See US Senate Executive Report 109-18 (2006) available at <http://www.gpo.gov/fdsys/pkg/CRPT-109erpt18/html/CRPT-109erpt18.htm> (accessed 26 October 2013).

stance by the US government which is notoriously critical towards the ICC can arguably not be expected. Without such political backing from an influential State, obtaining an international consensus will be a much more onerous and protracted task. Thus, both potential causes for guarded optimism remain flawed.

Therefore, it would clearly be overly sanguine to expect an amendment of the Rome Statute at the next Review Conference. However, international criminal law is and will most likely remain a dynamic and evolving field of law, which had its renaissance only twenty years ago and has thus, as it stands at present, come of age only recently.

In the meanwhile, the ICC can potentially make a considerable contribution to the international fight against corruption by shining a light on the nexus of core crimes and corruption and thereby creating more awareness for the blameworthiness of the potential ramifications of corruption. Corruption is not limited to a distortion of the free market, but can indeed be instrumental and pivotal in the commission of ‘the most serious crimes of concern to the international community as a whole’. The independent judges sitting at the ICC can bestow authority and credibility on this message.

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