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**IS THE ESTABLISHMENT OF THE
INTERNATIONAL ANTI-CORRUPTION COURT
A GLOBAL ANSWER TO THE GLOBAL
CHALLENGE OF CORRUPTION?**

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Abstract

Impunity and the transnational nature of grand corruption have wide-ranging effects: it leads to significant economic losses, weakens the legitimacy of democratic institutions and undermines the enjoyment of human rights. Establishing accountability is often difficult in countries ruled by kleptocrats who control the administrative and justice system seek to forestall any free and independent investigations for their wrongdoings, thus fueling a never-ending vicious cycle of a *de facto* impunity. In light of such devastating consequences, several initiatives have been taken at an international, regional and national level in order to curb corruption.

This thesis argues that grand corruption can be effectively addressed through the establishment of an International Anti-Corruption Court. While being certainly an ambitious proposal, only an independent international institution would pressure countries into prosecuting and holding powerful political leaders accountable.

However, there are obstacles to the creation of the IACC, such as the voluntarily acceptance on the part of States of the IACC's, or issues concerning the cost-effectiveness of the project.

A number of approaches to combating corruption are underway and others have been proposed. This thesis seeks to show the potential of the IACC and how some criticism could be addressed.

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List of Abbreviations

ALAC	-	Advocacy and Legal Advice Center
CESCR	-	Committee on Economic, Social and Cultural Rights
CICIG	-	International Commission Against Impunity in Guatemala (Comision Internacional contra la impunidad en Guatemala)
GOPAC	-	Global Organization of Parliamentarians Against Corruption
ICC	-	International Criminal Court
IACC	-	International Anti-Corruption Court
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
III	-	Integrity Initiatives International
IMF	-	International Monetary Fund
OECD	-	Organization for Economic Development and Organization
OHCHR	-	Office of the High Commissioner of Human Rights
SDG	-	Sustainable Development Goals
TI	-	Transparency International
UN	-	United Nations
UNCAC	-	United Nations Convention Against Corruption
UNGA	-	United Nations General Assembly
UNGASS	-	United Nations General Assembly Special Session
UNODC	-	United Nations Office on Drugs and Crimes
UNSC	-	United Nations Security Council

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INTRODUCTION

General background

This thesis seeks to investigate the relationship between corruption and human rights and to explore new perspectives in the global fight against corruption. Indeed, public corruption is endemic at the highest levels of government in several countries throughout the world. Though corruption has not been conceptualized as a violation of human rights *per se*, it is difficult to see any other crime resulting in more victims globally than corruption of this kind, which is often referred to as “grand corruption”. By diverting stolen public resources, that could otherwise be invested more fairly, for instance, in education, health programs or infrastructure, corruption has huge repercussions on the economic growth and general welfare, undermines the stability and legitimacy of democratic institutions and lead to massive violations of human rights. As Anne Peters has underlined “it is a fact that states with a high corruption rate are the same time those with a poor human rights record”.¹ They thrive in the same environment since they presumably have the same root causes, such as poverty and weak institutions.

In light of the abovementioned destructive effects and in the recognition that corruption has become a cross-border problem, several initiatives have been taken at an international, regional and national level to think of effective solutions. However, despite the efforts made so far by both international organizations and States, grand corruption still constitutes a global challenge which requires a strong, global response.

Research question

More specifically, the aim of this work is to examine the ambitious proposal put first forward by US District Judge Mark L. Wolf, according to whom endemic corruption could be addressed only through the establishment of a new independent supranational Court, namely the

¹ Anne Peters, “Corruption as a violation of international human rights” (2018), *European Journal of International Law*, 29(4), pp. 1251-1287.

International Anti-Corruption Court (IACC). According to Judge Wolf, the IACC could be modeled after the International Criminal Court and function on the principle of complementarity, which means that it would intervene only in case a country is unwilling or unable to hold powerful senior figures domestically accountable for their crimes.

As a matter of fact, ample evidence from throughout the world demonstrates that corruption does not endure because of a lack of laws. On the contrary, the extant international norms against corruption have so far yielded only modest success. For instance, the United Nations Convention Against Corruption has more than 187 signatory parties and all of them have domestically enacted laws criminalizing different forms of corruption. However, corrupt government officials, kleptocrats, often yield their control over police, prosecutors and courts in the countries they rule, thus impeding the honest and free investigation and prosecution of their crimes. The unwillingness to enable the prosecution of grand corruption results in a vicious circle of impunity which could reasonably be broken only thanks to an external, supranational institution, provided with the capacity of holding political leaders accountable for their behavior and based on independent investigators, prosecutors and judges.

The recent developments bear witness of the fact that support and momentum are building for action: more and more States are showing an increasing willingness and commitment to invest public resources into the creation of the Court. However, the proposal still demands attention and closer examination. There is still significant and well-funded skepticism around the creation of the IACC and many scholars argue that a premature action regarding “an immature and underdeveloped proposal could have unintended negative consequences and the result be counterproductive”.² A scant literature on the matter reflects the physiological difficulties that arise with regard to the concrete functioning of the Court.

Research Methodology: motivation and materials

My thesis proposal originates from a general interest that I have been cultivating in my last academic years towards corruption-related problems. I come from a country, Albania, which after the fall of the communist regime has strongly suffered – and continues to do so – from corruption. Most of the challenges that the nation is still facing can be traced back to the

² Stuart S. Yeh, “APUNCAC and the International Anti-Corruption Court (IACC)” (2021), *Laws*, 10(1), 1, pp. 1-18.

diversion of public resources on the part of high-level government officials and political representatives at the detriment of the common good of the community.

Because the proposal of creation of the IACC is still in an early stage, the availability of resources and scholarship was also very limited. This has posed several challenges in terms of developing a detailed analysis of the Court, but it also encouraged an innovative and original approach based, on the one hand, on a comparative perspective with other similar institutions and, on the other, on a closer attention to the specific features of corruption, which reasonably require other forms of responses.

Consequently, the research methodology followed was primarily based on the few written contributions made by, *inter alia*, Judge Mark L. Wolf and Judge Richard J. Goldstone – the two biggest supporters of the need for the IACC – and other international criminal lawyers and anti-corruption experts.

Research work carried out on the matter by international organizations, such as Transparency International, Integrity Initiatives International and the UNCAC Coalition, was also relevant for the assessment of the feasibility of the Court, which remains understandably one of the main concerns – as it will be discussed more in depth in the thesis.

Likewise, resolutions and political declarations adopted by States in support of the creation of the Court were vital in understanding to what extent the project has been discussed. In particular, the Special Session of the UN General Assembly (UNGASS), held on the 2-4 June 2021, was called for with the specific aim to examine new and stronger approaches against corruption. During the UNGASS 2021, States reiterated their commitment to curbing corruption and their willingness to actively contribute to the establishment of the Court; moreover, they agreed to the creation of a Working Group which will be charged with dealing specifically with the creation of the IACC in the coming years.

Structure

The first chapter of the thesis seeks to provide a brief, general overview of the destructive impact of corruption on society and it focusses, in particular, on its detrimental effect for the attainment of human rights. It illustrates how corruption can affect not only social, economic and cultural rights – which have long been perceived as the most vulnerable category of rights to corruption-related problems – but also civil and political rights, and lately, also the rights of

third generation, meaning environmental and developmental rights. The fact that grand corruption can often represent the primary cause for the violation of such a wide range of rights sheds light on the need to work on innovative instruments which can effectively strengthen the human rights protection system.

The second chapter explains the reasons why an international, independent institution is needed in order to combat grand corruption on a global scale. First of all, it's worth recalling the important lessons that can be learnt from the creation of the International Criminal Court, such as the prosecutorial potential – thanks to the higher capacity of an international institution in terms of expertise and resources – and, most importantly, the social deterrence – supported by a strong evidence that an independent, supranational jurisdiction can *per se* compel observance of laws and conventions and end impunity. The chapter goes on explaining how specific features of corruption cannot be addressed relying exclusively on the internal jurisdiction of the countries. The need for a global response based on a universal jurisdiction can be better comprehended also in light of the partial ineffectiveness of the United Nations Convention Against Corruption, whose shortcomings are examined closer in a dedicated sub-paragraph. Finally, the chapter provides an explanation of the possible functioning mechanisms of the International Anti-Corruption Court: potential and useful points of reference could be the International Commission Against Impunity in Guatemala (CICIG) and, once again, the International Criminal Court.

The third and last chapter deals with the obstacles to the IACC project. A significant part of the skepticism concerning the creation of the Court revolves around its political feasibility and effectiveness, since it is reasonable to assume that corrupt political leaders who enjoy impunity thanks to the control they exercise over the judiciary system of their country will hardly agree to submit to the jurisdiction of the Court. Finally, the thesis tries to address and respond to part of the criticism, though knowing that, in order to overcome the abovementioned challenges, a lot of work and commitment on the part of the international community is still needed.

I CHAPTER

THE DEVASTATING EFFECTS OF CORRUPTION ON THE ENJOYMENT OF HUMAN RIGHTS

This first chapter is going to provide a brief introduction about the relationship between corruption and human rights, which I consider to be as one of the founding reasons for the need to set up an International Anti-Corruption Court.

Addressing corruption with a human rights-based approach has long been controversial and it is still subject to debate, as witnessed by a scant literature.³ As a matter of fact, the prevailing discourse on corruption tends to focus on its economic consequences, thus ignoring or not paying due consideration to the destructive impact it has on the practical enjoyment of human rights.⁴ It is no coincidence that so far human rights legal frameworks do not include either regional or international treaties and instruments specifically aimed at combating corruption.⁵

Nonetheless, lately more and more authors have started to mention the serious political, social and economic adversities that corruption causes to a nation and its population, which directly or indirectly result in massive violation of fundamental rights and freedom, both in developed and developing countries.

³ As for the relationship between corruption and human rights: Anne Peters, “Corruption as a violation of international human rights” (2018), *European Journal of International Law*, 29(4), pp. 1251-1287.

⁴ Berihun A. Gebeye, “Corruption and human rights: Exploring the relationships”, (2012) *Human rights & human welfare. A forum for work in progress. Working paper* (NO. 70).

⁵ Even the United Nations Convention Against Corruption (UNCAC), whose importance will be discussed at length further in the presentation, is not considered to part of the Human Rights International Framework.

The UN General Assembly Agenda 2030 for sustainable development of 2015 intends to “substantially reduce corruption and bribery in all their forms”⁶ and return all the stolen assets. Corruption has long been on top of the priorities.

I argue that establishing this link between human rights and corrupt practices not only is functional to the fight against corruption itself, but it also reinforces the protection and promotion system of fundamental human rights in general, by shifting the attention on those factors that most of the times trigger the emergence of circumstances where human rights violations flourish.

1.1 The impact of corruption as a cross-border phenomenon

Given the growing awareness of the cross-border nature of corruption, also partly on account of heightened media attention, several initiatives have been taken since the late ‘90 on a regional and global scale in order to tackle the phenomenon. As a matter of fact, since the mid-1990s, corruption has been placed on the international policy agenda as it was becoming an issue of major economic and political significance in many countries around the globe. These attempts resulted in the adoption of a number of multilateral agreements which were intended to find a common ground with respect to the best strategies to employ in order to systematically promote anti-corruption actions by identifying the root cause, regardless of the definition of corruption - upon which there is still little agreement.

Nevertheless, after more than twenty years of interventions and attention, both corruption and human rights violations appear to continue to flourish, even in countries that have been the target of substantial reforms, despite some signs of improvements.⁷ This is due to the fact that laws without enforcement or accountability mechanisms aimed at ensuring their effective implementation, are nothing but empty promises. One proposed solution, first made by US District Judge Mark L. Wolf⁸, is the establishment of an International Anti-Corruption Court (IACC) which would constitute a forum for the criminal enforcement of the laws prohibiting corruption in place in virtually every country and would ultimately erode the widespread

⁶ UNGA Res. 70/1 (25 September 2015).

⁷ Morten K. Andersen, “Why Corruption Matters in Human Rights”, (2018) *Journal of Human Rights Practice*, 10(1), pp. 179-190.

⁸ Mark L. Wolf is a US District Judge and he first suggested the establishment of an International Anti-Corruption Court as a possible effective answer to encounter corruption and the challenge of impunity.

culture of impunity as the first threat to democratic societies. However, the creation of an International Anti-Corruption Court as a potential global answer to the global challenge of corruption will be better studied in the second chapter of the thesis. First, a closer analysis on the consequences of corruption in general is necessary.

As already mentioned before, corruption doesn't have a legal definition in most international treaties. The only acknowledged and most common definition of corruption has been provided by Transparency International⁹, according to which corruption is the abuse of entrusted power for private gain. This abuse can manifest itself in two different ways: on the level of day-to-day administration and public service (petty corruption) or on the high level power that benefits the few at the expenses of many (grand corruption).

What is certain is that corruption can be very costly. It has been estimated that \$1 trillion is paid in bribes annually, and the cost of all forms of corruption amounts to more than 5% of global GDP.¹⁰ It is worth bearing in mind that these estimates might be even higher: as a matter of fact, the hidden nature of corruption does not allow for a precise and accurate evaluation of the effects in terms of financial losses. Public procurement, which is traditionally the economic sector most vulnerable to corruption, loses 13% of its budget.¹¹ In general, corruption may distort also the quality of the public services. This might occur in two different scenarios: when public investments are allocated to the sectors or programs that would best benefit the collectivity, but to those which offer the best prospects on the short run of personal advantage and enrichment for corrupt public officials; alternatively, when public servants are appointed on the basis of dynamics of favoritism and nepotism, instead of proven abilities and merits.

OECD research has shown that higher levels of corruption are associated with lower spending on social services, including health and education, which can undermine social welfare.¹² Moreover, the economic impact of corruption has been magnified by its increasing transnational dimension, as a direct consequence of an increasing global economy.

⁹ Transparency International is an international non-governmental organization working in over 100 countries which seeks to end corruption

¹⁰ These estimates are based on the UNODC, <https://www.un.org/press/en/2018/sc13493.doc.htm>.

¹¹ European Anti-Fraud Office (2017), *Public Procurement: costs we pay for corruption. Identifying and Reducing Corruption in Public Procurement in the EU*, PwCEU Services, https://ec.europa.eu/anti-fraud/sites/default/files/docs/body/pwc_olaf_study_en.pdf.

¹² OECD (2015), *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264230781-en>.

Democracy and Rule of Law are also significantly impacted by corruption. Both acts of petty and grand corruption are put in place by public officials serving the State and when they put their personal interests before the common good of society, the bond of trust with the society they are supposed to work is, is shattered. Corruption in political processes, such as elections or the financing of parties, undermine the rule of the people and thus the very foundation of a democratic society. If basic public services are not delivered to citizens due to distortion in the resources' allocation, the state eventually loses credibility.¹³

Corruption also creates a political climate in which organized crime and terrorist organizations thrive; in some cases, it even contributes to financing terrorism and creating inequalities that “disenfranchise communities and promote the development and growth of terrorist groups”.¹⁴ It is no coincidence that poor countries with weak institutions are the ones with widespread corruption. For example, drug lords operate easily in Mexico with the protection of corrupt officials, including law enforcement officers. Similarly, al Qaeda long found safe havens in countries characterized by corruption such as Afghanistan and Yemen.¹⁵ Similarly, illicit financial flows are increasingly associated with the illegal arms trade and drug trafficking, which arguably play also a significant role in the current refugee crisis by facilitating people smuggling.

1.2 Impact of corruption on the enjoyment of Human Rights

Finally, one of the most devastating consequence of corruption is the impact it has on the enjoyment of fundamental human rights and freedoms, as already mentioned before. In order to deeply understand how corruption affects them and how such violations can be attributed to the responsibility of the State, it is necessary to first explain its obligations towards the protection and the promotion of human rights.

¹³OECD (2016), *Putting an end to corruption*, <https://www.oecd.org/corruption/putting-an-end-to-corruption.pdf>.

¹⁴ OECD, *Ibid.*

¹⁵ Mark L. Wolf, “The World needs an international anti-corruption court”, (2014), *Daedalus*, 147(3), pp. 144-156.

States have always been considered the principal duty bearers for protecting and upholding human rights standards. Their responsibilities apply to every branch of the government and are threefold, namely the obligations to respect, to protect and to fulfil human rights¹⁶.

The obligation to respect means that “States must refrain from interfering with or curtailing the enjoyment of human rights, by depriving individuals of their ability to satisfy those rights by their efforts”.¹⁷

The responsibility to protect requires States to take active action in order to prevent violations of human rights and thus protect individuals against human rights abuses. Besides the preventive function, the responsibility to protect involves also the duties to “avoid or eliminate all the incentives to violate rights by third parties and to provide access to legal remedies once the violations have occurred”.¹⁸

Finally, the obligation to fulfil requires States to take measures aimed at facilitating and ensuring that people under their jurisdiction can actually enjoy human rights that they cannot secure by their own efforts. The UN Committee on Economic, Social and Cultural Rights divides this obligation in turn into the three subcategories of facilitate, provide and promote.¹⁹ All types of human rights give rise to these kind of obligations.

The State can fail to meet its obligations and prevent the occurrence of corrupt acts in two different ways. This might happen when the individual official puts in place a specific corrupt conduct which is then attributed to the State due to the official’s status; and when the State itself has not adopted a general anti-corruption policy. The deficient implementation, application and enforcement of effective anti-corruption regulations and measures is considered to be an omission by the State. Since all human rights give rise to the abovementioned obligations, and all of them require the State to be active and take the necessary measures to live up to its role, omissions constitute likewise violations of human rights. In particular, the adoption of an anti-corruption legislation might fall under the positive obligation to fulfil.

¹⁶ Samantha Besson, “The bearers of Human Rights’ duties and responsibilities: a quiet revolution?” (2015), *Social Philosophy and Policy*, 32(1), pp. 244-268.

¹⁷ Julio Bacio-Terracino, “Corruption as a violation of human rights”, (2008) *International Council on Human Rights Policy, Furthcoming*, pp. 1-36.

¹⁸ Julio Bacio-Terracino, *ibid*, p. 14.

¹⁹ This threefold division was introduced for the first time in UNHCHR, (CESCR) “General Comment No. 14”, (2000), para. 37.

When this happens, as said before, consequences of corruption can be devastating for the socio-economic fabric of a country and on its development, but also for the legitimacy of its democratic institutions; moreover inequality, poverty and social division are exacerbated and the attainment of human rights undermined. In fact, corruption and, in general, a mismanagement of public funds, represent a major obstacle to a just and fair allocation of resources to promote equal rights. Therefore, the existence of corruption in a State *per se* shows a failure to uphold the aforementioned responsibilities: it means that the State was not willing or able to enforce its human rights obligations towards the people living under its jurisdiction. As a matter of fact, anticorruption and protection of HR rest on accountable, representative governments committed to equality and transparency.

It needs to be said that a number of human rights violations have nothing or little to do with corruption.²⁰ However, there is a significant amount of other human rights, especially social and economic ones, which are often directly violated by corrupt practices.

There are scholars who are trying to reinforce this direct link between corruption and human rights, by reframing corruption as a human right issue. In particular, they say that a corrupt behavior constitutes *per se* a human rights violation, as they see in such reconceptualization a potential instrument which can contribute to closing the implementation gap of the international anti-corruption instruments.²¹ However, this new approach still presents a lot of shortcomings, especially with regard to the nexus between the violation and the corrupt act. Regardless of this new categorization - which is interesting and might actually enhance the capacity of the already existing instruments aimed at combating corruption - the impact of corruption on human rights is undeniable. The following provides a closer look at the range of human rights concretely affected by corrupt practices.

1.3 Which Human Rights are violated?

In most parts of the world “corrupt and human rights violations are experienced by people in their dealing with State institutions and local authorities as being interlinked, entangled and interdependent, systemic in character and closely associated with State processes and national

²⁰ Anne Peters, “Corruption as a violation of international human rights”, pp. 1251-1257.

²¹ For an in-depth discussion, see Anne Peters, *ibid.*

transformations and political configurations of power.”²² As Rose-Ackermann states, widespread corruption is a sign that something has gone wrong in the relationship between State and society²³. This is also confirmed by the fact that people involved in corrupt practices and human rights violations are often the same as well: corruption often benefits the elite minorities with access, money and expertise to manipulate institutions and processes of their own interest.

1.3.1 Social, economic and cultural rights

In order to make the connection clear, the following discusses some of the ways in which corruption interacts with human rights domains, thinking and practices and impedes their attainment. Let’s think, for instance, of a scenario where a professor employed in a public school lets students fail until they are willing to take private extra classes in order to pass the exams, even though the previous preparation was more than sufficient; or again, let’s imagine public officials who instead of investing public funds through fair and transparent procurement processes, accept bribes for their own purposes, assigning a public contract to a pharma company which freely sets medicine prices and makes them unaffordable for most of the people. We have respectively a violation of the right to the highest attainable standard of health and the right to education, both encompassed in a number of human rights treaties, first of all the International Covenant on Economic, Social and Cultural Rights (respectively art. 12 and art. 13). The right to education is crucial for the self-fulfillment and the development of the society as a whole, since it can enable the improvement of economic and social standards of disadvantaged groups.²⁴ Therefore, access to education should be free from any kind of discrimination based on corrupt behaviors. In light of the individual and collective importance of the right to education, according to the CESCR General Comment No. 13, State has the obligation to provide education that is available and has functioning educational institutions in sufficient numbers; to make it physically and economically accessible to everyone; to give it good quality and culturally acceptable; and to adapt it to the cultural and social context.²⁵

²² Morten K. Andersen, “Why Corruption Matters in Human Rights”, (2018) *Journal of Human Rights Practice* 10.1: pp. 179-190.

²³ Rose-Ackerman, Susan. *Corruption and development*. Routledge, 2017, pp. 104-107.

²⁴ Tristan McCowan, “Reframing the universal right to education” (2020), *Comparative Education* 46(4), pp. 509-525.

²⁵ CESCR, General Comment No. 13, E/C.12/1999/10.

As for the right to health, it is clear how the embezzlement of public resources intended for the health sector, violates the right to health to the entire society. Covid-19 has given ample evidence of that. A survey published by Transparency International's Advocacy and Legal Advice Centre (ALAC) shows that most of the reports issued to the organization by more than 24 countries²⁶ relate to patients paying bribes for PPE and Covid-19 tests.

Moreover, instances of theft and embezzlement of money, medicines and other medical equipment and supplies by frontline healthcare staff are widespread across the world. According to TI "the theft and resale of publicly-funded medicines, vaccines and medical supplies contributes to shortages and stock-outs, limiting public health surveillance and control, and restricting patients' access to adequate medical treatment. This ultimately results in further spread of coronavirus infections and poor health outcomes such as disability and death".

1.3.2 Civil and political rights

Economic, social and cultural rights are often considered to be especially susceptible to corruption. This is due to the fact that they are perceived to require more public investments by the State compared to civil and political rights, for which it is often thought that the State has merely to refrain from interfering with individual rights and freedoms. However, it is worth recalling that all categories of human rights can be realized only through the allocation of substantial public resources. For instance, in order to maintain the judicial, law enforcement and prison system, a considerable amount of resources is needed.²⁷ Therefore, waste and diversion of public funds due to corrupt can endanger also liberal rights, meaning civil and political ones.²⁸ If a prisoner has to give the guard something in exchange for food or other goods, then the prisoner's right to a humane condition or treatment is affected (Art. 10 of the International Covenant on Civil and Political Rights).

Likewise, the right to a fair trial (Arts. 14-15 CPPR) is another fundamental right, essential in safeguarding the rule of law, which can be highly eroded by corruption. The right to a fair trial is an inalienable right of every citizen and is protected when the independence, impartiality and integrity of the judiciary are guaranteed. If a citizen has to pay a bribe to have access to the

²⁶ It is surprising to notice how the complaints came from all around the world: the countries are located in Africa, Europe, Latin-America, the Middle-East, and South-East Asia.

²⁷ UNDOC, Module 7, *Corruption and Human Rights*, <https://www.unodc.org/e4j/en/anti-corruption/module-7/key-issues/overview-of-the-corruption-human-rights-nexus.html>.

²⁸ Anne Peters, "Corruption as a violation of international human rights" pp. 1251-1287.

judicial system or to speed up a court service, or even when it has to pay a judge to obtain a favorable judgement, not only he is deprived of one of his fundamental rights, but also the administration of justice as a whole is compromised and loses credibility. Given the centrality of the right to a fair trial, a further consideration is important: in a society where corruption is highly widespread, only a well-functioning justice system can safeguard the host of human rights by holding corrupt public officials accountable.²⁹

1.3.3 Impact on the third generation of Human Rights

While the focus revolves more around the violation of individual rights – first and second generation – encompassed respectively in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), more and more frequently also the attainment of collective rights (third generation), namely environmental and developmental rights, can be hampered by corruption. For instance, when the right to housing is affected by corruption, this could lead to a violation of the collective right to development of a given community.

Or again, when corrupt practices put in place by public officials lead to pollution, not only the individual right to the highest attainable standard of health is affected, but also the collective right to a clean environment³⁰. With regard to this last scenario, the SERAC (Social and Economic Rights Action Centre) and Another v. Nigeria case is very emblematic. As a matter of fact, the Nigerian military government, which was directly involved in oil production, let corruption negatively impact on the rights of the people of Ogoniland to freely dispose of their wealth and natural resources, thus ultimately impeding their right to live in a favorable environment³¹.

1.4 Nexus between corruption and the specific human right violation

We can identify three kinds of different links between corruption and human rights: direct, indirect and remote. Examples for the first link could be the practice of offering a bribe to a

²⁹ UNDOC, Module 7, Corruption and Human Rights, <https://www.unodc.org/e4j/en/anti-corruption/module-7/key-issues/overview-of-the-corruption-human-rights-nexus.html>.

³⁰ UNDOC, *ibid*.

³¹ Morne Van der Linde, Lirette Louw. “Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication: recent developments” (2003), *African Human Rights Law Journal*, 3(1), pp. 167-187.

judge with the aim of manipulating or controlling his assessments. As said before, this behavior leads to a violation of the right to a fair trial (Art. 6 ICCPR).

When corruption does not constitute a direct cause for the violation, but contributes to the chain of events ultimately leading to its occurrence, thus representing a *conditio sine qua non* for it, then the relationship between the two of them is indirect. This situation arises, for instance, when public servants in return for a bribe allow the importation of toxic waste from other places to residential areas of their own countries, letting this way the waste affect the right to health and life of the citizens.³² The bribery given to the public official did not itself violate any right, but it constituted the premise for the creation of the circumstances leading to the violation. It can be concluded that without this factor the violation wouldn't have occurred at all.

There are also situation where corruption is one of the multiple factors for the violation: there is, namely, a remote link between the two of them. This may occur during an electoral process where bribes given for the purposes of vote-rigging may not only jeopardize the whole reliability and accuracy of the final results, but also provoke social unrest and protests. The electoral fraud violates the right to political participation and the repression of social unrest could lead to serious violations of human rights. However, responding with violence to riots cannot be considered a direct consequence of electoral corruption, as it might depend on a lot of factors, *inter alia*, the social background or the government in charge.

Regardless of the degree of intensity and correlation of the link between the corrupt act and the specific human right violation, it is important, once again, to underline in how many different ways corruption can impact the enjoyment of human rights.

What is even more striking is the level of permeation of corruption of NGO's work operating in countries with high level of corruption. Which have to align, as integral part of the society, with corrupt practices and being involved in them.

³² Berihun A. Gebeye, "Corruption and human rights: Exploring the relationships", (2012) *Human rights & human welfare. A forum for work in progress. Working paper* (NO. 70), pp. 1-43.

1.5 Effectiveness of the measures taken by States to combat corruption

All the aforementioned examples so far have shown that corruption and human rights violations are manifestations of a phenomenon that has the same root causes and are produced by the same conditions of failing rule of law, inequality, oppression and opportunism by elite minorities.

As it has been noted by many scholars, grand corruption does not endure due to a lack of laws. 187 countries are Party to the United Nations Convention Against Corruption (UNCAC), which requires them to have laws criminalizing varying forms of corruption.

In light of the international obligations and of the domestic impact of corruption on human rights and economy, most countries in the world have already adopted anti-corruption legislations or have recently started to put in place preventive policies to better tackle the problem at its source.

However, the punitive – and recently the preventive - approach haven't always proved as a sufficient tool to adequately and effectively combat the phenomenon. In fact, its roots lie so deeply in bureaucratic and political institutions that the law alone does not necessarily reflect a real, political will of the State to contrast and eradicate the phenomenon. Furthermore, given the control that the political leadership often exercises over the judiciary system, holding public officials accountable for corrupt practices becomes practically impossible. Corrupt government officials – kleptocrats – wield their control over police, prosecutors, and courts in the countries they rule to establish impunity. This unwillingness to allow an open and fair investigation, and the lack of accountability resulting from it, ultimately exacerbate the feeling among the population that nobody ever is going to respond for the violations of their own rights³³. Moreover, the response to COVID-19 has created new opportunities for grand corruption, as both democratic and authoritarian governments have suspended or ignored many existing transparency, accountability, and anti-corruption enforcement mechanisms.³⁴

This culture of impunity is particularly dangerous for the legitimacy of democratic institutions, as it erodes the trust of people in the political leadership. Corruption in turn feeds on the culture of impunity, in a never-ending vicious circle.³⁵ Political leaders who are involved in corrupt

³³ Mark L. Wolf, “The case for an international anti-corruption court” (2014), *Governance Studies at Brookings Washington, DC*, pp. 1-15.

³⁴ Integrity Initiative International, <http://www.integrityinitiatives.org/>.

³⁵ Mark L. Wolf, “The case for an international anti-corruption court” (2014), pp. 1-15.

practices, perpetuate corruption by initiating prosecutions against those who expose public officials implicated in dishonest misconduct at the expenses of the general interest.

Not only. As Judge Wolf, underlines “in many countries, grand corruption is even supported or encouraged by the quiet complicity of other nations, which benefit from foreign investment and official favor”.

However, as a result of the incentives coming from international organizations or institutions, some progress has been registered. For instance, both the European Union and the World Trade Organization, make of the fight against corruption a requirement for their membership. Generally, international financial institutions have taken up a proactive role in putting anti-corruption policies and transparency on top of their agendas, by encouraging the implementation of adequate programs on a domestic level and helping build capable, transparent and accountable institutions in the countries they provide assistance.³⁶

1.6 An emblematic case of the partial ineffectiveness of anti-corruption measures: Albania

Nevertheless, even in those nations where efforts to combat the problem have actually been pursued and specific anti-corruption laws and regulations been enacted, often there is an important “implementation gap” between legal frameworks and the pervasiveness of grand corruption of reality.

A very emblematic case is Albania. Following the increasing pressure from the European Union, the country undertook in 2016 a package of reforms aimed at changing the justice system, which suffered from widespread corruption, professional shortages and structural inefficiencies. As a result, public trust in the courts and law enforcement was likewise extremely low. The process was characterized by very substantial international involvement, with two entities being particularly active: the European Union’s EURALIUS project, which is offering technical assistance to the reform process, and the local mission of the U.S. Overseas

³⁶ Transparency International (2015), *The role of the financial sector in preventing corruption*, available at https://www.transparency.org/files/content/activity/2015_TI_G20PositionPaper_FinancialSector.pdf.

Prosecutorial Development, Assistance, and Training Program, which works to strengthen justice systems internationally³⁷.

The proposed reforms touched every level of the judicial and prosecutorial system, even at the constitutional level. They were intended to restructure these system's relationship with the country's political branches, and establish a number of new independent entities.

However, in spite of the depth of the abovementioned reforms, corruption can still be identified as the country's biggest challenge and hurdle to the further development of its socio-economic fabric. Indeed, many experts have questioned the validity of new regulations aimed at reforming exclusively the judiciary when the political leadership remains unchanged since the advent of democracy. Therefore, the undertaken reforms, considered to be merely a diversion to shift the attention from the substantial problems of the country, have not lead to the desired outcome.

The Albanian case perfectly anticipates what will be discussed more in depth in the second chapter. While equipping itself with laws aimed at curbing corruption, the country is still facing both petty and grand corruption. Such a phenomenon is difficult to eradicate, especially as long as political leaders are the ones who fuel corrupt practices at most and are not held accountable for their crimes. Because they ultimately control the judiciary system, thus undermining the independence and impartiality of judges and prosecutors, it is not possible to establish accountability process and end impunity. Therefore, it is reasonable to assume that the big fishes won't fry themselves until an external, independent and supranational institution will exercise enough pressure on the country in order to bring about real and structural changes, first of all by holding its political leaders accountable for crimes of grand corruption.

³⁷ Andi Dobrush, "How Albania is reforming its troubled justice system" (2016), *Open society foundations*, available at <https://www.opensocietyfoundations.org/voices/how-albania-reforming-its-troubled-justice-system>.

II CHAPTER

ESTABLISHMENT OF AN INTERNATIONAL ANTI-CORRUPTION COURT AS A GLOBAL ANSWER

Despite the numerous international efforts to combat corruption on a global scale through the ratification of multilateral agreements which have been domestically implemented, corruption still flourishes in many countries, thus undermining economic stability, democratic institutions and ultimately human rights. As Judge Wolf has pointed out on many occasions “corruption exists because of a failure to enforce existing criminal statutes”³⁸. It has become more and more evident that relying exclusively on laws, however necessary and adequate they might be, cannot constitute the exclusive answer to a problem which not only has a cross-border nature, but also far-reaching and destructive consequences in so many fields. A transnational response is essential in diminishing these harmful effects.

What I strongly support in this chapter is the establishment of an International Anti-Corruption Court (IACC) as an effective answer to grand corruption. The proposal of setting up an International Anti-Corruption Court was put forward for the first time by District U.S. Judge Mark L. Wolf³⁹ at the 2012 St. Petersburg International Legal Forum and subsequently presented at the 2014 World Forum on Governance.⁴⁰ According to his proposal, the Court would be an international tribunal, modeled in a way after the existing International Criminal

³⁸ Integrity Initiative International, “Briefing on why the World need an International Anti-Corruption Court”, available at <http://www.integrityinitiatives.org/multimedia>.

³⁹ Judge Wolf, supported by Judge Goldstone, has been advocating for the creation of the IACC on different initiatives around the development of strategies and policies aimed at combating corruption. It is worth mentioning that Judge Mark. L. Wolf was a former judge at the former International Tribunal for the Former Yugoslavia.

⁴⁰ Mark L. Wolf, “The World needs an International Anti-Corruption Court”, (2018), *Daedalus* 147.3, pp. 144-156.

Court (ICC), and would allow to tackle corruption by enhancing the capacity of countries to enforce criminal laws against corrupt leaders on a domestic level.

2.1 ICC and the lessons learned

Before examining in detail the potential of an International Anti-Corruption Court, it is necessary to make a brief digression on the International Criminal Court and its impact on the maintenance of security and safety in international relations. Indeed, only by fully comprehending the success of the ICC throughout the years, it is possible to envision with optimism the creation of the ICC and to recognize its potential, in spite of all the challenges inherent in the project.

One of the most challenging and important questions in international policy and research is whether justice is possible in a system dominated by sovereign state. In this sense, the ICC's purpose has always been "to provide instruments to reduce human suffering in inter and intra-state conflicts".⁴¹ The question of the ICC's impact is important because the Court has the authority to enforce international law against those who commit the most serious and systematic crimes, thus deterring a significant crime category within its jurisdiction. In the same way, the IACC, if established, would have the capacity to compel observance for already existing criminal anti-corruption statutes and laws in those countries accepting its jurisdiction.

First of all, it is worth recalling that similar circumstances brought up by those who advocate for the creation of an IACC - namely the ineffectiveness of the institutions and mechanisms already in place and the massive violations of human rights - led in 1998 to the adoption of the Rome Statute, which entered into force into force in 2002: the Treaty officially established the International Criminal Court for the prosecution of genocide, crimes against humanity and war crimes.

In the aftermath of the Cold War, the whole international community was seeking for justice and for a way to definitely end impunity with respect to the worst human rights violations occurred in the last fifty years. The Yugoslavian and the Rwandan Tribunals represented

⁴¹ Mats Benestad, "Let us get serious about corruption. An Indispensable Priority for the 2021 UN General Assembly Special Session", (2020), *Policy Brief Series No. 110*, PP. 1-4.

important milestones in this regard, but the most important achievement was made with the creation of the a permanent supranational Court, the International Criminal Court.

Despite the challenges that the Court is still facing and the shortcomings related to its mechanisms, it is undeniable that important cases have been brought in front of the Court and important results have been achieved.⁴² The International Criminal Court made it possible that political leaders who were the primary perpetrators of human rights violations in their countries but were unwilling to initiate any proceeding at the national level for their crimes, were investigated and sentenced. Without a complementary, alternative forum to prosecute these crimes, an accountability process wouldn't have been possible. At the same time, thanks to the complementarity principle, national courts remain the first guardian of their justice systems: as long as they show the willingness and dispose of the sufficient expertise and resources to prosecute violations of human rights, no other international institution is allowed to intervene.⁴³

As a supranational institution which establishes accountability and seeks to end impunity, the most important achievement of the ICC is the deterrent effect. Important studies, supported by empirical evidence, have underlined the potential prosecutorial and social deterrence of the ICC.⁴⁴ On the one hand, the ICC contributes directly to prosecutorial deterrence by initiating investigation and prosecution of international crimes on its own authority. Moreover, it encourages member states to enhance their capacity to reduce, detect, investigate and prosecute crimes on a domestic level. This happens through a twofold channel: by providing states with the required expertise and support needed; and by representing *per se* an incentive for ratifying states to be more proactive, especially if they fear an intervention of the Court and view it as a possible breach of their sovereignty. Furthermore, there is strong evidence of a reduction of intentional civilian killing by government actors of states which have implemented ICC-constituent statutes in domestic criminal laws, which can be reasonably attributed to the Court's influence⁴⁵. As Hyeran Jo and Beth A. Simmons with good reason point out "such domestic statutes magnify the ICC's prosecutorial deterrent effect by bolstering it with the added possibility of punishment at home".⁴⁶

⁴² Moses R. Phooko, "How effective the International Criminal Court has been: evaluating the work and progress of the International Criminal Court" (2011), *Notre Dame J. Int'l Comp. & Hum. Rts. L.*, 1, 182, pp. 1-29.

⁴³ Jan Klabbers, (2020). *International law*. Cambridge University Press, 2020, pp. 237-243.

⁴⁴ Heyran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?" (2016), *International Organization*, pp. 443-475.

⁴⁵ Heyran Jo and Beth A. Simmons, *ibid*, pp. 445-448.

⁴⁶ Heyran Jo and Beth A. Simmons, *ibid*, p. 469.

On the other hand, there is an interaction between legal rules and social pressures. The social deterrence is also produced by the demand for justice of the international community as well as of the domestic civil society. Arguably, the mobilizing effect is not absolute: no law or punishment can deter commitment of crimes with a 100% probability under every circumstance, but the ICC's determination to prosecute and issue warrants has certainly raised the risk of consequences for violations and contributed to the reduction of violence by convincing even some types of rebel leaders or government officials that impunity is a waning option.⁴⁷

The success and the accomplishments of the ICC, as illustrated so far, in spite of the shortfalls, suggest that another functioning, permanent international Court would certainly help address the problem of corruption in a more effective way, both on a global and a local scale.

2.2 International legal framework on corruption: UNCAC

In order to provide effective international and regional responses to the global challenge of grand corruption, several countries have agreed to multilateral agreements, thus building a robust international legal framework. The United Nations Convention Against Corruption (UNCAC) is certainly the most important and the only legally binding international anti-corruption treaty with a global scope. The Convention has significantly contributed to establishing legislation and institutions to combat and prevent corruption in several countries. It was a milestone when the Convention was adopted in 2003, with promising potential, as it signaled for the first time the acknowledgment of corruption as a transnational problem and catalyzed all global efforts to eradicate it⁴⁸. The Convention includes a catalogue of offences that all States Parties, in order to comply with their international obligations, are required to criminalize in their domestic legislation (the so-called mandatory offences, such as bribery of a public official and embezzlement of public funds), and offences that Member States are encouraged to criminalize (non-mandatory offences, such as trading in influence, abuse of function, illicit enrichment and private sector bribery). It must be underlined that the relatively

⁴⁷ Heyran Jo and Beth A. Simmons, *ibid*, pp. 469-470.

⁴⁸ Mats Benestad, "Let Us Get Serious about Grand Corruption: An Indispensable Priority for the 2021 UN General Assembly Special Session" (2020), *Policies Brief Series No. 110 (2020)*, pp. 1-4.

high number of non-mandatory crimes definitely represents a shortcoming of the Convention and leaves an important gap.

Moreover, the Convention covers all forms of corruption but does not differentiate petty from grand corruption, and most importantly, does not contain any specific obligation with regard to the latter. As Mats Benestad affirms “analyzing the implementation of the Convention 18 years after it entered into force, and taking into account the numerous recent grand corruption scandals in countries that have implemented UNCAC, it is clear that more specific obligations related to grand corruption would be an important improvement”.⁴⁹

In light of the increasingly important preventive approach⁵⁰, the Convention contains also key provisions about the principles of integrity, transparency, accountability and honest management of public funds, but does not introduce any mechanisms needed for their enforcement.⁵¹

A study by the U4 Anti-Corruption Resource Centre, which analyses whether UNCAC can address grand corruption, concludes that “its limitations in addressing the political nature of corruption must be recognized” and that the Convention’s “provisions on political corruption are weak”.⁵²

The lack of provisions concerning specifically political corruption has led to a general impunity, despite progress made thanks to the legal framework. Powerful political elite interfere with, control and disable their national justice systems, making justice officials unable or unwilling to deliver accountability. Moreover, since grand corruption practices often involve actors operating in both the public and private sector (for instance in the field of public procurement), investigating these cases can be very complex and expensive.⁵³

⁴⁹ Mats Benestad, *ibid*, p. 2.

⁵⁰ For a more in-depth discussion on the preventive approach, see G.S. Venumadhava and Mayuri Sahay, “Preventive approach of corruption” (2014), *Global Journal of Interdisciplinary Social Sciences*, Vol.3(2), pp. 108-113.

⁵¹ Hannes Hechler, Greta F. Zinkernagel, Lucy Koechlin, and Dominic Morris “Can UNCAC address grand corruption?” (2011), *U4 report*, 2011(2), pp. 1-33.

⁵² Hannes Hechler, Greta F. Zinkernagel, Lucy Koechlin, and Dominic Morris, p. 6s.

⁵³ Transparency International, *Proposals on the international legal framework and infrastructure to address grand corruption impunity* (2021), Submissions to the UNGASS 2021 Against Corruption.

Therefore the current international legal framework and infrastructure does not provide for effective legal remedies and does not create the conditions to ensure a strong accountability process for the perpetrators of grand corruption.

Therefore, it is clear that impunity for grand corruption should be given absolute priority by the international community, given its grave negative impact on human rights, security, development and on the possible achievement of the 2030 Sustainable Development Goals.⁵⁴

To do this, States need more assistance in preventing and combating grand corruption, which brings, once again, to the conclusion that a more vigorous international action, as well as a system of international obligations are absolutely necessary.

2.3 Why does the World need an IACC?

As already abovementioned, corruption does not thrive because of a lack of laws. Indeed, the United Nations Convention Against Corruption is the Convention with the highest number of signatures: 183 countries are parties to the Convention and have passed the required statutes to realize their commitment to the treaty and criminalize bribery, money laundering and misappropriation of national resources⁵⁵.

However, international treaties require the good-faith enforcement of internal criminal laws, meaning countries have also a legal obligation to domestically enforce those statutes and ensure their observance in particular against their political leaders. And therein lies the main challenge. Many countries, despite the required statutes and laws already in place, do not hold corrupt leaders accountable for their acts because these very leaders ultimately control the administration of justice.

In illustrating how IACC should work, Judge Wolf compares the relationship between the Court and the sovereign States to the one between the U.S. federal government and the 50 states, observing that:

“In the United States, we do not rely on elected state prosecutors to do this because they are often part of the political establishment that must be challenged and, in any

⁵⁴ UNGA, Res. 73/151, (17 December 2018).

⁵⁵ Mark L. Wolf, “The World needs an International Anti-Corruption Court.” pp. 144-156.

event, lack the necessary legal authority and resources. Rather, we rely primarily on federal investigators, prosecutors, and courts to pursue and punish corrupt state and local officials.”

And goes on to specify that:

“Federal investigators are authorized to conduct undercover operations and secretly record conversations, and are adept at unraveling complicated financial transactions. Federal prosecutors are capable of trying complex cases successfully before impartial judges and juries. As a result, public officials convicted of corruption often receive serious sentences, which have the potential to deter others and to create a political climate in which good government is also good politics.”

Therefore, Judge Wolf suggests assigning a similar authority to the IACC and insists on three elements: the political neutrality of a supranational Court which wouldn't be involved in any conflicts of interests, a higher availability of resources and expertise and an increased legitimacy of such an international institution.

In order to better understand each of these elements and see how they would practically impact on the functioning of the Court, some preliminary considerations on their *raison d'être* are necessary.

2.2.1 Need for accountability

Needless to say, political leaders must be just like other citizens in front of justice and they must obey the law and court orders. The Watergate case⁵⁶ demonstrated that in the US even the President must obey law and in case of non-compliance with the law be subject to investigation.⁵⁷

However, not every country creates the condition for a real accountability process. On the contrary, in many nations lawmakers enact on purpose laws aimed at introducing legislative immunities which ultimately prohibit investigations and charges against political personalities. This can happen, for instance, by not permitting undercover operations, such as wiretapping or consensual recordings of conversations, thus minimizing or suppressing at all any possibility

⁵⁶ The Watergate case was a major political scandal in the US involving the administration of U.S. President Richard Nixon from 1972 to 1974 that led to his resignation, after that the House Judiciary Committee approved articles of impeachment against him for obstruction of justice, abuse of power and contempt of Congress.

⁵⁷ Mark L. Wolf, “The World needs an International Anti-Corruption Court.” pp. 144-156.

for secret investigation.⁵⁸ With regard to corruption, which has been often defined as a phenomenon with a “hidden nature”⁵⁹, this kind of operations has become even more essential in proving crimes which are structured to remain “shadowed”, difficult to find and prove.

2.2.2 Lack of independent media

Besides the political unwillingness to effectively contrast corruption, there are several reasons why it would be unrealistic, and maybe even utopic, to exclusively rely on a prosecution of the country where the crimes were committed.

First of all, the lack of independent media in a lot of countries increases exponentially the opportunities for corruption to occur.⁶⁰ As a guarantee of checks and balances, free media can play a crucial role in exposing and curbing corruption.⁶¹ Surely, media cannot rely on the possibility of sanctioning misconduct by corrupt public officials. However, they can still exert some form of indirect control: for instance, by highlighting maladministration within the public sector, policy failures or corruption in the judiciary bodies. They can also provide “specific support to prosecutorial organs by reporting or investigating cases of corruption”.⁶² By so doing, media act as a sounding board for complaints and contribute to forming public opinion, as they generate public pressure and a strong demand for accountability. Indeed, what often happens is that political leaders and public official in general, whose involvement in corrupted misconduct has been exposed and their reputation put at stake, are forced to resign after public protest.

Moreover, free media can have a relevant impact on the transparency and governance of independent anticorruption bodies, “by highlighting possible flaws in their inner functioning and thus prompting a reform of these bodies when necessary”.⁶³ Both ways of intervention can enhance the general climate of transparency in the society, which arguably plays a vital role in

⁵⁸ Mark L. Wolf, *ibid*, pp. 144-148.

⁵⁹ GRECO, *Summary sheet n. 32: Focus on Corruption*, available at <https://rm.coe.int/a2-6-focus-on-corruption-definitions-forms-and-cartography-of-corrupti/1680995272>.

⁶⁰ Mark L. Wolf, „The World needs an International Anti-Corruption Court”, pp. 144-156.

⁶¹ Christopher Starke, Teresa K. Naab and Helmut Scherer. Free to expose corruption: “The impact of media freedom, internet access and governmental online service delivery on corruption”, (2016), *International Journal of Communication*, 10, 21, pp. 4702-4722.

⁶² Pippa Norris, “Global political communication: Good governance, human development and mass communication” (2004), *Comparing political communication: Theories, cases, and challenges*, pp. 115-150.

⁶³ Raymond Fisman, and Edward Miguel. *Economic gangsters: corruption, violence, and the poverty of nations*. Princeton University Press, Princeton, 2010.

fighting corruption on a systemic level⁶⁴, and increase ultimately public trust in political institutions.

Some scholars have also identified a preventive function in the work of free media and have elaborated on its deterrent effect.⁶⁵ The deterrence theory is based on three forces: a high magnitude of external rewards, a low probability of detection and low severity of punishment. If the media are able to work free from any kind of external influence, there is a higher likelihood for corrupt public officials to be exposed. The fear for the reputational loss resulting from this increased risk would make them refrain from a future reiteration of their conduct.

All this demonstrates how important the contribution of free independent media for the democratic life of a society can be.

However, as Judge Wolf underlines “few countries have real independent media because journalists risk being ordered by Courts to pay substantial litigation costs and libel judgements if they report an official misconduct”⁶⁶. On the contrary, in countries where corruption flourishes, leaders control the media and do not permit their own criminal activity to be exposed. Independent investigative journalist who try to do this get often threatened, imprisoned and even killed. This is what has occurred in Turkey, Russia or in Poland, where prosecutors and judges are being removed from their offices for having carried out an independent investigation⁶⁷. There are no free and fair elections which would allow a replacement of the political establishment, and this is due to the fact that their political campaigns are financed by the same persons who give them bribes in order to have their own interests represented. Because those leaders control prosecutors and judges, they can operate with impunity.

And even in countries where free, strong media function properly, they cannot alone serve as the only instrument to successfully deter corruption among the public sector. Rather, media exposure, strict application of anticorruption laws, an effective prosecution from strong

⁶⁴ Ivar Kolstad and Arne Wiig, “Is transparency the key to reducing corruption in resource-rich countries?” (2009), *World development*, 37(3), pp. 521-532.

⁶⁵ Gary S. Becker, “Crime and punishment: an economic approach” (1974), *Essays in the economics of crime and punishment*, pp. 1-54.

⁶⁶ Mark L. Wolf, “The case for an International Anti-Corruption Court” (2014) *Governance Studies at Brookings Washington, DC*, pp. 1-15.

⁶⁷ This happened recently, for instance, in Poland, where the State Prosecutor Bogdad Świączkowski was removed from his office.

institutions of justice and, lately, the importance of preventive policies based on moral values and codes of conducts, need to complement each other.

In order to rely on an effective and successful prosecution strong investigative skills and instruments are needed. In light of the structural complexity of corruption and its systemic character, specific tools, expertise and training are required, especially when it comes to the investigations of financial transactions.⁶⁸ Once again, several countries are not equipped with investigators or prosecutors who have the right preparation or the necessary tools to conduct such inquiry.

2.2.3 Need to neutralize the risk of corruption related to Covid-19

Another concern of utmost importance is the devastating impact of corruption on the enjoyment of the right to health due to the Pandemic Covid-19. As underlined by many anti-corruption experts, *inter alia*, Judge Goldstone and Judge Wolf, Coronavirus is becoming a “bonanza for kleptocrats - an opportunity for the corrupt leaders of many countries to further enrich themselves”⁶⁹. This is a fact: trillions of dollars in relief funds are being disbursed without even the usual, often ineffective, safeguards⁷⁰.

There is already evidence that funds intended to combat the pandemic by containing its consequences are being misappropriated and misused by high officials in many countries.

This has happened, for instance, in Bosnia, where public authorities have arrested two high-ranking state officials and the owner of a private company which imported 100 ventilators that were found to be useless for Covid-19 patients.⁷¹ The prime Minister of Bosnia’s Muslim-Croat Federation, Fadel Novalic, a top state civil protection official and the owner of the fruit processing company has received 5 million from the government to get the equipment.

Also Brazil is facing a flurry of corruption investigations into the alleged misuse of public money rapidly shelled out for Covid-19 emergency procurement. The investigations have

⁶⁸ Mark L. Wolf, “The World needs an International Anti-Corruption Court”, pp. 144-156.

⁶⁹ Richard Goldstone and Mark L. Wolf, “Coronavirus presents bonanza for kleptocrats” (2020), *the Boston Globe*, available at <https://www.bostonglobe.com/2020/04/04/opinion/bonanza-kleptocrats-time-coronavirus/>.

⁷⁰ Other scholars, such as Lloyd Axworthy and Allan Rock, among others, have voiced support for the establishment of the IACC as an effective and strong response to the Pandemic-related corruption. For further information, see Lloyd Axworthy and Allan Rock “Let’s Hold Kleptocrats to account, published” (2020), *the Globe and Mail*.

⁷¹ Amer Cohadzic, Bosnia: Officials, firm owner arrested over ventilator deal, abcNews, available at [Bosnia: Officials, firm owner arrested over ventilator deal - ABC News \(go.com\)](https://www.abcnews.com/News/News/Bosnia-Officials-firm-owner-arrested-over-ventilator-deal-2020-04-04).

reached all levels of government, including three state governors who have come under federal scrutiny in the past two months. Nearly 1,500 federal criminal judicial proceedings have also been opened into coronavirus-related cases, including investigations into misuse of federal funds, fraud, corruption, overpricing, and money laundering.⁷²

Therefore, the coronavirus will – and has already in part - provided additional compelling proof that the world needs an International Anti-Corruption Court to punish and deter kleptocrats who enjoy impunity in the countries they rule.⁷³

In light of all these factors, the possibility of complementing national prosecution with a wider approach on an international level through the creation of a supranational institution would help to respond to the criticalities encountered so far.

2.4 Relation between ICC and IACC

Besides the IACC's creation, other possible solutions have been considered in order to tackle grand corruption on a global scale. One of the proposals has been to reinterpret the existing provisions on ICC's jurisdiction in the Rome Statute by including the prosecution of crimes of grand corruption in the mandate of the Court⁷⁴.

According to article 5 of the Rome Statute:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

⁷² Rodrigo Pedrosa, Marcia Reverdosa and Taylor Barnes, "As Corona cases explode in Brazil, so do investigations into alleged corruption", CNN, 8 July 2020, available at [Brazil coronavirus: Cases explode while country investigates corruption - CNN](#).

⁷³ Richard Goldstone and Mark L. Wolf, "Coronavirus presents bonanza for kleptocrats" (2020), *the Boston Globe*, available at <https://www.bostonglobe.com/2020/04/04/opinion/bonanza-kleptocrats-time-coronavirus/>.

⁷⁴ Naomi Roht-Arriaza and Santiago Martinez, "Venezuela, Grand Corruption, and the International Criminal Court" (2019), *UC Hastings Research Paper*, (340), pp. 1-35.

(d) The crime of aggression.

For a better understanding of “crimes against humanity”, article 7 (1) of the Rome Statutes states:

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The Rome Statute lists these crimes and requires that they be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Some of the scholars advocating for an expansion of the ICC’s jurisdiction with regard to grand corruption, do not really subsume corruption under “crimes against humanity” and more

specifically under “other inhumane acts”. Rather, they find that the definition of what is a “widespread or systematic” attack, as well as the types of enumerated acts chargeable under Article 7, and the existence of a “state or organizational policy, required by the Rome Statute, can all be facilitated or broadened by taking this approach.”⁷⁵

Crimes against humanity must be widespread, that is, “massive, frequent, carried out with a considerable seriousness and directed against a multiplicity of victims,”⁷⁶ not the mere sum of spontaneous acts;⁷⁷ or systematic, understood “as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as ‘patterns of crimes’ such that the crimes constitute a “non-accidental repetition of similar criminal conduct on a regular basis”.⁷⁸

With regard to the Venezuelan case – but the discourse can of course be extended to many other countries – Roht-Arriaza and Martinez, have argued that corruption is not only exacerbating crimes in Venezuela, but also motivating their commission and subsequent impunity. This is due to the fact that “the regime is not only targeting rebels and dissidents, but also intimidating and attacking officials in charge of the investigation, prosecution and judgement of major corruption scandals, and even those who might possess important knowledge and become whistleblowers”.⁷⁹ The lack of functionality and accountability systems is a systematic problem: they do not work because they are not allowed to, thus permitting the looting of the State with impunity. The fear generated by these practices and the impunity climate resulting from control over lucrative business through corruption lead to a general dissatisfaction towards justice.

Therefore, grand corruption often acquires widespread and systemic dimension, which makes an extensive interpretation of article 7 paragraph 1 sub-paragraph. k possible.

Quoting Roht-Arriaza:

“Incorporating a corruption-based analysis into efforts to achieve a measure of justice for victims of crimes against humanity provides a number of benefits. It allows advocates,

⁷⁵ Naomi Roht-Arriaza, and Santiago Martinez, *ibid*, p. 10.

⁷⁶ ICC-01/05-01/08, para. 163.

⁷⁷ ICC-01/09, para. 117.

⁷⁸ ICC-01/04-01/07, para. 397.

⁷⁹ Naomi Roht-Arriaza, and Santiago Martinez, “Venezuela, Grand Corruption, and the International Criminal Court” (2019), p. 5.

prosecutors and judges to name the phenomenon for what it is, in a way that resonates with ordinary people and has narrative power.”

Other international lawyers and scholars, like Martin Kenney, have argued that corruption can even fulfill the contextual requirements of Article 7(1) of Rome Statute and can be considered a crime against humanity under sub-paragraph k.⁸⁰

This proposal would not be unreasonable. Indeed, it is theoretically possible to make the case that corruption be subsumed under Article 7(1) sub-paragraph k. There is evidence suggesting that grand corruption in certain cases reaches the level of the crimes against humanity. Moreover, the restorative component of such criminal prosecutions should aim at “restoring, through civil mechanisms, the funds illegally appropriated to their rightful recipients, the defrauded local populations, under the principle of self-determination”.⁸¹

However, this approach, while having its benefits and offering a strong and global answer for investigating corruption, raises several questions. First of all, according to Judge Goldstone, the suggested inclusion of grand corruption in the jurisdiction of the International Criminal Court, would be very complicated and it would imply an inconceivable stretching of the Rome Statute, as it does not provide at all a theoretical basis for such an interpretation of grand corruption⁸². Indeed, the *travaux préparatoires* show that financial crimes were never seriously discussed and taken into consideration during the negotiations of the Rome Statute. The principle of legality, expressed in Article 22(2) of the Rome Statute, stipulates that:

“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated”.⁸³

Consequently, it is highly unlikely that grand corruption cases would be considered admissible for prosecution at the ICC.⁸⁴

⁸⁰ Martin Kenney, “An International Anti-Corruption Court Is a Fine Idea, but Not Necessary” (2014), *The Globe and Mail*, available at <https://martinkenney.com/2016/06/10/globe-mail-article-anti-corruption-court/>.

⁸¹ Ilias Banketas, “Corruption as an international crime and crime against humanity: An outline of supplementary criminal justice policies” (2006), *Journal of International Criminal Justice*, (2006), 4.3., pp. 466-484.

⁸² Interview of Judge Goldstone, available on III website, <http://www.integrityinitiatives.org/multimedia>.

⁸³ Rome Statute of the International Criminal Court, (entered into force on 1 July 2002).

⁸⁴ Ilias Bantekas, “Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies” (2006), pp. 466-470; Sonja B. Starr, “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations” (2007), in *Northwestern University Law Review*, pp. 1257-1314.

Furthermore, the phrase “other inhumane acts of a similar character intentionally causing great suffering” in article 7(1)(k) establishes that an act, in order to attain the level of severity required by the article, needs to be comparable to acts mentioned in sub-paragraphs from (a) to (j), which cover, for instance, murder, enslavement and torture. A common aspect for all criminal acts listed in the sub-paragraphs from (a) to (j) – except (h), persecution – is that they refer to crimes that directly cause physical harm to human beings, while the crime of grand corruption is a financial crime that certainly affects large groups of people, even in devastating ways, but not necessarily in a physical way. Therefore, it is questionable that grand corruption could be considered as an act “of a similar character”, unless it is part of a campaign of persecution (sub-paragraph g) against members of a group.⁸⁵

Even vocal supporters of this proposal, such the Global Organization of Parliamentarians Against Corruption (GOPAC), admit that there are problems with classifying grand corruption as a crime against humanity.⁸⁶ They also argue that grand corruption crimes are not necessarily “committed as part of a widespread or systematic attack directed against a civilian population. While grand corruption may meet the *actus reus* test of crimes against humanity, the *mens rea*, the clear intent to eventually destroy part of a population, is typically missing”.⁸⁷

Moreover, prosecution of grand corruption under Art. 7(1) would first require an amendment of the Statute, which is an utterly complicated and long procedure. Amendments to the Rome Statute of the International Criminal Court are actually possible and must be proposed, adopted, and ratified in accordance with articles 121 and 122 of the Statute. According to Art. 121, paragraph 3 and paragraph 4:

“The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”

Even with the 2/3 majority, the amendment would not come into force. Indeed, as paragraph 4 states:

⁸⁵ Mats Benestad, Let Us Get Serious About Grand Corruption”, pp. 1-4.

⁸⁶ GOPAC, “Declaration for the Fifth Forum of Parliamentarians”, 2013, available at http://www.gopacnetwork.org/Docs/Declaration%20for%20Fifth%20Forum%20of%20Parliamentarians_EN.pdf.

⁸⁷ GOPAC, *ibid.*

“Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”

Clearly, this procedure is not practical. And even in the case there was the political will to amend the Rome Statute in order to include a provision regarding prosecution and investigation of crimes of grand corruption, there would still be a further hurdle to cross. According to Judge Goldstone, it would be very difficult for prosecutors to give priority to corruption in the face of cases of genocide and other crimes in which thousands of people have been victimized by war criminals.⁸⁸

Therefore, according to the anti-corruption expert Mats Benestad “for grand corruption to be considered as an international crime under international criminal law, it would have to be defined properly through the negotiation of a new convention, or through an amendment or an additional protocol to an existing convention.”⁸⁹

Thus, it can be concluded that the International Criminal Court, even in the case its jurisdiction would be extended as to include the prosecution of kleptocrats, it would still not constitute the best and most appropriate place for addressing grand corruption.

Other potential complementary means aimed at ending impunity and ensuring accountability have been investigated. These include the creation of independent specialized anti-corruption courts operating at a national level, regional anti-corruption or hybrid efforts such as the International Commission against Impunity in Guatemala (CICIG)⁹⁰, which will be studied more in detail in the next paragraph. However, their potential is limited due to the dimension and scale they would operate at. Indeed, kleptocrats launder regularly illicit assets through the international financial system, and hide them in countries throughout the world. Therefore, strategies limited at a national or regional level which do not pay due consideration to the transnational dimension of corruption, cannot be successful. On the contrary, an institution with an international scope is needed to address this global challenge.

⁸⁸ Interview of Judge Goldstone, available on III website at <http://www.integrityinitiatives.org/multimedia>.

⁸⁹ Mats Benestad, “Let Us Get Serious About Grand Corruption”, pp. 1-4.

⁹⁰ Integrity Initiatives International (2020), *Proposal on the establishment of an International Anti-Corruption Court to address impunity for grand corruption*.

2.5 Increasing focus on large-scale corruption and reception of the creation of an International Anti-Corruption Court

Grand corruption has always represented a sensitive topic, which is why addressing it and studying comprehensive ways to encounter the challenge has been difficult, especially for a lack of cooperation on the part of countries. During the negotiations of the UNCAC, there was a widespread reluctance in including in the Convention provisions regarding political corruption. Despite the pressure of prosecutors, judges and non-governmental organizations underlining the need for international measures to combat high-level corruption and fight impunity, neither grand corruption nor political corruption were incorporated in the final version of the Convention's text. The topic was considered delicate at the United Nations.

However, in the last years important developments towards a more active approach in exposing corruption and exploring possibilities to fill in the gaps of the Convention have been registered.

The increasingly heightened media's attention on the matter has played a significant role. More and more journalists in the recent years have exposed corruption at an unprecedented level, starting with the 2016 scandal involving the offshore finance industry, published as "Panama Papers". The investigation shed light on several retired and current prime ministers, presidents and in general high-level public officials with dubious undocumented assets.⁹¹

At the sixth conference of the States Parties to the UNCAC in 2015, the Government of Peru presented a Conference Room Paper explaining the difference between grand corruption (state capture and control of public funds) and petty corruption (day to day administrative corruption). Quoting the last paragraph of the presentation:

"Grand corruption consists of offences mentioned in chapter III of UNCAC involving high-level officials and a significant amount of money, leading to significant public damage or to the infringement of fundamental rights of at least part of a State's population. (...) The effective prevention and prosecution of corruption in all its forms, such as grand corruption cases, must be ensured by taking measures at national and international levels and by enhancing international cooperation, in order to avoid that this crime goes unpunished."⁹²

⁹¹ Zaidi, Syed H. A., Wang, Xin-Yu, Ahmad, Sardar, Ping, Tan-Xue, and Qi, Meng, "Panama Papers and the dilemma of global financial transparency" (2018), *IJMRM International Journal of Modern Research in Management*, pp. 1-19.

⁹² UN Doc. CAC/COSP/2015/CRP.9, (4 November 2015).

After that, Norway took on the commitment to complement UNCAC with new mechanisms in 2017 and a new draft resolution “Preventing and Combatting Large-Scale Corruption” was presented to the seventh Conference of the States Parties by Chile, Norway and Peru in October 2017.

Following several and challenging negotiations, the first resolution on corruption involving vast quantities of assets⁹³ was finally adopted by 19 countries⁹⁴. The Resolution represented an important step in the fight against grand corruption, since for the first time States were urged to “give the necessary focus to, among others, acts of corruption that involved vast quantities of assets (...) and thereby contributing to the achievement of the 2030 Sustainable Development Goals”.⁹⁵

The steps forward the acknowledgment of the seriousness of grand corruption were confirmed at the first Expert Meeting in Lima, organized by the United Nations Office on Drugs and Crime (UNODC), where the experts recognized that corruption involving vast quantities of assets was a threat to global peace and security, to the enjoyment of human rights, to a livable climate and biodiversity, and encouraged the development of innovative ways to adequately investigate, prosecute and sanction individuals implicated in large-scale corruption.⁹⁶

Alongside with the adoption of Resolutions, the increasing focus on grand corruption has led many countries to recognize the importance of the International Anti-Corruption Court and voice their support to further study and working on its establishment.

If fact, interest around the creation of an International Anti-Corruption Court is growing at an accelerating rate around the world. In November 2018, the United Nations, on the initiative of Peru and Colombia, adopted a resolution calling for the convening of a Special Session of the General Assembly (UNGASS) in the first half of 2021 “on challenges and measures to prevent and combat corruption and strengthen international cooperation.” At the International Expert Meeting on Corruption Involving Vast Quantities of Assets in June 2019, Colombia’s then

⁹³ UNCAC, Res. 7/2, (10 November 2017).

⁹⁴ The Resolution was adopted by Chile, Guinea, Honduras, Indonesia, Iraq, Israel, Jordan, Kazakhstan, Liberia, Libya, the Netherlands, Nigeria, Nicaragua, Palestine, Peru, Sweden, Switzerland and the United Kingdom.

⁹⁵ UNCAC, Res. 7/2, (10 November 2017).

⁹⁶ UNODC, Lima Statement on Corruption involving Vast Quantities of Assets (5 December 2018), available at https://www.unodc.org/documents/corruption/LimaEGM2018/Outcome_Statement_Lima_EGM_2018.pdf.

Foreign Minister Carlos Holmes Trujillo articulated that Colombia supported the creation of an International Anti-Corruption Court based on the ICC's principle of complementarity.

In February 2020, United States Congresswoman Jackie Speier and Congressman Jim McGovern introduced a House Resolution entitled "Opposing Kleptocracy around the world and supporting efforts to develop and effective, independent International Anti-Corruption Court".⁹⁷ In June 2021, over 100 Nobel laureates, former presidents, high court justices, business leaders, and other prominent leaders from over 40 countries signed a Declaration in Support of the Creation of the IACC.

In light of the awareness that "grand corruption has global consequences and often cannot be combated by those countries most immediately victimized by kleptocrats"⁹⁸ setting up an International Anti-Corruption Court appears to be as more than justified.

Moreover, signatory countries agree upon the fact that - as it will be investigated more in detail in the following paragraph – the IACC should serve in a way as a Supreme International Court which is simply intended to ensure the observance of already existing domestic laws on the basis of the subsidiarity principle.

Finally - and most importantly - the establishment of the Court would ultimately represent a protection system for human rights, rule of law and democracy.

"As an International Anti-Corruption Court is urgently needed to promote democracy and human rights, protect human life and health, and enhance international peace and security, we hereby DECLARE our support for the creation of the Court and CALL ON others to join us in this crucial common cause."⁹⁹

Transparency International has likewise expressed support in favor of the creation of the International Anti-Corruption Court. In submitting its recommendation to the UNGASS 2021, TI recognized the need to reform international justice institution, identified the IACC as a particularly "notable proposal" and stated that it "deserves careful study".¹⁰⁰

⁹⁷ House of Representatives, H.Res.856, (12 February 2020).

⁹⁸ UNGA, GA/12329, Declaration in Support of the Creation of an International Anti-Corruption Court, (2 June 2021).

⁹⁹ III, "Declaration in Support of the Creation of the International Anti-Corruption Court".

¹⁰⁰ Transparency International (2021), *Proposals on the international legal framework and infrastructure to address grand corruption impunity*, Submission to the UNGASS 2021 against Corruption.

Similarly, in its submission to the UNGASS 2021, the UNCAC Civil Society Coalition said that “new and stronger mechanisms for international cooperation are needed to successfully investigate and prosecute grand corruption cases and member states should use the UNGASS to discuss and evaluate options or new international infrastructure to do so”.¹⁰¹

Endorsement from different States, institutions and organizations suggest that momentum is building for the creation of an International Anti-Corruption Court. Moreover, it is worth underlining again that the COVID-19 pandemic has exacerbated the need for the creation of the IACC. The pandemic is becoming a pretext for corruption,¹⁰² as trillions of dollars in relief funds are being disbursed without even the usual, often ineffective, safeguards. Evidence is emerging that funds intended to combat the pandemic are being misappropriated and misused by high officials in many countries, thus impacting once again on the enjoyment of basic human rights, first of all, under the current circumstances, the right to the highest attainable standard of health. It is therefore increasingly evident that something more is needed to deter corrupt high officials.

2.6 How would the IACC function?

2.6.1 Principle of complementarity

First of all, a fundamental premise of criminal law in general is the deterrent effect resulting from the severity and certainty of punishment. While not being the only factor, the prospect of punishment is vital in deterring crime. On the contrary, the lack of punishment or imprisonment contributes significantly to fueling crime and the persistence of grand corruption.

The same premise is valid with regard to violations of human rights, as confirmed by several research.¹⁰³ For this reason, as mentioned before, the international community decided to establish the International Criminal Court, with the purpose of punishing the most severe

¹⁰¹ UNCAC Civil Society Coalition Contribution to the Consultation Process in Preparation of the UNGA, Special Session against Corruption 2021.

¹⁰² Lloyd Axworthy and Allan Rock, “Let’s hold the kleptocrats to account”, *The Globe and Mail*, available at <https://www.theglobeandmail.com/opinion/article-lets-hold-the-kleptocrats-to-account/>.

¹⁰³ *Inter alia*, Valerie Wright, *Deterrence in criminal justice: Evaluating certainty vs. severity of punishment*, 2010. Sentencing Project, pp. 1-19, available at <https://www.sentencingproject.org/publications/deterrence-in-criminal-justice-evaluating-certainty-vs-severity-of-punishment/>.

crimes encompassed in the Rome Statute, namely genocide, war crimes and crimes against humanity.

At the same time, the Court aimed at addressing the shortcomings inherent to national courts, though without replacing them. Indeed, the ICC can intervene only when a country is unable or unwilling to initiate an internal prosecution against perpetrators of the abovementioned crimes.

Therefore, similarly to the International Criminal Court, an International Anti-Corruption Court could function based on the principles of complementarity and subsidiarity. It would serve as an extraterritorial prosecution and punishment of corrupt leaders of countries that are unwilling or unable to enforce their own laws. Therefore, the Court would only represent a forum which deals exclusively with grand corruption and prosecutes violations of international honesty, rather than encouraging the production of new norms. The Court wouldn't foresee any new legal obligations for the countries that submit to its jurisdiction; rather, it would be a venue for the enforcement of existing norms already codified almost everywhere¹⁰⁴. A forum in which evidence of corruption by a nation's leaders can be honestly and effectively presented to an impartial tribunal capable of imposing prison sentence on powerful people.

This would happen thanks to different factors, all equally relevant in order to make an international Court function.

Firstly, as demonstrated by previous experiences at the international level, it is reasonable to think that the convergence of expertise and resources coming from different countries would enhance the potential and the success of the Court. As a matter of fact, the Court could employ elite prosecutors from around the world with the experience and the skills required to develop and present complex cases in an effective way.¹⁰⁵ In addition, the IACC should be led by competent and impartial international judges.

Moreover, by operating on the principle of complementarity, the Court would give national courts the primary jurisdiction over crimes by corrupt leaders in their countries. This means that the IACC would only exercise its jurisdiction in case a nation does not show the willingness or doesn't dispose of the resources to effectively take actionable steps in investigating, prosecuting and punishing its leaders and accomplices for grand corruption. Quoting Judge

¹⁰⁴ Mark L. Wolf, "The World Needs An International Anti-Corruption Court", p. 150.

¹⁰⁵ Mark L. Wolf, *ibid*, p. 145.

Wolf “the IACC would be a Court of last resort, to be relied upon only in cases in which national enforcement of existing domestic laws against a country’s leaders is not possible”.¹⁰⁶

To encourage broad participation and push even the most reluctant States to embrace the jurisdiction of the Court, Wolf suggests that

“...submission to the jurisdiction of the IACC should be incorporated in the United Nations Convention Against Corruption. It should also be made a condition of membership in international organizations such as the OECD and WTO [World Trade Organization], and for obtaining loans from international lenders such as the World Bank. Similarly, among other new measures to combat corruption being discussed in the current negotiations of the fifth round of the Transatlantic Trade and Investment Partnership, participation in an International Anti-Corruption Court should be included, which would then serve as a model for other trade treaties.”

2.5.2 Need for UN support and intervention to establish international prosecution

Among other things, IACC investigators, prosecutors and judges would serve as sources of expert advice and assistance for countries striving to improve their domestic capacity. Moreover, previous experiences, such as the International Criminal Court or the International Commission against Impunity in Guatemala, can provide important lessons: strengths and shortcomings of institutions which worked, or work, in a similar way and have a similar scope, might prove particularly important when constituting and then studying the concrete functioning of the International Anti-Corruption Court.

For instance, Justice Richard Goldstone is now chairing a Committee of international experts tasked with recommending ways to improve the ICC. One of the possible recommendations, which could be applied to the IACC as well in order to prevent the occurrence of the same shortcomings, is that the judges of the IACC should be required to have prior judicial experience and the “demonstrated ability to preside in complex cases”¹⁰⁷.

¹⁰⁶ Mark L. Wolf, *ibid*, p. 150.

¹⁰⁷ Integrity Initiatives International, (2020) *Submissions to the UN financial accountability, transparency & integrity Panel*.

The International Commission against Impunity in Guatemala could be a quite relevant model as well. The CICIG was an international body, set up by a bilateral treaty between the United Nations and the Government of Guatemala and charged with investigative tasks, whose jurisdiction focused on corruption and organized crime rather than human rights violations.¹⁰⁸ The rationale behind the creation of a body of UN-supported inspectors was, once again, that dedicated domestic anti-corruption units could not work effectively if not insulated and protected from interference.¹⁰⁹ Back then, Guatemala was experiencing very high level of corruption and a UN intervention appeared as the only viable way to contain its spread.¹¹⁰ According to Human Rights Watch, "Guatemala's weak and corrupt law enforcement institutions have proved incapable of containing the powerful organized crime groups and criminal gangs that contribute to one of the highest violent crime rates in the Americas. Impunity remains the norm."¹¹¹

The commission employed international and local staff members to conduct international investigations and produce reports submitted to Guatemalan prosecutors. The Commission constituted indeed a first instance of an investigative body and did not dispose of prosecutorial action, which ultimately laid on state authorities.

Of course, such a body could only function if state authorities provide it with the necessary assistance and room for maneuver. Investigating into alleged crimes requires first of all having access to information and documentary material and for this condition to be fulfilled cooperation from the State involved in the prosecution is inevitably needed. If a State is not willing to cooperate because of a corrupt political leadership who controls the judiciary and the administration and does not allow free investigation, the potential of an investigative body is theoretically limited or even annihilated. Therefore, the agreement with the UN specified:

“the Government of Guatemala shall provide CICIG with all the assistance necessary for the discharge of its functions and activities...and shall ensure, in particular, that its members enjoy: (a) freedom of movement without restriction throughout Guatemalan territory; (b) freedom of access without restriction to all State locations...without prior

¹⁰⁸, “Why UN Inspections: Corruption, Accountability, and the Rule of Law” (2015), *SCJ Int'l L. & Bus.*, 11, 225, pp. 225-260

¹⁰⁹ Stuart S. Yeh, *ibid.*

¹¹⁰ CICIG, 2472 U.N.T.S. 47 (12 December 2006).

¹¹¹ Human Rights Watch, *Country Summary - Guatemala* 1 (2011), available at http://www.hrw.org/sites/default/files/related_material/guatemala_0.pdf.

notice... ; (c) freedom to meet and interview any individual . . . whose testimony is deemed necessary for the discharge of its mandate; (d) free access to information and documentary material that has a bearing on its investigations...whether civilian or military.”

Furthermore, to avoid retaliation and provide insulation from external interference, the Guatemalan government was committed to take all the necessary action to ensure the security and protection of the CICIG’s personnel, who enjoyed impunity from personal arrest or detention.

However, as already mentioned, the CICIG was not empowered to enforce cooperation or impose penalties for non-compliance. Nevertheless, the lack of enforcement capacity and the inability to initiate the prosecutorial action and discipline individuals did not prevent the CICIG from doing a very successful job: the investigations led to the indictment of powerful individuals including ex-President Alfonso Portillo or the ex-Defense Minister Eduardo Arévalo Lacs, and many others, all for corruption.¹¹²

The success of the CICIG’s experience, suggests, as Yeh with good reason notices, that “this type of investigative body can be successful even under conditions where criminal gangs, death squads, and powerful individuals appear to operate with impunity - conditions that characterize many developing countries.” However, the success of the CICIG relied also on the UN intervention and inspection. Had the inquiry been led only by domestic investigators, the whole prosecution would have suffered under the lack of independence. Not having to deal with a external pressure, control and, consequently, a higher legitimate risk of punishment, public officials would have been deterred in their investigative powers. Furthermore, the treaty establishing the CICIG, contained a provision to ensure that investigations are followed by prosecutorial action by, on the one hand, defining the crime of obstruction of justice and, on the other hand, allowing Transparency International to publish on their website reports of obstruction, so that individuals – in particular public officials - who truly impeded or hamper the investigations could be identified and exposed to the court of public opinion.

For all the reasons illustrated so far, it can be concluded that a promising way to combat corruption could be through the ratification of international treaties similar to the one that

¹¹² Emi McLean, “Guatemala’s Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to April 19”, (2013), published on *INTL JUSTICE MONITOR*, available at <https://www.ijmonitor.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19/>.

created the CICIG.¹¹³ In particular, assigning external, independent inspectors the task of investigating into alleged crimes of corruption, would provide the domestic anti-corruption units with the protection needed in order to be able to operate free from interference on the part of powerful political leaders. Furthermore, inspectors, prosecutors and judges could and would be a resource for domestic prosecutors and judges, strengthening their capacity and enhancing the general potential of the IACC as a whole.

Also, the CICIG's experience also demonstrated that the UN intervention, though posing the risk to violate the national sovereignty, could be overcome thanks to realist political considerations, according to which the benefits outweigh the costs.

2.5.3 Importance of a protecting witnesses program

Another lesson that can be learnt from the CICIG and used for the institution of the IACC, include the need to invest significant resources in witnesses and staff security.¹¹⁴ In order to encourage victims and witnesses to cooperate, CICIG created a witness protection program which included the relocation of witnesses and ensured absolute privacy of their identity. A similar program could be studied with regard to the International Anti-Corruption Court. Furthermore, such a program would be vital if private whistleblowers were allowed to bring in front of the court civil corruption cases.¹¹⁵

The possibility of involving private whistleblowers would represent a unique feature and the idea has been put forward, once again, by Judge Wolf. Taking into consideration the United States anti-corruption system, he argues that the State False Claims Act, by authorizing the filing of such suits, has proven particularly successful, as it has allowed the recovery of billions of dollars in the United States. Something similar could be introduced with regard to the IACC, whereby private whistleblowers denouncing illicit assets captured by states officials could be actual gamechanger for countries dominated by political kleptocrats.

¹¹³ Stuart. S. Yeh, "Ending corruption in Africa through United Nations inspections" (2011), *International Affairs*, 87(3), pp. 629-650; Stuart S. Yeh, "Is an international treaty needed to fight corruption and the narco-insurgency in Mexico?" (2012), *International Criminal Justice Review*, 22(3), pp. 233-257.

¹¹⁴ CICIG, Witness Protection Programm: a necessary tool in justice administration, (2011), available at <https://www.cicig.org/history//index.php?page=0046-20110927E>.

¹¹⁵ Once again, the proposal has been made by Judge Wolf, see Mark L. Wolf, "The Case for an International Anti-Corruption Court", pp. 10-12.

2.5.4 Jurisdiction

As for the jurisdiction of the Court, a lot of questions remain still open and unanswered. While waiting for the recommendations of the working group, some proposals about the functioning of the Court could be made. This represents also the most critical point, as the likelihood that a country might not be willing to agree to the prosecution of kleptocrats involved in money laundering or other crimes of corruption under its jurisdiction, is certainly still high.

Similarly to the ICC's mandate, the International Anti-Corruption Court would have jurisdiction over:

1. crimes committed by nationals of an IACC member state;
2. crimes committed on the territory of an IACC member state.

This solution might actually prove valuable and practical, especially with regard to crimes of grand corruption, which, *per se* – as described before – is now characterized by a transnational dimension. Usually, kleptocrats launder their illicit assets through major financial centers and invest them in attractive and stable foreign markets, presumably of countries which have decided not to be members of the Court. By so doing, if a country was not subject to the jurisdiction of the Court, and in case of alleged crimes of corruption occurred in its territory, was still unable or unwilling to prosecute its own kleptocrats, would still have to agree to the IACC's investigation because the illicit transfers have taken place there. This scope of the jurisdiction, combined with the capacity of investigating into cases brought by private whistleblowers, would actually result in a quite far-reaching potential of the Court, which would significantly enhance its impact as an international body.

In addition, criminal prosecution of kleptocrats has great potential to recover stolen assets. A successful prosecution of a kleptocrat by IACC's inspectors would not only result in his or her imprisonment, but also include “an order of restitution or disgorgement of illicit assets, for the benefit of victims. In 2018, the United Kingdom announced that its prosecutors had in four years recovered more than £49m for overseas victims of corruption and other economic crimes, including funds that it repatriated to buy ambulances in Kenya and allocated to benefit the poorest people in Chad”.¹¹⁶

¹¹⁶ Mark L. Wolf, *ibid*, p. 10.

All the efforts and the proposals made so far would theoretically be feasible. Important previous experiences have demonstrated that international bodies and institutions entrusted with far-reaching tasks can truly make a difference. However, there is still a significant amount of studying and researching that certainly needs to be done by international criminal law scholars and anti-corruption experts. While being true that the creation of the International Anti-Corruption Court would send a strong and powerful message about the international community's will to seriously commit to combating corruption and establishing accountability, the idea still presents a lot of shortcomings which will need to be addressed and responded.

III CHAPTER

SKEPTICISM AROUND THE ESTABLISHMENT OF THE IACC

The proposal of the creation of an International Anti-Corruption Court has attracted a lot of endorsement so far. Support has been vocally expressed by, *inter alia*, NGOs and international lawyers, whose advocacy has often inspired international conventions and constituted fertile ground for the ratification of treaties aimed at introducing or strengthening anti-corruption measures.¹¹⁷

For instance, United Nations High Commissioner for Human Rights Navi Pillay opined in 2013 that corruption was a violation of human rights:

“There is no doubt that, in practical terms, corruption is an enormous obstacle to the realization of all human rights—civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of life of the community.... As we continue to clarify the links between corruption and human rights, groups working to combat corruption locally and internationally will see more clearly the value of working with agencies in the field of human rights.”¹¹⁸

However, while momentum is building in support of the IACC, there is still considerable skepticism with regard to its practicality and effectiveness. Harvard Law Professors Matthew

¹¹⁷ Brett. D. Schäfer, Steven Groves and James M. Roberts, “Why the U.S. Should Oppose the Creation of an International Anti-Corruption Court?”, (2014), *The Heritage Foundation*, No. 2958, pp. 1-15.

¹¹⁸OHCHR, Opening Statement by Navi Pillay, High Commissioner for Human Rights, “*Panel on ‘the Negative Impact of Corruption on Human Rights.’*”

Stephenson and Alex Whiting have raised several issues and questioned the feasibility of the Court for different reasons.

This chapter seeks to take a closer look at the critical points raised by skeptics. Whereas Judge Wolf vigorously supports the idea that the International Criminal Court should serve as a model for the creation of the IACC, Matthew Stephenson argues the ICC's experience suggests the limits and potential shortcomings of a future potential IACC rather than inspiring its creation and functioning¹¹⁹. Indeed, ICC's history has shed light on the problematic aspects related to the political feasibility of an institution with extraterritorial jurisdiction; according to several scholars, those circumstances will almost certainly affect the IACC as well. Stephenson continues saying that in order to create another properly functioning Court with universal jurisdiction, endowed with the power to deal exclusively with grand corruption, it's first necessary to rethink and reconceptualize the ICC. However this ambitious proposition, which would first of all benefit the ICC, has not been welcomed so far.

The criticism is primarily based several arguments. The first concern has to do with the political feasibility of an International Court. If an IACC was to be modeled after the ICC, it is necessary to start from the shortcomings of the latter to closer understand why the path towards the creation of another International Court would be unlikely to succeed.

3.1 ICC's experience suggests shortcomings of the IACC

Historically, the ICC was born in a diplomatic golden moment, where the need for an institution with universal reach that could ensure justice had been already demonstrated by different *ad hoc* tribunals. The first international tribunal *sui generis* was the International Military Tribunal, established in Nuremberg in the aftermath of the second world war to try Nazi leaders and prosecute the atrocities occurred. Despite the successful trials, the project for an international institution was not followed up as the Cold War impeded further cooperation to punish perpetrators of massive human rights violations.¹²⁰

¹¹⁹ Matthew Stephenson, "Is an International Anti-Corruption Court a Dream or a Distraction?" (2018), *GAB, The Global Anticorruption Blog*, available at <https://globalanticorruptionblog.com/2018/10/04/guest-post-is-an-international-anti-corruption-court-a-dream-or-a-distraction/>.

¹²⁰ Matthew Stephenson, *ibid.*

The outbreak of the severe ethnic conflicts in the Balkans and the perpetration of atrocities that after the mantra “never again” weren’t even supposed to occur, led to the creation of the International Criminal Tribunal for the Former Yugoslavia. Subsequently, others *ad hoc* tribunals were set up: the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra-Leone (SC-SL), and the Extraordinary Chamber in the Court of Cambodia.

Following these successful international attempts to try and prosecute perpetrators of atrocities, it became clear that the most severe human rights violations needed to be addressed more systematically through a permanent supranational judicial authority: the Statute of Rome was adopted in 1998 and entered into force in 2002, establishing the International Criminal Court.

Out of 60 countries joining the ICC, 33 were Africans: “the most from any region” as Judge Wolf rightly pointed out. The African continent was also the region where most of the ICC’s cases originated. However, times have drastically changed and the biggest challenge the Court has to face nowadays is to keep African countries from leaving.¹²¹ Many scholars have seen in the *modus agendi* of the International Criminal Court a failure to achieve universality in membership which has led to the perception that the Court is inappropriately and unfairly targeting African countries and failing to investigate equally severe conflicts elsewhere¹²².

This critique has been easily validated by the extremely contested power of the United Nations Security Council to refer to the ICC situations in which crimes under the jurisdictions of the Court¹²³ have been committed, even when those cases arise within the territories of countries which are not States Parties to the Rome Statute.

Accusations of anti-African bias have gained traction since 2009 when the ICC issued a warrant of arrest for then-President Omar al-Bashir of Sudan, the first time that an arrest warrant was issued for a sitting head of State thanks to the referral power of the UN Security Council. Sudan called upon the 34 African states that had ratified the ICC’s treaty to withdraw from the Court

¹²¹ Matthew Stephenson, *ibid.*

¹²² This critique has been raised by several scholars, among others: Margaret M. Deguzman, “Is the ICC targeting Africa inappropriately? A moral, legal and sociological assessment” (2020), *Contemporary issues facing the International Criminal Court*, pp. 333-337.

¹²³ According to Art. 5 of the Rome Statute, these are: “*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the International Community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.*”

in an act of solidarity. Burundi and South Africa have officially communicated their decision to withdraw from the ICC. Around the same time, Gambia has threatened to do so as well.¹²⁴

Since then, the feared exodus from the ICC by African countries has not materialized, despite a strategy calling on a collective withdrawal from the Court. Regardless of whether these allegations are well-funded and, if so, to what extent, it's important to underline the fact that Court has to deal with a significant dissatisfaction coming from African countries, whose sovereignty is considered to be disproportionately questioned. The amount of criticism towards the operational work of the Court has undermined its legitimacy and has had a huge impact on the international climate, turned, as pointed out by Stephenson "from one of cooperation to one of unilateralism".¹²⁵

For skeptics of the IACC's institution, it is inevitable to draw certain conclusions. Indeed, ICC's experience has demonstrated the inherent difficulties of an international institution aimed at bringing universal justice and has contributed to fueling, at the same time, the skepticism with regard to the IACC and its potential of having an actual, global reach.

Furthermore, those who fear a neo-imperialist drift of the IACC similar to the one contested to the ICC, base their argument on the same aid-assistance program which are supposed to secure the participation of recalcitrant nations to the Court. Indeed, one of the proposal is that International Financial Institutions, such as the World Bank or the International Monetary Fund, incorporate anti-corruption agendas in their aid-assistance programs to developing or under-developed countries in order to encourage them to submit to the jurisdiction of the IACC and implement international efforts domestically in laws criminalizing corruption.

Some proposal include also extreme coercive measures, like stripping reluctant states of membership in the abovementioned financial institutions or expelling them from the United Nations Convention Against Corruption. According to Stephenson, these coercive measures "are counterproductive because, (A) trade and id sanction – if imposed – would probably worsen the corruption problem, given that poverty and international isolation are significant drivers of corruption, (B) the threat of such sanctions would likely increase the citizenry's sympathy for the corrupt leaders, and (C) the threat of sanctions – almost certainly targeted at

¹²⁴ Franck Kuwonu, "ICC: Beyond the threat of withdrawal. African countries in dilemma over whether to leave or support the International criminal Court", (2017), available on <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>.

¹²⁵ Matthew Stephenson, "Is an International Anti-Corruption Court a Dream or a Distraction?"

weak developing countries – would send the message that anticorruption is a kind of Western/Northern neo-imperialism (thus undermining two generations’ worth of progress in refuting this old canard).”¹²⁶

The IACC would then risk ending up like the ICC, perceived by many as a neo-imperialist instrument which targets weak developing countries.¹²⁷

3.2 Voluntary acceptance of the IACC’s jurisdiction

For the IACC to have jurisdiction over a country’s leaders who has committed corruption, that country would need to voluntarily agree to join the IACC. However, the rationale behind the establishment of an international institution is precisely that corrupt leaders of certain countries refuse to submit to their domestic jurisdiction; by so doing, they manage to avoid accountability and fuel the never-ending impunity cycle. For which reason would a political leader who refuses to be held accountable in his country nonetheless agree to submit to the jurisdiction of a Court endowed with the capacity to prosecute and sanction him? Stephenson argues that “political leaders of countries characterized by high-level corruption cannot be induced to sign agreements permitting an international anticorruption court because they would not voluntarily surrender control”.¹²⁸

Likewise, Schäfer et. al argue that is unlikely that a government made up of predominantly corrupt politicians would ever willingly accept the authority of the IACC.¹²⁹ For instance, it is highly unrealistic to expect Russian President Vladimir Putin, Chinese Premier Li Keqiang or King Abdullah of Saudi Arabia to submit to the IACC if charged with corruption.

However, like professor Stuart Yeh suggest, a voluntary acceptance of a universal jurisdiction even in cases where there is a clear conflict of interests – such as in corrupt countries – is not necessarily so unlikely. According to him, “when domestic and international actors frame the issue as a litmus test – meaning a test of whether or not a head of state truly supports strong anticorruption measures – it can be politically costly for a head of state to reject those

¹²⁶ Matthew Stephenson, *ibid.*

¹²⁷ Micheal R. Darling, “I Can Resist Everything Except Temptation: An International Solution to African Resource Corruption” (2017), *Texas International Law Journals*, pp. 421-448.

¹²⁸ Matthew Stephenson, “Is an International Anti-Corruption Court a Dream or a Distraction?”.

¹²⁹ Brett D. Schaefer, Steven Groves, and James M. Roberts. "Why the US Should Oppose the Creation of an International Anti-Corruption Court", pp. 1-15.

measures”.¹³⁰ History has demonstrated that heads of state, regardless of their personal probity and ethics, chose to publicly support and sign anti-corruption measures mainly for the political symbolism of the gesture and the consequent benefits in terms of reputation and credibility of their own political career. It is well-known that voters prefer political leaders who are tough on crime and put at the priority of their agendas the fight against corruption, as it generally constitutes one of the very few cross-cutting concerns of a country. Moreover, behind their support for anti-corruption laws there is frequently a sense of “*hybris*, the belief that they are above the law and will not be caught by the law”.¹³¹ This feeling is often fuelled and reinforced by the blatant impunity that persists in many states.

The historical record provides several examples of countries ruled by kleptocrats in which independent courts were installed despite endemic corruption, such as in America, Romania, UK, Rome, Guatemala, Honduras and Ukraine. The mere existence of the ICC *per se* – and the high number of countries accepting its jurisdiction, 123 – is, according to Yeh, the very proof that it is feasible to establish international independent prosecutors and courts across a range of jurisdictions even in countries characterized by high levels of crime.

3.3 Lack of consensus around the inclusion of corruption in the ICC’s mandate

Another criticism raised by Schäfer is based, once again, on the ICC’s experience and, more specifically, on the proposal of including acts of grand corruption in the mandate of the Court. As already addressed in the second chapter of the thesis, several human rights activists¹³², international lawyers¹³³ and politicians¹³⁴ have argued that corruption should be categorized as a crime against humanity, thus suggesting to expand the mandate of the ICC in order to incorporate in its jurisdiction grand corruption as well, instead of establishing *ex novo* a new tribunal. However, this would be politically and procedurally difficult, as even some vocal supporters, like the Global Organization of Parliamentarians Against Corruption (GOPAC) have recognized. Indeed, the credibility of the ICC is so at stake that reopening the Rome

¹³⁰ Stuart S. Yeh, “APUNCAC and the International Anti-Corruption Court”, (2020), *Laws* 10.1 (2021): 1, pp. 1-18.

¹³¹ Stuart S. Yeh, *ibid*, p. 14.

¹³² Brett D. Schaefer, Steven Groves, and James M. Roberts, Why the US Should Oppose the Creation of an International Anti-Corruption Court”, pp. 1-15.

¹³³ Sonja Starr, Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations, p. 1257.

¹³⁴ Luke Balleny, “Grand Corruption Is ‘Crime Against Humanity’—Lawmakers”, (2013), *Thomas Reuters Foundation*, available at <https://news.trust.org/item/20131129173618-0jev1/>.

Statute to amend it and expand the Court's powers would likely lead to its demise. An amendment of the Rome Statute requires approval of at least two-thirds of all States Parties. Since grand corruption necessarily involves senior government officials, it is reasonable to expect that corrupt governments - which could be a substantial number as two-thirds of the world falls below the median CPI score according to Transparency International - may not give their support to the effort.¹³⁵ Even if it is adopted, as an amendment to Article 7 of the Rome Statute¹³⁶ that identifies crimes against humanity, it would apply only to the states that accept the amendment.¹³⁷ In other words, amending the Rome Statute is politically unlikely and, even if such an amendment was adopted, would be circumscribed to the extent that states choose not to accept it.

Consequently, according to both Stephenson and Schäfer, it can easily be assumed that if States wouldn't embrace the perspective that the ICC addresses grand corruption, all the more reason they would never agree to the creation of a new international tribunal charged with the task of exclusively prosecuting corruption and reasonably endowed with more specific powers to do so.¹³⁸

3.4 Lack of strong independent investigative powers

Another criticism concern the difficulties in prosecuting corruption at an international level and the necessity to rely on domestic authorities. International criminal law, just like International law in general, is built on the foundation of state consent. A state's legal

¹³⁵ Brett D. Schaefer, Steven Groves, and James M. Roberts. "Why the US Should Oppose the Creation of an International Anti-Corruption Court", pp. 6-9.

¹³⁶ Article 7(1) states: "*For the purposes of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a. Murder; b. Extermination; c. Enslavement; d. Deportation or forcible transfer of population; e. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence or comparable gravity; persecution of any identifiable group or collectivity national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i. Enforced disappearance of persons; j. Crime of Apartheid; k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

¹³⁷ Article 121(5) states: "*Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.*" Rome Statute of the International Criminal Court, 1998 (corrected 2002), Articles 7 and 121.

¹³⁸ Stuart S. Yeh, "APUNCAC and the International Anti-Corruption Court" (2021), *Laws*, 10(1), 1.

obligations are overwhelmingly – some would say exclusively – based on its consent to be bound.¹³⁹ Similarly to the ICC, the International Anti-Corruption Court, as a treaty-based Court, would require States to give their voluntary consent to submit to its jurisdiction. Only in that case the Court would be able to determine if a country has actually tried and held their political leaders accountable and if the legal system is adequately prepared to tackle grand corruption.¹⁴⁰ Corruption has been, indeed, already criminalized in almost every country and, as previously mentioned, the main problems in eradicating the problem lie in the law enforcement. If the Court was to serve as an actual supranational institution which ensures the implementation of strategies aimed at fighting corruption, it would have to dispose of the legal capacity to execute its warrants and arrest suspects. Thus, enforcement capacity constitutes arguably an essential element for the IACC to function effectively as an international prosecutorial authority.

Moreover, for the Court to prosecute effectively crimes of grand corruption, strong independent investigative powers are required. Such powers are even more necessary with respect to grand corruption compared to war crimes or acts of genocides over which the ICC has jurisdiction. As a matter of fact, war crimes or acts of genocide certainly present challenges when being prosecuted, but the victims, as well as the criminal conduct put in place, are quite visible and so is the forensic evidence. While identifying exactly and concretely the senior actors of genocides or war crimes might be difficult, the perpetration of the crimes themselves can be easily proved beyond any reasonable doubt.

On the contrary, proving grand corruption is different: the nature itself of corruption is hidden and the commission of corrupt acts is ontologically hard to detect. In order to unduly obtain large sums of money, complex techniques of financial transactions have been developed, which often result in investments abroad to avoid further controls. As a result, the sources of those funds are hard to trace and the real owners of those assets likewise difficult to identify. As Judge Wolf rightly underlines “obtaining financial records to trace the origins of money is cumbersome; each record usually shows only that the money has been moved elsewhere, and allows for endless possibilities for obstruction”.

¹³⁹ Andrew Guzman, “The consent problem in International Law”, (2011), *Berkeley Program in Law and Economics*. Working Paper Series. Available at: <https://escholarship.org/content/qt04x8x174/qt04x8x174.Pdf>.

¹⁴⁰ Stuart S. Yeh, “APUNCAC and the International Anti-Corruption Court”, pp. 1-19.

This would mean that the Court would have to strongly rely on the cooperation and support of national authorities¹⁴¹ to enforce its own rulings. Even if there was some sort of international pressure on States to cooperate with the IACC's investigative bodies, ultimately the decision lies with the national political leadership.

Therefore, if the final objective is to set up an international court and enable it to work effectively, it is crucial to foresee even more power and independence than those given to the ICC or to the *ad hoc* tribunals set up so far. The answer could be installing an International Court modeled after the ICC and incorporating in it an independent body endowed with strong, investigative powers, like it was in the case of the CICIG - as amply illustrated in the second chapter with regard to the functioning of the Court.

3.5 A definition of Grand Corruption lacks clarity

Another criticism regards the lack of clarity with regard to the definition of grand corruption. The understanding of grand corruption is not clear because of the boundaries with petty corruption. Indeed, the United Nations Convention Against Corruption (UNCAC) does not provide a definition of corruption as such. It rather defines specific acts of corruption that should be considered in every jurisdiction covered by UNCAC.¹⁴² These include bribery (articles 15 and 16), embezzlement (article 17 and 22), but also money laundering (article 23), concealment (article 24) and obstruction of justice (article 25).¹⁴³

Moreover, it is not clear if within the prosecutorial mandate of the Court should fall exclusively the perpetration of the abovementioned acts or if the jurisdiction should be extended also to the failure of taking acts to punish and discourage commission of crimes. As Stephenson, in response to Judge Wolf, says "If the understanding of 'grand corruption' includes not just theft or bribe-taking by high-level government officials, but also failure by those officials to take

¹⁴¹ Antonio Cassese, 2009, Acceptance speech for the Erasmus Prize.

¹⁴² Hannes Hechler, "UNCAC in a nutshell. A quick guide to the United Nations Convention against Corruption for embassy and donor agency staff", (2010), *U4 Brief*, 2010, 2010.6.

¹⁴³ The first part of the Chapter III of the United Nations Convention Against Corruption, meaning articles ranging from 17 to 24, is mandatory and requires States to implement in their domestic legislation the criminalization of the crimes listed. The remaining provisions of Chapter III encompass acts that states are encouraged - but not required - to criminalize and include acceptance of bribes by foreign and international public officials, trading in influence, abuse of function, illicit enrichment, bribery and embezzlement within the private sector, money laundering and the concealment of illicit assets.

action to punish corruption by friends or political allies (...) then just about every U.S. President, or any other national leader, could feel potentially vulnerable to IACC liability”.¹⁴⁴

And once again, such a far-reaching mandate of the Court would result in greater interference in the national sovereignty at the expenses of States.

3.6 Potential erosion of the gravity of serious crimes

Moreover, Stephenson draws another comparison with the ICC to elaborate on the significance of another International Court. The creation of the ICC reflected a joint attempt of the international community to encounter the problem of impunity and fight injustice by bringing accountability. In the same way, the establishment of an International Anti-Corruption Court would pursue a similar aim, meaning giving a global answer to a global challenge, whose devastating effects and cross-border nature have been widely acknowledged. However, according to Stephenson, expanding the definition of serious crimes by equating corruption to crimes against humanity, war crimes or violent aggression, would arguably erode their gravity and trivialize them. For this reason, the prosecution of acts of corruption in general, without any distinction as for grand or petty corruption, should be left to the jurisdiction of domestic tribunals.

It is with regard to the distinction between grand and petty corruption that a last, but quite relevant issue has been raised by skeptics of the IACC. The problem of low-level corruption, while not equally notorious, is equally widespread and devastating.¹⁴⁵ In order to countering corruption effectively a comprehensive approach is required, including policies aimed at addressing the problem at all levels. If practices of providing or accepting small bribes to obtain a service or an undue advantage occur on a daily basis and are normalized to the point that people become inured to them, also corruption at a higher level of governments will be viewed and accepted with more resignation. Therefore setting up a supranational Court which targets exclusively perpetrators of grand corruption, thus leaving out of its jurisdiction the prosecution

¹⁴⁴ Matthew Stephenson and Sofie Schütte, “An International Anti-Corruption Court? A synopsis of the debate”, *Bergen: U4 Anti-Corruption Resource Centre*, 2019:5, pp. 1-19.

¹⁴⁵ Brett D. Schäfer, Steven Groves, and James M. Roberts, “Why the US Should Oppose the Creation of an International Anti-Corruption Court”, p. 13.

of minor offenses, would not deter corruption that affects the majority of the population and accounts for a significant loss in terms of domestic economy.

3.7 Cost-effectiveness

Finally, the serious doubts about the political feasibility and practicality of the IACC, are buttressed also by questions of cost-effectiveness. Indeed, operations of the Court might cost hundreds of millions of dollars per year, money that could be used to strengthen other efforts to reduce grand corruption and impunity. It has not yet been estimated precisely how much the court's operation costs would amount to, but, once again, the existing international tribunals might serve as a precedent. The ICC's operating costs have averaged roughly 100 million dollars per year and it is now around 160 million dollars.¹⁴⁶

If the international community was going to spend 100 million per year to fight grand corruption, the same considerable amount of money could be used in a more effective manner than on an international court, especially when it is still highly uncertain how successful it would be in terms of convictions. Judge Wolf suggests to use part of the funds recovered in the functioning of the Court¹⁴⁷. However, this would be possible only after a conviction and assumed that the stolen assets are actually recovered; furthermore, many would contest this use of the recovered money, as they are supposed to help victims in the countries from which it were stolen.¹⁴⁸

From what has been illustrated so far, it seems that the practical obstacles to the IACC's project are several. While some of them are clearly based on considerations that necessarily present some speculation, other – such as the willingness of States to accept the jurisdiction of the Court or the questions related to the cost-effectiveness – are more well-funded and need to be addressed by the international community when articulating a substantive plan with regard to the establishment process of the IACC.

¹⁴⁶ Matthew Stephenson and Sofie Schütte, "An International Anti-Corruption Court? A synopsis of the debate.", p. 6.

¹⁴⁷ Mark L. Wolf, "The case for an International Anti-Corruption Court".

¹⁴⁸ Global Forum for Asset Recovery 2020, available at <https://star.worldbank.org/case-study/global-forum-asset-recovery-gfar>.

CONCLUSION

One of the most frequent causes of massive human rights violations is corruption, perpetrated both in the form of day-to-day corruption and at the high levels of government, often referred to as “grand corruption”. While not being certainly underestimated in general terms, not enough attention is paid to corruption specifically in its interaction with human rights domain and thinking. It is a fact that the discourse on the need to strengthen the human rights protection and promotion system rarely revolves around the devastating consequences of corruption on the attainment of human rights. Consequently, anti-corruption legal frameworks have not yet been filtered through the lens of a human rights-based approach.

In fact, the mutual reinforcement resulting from the incorporation of human rights-related instruments in the fight against corruption, could be realized with the establishment of the International Anti-Corruption Court. The creation of the Court is certainly ambitious and it presents challenges that require long studying and examination. However, what is certain is that the international efforts pursued so far in order to curb corruption on a global scale have yielded only modest success, as corruption still remains endemic and systematic on a particularly high number of countries throughout the world.

The several multilateral agreements and conventions adopted, first of all the United Nations Convention Against Corruption, while prompting States to criminalize domestically corrupt conducts pursuant to their international legal obligations, do not provide concrete instruments which practically ensure their implementation. Indeed, corrupt leaders – kleptocrats – enjoy impunity in their own countries because they control the administration of justice and do not allow for a free and independent prosecution of corruption. Consequently, the lack of accountability fuels the perpetuation of corruption and impunity persists in a pervasive and destructive manner. Not only: impunity erodes relentlessly people’s trust in institutions and threatens their legitimacy. In the recognition that holding kleptocrats criminally accountable for their wrongdoings in their own countries is often practically impossible, a supranational prosecutorial institution may be the needed gamechanger.

Since new and stronger mechanisms for international cooperation are needed to successfully investigate and prosecute grand corruption cases and compel observance by states with regard to the existing anti-corruption measures, the International Anti-Corruption Court would represent the only viable supranational infrastructure capable of addressing impunity in an innovative and effective way.

First of all, the IACC would constitute a forum for the enforcement of already existing national anti-corruption laws, thus complementing the United Nations Convention Against Corruption. The Court would operate on the principle of complementarity, meaning it would only intervene when a country is not willing or able to prosecute its own leaders. Moreover, the mere existence of the IACC would have a deterrent effect: the historical record of the International Criminal Court demonstrates that the mere risk of punishment and the threat of investigation and criminal prosecution at the international level deters the commitment of crimes by both state and non-state actors at the national level. Similarly, the IACC would *per se* constitute an incentive for domestic courts to prosecute corrupt public officials.

Where the national Courts fail, the IACC would succeed, putting an end to impunity and establishing again accountability. With regard to the criticism concerning a possible neo-imperialist drift of the IACC, public opinion polls in Africa indicate that several African countries have grown old from empty promises and claims of domestic authorities that corruption would be addressed. Therefore they are ready to accept an intervention of the IACC.¹⁴⁹

The political symbolism of the Court must not be underestimated either: as the ICC's creation signaled the intolerance of the international community of genocides and war crimes, leaders accepting the universal jurisdiction of the IACC would send a powerful statement concerning their serious commitment to prioritize legality over their own interests. The very existence of the IACC would help rebuild people's trust in the domestic political institutions.

In terms of practical benefits, an important aspect of the IACC must be underlined: the Court would be endowed with the power to recover and repatriate stolen assets, which would then be returned to their original countries and invested back into public sectors. As a result, the

¹⁴⁹ Steven Brown, and Chandra L. Sriram, "The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya" (2012), *African Affairs*, 111(443), pp. 244-260.

restitution of these illicit assets would ultimately benefit the victims and represent an effective remedy for the human rights violations they have suffered from. Such a capacity could be even more strengthened by a possible provision allowing for whistleblowers to bring private corruption cases in front of the Court.

Reasonably, several questions could be raised with regard to the feasibility and the effectiveness of the IACC, especially in a time when skepticism towards international institutions, in particular the ICC, is at its apex. According to the main line of criticism, it is highly unlikely that countries ruled by kleptocrats would voluntarily agree to submit to the jurisdiction of the Court.

The second major concern is related to the effectiveness, and more specifically the limited set of tools that international investigators and prosecutors would dispose of, having to rely almost entirely on the cooperation with domestic authorities.

While being both reasonable and well-funded, these arguments could be addressed by structuring the IACC as a hybrid model. In particular, what it is argued in the thesis is that the IACC could be a valuable combination of the International Criminal Court and the International Commission Against Impunity in Guatemala. By modelling the IACC after the ICC and endowing it with the same capacity of the CICIG - namely installing in the Court an independent body with strong investigative powers - would be possible to overcome most of the critical issues and enable a real, effective and efficient functioning of the Court.

However, the motivation behind the pressure to create the International Anti-Corruption Court is primarily the need to “break the self-reinforcement corruption-impunity cycle that persists in many countries”¹⁵⁰. In many nations, the culture of legality has been almost irretrievably compromised by corruption perpetrated by those same leaders who are supposed to represent the interests of the community and are charged with the power to do so. The lack of a sound and independent judicial system does not allow for accountability and this not only has serious repercussions in terms of general affection and interest of the population for the institutions, but it also fuels the belief that corruption can be perpetuated without major legal consequences.

¹⁵⁰ Matthew Stephenson, and Sofie Schütte, “An international anti-corruption court? A synopsis of the debate”, (2019), *Bergen: U4 Anti-Corruption Resource Centre*. Available at <https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate>.

However, awareness is growing especially among young people who are protesting against corruption at their great peril and demanding the opportunity for democratic elections to finally give rise to a honest political leadership, willing to serve the country's interests in a transparent way.

Therefore, what is needed to re-establish the culture of legality is often accountability: if kleptocrats were brought in front of a Court and held responsible for the committed crimes, people would start actually believing again that justice is possible: a belief that would be reinforced by a fair allocation of the public resources they contribute to.

Obstacles to the IACC's project cannot certainly be underestimated, but the international community should pursue its efforts in thinking of solutions in order to prevent the shortcomings. As ambitious and challenging as it might seem, the IACC's creation represents one of the very few – if not the only one – effective global answer to the global challenge of corruption.

As Nelson Mandela said “everything seems impossible until it's done”.

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