

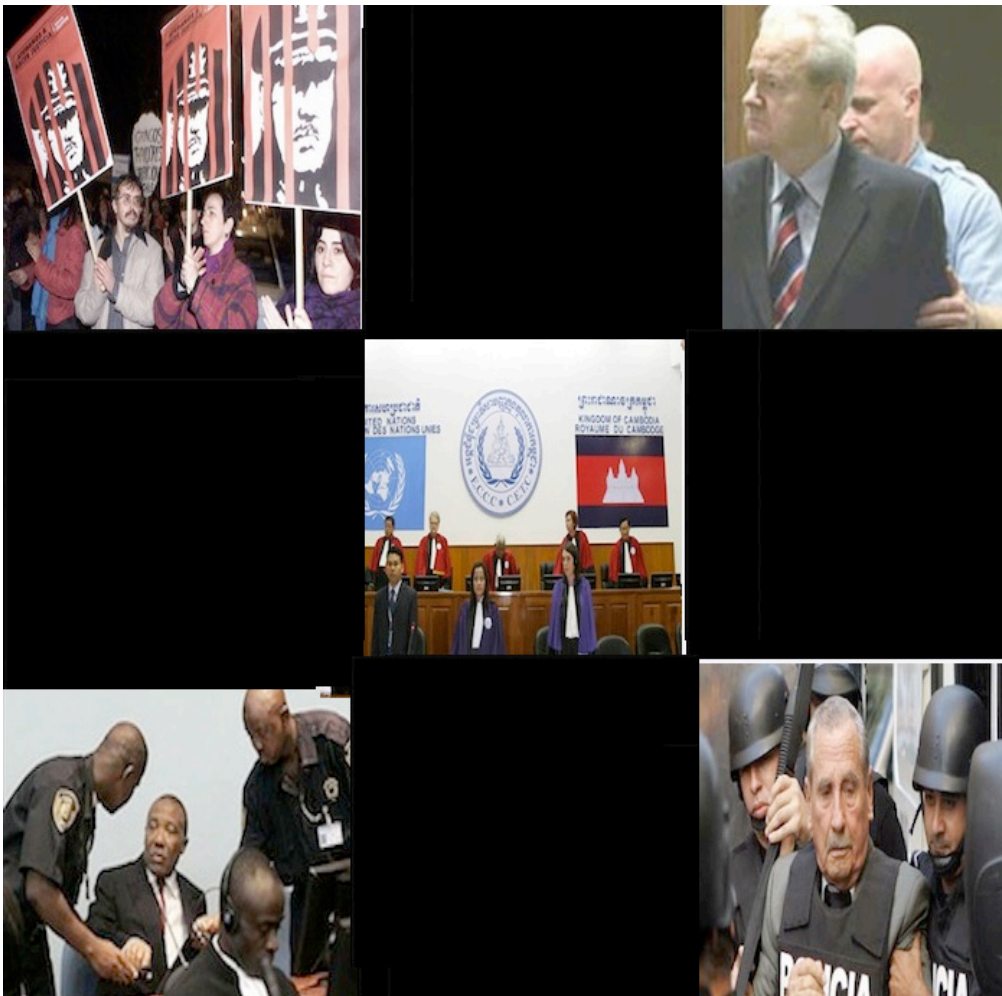
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**THE ROAD TO CHALLENGING IMPUNITY: FROM
CONTESTING AMNESTIES TO ASSETS RECOVERY.**

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ABSTRACT

For centuries, the impunity of the sovereign has been one of the most evident features of the international political architecture. The sole fact that we refer to this phenomenon as '*culture of impunity*' indicates how deeply has it been ingrained in our societies.

However, following the atrocities of the Second World War and the post-war growing concern with human rights, this paradigm started to change, especially during the last two decades.

Gradually, impunity started being stigmatized. Twenty years ago, only few utopian idealists could imagine that dictators such as Charles Taylor could be held accountable for their crimes.

Although impunity is usually discussed within its legal context, this thesis sheds a new light on the subject, arguing that dictatorship can be eliminated only if a mixture of strategies is applied. Using an analogy to the chess game where the one that attacks his opponent from different sides is the winner, this paper demonstrates that different aspects of world's despots impunity (such as legal, economic, political) need to be comprehensively tackled in order to achieve the ultimate goal of toppling the regime.

TABLE OF ABBREVIATIONS

ADB -	Asian Development Bank
EC-	European Commission
ECHR-	European Convention of Human Rights
EU -	European Union
FATF -	Financial Action Task Force
HRC -	Human Rights Committee
IACtHR-	Inter- American Court of Human Rights
ICC-	International Criminal Court
<i>Idem</i> -	the same
IICI –	Institute for International Criminal Investigations
ICJ -	International Court of Justice
IMT –	International Military Tribunal
ICCPR –	International Covenant of Civil and Political Rights
ICESCR –	International Covenant of Economic, Social and Cultural Rights
ICTY-	International Criminal Tribunal for Yugoslavia
ICTR-	International Criminal Tribunal for Rwanda
MEP -	Mutual Evaluation Procedure
MLA -	Mutual legal assistance
NGO -	Non-Governmental Organisation
OECD-	Organisation for Economic Co-operation and Development

PEP -	Politically Exposed Person
RIAA -	Return of Illicit Assets Act
RICO -	Racketeer Influenced Corrupt Organization Act
SEP -	Self-Evaluation Procedure
STAR -	Stolen Assets Recovery Initiative
<i>Supra</i> -	above
TRC -	Truth and Reconciliation Commission
UDHR -	Universal Declaration of Human Rights
UN -	United Nations
UNCAC -	United Nations Convention Against Corruption
UNGA-	United Nations General Assembly
UNODCA -	United Nations Office on Drugs and Crime
UNSC -	United Nations Security Council
UNWCC-	United Nations War Crimes Commission
WHO –	World Health Organisation

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INTRODUCTION

For centuries, impunity of the ‘powerful’ has been one of the key features of international political architecture. Although already in 4th century BC, Demosthenes said “*Every dictator is an enemy of freedom, an opponent of law*”, human history is marked by stories of potent men being exempted from punishment. In fact, it would be not an exaggeration to say that dictators have dominated 20th century’s history.

Despite sovereignty being one of the most important characteristics of international relations, we have to acknowledge that this paradigm is changing. Following the atrocities of the Second World War, a number of universal instruments of human rights protection has been put in place. Thus, sovereignty can no longer be perceived as ‘a shield’ from responsibility. Systematic breaches of human rights are no longer of solely domestic concern, but are relevant to the international community as a whole.

Just a few decades ago, ‘outgoing’ dictators could feel safe in their villas built for the money stolen from national treasuries. There was no permanent international institution, which could hold them accountable for gross human rights violations. What is more, there was no genuine political will from states to bring them to justice. General Pinochet famously said: “*sometimes democracy must be bathed in blood*”, which is a direct contradiction of what international human rights movement has been all about. Nevertheless, for many years after he gave up his power, he could enjoy luxuries of a very comfortable life while his victims had no say.

Although the immense endeavour of fighting impunity is only at its starting point, it is argued that dictators are gradually being ‘cornered’ from different directions. Waiving Pinochet’s immunity by a British court is just one example of that.

It is as if international *justice* is in a game of chess versus *dictators*’ where the bargaining chip is impunity; and if the current trend of the game is maintained, dictators are to be

pinned down and stripped of this impunity. As will be presented further in the thesis, there are various components of the fight against impunity and in order for justice to win this battle those components should be addressed comprehensively. Furthermore, if the legacy of recent events that took place in Africa and Middle East (referred to as ‘Arab Spring’)¹ are not to be wasted, the international community has to create a long-term message for human rights perpetrators that their impunity is no longer to be tolerated.

In the first decade of the 21st more countries are considered democratic than during last two decades of 20th century. However, according to the Freedom House, in 2011 still forty-seven states are listed as ‘not free’ and ruled by dictators.² Consequently, in order to ‘corner’ dictatorial and authoritarian regimes, international community has to challenge impunity diplomatically, legally as well as economically.

The first chapter of the thesis will give a brief historical overview of the most significant events that have brought us a step closer to challenging impunity- starting with the International Military Tribunal in Nuremberg, which held war criminals accountable for the atrocities committed during the Second World War and ending with a ‘crown jewel’ in Nuremberg legacy, namely the International Criminal Court. Although post-Nuremberg there have been attempts to establish a permanent criminal court, they have failed owing to the geopolitical rivalry during the Cold War, in which international law was arguably one of the big victims. Therefore, it took half a century to create an universal mechanism, which ultimate goal was to challenge impunity of human rights perpetrators.

Furthermore, some of the biggest developments in the field of human rights protection have actually occurred in regional organisations; particular attention will be paid to Inter-American institutions.

¹ such term has been widely used by the media, e.g.

http://www.newyorker.com/reporting/2011/05/02/110502fa_fact_lizza, consulted 18 June 2011,

<http://www.time.com/time/world/article/0,8599,2068931,00.html>, consulted 18 June 2011.

² Roberts, 2011,p.1.

Since the fall of the Berlin Wall, *transitional justice* has started to become a buzzword of international relations. Despite heralding the ‘end of history’, international public was shaken with brutal images of war in Yugoslavia, Rwanda or Sierra Leone. In spite of its initial shock, and following the military response, transitional justice mechanisms were put in place. However, even though they were crucial for universal justice, *ad hoc* tribunals were designed to deal only with particular conflicts.

Since there was a clear need for an universal mechanism and despite the criticisms of many neo-realists, who argued it would undermine states’ sovereignty, the Statute of Rome has entered into force on 1 July 2002.³ Even though it was a great success on the road to challenging impunity, much more has to be done.

As will be shown in the second part of this paper, one of the pieces in the puzzle of battling impunity is its legal aspect. ‘*Amnistia*’ is one of the oldest legal concepts and although there is no clear definition of amnesty in international law, its underlining idea was that of ‘casting the crime into oblivion’.⁴ Consequently, it comes as no surprise that it was one of the instruments used by human rights perpetrators to enforce their impunity.⁵ Officials representing outgoing regimes have often granted themselves ‘self-absolution’ from the crimes committed.⁶ As highlighted by Seibert-Fohr “in those States in which massive and systematic human rights violations take place, there has been a tendency for such crimes to go unpunished. Impunity involves a vicious circle which tends to recur”.⁷ Amnesties make it more difficult rather than facilitate the process of promotion of rule of law and transition to democracy.⁸

³ <http://untreaty.un.org/cod/icc/index.html>, consulted on 15 March 2011.

⁴ <http://www.qub.ac.uk/schools/SchoolofLaw/Research/InstituteofCriminologyandCriminalJustice/Research/BeyondLegalism/DefiningAmnestyLaws>, consulted on 17 March 2011.

⁵ Although it has to be emphasised that for instance in the South African context, rather than as an instrument used to ‘forget’ past crimes, it has been used as a tool to ‘reveal’ them (Freeman 2005, p.13-14)

⁶ e.g. Argentina’s Ley 23.521, *Obediencia Debida*.

⁷ Seibert-Fohr 2009, p.55.

⁸ interview with IICI representative, 12 May 2011.

However, recently there has been a growing trend to question amnesties and in many cases to repeal them.⁹ It has been especially relevant in the South American context where the Inter-American Court and the Inter-American have been instrumental in challenging amnesty legislation.¹⁰

Furthermore, it is not surprising that the institution, which claims one of its aims is to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”¹¹ is of particular relevance for contesting amnesties. Nevertheless, there is no mention of amnesties in the Statute of Rome, which makes the issue of amnesty even more ambiguous. This paper does not argue that international law should bar amnesties *per se* and it does acknowledge that in rare situations, amnesty may actually serve the interest of justice.¹² However, it argues that it is in the interest of the international fight against impunity to have a more coherent understanding of the issue. Therefore, a clearer definition of when amnesties *are* or *are not* allowed is a prerequisite. States have to acknowledge that human rights perpetrators might be subject to international prosecution even if there is domestic amnesty legislation that precludes criminal prosecution.

Furthermore, although it is an often neglected aspect of the fight against impunity, it is argued that in order to comprehensively tackle the issue, more attention needs to be drawn to the economic ‘piece of the puzzle’. It will be the scope of chapter three.

In the past, the distinction between civil and political rights and economic, social and cultural rights has been emphasised.¹³ However, it is now widely accepted that human

⁹ <http://www.amnesty.org/en/library/asset/AMR13/004/2003/en/af9b4393-d701-11dd-b0cc-1f0860013475/amr130042003en.html>, consulted on 17 March 2011.

¹⁰ For instance, most recently: Inter-American Court, Caso Gomes Lund y Otros (“Guerrilha do Araguaia”) v Brazil, 24 November 2010.

¹¹ Statute of Rome, Preamble.

¹² Statute of Rome, Art.53(c) : “Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.

¹³ As demonstrated for instance by two different conventions to address them: ICCPR and ICESCR.

rights are in fact “interrelated, interdependent and indivisible”.¹⁴ Furthermore, just as human rights are indivisible so is the impunity not solely a problem of breaching civil and political rights but also of systematic economic violations. In fact, *indigenous spoliation* and the impunity of those enforcing it are arguably one of the greatest problems affecting populations of many countries. Looting national treasuries by constitutionally responsible officials is one of the major causes of extreme poverty in many parts of the world. In Haiti, the poorest country in the Western Hemisphere¹⁵, Jean Claude Duvalier and his closest family and friends have stolen up to \$500 million.¹⁶ Philippines’ Ferdinand Marcos has embezzled \$5 billion, in Indonesia General Suharto and his family stolen up to \$40 billion and Mobutu Sese Seko of Zaire has robbed from \$4 billion to over \$10 billion.¹⁷ Furthermore, although in the past there have been economists who said that in a short-term perspective corruption can be beneficial to developing economies¹⁸, the reality proves otherwise and in fact there is a link between “between indigenous spoliation and political instability”.¹⁹ What is more, it is often overlooked that Western export credit agencies can sometime be the co-culprit of stealing public resources if they do not effectively consider the corruption records of companies competing for contracts.²⁰ Consequently, the issue of illicit enrichment of officials needs to be addressed in more detail by states and international organisations, in order for the international public to get the grasp of how serious this problem is.²¹ There are some who argue indigenous spoliation can actually be considered a crime against humanity.²² As will be shown in chapter three

¹⁴ <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>, consulted on 10 March 2011

¹⁵ <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html>, consulted on 13 March 2011

¹⁶ Prince 1985,p.51.

¹⁷ Masland et al.,2010,p.2.

¹⁸ Gathii 2009, p.7.

¹⁹ Kofele-Kale, 2006b,p.30.

²⁰ As it was a case e.g. with regard to the Lesotho Highland Water project (<http://www.internationalrivers.org/africa/lesotho-water-project/lesotho-highlands-water-project-what-went-wrong>, consulted on 20 April 2011).

²¹ In many states illicit enrichment is not even considered as a crime, for instance Thailand has only recently ratified the United Nations Convention Against Corruption (ADB&OECD 2007,p.2.).

²² e.g.Skogly 2009.

although putting it in this category might be too far-fetched, it seems that illicit enrichment should in fact be considered an international crime in its own right.

Chapter four will examine what happens to assets once states' highest officials steal them. The contrast between external debts of some countries and mountains of cash stashed abroad is sometimes truly shocking. For instance, when Philippines' external debt amounted to \$26 billion, the private wealth held abroad by officials was \$11 billion²³ despite the fact the salary of President Marcos was modest \$5,7000 per year.²⁴ What seems even more startling is that stolen resources have often been stored in Western states officially condoning corruption, such as Switzerland or Lichtenstein. Nevertheless, with the growing emphasis on challenging impunity and media publicising stories of dictators hiding 'dirty money' on foreign accounts, it started becoming clearer that this issue needs to be addressed. For example in 2000 banks, seeing how negatively it affects their public image, have developed set of rules known as *Wolfsberg Principles*.

In the context of assets recovery the country that has perhaps been mentioned most frequently has been Switzerland. Once acclaimed for their secrecy, Swiss banks actually have been receiving great amount of criticism for their lack of due diligence. Consequently, eager to remove its negative image, Switzerland commenced to adjust its legislation to answer the problem. Most recently, it has passed so-called *Lex Duvalier*, which deals with the issue of failed states and recovering assets. Although definitely a step in the right direction, arguably it is too small of a step. It should be considered first of all how to prevent officials from looting treasuries (by sending a clear message of non-tolerance for their impunity) and secondly how the assets can be recovered before it is too late and the state actually becomes a 'failed state'. For instance, once the *Arab Spring* has started and Egypt's Mubarak has been overthrown, his assets were immediately frozen.²⁵ However, no

²³ de Vries 1986,p.6.

²⁴ Congressman Stephen Solorz, Hearings before the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, House of Representatives, 99th Congress.

²⁵http://money.cnn.com/2011/02/11/news/international/swiss_banks_mubarak/index.htm, consulted on 19

one was so eager to say why the issue has not actually been dealt with during the thirty years that Mubarak has been in power.

As William Schabas wrote:

“New goal, in the name of combating impunity, is to ensure that those once held out as the victims of human rights violations are now put away in jail, and preferably for a very long time”.²⁶

The attempt of this thesis will be to prove that in the past two decades there have been some really positive stepping stones on the road to challenging impunity, of which the establishment of the International Criminal Court has been perhaps the most substantial one. However, the fully-fledged game of *justice versus dictatorships and authoritarian regimes* has only recently begun and if it is to be won, the issue needs to be dealt with comprehensively. Various elements of this comprehensive approach will be presented in next chapters.

June 2011.

²⁶ Schabas, 2004,p.155.

CHAPTER I

CHALLENGING IMPUNITY- HISTORICAL PERSPECTIVE

For centuries, the sovereignty of states and impunity of their Highest Officials have been amongst the most important features of international relations.

Our history has been dominated by the '*culture of impunity*' for a very long time.²⁷ For hundreds of years justice has been a subject to the power of a sovereign. The sole fact that we refer to this phenomenon as *culture of impunity* might indicate how deeply it has been embedded in societies across the globe. As Isabel Allende once said : "What I fear most is power with impunity. I fear abuse of power, and the power to abuse".²⁸

However, in the last few decades this *status quo* has gradually started to change and international law has begun to reverse this paradigm. The atrocities of the Second World War acted as a catalyst for states to acknowledge the existence of a 'new kind'²⁹ of criminal offence: crime against humanity. The overwhelming scale of those crimes was in turn a push towards the birth of universal jurisdiction. As Goldstone puts it:

"It was a new idea that some crimes were so horrendous that they were crimes not only against the immediate victims or solely the people who lived in the country in which they were committed ; they were truly crimes against all mankind".³⁰

Throughout the years following the Second World War there has been a growing notion that serious human rights violators cannot go unpunished and that it is in fact the responsibility of the international community to punish them. In literature, the idea of the international community's responsibility for prosecution of grave human right violators is

²⁷ Lauren 2004,p.15.

²⁸ <http://dotsub.com/view/32444fb9-72f7-4996-b826-27d1c0a9e491/viewTranscript/eng>, consulted on 30 March 2011.

²⁹ Clearly only the recognition of this phenomenon has been new, it has itself been present for centuries.

³⁰ Goldstone 2004,p.viii.

often referred to as the concept of *Global Justice*.³¹ The desire to develop just and effective system of international accountability for those responsible for serious breaches of human rights is an outstanding quality of recent multilateral democracy.³² Therefore, considering how entrenched ‘impunity’ has been in human history it appears that fighting this paradigm is one of the great challenges of the twenty first century.³³

This chapter will focus on the historical developments that have allowed the battle against impunity to become more than just a utopian dream held by a handful of idealists. It will be a prologue to issues, which will be discussed in later chapters. Although some events presented in this chapter give hope for the future, it is beyond doubt that impunity is still ‘alive and kicking’. What will be therefore examined in the following stages of this thesis are some of the most important aspects of the international fight for justice: its legal side tackled by *inter alia* challenging amnesties and its economic features, seen through the lens of confronting systematic economic violations.

1.1. IMT NUREMBERG

The international criminal law regime began with the Nuremberg and Tokyo Tribunals. The unspeakable experience of the *Shoah* had pushed states to bequeath individual human beings with human rights through the Universal Declaration of Human Rights.

In October 1943, seventeen Allied Nations set up the United Nations War Crimes Commission (UNWCC), whose task was to investigate war crimes and later give recommendations for the punishment process.³⁴ However, it was ineffective and set-up to be “seen to be doing something” rather than actually doing it. One of the main reasons for

³¹<http://www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2011/06/10/opening-of-the-hague-institute-for-global-justice.html>, consulted on 15 June 2011.

³²Ahtisaari 2004,p.xii.

³³As Lauren puts it, it will “require extraordinary forces” (2004:17).

³⁴<http://www.nationalarchives.gov.uk/records/research-guides/war-crimes-1939-1945.htm>, consulted on 1 April 2011.

its ineffectiveness was the lack of political support from Allied nations.³⁵ In 1945, the London Agreement established the International Military Tribunal (IMT) in Nuremberg. Although Nuremberg is considered to be the first truly international criminal tribunal, thereby heralding the future *naissance* of international criminal justice mechanisms, there is some dispute as to whether IMT was truly international. In the *Tadic* case, the Trial Chamber of the International Criminal Tribunal for Yugoslavia (ICTY), has stated that Nuremberg IMT was not international but “multinational in nature, representing only part of the world community”.³⁶ Nevertheless, despite this debate, it is beyond doubt that the creation of the Nuremberg Tribunal was an absolutely extraordinary event. For the first time it was clear that individuals carried criminal liability beyond domestic legal orders.³⁷ It was the “unambiguous affirmation of the international responsibility of individuals”.³⁸ Despite some flaws, such as the fact that the crimes against peace charge were actually enacted *ex post facto*³⁹, the effect it exerted on international law was profound.⁴⁰ Nevertheless, the further development of international criminal justice was stalled during the Cold War, which *de facto* undermined any endeavours to put international criminal law mechanisms in place.⁴¹ Although transitional justice traces its roots back to the Nuremberg trials it has not entered political phrasebooks until after the Cold War.⁴² The efforts to “entrench the law identified at Nuremberg”⁴³ and to establish a permanent international criminal court have failed due to the Cold War rivalry, which meant that for half a century there was no supranational mechanism dealing with crimes against humanity.

³⁵ Cryer, 2005, p.38.

³⁶ Prosecutor v. Tadic, Opinion and Judgement, IT-94-1-T, 7 May 1997, para.1.

³⁷ supra note 15 ,p.39.

³⁸ idem.

³⁹ Sellars, 2011, p.1089.

⁴⁰ supra note 15,17, p.40.

⁴¹ Bloxham, 2001, pp.24-5.

⁴² Freeman, 2009,p.18.

⁴³ supra note 15,17,20, p.48.

1.2. INTER-AMERICAN HUMAN RIGHTS INSTITUTIONS

Thus, during the Cold War period, the biggest developments in the area of international criminal justice actually happened because of the attempts of regional organisations.

One institution that has been particularly substantial for the conceptualization of human rights and international criminal justice has been the Inter-American Court of Human Rights. In the broad array of international organisations, Inter-American institutions have particularly contributed to the fight against impunity.

In 1998, in the *Panigua Morales et al.* case the Court stated that impunity is a

“total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention” .⁴⁴

One of the most substantial cases before the IACtHR, which will be discussed in more detail in the next chapter, has been the *Velasquez-Rodriguez* case, in which it was concluded that the Honduran government had violated human rights through the “support or tolerance” of forced disappearances.⁴⁵

This case has set a precedent in the Inter-American system as well as having a profound impact on the international fight against impunity. Furthermore, as will be more closely examined in the following chapter, Inter-American institutions were instrumental in repelling blanket amnesties, so ‘eagerly’ used by dictators in South America.⁴⁶

1.3. AD HOC TRIBUNALS

The rise of transitional justice, catalysed by the case law of regional courts, could begin to reach its full potential after the end of the Cold War.

⁴⁴ Panigua Morales et al case, No.37, para.137, 1998.

⁴⁵ <http://www.wcl.american.edu/hrbrief/08/3juris.cfm>, consulted on 25 March 2011.

⁴⁶ e.g. Barrios Altos v Peru, Inter-American Court of Human Rights, 14 March 2001, Inter-Am. Ct. H.R., (Ser.C) No.75; Luis Alfredo Almonacid Arellano et al. v. Chile, Case 12.057, Report No. 44/02, Inter-Am.C.H.R., Doc.5 rev.1 at 208 (2002).

Faced with the humanitarian crises in Yugoslavia, the Security Council passed resolution 780⁴⁷, which created a Commission of Experts whose task it was to investigate breaches of humanitarian law in the region. However, just like pre-Nuremberg UNWCC, the Commission's efforts were constrained by the lack of political and financial support from States.⁴⁸ As the situation was deteriorating, in February 1993 the Security Council decided to establish an international criminal tribunal⁴⁹ and in May the ICTY⁵⁰ was established. In 1945 in the Charter of the International Military Tribunal, the idea of crimes against humanity was used for the first time and it included “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population”.⁵¹ The two *ad hoc* tribunals, ICTY and ICTR, have also added ‘imprisonment, torture and rape’ to that definition.⁵²

The UNSC stated that it was

“determined to put an end to such crimes and take effective measures to bring to justice the persons who are responsible for them(...) and convinced that the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation”.⁵³

Nevertheless, the power of the UNSC to establish an international criminal tribunal under Chapter VII of the Charter was questioned by Brazil and China.⁵⁴

Despite that, as emphasised by Greenwood:

“there seems no reason in principle why the Security Council, if it considers that the creation of a judicial instrument is necessary for it to effectively perform its

⁴⁷ UN Doc.S/RES/780.

⁴⁸ Cryer, 2005,p.52.

⁴⁹ UN Doc.S/RES/808.

⁵⁰ UN Doc.S/RES/827.

⁵¹ cited in Cryer,2005,p.53.

⁵² Art. 5 ICTY and Art. 3 ICTR .

⁵³ idem.

⁵⁴ supra note 48,p.53.

functions in respect of peace and security, should not create such instrument”.⁵⁵

The creation of an *ad hoc* criminal tribunal was further entrenched in international law by the Resolution 955 of November 1994, which created the International Tribunal for Rwanda.⁵⁶ Although Brazil and China initially repeated their previous reservations regarding the legality of an international criminal tribunal, in the end they did not vote against its creation.⁵⁷ Consequently, the power of the UNSC to establish such tribunals was further embedded in international law.

Following the establishment of the ICTY and ICTR, which ‘revived’ the determination to prosecute international crimes, there were other events crucial for the further development of international criminal justice: the creation of the Special Court for Sierra Leone in 2002⁵⁸ and the Extraordinary Chambers in the Courts of Cambodia⁵⁹ are just two examples of such events.

Moreover, the *Pinochet case* was also very significant for universal justice and the fight against impunity.⁶⁰ In this case, universal jurisdiction was asserted by the Spanish Court on the basis of genocide claims against the General.⁶¹ Under universal jurisdiction

“any state in the world may prosecute and try the core international crimes against humanity, genocide, torture, and war crimes without any territorial, personal, or national-interest link to the crime in question when it was committed”.⁶²

⁵⁵ Greenwood, 1998, p.104.

⁵⁶ UN Doc.S/RES/955.

⁵⁷ Cryer, 2005, p.56.

⁵⁸ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002. “The Court itself is neither fully national or international, it is a treaty-based sui generis court of mixed jurisdiction” Cryer, 2005, p.62.

⁵⁹ UN Doc.A/57/RES/228B.

⁶⁰ <http://www.es.amnesty.org/campanas/justicia-internacional/el-caso-pinochet/>, consulted on 20 March 2011.

⁶¹ *idem*.

⁶² Langer, 2011, p.1.

The main idea behind such use of the universal jurisdiction principle is that it is subsidiary and exercised only if the territorial jurisdiction is either unable or unwilling to prosecute.⁶³

1.4. INTERNATIONAL CRIMINAL COURT

Nevertheless, despite those developments, the most substantial step in the international fight for justice has been the establishment of the International Criminal Court (ICC) on 1 July 2002. The effort of *ad hoc* tribunals has to be recognised but “we still need to re-emphasize that the truly crowning jewel in the Nuremberg legacy was the hope that it inspired about the future operation of a permanent ICC”.⁶⁴ As Luis Moreno-Ocampo said after he was elected as the first Prosecutor of the ICC:

“I deeply hope that the horrors humanity has suffered during the 20th century will serve us as a painful lesson, and that the creation of the International Criminal Court will help us to prevent those atrocities from being repeated in the future”.⁶⁵

The whole process leading to the establishment of the ICC has been marked by a wide array of choices influenced by world geopolitics and the degree of control that the executive branch of states holds over universal jurisdiction prosecutorial decisions is considerable.⁶⁶ Consequently, the adoption of the Rome Statute (after heated negotiations) came as a surprise to many.⁶⁷ For decades, international humanitarian law had been ‘confiscated’ by states and opening it to non-state actors was a true revolution in international law.⁶⁸ Unlike *ad hoc* tribunals, whose jurisdiction was limited to specific conflicts, the idea behind the creation of the ICC was for it to be truly universal. Therefore, following the signature of the

⁶³ Cryer, 2005,p.90.

⁶⁴ Biddiss 2004,p.53.

⁶⁵ <http://icarusfilms.com/new2011/pros2.html>, consulted on 15 April 2011.

⁶⁶ Langer 2011,p.11.

⁶⁷ “surprising adoption of the Statute of the International Criminal Court (ICC)” (Côté 2006:133).

⁶⁸ Côté, 2006,p.134.

Rome Statute, the UN Security Council has limited the mandate of the tribunals, in an attempt to remind them of their *ad hoc* character.⁶⁹

However, it has to be emphasized the ICC is not a ‘World’s superior Court’. In the continuing fight against impunity, the ICC only ‘steps in’ when national courts are unable to do so, which contradicts the argument of many neorealist claiming that the ICC will undermine the independence of domestic jurisdictions. According to Art.17 of the Rome Statute a case can only be brought before the ICC if a state⁷⁰ is not acting upon the prosecution of crimes committed or its actions are ineffective.⁷¹

Furthermore, the ICC has jurisdiction even if the state in which the crime occurred is attempting to excuse the failure to prosecute this crime with the lack of explicit international obligations requiring domestic prosecution.⁷² Therefore, “states’ intent to keep certain offences from criminal punishment may be jeopardized by international prosecution”⁷³, which, as will be discussed later in this paper, put into question some of the amnesties enacted.⁷⁴

Nevertheless, despite the fact that the establishment of the ICC was an immense endeavour of international law, its creation has drawn a lot of criticism. First of all, ratification of the Rome Statute requires states to take a more flexible approach towards their sovereignty.⁷⁵ There are even those who challenged the democratic accountability of the Court.⁷⁶ Therefore, one of the greatest weaknesses of the ICC is that its Statute has not been ratified

⁶⁹ UN Doc. S/RES/1534.

⁷⁰ both a State party as well as a non-State party.

⁷¹ UN. Doc.A/CONF.183/9.

⁷² Seibert-Fohr, 2003,p.574.

⁷³ supra note 72.p.556.

⁷⁴ This aspect of the Rome Statute was actually presented by the USA as one of its objections (www.state.gov/r/pa/prs/ps/2002/9968.htm, consulted on 20 March 2011).

⁷⁵ Bingham, 2009,p.94.

⁷⁶ Morris, 2004,p.187.

by the world's most powerful states.⁷⁷ Other criticisms include the inability of the Court to put its warrants into effect⁷⁸, or the fact that the ICC seems to be active only in Africa.⁷⁹ Despite some weaknesses of the ICC system, its 'revolutionary' factor for the universal justice movement ought to be acknowledged. As Patrick Lumumba from Kenya's Anti-Corruption Commission has said, "for the first time it seems that regardless of what power you have, you are not a subject to impunity".⁸⁰ The ICC is a true embodiment of the notion that some crimes such as genocide affect the international community as a whole and this community cannot allow them to go unpunished.

Furthermore, unlike half a century ago when sovereignty was the overriding principle of international relations, the creation of the ICC indicates that this notion is changing. It is not the impunity of States' officers but the respect for individual human rights of its citizens that is now of superior value.

Two decades ago, it seemed almost utopian that perpetrators like Charles Taylor or Augusto Pinochet could be ever held accountable for the breach of basic human rights. Today, it is a reality and "over the past decade, the advent of new judicial institutions has ushered a whole new phase in international criminal law".⁸¹ Nonetheless, the fight against impunity is still an immense task, which, as will be presented in next chapters, has to be comprehensively approached. As argued in this paper, there are different aspects of the struggle against impunity: legal, diplomatic, economic and in order for universal justice to succeed, they all need to be tackled.

⁷⁷ e.g. three permanent members of the UNSC: Russia, China, USA have not ratified it(<http://www.iccnw.org/?mod=romesignatures>, consulted on 1 July 2011).

⁷⁸ for instance, arrest warrant on Joseph Kony from Lord's Liberation Army has not yet been realized.

⁷⁹http://www.communicatingjustice.org/en/stories/06082008_uganda_icc_faces_widespread_criticism, consulted on 20 April 2011.

⁸⁰ Radio Podcast, Polskie Radio Trojka, 'Raport o stanie swiata', consulted on 25 June 2011.

⁸¹ Côté, 2006,p.143.

CHAPTER II

THE ROAD TO CHALLENGING AMENSTIES

In ancient Greece amnesty meant ‘to cast into oblivion’ and despite the fact that throughout the centuries the legal understanding of this concept has fluctuated, the notion underpinning the idea of amnesty is still that of ‘forgetting’ the crime. Nevertheless, despite the fact amnesties have been a feature of domestic law for centuries, international law does not offer a clear and comprehensive definition of ‘*amnistia*’, nor does it have a clear standpoint on the issue of use of amnesties. This problem of lack of clear-cut understanding of amnesties has become even more complex following the rise of transitional justice and the increased focus on the fight against impunity. Consequently, ‘amnesties’ have to a large extent been in the middle of a decades- long ‘peace versus justice debate’. Throughout the ages the practice of amnesty has:

“become an elastic and effective tool for striking compromise for peace by nations in transition. Consequently, amnesties have featured prominently at various times in the peace efforts of nations for the protagonists of war.”⁸²

Furthermore, due to the instability that often follows conflicts, many leaders consider amnesties as a legitimate way of bringing human rights violations to an end and fostering reconciliation⁸³. Nevertheless, with the growing focus on the fight against impunity this position has more recently been cautiously rejected, by some who consider it a somewhat false provision of hope and stability.

The treaties, which form the core of international protection of human rights such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the

⁸² Oluborode 2008,p.1.

⁸³ It should be noted that when focusing on ‘transitions’ this work encompasses not only transitions from war to peace, but also transformation of authoritarian regimes to democracy.

American Convention on Human Rights or the International Covenant on Civil and Political Rights, all emphasize the importance of the right to ‘an effective remedy’. They do not however include an explicit duty for states to prosecute grave human rights violations, which may therefore allow states to enforce domestic amnesties for such violations.

However, “whether human rights law provides for a duty to prosecute serious human rights violations is relevant in practice when considering the large-scale impunity which can be found throughout the world”.⁸⁴ Consequently, despite the lack of an unambiguous duty to prosecute, the visible trend of the last few decades (especially following the establishment of the *ad hoc* tribunals and the International Criminal Court) has been to ‘chase and punish’ human rights perpetrators. The chance of prosecuting those responsible for genocides and gross human rights violations like Slobodan Milosevic, Pol Pot or Ratko Mladic is in historical terms a relatively new development since “state leaders acted with impunity”⁸⁵ for decades. Moreover, there is a growing consensus amongst the international community that high political office cannot serve as a pretext to evade prosecution. As Matti Ahtisaari once said: “high political office should not constitute an impenetrable shield against legal proceedings. All human beings should be equally accountable”.⁸⁶

The overall argument of this thesis is that the focus on the fight against impunity means that dictators and human rights perpetrators gradually have less and less possibility of evading justice. While later chapters deal with the ‘economic’ aspect of combating impunity namely the recovery of stolen assets, this chapter aims to show how challenges to amnesties indicate that legal ‘get away’ for violators of human rights is slowly becoming more limited. Furthermore, it should be noted that the concept of transitional justice encompasses the notion of restoration. Therefore, while the next chapter deals with the restoration of economic and social rights, this chapter focuses on the re-establishment of

⁸⁴ Seibert-Fohr 2009,p.5.

⁸⁵ Trumbull 2007,p.284.

⁸⁶ Ahtisaari 2004,p.xiii

civil and political rights (and this comprehensive approach confirms the indivisibility of human rights).

The assertion of this chapter is that although *amnsitia* has not been ‘cast into oblivion’ by international law, the increasing pressure from the global fight against impunity of human rights violators on the international political agenda has greatly contributed to the gradual eradication of amnesties for human rights perpetrators. Moreover, this rejection of amnesties needs to be acknowledged at the level of international organisations, which have so far been reluctant to set out a comprehensive position on the issue.

2.1. AMNESTY- HISTORICAL PERSPECTIVE

Amnesty laws can vary from those that include all actions of previous regimes to those which encompass only limited categories of crimes. In the 1970s, 1980s and 1990s amnesties have been used across the world in countries such as Argentina, Uruguay, Chile, Nicaragua, Haiti, Ivory Coast, Angola, Togo, South Africa and so forth.

As elaborated by Seibert-Fohr, there are a number of reasons for granting amnesties across the world, ranging from regimes attempting to escape future prosecutions to amnesties used as bargaining chips for peace and security.⁸⁷ Often, for instance in South Africa, amnesties were used as a political tool to ensure peace. However, for many authoritarian regimes, amnesties served solely as ‘the escape route’, put in place to avoid responsibility for past violations; in other words a mechanism to cover past crimes rather than a tool used to facilitate a peaceful transition.

However, the attitude towards impunity began to evolve, especially following the creation of the *ad hoc* tribunals: the International Criminal Tribunal for Yugoslavia⁸⁸ and the International Criminal Tribunal for Rwanda⁸⁹. Indeed, the phrase that summarises the

⁸⁷ Seibert- Fohr 2003,p.555.

⁸⁸ established by the United Nations Security Council Resolution 827, S/RES/827, 25 May,1993.

⁸⁹ established by the United Nations Security Council Resolution 955, S/RES/955, 8 November, 1994.

efforts of the ICTR published on the website of the Tribunal is “challenging impunity”.⁹⁰ In 1993, the Security Council unanimously agreed that, in relation to crimes against humanity, “it was determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them”.⁹¹

Rather than focusing mainly on political considerations, the spotlight thus began shifting more towards “bringing justice to the victims”⁹² and ensuring that perpetrators would be prosecuted.

Nevertheless, in the meantime something else crucial for the understanding of amnesty has occurred. In 1995, the Truth and Reconciliation Commission was established in the Republic of South Africa.⁹³ Unlike in the past, when amnesty meant ‘forgetting’ about the crimes of the past, in the case of the South African Truth Commission, the price for amnesty was in fact the publication of the past. Unlike in previous cases, an amnesty was not used to conceal past crimes, but rather it was an instrument used to reveal these crimes. The rationale behind that use of an amnesty was the reconciliation of the society destroyed by decades of internal conflict. This totally changed the paradigm of amnesty and made its position in international law even more complex.

Following the South African experience a number of states have decided that prosecution of individuals for past human rights violations without any other mean of transitional justice, could in fact be detrimental for the whole reconciliation process. Consequently, some states have granted amnesties as a way of securing peace. Within the understanding of amnesty based upon the condition of disclosing the truth, amnesty for the price of confession of past crimes was seen to some extent as satisfying victims’ need for investigation.

⁹⁰ <http://www.unicttr.org/> consulted on 25 May 2011.

⁹¹ United Nations Security Council Resolution 808/1993.

⁹² <http://www.icty.org/> consulted on 25 May 2011.

⁹³ Promotion of National Unity and Reconciliation Act, No 34 of 1995.

Between the years of 1974 and 2002 truth commissions have been used 17 times as a means of dealing with the past.⁹⁴ Although the concept behind truth commissions does not automatically reject prosecution, in her analysis of 15 truth commissions Priscilla Hayner has shown that “prosecutions seldom occur after a truth commission, even where the identity of the perpetrators is known. Thus, in the case of many of the transitional societies (...) the power to prosecute was exchanged for truth”.⁹⁵ Consequently, there are those who argue that since truth commissions “cannot ensure criminal prosecution of perpetrators of mass crimes, they ultimately fail to address the yearning of the victims for justice”.⁹⁶

Therefore, with the relative success⁹⁷ of the South African Truth Commission the perception of amnesties has become even more convoluted.

When, in September 1998, the former Prime Minister of Rwanda, Jean Kambanda became the first former head of government ever convicted and punished by an international criminal court for crimes against humanity, the then Secretary General of the United Nations Kofi Annan said: “there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law”.⁹⁸ Furthermore, as Seibert-Fohr claims “recent pronouncements suggest that criminal punishment is increasingly regarded also as a remedy for serious human rights violations”⁹⁹ and consequently even very ‘brief’ statutory limitations for crimes against humanity and other human rights violations such as torture, rape or forced disappearances are now being regarded as a serious hindrance to the promotion of legal responsibility.¹⁰⁰

⁹⁴ Majzub, 2002, p.1.

⁹⁵ idem.

⁹⁶ Malcontent 2004, 9.

⁹⁷ It seems impossible to refer to a truth commission, a mechanism whose chief goal is to demonstrate unimaginable violations of human rights as a ‘success’. Nevertheless, in the case of South Africa, where it led to the transition to democracy and an end to apartheid, it has been widely perceived as a ‘success story’.

⁹⁸ quoted on <http://www.norway-un.org/Statements/2006-/PlenaryMeetings/ICC/>, consulted on 20 April 2011

⁹⁹ Seibert-Fohr 2009, p.22.

¹⁰⁰ idem. p.30.

The ‘trend’ of giving amnesties a closer look and placing more attention on the provision of justice to victims was initiated by the Inter- American Court of Human Rights and the Inter- American Commission of Human Rights. This is unsurprising given that a bulk of amnesties was enacted from the 1970s onwards in South American countries such as Argentina, Brazil and Uruguay. The Inter- American Court and the Inter- American Commission were one of the first international institutions to draw attention to the fact that each victim has a right to have the offenders tried by a criminal court¹⁰¹ as was emphasized in the Durand and Ugarte case.¹⁰² Other international institutions such as the Human Rights Committee have also called upon States to “hold accountable perpetrators of serious human rights violations”.¹⁰³ In the case of Uruguay v. Bleier, the HRC called on the Uruguayan government to “bring to justice any persons found to be responsible for the victim’s death, disappearance, or ill treatment”.¹⁰⁴ That said, the case which set a precedent and confirmed the importance of fighting impunity and providing justice for victims was the Velasquez Rodriguez case¹⁰⁵, which was a case of forced disappearance in which the Court held by reference to Article 1(1) of the American Convention¹⁰⁶ that the “practice of torture and assassination with impunity is itself a breach of the duty to prevent violations of the right to life and physical integrity of the person”.¹⁰⁷ The Court also stated that Articles 8 and 25 of the Convention¹⁰⁸ require States to “investigate every situation involving a

¹⁰¹ *idem.* p.23.

¹⁰² Durand and Ugarte Case, Judgment of May 28, 1999, Inter-Am. Ct. H.R.(Ser. C)No.50(1999).

¹⁰³ Barbato v, Uruguay, Communication No.84/1981, Isidore Kanana Tshiongo a Minanga v. Zaire, Communication No.366/1989.

¹⁰⁴ Bleier v. Uruguay, Communication No.R 7/30, UN Gaor, Suppl. No.40, HRC, UN Doc. A/37/40, at 130, para.15(1982).

¹⁰⁵ Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R.(Ser. C)No.4 (1988).

¹⁰⁶ American Convention of Human Rights, 1969,Art.1(1) 1. “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

¹⁰⁷ Velasquez Rodriguez Case, para 175.

¹⁰⁸ American Convention of Human Rights, 1969, Art. 8 “right to a fair trial” and Art.25 “right to judicial protection”.

violation of the rights protected”.¹⁰⁹ The Court thus ruled that “the Government of Honduras failed to guarantee the human rights affected by that practice [forced disappearance]”.¹¹⁰ The Velasquez Rodriguez case therefore provides authority for the proposition that if the state fails to refrain from violations, prevent or punish them, it can be held responsible even if those violations were committed by a private individual.

Although the fight against impunity was initially promoted through regional institutions, in particular the Inter- American network of institutions¹¹¹, the ‘trend’ then began to spread. Gradually reaching a wider political scene, it eventually led to an event that changed the face of international law- the signing of the Rome Statute and the establishment of the International Criminal Court.

In April 2002 the Rome Statute received its sixtieth ratification and the International Criminal Court was thus established in July of that year. As underlined by Wladimiroff, the “ICC Statute represents the present international consensus on the criminal responsibility of individuals”¹¹². As stated by the Preamble of the Rome Statute:

“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured(...) Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.¹¹³

¹⁰⁹ Velasquez Rodriguez Case, para.176.

¹¹⁰ *idem*, para.148(3).

¹¹¹ Which is not surprising, considering the scale of the problem of forced disappearances in South America was considered as grave “Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years”, Velasquez Rodriguez Case, para.149.

¹¹² Wladimiroff 2004,p.106.

¹¹³ Rome Statute of the International Criminal Court, 17.07.1998, A/CONF.183/9.

One of the biggest reservations towards the ICC and its ‘universality’ is that the Rome Statute is still pending ratification from a number of states.¹¹⁴ Nevertheless, despite however banal it might sound, twenty years ago few would have expected that a criminal court with universal jurisdiction could receive over a hundred ratifications.¹¹⁵ Furthermore, what is encouraging is that a number of countries which in the past have been extremely reluctant to address grave violations of human right have now ratified the Rome Statute, which means that if any similar cases were to occur in the future, perpetrators could be tried by the ICC (e.g. Argentina, Brazil, Honduras, Paraguay, Peru etc.).¹¹⁶

2.2. AMNESTY AND INTERNATIONAL LAW

However, it is important to remember that the Rome Statute does not create a set of entirely new obligations upon States to bring perpetrators to justice and to provide redress to the victims. Rather, it takes account of the already existing obligations stemming from international treaties and customary international law.¹¹⁷ There are some who claim that state practice strongly points towards the conclusion that there is no customary international law that imposes a duty to prosecute grave human rights violators.¹¹⁸ Indeed there is no explicit obligation to prosecute. Nonetheless, human rights are protected by international law through a wide architecture of treaties, as well as by customary international law. There are some violations of international humanitarian law and international human rights law, which can amount to crimes for which international law imposes individual liability.¹¹⁹

¹¹⁴ Perhaps, what is a biggest hindrance for the ‘best’ functioning of the Court, three out of five permanent members of the UN Security Council have not ratified it: China, Russia, USA.

¹¹⁵ At the moment it is 111 states on 25 May 2011, <http://www.iccnw.org/?mod=romesignatures>, consulted on 24 May 2011

¹¹⁶ Popkin 2003,p.5.

¹¹⁷ Art. 25 para 4 Rome Statute “no provision in this Statute relating to individual criminal responsibility shall effect the responsibility of States under international law”.

¹¹⁸ Trumball 2007,p.295.

¹¹⁹ Majzub 2003,p.26.

For instance, Art.2(3) of the International Covenant of Civil and Political Rights ensures that any person whose rights under the Covenant have been violated, has a right to an effective remedy.¹²⁰ Furthermore, it has also been the position of the Human Rights Committee to “consider punishment as a general measure to protect and implement human rights”.¹²¹ Following this position of the Committee, the absence of prosecution of the persons responsible for violations may amount to a breach of Art.2 of the ICCPR. Therefore, impunity *de facto* breaches the ICCPR.

Furthermore, under international law there is no multilateral treaty that imposes an explicit obligation on states to prosecute all serious crimes. As Trumball says: “to the contrary, several domestic courts have interpreted one important multilateral treaty to imply that states are not required to prosecute serious crimes under international law, at least in some circumstances”.¹²² The treaty he is referring to is the Protocol II Additional to the Geneva Conventions. Art.6 (5) of the APII states that: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict”. Nevertheless, recognising that this provision could be effectively used in order to justify impunity, the International Red Cross commented on this article by stating that it only applies to those who are punished because of the “mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law”.¹²³

¹²⁰ ICCPR, 16 December 1966, Art. 3. Each State Party to the present Covenant undertakes:(a)To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;(b)To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;(c)To ensure that the competent authorities shall enforce such remedies when granted.

¹²¹ Seibert-Fohr, 2009,p.15.

¹²² Trumball 2007, p.292.

¹²³ Stoyanka Junod, 1987, para.4618.

Furthermore, regardless of the debate surrounding amnesties, there is a number of crimes that international law now considers could not be a subject to amnesty. It is now widely accepted by international lawyers and scholars that an absolute prohibition of certain violations of human rights (such as torture or slavery) now forms the basis of international law. Consequently, violation of those rights is a *ius cogens* crime, which in turn means that amnesties for violators of those rights stands in opposition to the idea of non-derogability of human rights¹²⁴. Furthermore, despite the fact that in certain cases amnesty might be recognised as a tool facilitating peaceful transition in a country torn by a conflict, it is now widely accepted that amnesties for crimes against humanity, genocide and international war crimes are not permitted under international human rights law¹²⁵. In its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice has argued the *ius cogens* prohibition of genocide.¹²⁶ Even despite the debate surrounding the lack of an explicit international obligation to prosecute, it now seems clear that amnesties for genocide and self-amnesties fall outside the limits of international law.¹²⁷ Consequently, even if an amnesty law might be completely legitimate domestically, there are certain crimes, for which a state just cannot overlook individual responsibility.¹²⁸ Basic principles of treaty and customary law sought to outlaw any law whose purpose would be to grant amnesty regarding those acts, despite the fact there might exist domestic and international support for such an amnesty.¹²⁹ This has been further demonstrated in the jurisprudence of the International Criminal Tribunal for Yugoslavia. In the case of *Furundzija*, the Tribunal has underlined the importance of the values states are obliged to protect and stated that a state cannot evade its responsibilities by granting amnesty to perpetrators of torture.¹³⁰

¹²⁴ Trumball 2007,p.286.

¹²⁵ Oluborode 2003,p.3.

¹²⁶ 1951 I.C.J.15.

¹²⁷ Seibert-Fohr 2009,p.221.

¹²⁸ Burke- White 2001,p.478.

¹²⁹ Idem.p.479.

¹³⁰ Prosecutor v. Furundzija, ICTY(10 December 1998)para.155.

The recent judgement of the Inter-American Court of Human Rights in *Guerrilha do Araguaia v Brazil*¹³¹ also confirms the invalidity of domestic amnesties in cases of grave human rights violations.¹³² In paragraph 147 the Court has emphasized that amnesties have repeatedly obstructed the investigation of justice in cases of serious violations of human rights¹³³ and it thus declared the Brazilian Law of Amnesty to be in violation of the American Convention on Human Rights.¹³⁴

Whether an amnesty law is permissible may be to a large extent dependant on the reasons for which prosecution is pursued.¹³⁵ Burke-White has determined a classification of amnesties, dividing these into three groups:

1. Blanket Amnesty that is locally legitimized,
2. Partial Immunity that can be Internationally legitimized and,
3. Partial immunity that can be internationally recognised by becoming part of the national constitution.¹³⁶

It is the first group, the so-called ‘blanket amnesties’, which is most widely stigmatised by the international community. A blanket amnesty is usually granted by members of the regime to themselves while still in power or by the successor government. It is usually

¹³¹ Inter-American Court, Caso Gomes Lund y Otros (“Guerrilha do Araguaia”) v Brazil, 24 November 2010.

¹³² As emphasised in para.137 of the judgement “ Desde su primera sentencia esta Corte ha destacado la importancia del deber estatal de investigar y sancionar las violaciones de derechos humanos. La obligación de investigar y, en su caso, enjuiciar y sancionar, adquiere particular importancia ante la gravedad de los delitos cometidos y la naturaleza de los derechos lesionados, especialmente en vista de que la prohibición de la desaparición forzada de personas y su correlativo deber de investigarla y sancionar a sus responsables han alcanzado desde hace mucho carácter de *jus cogens*”

¹³³ Idem. para.147 “Las amnistías o figuras análogas han sido uno de los obstáculos alegados por algunos Estados para investigar y, en su caso, sancionar a los responsables de violaciones graves a los derechos humanos”.

¹³⁴ Idem, para.325(3) “Las disposiciones de la Ley de Amnistía brasileña que impiden la investigación y sanción de graves violaciones de derechos humanos son incompatibles con la Convención Americana, carecen de efectos jurídicos y no pueden seguir representando un obstáculo para la investigación de los hechos del presente caso, ni para la identificación y el castigo de los responsables, ni pueden tener igual o similar impacto respecto de otros casos de graves violaciones de derechos humanos consagrados en la Convención Americana ocurridos en Brasil”

¹³⁵ Seibert-Fohr 2009, p.194.

¹³⁶ Burke-White 2001, p.480.

enacted through decrees.¹³⁷ Despite being domestic legislation, this type of amnesty usually lacks popular domestic support as well as international endorsement. Commonly, it does not draw a distinction between political crimes, international crimes and common crimes. This lack of a distinction, coupled with the fact that such amnesties are usually self-amnesties and do not look at the motives behind the crimes committed means this type of amnesty cannot be justified. Together with a lack of any sort of accountability of perpetrators, this type of amnesty is “immoral, injurious to victims, and in violation of international legal norms”.¹³⁸ The lack of any consequences for perpetrators can in fact provoke even more gross human rights abuses both in the country where those abuses occurred but also in other parts of the world. As emphasized by the executive from the Institute for International Criminal Investigations in an environment where there is no sense of justice it is also more likely for victims to become perpetrators.¹³⁹

Nevertheless, despite the growing rejection of amnesties, there is still no universal agreement on the issue, even amongst scholars. In January 2001, a group of legal scholars from around the globe convened in Princeton, to try and establish a number of universal jurisdiction principles that could be internationally recognised. Regrettably, even after a long debate they were unable to agree on the general rule concerning the legality of domestic amnesties under international law. The first paragraph of Principle 7 of the Princeton Principles on Universal Jurisdiction 28 (2001) states that “amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law”.¹⁴⁰ The word ‘generally’ indicates that in certain cases derogation from that principle can be permissible, but the conditions under which it would be permitted are not specified. Moreover, as Trumball argues it implies that “states do not have a legal obligation to prosecute and punish criminals under international law; they only

¹³⁷ *idem.* p.482.

¹³⁸ Kritz cited in Majzub 2003, para.77.

¹³⁹ interview with ICI representative, 12 May 2011.

¹⁴⁰ The Princeton Principles on Universal Jurisdiction 28(2001), Principle 7(1).

have an obligation to provide some form of accountability”.¹⁴¹ Nevertheless, the second paragraph of that principle states that “the exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state”¹⁴², which as previously mentioned at least limits the scope of permissible amnesties.

Furthermore, scholars and human rights advocates name three principal reasons to prosecute perpetrators of serious crimes under international law, regardless of the existence of a domestic amnesty. The prosecutions are necessary in order to:

- (1) deter future violations of human rights;
- (2) honour the victims' right to seek justice; and
- (3) restore the rule of law.

Despite general agreement regarding the applicability of those reasons, the position of international organisations and in particular of the United Nations is ambiguous. On the one hand, the UN does not discard amnesties *per se*, nor does it deny the fact that in some cases they might contribute to peace and stabilisation. For instance, in 1993 the UN communicated its full support for the Governors Island Agreement. This Act granted full amnesty to members of General Cedras’ and Brigadier General Biamby’s military regime, which has been repeatedly accused of committing crimes against humanity in Haiti between 1990-1994.¹⁴³ The General Assembly has issued a statement in which it has asserted that the “Governors Island Agreement continues to be the only valid framework for resolving the crisis in Haiti”.¹⁴⁴ The question of dealing with amnesty laws has proved to be problematic with regards to the Lomé Peace Agreement, which effectively brought into force an amnesty law in Sierra Leone. Although the then UN High Commissioner for

¹⁴¹ Trumball 2007,p.295.

¹⁴² The Princeton Principles on Universal Jurisdiction 28(2001), Principle 7(2).

¹⁴³ Trumball 2007,p.297.

¹⁴⁴ UNGA, A/RES/48/27, 6 December 1993, Art.6.

Human Rights Mary Robinson asked the UN representative not to sign the agreement, he [Francis Okelo] convinced her it was indispensable to sign it in order to achieve peace.¹⁴⁵ Finally, the agreement was signed but with the caveat that the UN would not recognise amnesty for crimes against humanity, war crimes and genocide, which effectively did not make the UN's position any clearer.

Moreover, the regional institutions perceived as 'pioneers' in dealing with the issue of amnesties¹⁴⁶ have not "dealt with the actual validity of amnesty legislation but rather the rights of victims to adequate means of redress for grave human rights violations".¹⁴⁷

However, despite the lack of coherence regarding the position on amnesties, the creation of the ICTY and ICTR and then the establishment of the ICC has 'sent a signal'. It seems that 'limits' of amnesties are becoming more and more tight. The creation of those institutions "provides further evidence of an emerging principle of international law prohibiting amnesty for international crimes".¹⁴⁸ Consequently, it proves that the 'legal escape' that previously has served some dictators as an 'exit strategy' from the responsibility for crimes committed is turning out to be harder and harder to pursue. That said, while such a principle may be developing, it has not yet crystallised into a rule of law.

There is a need for the international community to develop its position regarding amnesties. As Trumbull has argued, the UN is left with two options: either it refuses to recognize all amnesties and acknowledges that sometimes it might make it harder to achieve short-term peace, or it can allow for amnesties that fulfil certain criteria "thereby helping to crystallize the emerging norm in international law that requires accountability - but not necessarily prosecution - for serious violations of international law".¹⁴⁹ The criteria, which should be

¹⁴⁵ Gottschalk 2007,p.xvi.

¹⁴⁶ Reference to the Inter-American system, as previously mentioned.

¹⁴⁷ Burke- White 2001,p.519.

¹⁴⁸ Trumbull 2007,p.295.

¹⁴⁹ idem.p.320.

analysed in determining whether, an amnesty strikes the necessary balance between peace and justice

- “(1) The process by which the amnesty was enacted
- (2) The substance of the amnesty legislation; and
- (3) The domestic and international circumstances”.¹⁵⁰

For instance, in order for the amnesty to be perceived as legitimate domestically and internationally it would be most beneficial for it to be enacted through a democratic process, for victims of the atrocities to recognise it, for those responsible would be in some way held accountable, for steps ensuring that similar crimes would not be carried out in the future are undertaken. Moreover, it would be a ‘last resort’ and an amnesty would be substantial in ensuring peace and last but not least the international community is not willing to intervene.¹⁵¹

Consequently, using these or similar criteria, the UN should attempt to make its opinion regarding amnesties clearer. At the moment the situation is dually tangled: on the one hand there is no coherent position but on the other, the rise of international tribunals and the ICC suggests that amnesties are being perceived as an exceptional solution of last resort.

Furthermore, it is now widely agreed that the fact that a domestic amnesty is implemented may impede prosecution in the state, but does not preclude the international community from acting. An initially recurring argument of state sovereignty as a basis for enacting amnesty laws has become a feature of the past with the growing recognition of an international human rights regime. Although the earlier ‘realist’ notion of governments as unified entities is still influential, the more liberal concept of international legal regime and

¹⁵⁰ idem.p.322.

¹⁵¹ idem.p.321.

disaggregated-state model is nowadays prevailing.¹⁵² Consequently, although amnesties were often used as a tool of ensuring sovereignty, it is now widely perceived that there are certain universal values that trump the *Westphalian* realist notion of autonomy of states. As mentioned in the previous chapter the individual rather than the state alone is attaining relevance for international law, so are the human rights of an individual reaching the forefront of a legal discussion.¹⁵³

It is beyond doubt that one of the most important factors contributing to this ‘change in perspective’ has been the creation of the ICC.

As declared in the Preamble of the Rome Statute: “It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.¹⁵⁴ Furthermore, Art.29 of the Statute states that: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”¹⁵⁵, which suggests a domestic amnesty cannot shield perpetrators from the prosecution of the ICC. Nevertheless, there has been a discussion regarding the wording of this article and whether it in fact provides for a substantive obligation to prosecute. The majority of academics agree that it cannot be perceived as an explicit obligation to prosecute a definite prohibition of statutes of limitation and an unambiguous obligation to extradite an alleged offender.¹⁵⁶ The ICC statute does not therefore bar amnesties *per se*. This ambiguity is a result of extensive negotiations during the drafting stages of the Rome Statute, which were characterised by a lack of agreement regarding amnesties.¹⁵⁷ In the end, the lack of compromise meant the only way the Rome Statute could be drafted was to ‘agree to disagree’. This “lack of provision on amnesties in the Rome Statute has been criticized as giving rise to ambiguity

¹⁵² Burke- White 2001, Slaughter 2000.

¹⁵³ Which can be portrayed by the rise of institutions such as the European Court of Human Rights or the Inter-American Court of Human Rights.

¹⁵⁴ Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

¹⁵⁵ *idem*.

¹⁵⁶ e.g. Schabas 1999,p.523, Seibert-Fohr 2003,p.559.

¹⁵⁷ GAOR,50th Session, Suppl.No.22, Doc.A/50/22, 9, para.46;GAOR, 51st Sessions, Suppl.No. 22,Doc.A/51/22,7.Para.160.

and fear has been expressed the matter may not be handled discreetly”.¹⁵⁸ Furthermore, it means that the Court can be required to analyse whether an amnesty falls within the borders drawn by Art.17 of the Statute and whether a case can be therefore considered inadmissible.¹⁵⁹

Although there has been an argument pursued that the Court is not competent to review domestic legislation *ergo* amnesties¹⁶⁰ such a notion would in fact undermine the whole legitimacy of the Court. If the ICC was to be prohibited from acting in cases where national amnesty laws had been established, the jurisdiction of the Court could be avoided by means of domestic statutes of limitation.¹⁶¹ Consequently, the recognition of the ICC jurisdiction by States means that they are required either to domestically prosecute crimes falling within the jurisdiction of the Court or to present such cases in The Hague.¹⁶² Furthermore, although it does not seem probable that a state that has granted an amnesty will itself then submit a case to the ICC, the prosecutor can himself initiate prosecution. He can instigate

¹⁵⁸ Seibert-Fohr 2003,p.562.

¹⁵⁹ Rome Statute of the ICC, Art.17“Issues of admissibility: 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:(a)The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;(c)The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;(d)The case is not of sufficient gravity to justify further action by the Court.2.In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:(a)The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;(b)There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;(c)The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.

¹⁶⁰ Arsjanjani 1999,p.65.

¹⁶¹ Seibert-Fohr 2003,p.563.

¹⁶² idem.p.558.

the prosecution process either on a basis of *proprio motu* clause¹⁶³ or on the basis of a referral from the United Nations Security Council.¹⁶⁴

Therefore, although the Statute of Rome did not fully exclude amnesties as a potential bargaining chip, the creation of the ICC meant that nowadays it is generally accepted that the impunity of perpetrators, rather than contributing to the establishment of peaceful societies, is a hindrance in achieving long-lasting reconciliation. It is best emphasized by the words of the Statute of Rome Preamble, which identifies ending impunity of human rights perpetrators as a chief goal of the ICC.¹⁶⁵

2.3. REPEALING AMNESTY LAWS

One trend that has both been an indication of the strengthening of the fight against impunity as well as to some extent catalysed this fight has been the repealing of amnesties. The way that states actually interpret the duties bestowed upon them by international instruments is substantial¹⁶⁶. As a result “national courts in a number of countries have issued rulings limiting the effects of amnesty laws and even finding them unconstitutional”.¹⁶⁷ For instance, in 2003 the Argentinean Congress annulled the laws of *Punto Final* and *Obediencia Debida*.¹⁶⁸ This was preceded by a recommendation from the Human Rights Committee for people previously involved in gross human rights violations to be removed from public service and the military¹⁶⁹. Also in Honduras, the Supreme Court has decided

¹⁶³ Rome Statute of the ICC, Art.15.

¹⁶⁴ *idem*. Art.13.

¹⁶⁵ Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.

¹⁶⁶ Trumbull 2007,p.303.

¹⁶⁷ Popkin 2003,p.2.

¹⁶⁸ http://www.es.amnesty.org/com/2003/com_13ago03b.shtm, consulted on 1 June 2011.

¹⁶⁹ CCPR/CO/70/ARG, 2000:para 9.

that the Constitution does not allow for amnesty laws that would include common crimes committed by the military.¹⁷⁰

Furthermore, in 2000, the Inter-American Court of Human Rights looked at Peru's Amnesty Law No. 26479 to determine whether it had violated the American Convention on Human Rights. The Court stated that

“The establishment of measures designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”¹⁷¹

and concluded by saying that "owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect".¹⁷² Following this judgement, Peru's Truth and Reconciliation Commission rejected, in its 2003 report, the amnesty option and urged the government to pursue prosecutions. It also underlined the importance of the framework established by the Inter-American Court of Human Rights, contending that if an amnesty were to be established it would have to be within the limits identified by the Inter-American system.¹⁷³

Furthermore, what can be perceived as evidence of eradication of the culture of impunity is the recent call on the authorities in Afghanistan to repeal an amnesty enacted in 2007. The National Stability and Reconciliation Law acts retrospectively and states that “all those who were engaged in armed conflict before the formation of the Interim Administration in

¹⁷⁰ Popkin 2003,p.2.

¹⁷¹ Inter-American Court of Human Rights, case of Barrios Altos v Peru, para.41.

¹⁷² Idem, para.44.

¹⁷³ Popkin, 2003,p.4.

Afghanistan in December 2001 shall enjoy all their legal rights and shall not be prosecuted".¹⁷⁴ The enactment of this amnesty has raised great concerns for the international community as an "an invitation for future human rights abuses"¹⁷⁵. Consequently, in March 2010 the Transitional Justice Co-ordination Group, which represented twenty four Afghan civil society organizations called for the law to be repealed. They issued a statement, which stated that

"accountability, not amnesia, for past and present crimes is a prerequisite for genuine reconciliation and peace in Afghanistan. All Afghans will suffer as a result of the implementation of this law, which undermines justice and the rule of law".¹⁷⁶

2.4. ANSWER TO SOME OF THE CRITICISMS

Nevertheless, despite those visible signals that could serve as a proof that amnesties are being challenged, note has to be taken of those who argue otherwise. One of the repeated accusations is that the threat of prosecution might actually discourage perpetrators from surrendering power. However, as is the case for instance in Afghanistan, where amnesty laws have been enacted they have not brought more peace to the region. On the contrary, it *de facto* promoted the culture of impunity.¹⁷⁷ What is more, it is estimated that around "fifty per cent of such peace agreements collapse within the first five years".¹⁷⁸

Furthermore, as Flineterman claims

"Rome Statute may discourage national states from exercising universal jurisdiction. The role of the ICC in bringing a real end to the culture

¹⁷⁴ <http://www.unhcr.org/refworld/country,,HRW,,AFG,,4b9a09e9e,0.html>, consulted on 1 June 2011.

¹⁷⁵ *idem*.

¹⁷⁶ <http://www.hrw.org/en/news/2010/03/10/afghanistan-repeal-amnesty-law>, consulted on 1 June 2011.

¹⁷⁷ Rangelov 2011,p.3.

¹⁷⁸ *idem*.

of impunity is therefore in doubt”.¹⁷⁹

However, one of the most important principles underpinning the establishment of the ICC has been the principle of complementarity. As stated in the Preamble of the Rome Statute: “International Criminal Court (...) shall be complementary to national criminal jurisdictions”.¹⁸⁰ As substantiated by a representative of the Institute for the International Criminal Investigations, in recent years an increasing emphasis has been put on the principle of complementarity.¹⁸¹ As a consequence, resources are being spent on ensuring that domestic courts are capable of prosecuting crimes against humanity.¹⁸²

Schabas argues that actually too much emphasis is nowadays placed on fighting impunity rather than on the coherence of international criminal justice. He gives the example of the use of anonymous witnesses by international criminal tribunals and goes on to argue that tribunals are in fact disregarding the canon of strict construction of criminal law.¹⁸³ However, he seems to forget that the nature of the international law as a whole and international criminal law in particular is distinguished from domestic law and therefore follows its ‘own rules’.¹⁸⁴

In conclusion, the ‘legal escape’ that human rights perpetrators have at their disposal is gradually narrowing. Although amnesties were once used as a tool ‘confirming’ sovereignty, it is now agreed that there are some universal values that override the independence and immunity of each state’s High Officials. By contrast with the past, when members of the regime could ensure their future immunity by enacting amnesty laws, this option is now far more limited. Although amnesties are not rejected *per se* it is apparent that the international community now approaches all statutes of limitation with great

¹⁷⁹ Flinterman 2004, p.267.

¹⁸⁰ Rome Statute of the ICC.

¹⁸¹ Interview with ICII representative, 12 May 2011.

¹⁸² The interviewed representative has given the example of Uganda, where domestic jurisdiction has considerably improved in recent years.

¹⁸³ Schabas 2004, p.155.

¹⁸⁴ International Law Commission 2001, para.3.

cautiousness. Furthermore, as emphasized by many international scholars “it is hoped that the existence of the permanent International Criminal Court will end forever the culture of impunity, thereby deterring the commission of gross human rights violation in the future”.¹⁸⁵ Although this is a very ambitious vision, which beyond any doubt will require many years to be fulfilled, it is something to look up to. Moreover, as will be argued in the next chapter, challenging impunity through instruments of international law in fact catalyses addressing its other aspects too. The next step in the fight against impunity for human rights perpetrators is to deal with the issue of systematic violations of economic rights.

Nevertheless, in order to achieve this the international community must take a more comprehensive stand regarding amnesties. Rather than avoiding the subject, international organisations should reach greater consensus concerning amnesties¹⁸⁶ and attempt to draw clearer margins within which amnesties, as a last resort, could be enacted. Burke-White gives the example of ‘international constitutional immunity’, which is the “most narrowly tailored form of amnesty and has the greatest legitimacy, both domestic and international”.¹⁸⁷ In order to fall within this category an amnesty should be enacted through a legitimate process that represents the will of the people, it should be applied only to crimes, which the state does not have an international duty to prosecute and such legislation should be approved by the international community (e.g. via an UNSC resolution).¹⁸⁸

It is not therefore argued that the international community should endeavour to achieve a full ban on all amnesties, as they can in rare cases serve the interests of peace. It should however be acknowledged that greater accountability of perpetrators has to be enforced and that if amnesties are to be enacted in certain cases, there has to be a greater consensus regarding the ‘limits’ of their endorsement.

¹⁸⁵ Flinterman 2004,p.266.

¹⁸⁶ e.g. Trumbull 2007.

¹⁸⁷ Burke- White 2001, p.510.

¹⁸⁸ idem.

As in the chess game, where a mixture of strategies has to be applied in order to win and the opponent needs to be attacked from different direction, so in the international fight against humanity, legal aspect is only one of the issues that need to be considered. In order to challenge dictator's impunity he needs to be striked legally (by a combination of different domains of law such as criminal law, civil litigation, constitutional law, international law etc.) as well as politically or economically.

In *Masters of War*, Bob Dylan sang

“You that build all the bombs
You that hide behind walls
You that hide behind desks
I just want you to know
I can see through your masks”¹⁸⁹

We can only hope that the international community can indeed take the masks off gross perpetrators of human rights violations and make them accountable for their crimes, but in order to achieve this goal a comprehensive approach is a prerequisite.

¹⁸⁹ <http://www.sing365.com/music/lyric.nsf/masters-of-war-lyrics-bob-dylan/a17b1e57d80048d0482569690027973b>, consulted on 5 June 2011.

CHAPTER III

ANOTHER PUZZLE IN CHALLENGING IMPUNITY. CONFRONTING SYSTEMATIC ECONOMIC VIOLATIONS

In 2009, when celebrating the commemoration of International Justice Day, the International Commission of Jurists declared that:

“The fight against impunity and for international justice has made positive progress in the last decade(...). Nevertheless, international justice continues to encounter obstacles in its development. The ICJ, the legal community and all the human rights movement must continue their efforts to attain universal justice and an end to impunity”.¹⁹⁰

Indeed, especially taking into account the events that took place during the ‘Arab Spring’¹⁹¹, the fight against impunity has been at the forefront of international interest. However, the fact that ‘overthrowing’ a tyrant is simply the beginning of a very long and exhausting road towards democratic transition tends to be neglected. Furthermore, it is often overlooked that the different aspects of one of the world’s hardest combats- ending impunity - are all closely interconnected and therefore require a more comprehensive and internationally concerted approach.

As emphasised in the previous chapter, one of the ‘pieces’ of this fight is the legal struggle to bring justice to perpetrators. However, in his ‘Foreign Policy’ article concerning the pressure put on dictators, Graeme Roberts writes: “the credible threat of ending up at the war crimes tribunal in The Hague or having your Swiss bank accounts frozen can work wonders as well”, which takes account of the fact that economic pressure can often be as

¹⁹⁰ <http://hrcpblog.wordpress.com/2009/07/22/icj-fight-against-impunity-must-be-continued-on-international-justice-day/> consulted 18 June 2011.

¹⁹¹ this term has been widely used by the media, e.g. http://www.newyorker.com/reporting/2011/05/02/110502fa_fact_lizza, consulted 18 June 2011, <http://www.time.com/time/world/article/0,8599,2068931,00.html>, consulted 18 June 2011.

effective as legal measures. Consequently, this chapter will focus on another piece of the puzzle called *the fight against impunity*- namely its economic aspects. The first part will examine the issue of systematic violation of economic rights, dealing not only with corruption but also with the phenomenon known as ‘indigenous spoliation’. The second part will look at the way that the international community and international law has approached the subject. It will be argued that further ‘cementing’ of universal values has catalysed the international and domestic response to the problem.

3.1. CORRUPTION AND INDIGENOUS SPOLIATION

The World Bank has referred to corruption as one of the greatest obstacles to economic and social development’.¹⁹² It has assessed that between 1986 and 2010, financial centres have returned a total of \$5bn of stolen assets to developing countries.¹⁹³ Although encouraging, it is only a very small fraction of the \$20bn to \$40bn the bank says is stolen each year by corrupt public officials in those countries.¹⁹⁴

According to the UN Office on Drugs and Crime Anti-Corruption, there is a variety of ways by which politicians and state officials can steal assets, ranging from: “outright theft, bribes, kickbacks, systematic looting of the state treasury, illegal selling of national resources, diversion of loans granted by regional and international lending institutions and project funding from multinational donor agencies”.¹⁹⁵

As argued by Gathii, in the past corruption has been primarily considered more of a governance problem and not necessarily as a human rights concern¹⁹⁶. Nevertheless, since the end of the 1960s, it started becoming clearer that widespread corruption is frequently

¹⁹²<http://info.worldbank.org/etools/antic/detailR.asp?ID=70> , consulted 15 June 2011.

¹⁹³ Ball, 2010.

¹⁹⁴ Idem.

¹⁹⁵ www.undoc.org/pdf/crime/toolkit/fg/pdf , consulted 20 June 2011.

¹⁹⁶ Gathii 2009, p.12.

closely interconnected to the rising trend of authoritarian, one-party, often military rule as well as being related to economic decline and political volatility.¹⁹⁷

Despite this notion gaining more support, many realist and neorealist Western scholars have promoted the view that in order for developing countries to achieve a higher level of economic expansion, corruption is often a necessary cost of business. Economists like Nathaniel Neff claimed that corruption could in fact be beneficial for the economic growth of a developing country.¹⁹⁸

However, factual data suggests otherwise. For instance in Haiti, a country notoriously known for cases of grand corruption, in 2003 around 80 per cent of the population has lived below the WHO poverty line (\$1.25 per day)¹⁹⁹ and it is not an exaggeration to say that to a large extent the corruption and hiding of resources offshore by officials has caused this poverty.

In 2005, the European Commission report assessed that “stolen African assets equivalent to more than half of the continent’s external debt are held in foreign bank accounts”.²⁰⁰

It is crucial to bear in mind that one of the most substantial elements in the assets stealing matrix is in fact foreign aid. As emphasised by Scher, who has analysed this in the context of Africa, foreign aid during the Cold War was linked to support for either the Western or the Soviet bloc. In return for political support, Western or Eastern governments were eager to ignore pillaging of aid often spent on arms rather than on aiding the population.²⁰¹ One of the ‘classic’ practitioners of this corruption was Mobutu Sese Seko of Zaire.²⁰² During his 32 years in power, he received an estimated US\$2 billion in aid from the US alone, the

¹⁹⁷ supra note 196. p.6.

¹⁹⁸ supra note 196,197. p.7.

¹⁹⁹ http://www.nationmaster.com/graph/eco_pop_bel_pov_lin-economy-population-below-poverty-line, consulted 17 June 2011.

²⁰⁰ Commission for Africa2005, p.152.

²⁰¹ Scher 2005, p.18.

²⁰² now renamed to the Democratic Republic of Congo.

“bulk of which wound up in his pocket, for private planes, European chateaux, shopping sprees, and other hallmarks of the high life”.²⁰³

Corruption and the pillaging of resources is in fact one of the biggest plagues of contemporary societies and it needs to be dealt with as a first step towards combating poverty. It is because of this corruption that thousands of people are denied basic social and economic rights.

First of all, corruption seriously decreases resources that might otherwise be spent on indispensable public needs such as basic health care or the provision of potable water:

“corruption affects human rights in a variety of ways. For example, the rights to food, water, education, health, and the ability to seek justice can be violated if a bribe is required to gain access to these basic rights”.²⁰⁴

Thus, corruption challenges the ability of governments not solely to meet their citizens' wants and needs, but in a broader sense their social and economic rights. In the General Comments to the right to food or water, the concept of ‘minimum core obligations’ is invoked and it is emphasised that the state can only use the argument that it has used its maximum available resources if it can demonstrate that every effort has been made to make use of all available resources in order to satisfy minimum obligations.²⁰⁵

Although the issue of economic systematic crimes has initially been separated from the transitional justice discussion, recently the relationship between the two has been gaining more attention. Scholars have begun to consider how criminal justice and other transitional justice mechanisms can become part of a broader range of economic issues such as “a

²⁰³ Scher 2005, p.18.

²⁰⁴ Gathii 2009, p.3.

²⁰⁵ Young 2008, p.155.

continuing part of the ongoing peace-building process”.²⁰⁶ This ‘wider approach’ represented by for instance Ruben Carranza defines economic crimes retrospectively as violations of the International Convention on Economic and Social Rights (an example of such breach can be starvation) with possible inclusion of the large scale corruption.²⁰⁷

Consequently, there is a number of scholars that emphasise the need to recognize the historical interconnectedness between political, criminal and economic violations²⁰⁸, one of the ‘classic’ cases being South Africa. In order to comprehensively address impunity, transitional justice mechanisms must acknowledge any economic roots and social inequality patterns that might impel a particular conflict.²⁰⁹ It is one of the reasons for the increasing focus of political economists on economic factors as determinants of the spread of internal conflict.²¹⁰ As Ballentine and Nietzsche note in cases where ‘shadow economies’ are involved in the political economy of the conflict, the economic criminality is usually systematic as well as incorporated into domestic, regional and global criminal networks.²¹¹

Therefore, if the anti-corruption agenda is classified as a human rights issue, “the democratization of a country's political, economic and social fabric makes it more attentive and responsive to the rights of the most marginalized segments of society”.²¹²

Looking at the case law of international courts such as the European Court of Human Rights or the Inter-American Court of Human Rights it seems apparent that despite the indivisibility of human rights as stressed in Article 5 of the Vienna Declaration and

²⁰⁶ Eichlin 2010, p.5.

²⁰⁷ Carranza 2008, p. 320.

²⁰⁸ E.g. Graeme 2011, Eichlin 2010

²⁰⁹ Eichlin 2010, p.6.

²¹⁰ Cramer 1999, p.4.

²¹¹ Ballentine and Nietzsche 2005, p.15.

²¹² Gathii 2009, p.5.

Programme of Action²¹³, the focus of human rights protection has rested on civil and political rights. Skogly argues that by neglecting the economic dimension of the fight against impunity, the international human rights community risks repeating the same mistake it made in the 1960s and 1970s, namely leaving the economic and social rights behind in the debate on gross human rights violations.²¹⁴ Thus, in order to address the issue comprehensively, the international struggle to combat impunity has to include the fight against violations of social and economic rights.

To some extent, examples of a more complex approach can be seen in some post-transition states such as Bosnia, where economic systematic crimes have been integrated into the criminal jurisdiction nexus. Since 2004, the criminal jurisdiction of the Bosnian Court has been split into three parts depending on the jurisdiction of the subject matter.²¹⁵ The first Chamber has been dedicated to War Crimes and it served as a domestic addition to ICTY. The Third Chamber dealt with General Crimes. The Second Chamber has been assigned to Organized Crime, Economic Crime and Corruption as a response to crimes that had an impact on the economy of the state.²¹⁶ Also, at the state-level of Bosnia and Herzegovina's Prosecutor Office, there are Special Departments for both War Crimes as well as Organized Crime, Economic Crime and Corruption²¹⁷, which confirms the interconnectedness of the two.

The focus of this chapter is not corruption *per se*, but rather the systematic pillaging of national resources by constitutionally responsible officials. It should be underlined that

²¹³ Art. 5 Vienna Declaration and Programme of Action: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms"

²¹⁴ Skogly 2009, pp.70-74.

²¹⁵ Eichlin 2005, p.4.

²¹⁶ *idem*.

²¹⁷ *supra* note 215,216, p.5.

there is a difference between corruption and indigenous spoliation. The act of indigenous spoliation is an illegal act of depredation, which is committed for private ends by constitutionally responsible rulers, public officials or private individuals.²¹⁸ Moreover, what is discussed here is not a separated case of authorities abusing their power; it is a systematic looting of resources belonging to whole nations which are then stored in foreign accounts while ordinary citizens are deprived of their basic economic rights. This systematic deprivation goes beyond what we understand as corruption- it is a systematic and continuous violation of basic economic rights of populations by the very people who are supposed to act on behalf of those populations.²¹⁹ By reference to genocide, Kofele-Kale refers to this phenomenon as '*patrimonicide*'.²²⁰ Although only recently acknowledged by scholars, *patrimonicide* has been a long-time feature of human history and an instrument of the political game throughout the 20th century. Just to name one past example of systematic economic violation, we could refer to what history books name the 'Big Hunger' in Ukraine, which led to tragic death of millions of people, despite Ukraine having one of the most fertile soils in Europe.

Indigenous spoliation does not have to be an act of immediate killing or torture; on the contrary- it is a deliberate and continuous process of, for example, starvation of the population as occurred in Kosovo during the conflict in Yugoslavia, when thousands of people were forced to leave their homes and in result died from lack of shelter and food supply.²²¹

The effects that indigenous spoliation has on the population of states robbed of their resources are hard to overlook. For instance, Haiti, which was successively plundered of its assets by the clan of Duvaliers, is currently the poorest country in the Americas and one of the poorest in the world. According to World Bank estimates, around 77% of its population

²¹⁸ Kofele- Kale 1995, p.10.

²¹⁹ Kofele- Kale 2006(b), p.13.

²²⁰ idem.

²²¹ Skogly 2009, p.58.

lives below the poverty line.²²² As Mintz and Lundahl put it: “the treasury has continued to be legitimate prey for the cliques in power, and power is viewed as a means to reach the prey”.²²³ As a result, between 1960-1967 the amount of government resources paid to the Duvalier team reached 87%.²²⁴ Furthermore, although the official salary of Papa Doc Duvalier was \$20,000 per annum, he was able to purchase two villas for \$575,000 and held stock worth around \$1.5 million in his Swiss account.²²⁵ Bearing in mind what has been mentioned previously regarding the link between foreign donations and the plundering of national resources, in this case also the bulk of those assets originated from international aid; between 1973 and 1983, Haiti received \$477 million in international donations.²²⁶ Haitian students have drawn a direct link between the poverty, looting of national resources and diverting international aid away from the population; they have thus pointed out that “wealth extracted from the national economy has never been used to finance public services or economic development programmes likely to benefit the masses of Haitians”.²²⁷

The scale of looting is often hard to grasp for Western states; the private concentration of stolen assets held in foreign accounts is often so large when compared to the total external debts of countries they have been stolen from that in some cases it even exceeds their foreign debt.²²⁸

In the Philippines, the corruption of highest state officials reached an almost unimaginable level:

“the magnitude of the amounts involved, and the damage done to both the government and the economy make the corruption of the Marcos regime a singular and one would hope, unique

²²² <http://data.worldbank.org/country/haiti>, consulted on 20 June 2011.

²²³ Mintz and Lundahl 1983, p.399.

²²⁴ *idem*.

²²⁵ *supra* note 223,224, p.345.

²²⁶ World Bank 1983.

²²⁷ Kofele-Kale 2006(b), p.24.

²²⁸ Kofele-Kale 2006(a), p.935.

experience in Philippine history”.²²⁹

Also in the case of Haiti, the longer the Duvalier’s were in power, the faster the economic status of the Haitian population deteriorated. Despite the fact that during the 1980s 90% of Haitians earned less than \$150 per annum, Baby Doc Duvalier and the ring of his closest friends managed to rob the national treasury of around \$505 million.²³⁰

In Sierra Leone, two former presidents: Siaka Stevens and Joseph Momoh have been examined by the Marcus-Beccles Commission. The Commission has found that rather than ensuring the interest of people of Sierra Leone, they put their personal interests first and therefore did not preserve the country’s common public property.²³¹ Moreover, the Commission found that although the salary of Mr. Stevens during his time in office amounted to Le271,975, he managed to purchase sixteen houses valued at \$5.850.000.²³²

Unsurprisingly, the continuous looting of resources gradually undermines the legitimacy of government, which in turn has to often impose forceful measures in order to govern.²³³ Thus, once a regime starts to show signs of weakness, the population tends to turn its power against it.²³⁴ Thus, the previously mentioned realist argument of corruption being a mean to democratic consolidation and stability can actually be refuted. What is more, in war-torn states, illicit funds actually facilitate consolidation of power in the hands of ex-combatants and “others who may have an interest in spoiling the peace and provoking further conflict for their own gain”²³⁵, which further undermines the realist argument.

²²⁹ Timberman 1991, p.76.

²³⁰ Prince 1985, p.51.

²³¹ Sierra Leone Government 1993, para 8.

²³² Idem.

²³³ Kofele-Kale 2006ii, p.30.

²³⁴ as was a case of Ceaușescu in Romania, Suharto in Indonesia or most recently Ben Ali in Tunisia.

²³⁵ Eichlin 2010, p.12.

3.2. RESPONSIBILITY OF ELECTED OFFICIALS

The scale of “sacking of national treasuries by the very people in who the public trust is placed”²³⁶ is usually followed by their evasion of justice and flight to safe havens, often to Western states²³⁷, where they live in luxury. The efforts of states whose resources have been stolen to recover these assets is often reduced to a domestic matter rather than seen as an issue relevant to international interest. As Kofele-Kale puts it, these issues “represent a complex and under-analyzed area of international law”.²³⁸

Many authoritarian regimes have a long tradition of equating public finance with the private financial interests of its officials.²³⁹ By many Western states this phenomenon has actually been perceived as an indispensable element of the political architecture of many countries.²⁴⁰ Tacit acceptance of this *status quo* as a price of relative stability has in fact brought suffering to the populations of many states.²⁴¹

When an official takes public office he automatically and voluntarily undertakes an obligation to defend the interests of the public; the population entrusts him with their interests.²⁴² It is the very foundation of democratic societies that by being appointed to public office, the official agrees to act only in the best interest of citizens he is accountable to.²⁴³ In many cases those involved in the looting of public resources are actually the ones with the biggest networks of power.²⁴⁴

²³⁶Kofele-Kale 2006ii, p.2.

²³⁷ for instance until January 2011, Jean-Claude Duvalier has lived in France for many years.

²³⁸ Kofele-Kale 2006(b), p.2.

²³⁹ Kofele-Kale even refers to it as a “tradition of plundering the national treasury” [2006(b), p.2].

²⁴⁰ One of the most obvious examples seems to be the approach of the USA towards military regimes in Latin America in 1970s and 1980s e.g. its relationship with General Pinochet.

²⁴¹ See Annex 1 for photos of Western Heads of States with people widely perceived as dictators and human rights perpetrators.

²⁴² This responsibility arises from the so-called *entrusting theory*, which sees the manager of property is entrusted with the task of administering it by the beneficiary DeMott 1988, p.879.

²⁴³ Kofele-Kale 2006(b), p.146.

²⁴⁴ Scher 2005, p.17.

The main problem is in fact usually not a lack of legal documents listing the duties that officials have towards their citizens. On the contrary, it often seems that the more corrupt the government of a particular state is, the better ‘democratically-sounding’ legislation it has.²⁴⁵ However, what is on paper is unfortunately not often translated into actions. Furthermore, the issue seems even more complicated considering that even if such cases reach the courts, in cases of grand corruption the evidence is generally more accessible to the accused “and the state’s lack of access to this evidence is likely to create a clear inequality of arms between the parties as well as an imbalance of powers”.²⁴⁶ And even if those corruption investigations are in fact carried out in order to ‘appease’ the international community and convince it the problem has dealt with²⁴⁷ those investigations rarely target higher-level officials, focusing almost solely on low-level administrators.²⁴⁸

For example, in the case of Ghana’s Kwame Nkrumah, he took the position at the top of the pyramid of party and government officials who successfully pursued the ‘institutionalization’ of the political corruption at the highest levels.²⁴⁹

In 2004 in Bosnia, first big cases of the highest state officials took place. Amongst others, the former Minister of Defense, Miroslav Prce²⁵⁰ and Ante Jelavic, former Croat President of the Federation²⁵¹ were convicted of numerous counts of abuse of official authority, embezzlement, lack of commitment to office and tax evasion.

²⁴⁵For instance, Kosovo which on ‘paper’ has one of the most democratic constitutions in reality is also consumed by a very high level of corruption (The Economist, 18 March 2010).

²⁴⁶Kofele-Kale 2006(a) p.936.

²⁴⁷ especially taking into account that foreign aid is often dependant on decreasing the corruption indicators.

²⁴⁸ Kofele-Kale 2006(b), p.19.

²⁴⁹ Le Vine 1975, p.29.

²⁵⁰ http://www.sudbih.gov.ba/komponente/print_vijesti.php?id=114&jezik=e, consulted on 22 June 2011.

²⁵¹ <http://report.globalintegrity.org/Bosnia%20and%20Herzegovina/2007/timeline>, consulted on 22 June 2011.

This raises a question as to whether people who are entrusted with high public office who, after being sworn into office, unexpectedly and inexplicably become wealthy should explain themselves and give the reasons for such suddenly acquired wealth.²⁵² In accordance with the right to a fair trial, there is a presumption of innocence. Nevertheless, nowadays “several multilateral treaties²⁵³ include the crime of illicit enrichment, which reverses the presumption of innocence by shifting the burden of proof as to how unexplained wealth was acquired by the accused”.²⁵⁴

The issue of responsibility of officials is gradually beginning to be addressed, as illustrated by the ‘Arab spring’ and the freezing of accounts of Hosni Mubarak, Zine El Abidine Ben Ali or Muammar Kaddafi. One of the concepts, which is particularly applicable to deal with the issue of assets recovery is the notion of Politically Exposed Persons. In 2001, the new Nigerian government, which succeeded the regime of Sani Abacha has attempted to recover the stolen assets. It has filed complaints to the Federal Office of Police of Switzerland. FOP has investigated almost sixty Swiss banks. It is during this investigation that the concept of PEP has appeared. It applies to “persons who perform important public functions for a state”.²⁵⁵

3.3. INTERNATIONAL LAW AND INDIGENOUS SPOILIATION

The question is, if the international community becomes in fact aware of the scale of looting that leaders carry out on the very populations they were elected to protect, what is its role? How can the international community act effectively in the face of indigenous spoliation and upon what obligations of international law? Patrick Lumumba, head of the

²⁵² Kofele-Kale 2006(a), p. 910.

²⁵³ An example could be Article IX of the Inter-American Convention Against Corruption, which defines the crime of illicit enrichment as “a significant increase in the property of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions”.

²⁵⁴ Kofele-Kale 2006(a), p.915.

²⁵⁵ <http://www.wolfsberg-principles.com/faq-persons.html>, consulted on 16 June 2011.

Kenya Anti-Corruption Commission said that seeing the scale of destruction made by the successive looting of states' national resources, the international community has a moral and political obligation to react.²⁵⁶ Nevertheless, what is the legal basis to argue the responsibility of High Officials?

First of all, Kofele-Kale argues that acts of indigenous spoliation violate the existing Treaty law by breaching:

- convention-based obligations that impose on State parties a duty to promote individual economic rights within their domestic spheres
- convention-based obligations that impose on State parties a duty to promote and protect fundamental human rights law”.²⁵⁷

In its 1952 resolution the General Assembly stated that people have the right to freely use and

“exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations”.²⁵⁸

Furthermore, in General Comment number 3 regarding Art.2(1) of the ICESCR, the Committee on Economic, Social and Cultural Rights stated that:

”On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party”.²⁵⁹

²⁵⁶ Radio Podcast, Polskie Radio Trojka, ‘Raport o stanie swiata’, consulted on 25 June 2011.

²⁵⁷ Kofele-Kale 2006(b), p.9.

²⁵⁸ GA Resolution 626.

²⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment no.3,para.10.

Consequently, if every State has a positive obligation to assure minimum levels of rights, an active breach of those obligations by deliberate denial of those rights (rather than neglect or an incapability to provide those minimum levels), can be considered an active breach of those obligations.

Gradually, the sudden ‘inexplicable’ wealth of political leaders started to become a focus of legislation both at the domestic and international levels.²⁶⁰ It has been a scope of tools such as the Inter-American Convention Against Corruption²⁶¹, African Union Convention on Preventing and Combating Corruption²⁶², the International Code of Conduct for Public Officials²⁶³ and most importantly the United Nations Convention Against Corruption (UNCAC)²⁶⁴. During the 14th International Anti-Corruption Conference it was noted that:

“The UN Convention against Corruption was groundbreaking as the first global instrument to address corruption. Regrettably, many countries have yet to ratify the convention or are lagging behind in implementation. Addressing shortcomings in the convention’s process can be assisted through gap analyses, robust self-reporting and transparency by states parties”.²⁶⁵

Some states, such as Thailand, in which illicit enrichment was not a crime, have only recently ratified the Convention, which certainly gives hope for the future.²⁶⁶

Also, another crucial development in dealing with the illicit enrichment has been the STAR programme- Stolen Assets Recovery Initiative. It is a joint initiative of the World Bank and the United Nations Office on Drugs and Crime (UNODC); it is the

“first organization of its kind to act as an honest broker and coalition builder among stakeholders, provider of knowledge and technical assistance to countries, and international political advocate on the issue

²⁶⁰ Kofele-Kale 2006(a), p.910.

²⁶¹ 29 March, 1996.

²⁶² 11 July, 2003.

²⁶³ General Assembly resolution 51/59 of 12 December 1996.

²⁶⁴ 18 December 2002.

²⁶⁵ 14th International Anti-Corruption Conference Newspaper 2010, p.2.

²⁶⁶ ADB&OECD 2007,p.2.

of stolen assets”.²⁶⁷

Furthermore, acts of indigenous spoliation are in violation of international customary law since they infringe upon the fiduciary duty that constitutionally responsible officials owe to the citizens of the states they represent.²⁶⁸ In the course of international law, this obligation has developed into an international custom.²⁶⁹

Moreover, we can draw a parallel between illicit enrichment cases and the famous International Court of Justice judgement on the Nuclear Tests Case where it was recognised that states have an international obligation to the environment since it is a means of provision of sustainable use for future as well as present generations. Consequently, so should national resources be used bearing in mind their preservation for present and future generations.²⁷⁰ Looting them therefore is a breach of customary law in accordance with this precedent. Another concept that is particularly relevant to the argument that ‘patrimonicide’ is in fact a violation of international customary obligations is the notion of *permanent sovereignty*.

It first appeared during the 8th Session of the Human Rights Commission of the United Nations while negotiating the draft International Covenants on Human Rights.²⁷¹ It was during those negotiations that Asian and African members of the Commission pointed out that economic autonomy is a cornerstone of political independence and the rights of citizens to organise their own natural resources are vital to their economic freedom.²⁷² The concept of permanent sovereignty has thus been encompassed in the idea of self-determination. The Commission on Human Rights stated that “the principle of permanent

²⁶⁷ http://www1.worldbank.org/publicsector/star_site/ten_things.html, consulted on 20 June 2011.

²⁶⁸ 18 December 2002.

²⁶⁹ *idem*.

²⁷⁰ Kofele-Kale 2006(a), p.935.

²⁷¹ Those negotiations have later resulted in the ratification of the ICCPR and ICESCR.

²⁷² Banerjee 1968, pp.515-517.

sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements”.²⁷³

Thus, this concept started receiving recognition and in 1962, the Resolution on “Permanent Sovereignty Over Natural Resources” was passed. It represents the most comprehensive UN perspective on the issue and it became the foundation of a new international economic order, promoted by developing countries.²⁷⁴ One of the points crucial for the issue of indigenous spoliation is the conviction that any violation of the right to independence over natural resources is in fact “contrary to the spirit and principles of the United Nations”.²⁷⁵ However, as noted by scholars, one of the biggest drawbacks in defining the concept of permanent sovereignty in the Resolution 1803 is the lack of a clear designation of the bearer of the right to permanent sovereignty. In its text the Resolution sometimes refers to ‘all States’ and in other clauses mentions ‘peoples and nations’. Consequently, the relationship between the sovereign state and its peoples is not clearly defined within the Resolution.

Furthermore, under customary international law, Heads of State as well as their families enjoy absolute immunity from criminal proceeding. This means that a Head of State is immune from criminal investigation or criminal prosecution by another State.²⁷⁶ However, as mentioned in the previous chapter, this immunity does not extend to crimes against humanity, genocide etc. The question is whether Heads of State are also immune in cases of illicit enrichment. In 1997, the Institute of International Law has argued for the restrictions of immunity of heads of state when there is “misappropriation of assets of the states which they represent”.²⁷⁷

²⁷³ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-sixth session, Art. 32(c).

²⁷⁴ Kofele-Kale2006(b), p.95.

²⁷⁵ General Assembly Resolution 1803 (XVII), para 7.

²⁷⁶ <http://www.eda.admin.ch/eda/en/home/topics/intorg/chres/indig.html>, consulted on 20 June 2011.

²⁷⁷ Resolution of the Institute de Droit Internationale, 2001.

In 1989, *Marcos v Federal Department of Police* case, the United States requested bank documents in relation to the criminal prosecution of Ferdinand and Imelda Marcos under the Racketeer Influenced Corrupt Organization (RICO) Act of 1979.²⁷⁸ The American prosecutor argued that the Marcoses had used their public office to steal public resources, and laundered these resources by acquiring real estate and art in New York²⁷⁹. Initially, the Swiss Court dealing with the petition recognised the defendants' immunity and rejected the United States' request for mutual assistance.²⁸⁰ The Court stated that Heads of State fall outside the jurisdiction of foreign states, in their exercise of official functions and, unlike immunity from civil jurisdiction, the immunity from criminal prosecution is absolute.²⁸¹ However, as emphasised by the Swiss Department of Foreign Affairs, the immunity can be revoked if the “state expressly waives the immunity of its head of state”.²⁸² Hence, the Swiss Supreme Court stated that Ferdinand and Imelda Marcos were not entitled to claim Head of State immunity due to an express waiver by the Philippines Government of that immunity. It stated that public international law does not grant Heads of State immunity as a “personal advantage but for the benefit of the state over which they ruled”.²⁸³ Consequently the immunity argument was not a valid reason for rejecting the US request for Swiss bank files.²⁸⁴ Being one of the most famous cases, the Marcos affair has become a powerful precedent in the fight against the impunity of dictators and a “precedent in dictators' jurisprudence”.²⁸⁵

Nevertheless, the question of whether illicit enrichment is an international crime has not been fully answered. It is a proposition within this essay that in order for dictators to

²⁷⁸ Chaikin 2005, p.32.

²⁷⁹ idem.

²⁸⁰ Bautista 2009, p.73.

²⁸¹ supra note 278,279

²⁸² <http://www.eda.admin.ch/eda/en/home/topics/intorg/chres/imdig.html>, consulted on 20 June 2011.

²⁸³ Supra note 278, 279,281.

²⁸⁴ Supra note 278,279,281,282

²⁸⁵ Chaikin 2005, p.37.

receive a 'clear message' that they are accountable both to citizens of states they are representing as well to the international community, international law has to have a more coherent response to the problem of systematic violation of economic rights.

Kofele-Kale argues that acts of indigenous spoliation, as violations of the permanent sovereignty doctrine, in fact violate customary law obligations, which require States to promote individual economic rights in their domestic capacity as well as customary law obligations²⁸⁶ that oblige States to protect and promote fundamental human rights.²⁸⁷

Prior to the creation of international criminal law mechanisms such as the ICC, international criminal conventions have been subject mostly to indirect enforcement via domestic systems.²⁸⁸ Consequently, nowadays it is widely accepted that if a certain act is recognized as an international crime by international conventions it places a duty on states to criminalize it in national legislation.²⁸⁹ As previously mentioned most of the states affected by illicit enrichment have in fact enacted legislation necessary to challenge it. For instance, in 2003 the National Assembly of the Federal Republic of Nigeria passed the Anti-Corruption Commission Act²⁹⁰ and in the same year in Kenya, the Anti-Corruption and Economic Crimes Act was endorsed.²⁹¹ However, as Patrick Lumumba, the Head of Kenya's Anti-Corruption Commission says, in order to fight this problem, consuming Africa in particular where "for too long officials have assumed there is no consequence", international community needs to become more involved.²⁹² Furthermore, systematic

²⁸⁶ E.g. Art. 2(1) of the ICESCR "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

²⁸⁷ Kofele-Kale 2006(b), p.80.

²⁸⁸ Bassiouni 1986, pp.1-3.

²⁸⁹ Idem.

²⁹⁰ <http://www.dawodu.com/corrupt03.htm>, consulted on 23 June 2011.

²⁹¹ <http://www.kacc.go.ke/default.asp?pageid=2>, consulted on 23 June 2011.

²⁹² Radio Podcast, Polskie Radio Trojka, 'Raport o stanie swiata', consulted on 25 June. 2011

breaches of economic rights by dictators are not isolated instances of the violation of a few individuals' rights, but a deliberate breach of basic human rights as well as an abuse of

“principles sacred to the international community of peoples- the dignity, equality, and inviolability of fellow human beings. When these principles are violated in a shrewd and calculating manner (...) the international community has a right and a duty to react”.²⁹³

In his “Draft International Criminal Code” Bassiouni presents a list of 22 crimes that he considers to be international crimes that stem only from the multilateral convention and include *inter alia*:

- aggression
- war crimes
- unlawful use of weapons
- crimes against humanity
- genocide
- racial discrimination
- slavery
- torture.²⁹⁴

There are two important issues arising in relation to this list. First of all, although at a first glance it appears to be comprehensive, we have to bear in mind that ratification of multilateral conventions that might criminalize some of those offences is often subject to both the domestic political situation as well as to the delicate architecture of international politics.

Secondly, in order to deter dictators from continually violating the rights of populations they have sworn to serve, the illicit enrichments of constitutionally responsible officials should also figure on this list. Despite the fact the subject has received considerably less attention than the violation of civil and political rights, the examples of President Mubarak

²⁹³Skogly 2009, p.74.

²⁹⁴ Bassiouni 1987, p.26-29.

in Egypt or President Ben-Ali of Tunisia show that challenging the impunity of dictators has to be approached comprehensively, and it has to confront the looting of national treasuries as a crucial element of this puzzle.

In many instances, the problem has been ignored due to the ‘constraints’ of *realpolitik*. For instance, Saif- al Islam Gaddafi, son of the notorious Libyan dictator, has enjoyed “close friendships with senior British politicians”.²⁹⁵ As previously mentioned, in the past some scholars have argued that corruption is often a necessity that facilitates other more important political goals such as development of infrastructures in the early stages of state-building²⁹⁶. Nevertheless, as proven by the same example of Libya, facts demonstrate that such ‘balance sheets’ do not work in reality. Therefore, there is a need for greater coherence by the international community on the issue of world leaders' impunity from answering for the plundering of national resources. There can be no excuse for the international community’s tacit acceptance of the deprivation of national resources carried out by High Officials.

Even though principles of national sovereignty do apply, the international prosecution of “systemic economic crimes is so fundamentally important that it may be justified in situations where the domestic judiciary alone is not prepared to do so”²⁹⁷. It seems especially applicable in situations in which crimes against humanity are *de facto* funded by systemic economic crimes or where such crimes create a considerable continuous obstruction to peace-building.²⁹⁸

What is more, some scholars, taking account of the gravity of the consequences of plundering resources and their premeditation, argue that it actually makes systematic

²⁹⁵ <http://www.guardian.co.uk/world/2011/feb/27/gaddafi-son-saif-al-islam-profile>, consulted on 23 June 2011.

²⁹⁶ e.g. Nye 1989, Whitehead 1983, p.156.

²⁹⁷ Eichlin 2010, p.23.

²⁹⁸ *idem*.

economic crimes fit within the borders of crimes against humanity.²⁹⁹ Skogly reaches a conclusion that the definition of crimes against humanity³⁰⁰ is an idea that is sufficiently open-ended to encompass crimes against economic and social rights.³⁰¹ Although indeed in some cases the violation of economic rights could be considered a crime against humanity, for instance “if a government (...) prevents people from receiving food that would be available to them without this interference, and the result is massive suffering or even death”³⁰² and it could fit within the meaning of Art.7(k) of the Rome Statute. Furthermore, if it is actually an intentional act directed against a certain group, it could be seen as a violation of Art II of the Convention on the Prevention and Punishment of the Crime of Genocide³⁰³. An example of such violations might be the case of Sudan where in the period

²⁹⁹ Eichlin 2010,p.3.

³⁰⁰ One of the broadest legal explanations of crimes against humanity is incorporated in Art.7 of the Rome Statute: “1. 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.

³⁰¹ Skogly 2009,p.58.

³⁰² supra note 301,p.70.

³⁰³ Convention on the Prevention and Punishment of the Crime of Genocide, Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;

from 1985 to 1989 “military means of famine creation by both government were elementary but devastating (...).Perhaps 30,000 people died in the displaced camps of Western Sudan”.³⁰⁴ Nevertheless, although in certain cases systematic economic violations appear to fit within the understanding of crimes against humanity, it seems that to claim that every case of a dictator’s illicit enrichment falls within this definition would be an exaggeration; rather it is a separate category that needs to be more ‘acknowledged’ by the international community.

Nevertheless, it seems that transitional justice is gradually modifying itself in order to meet the challenges of a more comprehensive approach towards the fight against impunity.

There are certain lessons from the past regarding the criminal responsibility of those who facilitate the financing of a conflict. For instance, the International Military Tribunal at Nuremberg prosecuted a number of defendants for crimes of aggression, crimes against humanity, and war crimes based partially on their part in funding the Nazi regime and exploitation of people in camps.³⁰⁵ One such example is the conviction of Hermann Goring for his role as ‘Plenipotentiary for the Four Year Plan’ and true ‘economic dictator’ for the Nazi regime.³⁰⁶ Consequently, this precedent is a crucial precedent in recognising activities that provide financial assistance as an inseparable part of conflict. It promotes the role that the international community has to play in addressing economic factors that facilitate the widespread breach of human rights.³⁰⁷

(e) Forcibly transferring children of the group to another group.

³⁰⁴ De Waal 1993,p.161.

³⁰⁵ Eichlin 2010,p.22.

³⁰⁶ idem.

³⁰⁷ idem.

CHAPTER IV

ASSETS RECOVERY

One of the most shocking features characterising the violation of systematic economic rights by constitutionally responsible leaders is the contrast between the debt of countries and the value of assets stashed abroad by those countries' leaders. Mahatma Gandhi once said: "Corruption and hypocrisy ought not to be inevitable products of democracy, as they undoubtedly are today".

Therefore, the attempt of this chapter will be to provide a closer examination of the way stolen assets have been returned to citizens from whom they were stolen. As one of the pioneers in addressing this issue, Switzerland will be used as a case study.

In 1985, Argentina's external debt amounted to \$49 billion, while the private assets held abroad by Argentines totalled \$33 billion; in Mexico the ratio was \$97 billion to \$60 billion and when the Philippines' external debt reached \$26 billion, private wealth held abroad by officials was \$11 billion³⁰⁸ despite the fact that the salary of President Marcos had been a modest \$57,000 per year.³⁰⁹ It seems that one recurring feature is that resources stolen by officials rarely stay in their country of 'origin'. Rather, they are moved to accounts in foreign banks recognised for their 'discretion', which makes the task of finding them all the more difficult; it turns into a genuine "game of hide-and-seek".³¹⁰

Furthermore, unlike in the past where moving the wealth usually meant leaving some sort of physical trail, in the 21st century shifting assets requires as little as a 'click' of a computer mouse. Nowadays the "illicit activities of political and military elites are facilitated by an infrastructure of money laundering located in the world's offshore and

³⁰⁸ de Vries 1986, p.6.

³⁰⁹ Congressman Stephen Solorz, Hearings before the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, House of Representatives, 99th Congress.

³¹⁰ Ombudsman of the Republic of Philippines, Sir Simeon Marcelo.

international financial centres”.³¹¹ As a consequence, one of the biggest problems in returning assets to their rightful owners is locating the assets. Officials often take advantage of opportunities of existing financial services and use so-called ‘gatekeepers’ to conceal the illicitly obtained funds ³¹², which makes “piercing the veil” of secrecy a formidable task.³¹³ What needs to be underlined is that there are two legal avenues that can be followed while pursuing asset-recovery: criminal and civil. Both of them will be discussed later in this chapter.

As emphasized in their comparative study of the ways that different states deal with money laundering, Aiolfi and Pieth note that in every national system there are at least three levels: first of all, there is codified legislation; secondly, the implementation of this legislation through the application of internal policies and procedures; the third layer encompasses the corporate culture which ensures that these regulations do in fact determine the actions of banking employees.³¹⁴

Furthermore, there is a great number of differences between state practices on returning assets. To name one practice, there are states that argue it should be allowed for requesting and requested state to share the frozen assets.³¹⁵ Nevertheless, according to Art. 57(1) of the United Nations Convention Against Corruption: “Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners”.

4.1. FINANCIAL ACTION TASK FORCE AND WOLFSBERG PRINCIPLES

One of the biggest advances in accomplishing greater coherence has been the creation of the Financial Action Task Force. Established in 1989 by the G-7 and the European

³¹¹ Chaikin 2005, p.28.

³¹² Phyllis 2009, p.20.

³¹³ Pieth 2009, p.7.

³¹⁴ Gysi 2004, p.3.

³¹⁵ Draft Model Bilateral Agreement On Disposal of Confiscated Proceeds of Crime.

Commission, this inter-governmental body has been the organization, which stimulated the world's financial centres to subject themselves to international regulations. FATF's monitoring body has been depicted as a great "departure from the traditional view that implementation of treaties and conventions was a purely domestic matter".³¹⁶ While through the *Self-Evaluation Procedure (SEP)* member states are given a chance to describe their approach in their own words, the *Mutual Evaluation Procedure* is based on on-site visits by experts who provide a critical overview.³¹⁷

Although FATF is a relative success, in order to put forward a clear message of zero-tolerance of the illicit enrichment of public officials and impunity, FATF has to both increase its membership³¹⁸ and to go beyond its initial mandate of solely assessing its members.³¹⁹

Furthermore, although asset recovery is theoretically a legal issue, we need to bear in mind that it is to a great extent influenced by political economy³²⁰ and ultimately "the major obstacles to asset recovery campaigns will come from lack of political will".³²¹ This lack of political will can refer both to the state where the assets have been stolen from as well as to the state where they have been stored. However, since gradually the global emphasis on human rights has also exerted its impact on the issue of asset recovery, it has become clearer that even states that once prided themselves as being neutral cannot remain so in the face of grave human rights violations.³²²

³¹⁶ Aiolfi and Pieth 2004, p.10.

³¹⁷ idem.

³¹⁸ perhaps being a member of FATF could become part of conditionality for concluding bilateral and multilateral trade agreements.

³¹⁹ Winer 2002, p.30.

³²⁰ Gysi 2004, p.4.

³²¹ Scher 2005, p.21.

³²² And so in President Marcos' case "Swiss authorities used the vehicle of human rights so as to continue to exert control over the alleged illicit assets of former President Marcos (Chaikin 2005,p.44).

As underlined in Aiolfi and Pieth's study, one of the crucial layers of national systems that deal with asset recovery are the banks. Although usually portrayed by the media as villains³²³, it has to be noted that banks too are adjusting their position. One of the signs that financial institutions are attempting to address the problem are the *Wolfsberg Principles*. In late 2000, the world's leading banks together with Transparency International started developing general principles, whose goal was to improve standards applied to combating money laundering.³²⁴ One of the main catalysts for the establishment of those principles was the banks' deteriorating reputation. As pointed out by the Basel Committee: "reputational risk poses a major threat to banks (...)they need to protect themselves by means of continual vigilance through an effective know your client programme".³²⁵ What has been of particular importance for the issue of illicit enrichment of public officials is the fact the Principles emphasized that in transactions undertaken by PEPs and their families "heightened scrutiny" applies.³²⁶

4.2. CIVIL LITIGATION

As previously pointed out, the way to recuperate assets can proceed through either criminal or civil procedures. There are some who assert the *absolute immunity* for Heads of State, which means they would be immune from civil proceedings for acts committed not only in their public capacity but also in a private one.³²⁷ However, in most Western systems, the *restrictive immunity* model is applied, according to which "immunity would attach only to inherently governmental or 'public' acts of a state"³²⁸. Furthermore, considering the growing importance of the fight against impunity, some scholars go even further claiming that

³²³ see e.g. http://articles.chicagotribune.com/1987-05-05/news/8702030217_1_swiss-bankers-swiss-banking-bank-accounts, consulted 26 June 2011, http://articles.nydailynews.com/1997-07-24/news/18045427_1_swiss-banks-holocaust-victims-world-war-ii-era-accounts, consulted 26 June 2011

³²⁴ Haynes 2004,p.207.

³²⁵ idem.

³²⁶ <http://www.wolfsberg-principles.com/faq-persons.html>, consulted:2 June 2011

³²⁷ Watts 1994,p.54.

³²⁸ George 1995,p.1095.

public officials should not be entitled to immunity from civil jurisdiction for acts that have taken place within the realm of their public *or* private competences.³²⁹

One of the crucial developments on the road to assets recovery, albeit in a different context to global efforts to combat corruption, has been the *Holocaust Claims Commission*. The Holocaust Victims Asset Litigation against Swiss banks began in 1997 and led to the repatriation of US\$269 million in Jewish assets looted by the Nazi regime and secured in Swiss banks.³³⁰ This has set a landmark legal precedent, which means some “African leaders have begun to focus on the repatriation of these looted African assets as an important element of anti- corruption efforts”.³³¹ For instance, since 2004 in Sierra Leone a team of prosecutors has been involved in a time-consuming process of recovering \$375 million of former Liberian President Charles Taylor's illicit assets to compensate victims of his regime.³³²

4.3. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The other way of recovering assets is through criminal procedures. Since stolen funds are almost always moved outside the jurisdiction of the country they have been stolen from, the assistance of other states where the assets have been deposited is required. This support of the *other country* is referred to as ‘mutual legal assistance’.³³³ In Switzerland, the country perhaps most ‘associated’ with hiding resources, used its 1983 Federal Act on International Mutual Assistance in Criminal Matters 25 years ago to freeze the assets of the Philippines' Ferdinand Marcos.³³⁴

³²⁹Chaikin 2005,p.34.

³³⁰Scher 2005,p.17.

³³¹supra note 330,p.19.

³³²Eichlin 2010,p.5.

³³³“Mutual legal assistance (MLA) is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country” <http://www.homeoffice.gov.uk/police/mutual-legal-assistance/> consulted 23 June 2011.

³³⁴Phyllis 2009,p.17.

In the past, the state in which assets had been hidden would often not confiscate or return the funds to their country of origin unless there was clear and admissible evidence linking them to a criminal activity.³³⁵ Furthermore, as identified by Chaitin, there are several reasons for the refusal to provide assistance to a recently formed foreign government in a criminal matter:

→ Requested state might not recognise the new government of the requesting state as was the case in Switzerland in 1973 when it refused to freeze the assets of Emperor Haile Selassie which had been requested by Ethiopia's new military regime³³⁶

→ Lack of treaty relationship between two parties [the requesting and the requested]³³⁷

→ “Discretionary grounds for rejection”, which can encompass issues relating to for example military offences committed by the new government.³³⁸

However, these conditions make the process of asset-recovery significantly time-consuming.

For instance, the Supreme Court of the Philippines has declared US\$ 650 million of the Marcos assets to be illegally obtained only on 15 July 2003.³³⁹ That means that it took 18 years from the first mutual assistance request made to the Swiss government, until the funds were recovered.

The assets stolen by Haiti’s Jean-Claude Duvalier were frozen in 1986 after the overthrow of the dictator, but the alleged \$5 billion still has not been returned and “the money sits frozen in Swiss banks, held up by Haiti’s inability to mount a case against Duvalier and the former dictator’s own drive to reclaim the money”.³⁴⁰

³³⁵ Daniel 2001,p.1, Phyllis 2009,p.20.

³³⁶ historically the central feature of foreign policy, especially prior to its accession to the UN in 2002(McManus, 25 March 2002).

³³⁷ However, this reason has gradually become less viable since the number of multilateral treaties has grown (Chaikin 2005,p.30).

³³⁸ Chaikin 2005,p.29.

³³⁹ supra note 338,p.44.

³⁴⁰ Ball 2010.

In the case of Mobutu Sese Seko, who ruled Zaire for 32 years, during which he “used a country as his personal bank”³⁴¹, the Swiss government initially rejected the application of Zaire's opposition to freeze the dictator's assets since the civil war was not yet concluded. Later, when the request was finally accepted, the Swiss government discovered only \$3.4 million, contrary to the suspicion of the new government of Zaire that there were hundreds of millions of stolen assets.³⁴² What is even more discouraging is how deeply politics influenced this process. When Mobutu died, Kinshasa did not pursue criminal charges against his associates and family. And a Congolese official said “it became politically difficult to pursue criminal charges against Mobutu because his son later joined the government”.³⁴³

It is therefore not surprising that due to the complexity of the process perpetrators often manage to secure those resources, before procedures can be put in place. In Marcos' case, it has been argued that the assets in question were transferred out very shortly before the accounts were frozen.³⁴⁴ That clearly demonstrates that it is in the interest of justice as well as defrauded societies to streamline the recovery procedures.

It comes as no surprise that in cases of requests for mutual assistance made by the new governments, public officials accused of plundering national resources will object to those claims by relying on their immunity³⁴⁵. Nevertheless, according to Art.40(2) of the United Nations Convention against Corruption:

“Each State Party shall take such measures as may be necessary to establish or maintain(...)an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility(...)of effectively investigating, prosecuting and adjudicating

³⁴¹ Adams1991,p.148.

³⁴² Chaikin 2005,p38.

³⁴³ Ball 2010,p.2.

³⁴⁴ Cueto 2002,p.1.

³⁴⁵ supra note 342, p.31.

offences established in accordance with this Convention”.

Furthermore, one of the legal arguments that dictators accused of illicit enrichment have invoked to dispute their case has been the principle of *forum non conveniens* which allows courts to reject a claim due to the courts' discretionary power to determine that another court might be better suited to hear the case.³⁴⁶

Furthermore, it is according to the so-called *state doctrine* that domestic acts of a sovereign state cannot be a subject of investigation by a court in another country. Although the state doctrine is not an obligation under international law, it has been adhered to by the United States courts.³⁴⁷ As a consequence, unless the State that is attempting to recover assets can convince the Court of the State where the founding is accumulated that “defendants’ activities violate the law of nations, defendants will under US case law prevail”.³⁴⁸ One of the most important cases, where the state doctrine defence has been used was the Marcos case. In *Republic of Philippines v Marcos*, argued before the United States Court of Appeals, the Philippines' new Aquino government claimed that in his capacity as president, Ferdinand Marcos strained his authority in order to acquire huge amounts of property and wealth that rightfully belonged to the citizens of the Philippines. At the same time, Ferdinand and Imelda Marcos argued that the principle of state doctrine was applicable in this case and that therefore the US court could not adjudicate over another sovereign state’s acts.³⁴⁹ However, the US justice department stated:

“with respect to the act of state doctrine the burden is on the party asserting the applicability of the doctrine, that defendants have to date not discharged their burden of proving acts of state, and that, as to the allegation of state immunity, the defendants do not have standing to invoke the doctrine”.³⁵⁰

³⁴⁶http://topics.law.cornell.edu/wex/forum_non_conveniens, consulted 24 June 2011.

³⁴⁷<http://definitions.uslegal.com/a/act-of-state-doctrine/>, consulted on 25 June 2011.

³⁴⁸ Kofele-Kale2006(b),p.281.

³⁴⁹ *Republic of Philippines v Marcos*, United States Court of Appeals, Second Circuit, 888 F.2d 954, 15 Fed.R.Serv.3d 45.

³⁵⁰.
idem.

The Court recognised that argument and ruled that the defendants did not provide sufficient proof that their actions would fall within the scope of the doctrine and assets of Ferdinand and Imelda Marcos were frozen. Despite that, in a case against the same defendants, heard by the Ninth Circuit Court of Appeals, the Court recognized the ‘state doctrine’ as applicable and the activities of President Marcos were considered to be public.³⁵¹ Nevertheless, the judgement of the Ninth Circuit “was widely criticized by reviewers many of whom felt that the two cases were virtually indistinguishable”³⁵², which to a large extent proves that the international community agrees that in cases of illicit enrichment state doctrine cannot be used as a shield anymore.

4.4. CASE STUDY. SWITZERLAND AND ASSETS RECOVERY

One of the countries that is most widely associated with the image of a hiding place for illicitly acquired assets is Switzerland. Since 1986, when the Swiss Federal Council decided to freeze the assets of Ferdinand Marcos, the “Swiss courts have been at the centre of a legal battle to recover the plundered wealth of developing countries”.³⁵³ Despite its reputation as a ‘moneybox’ for dictators, Switzerland has returned about CHF 1.7 billion to their countries of origin.³⁵⁴

In fact, perhaps it has been this black PR of Switzerland as a ‘banking centre of ex-dictators’ that has catalysed changes in Swiss legislation. Swiss banks have received a lot of ‘bad press’ and “they were still smarting from embarrassing disclosures of their lax banking regulations in 1998 when it emerged that Swiss banks had handled accounts belonging to Slobodan Milosevic, Jean-Claude ‘Baby Doc’ Duvalier and Mobutu Sese Seko”.³⁵⁵

³⁵¹ Republic of Philippines v Marcos, United States Court of Appeals, Ninth Circuit, 818 F.2d 1473.

³⁵² Kofele-Kale2006ii, p.289.

³⁵³ Chaikin 2005,p.28.

³⁵⁴ <http://www.eda.admin.ch/eda/en/home/topics/finec/inter/poexp.html>, consulted on 15 June 2011.

³⁵⁵ Scher 2005, p.20.

Because of this stereotype of Switzerland as a financial safe haven for war criminals, the problem of illicit enrichment has been addressed. As emphasised by Aiolfi and Pieth, when compared to other jurisdictions “Switzerland took an early lead in tackling the problem of money laundering (...) the focus was on safeguarding the reputation of Switzerland as a financial centre”.³⁵⁶ Mark Vlastic, law professor at Georgetown University and head of operations of the World Bank's Stolen Asset Recovery Initiative goes as far as saying “Switzerland is one of the most forward-leaning countries in the world of asset recovery”.³⁵⁷ Although arguably it was the damage to Switzerland's reputation, rather than a selfless concern about human rights, that catalysed those changes. Nonetheless the breach of economic rights has been quoted as the reason Swiss authorities exerted their control over illicitly acquired assets, as occurred in the Marcos case.³⁵⁸

Following the Marcos case³⁵⁹ the so-called ‘*Lex Marcos*’ was implemented in 1996. Its aim was to reduce time delays through *inter alia* limiting the number of parties holding rights to appeal.³⁶⁰ Although this reform has improved the situation, it has not fully dealt with the problem. This is demonstrated by the case of the military dictator of Nigeria, Sani Abacha, as it took almost four years for the Government of Nigeria to receive documents requested from Switzerland.³⁶¹ Despite the changes in legislation, \$1.7 billion of returned assets is, as argued by many, only “a tip of the iceberg”.³⁶² According to Global Financial Integrity, a Washington group that tracks corruption in the developing world Switzerland is still securing the world’s largest cache of stolen money, estimated at more than \$150bn.³⁶³

³⁵⁶ Aiolfi&Pieth2004,p.20.

³⁵⁷ <http://www.csmonitor.com/World/Global-Issues/2011/0225/Swiss-freeze-Qaddafi-assets-How-dictators-stash-their-cash-101>, consulted 17 June 2011

³⁵⁸ Chaikin 2005,p.44.

³⁵⁹ in which it took close to five years before first documents have been handed to the Government of Philippines by Switzerland.

³⁶⁰ Chaikin2005,p.35.

³⁶¹ <http://www.assetrecovery.org/kc/node/52f770df-a33e-11dc-bf1b-335d0754ba85.0;jsessionid=45F93A0F03F0E30CEA41B0F193A6ACF8>, consulted on 18 June 2011.

³⁶² Ball 2010.

³⁶³ Idem.

In 2005 Chaikin argued that the Swiss system of asset recovery “has been too demanding and too slow in providing effective and efficient asset tracing and recovery”.³⁶⁴ Since documents from Swiss banks are frequently the sole meaningful evidence of illicit enrichment, any big setback in their delivery to the ‘victim-country’ may in fact result in a huge impediment to the whole case, which in turn may have a negative impact on the democratic stability of the requesting country.³⁶⁵

One of the biggest criticisms has been that all the conditions put in place by the Swiss legal system have slowed down the process of returning assets to the treasuries they have been stolen from, which has caused great problems for developing countries.³⁶⁶

Nevertheless, despite the criticisms of the Swiss system that focus on the rigorousness of the conditions, there is also another side of the coin. Some argue that the vice of the present Swiss procedure is that it does not compel the requesting country to declare that if the precautionary order to freeze assets were unjustified the costs or damages would be borne by the requesting country.³⁶⁷ As a consequence, the requesting country does not in fact undertake any risk if it fulfils all the conditions (such as for instance, previously mentioned system stability etc.). Therefore, there is no “consideration of the possibility of awarding damages against a foreign government which has wrongfully obtained a freeze order”.³⁶⁸ An example used to illustrate this point could be the case of the Russian Yukos company owned by Mikhail Khodorkovsky. In 2004, \$5 billion of Yukos’ assets were frozen and later this year the Swiss Supreme Court ordered the release of US\$ 3.3 billion. When appealing against the freeze, Yukos’ lawyers claimed the Russian government’s decision

³⁶⁴ Chaikin2005,p.27.

³⁶⁵ supra note 364,p.37.

³⁶⁶ idem.

³⁶⁷ Mortished 2004

³⁶⁸ idem.

was based on political motives. In the end, “the damage to Yukos by the freeze order was not subject to any compensation”.³⁶⁹

Furthermore, another controversial feature of the Swiss mutual assistance system is the policy of delaying the return of stolen resources to the developing country if its situation is unstable and there is a risk that the assets might be again misused once returned³⁷⁰. As emphasized by the Director of Financial and Economic Affairs of the Swiss Ministry of Foreign Affairs, Jacques de Watteville:

‘Morally, we can’t give money back to a country if we know it will just go into another pocket, from one corruption case to another’.³⁷¹

In some cases, this *conditionality* has meant that assets have been frozen for a considerable amount of time, without any positive effect on the population they have been stolen from.³⁷² However, in other instances, conditionality, although questioned by requesting government, can in fact have a positive outcome for the population. For instance, in the case of Nigeria’s Sani Abacha, in May 2005 the Swiss Federal Council stated that one of the conditions for the return of monies, was that the “World Bank would monitor the Nigerian Government’s use of the funds for specific development projects in health, education and infrastructure”.³⁷³

Switzerland has been haunted for years by the widespread criticism that it is protecting dictators by blaming requesting states’ inability to provide the Swiss Federal Criminal agencies with sufficient collaboration in the due diligence process of determining the source of resources secured on Swiss accounts by PEPs.³⁷⁴

³⁶⁹ Idem.

³⁷⁰ Chaikin 2005,p.45.

³⁷¹ idem.

³⁷² As it happened, for instance in the case of Haiti’s Duvalier where “the illicit funds of Duvalier, which had been frozen for more than 16 years, are in a state of ‘legal limbo’” (Chaikin 2005,p.45).

³⁷³ Swissmoney News, 29 May 2005.

³⁷⁴ Wheeler& Fearn 2011.

As previously outlined, it has already reformed its legislation in the past in order to answer those allegations. However, as proven by the Duvalier case, its reforms have been insufficient.

One of the changes, which suggest that domestic legislatures are responding to the international focus on fighting the impunity of perpetrators, is Switzerland's Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means . This new law referred to in the media as *Lex Duvalier*³⁷⁵ entered into force on 1 February 2011.³⁷⁶ It is “a corrupt politician's worst nightmare; those absconded with embezzled funds will no longer be able to hide their misbegotten fortunes and will ultimately face justice”. This new legislation allows Switzerland to act even in cases where there would be no mutual legal assistance between states, which is especially relevant in cases of ‘failing states’ unable to deal with issues such as mutual assistance requests.³⁷⁷ Consequently, in order to commence the process of restitution, the judge will be able to order it and it will only be necessary for the requesting government to “prove a discrepancy between the wealth of a ‘politically exposed person’ and his or her earnings, along with high levels of corruption in that country”.³⁷⁸ The new law takes account of cases in which ‘usual’ Mutual Legal Assistance channels do not apply, for instance because of the defectiveness of the judicial system in the requesting country, which could mean there are “no relevant criminal prosecution sanctions in place in the affected state”.³⁷⁹ Furthermore, there is a direct link between this new law and what has been discussed in the previous chapter. For instance, in the case of Haiti, the new law would allow Switzerland to override a Swiss Court ruling from January 2010³⁸⁰ that stated that the statute of limitations on Duvalier's alleged crimes was applicable and therefore assets could not be returned to Haiti.³⁸¹

³⁷⁵ also referred to as “Return of Illicit Assets Act or ‘RIAA’”- Wheeler& Fearn 2011.

³⁷⁶ Basu 2011.

³⁷⁷ idem.

³⁷⁸ idem.

³⁷⁹ Wheeler&Fearn 2011.

³⁸⁰ Ball 2010.

³⁸¹ <http://www.assetrecovery.org/kc/node/558ce875-a33e-11dc-bf1b-335d0754ba85.1>, consulted 1 July 2011.

What is more, RIAA increases the due diligence conditions in financial operations involving PEPs and, unlike in the past when the burden of proof in determining the right to assets was placed on Swiss authorities, it has now moved onto the PEPs since

“the presumption of unlawful origin will automatically arise where a PEP’s wealth is subject to an extraordinary increase connected to the exercise of his public office and the level of corruption in the country of origin”.³⁸²

Furthermore, what is perhaps most important for the victim state's population and their enjoyment of economic rights is the fact that RIAA will allow Courts to confiscate looted assets even in cases where the state in question is unable to commence the process. Previously, the co-operation from the victim country was a prerequisite to initiate proceedings, which often was an unimaginable challenge for states, which legal and political systems were in shambles or where a “deposed dictator remains so powerful that officials are reluctant to act against him even after he leaves office”.³⁸³ In such cases, confiscated assets can be used to fund initiatives in the involved country for the profit of the population rather than a private financial institution.³⁸⁴ Despite some accusations from developing states about paternalism, this legislation is perceived by many as “marking a new era in Switzerland’s stance on asset recovery involving PEPs”.³⁸⁵

Furthermore, wanting to demonstrate its eagerness to effectively address the issue of a dictator’s accounts and following the events that took place during the Arab Spring in 2011, on 24 February 2011, the Swiss Federal Department of Foreign Affairs has issued a statement saying:

"In view of the developments, the Federal Council has decided with immediate effect to block any assets in Switzerland of Moammar Gaddafi and those who are

³⁸² idem.

³⁸³ Ball 2010.

³⁸⁴ Wheeler&Fearn 2011.

³⁸⁵ idem.

closely associated to him. In this way, the Federal Council wishes to avoid any risk of embezzlement of any assets belonging to the Libyan state still held in Switzerland".³⁸⁶

Nevertheless, despite *Lex Duvalier* being a big step in the international fight against the impunity of those orchestrating indigenous spoliation, there are still many voices claiming this is not enough. Critics point out it only applies to 'failed states' and that if a "state is really at rock bottom, it helps".³⁸⁷

Egypt, for example, is not a failed state. The problem arises when it is not a case of a failed state, but it is nevertheless widely suspected by the international community that the economic rights of the population are violated the illicit enrichment of state officials.³⁸⁸ Pieth refers to Egypt and its former president Mubarak whose accounts were frozen only after years of embezzlement.³⁸⁹ Consequently, it seems that rather than 'waiting' for a state to fail, which obviously brings years of suffering to its people, the accounts of dictators should be frozen earlier.³⁹⁰

The Swiss case study to a large extent portrays a wider trend of addressing the issue of illicit enrichment and the economic impunity of dictators. As discussed, over the years the system of mutual assistance has changed considerably, especially owing to the fact that bringing human rights perpetrators to justice has gradually started to be at the forefront of international law discussions. The recent changes in legislation in particular, namely the *Lex Duvalier* as well as the swift reaction to the *Arab Spring*, shed a new light on the issue and provide hope for the future. However, as previously emphasized even though the international community has to large extent proven it can act in response to events, the

³⁸⁶ <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=37795>, consulted 28 June 2011.

³⁸⁷ Pieth cited in Ball 2010.

³⁸⁸ In his article in Wall Street Journal, Ball gives example of Thailand or Philippines.

³⁸⁹ <http://www.eurasiareview.com/lex-duvalier-a-corrupt-politician%E2%80%99s-worst-nightmare-21022011>, consulted on 20 June 2011.

³⁹⁰ *idem*.

challenge is to become more proactive. Rather than waiting for a state to ‘fail’, a clear message of non-tolerance for legal, economic and political impunity should be sent. It is beyond doubt that states need to address more widely the issue of indigenous spoliation, which has to date been rather neglected. Although innovations such as the condition for the return of stolen assets to be used for development projects are a step in the right direction, these are not enough. It is therefore crucial that international organisations, civil society and democratic governments speak with one voice on the issue.

First of all, there is a need for greater co-operation and greater intra-state facilitation of the provision of investigative assistance in identifying and tracing property, obtaining documents and enforcing provisional measures aimed at freezing or seizing the proceeds of crime”.³⁹¹ Although FATF seems a fine tool to pursue those goals, it needs more power as well as more members to make a difference.

Furthermore, it appears that it is the task of governments to make sure that the regulations on due diligence of assets are in place rather than expecting banks to self-regulate. Although the regulations might in fact exist, they are rarely effectively implemented due to the lack of harmonisation.³⁹² It is in the interest of states requesting mutual assistance as well as requested states to apply the same standards in order to evade the “navigation of a costly international legal labyrinth”.³⁹³ What is more, governments do have to convince banks that these regulations are in the banks' own long-term interest since

“the long delay of other competing financial centres or the reluctance of such countries to implement agreed international standards leads to a competitive disadvantage for the complying institutes. Those who win the race of implementing the internationally agreed standards loose out on the business side”.³⁹⁴

³⁹¹Phyllis 2009,p.22.

³⁹²Aiolfi&Pieth2004,p.6.

³⁹³Scher 2005,p.17.

³⁹⁴Gysi 2004,p.4.

The first and foremost consideration of the international community should be the respect of the rights of populations. In 1950, Pablo Neruda published a poem called “The Dictators” in which he wrote:

“dictator is talking
with top hats, gold braid, and collars.
(...)The weeping cannot be seen, like a plant
whose seeds fall endlessly on the earth,
whose large blind leaves grow even without light.
Hatred has grown scale on scale”.³⁹⁵

When one of Latin America’s greatest poets wrote those words, it seemed almost unimaginable that one day dictators could be held accountable for taking advantage of public funds. Today, although the situation is radically different, there is still a lot to be changed in order for dictators to feel that their impunity, not only legal but also economic, is over.

³⁹⁵ http://www.poetryconnection.net/poets/Pablo_Neruda/2421, consulted on 20 June 2011

CONCLUDING REMARKS AND RECOMMENDATIONS

Bob Dylan once sang:

“He’s just one man
His enemies say he’s on their land
They got him outnumbered about a million to one
He got no place to escape, no place to run”³⁹⁶

It was the purpose of this paper to show that despite decades of continuous impunity, dictatorial and authoritarian regimes are now being trembled from all directions. In the past even after dictatorships toppled, despots could enjoy their exile supported by resources stolen from national treasuries, as did Charles Taylor in Nigeria or Augusto Pinochet in the UK. However, dictators’ escape routes are becoming considerably limited, especially considering both Taylor and Pinochet were given up by their ‘host’ countries. With the establishment of institutions such as the ICC, the diplomatic, legal and economic impunity of tyrants is gradually decreased owing to the global push for justice and human rights. Using the analogy to the chess game, where the one who applies diverse strategies and attacks its opponent with various moves is the one who achieves the ultimate goal of defeating his adversary. Similarly, in the struggle against dictators, they have to be ‘striked’ from different sides. Despots tend to surround themselves with circles of henchmen, which are tough to break. Therefore, in order to topple a dictator, he has to be cornered from all possible directions. Furthermore, in putting an end to abusive regimes and using law as a tool to do it, a mixture of various domains of law should be applied, such as criminal law, civil litigation, international law or constitutional law.

³⁹⁶ Bob Dylan, “*Neighbourhood bully*”

As underlined in Chapter II, legally speaking one of the biggest challenges for the impunity of human rights perpetrators has been the trend of contesting amnesties. Regardless of centuries long emphasis put on states' sovereignty, the establishment of the ICC confirmed that there are certain crimes such as genocide, for which impunity cannot be granted and

“there can be no ‘legitimate’ amnesty for these crimes; rather, the application of an amnesty law to these offenses would be a clear contravention of established principles of international law“.³⁹⁷

The purpose of sovereignty is therefore not to protect gross human rights violators, but to penalize them.

Furthermore, taking account of a more ‘practical’ side of transitional justice; as explained by the war crimes investigator from the Institute for International Criminal Investigations, when collecting evidence, time is of crucial importance and amnesty can actually act as a hindrance for the investigation.³⁹⁸ It often makes it much harder to recover evidence.³⁹⁹ In most cases amnesties do not perform as crime deterrents and do not bring peace to victims, who are then more likely to become perpetrators themselves. For instance in Afghanistan, where amnesty law was enacted in 2003, it has in fact consolidated the power of commanders involved in serious human rights violations and has become one of the “key drivers of the current escalation of the conflict”.⁴⁰⁰

Nevertheless, this thesis does not reject amnesty *per se* and it has to be mentioned that there are rare situations when amnesty could be beneficial for a peace process. However, in order to be advantageous for transitioning states, such amnesty has to come with a number of conditions and it has to provide some sort of accountability for perpetrators in order to restore the dignity of victims.⁴⁰¹

³⁹⁷ Trumball, 2007,p.303.

³⁹⁸ interview with IICI representative, 12 May 2011.

³⁹⁹ idem.

⁴⁰⁰ Rangelov,2011,p.3.

⁴⁰¹ For instance, amnesty legislation in Uruguay, allowed for perpetrators to be held liable in civil courts (Burke-White 2001,p.499).

The legal feature of impunity is just one piece of the puzzle. Often its economic aspect is even more hurtful for nations oppressed by dictators. The outrageous social and economic injustice that is affecting millions of people all across the globe requires a change of paradigm in which the powerful loot resources from those that they have constitutionally sworn to protect and in which they do it without any fear of punishment. Alexander Pope once compared corruption to grand flood that deluges all⁴⁰² and it seems that the long-term economic destruction caused by decades of illicit enrichment could in fact be likened to that of a natural disaster. For example, in Haiti, the poorest country in the Western Hemisphere, Jean-Claude Duvalier and his clan have stolen up to \$500million.⁴⁰³

The inability of the international community to effectively deal with the issue of indigenous spoliation has brought suffering to many people, whose economic rights are systematically and premeditatedly violated. The recent events that took place in Tunis or Tahrir Square demonstrate that nations oppressed not only politically but also economically, by years of illicit enrichment are reaching their limits. There is a potential for a change and it cannot be wasted, which calls for a clear international consensus on the issue of fight against impunity.

The task of challenging impunity is an immense endeavour, which is only in its initial stage. For instance, Africa has more “dictators per capita than any other continent”- while in 1990 only four African states were democratic, twenty-one years later this number has increased to mere fifteen.⁴⁰⁴ The West has spent trillions of dollars trying to persuade those dictators to reform economic and political systems. However, as emphasized by the Ghanaian economist George Ayittey during his speech at the 2011 Oslo Freedom Forum,

⁴⁰² “At length corruption, like a general flood (So long by watchful ministers withstood), Shall deluge all; and avarice, creeping on, Spread like a low-born mist, and blot the sun.” Pope, ep.III,l.135.

⁴⁰³ Prince,1985,p.51.

⁴⁰⁴ George Ayittey’s speech at the Oslo Freedom Forum 2011, accessible at http://www.youtube.com/watch?v=rSkK5nbk_fl, consulted on 4 July 2011.

dictators are alleging to reform, but in fact they are not interested in reforming. On the contrary, they take “swing to the right and three swings to the left” securing stolen millions on their foreign bank accounts.⁴⁰⁵

Consequently, as argued in Chapter IV in order to effectively and comprehensively deal with the problem of impunity, measures need to be undertaken to address the issue of assets recovery. There have been some positive signs of change such as the Swiss law, referred to as *Lex Duvalier*, which deals with assets recovery and failed states. Unlike in the past, where it was legally required for a state requesting to initiate the recovery proceedings to be able to demonstrate that it is criminally investigating illicit enrichment case, new legislation will allow Switzerland to initiate such process even if the state is considered a ‘failed State’ and its judiciary mechanisms are in shambles. However, although it is a step in the right direction it does not answer the question of what to do in cases where state is not yet failed but there is evidence of illicit enrichment.⁴⁰⁶ Furthermore, it has to be emphasized that the example of Switzerland is employed but that the need to tackle the problem of assets recovery applies universally.

It is easy to notice that at the moment even ‘progressive’ law rather than precluding states from failing, solely deals with the problem once it gets truly severe. Rather than just *reactive*, assets recovery regulation should be more *proactive*. The idea of *Preventive Law*⁴⁰⁷ has already been introduced in environmental or computer law. In order to prevent illicit enrichment and hiding illegitimate resources on foreign accounts it should become also a part of assets recovery legislation. First of all, more emphasis has to be put on transparency of states regarding banking procedures, which will make possible storing of illicit assets more complicated. Secondly, one of the crucial and most difficult tasks is actually tracing the assets and it requires “intense cooperation between law enforcement

⁴⁰⁵ *idem*.

⁴⁰⁶ One of the recent examples is Hosni Mubarak, whose assets were frozen after the ‘Arab Spring’, but nothing was done during the thirty years he has been in power.

⁴⁰⁷ “Preventive law seeks to anticipate and prevent legal problems and litigation in a broad scope of areas(...)” (<http://definitions.uslegal.com/p/preventive-law/> , consulted on 5 July 2011).

agencies or those tasked with tracing assets, Financial Intelligence Units and, in most instances, the prosecutor”.⁴⁰⁸ Often biggest obstruction to successful asset tracing is lack of co-operation between states. Consequently, bearing in mind obligations under the UNCAC, states have to implement it more effectively and focus on intra-state co-operation. Thirdly, although illicit enrichment falls under the UNCAC regime, its perception as an international crime is sometimes disputed, especially considering that some states have not yet ratified it. Therefore, it has to be made clear that illicit enrichment should be considered as an international crime in its own right. Fourthly, as argued by Gysi:

in many countries around the world banks are not obliged to identify the beneficial owners of assets(...)Someone once said that the UK and the US do not need banking secrecy as their banks are anyhow not even obliged to know who their customers are”.⁴⁰⁹

Although the due diligence of PEPs has improved, particularly taking into account the creation of Wolfsberg Principles, it is far from ideal. For instance, it was reported that in the case of Nigerian despot Sani Abacha, a private Swiss bank has accepted \$200 million from his 26-years old son, without asking any questions.⁴¹⁰ Rather than being simply a broad principle, more detailed regulations concerning thorough due diligence of PEPs should be imposed.

Furthermore, international organisations should act as ‘ensurers’ that once the assets are actually returned to their state of origin, rather than entering corruption’s vicious circle once again, they are actually spend on development projects. Particularly helpful in ensuring that might be the World Bank and its conditionality in policy-based lending.⁴¹¹

⁴⁰⁸ Phyllis, 2009,p.20.

⁴⁰⁹ Gysi,2004,p.4.

⁴¹⁰ Masland et al.2005.

⁴¹¹<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20292723~pagePK:41367~piPK:51533~theSitePK:40941,00.html>, consulted on 20 June 2011

Also, while recognising their ‘complementarity’ to domestic systems⁴¹², international organisations have to act as catalysts for change and true advocates of the fight against impunity. They can combine both for instance by promoting the ground-up approach and support for initiatives coming ‘from the people’.⁴¹³

An immense task could be attributed also to both domestic as well as to international NGOs. First of all, they have to promote change in dictatorial regimes and support the opposition. However, one of the biggest problems with opposition in different states is that it is often very dispersed. For instance, during the 2010 Ethiopian election, there were 92 political parties trying to challenge the regime.⁴¹⁴ Consequently, in order to succeed in removing the dictator there is a need for what Avitney refers to as ‘Grand Alliance Coalitions’ such as *Charter 77* in Czechoslovakia in 1989 or *Danube Circle* in Hungary in 1988.⁴¹⁵ Therefore, the task of NGOs is to promote such ‘Grand Alliance Coalitions’. At the same time international organisations should provide them with the tools for reform once the regime has toppled.

Moreover, also international media as the ‘fourth power’ are a very substantial component of the international battle with impunity. Much has been written about ‘briefcase bandits’⁴¹⁶ once the ‘Arab Spring’ has started. Still, it could be argued that beforehand the public’s knowledge about e.g. Swiss accounts of Hosni Mubarak was rather limited due to lack of media’s interest in it. Consequently, rather than being simply a ‘delivery boy’ of bad news once the situation has reached its ‘boiling point’, media should act as a deterrent,

⁴¹² e.g. Statute of Rome Preamble recognises ICC jurisdiction only when national courts are "unwilling or unable" to "genuinely" prosecute.

⁴¹³ For instance, as illustrated by the official from the European Commission such approach can be seen in the EU’s support for Truth Commission in the Balkans- REKOM; an initiative that came from the civil society.

⁴¹⁴ George Ayittey’s speech at the Oslo Freedom Forum 2011, accessible at http://www.youtube.com/watch?v=rSkK5nbk_fl, consulted on 4 July 2011

⁴¹⁵ idem.

⁴¹⁶ idem.

publicising not only bad deeds of dictators but also the way that international community and states reacts or rather does not react to them.

The fight against impunity has commenced and dictators are being cornered from all directions; their field of manoeuvre is getting smaller and smaller. However, we have to remind ourselves that getting rid of dictators does not necessarily automatically create a free society. To achieve successful transition, post-dictatorial reforms are an indispensable element. After the events of the Arab Spring, the hopes are grand. The next move on the 'chess-board' belongs to international community- let's hope states, international organisations, civil society and media do not waste this unique chance.

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ANNEX



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