# PROSECUTING CORRUPTION UNDER THE INTERNATIONAL CRIMINAL JURISDICTION OF THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

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**BY**

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## 2.1 Abstract

The adoption of effective reprobative measures against corruption have proven to have a positive impact on the public service sector and infrastructure of a state. With the alarming rate of corruption and the billions of dollars lost globally as a result of corrupt activities, it is not surprising that more and more legislation has been promulgated to combat corruption. The unequivocal stance against the prevalence of corruption is best denoted from the proposed amendments to the protocol establishing the African Court, as these proposed amendments explicitly provide for the crime of corruption. It is upon this premise that it is necessary to embark on an investigation and analysis of the possible impediments to the success prosecution of the crime of corruption by the court should the amendments be adopted. The study will therefore employ an in depth legal analysis of existing international instruments criminalising the crime and will draw lessons from varying jurisdictions that have adjudicated on the matter in order to give informed postulations that may aid the court in future.

**Key words:** Corruption; impunity; and criminal responsibility.

## 1.1. Background

Corruption is said to constitute a significant proportion of the world's economic activity.[1] While the definition of corruption is broad, it may be defined as the exercise of official powers against public interest or the abuse of public office for private gain.[2] The emanation of the consternation regarding corruption can be traced back to the inception of the institution of governance; it may be depicted in the sentiments of Aristotle who in 350BC suggested that all money be issued publicly in front of the whole city and copies of accounts published in various wards as a measure to guard against the looting and defrauding of the treasury.[3] An introspection of methods employed in the fight against corruption is centred on transparency as postulated by Aristotle in 350BC.

The resounding concern regarding corruption is not unwarranted when one takes into cognisance the adverse effects of corruption that cut across a wide range of sectors within a state. Corruption is considered to be a significant factor that underlies the regression in an affected country's gross domestic product (GDP).[4] It negatively affects a country's capital accumulation;[5] and has also been linked to mediocrity in education, public infrastructure and health services as these phenomena are considered to be traits that

[1] Performance Accountability and Combating Corruption, edited by Anwar Shah, World Bank Publications, 2007 p233. Also see generally Shah Anwar, and Mark Schacter. 2004."Combating Corruption: Look before You Leap." Finance and Development (International Monetary Fund) 41 (4): 40–43 wherein it is submitted that in Kenya "questionable" public expenditures noted by the controller and auditor general in 1997 amounted to 7.6 percent of GDP. In Latvia a World Bank survey found that more than 40 percent of households and enterprises agreed that "corruption is a natural part of our lives and helps solve many problems".

[2] Shah,Anwar, and Mark Schacter. 2004."Combating Corruption: Look before You Leap." Finance and Development (International Monetary Fund) 41 (4): 40–43

[3] See Shah note 1 above at p 234.

[4] See Shah note 1 above at p 235.

[5] See generally Lambsdorff, Johann Graf. 1999, "Corruption in Empirical Research: A Review." Paper presented at the Ninth International Anti-corruption Conference, Durban, South Africa.

are attributable to corruption.[6] Corruption is also said to reduce the effectiveness of development aid and causes a rise in income inequality and poverty of a nation.[7]

What is most disconcerting about corruption is its striking ability to further impoverish and vex the livelihood of the disenfranchised and marginalised groups such as women and minorities in society.[8] Corruption effectively serves as an impediment to the aforementioned groups' ability to obtain public services as its prevalence is most often associated with poor service delivery.[9] Bribery, which is considered to be the most prevalent and visible manifestation of corruption in the public sector, harms the reputation of a State and invariably erodes the trust in the State. In Tanzania, service delivery survey data suggests that bribes paid to officials in the police, courts, land offices and tax services amounts to 62 percent of official public expenditures in these areas.[10]

While bribery is the most prevalent and evident form of corruption, it is important to note that the occurrence of corruption does not take a singular form but may be categorised into at least four broad forms, namely:

i. *Petty, administrative, or bureaucratic corruption:* wherein corrupt acts are typically isolated transactions by individual public officials who abuse their office by demanding bribes and kickbacks, diverting public funds, or awarding favours in return for personal considerations.[11] Such acts are often referred to as petty

[6] See generally Gupta, Sanjeev, Hamid Davoodi, and Erwin Tiongson. 2000. "Corruption and the Provision of Health Care and Education Services," Working Paper 00/116, International Monetary Fund Washington, DC; Tanzi, Vito, and Hamid Davoodi. 1997. "Corruption, Public Investment, and Growth." IMF Working Paper 97/139, International Monetary Fund, Washington, DC and Tomaszewska, Ewa, and Anwar Shah. 2000."Phantom Hospitals, Ghost Schools, and Roads to Nowhere: The Impact of Corruption on Public Service Delivery Performance in Developing Countries. "Working Paper, World Bank, Operations Evaluation Department, Washington, DC.

[7] See generally Gupta, Sanjeev, Hamid Davoodi, and Rosa Alonso-Terme. 1998."Does Corruption Affect Income Inequality and Poverty?" Working Paper 98/76, International Monetary Fund, Washington, DC.

[8] See Shah note 1 above.

[9] See Shah note 1 above

[10] Tapales, Prosperpina. 2001."An Evaluation of Anti-corruption Programs in Philippines." World Bank, Operations Evaluation Department, Washington, DC.

[11] See Shah note 1 above.

corruption, even though, in the aggregate, a substantial amount of public resources may be involved.[12]

ii. *Grand corruption:* which refers to the theft or reckless use of enormous amounts of public resources by government officials; these are typically people that have close ties with the political or administrative elite.[13]

iii. *State or regulatory capture and influence paddling:* which entails a situation wherein private actors with public officials or politicians collude for their mutual and private benefit.[14] The private sector is therefore considered to have "captured" the state legislative, executive and the judiciary for its own purpose.

iv. *Patronage, paternalism, clientelism, and being a "team player"* corruption in this context takes place when officials use their position to assist clients or colleagues to obtain advantageous preferential treatment in their dealings with the public sector, including public sector employment.[15] The assistance rendered maybe based on geographical, ethnic or cultural lines.

Africa, like any other continent is not immune to corruption and given that Africa is still developing as a continent with the vast majority of the countries severely impoverished, it is imperative that any trace of corruption be eradicated through effective prosecution, not only within states but also on a regional level, in order to foster growth and development of the continent. In a study conducted in 2004 by the World Bank, - a study that focused on the ramifications of corruption for service delivery - a conclusion was reached that an improvement of one standard deviation in the International Country Risk Guide corruption index leads to a 29 percent decrease in infant mortality rates, a 52 percent increase in satisfaction among recipients of public health care, and a 30–60 percent increase in public satisfaction stemming from improved road conditions.[16]

[12] See Shah note 1 above.

[13] See Shah note 1 above.

[14] See Shah note 1 above.

[15] See Shah note 51above.

[16] See generally Gupta *et al* note 7 above and Hall, Robert E., and Charles I. Jones. 1999. "Why Do Some Countries Do Much More Output per Worker Than Others?" Quarterly Journal of Economics 114 (1): 83–116.

## 1.2. Problem Statement

A significant amount of money is lost to corrupt activities and practices in Africa.[17] Research has shown that countries that successfully curb this pandemic significantly improve the livelihood of their citizens.[18] However the fight against corruption and its effective eradication is impeded by the fact that the crime is committed by high-ranking public officials who are entrusted with the mandate of fighting the said crime. Currently in South Africa, the "state capture inquiry" is still ongoing and costing taxpayers millions and yet despite shocking revelations of corruption within the government, no meaningful arrests have been made.[19] In Zimbabwe, the Journalist Hopewell Chin'ono was at the inception of the Corona virus pandemic, imprisoned and denied bail for trumped up charges after exposing the corruption and embezzlement of funds that were donated to Zimbabwe to alleviate the impact of Covid 19.[20] It is common cause that Africa is a developing continent that yearns for the benefits attributed to a corrupt free environment; and should the African Court on Human and Peoples' rights be the first international court that explicitly provides for corruption as a crime upon which it exercises jurisdiction over, it is necessary to investigate the possibilities of the success of the court should it be called to adjudicate over the matter.

## 1.3. Definition of concepts

When considering the jurisprudence on corruption and the prosecution thereof as an international crime, there are words and phrases that warrant definition. The words and phrases in question are corruption, good governance, impunity, serious crimes in international law and the imposition of criminal responsibility in international law.

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[17] See note 1 above.

[18] See Gupta note 7 above.

[19] https://www.news24.com/news24/columnists/ralph_mathekga/ralph-mathekga-sa-still-waiting-on-the-npa-to-use-the-full-might-of-the-law-20191126 Accessed 02 September 2020.

[20] https://www.dailymaverick.co.za/article/2020-08-17-journalist-hopewell-chinono-still-in-jail-as-state-attempts-to-bar-his-lawyer/ Accessed 02 September 2020.

### 1.3.1. Corruption

According to the Lectric law library, corruption refers to an act that is done with the intention to induce an advantage contrary to the official duty and rights of others.[21] Although it encompasses bribery it is more comprehensive as the advantage that flows from the commission of a corrupt act might not necessarily be offered by another. In certain instances, corruption is regarded as something that is unlawful such as an agreement where a borrower undertakes to pay the lender an exorbitant interest rate. Such a case may be viewed as "corruptly agreed".[22] Prof Kenneth Mwenda further expands and contextualises the definition. He proposes an expansion of the conventional view of corruption to include the improper influence in the taking or reviewing of procurement decisions.[23] He further proposes the criminalisation of tipping-off a suspect of corrupt practices and the imposition of criminal liability on a public officer who fails to report his knowledge or suspicion of a fellow public officer engaging in corrupt practices.[24]

### 1.3.2. Impunity

Makes reference to a scenario wherein a person is exempted from punishment, or there is an intentional avoidance of the imposition penalties, in a situation which clearly calls for punishment.[25] This is very common in cases of corruption as the perpetrators are usually high-ranking public officials wielding substantial political influence.

### 1.3.3. Criminal Responsibility in International Law

The legal articulation of the confines of the doctrine of 'criminal responsibility' simply outlines a scenario in which an individual, by his act or omission, is held legally

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[21] Lectric Law Library's *lexicon on corruption* https://www.lectlaw.com/def/c314.htm Accessed 24 April 2020

[22] Lectric Law Library's *lexicon on corruption* https://www.lectlaw.com/def/c314.htm Accessed 24 April 2020

[23] Mwenda KK *Public International Law and The Regulation of Diplomatic Immunity in the Fight Against Corruption,* Pretoria University Law Press 2011, p31. The conventional definition of corrupt practices usually cover the offering, giving, receiving, or solicitation, directly or indirectly, of anything of value with the aim of influencing a public official in an improper manner.

[24] See Mwenda note23 above.

[25] https://legaldictionary.net/impunity/ Accessed 24 April 2020

accountable for an unlawful act that he or she has committed.[26] Encompassed under the ambits of the responsibility are elements such as the unlawful act, wrongful intention, causation, youthfulness/age of the actor, mental illness, voluntariness of conduct and so on.[27] In essence, before imposing criminal liability on an individual, an inquiry into the fairness of holding a particular person accountable in law for a wrongful act in question must be held.

### 1.4. Aim and objectives of the study

As discussed earlier, the rampant existence of corruption as well as the call to fight it and its adverse effects on society is uncontentious. However, bringing the perpetrators to justice is not always easy. The prosecution of corruption tends to be problematic in instances involving high-ranking government officials who are "connected" as the mechanisms designed to guard against corruption are likely to be "captured" thus leaving the perpetrators to exist with impunity.

While international instruments are clear on the reprobation of the crime, no international tribunal had specifically spelt out corruption as a crime upon which it would exercise jurisdiction. This position will change with the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights as it will in *Article 28I* provide for the crime of corruption explicitly.

Thus, the aim of this study was to:

I. Elicit from varying jurisdictions, the principles that may govern the prosecution of corruption as an international crime.

This dissertation, therefore, fulfilled the following objectives:

i. To trace the history and the evolution of corruption.
ii. To examine how other jurisdictions have dealt with cases of corruption.

[26] G. Kemp *et al Criminal law in South Africa* (2015) Oxford University Press, 24-25.

[27] *Note above.*

iii. To interrogate and examine some of the rules that are reflected in the judgments of the examined jurisdictions and see how they can be used by African Court of Justice and Human and Peoples' when similar cases are tried.

With these objectives, it was imperative that specific research questions that had to be answered be articulated.

### 1.5. Research Questions

In order to meet the objectives discussed above, there were some specific questions that needed to be answered:

I. Firstly, where does the crime of corruption emanate from and how has this crime evolved to the status of a crime in international criminal law?
II. What are the international instruments that define corruption?
III. Thirdly, what are the successful prospects and challenges of prosecuting corruption by the African Court?

### 1.6. Literature Review

Many Scholars in the field articulated on the far reaching and negative impact of the prevalence of corruption in society. Although much literature is available on combating corruption, it is important to note that none of the literature has been centred on its adjudication by a charter or statute of an international tribunal or court as there lacks a body that explicitly provides for the crime of corruption.

Mwenda is weary of the dangers of diplomatic immunity being used as a shield against the imposition of criminal liability by corrupt officials.[28] He instead argues for the use of diplomatic immunity as a shield that safe guard *bona fide* diplomatic agents who inquire and demand the provision of receipts from states that would have received funds from donors.[29] Mwenda also unpacks the anatomy of corruption and good governance and goes further by delving into the right of diplomats to request receipts of the utilisation of

[28] See generally Mwenda note 23 above at p56–71.

[29] See Mwenda note 23 at p2.

donor funds from receiving states.[30] Unlike this study, he does not concentrate on the successful prospects and potential complexities of prosecuting corruption in the African Court.

Shah outlines the problem of corruption and articulates on the adverse effects which ultimately exacerbate the plight of the already impoverished and vulnerable groups such as women and minorities.[31] Shah also defines and categorises the varying forms of corruption and ventures into outlining the factors that drive corruption. She does not solely focus on the prevalence of corruption in Africa neither does she deal with its prosecution through an international Court.

Genger contrasts the "western bureaucratic method of combating corruption against African restorative Justice.[32] He considers corruption to be a "hydra-headed monster that cannot be successfully fought with a one size fits all approach.[33] He calls for legitimacy to be given to African restorative justice tradition which he warns should not play second fiddle to western methods that he considers to be flawed, loop-holed and ineffective.[34] Genger focuses on the eradication of corruption in Nigeria and does not proclaim to provide a solution to the African Continent. This study differs from the reviewed author in that it looks at the prosecution of the crime using an International Court.

Obura, after an examination of international law confirms the existence of a duty to prosecute and punish international crimes despite the state practice of conferring amnesties on offenders.[35] Obura limits his discussion to crimes that constitute the peremptory norms of general international law. However, this study focusses on the

[30] See Mwenda note23 above at p79-83.

[31] See Shah note 1 above at p235.

[32] Genger P Combating Corruption With African Restorative Justice Tradition: Suggested Steps For Nigeria (2018) vol. 11 *African Journal of Criminology and Justice Studies: AJCJS.*

[33] See Genger note 32 above at p29.

[34] See Genger note 32 above at p29-30.

[35] Obura K 'Duty to Prosecute International Crimes under International Law' in Murungu C and Biegon J (ed) *Prosecuting international Crimes in Africa* Pretoria University Law Press 2011 p31.

proposed prosecution of the crime of corruption under the African Court and discusses the complexities of such prosecution by and international court.

Quah explores the failure and successes of Asian countries in combatting corruption.[36] Quah seeks to address the question of why Singapore and Hong Kong experience success in their fight against corruption while India, China and the Philippines are failing. Quah identifies four lessons that policy makers ought to adopt in order to enhance the effectiveness of Anti-corruption Agencies (ACAs), namely: The presence of political will; the adoption of initiatives that tackle the root cause of corruption; the establishment of a 'Type A' ACA [37] and finally policy makers must ensure the independence of the established Type A institution.[38] The primary focus of the author is Asia while this study concentrates on prosecution of corruption in Africa.

Ratner *et al* begins by unpacking the substantive law regarding international crimes before embarking on an exposition of mechanisms for accountability.[39] There is also a case study of atrocities under the Khmer Rouge rule over Cambodia.[40] In essence this study differs in that it explores the notion of Corruption being prosecuted as an international crime by an international Court.

In all, there has been no jurisprudence on the prosecution of corruption by an international Court or Tribunal as the crime was not specifically spelt out thus leaving its adjudication in the hands of national courts. The proposed amendments to the Protocol on the

[36] Quah J.S.T Combating Corruption in Asian Countries: Learning from Success & Failure (2018) vol. 3, *Dædalus, the Journal of the American Academy of Arts & Sciences,* p202.

[37] 'Type A' ACAs refer to institutions that focus solely on performing anti-corruption functions while 'Type B' ACAs perform both anti-corruption and non-corruption functions. Quah J S T, "Learning from Singapore's Effective Anti-Corruption Strategy: Policy Recommendations for South Korea," *Asian Education and Development Studies 6* (2017) vol.1, p20–21.

[38] See Quah note 36 above at p210-212.

[39] See generally Ratner S R *et al Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy* 3rd edition Oxford University Press 2009.

[40] See note 39 above at p 305 – 364.

establishment of the African Court necessitate a study into the prospects of successful prosecution of the crime of corruption in the African Court.

### 1.7. Methodology

This study is conducted by way of an extensive desktop research and analysis. It outlines and analyses international instruments and literature that is deemed relevant. The approach is commonly referred to as doctrinal legal research or the Black Letter Law.[41] In delineating the concept of "Doctrinal Research" Duncan traces the roots of the prase doctrinal to the Latin word '*doctrina*' which means instruction, knowledge or learning.[42] The author submits that the doctrine in question entails concepts and various principles, that may be found in cases, statutes and rules.[43] It justifies and makes coherent a segment of the law that is part of a larger system.

Having outlined the relevant methodology, it is of necessity to outline the potential limitations of the study. It is common cause that every study has certain limitations that may hamper the outcome of its efficacy, and for the purposes of fully informing the reader, the author endeavours to highlight such shortcomings.

### 1.8. Limitations of the study

This dissertation is centred at postulating the prospects of success of prosecuting a crime that has not been dealt with by international bodies. To overcome this, the dissertation will seek aid of national jurisprudence drawn from England and the United states of America in order to come up with a formulation of the parameters used to apportion criminal responsibility for the crime of corruption by an international body.

[41] W.T Murphy & S Roberts 'Introduction to the Special Issue of Legal Scholarship' (1987) Vol. 50 No. 6 *Modern Law Review*, 677.

[42] N. Duncan 'Defining and Describing What we do: Doctrinal Legal Research' (2012) Vol. 17 No. 1 *Deakin Law Review*, 84.

[43] See Duncan note above.

## 1.9. Structure

This dissertation is structured into five chapters. A concise outline of the issues discussed in each chapter is given below.

**CHAPTER ONE: GENERAL ORIENTATION**

This is the introductory chapter which outlines the global pandemic of corruption and its adverse effects on development. it poses questions of the efficacy of prosecuting this crime within the confines of the proposed Amendment of the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.

**CHAPTER TWO: THE HISTORY OF CORRUPTION AND ITS ADJUDICATION**

This chapter examines the evolution of the crime of corruption; it further examines the rationality of elevating this crime to the status of an international crime. It will briefly explore the evolution of the doctrine of criminal responsibility in international law as the primary mechanism for holding accountable perpetrators who commit crimes in international law.

**CHAPTER THREE: INTERNATIONAL LAW AND TREATY DEFINITIONS OF CORRUPTION**

This chapter analyses all the international instruments on corruption and measures them against the provisions of the proposed Amendment of the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.

**CHAPTER FOUR: THE INTRICACIES OF SUCCESSFUL PROSECUTION**

This chapter undertakes to embark on an exposition of the considerations the African Court would be faced with when tackling the issue of adjudication over the crime of corruption in terms of its protocol. It will analyse the prospects of successful convictions and endeavour to pre-empt any possible challenges and complexities in an attempt to answer the research questions that triggered this study. In this chapter the study will also concentrate on jurisdiction admissibility and *locus standi* under the African Court.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

The chapter profiles the relevance of the considerations discussed in the preceding chapters. It offers possible recommendations to challenges unravelled and concludes the findings of this research.

# Chapter 2

## 2.1. Introduction

Revelations and news headlines exposing the incessant prevalence of corruption in governments, financial institutions and procurement of goods and services have become a typical norm in society especially in the African context where corruption could be considered as mundane. It is therefore necessary to delve in the origins of this crime in order to better understand how to successfully curtail its practice.

## 2.2 Traces of Corruption in History

When one takes into cognisance Aristotle's call for transparency as a tool to be employed in the fight against corruption, a call that is dated around 350BC,[44] it comes as no surprise that sordid acts of corruption were already rampant in Ancient Rome.[45] The great Julius Caesar is said to have utilised both violent and financial means to consolidate his power.[46] Plutarch notes:

> When Metellus, the tribune, would have hindered [Caesar] from taking money out of the public treasure, and adduced some laws against it, Caesar replied, that arms and laws had each their own time; "If what I do displeases you, leave the place; war allows no free talking. When I have laid down my arms, and made peace, come back and make what speeches you please. And this," he added, "I will tell you in diminution of my own just right, as indeed you and all others who have appeared against me and are now in my power, may be treated as I please." Having said this to Metellus, he went to the doors of the treasury, and the keys being not to be found, sent for smiths to force them open.[47]

Caesar is recorded to have taken possession of 15,000 gold ingots, 30,000 silver ingots, and 30 million sesterces.[48] In bid to secure his election, Caesar is said to have accumulated a number of debts and financed his own campaign by dipping with both

[44] See Shah note 1 above at p 234.

[45] See generally Brioschi CA *Corruption: A short history* (2017) Brookings Institution Press p24-29.

[46] See Brioschi note above.

[47] See Plutarch, *Plutarch Live's of Thermistocles…* p305

[48] See Plutarch note above.

hands into the tubs of cash made available to him by individuals such as Crassus, a wealthy building contractor who was later paid back with public works contracts.[49]

Caesar, Crassus and Pompey are considered to be the first to introduce the habit of corrupting the public at great cost to the said public.[50] The Roman historian Sallust articulates and unequivocally condemns the unchaste ways of Rome and her rulers, He paints the following elaborate picture:

> society was divided into two parties, and the body of the state in which they had been united was rent asunder. The nobles, however, had the advantage in party strife, while the power of the people was of less effect, being distributed and dissolved among so many. The will of a few men determined both military and domestic policy: the treasury, provinces, and magistracies, the glories and triumphs of war were all in these men's hands, while the people suffered the hardships of poverty and military service. The spoils of war were seized by the generals and a chosen few; meanwhile the parents and babes of the soldiers were driven from their homes by powerful neighbours.[51]

Sallust attributed the profanation of public life to the then rulers of Rome; one ought to give credence to his claim as he himself held an office of some importance which he abused and used to exploit and bleed dry a wealthy land through bribery and excessive taxation to such an extent that it was deemed scandalous amongst his contemporaries.[52] Because the money that Sallust had swindled had been used in part to build a villa for Caesar near Tivoli and in part to plant and build splendid gardens around his own Roman villa; it comes as no surprise that when faced with charges for his actions , Sallust sought aid from Caesar whose intervention and bribery of the judiciary saw Sallust acquitted of all charges levelled against him.[53]

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[49] See Brioschi note 45 above at p 24.

[50] See Brioschi note 45 above at p 25.

[51] Butler H.E, *Sallust* p46-47.

[52] See Brioschi note 45 above at p 25

[53] See Brioschi note 45 above at p 25.

Bribery and the looting of public coffers became embedded in what constituted the normative culture of the Roman empire.[54] Verres, the governor and proprietor of Sicily from 73 – 73 BC embezzled over 40 million sesterces from the tax roll during his tenure, in order to fully comprehend the gravity of the looted amount one must take into consideration that a legionary at that time earned 900 sesterces per annum.[55] It is said that the manner in which Verres undertook to rob the province evidenced scientific and methodical determination; fortunately his attempts to bribe the jury during his trial were not as successful and thus failed to secure him an acquittal.[56]

An introspection of the more recent past centuries evidence that corruption is still present even in hegemonic states as can be denoted from the Almanac of Political Corruption, Scandals & Dirty Politics by Kim Long which outlines instances of corruption that warrant citation:[57]

> "Before 1776 - The United States created a demonstrably unique form of government after its independence from England, but it can't take credit for the concept of political corruption and scandal. British officials who were appointed to positions in the American colonies committed misdeeds from graft to bribery to extortion. One estimate of the loss to the British Treasury in the year 1765 due to corrupt colonial officials was £700,000 ($132 million as of 2007).[58]

Kim also records the following:

> On January 22, 1987, R. Budd Dwyer (1939-1987), Pennsylvania state treasurer, shot and killed himself during a televised news conference. Dwyer's troubles began in 1984 when he was implicated—but not charged—in a case that involved a no-bid

[54] See note 45 above.

[55] See note 45 above.

[56] See note 55 above.

[57] Long K *The Almanac of Political Corruption, Scandals & Dirty Politics* 2007 Random House Publishing.

[58] See Long note above.

> award for a State contract. In 1986, Dwyer and a former chairman of the state Republican Party were indicted in a state-wide bribery case that was tied to this previous investigation. On December 19, 1986, both men were convicted of bribery after a federal trial. Both declared their innocence, and there were reports that Dwyer had been offered a plea bargain but had turned it down in anticipation of a favourable verdict.

In the twenty first century today, the world is riddled with acts of corruption that mirror all the previously discussed instances. What is most appalling is the ever increasing unscrupulous looting of the politicians and none state actors of today. It is scandalous to note that in the midst of this Covid 19 pandemic officials have been embezzling and misappropriating funds earmarked to alleviate the adverse effects of the pandemic on the socio-economic welfare of the ordinary citizens.[59] Shortly after the announcement of the lockdown on the 28th of March 2020, the government embarked on a campaign of distributing food parcels to the less fortunate who were devastated by the impact of the lockdown.[60] In reality several people linked to political parties were accused of selling the food packages or unfairly distributing by giving preference to party members.[61]

In July allegations of personal protective equipment (PPE) emerged from several spheres of the country; in the Eastern cape, it is alleged that the designated isolation centres were in fact guest houses of politicians friends or family and that at least 10 million Rands was wasted in a scooters project that was condemned by the minister of health.[62] In the Free state there at least seven companies with close links to the current African National Congress (ANC) Secretary-General Ace Magashule, benefited from PPE tenders.[63]

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[59] https://www.sabcnews.com/sabcnews/timeline-covid-19-food-parcels-ppe-corruption-timeline/ accessed 24 September 2020.

[60] *Note above..*

[61] *Note above..*

[62] *Note above..*

[63] *Note above..*

In summation, it is clear that corruption is reaching levels where it is directly affecting the right to life and dignity of the ordinary folk and it must be nipped in the bud. However, one cannot be oblivious to the complexity of doing so when one factors in the reality that it is being perpetrated by officials who are in power. It is therefore necessary to discuss how international criminal law has evolved and made the prosecution of state actors and none state actors possible through the concept of individual criminal responsibility.

### 2.3 Individual Criminal Responsibility

The epoch of individual criminal responsibility can be traced back to the establishment of the International Military Tribunals of Nuremburg and Tokyo which saw the victors of the allied powers bringing forth the leaders of the defeated Axis powers before these tribunals to stand trial for crimes they committed that were deemed to be gross human rights violations.[64] Hailed for being mankind's response to its "worst excesses";[65] the Nuremburg tribunal must also be credited for acknowledging that individuals, and only states, are responsible for atrocities that violate human dignity and that these individuals, whether state officials or not, should be held accountable for their actions.[66]

Prior to the inception of individual criminal responsibility alluded to above, tyrannical states and government officials acted with impunity as the application of criminal liability being emitted on perpetrators who wielded state authority seemed to be a concept that was cast into the oblivion.[67] It is important to note how irregular this practice was as all criminal justice systems do recognize the concept of holding accountable an individual who contravenes law whose violation is backed by the threat of punishment. Scholars do concede that the application of individual criminal responsibility does raise legal questions which Prof Cherif Bassiouni has quantified as follows:

i. Whether individuals are the proper subjects under the applicable law of international criminal law?

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[64] See generally Ratner S R note 39 at xlv

[65] See generally Makau Mutua, *'From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*,(2000) 6 Buff. Hum. Rts. L. Rev. 77.

[66] See note above.

[67] See generally Ratner S R note 39 at p4.

ii. Whether international criminal law can impose direct criminal responsibility on individuals without going through the mediation of states especially when one takes into cognisance the fact that the proscriptions that arise in international criminal law are already embodied in the jurisprudence of the national criminal law of states.
iii. Whether international criminal law can bypass the criminal justice system of states and directly enforce its normative proscriptions on individuals?[68]

The answers to questions above are in the affirmative as evidenced by the Nuremburg and Tokyo Charters. Article 6 of the IMT Nuremburg established the principle of individual criminal responsibility by stipulating that:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [Crimes against peace, war crimes and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.[69]

This was subsequently affirmed by the U.N. General assembly when they formulated the "Affirmation of the Nuremburg Principle" which effectively confirmed the principle of direct individual criminal responsibility under International criminal law irrespective of any law to the contrary that may be embodied in national laws.[70]

Post-World War II, both the International Criminal Tribunals of the Former Yugoslavia (ICTY) and Rwanda (ICTR) confirmed the principles of individual criminal responsibility as their founding charters provided the following:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 [Grave breaches of the Geneva Conventions of 1949,

[68] See Bassiouni C *Introduction to International Criminal Law: Second Revised Edition* Martinus Nijhoff Publishers 2014 p 66.

[69] Charter of the International Military Tribunal of Nuremburg Article 6 (c).

[70] Affirmation of the Principles of International Law Recognised by the Charter of the Nuremburg Tribunal, G.A. Res. 95 (1), U.N. Doc. A/236 (Dec. 1, 1946), at 1144.

> Violations of the laws and customs of war, genocide and crimes against humanity] of the present statute, shall be individually liable for the crime.[71]

This stipulation was reiterated by the ICTR in Article 6 (1):

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.[72]

It is evident that the era of impunity for perpetrators of gross human rights violations had come to an abrupt end since the enforcement of individual criminal responsibility by the Nuremburg and Tokyo Tribunals. The rationale for individual criminal responsibility by these tribunals was premised on the notion that "crimes against international law are committed by individuals and not abstract entities, therefore the effective enforcement of international law can only be sought by punishing such individuals who contravene the said law.[73]

Similarly the International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind also has a provision that articulated on individual criminal responsibility and it reads:

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression in accordance with article 16.
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
   a. Intentionally commits such a crime;
   b. Orders the commission of such a crime, which in fact occurs or is attempted;
   c. Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

[71] Statute of the International Criminal Tribunal of the Former Yugoslavia Article 7 (1)

[72] Statute of the International Criminal Tribunal of Rwanda Article 6 (1)

[73] See generally *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, Nuremberg 14 November 1945 – 1 October 1946* (1947) Published at Nuremberg Germany.

d. Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
e. Directly participates in planning or conspiring to commit such a crime, which in fact occurs;
f. Attempts to commit such a crime by taking action commencing the execution of a crime, which does not in fact occur because of circumstances independent of his intentions.[74]

This notion of holding individuals accountable for international delicts deemed to be in contravention of human dignity is now embedded in international criminal law and no longer considered a subject of contention; it is therefore not surprising to see the International Criminal Court dedicating Article 25 to the articulation of individual criminal responsibility. The article reads:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this statute.
3. In accordance with this statute a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating such a crime, aids, abets or otherwise assists in its commission or attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contributions shall be intentional and shall either:
   (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

[74] The International Law Commission's Draft Code of Crimes Against Peace and Security of Mankind Resolution 36/106 10 December 1981.

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

In summation, it is submitted that there is currently vast precedents and contemporary legal developments establishing and supporting the principle of individual criminal responsibility under international criminal law. The rationality for this principle being that the only way of effectively ensuring the non-contravention of international law is through enforcement of punitive sanctions upon individuals who contravene the said law as mentioned above.

Having established the existence of individual criminal responsible in international criminal law, it is necessary to trace the concept of international crimes in order to posit the notion of the crime of corruption as an international crime.

## 2.4 Evolution of International Criminal law

"Despite its modest and ill-defined proportions," Friedmann acknowledged that international criminal law had always existed.[75] According to him, the crimes which constituted international crimes, included piracy *jure gentium*,[76] and war crimes; this

[75] W. Friedmann, *The Changing Structure of International*, (1964) New York, Columbia University Press.

[76] Piracy is described as robbery that is committed upon vessels on high seas or any place outside the state's jurisdiction. The gravity of this crime is stemmed in how it threatens the interests of the international community, in that, piracy constitutes an impediment to the security of commerce on the high seas, the principle of freedom of maritime communication and the principle of freedom of the high seas. "E. La Haye, *War Crimes in Internal Armed Conflicts,* (2008) USA, Cambridge University Press, 219."

articulation was later expanded by Eve La Haye who added the crime of slavery[77] to the list of crimes that have long been subject to universal jurisdiction.[78] Having established that the era of the IMT Nuremburg and Far East Tokyo signalled the official birth and codification of international criminal law; it is necessary to delve into crimes that were pronounced to be international crimes warranting universal jurisdiction.

The Charter of the IMT Nuremberg named and articulated the crimes that the Tribunal would have jurisdiction over; namely crimes against peace, war crimes and crimes against humanity. These were confirmed by more recent tribunals and courts.[79]

In advocating and rationalising the elevation of corruption as an international crime, it is the author's intention to draw attention to the definition of crimes against humanity as articulated by the ICTY and the ICTR respectively. Article 5 of the ICTY reads as follows:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation;
> (e) Imprisonment;
> (f) Torture;

[77] Article 1 of the League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414, available at: http://www.refworld.org/docid/3ae6b36fb.html [accessed 21 September 2020] defined slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. Having been in existence since time immemorial, the universal call for the condemnation of slave trade was in the early nineteenth century through the 1815 Declaration Relative to the Universal Abolition of the Slave Trade. See generally the Declaration Relative to the Universal Abolition of the Slave Trade, 8 February 1815, *Consolidated Treaty Series,* vol.63, No.473.

[78] See E. La Haye, note 78 above.

[79] The ICTY and the ICTR also introduced the crime of genocide however their Charters did not provide for crimes against peace; however the Rome Statute for the ICC reintroduced the crime of crimes against peace through it's listing and defining of the crime of aggression

(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.[80]

This definition was reiterated word for word by the Statute of the ICTR[81] while the Rome statute slightly expanded this articulation by adding the crime of apartheid and enforced disappearances of person; the Statute also expanded *inter alia* its articulation of imprisonment and the crime of rape.[82] It is submitted that the Rome statute's articulation

[80] See Article 5, Statute of the ICTY.

[81] Article 3 of the Statute of the ICTR reads:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

[82] Article 7 of the Rome Statute reads:

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

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other sever deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any form of sexual violence of comparable gravity;
(h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, grounds that are universally recognised 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;

of “other inhumane acts…causing great suffering…to mental or physical health”, should be taken into consideration when one looks at the effects of corruption. It has already been demonstrated how acts of corruption with the context of the Covid 19 pandemic threatened the livelihood of the ordinary citizens whom failed to receive food packages due to the unscrupulous practices of political leaders entrusted with the said distribution of the parcels. The author thus submits that the crime of corruption leads to great suffering outlined in the Rome Statute and should thus be viewed as an international crime.

## 2.5 Conclusion

In conclusion it is evident that the crime of corruption is not an new phenomenon as it dates back centuries ago. It is also clear that the effective tool that may be employed I the fight against corruption is transparency. While it is conceded that prosecuting corruption related crimes within the jurisdiction they are committed is not an easy task, especially when they involve high ranking government officials; it is submitted that this challenge may be overcome by allowing the crime of corruption to evolve to the status of an international crime. The importance of this evolution cannot be gainsaid when one looks at the suffering and the threat to life that corruption brings.

(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.

# Chapter 3

## 3.1. Introduction

In order to set the stage for the analysis of corruption as well as its definition under various international instruments against the provisions of the proposed Amendment of the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights this section will provide a description of the structure and content of the international legal instruments which deal with corruption and its intricacies.

From the onset, it is worthy to note and mention that the legal aspects of combating corruption under international law have been examined by a number of academics and in this regard it is sufficient to state that, in terms of multilateral treaties dealing with corruption, the United Nations (UN) Convention against Corruption 2005,[83] the Southern Africa Development Community (SADC) Protocol against Corruption 2001[84] and the African Union (AU) Convention on the Prevention and Combating of Corruption 2003,[85] provide some valuable sources of what may be classified as orthodox international law. One can even argue that the treaties mentioned above carve out some essential norms of customary international law which have evolved increasingly over the past couple of years concerning the fight against corruption in different countries and across international borders as a whole.[86]

In addition to the above-mentioned treaties there are a few more treaties which deal with and make reference to the crime of corruption. Although most of these treaties do not

[83] UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, available at: https://www.refworld.org/docid/4374b9524.html [accessed 26 June 2021]

[84] Southern African Development Community. 2001. *SADC Protocol Against Corruption*. Blantyre: Southern African Development Community.

[85] African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, available at: https://www.refworld.org/docid/493fe36a2.html [accessed 26 June 2021]

[86] See A Posadas 'Combating corruption under international law' (2000) 10 Duke Journal of Comparative and International Law 345 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158920 (accessed 23 November 2020).

clearly articulate definitions of the crime of corruption an analysis of their provisions in so far as the crime of corruption is concerned is of vital importance. These treaties include the Inter-American Convention against Corruption, [87] the Civil Law Convention on Corruption of the Council of Europe and the Criminal Law Convention on Corruption of the Council of Europe.[88]

### 3.2. The United Nations (UN) Convention against Corruption 2005

The United Nations (UN) Convention against Corruption, that only came into force on 14 December 2005, is the only legally binding universal anti-corruption instrument.[89] This Convention approach and the mandatory character of its provisions make it an exceptional instrument which has been playing a pivotal role in the development of a comprehensive response to a global problem of corruption. The Convention's main focus is on the prevention, law enforcement, international cooperation, criminalisation, asset recovery and technical assistance and information exchange with regards to the ever increasing crime of corruption.[90]

The Convention, which is a very unique piece of legislation, brings forth a very comprehensive set of measures, rules and standards that all countries can apply with the aim of strengthening their legal frameworks and regulatory structures with the aim of combatting corruption. The UN Convention against corruption calls for deterrent measures as well as the criminalization of the most predominant forms of corruption in both the private and public sectors.[91] Furthermore, the Convention covers many different forms of corruption, such as trading in influence, abuse of power, and various acts of corruption in the private sector.

In terms of Article 2 of the Convention a public official is defined as follows:

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[87] Organization of American States. 1996. *Inter-American Convention Against Corruption*. District of Columbia: Organization of American States

[88] Council of Europe Group of States against Corruption. 1999. *Criminal Law Convention on Corruption*. *Council of Europe Treaty Series 173*. Strasbourg: Council of Europe.

[89] See note above

[90] See generally note above

[91] See note above.

> (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;
>
> (ii)any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;
>
> (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.[92]

Article 2 further defines a "foreign public official" as follows:

> any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.[93]

It is important to highlight that although the UN Convention against Corruption does not give a specific legal definition of 'corruption' however, Chapter III of the UN Convention against Corruption places certain legal obligations on all state parties, amongst others, by stating the following in Article 15:

> Bribery of national public officials each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

[92] See Article 2 of the United Nations Convention against Corruption 2005

[93] Note 88 above.

(a) the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[94]

Chapter III of the Convention places a legal obligation on all states that are party to the Convention to ensure that laws are passed that will cover, amongst other things, the following offences in relation to corruption:

i. Bribery

Article 16 of the Convention states:

Bribery of foreign public officials and officials of public international organisations

(1) Each state party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(2) Each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or

[94]See Article 15 of the United Nations Convention against Corruption 2005.

another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[95]

ii. Embezzlement

Article 17 articulates embezzlement as follows:

Embezzlement, misappropriation or other diversion of property by a public official

Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.[96]

Further obligations are placed on state parties under Articles 18, 19, 20 and 21 which expand the types of offences relating to corruption under the Convention. These Articles provide for the following:

iii. Trading in influence

Each state party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) the promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the state party an undue advantage for the original instigator of the act or for any other person;

[95] See Article 16 of the United Nations Convention against Corruption 2005.

[96] See Article 17 of the United Nations Convention against Corruption 2005.

(b) the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the state party an undue advantage.[97]

iv. Abuse of functions

Each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.[98]

v. Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.[99]

vi. Bribery in the private sector

Each state party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another

[97] See Article 18 of the United Nations Convention against Corruption 2005.

[98] See Article 19 of the United Nations Convention against Corruption 2005.

[99] See Article 20 of the United Nations Convention against Corruption 2005.

> person, in order that he or she, in breach of his or her duties, act or refrain from acting;
>
> (b) the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.[100]

When dealing with the extension of the category of offences that relate to corruption it is important to note that Article 22 of the Convention under discussion extends the category of offences relating to corruption to the embezzlement of property in the private sector.

According to this Article every state party should consider the adoption of legislative and other necessary measures for embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position, to be established as a criminal offence when committed intentionally in the course of economic, financial or commercial activities.[101]

Article 23 of the Convention further goes on to establish a link between the offences of corruption and the offences of money laundering. It further establishes that corruption can form the basis an offence of money laundering. In this regards Article 23 provides as follows:

> Laundering of proceeds of crime
>
> (1) Each state party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

[100] See Articles 21 of the United Nations Convention against Corruption 2005.

[101] Article 22 of the United Nations Convention against Corruption 2005.

(a)(i)the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(2) For purposes of implementing or applying paragraph 1 of this article:

(a) Each state party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each state party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph

(b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the state party in question. However, offences committed outside the jurisdiction of a state party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the state where it is committed and would be a criminal offence under the domestic law of the state party implementing or applying this article had it been committed there;

(d) Each state party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a state party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.[102]

Based on the above analysis the writer concludes that although the UN Convention against Corruption does not define the crime of corruption it does give a list of and explanations of offences of corruption such as bribery, money laundering, embezzlement and illicit enrichment. The Convention also places legal obligations on all states that are parties to the Convention in relation to corruption.

### 3.3. The Southern Africa Development Community (SADC) Protocol against Corruption 2001

The Southern Africa Development Community Protocol against Corruption was adopted by the Southern Africa Development Community in 2001 in the midst of concerns of the adverse and threatening repercussions of corruption throughout the world on the culture, economic, social and political foundations of society. The Protocol highlighted and imparted upon member states, the responsibility to hold accountable corrupt persons in the public and private sectors.[103] It further implored member states to take all the necessary measures against those who commit acts of corruption.[104]

One of the main purposes of the Protocol is the detection, prosecution and prevention of corruption in the public and private sector.[105] In order for this purpose to be fulfilled there needs to be legislative and other measures which are implemented in which acts of corruption are investigated, prosecuted and criminalised.[106] The purpose of the Protocol

[102] Article 23 of the United Nations Convention against Corruption 2005.

[103] See generally the preamble of note 84 above.
[104] Chantelle de Sousa, *"Combating corruption in the SADC"*, (2015), De Rebus.

[105] See SADC Protocol Article 2 note 84 above
[106] Note above.

can all be fulfilled by setting out the mandate and authority of anti-corruption institutions. The Protocol also makes provision for the adoption of measures which state parties should take in order to protect individuals who report acts of corruption.[107]

The SADC Protocol against Corruption defines corruption as "an act which is referred to in Article III of the Protocol and also includes acts such as bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sector which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantages of any kind for themselves or others".[108] It is very clear from this definition that the SADC Protocol's definition of corruption also extends to the private sector.

Article 3 of the SADC Protocol lists the following as acts of corruption:

> (1) This Protocol is applicable to the following acts of corruption:
>
> (a) the solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
>
> (b) the offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

[107] See SADC Protocol Article 4 (1) (e) note 84 above
[108] See Article 1 of the Southern Africa Development Community Protocol against Corruption 2001.

(c) any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

(d) the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the state, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons;

(e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

(f) the offering, giving, solicitation or acceptance, directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

(g) the fraudulent use or concealment of property derived from any of the acts referred to in this article; and

(h) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.

(2) This Protocol shall also be applicable by mutual agreement between or among two or more state parties with respect to any other act of corruption not described in this Protocol.

It is important to draw the reader's attention to the fact that the acts of corruption referred to in the SADC Protocol were borrowed from those stipulated in the Inter-American Convention against Corruption which will be discussed in greater detail below. The writer emphasises that although the SADC Protocol against Corruption does not give a detailed legal definition of corruption, it's definition of the crime of corruption encompasses the acts of corruption which are stated in detail in Article III of the Protocol and as such the definition given here expands and sheds more light to the UN Conventions take of what corruption is and what it entails. It is also important to note that the SADC Protocol goes a step further by offering some sort of incentive, in the form of protection, to people who report acts of corruption be it in the public or private sector.

### 3.4. The African Union (AU) Convention on the Prevention and Combating of Corruption 2003

The African Union Convention on the Prevention and Combating of Corruption was adopted in 2003 and came into force in 2006 and as of the 18th of June 2020 44 countries have ratified and are thus bound by the Convention.[109]

The objectives of the Convention are mainly to:

i. Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.

ii. Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.

[109] See note 85 above.

iii. Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.
iv. Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.
v. Establish the necessary conditions to foster transparency and accountability in the management of public affairs.[110]

The Convention is applicable to the following acts of corruption and related offences:

i. The solicitation or acceptance of any goods of monetary value
ii. The offering or granting of any goods of monetary value
iii. Act or omission in the discharge of duties
iv. Abuse of office
v. Illicit enrichment
vi. the use or concealment of proceeds derived from any of the acts referred to in this Article
vii. participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or on any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.[111]

Article 3 of the Convention goes on to highlight the undertakings that State Parties to the Convention accept to uphold. The principles are as follows:

i. Respect for democratic principles and institutions, popular participation, the rule of law and good governance.
ii. Respect for human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

[110] Article 2 of the African Union Convention on the Prevention and Combating of Corruption.

[111] https://au.int/sites/default/files/newsevents/workingdocuments/33563-wd-2nd_version_presentation_on_the_aucpcc_gender_presummit_0.pdf (accessed on 23rd November 2020)

iii. Transparency and accountability in the management of public affairs

iv. Promotion of social justice to ensure balances socio-economic development.

v. Condemnation and rejection of acts of corruption, related offences and impunity.[112]

The African Union Convention on the Prevention and Combating of Corruption defines corruption as the acts and practices which include related offences as barred by the Convention. [113] Article 4 of the Convention in question lists some of the forbidden acts and practices referred to in Article 1. These acts and practices include: "solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself of herself or for another person or entity, in exchange for any act or omission in the performance of his or her public function".[114]

Article 4 of the Convention under discussion further goes on to state that other incidents falling under the Conventions list of proscribed acts and practices include:

> the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.[115]

Furthermore, in terms of the AU Convention on the Prevention and Combating of Corruption the concept of "corruption" could also include: "acts or omissions in the discharge of a public officer's or other officer's duties for the purpose of illegally obtaining benefits for that officer or for a third party or the diversion to an independent agency or to an individual property belonging to the state or its agencies by a public official or any other

[112] Article 3 of the African Union Convention on the Prevention and Combating of Corruption

[113] Article 1 of the African Union Convention on the Prevention and Combating of Corruption.

[114] Article 4 of the African Union Convention on the Prevention and Combating of Corruption.

[115] Note 85 above.

person, which property such public office official or person has received by virtue of his position".[116]

In addition to the above mentioned it is of vital importance to note that the AU Convention under discussion goes a step further than the other two instruments discussed above and gives a definition of the term "proceeds of corruption" as follows:

> 'Proceeds of crime' means assets of any kind corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption.[117]

Furthermore, the AU Convention provides the following as the definition of "illicit enrichment":

> "Illicit enrichment" means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.[118]

The writer concludes that the Convention gives a vague definition of corruption and it is therefore the writers' submission that the interpretation and implementation of the Convention with regards to the issue of corruption will not take into account the human rights dimension of the ongoing problem of corruption. Additionally, despite the complexities of the crime of corruption, the limited criminalization and prosecution of corruption and acts thereof remain an impediment in the legal response to corruption.

### 3.5. The Inter-American Convention against Corruption

The Inter-American Convention against Corruption which was adopted in 1996 and was, at the time of its adoption, the first legal instrument in the field of international criminal law and human rights field which recognized the international reach of corruption and the

[116] Note 105 above. See also Kenneth K Mwenda, *Public International Law and the regulation of diplomatic immunity in the fight against corruption* (2011) Pretoria University Law Press, page 24- 25.

[117] Note 85 above.

[118] Note 85 above.

need to promote and facilitate cooperation between states in order to fight against the crime of corruption.

The main purposes behind the adoption if the Inter-American Convention against corruption are:

i. To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption.

ii. To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of the measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.[119]

The Inter-American Convention founded a set of precautionary measures which provide for the criminalization of certain acts of corruption, including transnational bribery and illicit enrichment; and it also contains a series of provisions that are aimed at strengthening the collaboration between States Parties to the Convention in areas such as extradition and identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of acts of corruption and mutual legal assistance and technical cooperation, just to mention a few.[120]

It is important to highlight that although the Inter-American Convention against Corruption does not give a precise definition of the crime of corruption it does list the different acts of corruption which the Convention is applicable to. The Convention is applicable to the following acts of corruption:

a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or

[119] Note 87 above

[120] Note 87 above.

advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;

d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

e. Participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.

2. This Convention shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act of corruption not described herein.[121]

In summation it is evident from the above mentioned and the broad content of the Convention that the Inter-America Convention under discussion represents a more ambitious and inclusive approach to corruption as it addresses the demand side of "passive" corruption. This Convention further sets itself the wider objective of fighting "bribery" with regards to governmental affairs and also deals with the passive and active aspects of corruption on both an internal and external platform. Nevertheless, the emphasis of the Inter-American Convention is on corruption and this is evident from the

[121] Article VI of the Inter-American Convention against Corruption.

fact that the Inter-American Convention directly treats active corruption in only one of its twenty-eight articles.[122]

### 3.6. The Civil Law Convention on Corruption of the Council of Europe

The Civil Law Convention on Corruption of the Council of Europe entered into force in 2003 and its purpose is to require each State Party to provide, in its internal law, for effective remedies for people who have suffered various forms of damage(s) as a result of corruption. These remedies must be able to allow the affected people avenues that will enable them to defend their rights and interests, including the possibility of obtaining compensation for damage occasioned by the said corruption.[123]

Article 2 of the Civil Law Convention on Corruption defines the crime of corruption as "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".[124]

It is worth noting that the purpose of the above mentioned definition of the corruption was solely to ensure that no matter would be excluded from the scope of corruption in so far as the Civil Law Convention is involved.[125] However, it is important to draw the reader's attention to the fact that this definition does not inevitably match the legal definition of corruption which most Member States of the European Council rely on, particularly with reference to the usual definition given by the criminal law.

It is worth emphasising that the Conventions definition of corruption has a wide scope and this has a direct reflection on the Council of Europe's comprehensive approach towards the fight against corruption as corruption isn't only a threat to international

[122] See generally Alejandro Posadas, "Combating Corruption under International law" (2000) *Duke Journal of Comparative and International Law*, page 346-413.

[123] http://www.worldlii.org/int/other/treaties/COETSER/1999/2.html (accessed on 23rd November 2020).

[124] Article 2 of the Civil Law Convention on Corruption of the Council of Europe.

[125] Note 87 above.

business/finance interest but is also a huge threat to the concept of the rule of law, democratic values, social and economic progress and human rights as a whole.

### 3.7. The Criminal Law Convention on Corruption of the Council of Europe

The Criminal Law Convention on Corruption of the Council of Europe entered into force in 2002 and is aimed at co-ordinating the criminalisation of a large number of corrupt practices. This Convention also provides for criminal law measures and improved international co-operation in the prosecution of corruption related offences.[126]

It is important to note that although the Convention does not define the offence of corruption it does cover different forms of actions that are considered as specific categories of corruption. These actions are, but not limited to, the following:

i. active and passive bribery of domestic and foreign public officials;
ii. active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies;
iii. active and passive bribery in the private sector;
iv. active and passive bribery of international civil servants;
v. active and passive bribery of domestic, foreign and international judges and officials of international courts;
vi. active and passive trading in influence;
vii. money-laundering of proceeds from corruption offences;
viii. accounting offences (invoices, accounting documents, etc.) connected with corruption offences.[127]

Given the nature of the Conventions on Corruption of the Council of Europe and the definition of corruption as per the Civil Law Convention on Corruption the writer submits that the EU's definition of corruption is purely from a criminal law perspective as the

[126] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173#:~:text=The%20Criminal%20Law%20Convention%20on,the%20prosecution%20of%20corruption%20offences. (accessed on 23rd November 2020).

[127] n 88 above.

definition has a criminalising aspect of the conduct of corruption which is most often than not referred to as bribery, be it active or passive bribery.

### 3.8. The Protocol on the Amendments on the Protocol to the Statute of the African Court of Justice and Human and Peoples' Rights

Having noted the above treaties and the manner in which they define and deal with the issue of corruption the writer will now connect the above discussion to the crime of corruption with regards to the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

The Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights was adopted by the African Union in 2014. The Protocol has an annex entitled 'Statute of the African Court of Justice and Human and Peoples' Rights' and the Protocol together with the annexed Statute provide for the establishment of the African Court of Justice and Human and Peoples' Rights (the Court). According to Article 3 of the Protocol the Court will, "among others, exercise criminal jurisdiction over a wide range of international crimes involving individual criminal responsibility and corporate criminal liability over legal persons (with the exception of States), which goes beyond any other international tribunal."[128]

Furthermore, Article 3 provides that "the Court shall be vested with original and appellate jurisdiction which includes international criminal jurisdiction which the Court shall exercise in accordance with the provisions of the Statue of the African Court of Justice and Human Rights". Article 3 further states that "the Court has jurisdiction to hear matters or appeals as may be referred to it in any other agreements that the Member States, international organisations or Regional Economic Communities recognised by the African Union may conclude among themselves or with the African Union".[129]

[128] M Ssenyonjo and S Nakitto, "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?" (2016) Vol.16, *International Criminal Law Review*, page 71- 102.

[129] Article 3 of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

According to Article 28A of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights the International Criminal Law section of the Court shall have powers to try persons for crimes such as genocide, crimes against humanity, terrorism, human trafficking, drug trafficking, crimes of aggression, illicit exploitation of natural resources, trafficking of hazardous waste, crime of unconstitutional change of government, war crimes, piracy, money laundering, mercenaryism and corruption.[130]

Having noted that the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice does not give any definition of the crime of corruption as it merely just states that matters relating to the crime of corruption will fall within the jurisdiction of the Court it is the writers proposition that the definition that should be relied upon shall be one that encompasses the acts of corruption stipulated in the SADC Protocol, the definition of corruption as per the AU Convention, the definition as per the Inter-American Convention and the definition stated in the Civil Law Convention. Based on this submission the writer proposes that the African Court of Justice on Human and Peoples' Rights should utilises the following definition of corruption when dealing with matters relating to the crime of corruption:

> Corruption is defined as requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof. Corruption encompasses the following practices: the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions. The crime of corruption shall also be applicable to the following acts of corruption:

[130] Article 28A of the proposed Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights

a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;

d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

e. Participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to above.[131]

[131] See generally the Southern Africa Development Community Protocol against Corruption, the African Union Convention on the Prevention and Combating of Corruption, the Inter-American Convention against Corruption and the Civil Law Convention on Corruption of the Council of Europe.

# Chapter 4

## 4.1. Introduction

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) was adopted by the African Union in 2014 and needs to be ratified in order for the court be operational and for it to have jurisdiction over international crimes and transnational organised crimes. Once the required number of ratifications has been reached and the proposed court is established it will be the world's first regional court which will address international crime(s) and its wide scope in terms of its proposed jurisdiction has the potential to go a long way in addressing impunity for serious crimes in African continent.[132]

One of the main features of the Protocol is that it makes provision for the inclusion of criminal jurisdiction within the remit of the proposed African Court of Justice and Human Rights. While the proposed Court can play an enormously positive role in an African continent that is stubbornly tormented by the plague of conflict and impunity for crimes under international law, there are several legal and institutional implications that arise from the adoption of the proposed Protocol.[133]

## 4.2. Jurisdiction, admissibility and locus standi under the proposed African Court of Justice and Human and Peoples' Rights

### 4.2.1. Jurisdiction

According to the Protocol the Court will be bestowed with an original and appellate jurisdiction, including jurisdiction over international criminal matters which it will exercise in line with the provisions of the Statute of the African Court of Justice and Human Rights.[134] Article 3 further states that the Court has jurisdiction to hear matters or appeals as may be referred to it in any other agreements that the Member States, international

[132] Maram Mahdi "Africa's international crimes court is still a pipe dream" *ISS* https://reliefweb.int/report/world/africa-s-international-crimes-court-still-pipe-dream (accessed on 3rd of December 2020)

[133] Clarke KM , Jalloh CC and Nmehielle VO, The African Court of Justice and Human and Peoples' Rights in Context, https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/introduction/B3BD22C223382C23D002EAB97D59ECAC/core-reader (accessed on 03 December 2020)

[134] note 85 above.

organisations or Regional Economic Communities recognised by the African Union may conclude among themselves or with the African Union.[135]

In addition to the provisions of Article 3 of the Protocol Article 6bis of the same Protocol makes provision for the Courts temporary jurisdiction and it stipulates that at the entry into force of the Protocol, until ratification by Member States, any jurisdiction which has been accepted by Member States with respect to the African Court on Human and Peoples' Rights of the African Court of Justice and Human Rights shall be exercisable by the Court.[136]

According to Article 28 of the Statue of the African Court of Justice and Human Rights as amended the Court shall have jurisdiction over all legal disputes and cases that are submitted to it in accordance with the Statute. The said legal disputes and cases must relate to:

a. the interpretation and application of the Constitutive Act;
b. the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
c. the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;
d. the crimes contained in this Statute, subject to a right of appeal.
e. any question of international law;
f. all acts, decisions, regulations and directives of the organs of the Union;
g. all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;

[135] note 85 above.

[136] Article 6bis of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

h. the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
i. the nature or extent of the reparation to be made for the breach of an international obligation.[137]

The following is worth noting when dealing with the jurisdiction of the proposed Court:

- The Court shall not have jurisdiction over any person who is, at the time of the commission of the alleged crime, under the age of eighteen (18) years;
- The Court will have jurisdiction only with respect to crimes which are committed after the entry into force of the Protocol and the Statute and after the specific State becomes a Party to the Protocol;
- The Court may exercise its jurisdiction if one or more of the conditions below apply:
  - The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State or registration of the vessel or aircraft.
  - The State of which the person accused of the crime is a national.
  - When the victim of the crime is a national of that State.
  - Extraterritorial acts by non-nationals which threatens a vital interest of that State.
- The Court may exercise jurisdiction with respect to crimes listed under Article 28A of the Protocol if:
  - A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party.
  - A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union of the Peace and Security Council of the African Union.

[137] Article 28 of the Statute of the African Court of Justice and Human Rights (As Amended).

- The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 46G of the Protocol.[138]

It is important to note that the Court will exercise criminal jurisdiction over a wide range of international crimes involving individual criminal responsibility and corporate criminal liability over legal persons but not over States and such jurisdiction goes beyond the jurisdiction of any other international court or hybrid tribunal.[139] In this regard the Court has been conferred with a wide jurisdiction which means that national criminal jurisdiction needs to be strengthened in order to enable the Court to prosecute international crimes in Africa.

The subject matter jurisdiction of the proposed Court is enormously broad, covering both the traditional 'core crimes' and a number of 'transnational crimes'. The proposed African Court will be empowered to exercise jurisdiction over an extensive list of international crimes, which goes way beyond the jurisdiction of any other international court or cross criminal tribunal. The international criminal jurisdiction of the Court extends to genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.[140]

It is of vital importance to note that some of the crimes mentioned above, such as genocide, crimes against humanity and war crimes, are crimes that are already well established in international criminal law, while other crimes, such as mercenarism, terrorism, corruption, money laundering, and trafficking on hazardous wastes are already

[138] See generally Articles 46D, 46E and 46E bis of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

[139] note above.

[140] Statute of the African Court of Justice and Human and Peoples' Rights (Statute of the African Court), annex to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol on Amendments), adopted on 27 June 2014, Articles 28A - 28M.

defined in existing African Union treaties.[141] The list of crimes mentioned above also contains crimes over which the International Criminal Court (ICC) and other international courts have no jurisdiction over. In addition to the extensive list of crimes mentioned above, the Protocol in question also leaves open the possibility of new crimes to be added to the list.[142]

It is also important to highlight that in terms of Article 46H of the Protocol Article makes provision for the Courts complementary jurisdiction. This Article provides that the Court's jurisdiction shall be complementary to that of the National Courts as well as the Regional Economic Communities where the said Communities specifically provide for such complementation.[143] This complementarity provision is welcomed as it increases the likelihood of the prosecution of corrupt officials who would, as alluded to in chapter 1 above, continue to engage in corrupt activities with impunity.

When dealing with the proposed Court's jurisdiction it is also of paramount importance to note that the African Court's criminal jurisdiction was inevitably limited by granting immunity to heads of states serving under the African Union and other senior State officials. This form of immunity from prosecution came after the ICC's indictments for alleged commission of international crimes which were allegedly committed by the following African heads of State: President Omar Hassan Ahmad Al-Bashir of Sudan, President Uhuru Muigai Kenyatta of Kenya and Deputy President, William Samoei Ruto of Kenya.[144]

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[141] These treaties are: Convention for the Elimination of Mercenarism in Africa, adopted 3 July 1977 and entered into force 22 April 1985; OAU/AU Convention on the Prevention and Combating of Terrorism, adopted 1 July 1899 and entered into force December 2002; AU Convention on Preventing and Combating Corruption, adopted 1 July 2003 and entered into force 5 August 2006; and the Bamako Convention on the Ban of the Import into Africa and the control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted 30 January 1991 and entered into force 22 April 1998.

[142] See generally ACJHR Statute, article 28(A) (2).

[143] Article 46H of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

[144] Manisuli Ssenyonjo and Saidat Nakitto "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?" *International Criminal Law Review* 16 (2016) page 71-102.

The African Union contended that indictments and prosecutions of African leaders had the potential to undermine the sovereignty, peace and stability in African Union Member States and also undermine reconciliation and reconstruction as well as the normal functioning of constitutional institutions.[145] It is based on this that the African Union made a decision to fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights to try international crimes.[146]

It is the writer's averment that the proposed extension of the African Court to include an international criminal jurisdiction is mainly based on the dire need to fight impunity in the African continent and this could only be achieved by establishing a court which has jurisdiction over the serious crimes which are predominant in Africa. In addition to this, there was also a need to expand the Court's jurisdiction to encompass the prosecution of crimes which fell outside the jurisdiction of the ICC such as the crime of corruption, and the unconstitutional change of government as they are rampant in Africa.[147] These crimes fall outside the jurisdiction of the ICC yet they are some of the leading crimes in Africa and have serious consequences on the African region.

In summation of the above mentioned it is important to highlight the fact that the international criminal law section of the proposed African Court of Justice and Human Rights will serve as an African regional criminal court, operating in a manner similar to the ICC but within a narrowly defined geographical scope, and over a massively expanded list of crimes.

### 4.2.2. Admissibility

According to Article 46H of the Protocol the Court shall determine that cases are inadmissible under the following circumstances:

a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;

[145] The African Union's Decision on Africa's Relationship with the ICC, Ext/Assembly/Au/Dec.1 (October 2003), para.5

[146] note 140 above.

[147] See generally n 138 above.

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 to prosecute;
c. The person concerned has already been tried for conduct which is the subject of the complaint;
d. The case is not of sufficient gravity to justify further action by the Court.[148]

In addition to the above mentioned it is important to note that in order for the Court to reach the decision of whether or not a State is unwilling to investigate or prosecute a particular case, the Court shall consider whether one or more of the following exists:

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 Court's jurisdiction;
b. There has been an unidentified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
c. The proceedings are not or were 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 justice.[149]

It is worth noting that when the Court is determining whether a particular State is unwilling to prosecute of investigate in a particular case the Court must consider whether the above-mentioned factors are applicable and such determination must be made having regard to all the principles of due process that are recognised under international law. To

[148] Article 46H of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

[149] note 140 above, Article 46H (3).

this end it is submitted that the Court may be guided by some of the principles of Article 56 of the African Charter, namely whether local remedies would have been exhausted.[150]

### 4.2.3. Locus standi

According to Article 30 of the Statue of the African Court of Justice and Human Rights as amended the following entities are eligible to submit cases to the Court:

a. State Parties to the present Protocol;
b. The African Commission on Human and Peoples' Rights;
c. The African Committee of Experts on the Rights and Welfare of the Child;
d. African Intergovernmental Organizations accredited to the Union or its organs;
e. African National Human Rights Institutions;
f. African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.[151]

The entities listed above may submit cases to the Court on any violations of a right or rights guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the particular States Parties concerned.

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[150] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 26 June 2021]

[151] note 140 above, Article 30.

According to the above mentioned Non-Governmental Organisations (NGO's) and individuals will have very limited access to the Court. It is also worth noting that the only entities that will be able to seek advisory opinions from the Court are African Union organs and only African individuals of African NGO's will be able to have access to the Court.[152]

In summation, the writer notes that under the Protocol the African Union members have inevitably introduced amendments that have the potential of restricting the ability of African NGO's from having access to the African Court of Justice and Human Rights. Consequently, this means that African NGO's will lose the access which they currently enjoy when accessing the current African Court on Human and Peoples' Rights.

### 4.3. The prospects of successful convictions as well as the possible challenges of corruption in terms of the Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.

It is important to note that one of the major challenges/ issues relating to the prosecution and conviction of the crime of corruption by the proposed Court in terms of the Protocol is that of immunity which is enjoyed by heads of states serving under the African Union and other senior State officials. In this regard the writer highlights that the Protocol, in Article 46A, states that "no charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." [153]

In line with the above mentioned the writer notes that although serving Heads of State and Government and Senior State Officials enjoy immunity from criminal jurisdiction of a third state under customary international law, there are exceptions to this general rule. One of the exceptions to the general rules is that serving Heads of State, Government

[152] See generally Article 53 of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights for request for advisory opinion.

[153] Article 46A bis of the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights.

and Senior State Officials do not necessarily enjoy immunity from criminal proceedings which are initiated before international criminal courts such as the African Court of Justice and Human Rights.[154]

In support of the above mentioned, article 27(1) of the Rome Statute) provides as follows:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[155]

Article 27(2) of the Rome Statute further states that:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[156]

Having noted the above mentioned it is the writers' submission that the immunity clause in the Protocol will potentially have very serious implications when it comes to the on-going fight against crimes such as corruption in Africa. Furthermore, immunity poses a huge threat to the legitimacy as well as credibility of the proposed Court as it will ultimately prevent the investigation and prosecution of Heads of States and Government who use their positions and/or authority to order, plan, finance or mastermind the crime of corruption. This notion of immunity essentially promotes and also reinforces the culture of immunity which is not a new concept in most African countries. It deteriorates that gains that have already been realised in the fight against immunity in some African countries.

In addition to the averments above the writer opines that this notion of immunity is incompatible with the principles and objectives of the African Union such as the protection

[154] Amnesty International "Legal and Institutional Implications of the Merged and Expanded African Court", Index AFR 01/3063/2016, 2016.

[155] Article 27 (1) of the Rome Statute of the International Criminal Court.

[156] note above, Article 27(2)

and promotion of human rights. As such immunity will pose a very huge risk for the proposed Court in that it will ultimately be a threat to the Courts credibility, legitimacy and its integrity as a whole. Because of the immunity clause the Court will not have the necessary capacity to address the scourge of the crime of corruption which possess a huge threat to democracy and the protection and promotion of human rights across the African continent.[157]

Contrary to what the preamble of the Protocol stipulates, the Court will not compliment national, regional or continental bodies and institutions that are aimed at preventing massive violations of human rights.[158] It is submitted that should the immunity clause stand, the Court will not be able to ensure accountability for violations of human rights as well as crimes which the Court has jurisdiction over. Ultimately, the Court will have difficulties in harnessing the support as well as confidence of the victims and those individuals who are affected by corruption and the African population as a whole.

The writer notes that the crime of corruption is usually committed by individuals in power, usually Heads of States, government and state officials and as such this means that corruption depends on a culture of impunity especially in countries whose leaders will not allow the enforcement of laws that will essentially criminalise the practices of corruption that these individuals in power engage in. this notion is best exemplified by the state capture inquiries that are currently taking place in South Africa.[159] Ideally the establishment and operationalization of the proposed African Court of Justice and Human Rights would, if not for the immunity clause in the Protocol, provide a forum to enforce laws criminalizing the practices of corruption, punish corrupt leaders, and deter and diminish grand corruption. The successful prosecution and imprisonment of corrupt leaders would create opportunities for the

[157] Amnesty International "Legal and Institutional Implications of the Merged and Expanded African Court", Index AFR 01/3063/2016, 2016, page 27.

[158] Anne Peters, "Corruption as a Violation of International Human Rights", *European Journal of International Law*, Volume 29, Issue 4, November 2018, Pages 1251–1287, https://doi.org/10.1093/ejil/chy070 (accessed on 09 December 2020).

[159] https://www.ibanet.org/article/8F7C626D-1D3B-43F9-B7D5-179612D5D4F9

democratic process to produce successors dedicated to serving their people rather than to enriching themselves by engaging in corrupt practices.[160]

Secondly, another challenge that the proposed Court will face in the adjudication of cases of corruption is the question of whether or not corruption is a violation of human rights. It is important to highlight that the proposed African Court will be the world's first regional court which will address the international crime of corruption. Furthermore, it will be the first court of its kind which will have a wide scope in terms of its proposed jurisdiction and consequently have the potential to go a long way in addressing impunity for serious crimes in African continent.

In examining the question of whether or not corruption is a violation of human rights the writer notes that domestic courts such as the Indian and South African constitutional courts have, on numerous occasions, endeavoured to assert how corruption violates human rights. In this regard reference is made to the case of *South African Association of Personal Injury Lawyers v. Health and Others*[161] where the South African Constitutional Court held that 'corruption and maladministration are inconsistent with the rule of law and the fundamental values of the South African Constitution. They also undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms'.[162] Additionally, in a 2012 judgment, the Supreme Court of India held that 'corruption undermines human rights, indirectly violating them' and that 'systematic corruption is a human rights' violation in itself'.[163]

Lastly, it is worthy to note that the lack of direct access to the Court may serve as an impediment to the successful prosecution of cases of corruption by the proposed Court. In this regard Article 16 of the Statute of the African Court of Justice and Human Rights

[160] Mark L. Wolf, "The World needs an International Anti-Corruption Court", Journal of the American Academy of Arts and Sciences (3) 2018, p 147-156.

[161] *South African Association of Personal Injury Lawyers v. Health and Others*, [2000] ZACC 22, 28 November 2000, para. 4; see also Constitutional Court of South Africa, *Hugh Glenister v. President of the Republic of South Africa and Others* CCT 48/10, [2011] ZACC 6, 17 March 2011, para. 176

[162] note 161 above.

[163] Criminal Appeal no. 1648, *State of Maharashtra through CBI, Anti-Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar*, 15 October 2012, [2012] 9 SCR 601, at 602, para. 14.

(as amended), which deals with the entities which are eligible to submit cases to the proposed Court, limits access to the Court in that it only allows access by African individuals or African NGO's (with observer status at the AU or its organs or institutions and from states that have made a declaration accepting the jurisdiction of the court) to submit applications directly to the Court.[164] On one hand this Article is very progressive in that it gives NGO's the opportunity to submit cases to the Court but on the other hand it disadvantages NGO's that would like to submit cases in a country that has not accepted the Court's jurisdiction. Therefore entities .i.e. individuals, NGO's and State Parties have an unequal footing when it comes to submitting cases to the Court because State Parties have autonomous access to the Court whereas there are restrictions when it comes to which individuals and NGO's have access to the Court.[165] Consequently, this is a massive violation of human rights law which is mainly aimed at protecting individuals from the state.

In summing up the above mentioned short comings of the Protocol and the proposed Court the writer concludes that since the African Court will not prosecute serving African Union Heads of State and other senior State officials, who are ideally the main key drivers of the crime of corruption, this Court will not fully adjudicate on the fate of victims of corruption which simply means that there will not be any prospects of successful investigate and prosecution of corruption in cases that involve Heads of State and other senior State officials .

Additionally, given the fact that senior State officials, and sometimes Heads of States, are mostly responsible for crimes of corruption, it is very unlikely that the Court, which grants such officials immunity from prosecution, will bring such individuals to justice. Moreover, if the Court will only focus on prosecuting non-State actors and lower-level State officials only such one-sided prosecutions will undermine accountability and essentially promote

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[164] Kamari M. Clarke , Charles C. Jalloh and Vincent O. Nmehielle, "The African Court of Justice and Human and Peoples' Rights in Context" https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/introduction/B3BD22C223382C23D002EAB97D59ECAC/core-reader (accessed on 03 December 2020)

[165] Note above.

impunity among senior State officials and Heads of States. Consequently, this proposed Court, will not yield any positive outcomes and will therefore be ineffective.

# Chapter 5

## 5.1. Conclusion

In so many ways corruption is rapidly becoming one of the most significant crimes within the proposed Court's jurisdiction and this is mainly attributed to the fact that corruption continuously affects millions of people in their daily lives. These people face various forms of corruption ranging from petty corruption to 'grand corruption'. It therefore does not come as a surprise that corruption is one of the main concerns of people in African states.

Though most African states have put in place national laws which criminalise corruption as a result of the long standing international efforts to try and combat corruption through the adoption of various Conventions and Resolutions, there is little will power from African States to push for the establishment and operationalization of the proposed Court. This then raises the question as to whether the national anti-corruption laws and institutions have, on the face of it, proved to be effective if the same laws have not been effective on a national level. Based on the above mentioned the writer avers that the prospects of the proposed Court making any meaningful contribution to prosecuting corruption is very questionable.

Firstly, as mentioned in the chapters above the crime of corruption, under the proposed Court, will seemingly be impossible to prosecute because those seeking to combat grand corruption will have to confront the most powerful and influential individuals in society who enjoy the highest form of immunity against the said crime. The writer notes that some senior state officials enjoy unique political influence and control over the criminal justice system. This enables them to ensure that corruption-related investigations and/or prosecutions do not proceed, at least without their approval. The immunity clause in Article 46A does not make this easier as it possess a huge threat on the impact of the

Court as it significantly reduces the Courts importance and powers to prosecute individuals involved in the crime of corruption.[166]

In essence what Article 46A does in practice is that it excludes the Court's jurisdiction with regards to the adjudication of cases relating to acts of corruption which involve serving heads of state, government and senior state officials which will in turn encourage the said officials to remain in office for as long as possible while continuing to commit acts of corruption. Furthermore, it promotes and strengthens the culture of impunity that is already entrenched in most African countries and stands to bring the whole Court and the Protocol on Amendments to the Protocol on the Statue of the African Court of Justice and Human Rights into disrepute as it will be portrayed as a way to protect senior politicians from being held accountability for their crimes.

Secondly, several key states have not ratified the AU Convention on the Prevention and Combating of Corruption whilst others have not incorporated the provisions of the said convention into their domestic law. The vital challenge is generating the political will of African leaders to 'convince' them that there is a need to take active steps in combating corruption. However, the issue of whether the Court has the persuasive power to do so through the use of the criminal law is still debatable.

In summation the writer notes that although providing the Court with a jurisdiction over 'corruption' is an interesting phenomenon, especially given the fact that there is currently no other international court that has jurisdiction to try such offences. Furthermore, the establishment of this supranational court will not make a significant contribution in addressing the challenges of successfully prosecuting those who commit acts of corruption mainly based on the fact that most African states have an appalling record of tackling crimes corruption and, as noted above, there have been very few prosecutions of heads of states and senior public officials (and even fewer successful prosecutions) who form a vast majority of the perpetrators corruption.

[166] Note 148 above.

The writer concludes that the proposed Court faces significant challenges regarding whether or not it will contribute effectively to the vital challenges of prosecution of corruption. Additionally, given that the proposed Court's jurisdiction is in respect of crimes committed after the entry into force of the Statute, it may be many years before the Court's effectiveness will become apparent.

## 5.2. Recommendations

One of the main challenges the proposed Court will face in the successful prosecution of corruption is that of immunity. In order for the Court to overcome this challenge the writer proposes that the African Union consider amending the Protocol on the Amendments to the Statute of the Proposed Court by removing Article 46A in as far as it concerns the issue of immunity because the notion of immunity is incompatible with the principles and objectives of the African Union. Furthermore, this clause possess a very huge risk for the proposed Court in that it will ultimately be a threat to the Courts credibility, legitimacy and its integrity as a whole. Because of the immunity clause the Court will not have the necessary capacity to address the plague of the crime of corruption which possess a huge threat to democracy and the protection and promotion of human rights across the African continent.

Lastly, it is worthy to note that the fact that there is no direct access to the Court has the possibility of serving as an impediment to the successful prosecution of cases of corruption by the proposed Court. Article 16 of the Statute of the African Court of Justice and Human Rights (as amended) does not allow NGO's to submit cases against countries that has not accepted the Court's jurisdiction. This means that individuals, NGO's and State Parties have an unequal footing when it comes to submitting cases to the Court because State Parties have autonomous access to the Court whereas there are restrictions when it comes to which individuals and NGO's have access to the Court.[167] Consequently, this is a massive violation of human rights law which is mainly aimed at

[167] Note 158 above.

protecting individuals from the state. In this vein the writer recommends that Article 16 alluded to above be amended in so far as it relates to the unequal footing when it comes to submitting cases to the proposed Court.

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