

DECLARATION

I declare that this is an original piece of work, submitted in partial completion of the LLM (Transitional Justice and Crime Prevention). I declare that this paper has not been published anywhere else and that any use of other material has been correctly referenced.

Signed.....

Date.....

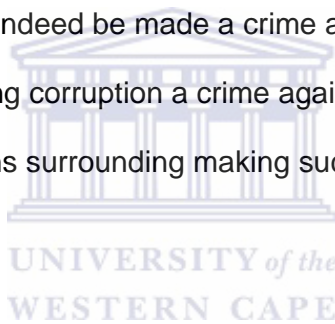
LIST OF ACRONYMS AND ABBREVIATIONS

AU	African Union
DRC	The Democratic Republic of Congo
FCPA	Foreign Corrupt Practices Act
IACAC	Inter-American Convention against Corruption
ICC	International Criminal Court
MDC	Movement for Democratic Change
MOSOP	Movement for the Survival of the Ogoni People
MPF	Nigerian Mobile Police Force
OECD	Organisation for Economic Cooperation and Development
POSA	Public Order and Security Act
PRC	Provisional Ruling Council
SEC	Securities and Exchange Commission
TI	Transparency International
TSKJ	Technip Snamprogetti Kellogg Japan Corporation
UNCAC	United Nations Convention against Corruption
USA	United States of America
ZANU PF	Zimbabwe African National Union Patriotic Front

CHAPTER ONE: INTRODUCTION

1.1 Abstract

Corruption is not a recent phenomenon but its implications continue to destroy economies, the principle of democracy and the very fabric of society. This research paper seeks to address the international legislation aimed at combating corruption. Apart from the conventions that are currently in place, the question is whether it is possible that making corruption a crime against humanity could be the solution to this global problem? This study will link corruption to crimes against humanity and will determine whether it can indeed be made a crime against humanity. The argument, in support of making corruption a crime against humanity will be addressed as will the concerns surrounding making such a drastic move.



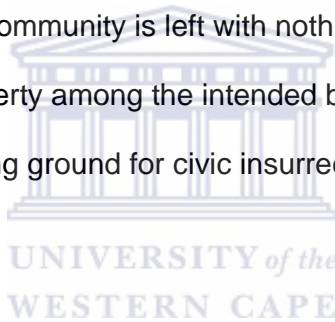
1.2 Background and Significance of Study

Corruption is a problem that plagues almost every sphere of our existence. It has social, economic, legal and political implications. The ever-increasing problems caused by corruption warrant an investigation into its possible classification as a crime against humanity. The many issues surrounding corruption will be dealt with, and one of those issues is the problematic definition of corruption.

The political implications of corruption include the erosion of the rule of law and a lack of respect for the concept of democracy. In countries where corruption is rife, the people have lost faith in the administration of justice. Corruption hampers

development and results in a legitimacy crisis that endangers the future of countries.¹ In places where officials are corrupt, a culture of accountability is never developed.

Corruption is a problem faced by both established and emerging democracies, and its effects in both are drastic but more so for developing countries. When public funds are diverted for personal gain, the people (intended recipients) suffer as a result. For example, money that was intended to go towards community development projects like housing, hospitals and water supplies ends up in the pocket of an official and the community is left with nothing. This results in further unhappiness, unrest and poverty among the intended beneficiaries. This kind of resentment is a fertile breeding ground for civic insurrection.



Corruption also affects market development as there is no fair competition² and investors become hesitant to invest in a place plagued with corruption. The people of a corrupt nation become complacent and most of the population will emigrate and this creates a '*brain drain*' in that nation, which leads to future complications.³ There are also the devastating environmental effects of corruption. This is because many, massive money-making business ventures have devastating effects on the environment. Those with the power to stop the damage are profiting (from corrupt

¹ Transparency International (2010).

² Transparency International (2010).

³ Transparency International (2010).

practices), hence have little or no motivation to fulfil their duty and protect the environment.⁴

What is abundantly clear is that corruption affects all aspects of life and on that basis this research paper seeks to investigate a possible solution – to make corruption a crime against humanity.

1.3 Research Question

The research question is whether corruption will meet the requirements for crimes against humanity.

The link between crimes against humanity and corruption will be made on the basis that most acts of corruption result in a crime against humanity and also that corrupt conduct causes great suffering both in its mental and physical manifestation. Article 7 of the International Criminal Court Statute,⁵ will be used to this effect, to show the link and basis for liability. Corruption, especially in Africa has led to situations in which large scale human suffering, as well as death have occurred. For example in the North East Democratic Republic of Congo (DRC) where bribery of state officials has resulted in foreign plundering of mineral deposits (gold, diamonds, cotton et cetera), which in turn has led to the oppression of the DRC's people by foreigners and by its own elite. In his study *Corruption and Governance in the DRC*,⁶ Kodi comes to the conclusion that unless corruption is combated effectively 'massive

⁴ Transparency International (2010).

⁵ Rome Statute of the International Criminal court is a treaty established by the international community and adopted at a conference in Rome on the 17 July 1998. It took effect on 1 July 2002. It has 111 states parties and another 38 are yet to ratify the Statute.

⁶ Kodi (2008:90).

*human rights violations will continue unabated and thousands more innocent people will die*⁷ .

Corruption has also been the predicate conduct that gave rise to the massive atrocities in respect of Charles Taylor, who currently stands trial before the International Special Court for Sierra Leone.

Another simple example is the case of Ken Saro Wiwa: the business needs of oil giant, Royal Dutch Shell, resulted in the exploitation of the people in the Ogoni region of Nigeria, where petroleum pipes were to be laid.⁸ Wiwa, who was an activist and the leader of the Ogoni community, fought against this exploitation. As a result of corrupt practices under the President of Nigeria General Sani Abacha, Wiwa was sentenced to death for his activism.⁹

Crimes against humanity are defined in the International Criminal Court Rome Statute as follows:

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

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*

⁷ Kodi (2008:90).

⁸ Remember Saro Wiwa (2010).

⁹ Wiwa against Shell (2010).

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

(f) Torture;

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

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

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

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

This research paper will determine whether or not corruption can meet the requirements for a crime against humanity. The most relevant part of the definition that may be used to curb corruption is Article 7 paragraph 1 (k),¹⁰ as this provision, is a non exhaustive list that leaves room for conduct not explicitly named. The mental element required for a crime against humanity is discussed in Article 30 of the Rome Statute, and in paragraph 2 (b) it is written that,

'For the purposes of this article, a person has intent where:

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'

¹⁰ (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This provision allows for liability for corruption, via the form of intent known as *dolus eventualis*. It will be argued that those who are involved in widespread, systematic acts of corruption can and should be held liable as they are aware of the fact that their conduct is likely to result in the deprivation of basic human rights which would then lead to the commission of a crime against humanity.¹¹

The philosophy of Thomas Hobbes will be used to further establish a link between crimes against humanity and corruption. Hobbes wrote about the state of nature as one of chaos, anarchy and war. This is attributed to our intrinsic human nature, which to him, was one of self-interest and greed. He believed that, as humans, we had the right to protect our own interests at any cost, and this meant that we would live in a constant state of war as each person fights for his or her individual interests.¹² To prevent the demise of the human race, Hobbes wrote that we willingly enter into a social contract with one another to agree to certain rules. These rules will serve civil society as a whole and allow us to co-exist peacefully.¹³

The behaviour of those who engage in corrupt practices at the expense of others, is precisely what Hobbes was referring to. Corrupt individuals who serve their own needs and divert public funds are putting their personal interests above those of the community at large. This behaviour is a breach of the social contract that we all enter into when we decide to co-exist. On this basis it will be proposed that international liability should be a consequence of this grave contractual breach.

1.4 Objectives

¹¹ Bantekas (2006:474).

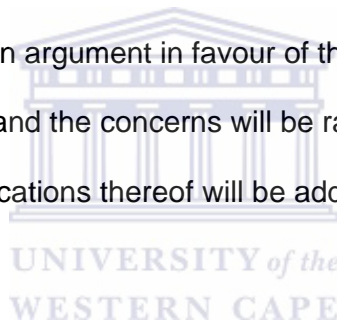
¹² Peters (1956:189).

¹³ Peters (1956:189).

The objective is to determine whether corruption can or should be a crime against humanity.

1.5 Research Methodology

Desktop research will be done and case studies will be used to show the ravaging effects of corruption on the lives of people in many African countries. Thomas Hobbes's social theory will be adapted and used to explain why there should be liability for corruption (when constructed as a crime against humanity). The matter will be addressed in a 'pro's and con's' fashion, whereby both sides of the argument are assessed. There will be an argument in favour of the classification of corruption as a crime against humanity and the concerns will be raised in opposition. The theoretical and practical implications thereof will be addressed as well.



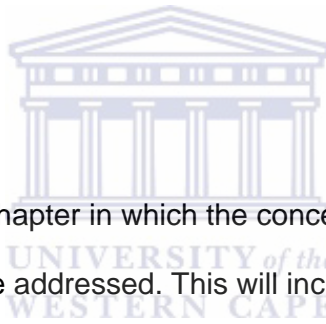
1.6 Structure

This is an introductory chapter and serves as chapter one of this paper.

In chapter two the details of corruption will be tackled. It deals with (a) the problems encountered with the definition of corruption and the lack of a globally accepted definition; (b) the types of corruption, and (c) the brief history of corruption. Chapter two will also discuss the international instruments that exist to combat corruption. Furthermore, this chapter will draw attention to the international measuring rods that have been developed, for example by Transparency International, to monitor and measure the degree of corruption that exists in various countries.

Chapter three will deal with crimes against humanity and the details pertaining to an understanding of the concept. This includes the definition, the different types of crimes against humanity and a brief history of the evolution of the concept.

In chapter four the argument in favour of corruption being a crime against humanity will be discussed. In this chapter the social contract theory of Thomas Hobbes will be used. Liability via *dolus eventualis* will also be discussed in conjunction with Article 30(2) b of the International Criminal Court Statute. Here, the link between corruption and crimes against humanity will be made using pertinent examples displaying the effects of corruption.



Chapter five will be the final chapter in which the concerns about making corruption a crime against humanity will be addressed. This will include a discussion on the potential erosion of international law if corruption is made a crime against humanity; and the practical problems surrounding implementation.

CHAPTER TWO: CORRUPTION

2.1 Defining Corruption

The word corruption is derived from the Latin verb '*rumpere*' which means to break.¹⁴

The implication is that it refers to something being badly broken, for example a moral code, or a rule, regulation or law. The individual who is responsible for the breakage, has benefitted or, personally gained in one way or another.¹⁵

Corruption is a word with several meanings and the *Oxford English Dictionary* acknowledges nine common definitions of corruption. Below are three of the broad categories that facilitate an assessment of corruption:

- 1) The physical aspect, which involves the destruction or ruin of an object;
- 2) The moral aspect, which includes any form of perversion or loss of integrity when in public office; and
- 3) The distortion of an object from its original state of purity.¹⁶

The difference between the above is a clear indication of just how wide the field of corruption is.

Despite this broad categorisation of corruption, it remains a very difficult to describe. There is no single comprehensive, globally accepted definition of corruption, and all efforts to come to one definition always encounter legal resistance and political problems.¹⁷ The United Nations Convention against Corruption (UNCAC)¹⁸ does not

¹⁴ Kempe *et al* (2000:18).

¹⁵ Kempe *et al* (2000:18).

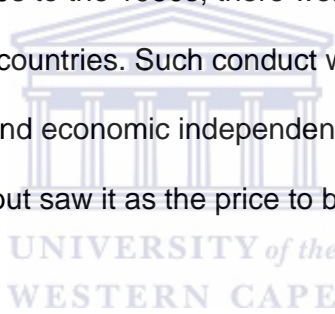
¹⁶ Kempe *et al* (2000:61).

¹⁷ Sampford *et al* (2006:9).

¹⁸ It was adopted by The General Assembly on 31 of October in 2003 by Resolution 58/4 and it entered into force two years later in 2005. It has 140 signatories and 137 ratifications.

define corruption but it lists specific conduct that can be classified as corruption. Corruption thus includes the following: grand corruption,¹⁹ petty corruption,²⁰ active and passive corruption,²¹ bribery,²² embezzlement,²³ fraud,²⁴ extortion,²⁵ abuse of discretion, favouritism, nepotism,²⁶ exploitation, and improper political contributions.²⁷ One of the major problems, when it comes to tackling corruption, is the lack of a comprehensive definition and the fact that many acts can be classified as an act of corruption.

For the last 30 years there has been an increasing need to define corruption in a way that breaks social, political and cultural barriers.²⁸ This demand for clarity came from many quarters. From the 1960s to the 1980s, there were high levels of bribery and embezzlement in developing countries. Such conduct was a symptom of the transition to greater political and economic independence.²⁹ The developed world was aware of this corruption but saw it as the price to be paid to do business in the developing world.



In the 1990s there were three specific triggers that sparked the international debate on corruption. The first was that rapid globalisation meant that business people became weary of the hidden costs and the uncertainty inherent in conducting

¹⁹ Grand corruption is corruption on a government level and it leads to the destruction of confidence in the rule of law. Sampford *et al* (2006:9).

²⁰ Petty Corruption includes the exchange of small amounts of money for small favours and preferential treatment. Sampford *et al* (2006:9).

²¹ Active and passive corruption are distinguished from a criminal law perspective, in active corruption the bribe is offered and accepted, whereas with passive, the bribe is offered and not necessarily accepted. Sampford *et al* (2006:9).

²² Bribery is the giving of a benefit in order to unduly influence an outcome. It is the most common form of corruption. Sampford *et al* (2006:9).

²³ This is the taking of money or property that one is not entitled to, yet by virtue of one's position the valuables are taken. Sampford *et al* (2006:9).

²⁴ The use of false or misleading information to obtain a specific outcome. Sampford *et al* (2006:9).

²⁵ This is the use of coercion, such as a threat of violence, to obtain cooperation. Sampford *et al* (2006:9).

²⁶ The abuse of discretion to favour another. Sampford *et al* (2006:9).

²⁷ Sampford *et al* (2006:13).

²⁸ Sampford *et al* (2006:57).

²⁹ Sampford *et al* (2006:57).

business. This concern was specifically with regard to doing business in foreign countries. This led to the Organisation for Economic Cooperation and Development (OECD) issuing a set of anti-bribery recommendations in 1994.³⁰ Secondly, civil society organisations such as Transparency International, spread the message that bribery and other forms of corruption were on the rise, and as a result were undermining democratic, and economic freedom.³¹ Thirdly, international finance institutions admitted that corruption was rampant and was a major inhibiting factor when it came to effective aid programmes and to true societal reform.

Sampford broadly defines corruption as follows:

*'When a public official, acting for personal gain, violates the norms of public office and harms the interest of the public.'*³²

Therefore any conduct that satisfies this definition is corruption. There are, however, smaller acts that do not fit the definition but may be viewed as corruption. In addition, this definition speaks only of public corruption, but there is also private sector corruption. The concept of corruption thus needs to be elucidated. Sampford presents a useful three-pronged typology, as part of his explanation of the varied ways in which corruption can be perceived.

2.1.1 The three-pronged typology of corruption

Sampford *et al* put forward the three-pronged typological approach used when defining corruption.³³

³⁰ Sampford *et al* (2006:57).

³¹ Sampford *et al* (2006:45).

³² Sampford *et al* (2006:45).

³³ Sampford *et al* (2006:58).

- 1) The public office-centred definitions;
- 2) The market-centred definitions; and
- 3) The public interest-centred definitions.

The above definitions shall now be discussed.

2.1.1(a) The public office-centred definitions

This approach makes corruption the '*misuse of public power for private profit*,³⁴ and as such, it is not actually a definition of corruption but a mere example of corruption. This form of corruption is the most widespread and most commonly known form of corruption. Unfortunately, it is indeed an unsatisfactory attempt to define corruption of but it has evolved into the following definition:

*'an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs'*³⁵

This definition is anchored by its illegality and thus leaves nations, where there is no criminalisation for side payments, out of the corruption bracket. This is an inadequate definition as these side payments still damage society and are still acts of corruption.³⁶

2.1.1(b) The market-centred definitions

This approach links corruption with its market related implications. These market oriented definitions are useful in the sense that they raise corruption to a new level as opposed to its traditional association with morality and political science.³⁷

³⁴ Sampford *et al* (2006:61).

³⁵ Rose-Ackerman (1997:353).

³⁶ Sampford *et al* (2006:62).

³⁷ Sampford *et al* (2006:64).

2.1.1(c) The public interest-centred definitions

Most public interest centred definitions are attributed to Carl Freidrich³⁸ who argued that corruption was best identified when damage to the interest of the general public was evident.³⁹ This damage must have been caused by the behaviour of an office-holder where he or she accepts a reward for conducting illegitimate dealings. This is indeed a much broader definition but the question is: how does one judge when the public interest has been damaged? What is the standard? Meny⁴⁰ suggests that the '*general interest*' is a common standard and corruption is clear when public rules of law and ethics have been violated. However, once again it is difficult to determine what damage has been sustained in cases such as institutional corruption, where power is abused for political gain.⁴¹ In cases where the corrupt conduct seemingly has a noble cause, there is no damage to public interest but an act of corruption has occurred nonetheless.

Heidenheimer and Johnstone⁴² suggest that to determine what public interest is, one must look at what the public's opinion is. However, this is not entirely useful as public opinion consists of subjective, ever changing cultural values that make it difficult to determine whether or not there has been an abuse of power.

The question becomes '*how can we stop a problem that we have not been able to collectively define?*'⁴³ Philip suggests that,

³⁸ Renound German physicist and mathmetician.

³⁹ Sampford *et al* (2006:67).

⁴⁰ Meny (1996:313).

⁴¹ Sampford *et al* (2006:67).

⁴² Heidenheimer and Johnstone (2002:10).

⁴³ Sampford *et al* (2006:68).

*'the term corruption is not in itself problematic ...the problem arises in the application of this to politics. Definitional problems are legion because there is hardly a general consensus on the 'naturally sound condition of politics'... One line of definitions of political corruption are inherently misleading because they generally obscure the extent to which the concept and its components are rooted in ways of thinking about the distinctive character of public office [to say nothing of private office], and the distinctive ends to which political activity is directed.'*⁴⁴

It has been said that the search for a multi-purpose definition is useless and that it is nice to be clear about what one is referring to but, it is not compulsory to remain fixated on finding a definition.⁴⁵ Moran concludes that there is no other way to study corruption other than treating it like a *'moving target'*.⁴⁶

Transparency International, which is a global, non-governmental, independent anti-corruption organisation, has settled on a very broad, open-ended definition of corruption, namely *'the abuse of entrusted power for private gain.'*⁴⁷ Private gain is said to include financial, tangible gains as well as any furtherance of a professional or political career.⁴⁸

2.1.2 Other definition-related perspectives

Whilst the above referenced authors have looked at the definition of corruption from a very technical point of view, Chihamo, Shumba and Shihata present a different perspective on the issue of a definition. They discuss and criticise the other widely used definitions.

⁴⁴ Philip (1997:445).

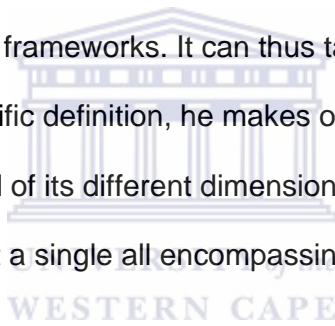
⁴⁵ Williams (1999:67).

⁴⁶ Moran (2001:380).

⁴⁷ Transparency International (2010).

⁴⁸ Chihamo and Shumba (2007:3).

Shihata⁴⁹ sees corruption as a form of behaviour and this behaviour manifests itself in two situations. The first is where benefits are allocated and the temptation to realise private gains trumps the duty to serve the greater good.⁵⁰ The second is where rules are meant to be applied in an impartial, unbiased nature, but instead the opposite is done and rules are applied in a discriminatory manner.⁵¹ In situations like these, the corrupt actor chooses to act to his personal benefit or to the benefit of a known third party, with no regard for the broader interests that he is legally required to serve. Thus corruption occurs when an abuse of a private or public function occurs. And as a result, a position of trust is exploited and undue gains are made by the corrupt actor.⁵² Corruption can be petty, grand, systematic, spread sporadically, casual or embedded in social frameworks. It can thus take on many forms.⁵³ Whilst Shihata does not offer a specific definition, he makes one aware of the how broad the crime of corruption is, and of its different dimensions. This is perhaps why it is particularly difficult to pinpoint a single all encompassing definition.



Chinhamo and Shumba⁵⁴ propose an institutional working definition of corruption that they feel, should be used by the Anti-Corruption Trust of Southern Africa. According to them, corruption should simply be defined as, '*the abuse or complicity in the abuse of private or public power, office or resources for personal gain.*'

The authors note that the Southern African Development Community Protocol against Corruption⁵⁵ defines corruption as:

⁴⁹ Shihata (1997:260).

⁵⁰ Shihata (1997:260).

⁵¹ Shihata (1997:260).

⁵² Shihata (1997:260).

⁵³ Shihata (1997:261).

⁵⁴ Chinhamo and Shumba (2007:1).

⁵⁵ Adopted August 2001.

'any act referred to in Article 3 and it includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others'.

This definition is broad and unique in the sense that it leaves room for the corruption that is usually hidden in supposedly democratic processes such as rigged elections and the abuse of resources for political leverage.⁵⁶

The World Bank's definition of corruption is brief and to the point, *'Corruption is the abuse of public office for private gain'*.⁵⁷ These types of definitions are short and accurate, but they have been criticised as being very vague and too general.

Chinhamo and Shumba submit that the abuse of this so-called power is not always entrusted power. There are those who abuse power that they have usurped or taken by force, as is seen in some dictatorships. The authors also state that most of these definitions do not include corruption in the private sector, which is problematic as corruption is common in the private sector.⁵⁸

There are also forms of corruption that do not cause tangible loss, according to Chinhamo and Shumba.⁵⁹ The example cited by the authors is the amendment of laws to give certain parties a political advantage. For example, in Zimbabwe, amendments to the Constitution and to the Public Order and Security Act (POSA)⁶⁰ were made by the ruling Zimbabwe African National Union Patriotic Front (Zanu

⁵⁶ Chinhamo and Shumba (2007:3).

⁵⁷ Chinhamo and Shumba (2007:4).

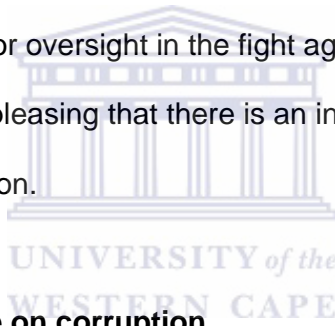
⁵⁸ Chinhamo and Shumba (2007:4).

⁵⁹ Chinhamo and Shumba (2007:5).

⁶⁰ The Zimbabwean Public Order and Security Act to be amended (2010).

PF)⁶¹ party. These amendments seem to have made it more difficult for opposition parties to take part in politics.⁶² While there is a loss with respect to the principles of democracy and good governance, there is no immediate tangible loss, yet such amendments could be perceived as an act of corruption.

Chinhamo and Shumba list the difficulties with all of the above mentioned definitions and the same logic applies to all the definitions that are similar to the above-mentioned. Most definitions are either too narrow or too broad, which makes them susceptible to misinterpretation. Most definitions do not include the private sector.⁶³ These definitions seem to exclude those who are complicit in acts of corruption, and the authors see this as a major oversight in the fight against corruption.⁶⁴ With such difficulty in the definition it is pleasing that there is an international convention that effectively addresses corruption.



2.2 The International stance on corruption

There are eight conventions on corruption, and two protocols. Of these ten instruments, nine of them are regional and one which is global, the United Nations Convention on Corruption (UNCAC). The other conventions are an important part of the anti-corruption framework, however they will only be mentioned as part of the brief introduction dealing with the development of anti-corruption legislation. UNCAC will be the focus of this chapter because it is a global convention and has been hailed as a leader in the fight against corruption.

⁶¹ The Zanu PF is the ruling party in Zimbabwe and has governed since 1980. Over the last 15 years the emergence of a strong opposition party, the Movement for Democratic Change (MDC) has challenged the supremacy of the Zanu PF. As part of a plan to maintain power, the Zanu PF and its members have instituted amendments to the country's legislation.

⁶² Chinhamo and Shumba (2007:5).

⁶³ Chinhamo and Shumba (2007:5).

⁶⁴ Chinhamo and Shumba (2007:5).

Snider and Kidane begin their discussion on anti-corruption legislation with the Watergate scandal.⁶⁵ In 1974 investigations linked to Watergate uncovered several incidents of money laundering through foreign countries and the bribery of foreign officials with American campaign money.⁶⁶ The American Securities and Exchange Commission (SEC) began investigations because American multinational interests were implicated in the saga.⁶⁷ Investigations revealed that there was much bribery by American multinational corporations so as to secure contracts in other countries. A total of 100 multinational corporations admitted to giving bribes totalling 300 million US dollars.⁶⁸ The magnitude of the problem became evident and so the United States of America had to be proactive about the situation. Eventually the Foreign Corrupt Practices Act⁶⁹ (FCPA) was enacted. This Act was the only Act that covered international corruption between 1977 and 1996 although it only applied to American companies.⁷⁰ It prohibited American companies from paying bribes to foreign officials as part of business. This resulted in an uneven playing field on the world trade markets as the European companies were not restricted in the same way. It pushed America to petition for international change with regard to the international legal position on bribery. Some 20 years later The Organization of American States' Inter-American Convention Against Corruption (IACAC)⁷¹ came into effect and it was the first binding international convention against corruption.⁷²

⁶⁵ In the United States of America, in 1972 it was discovered that President Nixon's Republican party had been funded by money that came from illegitimate gains. This scandal resulted in his resignation.

⁶⁶ Snider and Kidane (2007:696).

⁶⁷ Snider and Kidane (2007:697).

⁶⁸ Snider and Kidane (2007:697).

⁶⁹ The Act was signed into law by President Jimmy Carter on 19 December, 1977, and was amended in 1998 by the International Anti-Bribery Act of 1998 .

⁷⁰ Snider and Kidane (2007:698).

⁷¹ Entered into force on 6 March 1997, adopted by 34 members of the Organisation of American States.

⁷² Snider and Kidane (2007:698).

This Convention was followed by the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention on Corruption) which was adopted in November 1997.⁷³ A heightened awareness about the negative consequences of corruption brought more regional efforts to build onto the anti-corruption framework.

At an international level, it was time for a definitive convention that would seek to harmonise anti-corruption efforts. On 22 January 2001, the United Nations General Assembly declared in Resolution 55/61 that a global convention was necessary and subsequently the United Nations Convention against Corruption (UNCAC) was born.⁷⁴ Developments were underway in Africa as well and The African Union Convention on Preventing and Combating Corruption (AU Convention) was approved at a ministerial conference in September 2002. The African Union Assembly adopted this Convention in July 2003 and it entered into force on 5 August 2006.⁷⁵ The AU Convention has been ratified by 21 states. The other anti-corruption conventions are:

- The Council of the European Union's Convention on the Protection of the European Communities' Financial Interests⁷⁶ which also has two protocols.⁷⁷

- The Council of the European Union's Convention on the Fight against Corruption involving Officials of the European Communities or officials of Member States of the

⁷³ Entry into force 15 February 1999, adopted by 39 countries.

⁷⁴ Snider and Kidane (2007:698).

⁷⁵ Snider and Kidane (2007:700).

⁷⁶ Adopted on 26 July 1995, and it entered into force on 17 October 2002.

⁷⁷ The first protocol entered into force on 27 September 1996, and the second entered into force on 19 June 1997.

European Union.⁷⁸

-The Council of Europe's Criminal Law Convention on Corruption.⁷⁹

-The Council of Europe's Civil Law Convention on Corruption.⁸⁰

-The Southern African Development Community Protocol against Corruption.⁸¹

Lastly, the Economic Community of West African States Protocol on the Fight against Corruption.⁸²

2.2.1 The United Nations Convention against Corruption (UNCAC)

UNCAC was the end product of much negotiation and compromise. It was adopted by the General Assembly on the 31 October in 2003 by Resolution 58/4, and entered into force two years later. It has 140 signatories, 145 parties to the Convention and 137 ratifications.⁸³ The objectives of the Convention are to strengthen measures to prevent corruption and to encourage international cooperation on combating corruption. The Convention makes use of both permissive and mandatory language as it covers prevention, criminalisation, law enforcement, assets recovery and general international cooperation.⁸⁴

The mechanism adopted to prevent and combat corruption include the use of efficient international cooperation in assets recovery; the promotion of accountability and the management of public affairs and public funds in a manner that is transparent.

⁷⁸ Adopted on 26 May 1997 and entered into force on 28 September 2005.

⁷⁹ Adopted on 27 January 1999 and entered into force on 1 July 2002.

⁸⁰ Adopted on 4 November 1999 and entered into force on 1 November 2003.

⁸¹ Adopted on 14 August 2001, and entered into force on 6 July 2005.

⁸² Adopted on 21 December 2001 and will enter into force upon ratification by at least nine member states.

⁸³ United Nations Office on Drugs and Crime (2010).

⁸⁴ United Nations Office on Drugs and Crime (2010).

UNCAC has 71 articles and within these articles, corruption is tackled from the supply and demand perspective.⁸⁵ The Convention contains provisions that apply to the private and public sector, and makes use of permissive and mandatory rules.

With regard to prevention, there is great detail regarding the need for independent monitoring bodies that will be tasked with the responsibility of encouraging awareness and ensuring state party cooperation.⁸⁶ There is great emphasis placed on accurate record keeping, auditing, as well as efficient accounting.⁸⁷

The Convention criminalises corruption and mandates states parties to have civil and criminal punishments for those who fail to comply with anti-corruption provisions.⁸⁸

Criminalisation is a vital aspect of the Convention, and as a result, inchoate crimes are covered, as are the actual crimes as well. Examples include: embezzlement; illicit enrichment; abuse of power; bribery; and obstructing the course of justice .⁸⁹

According to UNCAC, it is illegal to accept and offer a bribe, and this applies across the board regardless of the rank or position of the accused.⁹⁰

Snider⁹¹ is of the opinion that one of the more important parts of the Convention is that which deals with corruption within the judicial system. The Convention calls on members to:

'take measures to strengthen integrity and to prevent opportunities for

⁸⁵ Snider and Kidane (2007:707).

⁸⁶ Snider and Kidane (2007:707).

⁸⁷ Snider and Kidane (2007:707).

⁸⁸ Snider and Kidane (2007:707).

⁸⁹ Snider and Kidane (2007:709).

⁹⁰ Snider and Kidane (2007:709).

⁹¹ Snider and Kidane (2007:707).

corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.⁹²

The Convention encourages the active participation of the community at large.⁹³

Article 13 requires the participation of society in the fight against corruption. This

Article is an appeal to civil society, non-governmental organisations, and community-

based organisations to promote public awareness. UNCAC recommends effective

access to information and the promotion of educational programmes in high schools

and universities. The idea behind this is to create a culture that is intolerant of

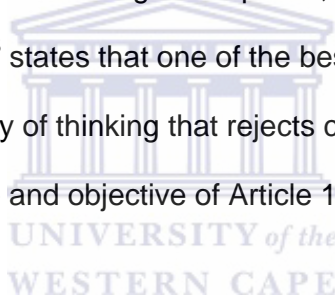
corruption.⁹⁴ Transparency and the creation of anti-corruption bodies that can cope

with corruption-related reports from the general public, are central to the notion of the

participation of society. Carr⁹⁵ states that one of the best ways to fight corruption is to

socialise the people into a way of thinking that rejects corruption at all levels. This

corresponds with the purpose and objective of Article 13.



International and domestic enforcement guidelines are included. On a domestic

level, standards are made clear with regard to the establishment of jurisdiction and

the use of prosecution. Enforcement mechanisms include property confiscation and

the seizure of assets.⁹⁶ The Convention goes so far as to provide for the protection

of witnesses and of those who have fallen prey to corruption. There are also private

remedies such as seeking compensation for damages, and the annulling of contracts

tainted by acts of corruption.⁹⁷

⁹² Article 11(1).

⁹³ Snider and Kidane (2007:707).

⁹⁴ Carr (2007:150).

⁹⁵ Carr (2007:150).

⁹⁶ Snider and Kidane (2007:709).

⁹⁷ Snider and Kidane (2007:709).

There is emphasis placed on the need for international cooperation in Article 46, which deals with extraditions, prosecutions, legal process, and investigations. The Convention calls for states parties to assist each other where possible.⁹⁸ This assistance includes mutual legal assistance, which is covered extensively in Chapter VI of UNCAC. Mutual legal assistance can include the serving of judicial documents in the early stages of investigation and extends right up to the possible seizure and freezing of assets. Assets recovery is also covered by the Convention and this is a characteristic that is unique to UNCAC.

UNCAC is the only global convention against corruption and the most important. Carr is of the opinion that UNCAC is so important that the other conventions should be forgotten and all should commit to this Convention alone.⁹⁹

2.2.2 Assessment of UNCAC

Babu is of the opinion that the adoption of UNCAC marked a new era in the history of anti-corruption.¹⁰⁰ The Convention is far-reaching and is the most comprehensive stance on corruption. UNCAC is believed to be novel and is commended for its legally binding effect. It should be praised for its wide coverage, from the public sector to the private sector, and for its delicate handling of domestic and foreign bribery.¹⁰¹ It pays much needed attention to the areas of mutual legal assistance and the repatriation of stolen funds that were taken abroad, to the their rightful owners.¹⁰²

UNCAC's lack of a definition of corruption indicates that a definition is not practically

⁹⁸ Snider and Kidane (2007:709).

⁹⁹ Carr (2007:153).

¹⁰⁰ Social Science Research Network Babu (2010).

¹⁰¹ Social Science Research Network Babu (2010).

¹⁰² Social Science Research Network Babu (2010).

feasible and is not necessary.¹⁰³ Corruption is what Babu calls '*a fluid concept*', for it is ever changing and represents different things to different people.¹⁰⁴ UNCAC is designed to work in a global environment and has to have a dynamic, multifaceted approach which can assist all member states. UNCAC has a descriptive approach that negates the need for a solid definition. Instead it describes acts that are corrupt and leaves room for states to handle other situations that may emerge.¹⁰⁵ This flexible approach is the most practical and is most accommodating of the respective, domestic systems of law.

From a substantive perspective the Convention correctly focuses on prevention, criminalisation, international cooperation, and assets recovery.¹⁰⁶ These provisions cover the private and public sector, including multinational companies. This wide coverage truly assists in the fight against corruption. Babu writes that the Convention is novel and ground-breaking because it calls for the establishment of anti-corruption bodies, stringent monitoring of financial institutions and more transparency with regard to election campaign money and the funding of political parties.¹⁰⁷ The call for active societal participation is also a new, yet vital step in anti-corruption. With public awareness and the support of an entire community, corruption is less likely to survive.

UNCAC has a chapter dedicated exclusively to International cooperation and this is a vital aspect of anti-corruption.¹⁰⁸ The importance of promoting and encouraging

¹⁰³ Social Science Research Network Babu (2010).

¹⁰⁴ Social Science Research Network Babu (2010).

¹⁰⁵ Social Science Research Network Babu (2010).

¹⁰⁶ Social Science Research Network Babu (2010).

¹⁰⁷ Social Science Research Network Babu (2010).

¹⁰⁸ Social Science Research Network Babu (2010).

international cooperation cannot be understated as corruption crosses borders. Not only does the act itself cross borders, but so do the actual consequences of corruption. It is very important for member states to join forces against corruption. The Convention covers extradition, the transfer of sentenced persons, possible transfer of criminal proceedings, and mutual legal assistance. All of these details are instrumental in the effective enforcement of anti-corruption legislation.¹⁰⁹ The Convention requires members to assist one another in the gathering of evidence and to facilitate extradition when necessary. This helps to prevent corrupt actors from simply running away from the country of their crimes and escaping liability.

Babu pays particular attention to UNCAC's handling of assets recovery as it goes further than the seizure and freezing of assets.¹¹⁰ This remarkable contribution acknowledges the important principle behind assets recovery. The Convention gives sufficient detail as to the deposition of the assets as well as to their return. This part of the Convention is of particular importance to developing countries that constantly fall prey to leaders who take the wealth of the nation and hide it in overseas accounts.¹¹¹ The Convention brings hope to these ravaged nations. Hope that money can be returned and that it should indeed be returned to the people. Also, along similar lines is the idea that victims of corruption can seek restitution and initiate legal proceedings against those responsible for their plight.¹¹² This is the first time that an international convention has covered the issues of civil legal action and the recovery of assets, and for that, UNCAC should be applauded.¹¹³

¹⁰⁹ Social Science Research Network Babu (2010).

¹¹⁰ Social Science Research Network Babu (2010).

¹¹¹ Social Science Research Network Babu (2010).

¹¹² Social Science Research Network Babu (2010).

¹¹³ Social Science Research Network Babu (2010).

Carr sees UNCAC as comprehensive, innovative, progressive and flexible.¹¹⁴ She notes that it is progressive because it encourages transparency and promotes international integrity.¹¹⁵ She also states that UNCAC will help many developing countries meet the demands of financial donors who require the country to have anti-corruption legislation in place before they may receive any financial assistance. This includes institutions like the World Bank and the African Development Bank.¹¹⁶

UNCAC is not perfect and there are notable shortfalls. Babu notes that there are a number of important articles that were deleted from the final version of the Convention. These changes were made by the Ad Hoc Committee, which also diluted other provisions in the name of compromise.¹¹⁷ One article in particular that was diluted by the Ad Hoc Committee was one that called for legislative and policy-making provisions that would make sure that the sources of political party funding are subject to transparency requirements. It was replaced by an optional clause that puts member states under no obligation to do so.¹¹⁸

Babu also cites a provision that was changed from a mandatory clause to a hortatory clause and it dealt with the criminalisation of bribery in the private sector.

Furthermore, the monitoring of the Convention was left in the hands of the Conference of States Parties, which only convened a year after the Convention came into force. This, according to Babu, is not good for the general effectiveness of the Convention, and perhaps, more monitoring should be done.¹¹⁹ For example the second Conference of States Parties, held in Bali in 2008, did not produce the

¹¹⁴ Carr (2006:39).

¹¹⁵ Carr (2006:39).

¹¹⁶ Carr (2006:39).

¹¹⁷ Social Science Research Network Babu (2010).

¹¹⁸ Social Science Research Network Babu (2010).

¹¹⁹ Social Science Research Network Babu (2010).

desired outcome due to the fact that states parties had different views on how the system of monitoring should work.¹²⁰ The other issue was also the fact that there was no agreement as to the role that civil society should take in the review process. Transparency International continues to push for an open review process, which allows civil society to comment on the Convention and on the proceedings of the Conference of States Parties.¹²¹

Fritz Heimann¹²² insists that follow-up monitoring is essential because UNCAC is not self executing.¹²³ He is of the opinion that UNCAC's success depends heavily on efficient '*follow up monitoring*'. This monitoring must be regarded as a long term project that will develop and evolve with time.¹²⁴ The monitoring will be effective because it will stir governments into action as their conduct will be scrutinised during the review process. Monitoring reports also give a platform for positive peer pressure from other governments. In addition, monitoring reviews will allow the private sector and the rest of civil society to give their perspective on the commitment of their governments to anti-corruption.¹²⁵ The current lack of an effective, open system of review is said be one of UNCAC's greatest weaknesses.

The wording of the Convention has been called ambiguous, and open to too many different interpretations.¹²⁶ This ambiguity may lend itself to flexible application.

However, it may also lead to uncertainty which would defeat the purpose and object

¹²⁰ Transparency International (2010).

¹²¹ Transparency International (2010).

¹²² Fritz Heimann is one of the founders of Transparency International (TI). He currently leads TI's study group on UNCAC monitoring.

¹²³ United Nations Global Compact (2010).

¹²⁴ United Nations Global Compact (2010).

¹²⁵ United Nations Global Compact (2010).

¹²⁶ Social Science Research Network Babu (2010).

of the Convention.¹²⁷ The biggest criticism levied against the Convention is the fact that it does not give information that will ensure effective implementation.¹²⁸ It is silent on the issue of sanctions, and on what form sanctions should take.¹²⁹ The Convention merely states that the level of sanctions should be influenced by the gravity of sanctions.¹³⁰ This results in a variety of interpretations among states, and this affects the idea of harmony in international law. Should a state look at the gravity of the act itself or the gravity of the consequence?¹³¹ Carr¹³² illustrates this point with the following example.

- 1) X is a public official who accepts a 100 000 US dollar bribe from a drugs company Y. Company Y is planning to build a hospital in an area that has no access to medical care. Unfortunately Company Y is known for its illegal testing of drugs on patients without their informed consent. In fact Company Y has just been prosecuted for such activity in a neighbouring country.
- 2) X accepts a 150 000 US dollar bribe from a well known celebrity who wishes to build a hospital in a remote and poor community.
- 3) X accepts a 10 US dollar bribe from a person called Jones who urgently needs to use X's phone.

In all of the above scenarios X has committed a grave offence as stipulated in Article 15 of UNCAC. But does this mean that X should be treated in the same way with regard to sanctions for all the above-mentioned crimes? Should one look at the value of the bribe perhaps? If the value of the bribe is the determining factor then Situation

¹²⁷ Social Science Research Network Babu (2010).

¹²⁸ Social Science Research Network Babu (2010).

¹²⁹ Carr (2006:34).

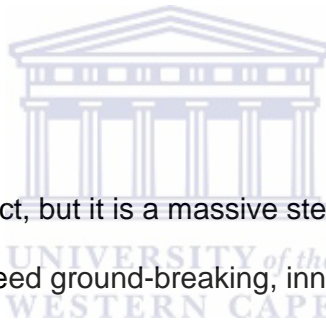
¹³⁰ Article 30 (1).

¹³¹ Carr (2006:35).

¹³² Carr (2006:35).

2 is the highest on the scale of gravity. But, if the result of the corrupt conduct is the deciding factor then Situation 1 is the most serious and hence the highest on the scale of gravity. The use of trial drugs on patients without informed consent is a very serious crime with grave consequences.¹³³ As UNCAC stands, such decisions are left in the hands of member states. This could result in a variety of sanctions and does not encourage international harmony.¹³⁴

Webb¹³⁵ adds to the UNCAC critique by saying that it should be more forceful when it comes to the issue of incorporation of UNCAC into a nation's domestic law. According to her, UNCAC makes the mistake of giving too much leeway to member states.



UNCAC is by no means perfect, but it is a massive step in the direction of a corruption-free world. It is indeed ground-breaking, innovative and comprehensive. With competent enforcement and stringent monitoring UNCAC could truly change the face of corruption. The very fact that it has so many states parties is a sure indication of a global commitment to anti-corruption. Having discussed corruption and the international position on corruption, it is important to move onto crimes against humanity.

The next chapter will introduce crimes against humanity, and give a brief history of the crime.

¹³³ Carr (2006:35).

¹³⁴ Carr (2006:34).

¹³⁵ Webb (2005:222).

CHAPTER THREE: CRIMES AGAINST HUMANITY

Crimes against humanity are defined in the International Criminal Court (ICC) Rome Statute as follows:

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

(a) *Murder;*

(b) *Extermination;*

(c) *Enslavement;*

(d) *Deportation or forcible transfer of population;*

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

(f) *Torture;*

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

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

(i) *Enforced disappearance of persons;*

(j) *The crime of apartheid;*



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

3.1 The history of crimes against humanity

The birth of the concept can be seen in the Preamble of the Hague Regulations of 1899 and 1907 which is a draft version of crimes against humanity.¹³⁶ In The Hague Regulations there was an obligation on parties to abide by the '*laws of humanity*'.¹³⁷ The term '*crimes against humanity*' was eventually coined in 1915. The criminalisation of crimes against humanity was eventually formulated under Article 6 of the Nuremberg Charter.¹³⁸

Crimes against humanity were also included in Article 5 of the Tokyo Charter.¹³⁹ Both the Nuremberg Charter and the Tokyo Charter required there to be a war-time link for a crime against humanity to occur. But this requirement was eventually dropped under Control Council Law No 10.¹⁴⁰ Therefore a crime against humanity can be committed during times of peace and during times of war.

The crime was then incorporated into the 1954 Draft Code of Offences against the Peace and Security of Mankind, and was also included in all the International Law Commission Drafts.¹⁴¹

The prosecution of crimes against humanity has not been very successful. In the early 1990s there were trials in which the accused were charged with crimes against humanity but the only defendants were Nazi criminals who committed crimes during

¹³⁶ Werle (2009:289).

¹³⁷ Bassiouni (1999:60).

¹³⁸ Werle (2009:289).

¹³⁹ The Tokyo Charter, was created on January 19, 1946, by order of General Douglas MacArthur The Law of War(2010).

¹⁴⁰ Control Council No 10 Article 2 (1) (c).

¹⁴¹ Werle (2009:290).

the Nazi era.¹⁴² The creation of the International Criminal Tribunal for Yugoslavia and International Criminal Tribunal for Rwanda respectively, changed the situation slightly as they acknowledged the customary law element of crimes against humanity.¹⁴³

In order to fully comprehend crimes against humanity, one must look at the structure of the crime, the protected interests, the material elements - both mental and contextual.

3.2 The structure of the crime

For the crime to be committed one of the acts listed in Article 7 must have occurred as part of a widespread or systematic attack on a civilian population.¹⁴⁴ The required contextual element is that the crime must be committed as part of a systematic or widespread attack. There is also a mental requirement which is that the perpetrator must have intent and knowledge (as is written in Article 30 of the ICC Statute) regarding the so called, material aspects of the crime and of the existence of a widespread or systematic attack.¹⁴⁵

The civilian population is usually the target of a crime against humanity. The civilian population automatically includes any group of people who are connected by any common characteristics. The connection of these people to one another can include anything from a shared geographical location to shared political ideals.¹⁴⁶ The crime can occur at any time and the previously required war-time link has been abolished.

¹⁴² For example, Eichman in Israel and Klaus Barbie in France.

¹⁴³ Werle (2009:290).

¹⁴⁴ Werle (2009:292).

¹⁴⁵ Werle (2009:290).

¹⁴⁶ Werle (2009:293).

The '*attack*' must be widespread or systematic, and the use of force is not required.¹⁴⁷ Most importantly, this notion of an attack is wide enough to include any kind of ill treatment of the civilian population.¹⁴⁸

The use of the word '*widespread*' reflects the quantitative element and includes the number of victims and people affected¹⁴⁹ as well as the geographic space covered by the act. An attack that is widespread can also be a single act that affects a large number of people.¹⁵⁰

The qualitative element of the crime is covered by the use of the word '*systematic*'. This means that single acts are not necessarily crimes against humanity, unless they fulfil the requirements.¹⁵¹

There is also a '*policy*' element that is required when looking at crimes against humanity. This is written in article 7(2) (a), the attack must be '*pursuant to or in furtherance of a State or organizational policy to commit such an attack*'. This policy element was inspired by the 1996 Draft Code where it was stated that support for the attack must be part of a government or group policy.¹⁵² The idea behind this was to ensure that a single isolated act would not be considered a crime against humanity. Since the Draft Code of 1996, there have been significant developments and the ICC Statute can be interpreted in two ways regarding the policy element.

The first is that the policy element can be seen as a way to limit the scope of the crime and to keep it specific in nature. The second interpretation is much wider and allows for other crimes to fall in the same bracket. This second interpretation was

¹⁴⁷ Werle (2009:297).

¹⁴⁸ Werle (2009:297).

¹⁴⁹ Werle (2009:298).

¹⁵⁰ Werle (2009:298).

¹⁵¹ Werle (2009:298).

¹⁵² Werle (2009:300).

utilised by the *ad hoc*¹⁵³ tribunals which decided that the policy need not be incorporated in a formal and official programme. In the *Tadic* judgement it was stated that:

*'such a policy need not be formalised and can be deduced from the way in which the acts occur. Notably if the acts occur on widespread or systematic basis that demonstrates a policy to commit those acts whether formalised or not.'*¹⁵⁴

This broad interpretation is the preferable option as it does not restrict the concept of a crime against humanity. The policy need not be specific and need not exist at the upper echelons of the attacking group.¹⁵⁵ The existence of a policy element is displayed by the fact that the attack is indeed widespread or systematic. The perpetrators must be an '*entity*' of sorts, which includes an organisation or a state.

The policy of a state or an organised entity is manifest in their activity or their inactivity. Refraining from acting against a human rights violation can be interpreted as a policy of sorts as it is in itself a definitive stance.¹⁵⁶ In the *Tadic*¹⁵⁷ case the court ruled that merely tolerating the crime is sufficient to fulfil the requirements of a crime against humanity. This reading of the policy element is favourable as it satisfies the purpose of the norm which is to protect the people from human rights violations.¹⁵⁸ The ICC has stated that the policy element is not an independent

¹⁵³ These are special tribunals that were set up to try war crimes, genocide, and crimes against humanity committed in the former Yugoslavia and Rwanda.

¹⁵⁴ *Prosecutor vs. Tadic* ICTY (trial Chamber), judgement of 7 May 1997, Para 653.

¹⁵⁵ Werle (2009:301).

¹⁵⁶ Werle (2009:302).

¹⁵⁷ *Prosecutor vs. Tadic* ICTY (Appeals Chamber), judgement of 31 January 2000 Para 14

¹⁵⁸ Werle (2009:302).

element of the crime but is useful as evidence of the systematic or widespread nature of the crime.¹⁵⁹

3.3 The mental element

Article 7 (1) explicitly states that the perpetrator must act with knowledge of the existence of the attack on a civilian population.¹⁶⁰ Hence his act must be part of this attack, but the perpetrator need not be aware of the intricate details of the state or organisations plans or implementation policy.¹⁶¹ This is supplemented by Article 30 of the Rome Statute paragraph 2 (b) which states as follows:

'For the purposes of this article, a person has intent where:

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'

3.4 The perpetrators

The perpetrators can include any individual who acts or who supports the policy.

3.5 The protected interests

Crimes against humanity are an attack on international peace and security because they not only affect the individual victim but they also affect the international

¹⁵⁹ *Prosecutor vs. Harun and Kushayb, ICC (pre-trial chamber) decision of 27 April 2007, Para 62; prosecutor vs. Bemba Gombo, ICC (pre-trial Chamber) decision of 10 June 2008 Para 33 : 'The Chamber is ...of the view that the existence of a state or organisational policy is an element from which the systematic nature of an attack may be inferred'*

¹⁶⁰ Werle (2009:303).

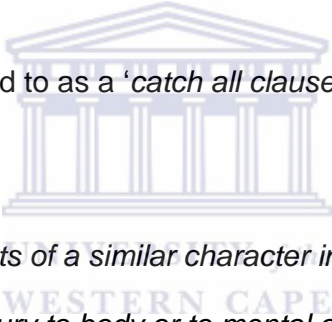
¹⁶¹ Werle (2009:303).

community at large.¹⁶² The issue as to whether an individual act can constitute a crime against humanity is an important one. An individual act can indeed be a crime against humanity if it is part of the widespread or systematic attack.¹⁶³

3.6 Article 7 1(k)

Having covered the structure of the crime, the mental element, the perpetrators, and the protected interests, it is pertinent to move on to the Article that is of particular use in this paper. Article 7 1(k) will now be dealt with as it specifically covers the area in which corrupt practices could fall.

Article 7 1(k) has been referred to as a 'catch all clause'¹⁶⁴ as it is general, vague and all inclusive. It states that,


'(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' will be considered as a crime against humanity'.

This clause is wide, but in an attempt to curtail its scope the 'other inhumane acts' must be as severe in nature as the other crimes against humanity.¹⁶⁵ With this idea in mind the court in *Prosecutor v. Katanga and Ngudjolo Chui* defined inhumane acts as 'serious violations of international customary law and the basic rights pertaining to

¹⁶² Werle (2009:303).

¹⁶³ *Prosecutor vs Blaskic ICTY (Appeals Chamber), judgement of 29 July 2004 Para 101.*

¹⁶⁴ Werle (2009:338).

¹⁶⁵ Werle (2009:340).

*human beings drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7 (1).*¹⁶⁶

The comparison of these '*other inhumane acts*' to listed crimes against humanity is important, however, the circumstances of each case must be analysed and taken into consideration.¹⁶⁷

The next chapter will deal with the argument in favour of making corruption an international crime against humanity. This will include relevant case studies of corruption; the application of the International Criminal Court Statute with regard to crimes against humanity; and the philosophy of Thomas Hobbes.

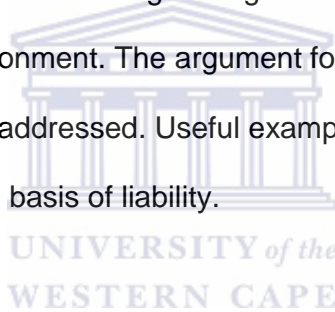


¹⁶⁶ Pre-trial Chamber, decision of 30 September 2008 Para 448.

¹⁶⁷ Werle (2009:340).

CHAPTER FOUR: MAKING CORRUPTION A CRIME AGAINST HUMANITY

Corruption as a single act has many ripple effects in all spheres of life. Transparency International estimates that corrupt government officials and politicians receive bribes of between 20% and 40% of what should be national development assistance money.¹⁶⁸ The World Bank estimates that governments that are corrupt consume more than one trillion US dollars in bribes annually, whilst other types of corruption take up a further 1.5 trillion US dollars.¹⁶⁹ Corruption debilitates a society from the inside out. It affects the economy, the rule of law, social development and faith in public administration. The effects are long-lasting and are reflected in the society, the politics and the physical environment. The argument for making corruption a crime against humanity will now be addressed. Useful examples will be discussed as well as the legal and philosophical basis of liability.



4.1 Nigeria

Nigeria is a prime example where the devastating effects of corruption can be seen. According to Transparency International's Corruption Perception Index (a ranking used to estimate level of public sector corruption), Nigeria scored 7 out of 10, which reflects high levels of corruption and low international confidence.¹⁷⁰ According to the *Boston News*, 'Corruption and mismanagement swallow about 40 percent of Nigeria's \$20 billion annual oil income'.¹⁷¹

¹⁶⁸ Transparency International (2010).

¹⁶⁹ Snider and Kidane (2007:692).

¹⁷⁰ Transparency International (2010).

¹⁷¹ Boston News(2010).

Corruption exists in many forms in Nigeria and it extends from the police to the judiciary. According to the writers Erero and Oladoyin, suspects held in police custody are required to pay money to the police officers who demand this money to cover their stationery costs. The police simply tell the suspects that the very pens they need to process bail application forms will cost them (the suspects) a fee.¹⁷²

Corruption is so common that police officers have been known to demand bribe money from public transport operators in front of the passengers themselves. In fact some of them even give change when necessary, for example when ten Naira is demanded and the driver only has a 50 Naira note, the police officer will unashamedly give 40 back.¹⁷³

The judicial system is also corrupt as every part of the legal process will cost an individual more than just the usual administrative costs.¹⁷⁴ This results in a violation of one's right to access to justice as those who cannot pay will not be heard.

The customs officials are also known for their corrupt practices. Anyone who is not a Nigerian can easily obtain a Nigerian passport if they pay the correct person. When arriving at customs, to gain entry into the country or to leave, one must place money in his or her passport to gain the co-operation of the official.¹⁷⁵ Here, another violation of basic human rights is evident as the right to freedom of movement, is violated. The Nigerian government is violating all these rights by omission and is equally as guilty as the individuals who act in corrupt manner whilst on official duty.

¹⁷² Kempe *et al* (2000:280).

¹⁷³ Kempe *et al* (2000:280).

¹⁷⁴ Kempe *et al* (2000:281).

¹⁷⁵ Kempe *et al* (2000:281).

The Nigerian story is a sad one, particularly when it comes to the most blatant display of corruption resulting in a human rights violation and indeed, a crime against humanity. The most blatant example is the Ken Saro Wiwa saga.

4.1.1 The Background to the Ogoni struggle

Ken Saro Wiwa was an activist and a member of the Ogoni community in the Ogoni region in Nigeria. Nigeria being an oil rich nation, had attracted multinational oil companies such as Royal Dutch Shell and the Ogoni Delta was perfect for their exploits. Royal Dutch Shell started producing oil in 1958.¹⁷⁶ As early as 1970 the trouble started when the first Ogoni Chiefs submitted a petition to the local Military Governor complaining about Shell's conduct. The petition made it clear that Shell's conduct was threatening the livelihood and lives of the Ogoni people.¹⁷⁷ These complaints were well founded as there had indeed been a massive oil blow-out in the Bomu oilfield in Ogoni, causing widespread environmental pollution and great concern amongst the people.¹⁷⁸

By the late 1980s other communities began to protest. The Iko people wrote to Shell asking for *'compensation and restitution of our rights to clean air and water and a viable environment where we can source for our means of livelihood.'*¹⁷⁹

Receiving no response, the Iko held a peaceful demonstration. The notorious Nigerian Mobile Police Force (MPF) were sent to subdue the protestors and this

¹⁷⁶ Remember Saro Wiwa (2010).

¹⁷⁷ Remember Saro Wiwa (2010).

¹⁷⁸ Remember Saro Wiwa (2010).

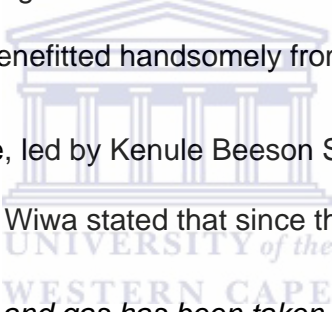
¹⁷⁹ Remember Saro Wiwa (2010).

resulted in an assault on the village, where 350 people were left homeless.¹⁸⁰ The unrest continued and in 1990 the Ogoni leaders signed the Ogoni Bill of Rights which demanded control over their own resources and lives. That year the Movement for the Survival of the Ogoni People (MOSOP) was born. Their objectives were rooted in peaceful principles, and their approach was a non violent one.¹⁸¹

The peaceful protests continued and Shell requested the services of the MPF, which resulted in the massacring of 80 people and the destruction of 500 homes.¹⁸²

Already the people had lost valuable farming land, suffered the after effects of large scale pollution, lost their homes, and some, their lives. Yet Shell continued to suppress the protests by making use of the MPF and with the assistance of government officials who all benefitted handsomely from the oil business.

In the 1990s the Ogoni people, led by Kenule Beeson Saro Wiwa, sought international assistance. Saro Wiwa stated that since the discovery of oil in 1958



*'100 billion dollars worth of oil and gas has been taken away from Ogoniland. In return for this the Ogoni people have received nothing.'*¹⁸³

Saro Wiwa attributed the plight of his people to the conduct of Shell, and to the complicity of the government officials and the military. He called it Genocide in his book, entitled *Genocide in Nigeria*.¹⁸⁴ The corrupt practices of Shell, insofar as they bribed the military and MPF, directly resulted in the mental and physical suffering of the people. The Nigerian military government at that time can also be accused of corruption by omission and by active participation as it did nothing to assist the

¹⁸⁰ Remember Saro Wiwa (2010).

¹⁸¹ Remember Saro Wiwa (2010).

¹⁸² Remember Saro Wiwa (2010).

¹⁸³ Remember Saro Wiwa (2010).

¹⁸⁴ Remember Saro Wiwa (2010).

suffering people. It ignored the petitions and cries for assistance. Instead it killed innocent, peaceful, protestors. This behaviour constituted a crime against humanity.

The situation worsened. In April 1993 Willbros, a contractor working for Shell, called in government troops to manage the Ogoni demonstrations. This resulted in the serious injury of 11 people. A month later, another person was shot dead and 20 more were injured.¹⁸⁵ Shell admitted that it had facilitated the *'field allowances and transportation'*¹⁸⁶ by Willbros, but vehemently denied any involvement in the shooting of the innocent. Saro Wiwa had already been arrested several times and reported being psychologically and mentally tortured by his jailers. The Ogoni community continued to be victims of violence. The military was heavily involved in this violence, and its top officials were receiving money from Shell for what was termed as *'field allowances'*.¹⁸⁷ Although it was never labelled as corruption it clearly was, as a small group of officials were benefitting at the expense of the Ogoni people. In his final statement before his death, Saro Wiwa described the relationship between Shell and the ruling government as follows:

*'Between oil companies such as Shell and the Nigerian military dictatorship, there is an alliance. The military dictatorship holds down oil-producing areas such as Ogoni by military decrees and the threat or actual use of physical violence so that Shell can wage its ecological war without hindrance and so produce the oil and petrodollars as well as the international and diplomatic support upon which the military dictatorship depends.'*¹⁸⁸

¹⁸⁵ Remember Saro Wiwa (2010).

¹⁸⁶ Remember Saro Wiwa (2010).

¹⁸⁷ Remember Saro Wiwa (2010).

¹⁸⁸ Complete Statement by Ken Saro Wiwa to the Ogoni Civil Disturbances Tribunal (2010).

He goes on to describe the relationship as 'cosy' and 'criminal'.¹⁸⁹ This indicates certain levels of corruption between Shell and the Nigerian government .

4.1.2 The Trial and Execution of Saro Wiwa

Perceived as a pest who must be disposed of, the Nigerian military government had to act. Saro Wiwa was charged with: the alleged murder of four other Ogoni leaders,¹⁹⁰ for contravention of the Civil Disturbances Act of 1987¹⁹¹ and for sedition.¹⁹² The trial was conducted by the Civil Disturbances Tribunal, and according to the United Nations Report on the Fact-Finding Mission to Nigeria, this was irregular because it was in line with the Nigerian Constitution but not with the International treaties that Nigeria has ratified.¹⁹³

The Fact-Finding Commission noted the arguments put forward by Saro Wiwa's defence which included the following:

- 'a) The validity of the Civil Disturbances (special tribunal) Act of 1987 was attacked on the ground that it denies fair trial, a right which is a guaranteed fundamental human right, both under the Nigerian Constitution and the International Covenant on Civil and Political Rights;*
- b) The constitution of the special tribunal is not valid for the reason that it was not preceded by the constitution of an investigation committee, a thorough investigation by the said committee[e]sic and submission of its report as required by Section 1 of the Act;*
- c) The Tribunal tried the defendants in two groups, in two concurrent trials, examining the same witnesses twice thus causing grave prejudice to the*

¹⁸⁹ Remember Saro Wiwa (2010).

¹⁹⁰ Report of the Fact-Finding Mission of the Secretary General (2010).

¹⁹¹ Report of the Fact-Finding Mission of the Secretary General (2010).

¹⁹² Complete Statement by Ken Saro Wiwa to the Ogoni Civil Disturbances Tribunal (2010).

¹⁹³ Report of the Fact-Finding Mission of the Secretary General (2010).

defence;

d) The refusal of the request of the defence by the Tribunal to present a video tape showing the Military Administrator of Rivers state accusing Ken Saro Wiwa of the murders at a press conference in May 1994, before the case was submitted to the Tribunal. This ruling of the Tribunal is evidence of bias against the defendants;

e) The refusal of the Tribunal to admit a video tape as evidence to bring out the contradiction in the testimony of a prosecution witness given before the Tribunal is again another circumstance indicating bias;

f) The lack of right of appeal against the decision of the Tribunal represents serious deficiency in dispensation of justice;

g) The haste with which the sentences were confirmed by the Provisional Ruling Council (PRC) implies that the Government had made up its mind and was not interested in a fair consideration of the case;

h) The PRC confirmed the conviction and sentence even before the records of the trial were received. At any rate, it was impossible for the Tribunal to provide within eight days (the period between the date of the judgement and the date of confirmation), the original or certified copies of the records and the judgement to all the 25 members of the PRC;

i) The failure of the defence lawyers (who were appointed by the Tribunal after the withdrawal of the original defence lawyers in protest) to present the case of the defendants before the PRC in order to commute the sentences showed that the lawyers provided, failed to protect the rights of the accused, thus violating their basic rights;

j) The presence of a military officer on the Tribunal affected its independence and impartiality, and

k) The Tribunal proceeded with the trial even when their case was pending before the High Court wherein the accused had prayed for stay of further proceedings on the ground that the members of the Tribunal are biased.¹⁹⁴

The arguments above are valid and show the denial of basic rights, such as the right to appeal. This reveals that there was a degree of collusion between the judiciary

¹⁹⁴ Report of the Fact-Finding Mission of the Secretary General (2010).

and the Nigerian government. This collusion is better described as judicial corruption and as a result of this judicial corruption innocent people were executed.

Saro Wiwa and eight other prominent Ogoni were leaders arrested, put on trial and then executed. Saro Wiwa was hanged in November 1995.¹⁹⁵ The trial displays judicial corruption as there were many procedural irregularities uncovered by the United Nations Fact-Finding Commission. The expeditious trial of Saro Wiwa attracted widespread international attention and was shrouded in a cloud of uncertainty and irregularity. The controversy warranted a United Nations investigation into the human rights abuses and into the execution of Saro Wiwa and the Ogoni Eight. There was great international outcry from prominent leaders like Bill Clinton and Nelson Mandela.¹⁹⁶

More evidence of corruption was uncovered when an affidavit signed by one of the two chief prosecution witnesses, Charles Danw, was found. The affidavit stated that he (Charles Danw) had been bribed by Shell to testify against Saro Wiwa.¹⁹⁷ It read that he was promised a house and a contract from Shell. In addition to that, he was promised money and was in fact given 300 000 Naira upfront. There was another affidavit from the other Chief prosecution witness, Nayone Akpa, who alleged that he too was offered 300 000 Naira. He was also promised work with the Gokana Local Government, a weekly stipend, and lucrative contracts with Shell. All of this was on condition that he signed a statement that implicated Saro Wiwa.¹⁹⁸

¹⁹⁵ Remember Saro Wiwa (2010).

¹⁹⁶ The Need for Nigeria to seek Advisory Services and Technical Assistance in the field of Human Rights (2010).

¹⁹⁷ Remember Saro Wiwa (2010).

¹⁹⁸ Remember Saro Wiwa (2010).

The execution was condemned by the international community and Nigeria was immediately expelled from the Commonwealth. The then English Prime Minister, Minister John Major, portrayed the trial as, *'a fraudulent trial, a bad verdict, an unjust sentence. It has now been followed by judicial murder.'*¹⁹⁹

The Managing Director of Shell Nigeria, Brian Anderson, later admitted to the Sunday Times that a *'black hole of corruption'*²⁰⁰ was present in Shell's Nigerian operations.

4.1.3 Linking the Ogoni situation to the formulation of corruption as a Crime against Humanity

The relationship between corruption and crimes against humanity becomes clearer as the Ogoni people suffered mentally and physically due to a systematic and widespread attack by the government and its financier Shell. The requirements for a crime against humanity were met in this case. The attack was indeed systematic and widespread as the entire Ogoni community was affected. There was intent and knowledge on the part of the military government and on Shell's part as well. The government's response to the Ogoni protest was indeed official government policy. The web of liability has several layers and the conduct of the military government, and that of Shell, shall be dealt with separately.

The government had an official policy which was to insure that those

'carrying out business ventures ... within Ogoniland are not molested'.²⁰¹

¹⁹⁹ Remember Saro Wiwa (2010).

²⁰⁰ Remember Saro Wiwa (2010).

General Okuntimo²⁰² told a British environmentalist that he was terrorising the Ogoni community, '*all for Shell.*'²⁰³ He also stated that he was unhappy with Shell '*because the last time he had asked Shell to pay his men their out-station allowances he had been refused which was not the usual procedure...*'²⁰⁴

The official policy was clear from the continued military presence in the Ogoni region and the massacring of innocent people in the region. The government also had the responsibility to protect the people from exploitation and one would have expected them to control the social impact of Shell's business on the community, but they did not. Failure to do so results in the government incurring liability by omission. The omission itself is an unspoken policy. The ICC Statute further requires intent and knowledge. It can be said that the government had every intention to stop the Ogoni protests and to use whatever means necessary to do so. This resulted in murder, intimidation and civil unrest. If one is unconvinced by the argument that the government had the direct intention to massacre the people then one could use *dolus eventualis* as a form of intent.

4.2 Dolus eventualis

Dolus eventualis occurs when a person acts and '*the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:*

²⁰¹ A memo sent between Lt Col Komo and Major Okuntimo who were appointed by Abacha as the commanders of Rivers State Internal Security Task Force. Their task was to protect the business interests of Shell at all costs found at The.Remember Saro Wiwa (2010) Website.

²⁰² As a commander of the River State Internal Security Task force, he was responsible for military action against the Ogoni community.

²⁰³ Remember Saro Wiwa (2010).

²⁰⁴ Remember Saro Wiwa (2010).

a)he subjectively sees the possibility that, in striving towards his main aim, the unlawful act maybe committed or the unlawful result may be caused, and

b)he reconciles himself to this possibility.²⁰⁵

According to Snyman,²⁰⁶ *dolus eventualis* is a form of intention that is different from intention in the normal sense of the word. There are two requirements for *dolus eventualis* to exist. The first part is the cognitive aspect of *dolus eventualis* and here the actor should foresee the possibility of the outcome and secondly, he should reconcile himself with the possibility of this outcome.²⁰⁷ The latter is the volitional element.

Snyman pays careful attention to the use of the word '*possibility*'.²⁰⁸ It is meant to be widely interpreted, meaning that there must be a real chance that the predicted outcome will occur.²⁰⁹ The standard used is that of the reasonable person.

Article 30(2) (b) of the ICC Statute states that a person has intent:

'in relation to a consequence [where] that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.

This is a *dolus eventualis* construction that will allow corrupt actors to incur liability for corruption. Bantekas²¹⁰ states that such *dolus eventualis* is good enough to hold members of corrupt governments accountable for their actions, and responsible for crimes against humanity. Such a construction for crimes against humanity is favourable because crimes against humanity are subject to the principle of universal

²⁰⁵ Snyman (2008:184).

²⁰⁶ Snyman (2008:184).

²⁰⁷ Snyman (2008:185).

²⁰⁸ Snyman (2008:185).

²⁰⁹ Snyman (2008:185).

²¹⁰ Bantekas(2006:474).

jurisdiction and the punishment and sanctions for such crimes are heavier and this may do justice to the ugly nature of corruption.²¹¹

The Nigerian military government did foresee that Shell's actions would negatively impact the Ogoni community as there was no way that pipes could be laid without displacing people. There was no way that oil spills would not cause environmental damage. There was also no way that armed soldiers with direct instructions to protect the interests of Shell, would not resort to violence if given permission to do so. This strongly suggests that the government did foresee that crimes against humanity would be committed for the action was directed against specific people.

The conduct of Shell can be assessed in a similar light and it is here where one can explain Shell's liability. As the offeror of the bribe, and hence part and parcel of the crime of corruption, Shell also incurs liability. Shell can also be guilty of a crime against humanity (in the form of corruption) for directly offering those benefits to office bearers of the Nigerian government. Shell should also have foreseen that the Military government had only one way of dealing with opposition – and that was to eliminate it. Shell should have foreseen that the crushing of the Ogoni resistance would lead to fatalities among these unarmed civilians. Thus Shell anticipated that ruthless military action would give rise to serious human rights violations which would constitute a crime against humanity. This outcome, Shell foresaw, would only come about if it gave the responsible state officials enough personal financial rewards to effect this result.

If corruption results in an attack on a civilian population that is widespread or systematic and part of an official or unofficial policy then it can indeed meet the

²¹¹ Bantekas (2006:475).

requirements of the Article 8. Acts of corruption, in this particular case caused mental and physical suffering on the part of the Ogoni people. Corruption was therefore the crime that resulted in the atrocities. In essence, when one looks at the individual acts of the military against the Ogoni people, they in themselves constitute crimes against humanity. For example, the murder and torture of Saro Wiwa, the massacring of the people, the injury and murder of peaceful protesters. However, instead of trying to prove that each individual act is a crime against humanity, which is more difficult, it would be better for the administration of justice if the root of the problem could be treated, as opposed to merely addressing the symptoms. If corruption is classified as a crime against humanity then conduct that flows from it could be prevented, as such a classification could serve as a deterrent.

According to Amnesty International, Saro Wiwa was routinely tortured in prison and the Nigerian Internal Security Task Force were reported to have indiscriminately beat members of the Ogoni community whilst many women and girls were raped.²¹²

These are the manifestations of corruption, perhaps classifying corruption itself, as a crime against humanity could be the solution. To supplement this argument the philosophy of Thomas Hobbes will now be discussed.

4.3 Hobbes

Thomas Hobbes was a 17th Century English philosopher and is commonly regarded as a social contract theorist. His work is easily understood when it is placed in two categories: The Human Condition and Psychological Egoism; and the Social

²¹² Remember Saro Wiwa(2010).

Contract theory which is based on the hypothetical State of Nature.²¹³ In *Leviathan*²¹⁴ Hobbes explains his understanding of human nature. According to Hobbes, human beings are totally self-interested and behave in a way that meets their immediate needs.²¹⁵ Hobbes believed that human beings are motivated by greed and self-interest, and as a result quarrel due to:

- 1) competition c
- 2) diffidence; and d
- 3) glory.²¹⁶ g

Initially, man fights to make material gains, and then he fights to maintain what he has gained, and finally he fights to maintain his reputation.²¹⁷ This leads to a constant state of war, unrest and destruction. This selfish, conceited and greedy behaviour makes man's life '*solitary, poor[e] sic, nasty, brutish, and short*'.²¹⁸ In this state of being, each and every person is somebody's enemy, and one acts to safeguard all his immediate interests at any cost. He argued that because of man's greedy ways, which increased the fear of a violent death in the state of nature, people (purely for their own good) surrender their liberties to a sovereign ruler. In exchange the ruler must agree and commit to keeping the peace.

²¹³ Internet Encyclopaedia of Philosophy Social Contract Theory (2010).

²¹⁴ Hobbes (1651:1).

²¹⁵ Internet Encyclopaedia of Philosophy Social Contract Theory (2010).

²¹⁶ Hobbes (1996:88).

²¹⁷ Hobbes (1996:88).

²¹⁸ Hobbes (1996:89).

In addition to selfish, self-motivated behaviour, Hobbes believed man to be reasonable as well.²¹⁹ Thus man would safeguard his interests in a self-seeking yet reasonable way because the only way to survive would be to *'seek peace and follow it, and to defend ourselves'*.²²⁰ Those are the Hobbessian Laws of Nature. The only way to find peace was for man to enter into a social contract with one another, and with the sovereign.²²¹ If this is transposed into a modern context then the sovereign power would be a chosen government and the social contract would be a manifestation of man's decision to live in a civil society.

This Social Contract is an understanding between man and the government, and certain rights have been given up to the sovereign, in exchange for peace and security. Man exchanges the right to defend himself at all costs and the right to maximum personal gain, for mutual coexistence. The Social contract was designed to serve two purposes. It

*'permitted the deduction of the institution of civil society from postulates of human nature. It was also a logical presupposition of the existence of any commonwealth as one commonwealth, whatever its governmental forms.'*²²²

The government is then tasked with the responsibility to make laws that will govern society and protect the common interests of such a society. Thus acts of corruption are a violation of this covenant and a return to the state of nature. A corrupt act is one that is based purely on greed and self-interest and as a result someone else is deprived of his or her needs. Corruption is a symptom of greed and it shows complete disregard for the agreement man makes with his neighbour and with his

²¹⁹ Hobbes (1996:91).

²²⁰ Hobbes (1996:92).

²²¹ Hobbes (1996:94).

²²² Peters (1956:193).

government. By agreeing to live in one society and agreeing to abide by the laws made by the ruling power, man agrees that there are ways in which mankind can peacefully co-exist. Those who engage in corruption contravene this unspoken agreement and thus threaten the very fabric of society. The breach of this contract is twofold. There is a breach of the contract made between individuals, and a breach of the contract made with the ruling government. This is precisely why acts of corruption are so devastating and far reaching in their consequences.

In light of the breach of the social contract and with regard to the devastating effects of corruption it can thus be suggested that corruption be made a crime against humanity. The current legal instruments in place are very important in the fight against corruption, but they have not had any practical effect on corruption itself. This could be attributed to the lack of enforcement and the fact that there are no serious repercussions flowing from acts of corruption. Making corruption a crime against humanity will serve as a deterrent as crimes against humanity are taken very seriously. Given the fact that corruption is so common in all societies, perhaps it is time a different approach was used.

Individuals who are trusted by society to act in a way that is ethical and corruption-free are bound to think twice if corruption is made a crime against humanity. The suffering of economies and communities could be alleviated if corruption is made a crime against humanity. The only way to fight the scourge of corruption is to make the legal consequences so severe that those individuals considering corrupt practices are deterred and a little more restrained when it comes to fulfilling their self-motivated desires.

Corruption should be a crime against humanity because it devastates communities, economies, environments and public order. The ripple effects of corruption are felt throughout the community and more should be done to protect the interests of the community as a whole.

Nigeria, under Abacha, suffered greatly from corruption between 1993 and 1998. Abacha has been called the richest unelected person to ever take over a country, according to Baker.²²³ Abacha wrote cheques of for tens of millions in his own name, pretending to buy arms for national defence overseas, yet nothing ever arrived. One cheque was valued at 75 million US dollars and it disappeared.²²⁴ Nigeria was also the hub of the drug trade which generated millions of dollars.

Despite being one of the worlds' biggest oil producers, Nigeria had to import diesel fuel, jet fuel, and gasoline because most of the oil was under the control of foreign corporations which did their best to keep Abacha himself, wealthy.²²⁵ In no time at all, Abacha was having large bags of money delivered to his house at night. This money came directly from the central bank.²²⁶ Abacha's millions were held in banks all over the world, in the United States of America, England, The Channel Islands, Dubai Singapore, Hong Kong, and Brazil, to name but a few.²²⁷

Nigeria, as a case study, displays the complicity of developed nations in corruption in developing nations. This brings to light a complex broader political context that gives rise to corruption. The banks that kept Abacha's money include those in first world countries as does the list of companies that were very actively running corrupt

²²³ Baker (2005:60).

²²⁴ Baker (2005:60).

²²⁵ Baker (2005:60).

²²⁶ Baker (2005:61).

²²⁷ Baker (2005:62).

businesses in Nigeria. American and British subsidiaries of ABB Ltd²²⁸ (which is a Swiss engineering firm) are reported to have paid ten million US dollars to settle charges of alleged bribery in Nigeria.²²⁹ In 2007 Siemens was fined 248 million US dollars after it was found guilty of having paid bribes worth ten million Euros to Nigerian officials between 2004 and 2007.²³⁰

In 2004 Enron and Merrill Lynch executives were also convicted for acts of corruption involving Nigeria. Halliburton was also heavily implicated in corruption scandals in Nigeria. In 2003 the company confessed that it had paid a bribe of 2.4 million US dollars to Nigerian tax consultants. Soon after that, there was a bigger scandal involving 4.9 million US dollars.²³¹

The 4.9 million US dollar project involved natural gas being piped, processed, contained and shipped to overseas markets. There was a contract for this project that was awarded to four companies: Technip (France), Snamprogetti (Netherlands), an affiliate of ENI (Italy), Kellog Brown and Root (KBR)-which is now a subsidiary of Halliburton, and finally the JCG Corporation of Japan.²³² These four companies came together and called themselves Technip Snamprogetti Kellog and JCG(TSKJ). KBR coordinated the project and a London-based lawyer was asked to be the TSKJ representative in Nigeria. He was also Abacha's advisor.²³³ The lawyer, Jeffrey Tesler, formed Tri Star Investments in Gibraltar and he only made one official visit to Nigeria. However, over a space of seven years, 166 million US dollars in payments

²²⁸ Baker (2005:65).

²²⁹ Baker (2005:65).

²³⁰ BBC news (2010).

²³¹ Baker (2005:66).

²³² Baker (2005:66).

²³³ Baker (2005:66).

was made from TSKJ to Tri Star accounts.²³⁴ Upon investigation it was discovered that various amounts had gone into the personal accounts of some of these corrupt company representatives. It is suspected that the rest went into the pockets of Abacha and his officials. This is further evidence of the complicity of multinational companies from the West. Baker questions whether the West's accumulation of all this Nigerian wealth has been worth the little business it has brought for the nation as a whole.²³⁵

There are countless other examples of corruption and according to information gathered by Baker, from a Nigerian Newsletter²³⁶ he subscribes to, here are a few. It has been reported that criminal networks with good political connections are illegally siphoning about one billion US dollars worth in oil, a year.²³⁷ In 2004, former Nigerian cabinet ministers were summonsed to court for allegedly accepting a bribe of more than one million US dollars from French electronic mogul SAGEM SA.²³⁸ In 2003 the Nigerian government released a report stating that there was a case of corruption involving 400 million US dollars and prominent government officials were implicated. These are just a few examples of the rot and decay caused by corruption in Nigeria. Other countries are in a similar position. The Democratic Republic of Congo is the next example.

4.4The Democratic Republic of Congo

²³⁴ Baker (2005:66).

²³⁵ Baker (2005:68).

²³⁶ Nigeria2day@aol.com

²³⁷ Baker (2005:67).

²³⁸ Baker (2005:68).

The Democratic Republic of Congo (DRC) has had a long history of corruption, but one of its worst periods was that under Mobutu Sese Seko. Sese Seko ruled the DRC (known as Zaire at that time) for 32 years, and during that time he used brutality, cunning and the power of money to maintain power.²³⁹ The natural resources of the country became his personal property and they were utilised as such. Sese Seko generated vast amounts of wealth from selling public property and used that money to gain valuable allies abroad who helped to keep him in power.²⁴⁰ The army existed mainly to protect him. The military itself was corrupt as officers embezzled their soldiers' salaries and assigned their soldiers to protect the wealthy businessmen who paid them directly for their services.²⁴¹

The network of corruption was far reaching. During the Vietnam War, America's military needs were met by the natural resources of Zaire as they exported vast amounts of copper and other base metals.²⁴² These metals were in high demand and so their market value increased, but the money generated from sales did not reach its intended recipients - the people of Zaire. Instead it was pocketed by Sese Seko and those in his immediate circle.²⁴³

Mobutu then embarked on what he called '*Zairianisation*'.²⁴⁴ This involved taking away the businesses of expatriates and giving them to his personal clients.²⁴⁵ Many of these new business owners lacked the experience to run the businesses so most sold what they could and pocketed the immediate benefits. This had devastating effects on the economy and Mobutu's intended idea to create a new class of elite

²³⁹ Kodi (2008:14).

²⁴⁰ Kodi (2008:14).

²⁴¹ Kodi (2008:15).

²⁴² Kodi (2008:15).

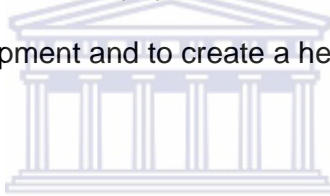
²⁴³ Kodi (2008:15).

²⁴⁴ An attempt to create a wealthy, upper class elite of black Congolese people.

²⁴⁵ Kodi (2008:15).

business people was a failure.²⁴⁶ As the economic situation worsened, so did the desperation of the people. Schools and hospitals were badly maintained, civil servants poorly were paid,²⁴⁷ the infrastructure collapsed, and with this disintegration, corruption was rife. According to Kodi,²⁴⁸ one had to be '*resourceful*' to ensure the survival of his or her family. The culture of corruption was growing as many saw it as the only way to survive. '*Corruption became an accepted and tolerated reality.*'²⁴⁹

The initial crisis was a direct result of the rampant corruption. Already the ramifications of corruption are clearly displayed in this example. Had Sese Seko, and those before him, not engaged in corrupt practices then the natural resources would have been used to aid development and to create a healthy standard of living for the people.



Mobutu's regime has been dubbed as a kleptocracy, which is a '*government by theft*' and he is believed to have stolen four billion US dollars from the Congolese people.²⁵⁰ Mobutu's influence made corruption an accepted part of everyday life, and that legacy lives on. The DRC is regarded as a failed state, with corruption more rampant than ever.

The devastation caused by corruption is clear. Perhaps it is time for the crime to be treated in a different way, thus making it a crime against humanity could be the solution. If corruption is made a crime against humanity it will ensure that corrupt heads of states and other officials are prosecuted under the principle of universal

²⁴⁶ Kodi (2008:15).

²⁴⁷ 90% of the civil service were so badly paid that they lived without knowing where the next meal would come from. Blundo *et al* (2006:63).

²⁴⁸ Kodi (2008:17).

²⁴⁹ Kodi (2008:17).

²⁵⁰ Solidarity Mobutu's Loot and the Congo's Debt (2010).

jurisdiction. Those people who escape their countries will not escape justice. For example, instead of Mobutu dying in exile, he could have stood trial, and perhaps some of the siphoned funds would have been returned to the people of the DRC. After plundering the wealth of his people he died without justice being done, and without the restoration of the wealth he stole. In 2009 a Swiss bank that was holding 6.68 million US dollars of Sese Seko's embezzled wealth was forced to unfreeze the assets and they were returned to Sese Seko's family. Yet again the people of the DRC were left with no compensation or recourse to justice.²⁵¹

4.5 Indonesia

This nation is also unfortunately known for its corruption. Its history involves two regimes of autocracy and corruption. Sukarno became the ruler at the end of the Second World War but was quickly ousted by his own chief of army staff Suharto, in 1967.²⁵² Suharto meticulously centralised economic power and began to credit his personal bank account.

Suharto began by taking over large businesses and gave them to close friends to establish monopolies over important industries such as flour milling.²⁵³ A company (PT Bogasari) owned by Suharto's close associate, used the wheat supplied by the U.S, under the U.S Food for Peace Program . This allowed him to create an empire

²⁵¹ Swiss Info Channel Switzerland forced to unfreeze Mobutu's assets (2010).

²⁵² Baker (2005:69).

²⁵³ Baker (2005:69).

that expanded into noodles, cement, and other businesses. Of course while this was happening, relations with the Suharto family were well maintained.²⁵⁴

Suharto formed foundations that were called 'yayasans'. This permitted him to take a small fraction of revenue from every rupiah that came into Indonesia.²⁵⁵ These foundations collected money from social welfare under the pretence that it would go to those in need, but in reality it went into Suharto's personal account. It was reported that 97 foundations were established over a period of 30 years.²⁵⁶

'A government investigation into just seven of the foundations laid out some of the sources of 'donations':

- *two and a half percent of the profits of the central bank and state owned banks* T
- *two percent of the incomes of individuals and state and private companies making more than \$40 000 a year.* T
- *percentage off the salaries of civil servants and other government employees* A
- *percentage of electric bills, movie tickets, and other consumer expenditures*²⁵⁷ A

Billions of dollars meant for social welfare ended up in the hands of Suharto and his clan.²⁵⁸ While Suharto became wealthier and wealthier the Indonesian population continued to suffer. Once again we see the devastating effects of corruption on

²⁵⁴ Baker (2005:69).

²⁵⁵ Baker (2005:69).

²⁵⁶ Baker (2005:70).

²⁵⁷ Baker (2005:70).

²⁵⁸ Baker (2005:70).

society at large. Suharto's children were also very good at exploiting their position in society.

Suharto's children are reported to have continuously taken loans and without ever intending to pay them back. His daughter established a private television station called TPI, using money and ²⁵⁹equipment she had taken from her own bank, Bank Yama. This loan was never paid back and soon enough, she was heavily in debt. She then used her position to force the state-owned telephone company to buy 45 million US dollars worth of convertible bonds, saving her two businesses from trouble. Her younger brother Tommy was also notorious for taking loans that were never to be paid back. He, along with a business partner, bought Sempati Airlines in the 1980s as a form of competition for Garuda Airlines.²⁶⁰ In their attempt to cut costs they stopped paying for the jet fuel that came from the state-owned oil company Pertamina.²⁶¹ They also tried to cut their costs by not paying landing fees and the catering costs. Garuda decided to follow suit and this led to much hardship for Pertamina.²⁶²

Tommy was a man of expensive taste and his failed business exploits led him to borrow a staggering 1.3 billion US dollars, which was never paid back.²⁶³ State banks were often forced into a corner and had no choice but to give the Suharto's the money. This eventually led to the government borrowing more money from the World Bank, which also ended up amongst the Suhartos.²⁶⁴ At this point the

²⁵⁹ Baker (2005:70).

²⁶⁰ Baker (2005:71).

²⁶¹ Baker (2005:71).

²⁶² Baker (2005:71).

²⁶³ Baker (2005:72).

²⁶⁴ Baker (2005:72).

country's economy was in tatters, with the Suhartos in control of 16.6 percent of the Indonesian market.²⁶⁵

Suharto himself was on good terms with Western multinational companies and he benefitted greatly from their business in Indonesia.²⁶⁶ Other industries controlled by Suhartos's people included sugar factories, imported Chinese medicines, oil products, paper used to print money, military equipment, and more. Suharto pocketed millions of dollars from all of these businesses.²⁶⁷

This corruption trickled down into other parts of society, including the military and the civil service.²⁶⁸ Suharto single-handedly destroyed the Indonesian economy and deprived the people of their basic needs. He has been called the '*grand Slam of all despots*'²⁶⁹ for his human rights abuses, corruption and theft.

Suharto was notorious for his human rights abuses. The Indonesian people suffered under strict media censorship, limited freedom of association, and torture.²⁷⁰ Under his rule the Indonesian society was politically and socially dominated by the military.²⁷¹ Political opposition was suppressed and those who resisted either disappeared, were tortured, beaten, or simply arrested and detained without trial.²⁷² His ambitions regarding the former Indonesian colony of East Timor, resulted in the army annexing East Timor and subsequently shooting and beating 270 pro-independence protesters.²⁷³ These are but a few examples of Suharto's human

²⁶⁵ Baker (2005:73).

²⁶⁶ Baker (2005:69).

²⁶⁷ Baker (2005:69).

²⁶⁸ Baker (2005:74).

²⁶⁹ Baker (2005:76).

²⁷⁰ Human Rights Watch (2010).

²⁷¹ Human Rights Watch (2010).

²⁷² Human Rights Watch (2010).

²⁷³ Human Rights Watch (2010)

rights violations that were linked to his corrupt and greedy nature.

4.5 Living in a corruption-free society: a fundamental right

Ndiva Kofele-Kale writes about the fact that human beings have the right to live in a corruption-free society.²⁷⁴ His argument is that human dignity, life and other important inalienable rights depend on the right to live in a corruption-free society.²⁷⁵

If individuals do not live in a corruption-free society then other rights are automatically placed in jeopardy. He states that the inherent right to economic self-determination, as stated in Common Article 1²⁷⁶ of the International Covenant on Civil and Political Rights,²⁷⁷ and the International Covenant on Economic, Social and Cultural Rights,²⁷⁸ is threatened by corruption.

Kofele-Kale is of the opinion that the right to a corruption-free society is very closely linked to the collective right to development.²⁷⁹ It is clear that corruption stunts development and does indeed result in the deprivation of socio-economic rights in every situation. Amartya Sen,²⁸⁰ a Nobel Laureate, writes that economic development is '*a process of expanding the real freedoms that people enjoy*'.²⁸¹

²⁷⁴ Kofele-Kale (2000:163).

²⁷⁵ Kofele-Kale (2000:163).

²⁷⁶ '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

²⁷⁷ Adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976.

²⁷⁸ Adopted by the United Nations General Assembly on December 16, 1966, and in force from January 3, 1976.

²⁷⁹ Kofele-Kale (2000:165).

²⁸⁰ Sen (2001:3).

²⁸¹ Sen (2001:3).

Hence economic development is hinged on the removal of things that threaten these freedoms. Such things include tyranny, poverty and most importantly, corruption.

Adding to the problem is the fact that the corrupt individuals go unpunished due to the inefficiency of domestic courts. Prosecutions of corrupt actors are rare and sadly dependent on the political situation at the time. The major culprits, presidents and heads of states, are often let off the hook as they flee to safe havens, whilst smaller officials are targeted.²⁸² Corruption is an issue that needs to be tackled from the top down, and most domestic courts are unable to do this.²⁸³ The corruption trial of Frederick Chiluba²⁸⁴ is a classic example of the difficulty faced by national courts.

In 2002, Chiluba's immunity from prosecution was overturned by the Zambian Parliament, and his trial on allegations of corruption and abuse of office commenced. Chiluba, his Intelligence Chief, Chungu, other ministers and senior officials were charged with 168 counts of theft and corruption.²⁸⁵ The prosecution alleged that during his rule Chiluba had fostered a culture of corruption that led to the misplacement of some four million US dollars.²⁸⁶ Two of the accused, Chungu and the Zambian Ambassador to the United States of America, Shansonga, fled before the trial commenced.²⁸⁷ After seven years of trial, Chiluba himself was eventually acquitted on all charges, under very suspicious circumstances.²⁸⁸

Suharto of Indonesia is another leader who was never successfully tried for

²⁸² Kofele-Kale (2000:175).

²⁸³ Kofele-Kale (2000:175).

²⁸⁴ Former President of Zambia 1991-2002.

²⁸⁵ Kofele-Kale (2006:712).

²⁸⁶ Kofele-Kale (2006:712).

²⁸⁷ Kofele-Kale (2006:712).

²⁸⁸ All Africa news (2010).

corruption. The former Indonesian president was charged with embezzling 400 million US dollars²⁸⁹ through maladministration of charity funds. Suharto is listed as one the most corrupt leaders of the 20th century, according to Transparency International. He is believed to have been responsible for an estimated 35 billion US dollars that went missing in Indonesia.²⁹⁰ His estimated wealth in the year 2000 was 45 million US dollars which was enough money to cover Indonesia's national debt at that time.²⁹¹ Despite these alarming figures his trial was stopped as he was declared unfit to stand trial.

It is clear that corruption fits into a broader, complex, political picture that exposes the gap between developed and developing nations, especially since so many western-based multinational corporations are heavily involved in corruption. Corruption also leads to other crimes, like money laundering, hence more should be done to address the matter. Hinterseer²⁹² writes about the strong link between corruption and money laundering and according to him, government officials often engage in money laundering with the proceeds of corruption.²⁹³ Money laundering is a common feature of regimes that engage in human rights abuses, corruption, bribery and extortion. Among the guilty are Sese Seko, Abacha, and Marcos (from the Philippines).²⁹⁴ As corruption increases, so too do other crimes like money laundering. To curb this rapid increase of chaos, serious consideration should be given to making corruption a crime against humanity.

²⁸⁹ BBC news (2010).

²⁹⁰ BBC news (2010).

²⁹¹ BBC news (2010).

²⁹² Hinterseer (2002:61).

²⁹³ Hinterseer (2002:61).

²⁹⁴ Hinterseer (2002:61).

This paper is an investigation into the possibility of making corruption a crime against humanity and as such, it must deal with the other side of the investigation. In order to produce a balanced view, one must canvass the concerns about such a step. The next chapter will raise and address those concerns.

CHAPTER FIVE: CONCLUSION

This matter is not one-sided, and as an introduction to the conclusion, the concerns regarding making a corruption a crime against humanity will be discussed.

5.1. Concerns

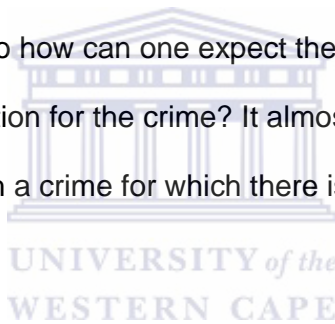
There are some obvious concerns about the prospect of making corruption a crime against humanity.

The first issue is that when a crime is made a crime against humanity it automatically falls under the jurisdiction of the International Criminal Court (ICC). Given the gravity and the nature of the crimes dealt with by the ICC one would be adding to the burden of the Court with matters that should be dealt with exclusively at a domestic level.

The second concern is how will the corruption, as a crime, be structured and at what level will the people be held accountable. Does one take the office clerk who accepted a small bribe in exchange for expeditious administration to the ICC for

corruption as a crime against humanity, or will one only go for the big fish, for example presidents? Where would the line be drawn and how long would it take to iron out these fine details? Given the nature of the crime of corruption and the many forms it takes, one also runs the risk of creating a *lex simulate*.²⁹⁵ Already in anti-corruption conventions and protocols we see laws that are barely enforced, and incorporating anti-corruption legislation into the Rome Statute may not change this.

Corruption is not as easily defined and delimited as the other crimes that fall under the jurisdiction of the ICC. As stated above,²⁹⁶ there is no universally accepted definition for corruption and so how can one expect the ICC to hear matters on corruption if there is no definition for the crime? It almost seems like a bridge too far to expect the ICC to work with a crime for which there is no concrete, universally accepted definition.



Crimes against humanity are very well structured in the ICC statute and it would be an erosion of the concept to add a crime that has no precise detailed structure. May calls the structure of crimes against humanity '*uncontroversial*'²⁹⁷ and he rightly notes that the concept has come a long way. It would therefore be a pity to taint the concept with uncertainty.

The prosecution of those who are accused of corruption will involve the collection of large amounts of evidence, which will obviously depend on the cooperation of the accused's country. Hans Peter Kaul²⁹⁸ writes²⁹⁹ that the ICC already faces many

²⁹⁵ This term refers to the creation of laws that are never enforced or implemented.

²⁹⁶ Chapter two.

²⁹⁷ May (2005:119).

²⁹⁸ Judge of the International Criminal Court and President of the Pre-Trial Division. He

limitations and one of those is the heavy dependence on effective criminal cooperation, which is not always forthcoming. Also, some regions where investigation is necessary are remote, and unsafe. In addition, the limited financial resources continue to make the Courts' work difficult.³⁰⁰

Evidence of corruption is particularly difficult to collect as the only evidence is a paper trail. Whereas with Genocide, War crimes and other crimes against humanity there are bodies, weapons and other forms of evidence that make securing a conviction easier.

The role that the law can play in the fight against corruption is limited as corruption needs to be tackled at social, economic and political levels. This means that making corruption an international crime against humanity would not necessarily rid the world of corruption. At the end of the day, political will often stands in the way of the ICC, in the way of justice, and hinders the fight against corruption.

Despite these potential challenges, the idea of making corruption a crime against humanity should not be rejected. The matter is one that deserves careful consideration, but a move towards making corruption a crime against humanity should be made. The first step to making corruption a crime against humanity is to agree on a definition that is legally sound and practically applicable. With that in place the idea of making corruption a crime against humanity is automatically palatable. In the event that corruption cannot be defined then the matter should be handled in the same way that the ICC has handled the crime of aggression.

Aggression has remained under discussion in the ICC for many years, and progress

headed the German ICC delegation of the German Federal Foreign Office from 1996 to 2003 before becoming the Court's first German judge in February 2003.

²⁹⁹ Kaul (2007:578).

³⁰⁰ Kaul (2007:578).

continues to be made. The handling of the crime of aggression is a prime of example of how, with time, anything is possible. With unified efforts and engagement on the matter, corruption could realistically become a part of the ICC as a crime against humanity. This will be a long term project that will require effort from all quarters.

Corruption is a hideous crime that cripples societies and kills social progress.

Corrupt practices are a violation of the social contract and an affront to the ideas of sharing and common courtesy. This kind of disregard for fellow human beings cannot go unpunished. Hence, with an effective link between corruption and crimes against humanity, offenders can be punished accordingly. Admittedly, creating the correct legal framework for corruption as a crime against humanity could take many years, but it is definitely worth the effort. The international conventions in place are a stepping stone but more must be done.

At the heart of this matter is the notion that the consequences of corruption are the same as the consequences of crimes against humanity. To effectively alleviate the suffering of the innocent, to prevent corruption and to see justice being done, one must make corruption a crime against humanity.

The idea of making corruption a crime against humanity warrants an attempt to put a framework in place. It should be noted that the purpose of this paper was merely to determine whether corruption should be a crime against humanity, and hence developing a comprehensive and thorough method of implementation is out of the scope of this paper. Having said that, I propose building onto UNCAC and incorporating it into the Rome Statute under crimes against humanity. From there, the scope of application should be deciphered, for example only perpetrators of grand corruption should be brought before the ICC. This should include high ranking

officials and heads of state. Companies guilty of corruption, should also be hauled before the courts as their corrupt practices have serious consequences. The exact requirements of a crime against humanity should be met and following a conviction, punishment should be imposed. In addition to this, the stolen assets should be returned to the people who were betrayed and robbed by their leaders. This means applying UNCAC's assets recovery procedure. The combining of UNCAC and the ICC Statute can be done and should be done if corruption is ever to be overcome.

LIST OF REFERENCES

PRIMARY SOURCES

Case Law

Prosecutor v. Bemba Gombo, ICC (pre- trial Chamber) decision of 10 June 2008

Prosecutor V Blaskic ICTY (Appeals Chamber), judgement of 29 July 2004

Prosecutor v. Harun and Kushayb, ICC (pre-trial chamber) decision of 27 April 2007,
Para 62;

Prosecutor v. Tadic ICTY (Appeals Chamber), judgement of 31 January 2000 Para
14

Prosecutor v. Tadic ICTY (trial Chamber), judgement of 7 May 1997, Para 653

Legislation



The Economic Community of West African States Protocol on the Fight against Corruption adopted on 21 December 2001 and will enter into force upon ratification by at least 9 member states

The Council of Europe: Civil Law Convention on Corruption adopted on 4 November 1999 and it entered into force on 1 November 2003

The Council of the European Union: Convention on the Fight against Corruption involving Officials of the European Communities or officials Member States of the European Union adopted on 26 May 1997 and entered into force on 28 September 2005

The Council of the European Union: Convention on the Protection of the European Communities' Financial Interests adopted on 26 July 1995, and entered into force on 17 October 2002



The Council of Europe: Criminal Law Convention on Corruption adopted on 27 January 1999 and it entered into force on 1 July 2002

The Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002

The Southern African Development Community Protocol against Corruption adopted on 14 August 2001, and it entered into force on 6 July 2005

The United Nations Convention on Corruption adopted 31 October 2003 by the General Assembly (came into force on 14 December 2005. Resolution 58/4)

SECONDARY SOURCES

Books

Baker R *Capitalisms Achilles Heel-Dirty Money and how to renew the free- market system* 2005 John Wiley and Sons Inc, Canada

Blundo G , Oliver JP, Arifari N B, Alou M T *Everyday Corruption and the State Citizens and Public officials in Africa.* 2006 Zed Books, Great Britain

Heffernan W, Kleinig J (eds) *Private and Public Corruption* 2004 Rowman and Littlefield Publishers, United States of America

Heidenheimer A.J and Johnstone M (eds) *Political corruption: concepts and contexts* 2002 Transaction Publishers, New Jersey

Hintenseer K *Criminal Finance The Political Economy of Money Laundering in a comparative context.* 2002 Kluwer Law International, The Hague Netherlands

Hope KR, Chikulo B (Eds) *Corruption and Development in Africa Lessons from country case studies* 2002 Palgrave Publishers, United States of America

May L *Crimes against Humanity: A Normative Approach* 2005 Cambridge University Press, United States of America

Peters R *Hobbes* 1956 Penguin Books, Great Britain

Raphael D *Hobbes Morals and Politics* 1977 Alden Press, Great Britain

Shihata I 'Corruption- a general review with emphasis on the role of the World Bank' in Rider B *Corruption: The Enemy Within* 1997 255-283 Kluwer International Law, The Hague

Rose-Ackerman S *Corruption and Government Causes, Consequences and Reform* 1999 Cambridge University Press, United States of America

Rose-Ackerman S *When is corruption harmful?*, found in Heidenheimer and Johnstone (eds), *Political Corruption Concepts and Contexts* 1997 351-371 Transaction Publishers ,New Jersey United States of America

Sampford C, Shacklock A, Connors C, Galtung F (Eds) *Measuring Corruption* 2006 Ashgate Publishers, Great Britain

Sen A *Development as Freedom* 2001 Oxford University Press, Oxford

Snyman CR *Criminal Law* 5th edition 2008 Lexis Nexus, South Africa

Werle *Principles of International Criminal Law* 2nd Edition 2009 TMC Asser press, The Hague Netherlands

Journal Articles

Bantekas I 2006 'Corruption as an international Crime and a crime against humanity' *Journal of International Criminal Justice*, vol 4 Issue 3 446-484

Carr I 2007 'Fighting Corruption through Regional and International Conventions: A satisfactory solution?' *European Journal of Crime, Criminal Law and Criminal Justice*, vol 15 121-153

Carr I 2006 'The United Nations Convention on Corruption: Making a real difference to the quality of life of millions?' *Manchester Journal of International Economic Law*, vol 3 3-44

Chinhamo and Shumba 2007 'Institutional working definition of corruption' *Anti-Corruption Southern Africa Working Paper Series ACT/1/2007/WPS*

Kodi M 2008 'Corruption and Governance in the DRC: During the Transition Period 2003-2006' *Institute of Security Studies Monograph Series No 148*

Kofele Kale N 2000 'The Right to a corruption-free society as an individual and collective Human Right: Elevation official corruption to a crime under international law' *International Lawyer*, vol 34 149-177

Kofele Kale N 2006 'Change or the illusion of change : the war against official corruption in Africa' *George Washington International Law Review*, vol 38 697-747

Meny Y 1996 'fin de siècle, Corruption: Change, Crisis and Shifting Values' *International Social Science Journal*, vol 48 no 3 309-320

Moran J 2001 'Democratic transitions and forms of corruption' *Crime. law and Social Change*, vol 36 379-393

Phillip M 1997 'Defining political corruption' *Political Studies* vol 45, 436-462

Snider TR and Kidane W 2007 'Combating corruption through International Law in Africa: A Comparative Analysis' *Cornell International Law Journal*, vol 40 691-784

Webb P 2005 'The United Nations Convention against Corruption Global Achievement or Missed Opportunity' *Journal of International Economic Law*, vol 8 191-230

Williams JW and Beare 1999 'The Business of Bribery: globalization, economic liberalization and the "problem" of corruption' *Crime, Law and Social Change*, vol 32 115-146

Websites

All Africa news

<http://allafrica.com/stories/200908180166.html> accessed 26 August 2010



BBC news

<http://news.bbc.co.uk/2/hi/business/7130315.stm> accessed 22 September 2010

BBC news

<http://news.bbc.co.uk/2/hi/asia-pacific/864099.stm> accessed 26 August 2010

Transparency International

<http://blog.transparency.org/2009/11/17/cpi2009/> accessed 16 July 2010

Boston News

http://www.boston.com/news/world/africa/articles/2004/12/17/corruption_costs_nigeria_40_percent_of_oil_wealth_official_says/ accessed 12 July 2010

Complete Statement by Ken Saro Wiwa to the Ogoni Civil Disturbances Tribunal

<http://www.ratical.org/corporations/KSWstmt.html> accessed 19 July 2010

Human Rights Watch

<http://www.hrw.org/english/docs/2008/01/27/indone17892.htm> accessed 22

September 2010

Internet Encyclopaedia of Philosophy Social Contract Theory

<http://www.iep.utm.edu/soc-cont/#SH2a> accessed on 24 July 2010

Law of War

<http://www.lawofwar.org/Tokyo%20Nurembueg%20article.htm> accessed 14 July

2010

The Need for Nigeria to seek Advisory Services and Technical Assistance in the field
of Human Rights

<http://www.jha.ac/articles/a055.htm> accessed 19 July 2010



Remember Saro Wiwa

<http://remembersarowiwa.com/> accessed 18 March 2010

Report of the Fact-Finding Mission of the Secretary General

<http://www.h-net.org/~africa/sources/unreport.htm> accessed 19 July 2010

Social Science Research Network

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891898 Babu accessed 29

September 2010

Solidarity, Mobutu's Loot and the DRC's Debt

<http://www.solidarity-us.org/current/node/2186> accessed 29 July 2010

Swiss Info Channel, Switzerland forced to unfreeze Mobutu's assets

[http://www.swissinfo.ch/eng/politics/foreign_affairs/Switzerland forced to unfreeze Mobutu assets.html?cid=986866](http://www.swissinfo.ch/eng/politics/foreign_affairs/Switzerland_forced_to_unfreeze_Mobutu_assets.html?cid=986866) accessed 22 September 2010

Transparency International

http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac accessed 29 September 2010

Transparency International

http://www.transparency.org/news_room/faq/corruption_faq accessed 16 March 2010



United Nations Global Compact www.unglobalcompact.org/docs/issues_doc/7.7/case.../BAC_1A.2.pdf accessed 30 September 2010

United Nations Office on Drugs and Crime

<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> accessed 20 June 2010.

Wiwa against Shell

<http://wiwavshell.org/wiwa-v-shell-victory-settlement/> accessed 18 March 2010.

The ZimEye Zimbabwe: Repressive Public Order and Security Act to be amended

<http://www.zimeye.org/?p=13233> accessed 27 September 2010



UNIVERSITY *of the*
WESTERN CAPE