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Combating Corruption Effectively?

The Role of the African Court of Justice and Human Rights

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THE CHALLENGE

The object of this chapter is to explore critically the potential effectiveness of the International Criminal Law Section of the African Court of Justice and Human Rights (the Court) in dealing with the crime of 'Corruption'. Given their close connection, the chapter also considers another crime within the jurisdiction of the Court, namely 'Money Laundering'.[1]

In many ways, corruption is the most significant of the crimes within the jurisdiction of the Court. Its importance lies in the fact that it is a continent-wide phenomenon which constantly affects millions of people. In their daily lives, ordinary people face petty corruption, including the payment of bribes to public officials for services they are entitled to obtain free of charge. They are also the victims of 'grand corruption' where senior public officials illegally acquire massive personal wealth. This comprises two main activities: (i) the receipt of bribe payments directly or through intermediaries; and (ii) the embezzlement and misappropriation of state assets. As a result billions of dollars have been stolen by African leaders and laundered around the world with disastrous economic consequences for the victim states and their citizens.

Not surprisingly, numerous studies have indicated that corruption is one of the main concerns of people in African states. For example, a 2016 survey by the Pew Research Centre found that broad majorities of people in Nigeria, Kenya and South Africa named government corruption as a major and continuing problem.[2]

[1] In fact the corruption-related offences are the only ones to which the money laundering provisions apply.

[2] R. Wike, K. Simmons, M. Vice and C. Bishop *In Key African Nations, Widespread Discontent with Economy, Corruption*, Pew Research Center, November 2016, at 4–5.

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International efforts to combat corruption are not new. As long ago as 1975 the United Nations General Assembly (UNGA) adopted Resolution 3514 which condemned all corrupt practices, including bribery. This was followed by the UNGA Declaration against Corruption and Bribery in International Commercial Transactions.[3] Then in Resolution 55/61 of 4 December 2000, the UNGA noted the need for a specific legal instrument against corruption and this resulted in the adoption of the United Nations Convention against Corruption (UNCAC) which came into force on 14 December 2005. The vast majority of African states are parties to the UNCAC. The African Union Convention on Preventing and Combating Corruption (the AU Anti-Corruption Convention) was adopted in July 2003 and entered into force on 5 August 2006.[4] Forty of the fifty-five AU members have ratified the Convention.[5] Both Conventions require States Parties to criminalise a series of corruption-related offences and to enact provisions facilitating the recovery of the stolen assets. In addition, each African State is a member of the Financial Action Task Force (FATF) 'family'[6] and is required to implement the anti-money laundering requirements set out in the 2012 FATF Recommendations, including enacting money laundering offences.

The result is that most African states have in place national laws criminalising a range of corruption and money laundering offences and providing for the recovery of stolen assets. In addition, many have established anti-corruption institutions with a mandate to prevent and/or to investigate and prosecute corruption.

Yet despite this activity, there have been very few (and even fewer successful) prosecutions of senior public officials in national courts. This raises the question as to why national anti-corruption laws and institutions have seemingly proved ineffective. This is important as it will help assess the prospects of

[3] UNGA Resolution 51/91 of 16 December 1996.

[4] The Southern African Development Community (SADC) Protocol Against Corruption was signed in August 2001. This has similar provisions to the AU Convention. The ECOWAS Protocol of the Fight Against Corruption has yet to come into operation. For an analysis of the Conventions see C. Nicholls, T. Daniel, A. Bacarese and J. Hatchard, *Corruption and Misuse of Public Office* (3rd edn., Oxford, Oxford University Press, 2017) chapters 15, 16 and 19.

[5] As at 20 October 2018. There are some key omissions. For example, Equatorial Guinea is not a party to either the UNCAC or the AU Convention. This is particularly ironic given the involvement of the Second Vice-President, Teodoro Obiang in grand corruption (Section Part 4 below) and the fact that the amendment to the Protocol was signed in Malabo, the capital of Equatorial Guinea.

[6] I.e. either a member of FATF itself or a member of a FATF-style regional body. Equatorial Guinea is a member of the regional body *Groupe d'Action contre le blanchiment d'Argent en Afrique Centrale* (GABAC).

the Court in making a meaningful contribution to prosecuting corruption and related money laundering.

The answer lies in the fact that those seeking to combat grand corruption must confront the most powerful and influential individuals in any society for those taking (or benefitting from) the bribes or looting state assets are those who hold political power (or have access thereto). Why else would the bribe be paid? Who otherwise could authorise the looting? It is also these same individuals who 'control the controls'.[7] For example, some senior state officials enjoy unique political influence and control over the criminal justice system. This enables them to ensure that corruption and money laundering-related investigations and/or prosecutions do not proceed, at least without their approval.[8] This control may also extend to influencing members of the judiciary in the manner in which they deal with such cases.[9] Given the importance of international cooperation in investigating corruption cases with a transnational element, they can also control or prevent mutual legal assistance being provided to other states.[10]

It follows that addressing such challenges requires the development and use of techniques and strategies designed to:

(a) Successfully prosecute those who commit acts of corruption; and
(b) Take the profit out of corruption through either the forfeiture of the proceeds of crime and/or the payment of compensation to the people of the victim state.

These are very ambitious aims yet, in practice, some important steps are being taken to address them.[11] This raises the question as to whether, and if so to what extent, the Court can make a meaningful and effective contribution to supporting these aims.

[7] Some of these are explored in J. Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham: Edward Elgar, 2014), at 279–82.

[8] This is fully explored in Hatchard, ibid., at 151–61.

[9] See, for example, the Chiluba case noted in Section 4 below. For another disturbing example see the report of the International Legal Assistance Consortium *Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya* (2010), available online at www.ilac.se/2010/04/20/ilac-and-ibahri-calls-for-radical-reform-of-kenya%E2%80%99s-justice-system-in-major-report/ (visited 30 November 2016) at 31.

[10] For an interesting example see the decision of the Court of Appeal of Kenya in *KACC v First Mercantile Securities Corp* [2010] eKLR: available online at http://kenyalaw.org/Downloads_FreeCases/76031.pdf (visited 30 November 2016).

[11] For example, see the Obiang case discussed in Section 4 of this chapter.

The chapter is divided into five sections: Section 1 explores the scope of the corruption offences themselves whilst Section 2 considers the relevant provisions relating to investigations, sentences and asset recovery. Section 3 reviews the limitations on the jurisdiction of the Court whilst Section 4 provides a series of case studies which explore the potential impact of the Court on combating grand corruption. Finally, Section 5 provides an analysis of the potential effectiveness of the Court in combating corruption and money laundering.

1. THE CORRUPTION OFFENCES

Article 28A(1) of the Statute provides the Court with the power to try persons for the crime of 'Corruption'. The meaning and scope of the word has caused some debate. Today, the best known (and most widely accepted) definition is that of Transparency International i.e. 'the misuse of entrusted power for private gain'.[12] Its multi-faceted nature is emphasised in the SADC Protocol Against Corruption which states that 'corruption' 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'.[13]

This approach is reflected in Article 28I of the Statute which provides no definition of 'corruption' but instead refers to a series of individual 'acts of corruption'. This has the advantage of providing prosecutors with a range of possible alternative charges. For example, bribery is often challenging to prove because of the secrecy surrounding the case and the identity of those involved. On the other hand, the offence of illicit enrichment i.e. where a senior public official or family member has a significant increase in their assets which they cannot reasonably explain in relation to their income, may be easier to prove.[14]

The Article 28I provisions are largely based on those found in the UNCAC and/or the AU Convention, so are likely to be already part of national legislation in many States. A notable addition and potentially serious restriction on the jurisdiction of the Court is that the offences are 'deemed to be acts

[12] See further Transparency International *The Anti-Corruption Plain Language Guide* (2009) which contains a useful set of standardized definitions of key words and phrases. Available online at www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide (visited 29 November 2016).

[13] Article 1.

[14] This constitutes a corruption related offence: see Article 28I(1)(g) and (2). The scope of the offence is discussed below.

of corruption' only if they are of 'a serious nature affecting the stability of a state, region or the Union'.[15] This point is discussed in Section 3 below.

A. *Bribery in the Public Sector*

Article 28I(1)(a) addresses so-called passive bribery and provides that an act of corruption is:

> The solicitation or acceptance, directly or indirectly, by a public official his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.

The act of corruption can be undertaken by a variety of individuals. The term 'public official' is not defined but presumably the intention was to follow the definition provided in Article 1 of the AU Anti-Corruption Convention, i.e.:

> any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy.[16]

This seems wide enough to also encompass members of the military: a particularly significant point given the instances of grand corruption involving senior officers.[17]

Given that the Statute requires the act of corruption to be of a 'serious nature', in practice it is likely that the Court will inevitably focus attention on those in the highest echelons of government and the military. The drafters of the Statute were clearly aware that corruption-related offences often involve others individuals and entities. Thus, unlike the UNCAC and the AU Convention, the Article also specifically extends liability to family members of the public official. Cases such as that involving members of the Abacha family (see Section 4 below), highlight the potential importance of this extended jurisdiction. However, there is no indication as to who is included in the term 'family member'. Here a potentially helpful definition is provided by the FATF i.e.: 'individuals who are related to a

[15] Article 28I(1).
[16] Article 1(1).
[17] For example, the Abacha case discussed in Section 4 below.

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public official either directly (consanguinity) or through marriage or similar (civil) forms of partnership'.[18]

The scope of the term 'any other person' is also not indicated. Here the definition provided by the FATF of a 'close associate' is helpful, i.e.: 'individuals who are closely connected to a public official, either socially or professionally'.[19] This emphasises the 'you can't do it alone' principle i.e. the reality that grand corruption requires the active assistance, willing or otherwise, of other senior public officials and/or influential individuals.[20]

The passive bribery offence consists of 'the solicitation or acceptance of goods of monetary value or other benefit ... in exchange for any act or omission in the performance of [the public official's] public functions'. A 'benefit' is widely defined so as to include a gift, favour (presumably including a sexual favour), promise or advantage.[21] There must also be a causal link between the paying of the bribe and the action or failure to act on the part of the public official. The benefit can be for the public official or for any other person or entity. This reflects the reality that bribe payments are often paid to third parties. This includes through the use of off-shore companies and trusts which allow the bribe-taker to conceal their beneficial ownership and control of the proceeds of corruption.

Article 28(I)1(b) addresses active bribery i.e.

> The offering or granting, directly or indirectly, to a public official, his/[her][22] family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.

Here the offering or granting of the corrupt payment must be for the benefit of another person or entity. The inclusion of an 'entity' is potentially of considerable importance owing to the continued problem of combating the bribery of

[18] See FATF Guidance Paper *Politically Exposed Persons (Recommendations 12 and 22)* (2013), available online at www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf (visited 29 November 2016), at 5. There is some confusion here in that Article 28N extends liability for corruption offences to any person who 'Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute'. Further, an offence is also committed by any person who aids or abets the commission of any of the offences; is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences or attempts to commit any of the offences.

[19] Ibid.

[20] See, for example, the Chiluba case noted in Section 4 below.

[21] The meaning of 'advantage' is discussed below.

[22] The word is omitted in the text of the Statute.

public officials by corporate entities. Several international efforts seek to address this problem, albeit with limited success. Thus the OECD Anti-Bribery Convention[23] requires Parties to criminalise the bribery of foreign public officials. Whilst all have done so, there remains a marked reluctance on the part of many of them to prosecute the bribe-payers.[24] On rare occasions, prosecutions in victim states have led to the conviction of some foreign companies for bribery. For example, Acres International (a Canadian company) and Lahmeyer International (a German company) were both convicted in the Lesotho High Court of bribery in connection with the obtaining of contracts for the Lesotho Highlands Water project.[25]

Given that Article 46C provides that the Court has jurisdiction over legal persons, there is seemingly no reason why a foreign company cannot be subject to prosecution for bribery. However, to what extent this may constitute an additional deterrent to undertaking such activity is questionable. In practice, it is the threat of prosecution/conviction and possible subsequent debarment that has led to even the most powerful companies agreeing to settlements with prosecutors in which they agree to pay a fine in exchange for either a conviction for a non–corruption related offence or an agreement not to prosecute.[26]

B. *Bribery in the Private Sector*

Article 28I(1)(e) provides that an act of corruption is:

> The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works

[23] The Organization for Economic Cooperation and Development *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* came into force on 15 February 1999. The 41 parties to the Convention are involved in some two-thirds of world exports and almost 90 per cent of total foreign direct investment outflows. South Africa is the only African state to be party to the Convention. Article 16 of the UNCAC also requires States Parties to establish as a criminal offence the bribery of foreign public officials and officials of public international organizations.

[24] For example, in 2015 there was 'Active enforcement' in only four convention countries, i.e. Germany, Switzerland, the United Kingdom and the United States: Transparency International *Exporting Corruption, Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery* (2015) available online at www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd (visited 28 November 2016), at 4.

[25] See Hatchard, *supra* note 8, at 251–4.

[26] See J. Hatchard, 'Combating the Bribery of Foreign Public Officials and the "Art of Persuasion": The Case of Alstom and the Energy Sector' 28 *Denning Law Journal* (2016) 109–37, at 121 et seq. Available online at www.ubplj.org/index.php/dlj/article/view/1278 (visited 29 November 2016).

> for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.

In contrast to the bribery provisions regarding the public sector, this provision combines both active and passive bribery. It also refers to any 'undue advantage' rather than a 'benefit': a phrase that also appears in the trading in influence provision in Article 28I(1)(f). The term is not defined but it appears in several other anti-corruption instruments, including the UNCAC and Council of Europe Criminal Law Convention on Corruption[27] albeit without any definition. However both the Legislative Guide to the UNCAC[28] (the Legislative Guide) and the Explanatory Report on the Criminal Law Convention on Corruption (the CoE Explanatory Report),[29] provide some assistance as to its meaning. The Legislative Guide indicates that an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary and that it does not have to be given immediately or directly to the official. However, the undue advantage or bribe must be linked to the official's duties.[30]

The CoE Explanatory Report also notes that the:

> undue advantage will generally be of an economic nature, the essence of the offence being that a person is, or would be, placed in a better position than that prior to the offence and that the official was not entitled to the benefit. Such advantages might consist of, for example, holidays, loans, food and drink, or better career prospects.[31]

The Report also suggests that the word 'undue' should be interpreted as something that 'the recipient is not lawfully entitled to accept or receive'. It adds that '[f]or the drafters of the Convention, the adjective 'undue' aims at excluding advantages permitted by the law or administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts'.[32]

It is not clear as to why Article 28I does not adopt a consistent terminology in respect of a key element of the offences. However, in essence, there is seemingly considerable overlap between both approaches.

[27] Articles 21 and 7, respectively.
[28] UNODC *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* New York, 2006.
[29] Council of Europe, *Explanatory Report on the Criminal Law Convention on Corruption*, Strasbourg, 27 January 1999.
[30] Ibid., § 196 et seq.
[31] CoE Explanatory Report, § 37.
[32] Ibid., § 38.

Curiously, there is no indication as to the requisite mens rea for the bribery offences. Other international anti-corruption instruments require proof that the act was 'committed intentionally' and arguably the Court should follow this lead.[33]

As regards corporate criminal liability, Article 46C provides that:

> Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence [and that] a policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

It adds that corporate knowledge of the commission of the offence 'may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation'.

C. *Abuse of Functions*

Article 28I(1)(c) addresses the offence of the abuse of functions in the following terms:

> Any act or omission in the discharge of his or her duties by a public official, his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party.

The Article is taken verbatim from the AU Convention. It is essentially a 'quality control' provision that addresses a serious breach of duty or abuse of functions where the act or omission goes beyond the need for mere disciplinary action against a public official. Such a provision is potentially extremely useful in that it can encompass a range of 'misconduct in public office' scenarios. For example where a public official awards a lucrative government contract to a company of which s/he is a secret beneficiary; or arranges for the sale of government land to a company owned or controlled by his/her family at a price far below the market value; or the improper disclosure by a public or private sector official of classified or privileged information.[34]

[33] Note that Article 46B(3) which makes clear that any offence committed by a subordinate 'does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'.

[34] For a detailed analysis of this offence see J. Hatchard, 'Combating Corruption: Some Reflections on the Use of the Offence and the Tort of Misconduct/Misfeasance in a Public Office' 24 *Denning Law Journal* (2012) 65–88.

Unlike the bribery provisions, the Article refers to a benefit being for the public official or a 'third party'.[35] Presumably this term is intended to have the same meaning as 'for another person or entity' and it is surprising that once again the drafters did not adopt a uniform approach.

D. *Trading in Influence*

Article 28I(1)(f) provides for the offence of trading in influence in the following terms:

> The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.[36]

The elements of the offence are essentially the same as the private sector bribery provisions save for the fact that it involves the use of real or supposed influence in order to obtain an undue advantage for a third person from performing functions in the public or private sector. As paragraph 64 of the CoE Explanatory Report puts it:

> Criminalizing trading in influence seeks to reach the close circle of the official … to which s/he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption.

Thus, unlike bribery, the influence peddlers are 'outsiders' who cannot take decisions themselves but misuse their real or alleged influence on other persons. Here family members of the official are the obvious 'peddlers' in this respect.

The exercise in influence, whether successful or otherwise, must be in consideration of an undue advantage[37] whilst the improper influence applies to the decision making of any person performing functions in either the public or private sectors.

[35] The term is also used in respect of the diversion of property offence in Article 28I(1)(d).
[36] This provision is taken directly from the AU Convention, Article 4(1)(e).
[37] See the earlier discussion on the meaning of this term.

E. *Illicit Enrichment*

Article 28I(1)(g) provides that 'Illicit enrichment' is an act of corruption. For the purposes of the Statute this means:

> the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.[38]

Extending the scope of the offence to 'any other person' presumably is meant to include family members or persons associated with a public official or even to a company owned or controlled by that public official. This is a sensible step in that it reflects the reality that bribes are often paid to such persons.

The wording suggests that once the prosecution has proved that the accused has enjoyed a 'significant increase' in his/her assets, the legal burden rests on that person to provide a reasonable explanation to the court as to how the assets were acquired or otherwise face conviction. Given the challenges of prosecuting corruption successfully, such an approach has much value.

However, such a provision affects the presumption of innocence enshrined in fair trial provisions in the African Charter on Human and Peoples' Rights.[39] Further, Article 46A provides for the 'Rights of the Accused' and specifically states that 'The accused shall be presumed innocent until proven guilty according to the provisions of this Statute'. It may therefore be necessary to read down the provision so as to place the evidentiary rather than a legal burden on the accused.[40]

F. *Diversion of State Assets*

The history of the looting of state funds by leaders and their families makes Article 28I(1)(d) of particular significance. This crime is defined as follows:

[38] This reflects the definition on Article 1(1) of the AU Convention.

[39] Although in the view of the European Court of Human Rights: 'It is not contrary to the European Convention for national legislation to relieve the prosecution of the obligation to prove certain facts by proving a set of other related facts, creating a presumption of fact against the accused.' X *v UK* Application No 5124/71, Collection of Decisions, ECHR, July 1972, 135. See also the views of the Court of Appeal of Hong Kong in *Attorney General v Hui Kin-hong* [1995] 1 HKCLR 227.

[40] See L. Muzila, M. Morales, M. Mathias, and T. Berger, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, World Bank 2012, available at https://star.worldbank.org/star/sites/star/files/on_the_take-_criminalizing_illicit_enrichment_to_fight_corruption.pdf (visited 29 November 2016), at 25 et seq.

> The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position.

Such an offence covers a wide range of activities including fraud, obtaining by deception, embezzlement and theft by public servant.

G. *Money Laundering*

Article 28A provides that the Court has the power to try persons for the crime of money laundering. Article 28I *bis* divides money laundering into three stages:[41]

(i) The placement stage: i.e. the 'Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action';
(ii) The layering stage: i.e. the 'Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences. . .'; and
(iii) The integration stage: i.e. the 'Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences'.

Whilst a separate offence for the purposes of the Statute, the Article applies only to the predicate offence of 'corruption'.[42] Addressing the link between corruption and money laundering is now seen as an international imperative.[43] All African States are part of the FATF 'family' either as members of the main body or of a FATF-style regional body. In 2012, the

[41] This provision is taken from Article 6 of the AU Convention.
[42] This is a curious limitation given that several of the other Article 28A crimes also almost invariably involve money laundering: for example, the three trafficking offences.
[43] See, for example, the FATF Report *Laundering the Proceeds of Corruption* (Paris, 2011) which provides a helpful analysis of the most common methods used to launder the proceeds of grand corruption: see, in particular 16 et seq. Available online at www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf (visited 29 November 2016).

FATF *Recommendations* were published[44] which set out the framework for anti-money laundering efforts and which are of universal application. They provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and international cooperation. In particular they require all states to implement a series of anti-money laundering measures including putting in place effective criminal laws.[45] A rigorous system of peer review has ensured that most African states have the required legislation in place. This means that any state through which the proceeds of corruption are laundered has the power to prosecute the launderers.

2. INVESTIGATIONS, SENTENCES AND ASSET RECOVERY

A. *Evidence Gathering*

Investigations into grand corruption cases, the laundering of the proceeds of crime and their recovery will almost inevitably require assistance from both the victim state and other states both within and outside of Africa. Article 46L (1) therefore requires States Parties to 'co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute'.

The secrecy surrounding such offences together with the power of senior public officials to 'control the controls', means that evidence gathering within the victim state may be extremely challenging. Much may depend upon the assistance (or otherwise) of national anti-corruption commissions and financial forensics and intelligence units.

In addition, whistle-blowers may play a key role in revealing the wrongdoing. This calls for effective protection provisions for those individuals reporting corruption or giving evidence before the Court. Here the introduction of rules providing for the 'non-disclosure or limitations on the disclosure

[44] The *FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*. The Recommendations were updated in October 2016. Available online at www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (visited 30 November 2016).

[45] Recommendation 3 states: 'Countries should criminalise money laundering on the basis of the … Palermo Convention [UNCAC]. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences'. The Glossary to the Recommendations makes it clear that 'For the purposes of assessing compliance with the Recommendations, the word *should* has the same meaning as *must*' (emphasis in the original).

of information concerning the identity of witnesses' might be considered.[46] This will require the Court to perform a difficult balancing act between admitting potentially vital evidence from anonymous witnesses whilst at the same time protecting the right of accused persons to confront their accusers.[47] Whether the Court will be in a position to offer effective protection to individual whistle-blowers is also unclear. The development of 'super-whistle-blowers' as epitomised by the leaking of the Panama Papers, may prove to be a more effective source of information and evidence for the Court.

As regards evidence located outside the victim state, the Court is empowered 'to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose'.[48] Article 46L(2) provides that:

> States Parties shall comply without undue delay with any request for assistance or an order issued by the Court, including but not limited to:
>
> (a) The identification and location of persons;
> (b) The taking of testimony and the production of evidence;
> (c) The service of documents;
> (d) The arrest, detention or extradition of persons;
> (e) The surrender or the transfer of the accused to the Court;
> (f) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

It is surprising that the provision omits specific reference to the power to require the production of relevant documents and records, including government, bank, financial, corporate or business records. Secrecy lies at the heart of corruption and money laundering and documentary evidence of this nature is almost invariably essential to a successful investigation and prosecution.[49]

The lack of clear provisions as to the procedure for obtaining such assistance is a matter of concern. It is essential that investigators have the power to obtain rapidly relevant evidence located in other states (or prevent its destruction) or to seek the freezing of the proceeds of crime before they are moved to another jurisdiction(s). Whilst the Office of the Prosecutor may seek additional information from States and others,[50] the power to make a formal

[46] See, for example UNCAC Article 32(2).
[47] See Article 46A(4)(e).
[48] Article 46L(3).
[49] Compare the equivalent list in Article 46(3) of the UNCAC.
[50] i.e. Organs of the AU or the United Nations, intergovernmental or non-governmental organisations or other reliable sources: see Article 46G(2).

mutual legal assistance request is seemingly only available to the Court under Article 46L. The power of the Office of the Prosecutor to seek mutual legal assistance from the start of an investigation is an absolute necessity.[51]

There is clearly much work to be done on addressing the area of mutual legal assistance especially in relation to corruption and money laundering offences. The very detailed provisions on mutual legal assistance contained in the UNCAC can provide a helpful model here.[52]

B. *Penalties and Asset Recovery*

The Court can impose 'prison sentences and/or pecuniary fines'.[53]

Given that the object of corruption and money laundering is for the offender(s) to enjoy the fruits of their criminality, the power to order the forfeiture of proceeds of crime is attractive. In this respect, Article 43A(5) provides that the Court may also order 'the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State'. This reflects the fact both the UNCAC and AU Convention have strong provisions requiring States Parties to have in place asset recovery mechanisms, with the return of assets being a fundamental principle of the UNCAC.[54]

Article 43A is complemented by Article 45(2) which provides that:

> ... the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims including restitution, compensation and rehabilitation.

A system of conviction-based asset forfeiture is attractive in that offenders are subject to a criminal conviction, face a prison sentence and, as part of their sentence, are also liable to an order for the confiscation of their proceeds of corruption. However such a system is premised on a criminal conviction. In practice, this may not be possible. Setting aside the very real challenges of proving the case to the criminal standard, a prosecution will be impossible

[51] An additional point is that MLA requests in sensitive cases will often require strict confidentiality: something that may not be available if an order of the Court is required. Presumably the Office of the Prosecutor will be in a position to obtain the necessary assistance from forensic accountants and other experts in undertaking what will almost inevitably involve complex financial investigations.

[52] See Article 46.

[53] Article 43A(1) and (2). In imposing sentences and/or penalties, 'the Court should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person'.

[54] Article 51. Chapter V of the Convention is devoted to 'Asset Recovery'.

where the suspect is unavailable (dead, unfit to stand trial, outside the jurisdiction etc.) or subject to the immunity provision.[55]

Given these realities, limiting the Court to a conviction-based asset recovery mechanism is unnecessary and out dated and the provisions in the Statute are likely to prove of little value in practice. The use of non-criminal asset forfeiture is now increasingly common as this allows action to be taken directly against the proceeds of crime without the need for a criminal conviction, thus avoiding the immunity provision in the Statute.[56] In addition, a state may bring a civil action against a wide range of individuals and entities involved in the corruption schemes and/or laundering of the proceeds of crime. This has also proved effective and again such a power might have been provided to the Court.[57] As discussed below, some of those involved in grand corruption cases are now seeking to reach settlements with prosecutors which involve the return of (at least part of) the proceeds of corruption in exchange for an agreement to defer or withdraw a prosecution.[58] Whether this power is available to the Office of the Prosecutor is unclear but it is one which might be usefully explored.

3. LIMITATIONS ON THE JURISDICTION OF THE COURT

There are two key limitations on the jurisdiction of the Court over corruption offences.

A. *The 'Serious Nature' of the Acts*

Of the fourteen offences included in the Statute, 'corruption' is only one of two which includes as a prerequisite that the acts are of 'a serious nature affecting the stability of a state, region or the Union'.[59] Given the prevalence of grand corruption and the need to prevent a flood of cases, it is perhaps understandable for a restriction to be placed on cases coming before the Court. However it is not clear as to why it is not simply left to the Court to determine which cases it chooses to pursue.

The well-known deleterious consequences of 'grand corruption' potentially make any such case one of a serious nature. The additional element which

[55] See Section 3 below. On a more positive note, Article 28A(3) provides that 'The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations'.
[56] For example, see the *Obiang* case in Section 4 below.
[57] For example, see the *Chiluba* case in Section 4 below.
[58] For example, see the *Obiang* case in Section 4 below.
[59] The 'Illicit exploitation of natural resources' includes a similar restriction: see Article 28L *bis*.

triggers a decision by the Court is that the act(s) of corruption *affects the stability* of a state, region or the Union. The interpretation of the italicised words is important. Does the phrase require evidence that the corruption-related activity has led to the actual destabilisation (whatever that means) of the State or is it in respect of a *potential threat* to its stability? The evil of grand corruption is that it often threatens the political and/or economic stability of a state. This is emphasised in the Preamble to the UNCAC where the States Parties to the Convention express their concern '... about the seriousness of the problems and *threats posed* by corruption to the *stability* and security of societies ...' and further express their concern:

> ... about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that *threaten the political stability* and sustainable development of those States (emphasis added).

In the light of the UNCAC Preamble, it is hoped that the Court will adopt a flexible interpretation of 'stability'. It is surprising that the drafters of Article 28I did not see fit to do so.

There is a further difficulty as to how the fact of the 'instability' is to be proved. This is presumably a matter for the Court to determine[60] but any case may get bogged down in preliminary arguments over this issue.

The scope of a 'region' is nowhere explained. Given the positioning of the word after 'state', the drafters presumably meant to refer to a geographical area that includes multiple jurisdictions.[61] This might cover a case, for example, involving senior military officers who loot vast sums of money allocated for defence equipment required to fight a terrorist group in the country. Their failure to provide the necessary equipment then enables the terrorist group to extend their activities into neighbouring states.[62]

[60] The Office of the Prosecutor will also need to make a preliminary decision as to whether there is a reasonable basis to proceed with an investigation: see Article 46G(3).

[61] Although an argument could be mounted that corruption in a particular region within a state could destabilize it: for example where corruption by leaders in the oil producing region of a state divert revenues from the sale of the oil and gas which leads to severe economic instability in the entire state.

[62] It has been alleged that the atrocities perpetrated by the Boco Haram terrorist group in Nigeria, Chad and Cameroon were facilitated by the diversion of vast sums of money allocated to the Nigerian military for arms and equipment by senior military officers. This prevented the Nigerian armed forces from dealing effectively with the terrorist threat. That military officers were involved in grand corruption is highlighted by the report that the former Chief of Air Staff, Air Marshal Adesola Amosu; Air Vice Marshal Jacob Adigun, former Chief of Accounts and Budgeting of the Air Force; and Air Commodore Olugbenga Gbadebo, former Air Force Director of Finance and Budget, pleaded guilty to the corruption charges filed against them by

Corruption on the part of officials of international organisations is another area of concern. Whether such officials are covered by the term 'public official' in Article 28I is uncertain. Equally uncertain is how an act of corruption can affect the stability of the African Union.

The money laundering offence does not include this requirement.[63] This is significant, especially given the increasing international efforts of the FATF and G20 to combat corruption-related money laundering.[64] Given their focus on requiring transparency as to the beneficial ownership of companies and trusts coupled with the impact of the 'super-whistle-blowers', the money laundering offence arguably holds out a greater promise of a successful prosecution than the corruption-related offences.

B. *The Immunity Provision*

The impact of the Court is significantly reduced by the general immunity provision in Article 46A. This provides that:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

In practice this effectively excludes the jurisdiction of the court from hearing cases relating to acts of corruption or money laundering involving senior state officials during their tenure of office.[65] The Statute provides no indication as to the scope of the term 'senior state officials' but inevitably it will protect those

the Economic and Financial Crimes Commission (EFCC) and agreed to jointly forfeit 33 properties in Nigeria and the UK. See further: www.aljazeera.com/programmes/countingthecost/2015/03/corruption-blights-nigerian-army-fight-rebels-150320160800536.html (visited 29 November 2016).

[63] Although the Court may determine that a case is inadmissible where it is not of 'sufficient gravity' to justify any further action: see Article 46H(2)(d).

[64] For example, the establishment of a regular joint G20 Anti-Corruption Working Group-FATF Experts Meeting on Corruption: see www.fatf-gafi.org/publications/corruption/documents/g20-acwg-fatf-october-2016.html (visited 29 November 2016).

[65] Article 46C.2. The Article is in stark contrast to the Rome Statute of the International Criminal Court, Article 27 of which specifically provides: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

who are most likely to be involved in grand corruption as well as encouraging them to remain in office for as long as possible.[66]

Whilst constitutional immunity is commonplace in customary international law for serving heads of state and government, extending immunity to 'senior state officials' is extremely unusual and has resulted in considerable criticism. For example Amnesty International asserts that the immunity clause essentially promotes and strengthens the culture of impunity that is already entrenched in most African countries and stands to bring the whole statute into disrepute 'as it will be portrayed (and may indeed have been intended) as a way to protect senior politicians from accountability for their crimes'.[67] However, as noted above, the corruption-related offences also apply to a range of other individuals and entities who are not subject to the immunity clause. It means that family members, the bribe-payers or those who trade in influence as well as those who launder the proceeds of corruption are all liable to prosecution. Given the 'you can't do it alone' principle and their often close involvement in grand corruption, the power to prosecute such persons is a potentially a valuable addition to the work of the Court.[68]

As regards the private sector, Article 46C provides the Court with jurisdiction over legal persons, with the exception of states. Further it is empowered to exercise its jurisdiction where, *inter alia*, 'the victim of the crime is a national of that State' or where the case involves 'Extraterritorial acts by non-nationals which threaten a vital interest of that State'.[69] This suggests the possibility, for example, of the prosecution of a company (or its agents) from within or outside Africa for the bribery of a foreign public official. Of course, this is subject to the 'act of corruption' being of a 'serious nature affecting the stability of the State' (Article 28I(1)) as well as threatening 'a vital interest of that State' (Article 46E *bis*).

[66] There is no indication as to the meaning of the phrase 'senior state officials'. Some guidance may be found in the definition of a Politically Exposed Person' found in the Glossary to the 2012 FATF Recommendations i.e.'. . . individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials'.

[67] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expended Africa Court* (2016), available online at www.amnesty.org/en/documents/afr01/3063/2016/en/ (visited 29 November 2016), at 27. See also the Southern African Catholic Bishops' Conference Briefing Paper 359 *The African Court of Justice and Human Rights: Protecting Africans, or Just Africa's Leaders?* August 2014.

[68] It may be that the wide scope of Article 28N as regards 'Modes of Responsibility' might also apply.

[69] Article 46E *bis* (2)(c) and (d).

4. CASE STUDIES

The Court has jurisdiction only with respect to crimes committed after the entry into force of the Protocol and Statute.[70] Thus it is likely to be some years before it has to consider a case involving corruption or money laundering. However, three case studies involving grand corruption by African leaders usefully illustrate the potential scope and limitations of the Court. The cases are described as if the Court is in operation and the respective States had accepted its jurisdiction.[71]

A. *The Obiang Case*

Teodoro Nguema Obiang Mangue (Obiang) is First Vice-President of Equatorial Guinea.[72] In 2014 his criminal activities were described in a United States Department of Justice press release as follows:

> Through relentless embezzlement and extortion, Vice President Nguema Obiang shamelessly looted his government and shook down businesses in his country to support his lavish lifestyle, while many of his fellow citizens lived in extreme poverty… After raking in millions in bribes and kickbacks, Nguema Obiang embarked on a corruption-fueled spending spree in the United States.[73]

The press release continues:

> [Obiang] received an official government salary of less than $100,000 but used his position and influence as a government minister to amass more than $300 million worth of assets through corruption and money laundering, in violation of both Equatoguinean and U.S. law. Through intermediaries and corporate entities, Nguema Obiang acquired numerous assets in the United States.

1. How the Court Might Deal with Such a Case

Given the appalling extent of Obiang's criminal activities, these represent a clear example of corruption of a 'serious nature' and its deleterious impact on

[70] As required under Article 46E(1).
[71] Under Article 46E *bis*.
[72] At the time of the proceedings, he was Second Vice-President.
[73] US Department of Justice Press Release, 10 October 2014, available online at www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased (visited 29 November 2016).

the economic well-being of the people of the country affects the 'stability' of Equatorial Guinea. However his position as a Vice-President makes him a 'senior state official' and consequently the immunity provision in Article 46A will apply and no charges can be brought against him during his tenure of office.[74] Patience is a virtue here as it is not clear as to when his tenure will expire. Until then, the Court is powerless to act against him or his looted assets.

2. The Alternatives

The case highlights the importance of having effective asset recovery powers in place. Even if the criminal forfeiture route is not available, the power to take away the profit from the senior public official represents a powerful weapon in the armoury of those seeking to combat corruption. The Obiang case is a prime example.

In 2012 civil forfeiture proceedings were launched in the United States, not against Obiang himself but against his assets located there which were suspected of being proceeds of crime.[75] This resulted in a civil forfeiture settlement with the Department of Justice in which Obiang agreed to sell his $30 million mansion located in Malibu, California, a Ferrari automobile and various items of Michael Jackson memorabilia purchased with the proceeds of corruption. Some of these proceeds of crime were to be returned to the people of Equatorial Guinea.[76]

Given the extent and impact of his corrupt activities, a court that is powerless to deal with individuals such as Obiang (either through a criminal prosecution or effective asset recovery powers) has little chance of commanding respect and influence.

B. *The Abacha Case*

Sani Abacha seized power in a military coup in Nigeria in 1993 and until his death in 1998 he and his family were involved in the widespread looting of

[74] He is the son of the President of Equatorial Guinea who has been in power since 1979.

[75] See *United States v One Michael Jackson Signed Thriller Jacket and Other Michael Jackson Memorabilia; Real Property Located on Sweetwater Mesa Road in Malibu, California; One 2011 Ferrari 599 GTO*. The Stipulation and Settlement Agreement is available online at www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang_settlement_agreement.pdf (visited 29 November 2016).

[76] The 10 October 2014 press release explains that 'Of those proceeds, $20 million will be given to a charitable organization to be used for the benefit of the people of Equatorial Guinea. Another $10.3 million will be forfeited to the United States and will be used for the benefit of the people of Equatorial Guinea to the extent permitted by law'.

state assets with estimates varying between US$3 billion and US$5 billion. As with the Obiang case, the scale of the grand corruption was enough to satisfy the 'serious nature' requirement of Article 28I. In 2005 the Federal Supreme Court in Switzerland ruled[77] that $480 million should be returned to Nigeria 'as obviously of criminal origin' and also found that the Abacha family and their accomplices were a 'criminal organisation'.[78] In 2010, an Indian national, Raj Bhojwani was convicted in Jersey of money laundering in connection with the Abacha case and sentenced to six years imprisonment.[79]

1. How the Court Might Deal with Such a Case

The untimely death of Abacha prevented any prosecution of him before the Court. However, his national security adviser and several members of Abacha's family were all involved in the looting of the state assets and their laundering around the world.[80]

As regards the national security adviser, his immunity from the jurisdiction of the court ended with his tenure of office. Abacha's family members did not enjoy any such immunity. Charges of abuse of functions under Article 28I(1)(c) and illicit enrichment under Article 28I(1)(g) (amongst others) and money laundering would be possible against them all. In addition Mr Bhojwani could face money laundering charges. Conviction would then empower the Court to order the forfeiture and return of the proceeds of crime

2. The Alternatives

The case demonstrates the importance of the use of money laundering charges in tackling grand corruption cases. This is a case in which the prime offender was not available to stand trial. Even so, in the absence of any legal action elsewhere, the Court would have power to convict all those involved in assisting Abacha in looting and laundering the assets and to order the recovery

[77] Swiss Federal Court decision (1A.215/2004/col), 7 February 2005. For a full account of the case see Nicholls et al., *supra*, note 5 at §§ 11.11 et seq.

[78] Pursuant to Article 260 of the Swiss Penal Code.

[79] *Attorney-General for Jersey v Bhojwani* [2010] JCA 188. For a useful analysis of the case see J. Kelleher and P. Sugden, 'Money Laundering in Jersey: A Case Analysis: *Att Gen v Bhojwani*' *Jersey & Guernsey Law Review* (2011), available online at www.jerseylaw.je/publications/jglr/Pages/JLR1106_Kelleher.aspx#_ftn6 (visited 27 November 2016). See also www.bailiwickexpress.com/jsy/news/jersey-committed-fighting-money-laundering-new-appeal-rejected/#.WD1aRtSLSt8 (visited 29 November 2016).

[80] One scheme is detailed by Rix, J. in *Compagnie Noga et d'Exportation SA v Australia and New Zealand Banking Group* Queen's Bench Division (Comm), 27 February 2001, unreported.

of the proceeds of crime. In this respect, it might play a useful role if alternative approaches are not available or utilised elsewhere.

C. *The Chiluba Case*

Between 1991 and 2001 Frederick Chiluba was President of Zambia. During his period in office he was involved in the large-scale looting of state assets and these were laundered on a global scale. He was assisted by numerous senior public officials, lawyers and corporate entities.[81] Upon leaving office, his successor, Levy Mwanawasa, established a Task Force on Corruption to investigate the case and a prosecution was launched in 2004 with Chiluba being charged with several counts of theft by a public servant. In 2008, Mwanawasa died in office and was succeeded by Rupiah Banda who was known to be more supportive of Chiluba. In 2009 Chiluba was acquitted in the Lusaka Magistrate' Court on all charges, a verdict that was greeted with much scepticism by civil society organisations.[82]

1. How the Court Might Deal with Such a Case

As a former head of state, Chiluba did not enjoy the benefit of the immunity provision. The Court has a complementary jurisdiction to national courts[83] although any case against Chiluba would be inadmissible 'if it is being investigated or prosecuted by Zambia' or has been investigated and the State has decided not to prosecute 'unless the decision resulted from the unwillingness or inability of the State to carry out the investigation or prosecution'.[84] In the Chiluba case, the concern focused on possible political pressure that was brought to bear on the trial magistrate.[85] In such circumstances, it is open to

[81] The full details are provided in the lengthy judgment of Peter Smith J. in *Attorney General for Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch). The case also provides an excellent example of the 'you can't do it alone' principle with the role of numerous individuals and companies involved in the looting and laundering of the assets being fully chronicled.

[82] For a critique of the decision see 'Press Statement on the Acquittal of Dr. Frederick Chiluba and the General Justice System n Zambia Delivered by 17 Civil Society Organisations on 30th September 2009': available online at http://gndhlovu.blogspot.co.uk/2009/09/press-statement-on-acquittal-of-dr.html (visited 30 November 2016).

[83] Article 46H(1).

[84] Article 46H(2). Article 46H(3) sets out the principles upon which the Court is to determine the matter.

[85] The Court may also determine that a case is inadmissible where it is 'not of sufficient gravity to justify further action': Article 46H(2)(d). This is not relevant to corruption cases given the 'serious nature' requirement in Article 28I.

the Court to determine that the 'proceedings were ... undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court'.[86] How such a situation is to be proved is not explored but it does open up the possibility of the Court having jurisdiction in a Chiluba-type situation.[87]

2. The Alternatives

The political will to act against former heads of state or senior government officials may vary from time to time depending upon the policies of the incumbent regime. As the Chiluba case demonstrates, it is essential to 'seize the moment' and take advantage of the political will to act. Article 53 of the UNCAC requires state parties to take the necessary measures '... to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired' through the commission of a convention offence. In 2006 the Government of Zambia brought a civil action in the High Court of England and Wales against Chiluba and the other conspirators in which it sought the recovery of the stolen assets.[88] Judgment was entered for the plaintiffs but, with the death of President Mwanawasa, the order was not enforced (and has never been enforced) in Zambia.

It follows that the jurisdiction of the Court may still be importance in cases where the political will to deal with grand corruption is not forthcoming in the victim state.

5. CONCLUSIONS

Millions of people in African states remain the victims of corruption. Untold billions of dollars have been looted by state officials and laundered through and into compliant jurisdictions around the world. The work of the FATF and G20 coupled with the development and strengthening of the UNCAC and AU Conventions, amongst others, highlight the fact that there is a growing international consensus to take action against corruption and money laundering. Even so, much still needs to be done.

The fundamental question is whether the establishment of a supranational court in Africa can make a significant contribution to addressing the two challenges of:

[86] Article 46H(3)(a).

[87] In fact several senior government officials involved with Chiluba in the corruption were successfully prosecuted in Zambia.

[88] See *supra*, note 82.

(a) Successfully prosecuting those who commit acts of corruption; and
(b) Taking the profit out of corruption by either the forfeiture of the proceeds of crime and/or the payment of compensation to the people of the victim state.

At one level, providing the Court with a jurisdiction over 'Corruption' is an attractive idea, the more so given the fact that there is currently no other international court that has jurisdiction to try such offences. Further, suggestions that the jurisdiction of the International Criminal Court be expanded, either explicitly or by implication, to include corruption offences have made no headway.[89]

A. *Punishing Those Who Commit Acts of Corruption*

African states have an appalling record of tackling grand corruption. As noted earlier, there have been very few prosecutions of senior public officials (and even fewer successful prosecutions). Further, several key states have not ratified the AU Convention whilst others have not incorporated the UNCAC provisions into their domestic law. The fundamental challenge is to generate the political will on the part of African leaders to 'persuade' them of the need to take active steps to combat corruption. Whether the Court has the persuasive power to do so through the use of the criminal law is debatable.

The approach in Article 28I of dividing 'corruption' into a series of separate offences is helpful. It highlights its multi-faceted nature and addresses the key conduct that constitutes 'grand corruption'. It also provides prosecutors with a range of possible charges. Yet the limitations contained in Article 28I are disappointing and serve only to undermine the anti-corruption mandate of the Court.

The requirement that the act of corruption is of a 'serious nature affecting the stability of a state, region or the Union' seems to serve little purpose other than to severely limit the cases which can be heard by the Court. No doubt much time and energy will be wasted on arguments as to the meaning and scope of this obscure phrase.

The immunity clause represents an even more serious challenge for the Court. As Amnesty International points out, it 'promotes and strengthens the

[89] The fact that several African states, including Burundi, The Gambia and South Africa have announced their withdrawal from the International Court of Justice is a worrying sign that some African states are not supporters of international courts. The fact that 'corruption' is outside the jurisdiction of the ICC, at least prevents any issues concerning overlapping jurisdictions and competing obligations.

culture of impunity that is already entrenched in most African countries. . .'.[90] In essence it protects (at least during their time in office) senior public officials from being accountable for their crimes.

On the face of it, these effectively undermine the power of the Court to punish those who commit acts of corruption. However, the linking of corruption to money laundering provides a possible escape route. The fact is that the proceeds of grand corruption are inevitably laundered both domestically and internationally, thus potentially giving rise to money laundering charges. This is significant in that the money laundering offence does not have the 'serious nature' limitation attaching to it. Further such a charge may also help investigators avoid the secrecy surrounding grand corruption in that information about, and evidence of, money laundering can be obtained from outside the victim state and thus beyond the control of the suspects.[91]

As regards the immunity provision, this does not offer any protection to the wide range of individuals and entities who also fall within the scope of the corruption and money laundering offences. This includes the bribe-payers, including multi-national corporations, as well as family members of the corrupt senior public official.

In essence, despite the serious limitations in the Statute, a successful prosecution for corruption or money laundering of those *involved with* the senior public official(s) in their grand corruption schemes is feasible. This will provide the 'teeth' that the Court will otherwise lack.

A potential practical problem concerns the obtaining of effective international cooperation. This is an essential prerequisite in prosecuting the corruption offences and money laundering. The Court will need to establish a procedure for seeking mutual legal assistance both for the purposes of the trial and for enabling prosecutors at the earliest available opportunity to obtain evidence and to freeze the suspected proceeds of crime no matter where in the world the evidence or proceeds are located.

B. *Asset Recovery*

Taking away the profit is the key strategy in the fight against corruption. This is emphasised in Article 51 of the UNCAC which makes the return of assets a

[90] See note 68 above.

[91] For example, corporate entities providing information about the bribe-seekers and takers as part of a settlement with prosecutors: see *supra*, note 27.

'fundamental principle' of the Convention. The development of the Stolen Assets Recovery Initiative (StAR) further emphasises its importance.[92]

Providing the Court with the power to order the forfeiture of the proceeds of corruption and their return to their rightful owners is therefore welcome. However, setting aside the practical challenges of making asset recovery effective, restricting the power to conviction-based asset forfeiture is disappointing and significantly reduces the usefulness of the Court. It is unfortunate that more thought was not given to providing the Court with the power to recover stolen assets through a system of non–conviction based asset forfeiture or to extend its power to order reparations to the victims of corruption without the need for a criminal conviction.

A possible way forward is to provide prosecutors with the power to agree settlements with the criminals (albeit with judicial approval) in which the return of the proceeds of corruption to the people of the victim state takes place in exchange for the withdrawal of criminal charges. This approach has led to a series of 'deals' with senior African public officials, perhaps the most notable being that involving Teodoro Obiang. Here this approach neatly avoided the immunity provision in the Constitution of Equatorial Guinea and has led to the recovery of millions of dollars-worth of stolen assets and the repatriation of significant sums to the people of Equatorial Guinea. Similarly corporate bribe-payers have agreed to pay hundreds of millions of dollars to settle corruption cases.

C. *The Way Forward*

Overall the discussion in this chapter indicates that the Court faces significant challenges if it is to contribute effectively to the vital challenges of prosecuting grand corruption and obtaining the return of stolen assets. However, it has been argued that linking the corruption offences to that of money laundering at least offers the opportunity for the Court to make some progress. Even so, given that its jurisdiction is in respect of crimes committed after the entry into force of the Statute, it may be many years before its effectiveness will become apparent.

Reliance on the criminal law alone to combat corruption is both out dated and unrealistic. Further it may be questioned as to whether such a jurisdiction for the Court is even necessary. Developing an African court to address

[92] The United Nations Office for Drugs and Crime and World Bank launched this initiative in 2007 with the aim of helping developing countries recover stolen assets. The international legal framework underpinning the Initiative is provided by the UNCAC.

African problems is an admirable objective. Replacing the ICC with an African court is understandable and has some merit. Yet corruption is not within the mandate of the ICC and is very different to the international crimes set out in Article 28A.

The reality is that every day, millions of people throughout Africa are the victims of corruption and that addressing the problem effectively calls not for just an African response but a global response. This is starkly demonstrated with the release of the Panama Papers which highlighted the involvement of states around the world in facilitating the laundering of the proceeds of corruption and which provide unprecedented information about those responsible for grand corruption. Further, information is being provided by multinational corporations to investigators detailing their involvement in the bribery of African public officials and identifying the bribe-takers. Today there is unprecedented action on the part of many states to take effective action against African kleptocrats and those assisting them. Whether the Court will be able to contribute meaningfully to these global efforts to combat corruption and money laundering remains to be seen.