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**A Critical Analysis of Grand Corruption with
Reference to International Human Rights and
International Criminal Law: The Case of Nigeria**

By

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A thesis submitted in fulfilment of the requirements for the degree
of Doctor of Philosophy

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April 2017

Abstract

Grand corruption remains a domestic crime that is not directly addressed by the international human rights and international criminal law regulatory frameworks. Scholars argue that the right to a society free of corruption is an inherent human right because dignity, equality and participation significantly depend upon it. The academic discourse linking corruption to the violation of human rights is relatively new, no regional or global human rights instrument has referred specifically to corruption while anti-corruption treaties rarely refer to human rights. There is also insufficient research within this area, establishing the direct causal link between high-level corruption and systemic human rights violations. Therefore, using qualitative interpretative analysis, this thesis aims to address this lacuna with reference to the case of Nigeria by interrogating case law, treaties, and other relevant legal human rights instruments. Consequently, the project placed the relevant international and regional oversight mechanisms under scrutiny by examining the impact of grand corruption upon human rights, as well as the analysis of accountability processes at the domestic level. Furthermore, it undertakes an assessment as to whether a normative gap exists within international criminal law regimes when it comes to the structural violations of socio-economic rights. The project considered the question of whether corruption ought to be framed as an international crime falling within the jurisdiction of the Rome Statute of the International Criminal Court. In conclusion, the thesis suggests that grand corruption in Nigeria violates certain human rights and recommends that international criminalisation of the crime of grand corruption could help to combat it in Nigeria.

Declaration

I certify that this thesis, which I now submit for examination for the award of PhD, is entirely my own work, and has not been taken from the work of others, save and to the extent that such work has been cited and acknowledged within the text of my work. This thesis was prepared according to the regulations for postgraduate study by research of the Dublin Institute of Technology and has not been submitted in whole, or in part for another award in any Institute. The work reported on in this thesis conforms to the principles and requirements of DIT's guidelines for ethics in research. DIT has permission to keep, lend or copy this thesis in whole or in part, on condition that any such use of the material of the thesis be duly acknowledged.

Signature _____

Date _____

Candidate

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Abbreviations

AAPPG	Africa All Party Parliamentary Group
AfchHPR	African Charter on Human and Peoples' Rights
AU	African Union
BMPIU	Budget Monitoring and Price Intelligence Unit
CPI	Corruption Perception Index
CCB	Code of Conduct Bureau
CCT	Code of Conduct Tribunal
ECOWAS	Economic Community of West African States
ECOWAS CCJ	ECOWAS Community Court of Justice
EFCC	Economic and Financial Crimes Commission
ESC	Economic and social cultural rights
EU	European Union
FATF	Financial Action Task force
FCPA	Foreign Corrupt Practices Act
GA	General Assembly of the United Nations
GOPAC	Global Organisation of Parliamentarians against Corruption
HDI	Human Development Initiative
HRC	Human Rights Commission
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPC	Independent Corrupt Practice Commission
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International criminal Tribunal for the former Yugoslavia
IMF	International Monetary Fund
ILC	International Law Commission

MNC	Multinational Corporation
NEIT	Nigeria Extractive Industry Transparency Initiative
NFIU	Nigeria Financial Intelligence Unit
NGO	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SAP	Structural Adjustment Programmes
SEC	Securities and Exchange Commission
SERAP	Socio Economic Rights and Accountability Project
TI	Transparency International
TUGAR	Technical Unit of Governance and Anti-Corruption Reform
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCh	Charter of the United Nations
UNTOC	United Nations Convention against Transnational Organised Crime
UNODC	United Nations Office on Drugs and Crime
VCLT	Vienna Convention on Law of Treaties
WB	World Bank
WGB	Working Group on Bribery (OECD)
WTO	World Trade Organisations
WW 1	First World War
WW 11	Second World War

Table of Contents

Abstract	ii
Declaration	iii
Acknowledgements	iv
Abbreviations	v
Table of Contents	vii
List of Cases	xii
List of Treaties	xv
Table of National Legislations	xvii

Chapter one

1.1	Introduction and Background to the Study	1
1.2	Statement of the Problem	8
1.3	Aims and Objective of the Study	11
1.4	Research Questions	12
1.5	Scope and Significance of the Study	12
1.6	Methodological Approach	13
1.7	Structure of the Thesis	15
1.8	General Perspectives on Corruption	17
1.8.1	Theoretical Framework	20
1.8.2	The Soft State Theory	21
1.8.3	Natural Resource Curse Theory	24
1.8.4	State Capture Theory	28
1.8.5	Conclusion	30

Chapter Two

2.	Grand Corruption in Nigeria: Historical Review	
2.1	Introduction	34
2.2	Grand Corruption (Colonial Era)	36
2.3	Grand Corruption: A Post-Colonial Experience	40
2.4	Grand Corruption (The Nigerian Military Connection)	41

2.5	Grand Corruption: Post Military Era to Date (1999-2016)	47
2.6	Multinational Corporations (MNCs) and Grand Corruption in Nigeria	58
2.7	Conclusion	65

Chapter Three

3. Nigerian Legal Instruments and the Nexus between Corruption and Human Rights

3.1	Introduction	68
3.2	Legal Instruments against Corruption in Nigeria	70
3.3	Nigerian Anti-Corruption Agencies	72
3.3.1	The Independent Corrupt practices Commission (ICPC)	72
3.3.2	The Economic and Financial Crimes Commission (EFCC)	77
3.4	Corruption and Human Rights in Nigeria	82
3.5	Universal Human Rights Framework	83
3.6	The African Charter on Human and Peoples' Rights	86
3.7	Justiciability of Socio-Economic Rights in Nigeria	89
3.8	Nexus between Grand Corruption and Human Rights in Nigeria	99
3.9	Conclusion	103

Chapter Four

4. International and Regional Legal Instruments on Corruption

4.1	Introduction	107
4.2	United Nations Convention against Corruption (UNCAC)	109
4.3	African Union Convention on Preventing and Combating Corruption	116
4.4	The Economic Council of West Africa (ECOWAS) Protocol Against Corruption	119

4.5	The Foreign Corrupt Practices Act (FCPA) 1977	122
4.6	Conclusion	128

Chapter Five

5.	Socio-Economic Rights: The Normative Gap in International Criminal Law	
5.1	Introduction	133
5.2	Socio-Economic Rights in Transitional Justice: Inclusions, Exclusions & Misconceptions	135
5.3	Socio-Economic Rights in International Criminal Law: Limitations and Possibilities	145
5.4	Conclusion	154

Chapter Six

6.	International Criminal Law and Grand Corruption	
6.1	Introduction	158
6.2	International Criminal Law and Grand Corruption	159
6.2.1	Defining International Criminal Law	160
6.2.2	What Constitutes International Crimes?	161
6.2.3	Grand Corruption within the Context of International Criminal Law	163
6.3	The Rome Statute	170
6.3.1	Article 7 of the Rome Statute (Crimes against Humanity)	175
6.3.2	Grand Corruption as an Inhumane Act	179
6.4	Other ways International Criminal law can prosecute Grand Corruption	182
6.4.1	An International Anti-Corruption Court	182
6.4.2	National Courts with Universal Jurisdiction	185
6.4.3	Regional Courts	188
6.4.4	Creating New Mechanisms	190

6.5	Conclusion	191
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Chapter Seven

7. Grand Corruption: A Crime against Humanity?

7.1	Introduction	193
7.2	Categories of the International Crime	194
7.3	Crimes against Humanity	197
7.4	Attacks	199
7.5	Widespread and Systemic	201
7.6	Directed Against any Civilian Population	201
7.7	Knowledge of Mental Element	202
7.8	Does Grand Corruption Merit Inclusion as an International Crime?	205
7.9	Conclusion	209

Chapter Eight

8. Summary, Conclusions and Recommendations

8.1	Introduction	214
8.1.1	How can Grand Corruption Violate Human Rights in Nigeria?	215
8.1.2	How have existing International, Regional and Domestic Legal Frameworks facilitated efforts at combating Grand Corruption?	218
8.1.3	How can International Criminal Law Conceptualise Grand Corruption as a Crime under International Law to be Prosecuted as a crime against Humanity?	219
8.1.4	Why are violations of Socio-Economic Rights less Susceptible to International Criminalisation?	221
8.2	Recommendations	222
8.2.1	Legal and Institutional Reform	223
8.2.2	Judicial Reform	223
8.2.3	Global Cooperation	224
8.2.4	International Criminalisation	225
8.2.5	Expedited Prosecutions	225
8.3	Limitations of Research	226

8.4	Opportunities for Future Research	226
8.5	Contribution to Knowledge	227
8.6	Summary	228
	Bibliography	230
	List of Appendices	
Appendix i	Ethical Clearance	256
Appendix ii	DIT Official Introduction Letter	257
Appendix iii	Sample Consent Letter for Participants in the Project	258
Appendix iv	Sample Interview Questions	259
Appendix v	List of Personal Publications	261
Appendix vi	Grand Corruption: Analysis of an Empirical Field Trip	262
Appendix vi/1	Social Characteristics of Respondents	265
Appendix vi/2	Presentation of Findings	266
Appendix vi/2a	Understanding Grand Corruption	267
Appendix vi/2b	Perceptions by Transparency International	268
Appendix vi/2c	Causes of Grand Corruption in Nigeria	269
Appendix vi/2d	Judicial Corruption	269
Appendix vi/2e	Law Reform	271
Appendix vi/2f	International Criminalization of grand corruption	271
Appendix vi/2g	Human Rights and Grand Corruption	273
Appendix vi/2h	Prosecution of High-Profile Grand corruption Cases in Nigeria	272
Appendix vi/2i	Institutional Frameworks	274
Appendix vi/3	Conclusion	276

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Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007.

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Chapter one

A Critical Analysis of Grand Corruption with Reference to International Human Rights and International Criminal Law: The Case of Nigeria.

1.1 Introduction and Background to the Study

Grand corruption ‘consists of the acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good’.¹ Grand corruption represents a very dangerous social phenomenon plaguing Nigeria since the colonial era. There have also been several legal and institutional efforts to combat it over the years and so far, none has proved successful. Corruption is referred to as “public enemy number one” that needs to be combated using a holistic approach.² The endemic nature of grand corruption in Nigeria elicits such thought-provoking questions: is it proper for government officials to take for their private use State’s resources that are sufficient to offset the country’s external debt or to underwrite the cost of basic services to millions of the people? Should the rights to water, health care, education, housing, food, and shelter not be realisable particularly in states endowed with abundant natural resources? Is it morally acceptable for government revenues to be disbursed in an opaque and unaccountable manner? These questions are thought provoking, and allude to the enormous corruption happening in Nigeria and moves one to inquire further whether ‘corruption is the space in which the state

¹ Transparency International, ‘What is Corruption?’ <
<http://www.transparency.org/what-is-corruption/#define>> accessed 15 January 2017.

² See the speech on ‘Corruption is “Public Enemy Number One” in Developing Countries’, by the World Bank Group President, Jim Yong Kim <
<http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim>> accessed 25 September 2016. The speech by Jim Yong Kim and some other key policy leaders such as James Wolfensohn is key to this thesis. The speeches propelled international community’s policy and reform initiatives aimed at tackling corruption.

intertwines with social practices, relations and even moralities’?³ Could it be inferred that Nigerian official elites are ‘... more susceptible to becoming involved in grand corruption than their opposite numbers in other countries ...’?⁴

Corruption is an extensively studied, but still contested phenomenon without a universally accepted definition. Arnold Heidenheimer notes ‘the word corruption has a history of vastly different meanings and connotations’.⁵ Transparency International (TI), the leading anti-corruption NGO, defines corruption as ‘the abuse of entrusted power for private gain’.⁶ Scholars have criticised this definition, for instance, Vito Tanzi argues that ‘corruption can be committed not only for private gain, but ... for the benefit of one’s party, class, tribe, friends, family, and so on’.⁷ The World Bank defines corruption as ‘the abuse of public office for private gain’.⁸ The World Bank’s definition asserts only public corruption, leaving out private corruption. This omission is a drawback as it is recognised that private sector corruption enables public corruption to thrive. Ian Bannon argues that ‘this definition is not original, but it was chosen because it is concise and broad enough to include most forms of corruption that the Bank encounters, as well as being widely

³ David Torsello, ‘Introduction: The Anthropology of Corruption’ in David Torsello (ed) *Corruption in Public Administration: An Ethnographic Approach* (Edward Elgar Publishing 2016) 10.

⁴ George Moody-Stuart, *Grand Corruption: How Business Bribes Damage Developing Countries* (Worldwide View Publishing 1997) 6.

⁵ Arnold Heidenheimer, *Political Corruption: Reading in Comparative Analysis* (Holt Rinehart and Winston Inc 1970) 3; Dan Hough, *Political corruption and Governance* (Palgrave Macmillan 2013) 2-3.

⁶ Transparency International (n 1).

⁷ Vito Tanzi, ‘Corruption around the World: Causes, Consequences, Scope, and Cures’, (IMF staff papers, December 1998) IMF Staff Papers Vol. 45 No. 4, Washington, D.C <<http://www.imf.org/external/pubs/ft/staffp/1998/12-98/pdf/tanzi.pdf>> accessed 28 January 2016.

⁸ The World Bank Group, ‘Helping Countries Combat Corruption: The Role of the World Bank’ (The World Bank Group) <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 6 April 2016.

used in the literature'.⁹ For Humphrey Asobie, World Bank's definition 'creates the impression that corruption is a malady that primarily or even solely afflicts those in the public service, especially state authority, whereas those in the private sector and civil society may be equally culpable'.¹⁰ Daniel Kaufmann saw the public office centered approach towards the definition of corruption as deficient, asserting that '... we challenged this definition of corruption as placing too much emphasis on public office...we presented empirical evidence of the extent to which many powerful private firms engage in undue influence, to shape state policies, laws and regulations, for their own benefit'.¹¹ The International Monetary Fund (IMF) defines corruption as 'the abuse of public authority or trust for private benefit'.¹² From the perspective of the IMF, corruption is linked unequivocally to the activities of the state and is public office centred. The IMF's definition is therefore defective for excluding private sector corruption.

In view of the difficulties inherent in defining corruption, this thesis adopts TI's definition because it is broader than the IMF and the World Bank definitions. It deals with the actor rather than the action and constitutes an improved way of defining corruption. Yet, adopting this definition of TI or any other still succumbs to the Torsello's question 'why

⁹ Ian Bannon 'The Fight Against Corruption: A World Bank Perspective' (Consultative Group for the Reconstruction and Transformation of Central America, 25-28 May 1999)<http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop6.htm>accessed 6 April 2016.

¹⁰ Humphrey Asisi Asobie, 'Meaning and nature of Corruption' (2012) United Nations Development Programme (United Nations Development Programme 2012) <http://escuelapnud.org/biblioteca/pmb/opac_css/doc_num.php?explnum_id=873> accessed 6 April 2016.

¹¹ Daniel Kaufmann, Myths and Realities of Governance and Corruption (Social Science Research Network, November 2005)<<http://ssrn.com/abstract=829244>>accessed 06 April 2016.

¹² See 'The International Monetary Fund Factsheet2013'<<http://www.imf.org/external/np/exr/facts/gov.htm>>accessed 06 April 2016.

stick to a single definition if the phenomenon is in constant mutation?'.¹³ I would suggest that proffering a working definition helps in providing a solid platform that could help in providing ways of combating corruption. In this regard, I would define corruption as acts performed by persons in course of their daily activity that breaches the workplace ethics, gives them undue advantage over others and bestows undue personal gain on them.

While other types of corruption exist, TI classify corruption as 'grand, petty and political, depending on the amounts of money lost and the sector where it occurs'.¹⁴ This research adopts the classification (petty and grand) as a preferred taxonomy providing the framework for a thorough analysis of the typical corruption in Nigeria. George Moody-Stuart¹⁵ is known for his seminal writings on the concept of grand corruption while scholars such as Alina Mungiu-Pippidi¹⁶ and Susan Rose Ackerman¹⁷ also adopted the TI's taxonomy of classifying corruption into petty and grand levels. Rose-Ackerman states that the term grand corruption refers to 'corruption that occurs at the highest level of government and involves huge government projects and programs'.¹⁸ Petty corruption also called,

“Low” and “street” corruption, indicates the kinds of corruption that people experience in their encounters with public officials and when they use public

¹³ Torsello (n 3) 15.

¹⁴ Transparency International (n 1).

¹⁵ Moody-Stuart (n 4).

¹⁶ Fazekas, Mihaly, Lukács, Péter András, and Tóth, István János, 'The Political Economy of Grand Corruption in Public Procurement in the Construction Sector of Hungary' in Alina Mungiu-Pippidi (ed) *Government Favouritism in Europe: The Anticorruption Report 3* (Barbara Budrich Publishers 2015) 11, 53.

¹⁷ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999) 177–197.

¹⁸ *ibid* 27.

services (hospitals, schools, local licensing authorities, police, tax offices, etc.). It generally involves modest sums of money'.¹⁹

Rose-Ackerman submits that 'grand corruption involves a small number of powerful players and large sums of money ... Heads of states may engage in outright embezzlement of public funds ...'. Deals involved in grand corruption 'are by definition the preserve of top officials and frequently involve multinational corporations operating alone or in consortia with local partners'.²⁰ The Halliburton \$180 million bribery scandal in Nigeria offered to facilitate a contract on the construction of the liquefied natural gas plant in southern Nigeria;²¹ the Sagem S.A of France bribe scandal in Nigeria where prominent government officials were indicted for collecting bribes worth \$3 million dollars each in order to facilitate and guarantee Sagem S.A winning the bid for the National Identity Card Scheme;²² and the diversion of \$2 billion Defence budget in 2015 by the former National Security Adviser to the President, retired Colonel Sambo Dasuki, are a few instances of established cases of grand corruption in Nigeria.

Although recognising that corruption exists in the private and public sectors, this research focuses on public sector corruption. Grand corruption is rampant within the Nigerian

¹⁹ See Anti-Corruption Resource Centre, *Corruption Glossary* available at: www.u4.no/document/faqs5.cfm#grandcorruption. The term "grand corruption" received universal acceptance following the book by Sir George Moody-Stuart which made reference to the bribery of foreign public officials by international corporations. The term later evolved to cover all corruption at the top levels of the public sphere, where policies and rules are formulated. It is usually (but not always) synonymous with political corruption. See Anti-Corruption Resource Centre, *Corruption Glossary*, available at www.u4.no/document/faqs5.cfm#pettycorruption.

²⁰ Susan Rose-Ackermann and Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform* (2nd edn, Cambridge University Press 2016) 11; Susan Rose-Ackerman, 'Corruption and Global Economy' Corruption integrity Development Initiative <<http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter02.pdf>> accessed 10 January 2016.

²¹ See 'Dick Cheney faces Bribery Scandal in Nigeria' *BBC News Africa* (London, 2 December 2012).

²² Olusola Akinpelu, *Corporate Governance Framework in Nigeria: An International review* (iUniverse Books 2011) 359.

public sector and remains one of the important constraints to efficiency in the civil service and an impediment to a viable productive public sector.²³

The consequences of public sector corruption are devastating, it affects the distribution and allocation of public services (such as health care, housing, water and sanitation), whether administered directly by the state or outsourced to private companies. Corruption also manifests itself in acts of cronyism, particularism, graft, bribery, fraud, kickbacks, embezzlement, nepotism and other illegal diversions of the state's scarce resources. Corruption makes it possible to the silence of critics, subvert of justice and non-punishment of human rights abuses. When corruption is rampant, it threatens basic human rights and liberties thereby foreclosing fundamental guarantees.

The US Foreign Corrupt Practices Act (FCPA) of 1977 is the bedrock of the international legal campaign against corruption.²⁴ The United Nations Convention against Corruption which entered into force in December 2005, was the first global legal agreement to provide a framework for tackling corruption-related offences at the national (state) level.²⁵ UNCAC provides a strong platform for holding states accountable by calling for international cooperation in the criminalisation of corruption offences. The UNCAC provide the avenues for combating endemic corruption which could help to address human rights abuses. Besides UNCAC, other International and Regional anti-corruption instruments include: the United Nations Convention against Transnational Organized

²³ John Maku, *Corruption in Africa, Causes, Consequences and Cleanups* (Lexington Books 2010) 47; See UNDP, 'Anti-Corruption' <http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_anti-corruption.html> accessed 20 June 2016.

²⁴ Foreign Corrupt Practices Act of 1977.

²⁵ United Nations Convention against Corruption, adopted 31 October 2003 and entered into force 14 December 2005.

Crime 2003;²⁶ the African Union Convention on Preventing and Combating Corruption 2003;²⁷ the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions 1996;²⁸ the International Code of Conduct for Public Officials;²⁹ the Economic Community of West African States Protocol on the Fight against Corruption (ECOWAS Protocol) 2001;³⁰ and the Southern African Development Community (SADC) Protocol against Corruption.³¹ The existence of these international and regional legal instruments demonstrate an international consensus that corruption poses a systemic problem that has the potential to violate human rights. In the words of James Wolfensohn, the former President of the World Bank, ‘where countries fail to ... confront the issue of corruption... their development is fundamentally flawed and will not last’.³² Wolfensohn laments ‘Corruption is a core poverty issue, robbing from the poor the little they have’.³³

Linking corruption and human rights frameworks in practice requires understanding how the cycle of corruption facilitates, perpetuates and institutionalises human rights violations. This research examines grand corruption through human rights and

²⁶ United Nations Convention against Transnational Organised Crime, adopted 15 November 2000 GA RES 55/25, entered into force 29 September 2003.

²⁷ African Union Convention on Preventing and Combating Corruption, adopted 1 July 2003, entered into force 05 August 2006.

²⁸ United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, adopted 16 December 1997 A/Res/51/191, effective 23 November 2013.

²⁹ The International Code of Conduct for Public Officials, adopted 12 December 1996 (A/Res 51/59 annex).

³⁰ ECOWAS Protocol on the Fight against Corruption adopted in Dakar, December 2001. November 2015.

³¹ Southern African Development Community (SADC) Protocol against Corruption, signed in Blantyre Malawi on 14 August 2001 and entered into force on 6 August 2003.

³² James Wolfensohn, ‘Coalitions for Change’ *Annual Meetings Speech, September 28-30, 1999* < www.imf.org/external/am/1999/speeches/pr02e.pdf > accessed 04 June 2016.

³³ *ibid.*

international criminal law lenses, thereby concentrating on the consequences of a government's acts of impunity on its citizenry. It is premised on the assumption that people have the right to be protected by their respective states and also within the international sphere.³⁴ Human rights according to the Preamble of the Universal Declaration of Human Rights are natural and inalienable rights which everyone enjoys by virtue of their humanity. 'These rights are based on the principles of dignity, equality and liberty and are underpinned by notions of solidarity'.³⁵ This research interrogates international and regional human rights frameworks on grand corruption by emphasising the obligations of the state to realise these rights for the people.

1.2 Statement of the Problem

This research undertakes an analysis of endemic grand corruption in the Nigerian public sector. Nigeria is located in West Africa and has a population of an estimated 167 million people.³⁶ Nigeria's economy is petroleum-based and the presence of vast petroleum resources presented exceptionally high corruption incidents acceding to the dictum of 'natural resource curse'.³⁷ Various manifestations of grand corruption occur in most Nigeria public offices,³⁸ and recent cases arising from the fight against the terrorist group

³⁴ Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 3.

³⁵ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 11.

³⁶ The National Population Commission in Nigeria puts the population of Nigeria to be above 167 million <<http://www.population.gov.ng/index.php/84-news/latest/106-nigeria-over-167-million-population-implications-and-challenges>>accessed 02 September 2015.

³⁷ Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' (2007) *North Western Univ. L. Rev.* 1, 7, 1282.

³⁸ See for example, *Tafa Balogun v Federal Republic of Nigeria* [2005] 4 NWLR (Pt. 324) 190). This seminal case involved Mr Tafa Balogun, a former Nigerian Police Chief (Inspector-General) who embezzled millions of Dollars of funds meant for the Nigerian Police

Boko Haram highlight the extent of the devastation caused by endemic grand corruption in Nigeria.³⁹ More recently, names of prominent Nigerian political elites featured in the leaked “Panama Papers”,⁴⁰ and exposed further the global dimension of the involvement of Nigerian public political elites in grand corruption. The Panama leaks raises concerns that transparency and probity remain elusive in Nigerian public office.

In *SERAP V Nigeria*, the ECOWAS Court in a landmark judgment delivered on 30 November 2010 ruled that ‘ ... embezzlement or theft in part of funds allocated to the basic education will have a negative impact ...’⁴¹ on human rights to basic universal education in Nigeria. The Socio-Economic Rights and Accountability Project (SERAP), a non-governmental organisation operating in Nigeria also petitioned the International Criminal Court (ICC) to commence an immediate investigation into corruption in Nigeria

Force> <https://efccnigeria.org/efcc/images/Annexture%20I.docx.pdf>> accessed 30 June 2016; See ‘Former Nigerian Governor James Ibori Jailed for 13 Years’ *BBC Africa* (London, 17 April 2012). James Ibori’s case exposed the depth of public office looting and the rot in Nigeria’s judicial system. Ibori was acquitted in a Nigeria court on the same offences that thereafter earned him 13 years jail term in the United Kingdom; See< <https://efccnigeria.org/efcc/images/Annexture%20II.pdf>> accessed 30 June 2016. *R. (On application of Alamiyeseigha) v Crown* [2006] Crim. LR.669; [2005] EWHC 274 (Admin). This case involved Mr DSP Alamiyeseigha, was a former governor of Bayelsa State Nigeria who stole billions of dollars belonging to the oil-rich Bayelsa State in Nigeria. He was arrested by the Metropolitan Police in London but disguised himself as a woman and fled London. Upon return to Nigeria, he was arrested, prosecuted and imprisoned. Most of the stolen funds were recovered and he agreed to forfeit certain assets illegally and criminally acquired by him.

³⁹ Abba Jimoh, ‘Grand Theft Nationale: How Elites Stole Nigeria Dry’ *Daily Trust* (Abuja, 2 July 2016). The total of \$2 billion Dollars earmarked for the procurement of weaponry against Boko Haram group in the security vote was allegedly siphoned off by a cartel of political elites; See ‘Nigeria’s Dasuki Arrested Over \$2 billion Arms Fraud’ *BBC Africa News* (London, 1 December 2015); See Ecowas Court ruling on the case: ECW/CCJ/APP/01/16.

⁴⁰ Documents leaked from the files of Mossack and Fonseca (referred to as the “Panama Papers”) lists some prominent Nigerian public office holders as having shell companies and involved in money laundering activities. < http://punchng.com/panama-papers-eminents-nigerians-in-another-corruption-> accessed 10 July 2016; http://www.nytimes.com/2016/04/16/business/international/panama-papers-europe.html?_r=0> ; accessed 10 July 2016.

⁴¹ ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS N0V 30 2010) 28.

with the aim of fast-tracking the inclusion of corruption among crimes under international law.⁴² The argument of SERAP is that the effects of corruption on the people are heinous and bear a direct connection to crimes against humanity.⁴³ The extent to whether, and how far this petition can progress is uncertain considering that, currently, the ICC has not commenced any investigation into corruption allegations in Nigeria. Notwithstanding, the SERAP petition is still relevant as it has stimulated further intellectual engagements on why this process should be fast-tracked. A recent publication by the Global Organisation of Parliamentarians against Corruption “GOPAC” appears to be furthering the campaign of SERAP by mobilising renewed intellectual engagement towards the international criminalisation of the crime of grand corruption.⁴⁴

This research explores a number of international engagements with grand corruption, but, will strongly argue for the prosecution of grand corruption as a crime under international law. The research supports the argument of the thesis by drawing from Article 7(1) of the Rome Statute which provides a definition of crimes against humanity. The Rome Statute

⁴² The Socio-Economic Rights and Accountability Project (SERAP) is a Nigeria based civil society organisation specialising in monitoring probity and accountability in governance. SERAP petitioned the ICC in 2008, and while the requested investigation is yet to commence, the ICC recently (September 2016) published ‘Policy Paper on Case Selection and Prioritisation’. A ‘Case Selection Document’ has been designated to select cases meriting ICC’s intervention. Perhaps, the commencement of this procedure may indicate a new era on petitions related to grand corruption < https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 20 September 2016.

⁴³ SERAP *ibid*; Sonja Starr, ‘Extraordinary Crimes at ordinary Times: International Justice Beyond Crisis Situations’ (2007) *North Western Univ. L. Rev.* 1, 7.; Ilias Bantekas ‘Corruption as an International Crime and a Crime against Humanity: An Outline of Supplementary Criminal Justice Policies’ (2006) *Journal of International Criminal Justice* 4, 474; Ndiva Kofele-Kale, ‘Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law’ (2009) *Centre for Human Rights and Democracy in Africa* <<http://fakoamerica.typepad.com/files/kofele-kale-keynote-address.pdf>> accessed 10 March 2016.

⁴⁴ See < http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf> accessed 01 February 2016.

provides for international prosecution for the most serious crimes of concern to the international community. Crimes covered by the Rome Statute include war crimes, crimes against humanity, genocide and aggression. Crimes against humanity in contrast to genocide, for example, do not require proof of specific intent to destroy a qualifying group, or in contrast to war crimes, need a particular connection to armed conflicts. The ingredients of crimes against humanity when scrutinised present the same characteristics as grand corruption in Nigeria. In line with Sonja Starr's reasoning, this thesis argues that referring 'corruption cases to the ICC would increase transparency and accountability, making it harder for kleptocrats to extract bribes from international companies or use financial institutions to move or hide ill-gotten assets'.⁴⁵

1.3 Aims and Objective of the Study

1. To assess, analyse and map out the various manifestations of grand corruption and its institutional facilitators in Nigeria.
2. To investigate the extent to which international law has recognised grand corruption as violating human rights and as constituting either actual or potential crimes against humanity.
3. To investigate the procedure for upgrading grand corruption to a crime under international law in the Rome Statute.

⁴⁵ Starr (n 37) cited in Richard L Cassin, 'Kleptocrats in Court' (2009) FCPA Blog <<http://www.fcpablog.com/blog/2009/3/31/kleptocrats-in-court.html>> accessed 30 September 2016.

1.4 Research Questions

1. How can grand corruption violate human rights in Nigeria?
2. How have the existing international, regional and domestic legal frameworks facilitated efforts at combating grand corruption?
3. How can international criminal law conceptualise grand corruption as a crime under international law to be prosecuted as a crime against humanity?
4. Why are violations of socio-economic rights less susceptible to international criminalisation?

1.5 Scope and Significance of the Study

This research undertakes an analysis of grand corruption in the public sector in Nigeria and how it impacts human rights from the perspectives of international human rights and international criminal law. It is one of the first studies to undertake a country-specific exploration of grand corruption within the context of international human rights and international criminal law. Although there are other studies on grand corruption in Nigeria,⁴⁶ the uniqueness of this research is the ability to locate the subject within the

⁴⁶ Jude Uddoh, *Corruption and Nigerian Foreign Policy (1999-2007)* (Authorhouse 2016); Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014); Paul Ocheje, 'Refocusing International Law on the Quest for accountability in Africa: The Case Against The (Other) Impunity' (2002) *Leiden Journal of International Law* 15 749-779; Bolaji Owasanonye, *Justice or Impunity? High-profile Cases Crawling or Gone to Sleep* (Human Development Initiative 2014).

realm of international human rights and international criminal law while at the same time thematically anchoring it in an inter-disciplinary and country- specific platform.

Hence, this research seeks to follow an interdisciplinary examination of the impact of grand corruption upon human rights, and an analysis of accountability processes at the domestic level by placing the relevant international and regional oversight mechanisms under scrutiny. It will equally undertake an assessment as to whether a normative gap exists within international criminal law regimes when it comes to structural violations of socio-economic rights. The research considers the question of whether corruption ought to be framed as an international crime falling within the jurisdiction of the Rome Statute of the International Criminal Court.

1.6 Methodological Approach

The thesis is rooted in qualitative interpretive paradigm adopting the inductive and hermeneutic approaches.⁴⁷ It views the phenomenon of grand corruption through the lens of the people being studied as hermeneutic phenomenology focuses on the subjective experience of individuals and groups.⁴⁸ Hermeneutic process attempt to show the world as experienced by the subject through his/her life world stories. This school of thought advances that interpretations are all we have and description itself is an interpretive process.

A wide range of primary and secondary sources, including books, journals, case laws, treaties, statutes, articles, reports, institutional records, government publications,

⁴⁷ Alan Bryman, *Social Research Methods* (3rd edn, Oxford University Press 2008) 697.

⁴⁸ *ibid* 694.

technical documents archival and internet sources was accessed. The study used snowball sampling technique in recruiting the elite sample participants in the research. Snowball sampling in this context refers to an activity whereby the researcher employs the help of existing participants/interviewees in recruiting other interviewees who are their acquaintances. This sampling technique is purposive and adequate for this research owing to the secretive nature of the concept under study.

Being aware that corrupt practices occur in a secret “grey area” of social behaviour, thereby limiting considerably the measurement of the real extent of grand corruption, and in consideration of the limitations of data generated by TI’s Corruption Perception Index,⁴⁹ the World Bank Governance Indicator,⁵⁰ MO Ibrahim Foundation,⁵¹ Afrobarometer,⁵² additional data obtained by the researcher through elite interviews augment the other secondary data listed above. The use of the semi-structured interviews allowed participants to provide additional information for the purposes of enriching the subject of the research. The semi-structured interviews were recorded on a Dictaphone and selective transcribing used in extracting the themes and findings. The thirteen questions (see appendix iv) were related to the research objectives such as matters arising from the reviewed literature; definitions of grand corruption; assessment of grand corruption in Nigeria; the role of non-governmental organisations (NGOs) in anti-

⁴⁹ See the Results for 2016 Corruption Perception Index of the Transparency International < http://www.transparency.org/news/feature/corruption_perceptions_index_2016 > accessed 25 March 2017.

⁵⁰ <http://info.worldbank.org/governance/wgi/index.aspx#reports>

⁵¹ See < <http://mo.ibrahim.foundation/news/2015/the-2015-ibrahim-index-of-african-governance-key-findings/> > accessed 25 June 2016.

⁵² See the 2015 result of Afrobarometer survey in Nigeria with relevant sections on key questions on grand corruption and its impact on human rights of respondents < http://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/nig_r6_sor_en.pdf > accessed 25 June 2016.

corruption projects; donor agencies; the justice system; and the government in combating grand corruption in Nigeria; assessment of the public perception of grand corruption; the role of political heritage in the dynamics of grand corruption and the main efforts being made to combat grand corruption. Thirteen elite participants were selected for the project. The thirteen selected Nigerians live in Lagos and Abuja, in Nigeria. The elite samples in this context do not represent people with high economic, social or political standing, but rather, these people are chosen because of who they are and the positions they occupy and for particular reasons of their involvement in anti-corruption projects.

1.7 Structure of the Thesis

This research work is divided into eight chapters. Chapter one holistically introduces the thesis, sets out the research objectives, research questions, methodologies, theoretical framework, research structure and reviews relevant literature related to the work. Chapter two considers the history of grand corruption in Nigeria setting out why it has remained systemic and has proved so difficult to combat. Chapter three examines the Nigerian legal instruments on corruption and the connection between grand corruption and human rights abuses. Emphasis is laid on the two major anti-corruption agencies, the Economic and Financial Crimes Commission and the Independent Corrupt Practices Commission, in contextualising the argument of the chapter. Chapter four considers the international and regional human rights instruments against corruption with the special focus on the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. Chapter five examines economic and social rights in relation to its relevance to grand corruption as well as the normative gap in international criminal

law in this regard. Chapter six assesses the relationship between international criminal law and grand corruption by highlighting the role of the Rome Statute within the research. Chapter seven argues for grand corruption as a crime against humanity by setting out the categories of international crimes and interrogating whether grand corruption merits inclusion as a crime under international law. Chapter eight contains the conclusions, summary of findings and suggestions/ recommendations of the entire thesis. Appendix vi elaborates further the methodology of the research and presents the data obtained from the research empirical field trip.

Conceptual Analysis of Related Literature

1.8 General Perspectives on Corruption and Grand Corruption in Nigeria

Susan Rose-Ackermann and Bonnie Palifka suggest that ‘public-sector corruption deserves special emphasis because it undermines developmental and distributional goals and conflicts with democratic and republican values’.⁵³ Moreover, the inability of States plagued with a high incidence of grand corruption to implement robust policies that could combat it has necessitated renewed efforts by the international community to combat corruption. Sharon Eicher remarks that ‘people everywhere are more concerned than they ever have been about corruption and business ethics’.⁵⁴ However, these efforts at promoting transparency in governance do not interpret human rights frameworks and content. The exclusion of human rights contents within corruption research reiterates the views of Daniel Kaufmann that corruption, human rights and international criminal law are intertwined, the linkages are multi-faceted, yet, with little formal interface in the international convention or advocacy world.⁵⁵ The United Nations Convention against Corruption, for instance makes no reference to “human rights”, but corruption siphons funds into private bank accounts, thereby impairing economic, political and social development.⁵⁶ Lyal Sunga and Ilaria Bottigliero assert that a human rights approach to

⁵³ Susan Rose-Ackermann and Bonnie J Palifka, *Corruption and Government: causes, Consequences and Reform* (2nd edn, Cambridge University Press) 7.

⁵⁴ Sharon Eicher, ‘What Corruption is and Why it Matters’ in Sharon Eicher (ed), *Corruption in International Business* (Gower Publishers 2009) 1.

⁵⁵ Daniel Kaufmann ‘Human Rights and Governance: The Empirical Challenge’ (2004) <<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/humanrights.pdf>> accessed 2 January 2016.

⁵⁶ See for instance the arguments that corruption is directly linked to the squandering of public funds advanced by Lyal S Sunga and ILaria Bottigliero, ‘In-depth Study on The Linkages Between Anti-Corruption and Human Rights for The United Nations Development Programme’

corruption research is essential as ‘a human rights approach maintains a broader international focus on the effects of corruption on the enjoyment of human rights’.⁵⁷ They argue that human rights based approach ‘represents a direct and potentially effective way in which to empower ordinary individuals to demand transparency, accountability and responsibility from elected representatives and public officials’.⁵⁸

The pervasiveness of grand corruption in Nigeria and its effects on social, economic and political development begs the question as to why a state with huge natural resource deposits should be afflicted. John Mbaku cautions that ‘unless and until Nigerians provide themselves with institutional arrangements that adequately constrain ... civil servants and politicians from engaging in corrupt enrichment, corruption will remain pervasive and the average citizen will continue to find it very difficult to have access to free public goods and services’.⁵⁹ Nihal Jayawickrama asserts in this regard that corruption violates human rights. He describes how grand corruption leads to violations of the UDHR, ICESCR, and ICCPR.⁶⁰ In recent times, scholars have linked international human rights and international criminal law to grand corruption with the aim of highlighting the effects such violation of human rights has on people, at the same time, pressing for international codification of the crime of grand corruption.⁶¹ Daniel Kaufman saw merit in such academic engagement concurring, that ‘the covenants and

(2007)< http://km.undp.sk/uploads/public1/files/Sunga-Bottigliero_Revised_Final_Report_on_HR_and_Anti-Corruption_Strategies1.pdf> 10 March 2016.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ John Mbaku, *Corruption in Africa: Causes, Consequences and Cleanups* (Lexington Books 2010) 48.

⁶⁰ Nihal Jayawickrama, ‘Corruption – A Violation of Human Rights’? Sofia, 1998, 1-6.< [file:///C:/Users/user/Downloads/Corruption%20-%20a%20violation%20of%20human%20rights%20-TI%20Working%20Paper_%20\(2\).pdf](file:///C:/Users/user/Downloads/Corruption%20-%20a%20violation%20of%20human%20rights%20-TI%20Working%20Paper_%20(2).pdf)> accessed 12 January 2016.

⁶¹ Ndiva Kofele Kale; Sonja Starr; Raj Kumar, Ilias Bantekas; Zoe Pearson and Daniel Kaufmann are some of the scholars that are very active in linking corruption and human rights.

declarations on human rights do not include freedom from corruption ...this implies that a key mechanism linking first and second generation issues is explicitly omitted from coverage by human right conventions, declarations and work by activists in this area'.⁶² This thesis submits that the international human rights instruments at the global and regional levels could potentially contribute to monitoring, reporting and following up matters involving grand corruption that relate to human rights violations.

International criminal law and human rights law are two fields of international law concerned with the individual. Larissa Van Den Herik observes that 'it is true that international criminal law and international human rights law share significant existential traits ... the articulation between international criminal law and human rights law seems rather one-sided'.⁶³ She submits that 'international criminal law is primarily concerned with violations of civil and political rights... Economic, social and cultural rights have, so far, less directly inspired the development of international criminal law...'.⁶⁴ Van Den Herik argues that 'the bias against socio-economic and cultural rights might be explained by the traditional conceptualization of this generation of human rights as having the character of programmatic aspirations rather than justiciable rights'.⁶⁵ This thesis will interrogate this claim as it examines grand corruption from the international criminal law and international human rights law perspectives within the context of Nigeria. It will argue, in line with Robert Klitgaard, that 'when corruption becomes systematic, fighting it must go beyond implementing liberal economic policies...Fighting

⁶² Daniel Kaufmann, 'Human Rights and Governance: The Empirical Challenge (March 1 2004) The World Bank Institute. 22<
<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/humanrights.pdf>> accessed 20 September 2016.

⁶³ Larissa Van Den Herik, 'Economic, Social and Cultural Rights -International Criminal Law's Blind Spot?'(2013) Grotius Centre Working Paper 2013/002-ICL. 1.

⁶⁴ *ibid* 1.

⁶⁵ *ibid*.

systematic corruption requires administering a shock to disturb a corrupt equilibrium'.⁶⁶ In line with this approach, the succeeding sections will outline the theoretical frameworks, and critically analyse grand corruption in Nigeria through the lens of international criminal law and international human rights law.

1.8.1 Theoretical Framework

In conceptualising the theoretical framework for this research, it is important to emphasise the opinion of Alt and Lassen that 'there is no commonly agreed-upon theoretical framework approach on which to base an empirical model of corruption, let alone to investigate the causes of corruption'.⁶⁷ It is also vital to be guided by the views of Chabal that 'the reality of [African] history is far more complex and [nobody] can account for all ... events [in the continent] within one particular theoretical framework or by means of a single conceptual apparatus'.⁶⁸ This is to say that, the various causes of corruption in Nigeria underline the connection and convergence of various theories on the concept. Hence, this research's theoretical framework concurs with the arguments of the UK Department of International Development that combating corruption involves understanding 'what are the conditions that facilitate corruption, what are its costs and what are the most effective ways to combat it'?⁶⁹

⁶⁶ Robert Klitgaard, 'International Cooperation against Corruption' (1998) Finance and Development Vol 35 no 1, 6.

⁶⁷ James E Alt and David D Lassen, 'The Political economy of corruption in American State' (2002) *Journal of Theoretical Political Study* 15 (3), 342.

⁶⁸ Patrick Chabal 'Introduction: Thinking about Politics in Africa' in Chabal Patrick (eds) *Political Domination in Africa: Reflections on the Limit of Power* (Cambridge University Press 1986) 4.

⁶⁹ Department of International Development, 'Why Corruption Matters: Understanding Causes, effects and how to address them. Evidence Paper on Corruption' (2015) UK Aid for the British People < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf> accessed 12 November 2016.

1.8.2 The Soft State Theory

Gunnar Myrdal's⁷⁰ "soft state theory" characterises the state-society relations, particularly in the third world.⁷¹ Myrdal's "soft state" means 'a lack of some discipline; deficiencies in law enforcement; disregard of the rules by public officials at all levels, their collusion with powerful persons whose conduct it was their duty to regulate'.⁷² Myrdal argued that at its base, softness refers to a condition in which civil society is weakly developed and state institutions lack autonomy⁷³ and 'the soft state is marked by corruption, racketeering, bribery, black market, arbitrariness, and political expediency in the enforcement of laws, and the abuse of power'.⁷⁴ Goldthorpe went further to argue that 'the soft state and corruption were linked in turn with an elitist conspiracy in which ... higher officials, legislators ... acted together to hinder reforms, manipulate them in their favours and obstruct their implementation'.⁷⁵ Soft states are characterised by citizens who have a weak or a diffuse sense of national interest and who do not have a commitment to public service.⁷⁶ Mbaku argues that corruption persists in 'soft states' like Nigeria as a result of the 'inability or failure to ... secure, efficient, professional and "modern" bureaucracies with competent, well -trained, honest and highly skilled civil servants'.⁷⁷ To this end, Kandeh submits that 'the failure of those who wield state power is a failure to promote the development of their societies and articulate a vision for the future is a failure to optimise the ruling class functionality of their states ... it is precisely this narrow,

⁷⁰ Gunnar Myrdal, *Asia Drama: Enquiry into the Poverty of Nations* (Allen Lane Abridged edition, Allen Lane 1972) cited in Kawabata (n 86) 20.

⁷¹ *ibid* 20.

⁷² *ibid*.

⁷³ *ibid*.

⁷⁴ William A Clark, *Crime and Ounishment in Soviet Officialdom: Combating Elite Corruption in Soviet Elite 1965-90* (Routledge 2015) 204.

⁷⁵ J E Goldthorpe, *The Sociology of Post Colonial Societies: Economic disparity, Cultural Diversity and development* (Cambridge University 1996) 126.

⁷⁶ Gould and Mukendi cited in John Mukum Mbaku (n 59) 64.

⁷⁷ Mbaku (n 59) 64.

immediate formative, preoccupation of the state bourgeoisie that deprives the soft state of any real reproductive dominant class functionality'.⁷⁸ Ilufoye Sarafa Ogundiya adds that a soft state is 'a state where the legal system and its paraphernalia are moribund or at least ineffective'.⁷⁹ This would agree with the situation in Nigeria where there is a pervasive culture of impunity across the social strata, the egregious culture of impunity has itself sabotaged and stultified the growth of the rule of law by fuelling a legal system bedevilled by delays. Corrupt officials have devised technical means to evade the national justice system and to protect themselves from the consequences of breaking the law by use of business fronts and pseudo names in contracts. Rothchild and Foley posit that some modern African states can be portrayed as 'soft — i.e. a state limited in its control over society and therefore incapable of implementing its regulations efficiently throughout its territory and of achieving its many-faceted goals, and requires policy implications to harden the state'.⁸⁰ Scott identified the problems of the soft state as corruption, tribalism, nepotism, collusion between civil servants and politicians, and the circumvention of the law and regulations.⁸¹ The argument of the term "soft state" was elaborated upon by Forrest⁸² in his analysis of the "hardness" of some African states. Forrest outlined four cardinal points synonymous with "hard states", '... a measure of structural autonomy from social forces ... political penetration in the sense of control over local-level structures ... the extraction of

⁷⁸ Jimmy D Kandeh, 'Sierra-Leone: Contradictory Class Functionality of the 'Soft' State,' (1992) *Review of African Political Economy* Vol 20 No 55, 43.

⁷⁹ Ilufoye Sarafa Ogundiya 'Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations' (2009) *Anthropologist* 11 (4), 286.

⁸⁰ D Rothchild and MW Foley, 'African States and Politics of Inclusive Coalitions' in Rothchild D and Chazan N (eds) *The Precarious Balance: State and Society in Africa* (Boulder West View Press 1988) 233-264 cited in Masahisa Kawabata, 'An Overview of the Debate on the African State' (2006) Afrasian Centre of Peace and Development Study, Working Paper, Ryukoku University, 20.

⁸¹ C V Scott, 'Socialism and the 'Soft State' in Africa: An Analysis of Angola and Mozambique,' (1988) *The Journal of Modern African Studies* Vol 26 No1 23-36.

⁸² Joshua B Forrest, 'The Quest for State 'Hardness' in Africa' (1988) *Comparative Politics* Vol 20 No 4, 423-442.

resources from society and peasant agriculture ... and ideological legitimacy to facilitate the achievement of the three goals without resort to coercion'.⁸³ Forrest concludes that 'some African states have not been able to decisively realise its state-building goals and therefore remains to a large extent soft'.⁸⁴ Chabal states that 'I believe that the African post-colonial state, although overdeveloped, hegemonic and omnipresent, is both soft and over-extended'.⁸⁵ Reviewing these developments, Villalón validates Forrest's opinion and adds that "soft" is 'the most frequently used term to describe the African state; the context in which it is used varies, but the term refers to the weakness vis-à-vis the society; and the state is "soft" because it is mostly incapable of achieving the goals stated in its definition; the soft states of Africa have failed either to establish their predominance over other organisations in the society or to institute binding rules to regulate their activities or both'.⁸⁶

However, the "soft state theory" is not without critics. For instance, Sangmpam condemned it, highlighting its failure to adopt a detailed comparison between Africa and other third world states as a major weakness.⁸⁷ Sangmpam further argued that the theory focuses on the decline or softness of the state in Africa, and that Africa shares most of its socio-economic features with other Third World countries that are not characterized by the softness of their states, and concludes that the theoretical issue of the state is the underlying pitfall of the soft state paradigm.⁸⁸ In his criticism of the "soft state", Fatton points out that the thesis is mistaken

⁸³ Forrest (n 82) 423.

⁸⁴ *ibid* 437.

⁸⁵ P Chabal, 'Some Reflections on the Post-colonial State in Portuguese-speaking Africa' (1993) *Africa Insight* Vol 23, No 3, 133.

⁸⁶ L A Villalón, *Islamic Society and State Power in Senegal: Disciplines and Citizens in Fatick* (Cambridge University Press 1995) 19; Masahisa Kawabata, 'An Overview of the Debate on the African State' (2006) Afrasian Centre of Peace and Development Study, Working Paper, Ryukoku University, 20-21.

⁸⁷ S N Sangmpam, 'Neither Soft nor Dead: The African State is Alive and Well' (1993) *African Studies Review* Vol 36 No 2, 73-94.

⁸⁸ *ibid* 73-94.

because it refutes the reality of an authoritarian, interventionist, and class-based state.⁸⁹ Fatton also insists that the state is never soft; it is always an organ of dominance; to characterise the state as being soft is to miss class relationships and class struggles.⁹⁰ Besides, other scholars have also opined that corruption in Nigeria has moved from prebendalism to predation in which office holders and public officials try to repay their supporters, family members, cronies and ethnic group members with sums of money, contracts and jobs.⁹¹ The corruption in Nigeria, a product of the soft state has indeed resulted in weakly developed civil society, low coherence, low capacity and low autonomy of government organisations.

1.8.3 Natural Resource Curse Theory

The “resource curse” or “paradox of plenty” literature describes a tendency for states not to harness their resources for national development, and even to be harmed by them in many cases.⁹² It brings to fore the question as to why some mineral dependent states in Africa are quite corrupt. Could it be inferred that the revenue from the natural resources are too much for the system to absorb? Has the appropriation of revenue from the natural resources not run contrary to the guarantee by Article 21 (1) of the African Charter on Human and Peoples’ Rights that, ‘all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived

⁸⁹ R. Fatton, ‘The State of African Studies and Studies of the African State: The Theoretical Softness of the ‘Soft State’, (1989) *Journal of Asian and African Studies*, Vol.24, No.3-4, 170-187.

⁹⁰ R. Fatton, ‘Predatory Rule: State and Civil Society in Africa’ (1992) Boulder: Lynne Rienner.

⁹¹ P. Lewis, ‘From Prebendalism to Predation: The Political Economy of Decline in Nigeria’, (1996) *Journal of Modern Africa Studies* 34 (1): 79-103; Prebendalism, a term developed by Richard Joseph is applied specifically to the Nigerian context and refers to the disbursing of public offices and state rents to an ethnic group to which one belongs.

⁹² Nicholas Shaxson, ‘Oil, Corruption and the Resource Curse’ (2007) *International Affairs* (Royal Institute of International Affairs) Vol. 83, No 6, Africa and Security, 1124-1125.

of it'.⁹³ The United Nations General Assembly has inter-alia recognised this right as belonging to the people when it adopted Resolution 1803 (XVII) 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources'.⁹⁴

The "resource curse" argument first used by Richard Auty in the early 1990 argues that 'a growing body of evidence suggests that a favourable natural resource endowment may be less beneficial to countries at low and mid-income levels of development than the conventional wisdom might suppose'.⁹⁵ It appears that the degree of corruption in most African states makes it look as if there is a correlation between wealth from natural resources and corruption. Nicholas Shaxson pointed out that 'this seems to afflict countries where the resource is extracted onshore (as in the Niger Delta) ...'.⁹⁶ O'Brien and Rathbone expressed similar views using Nigeria and Sierra Leone as examples of states where 'diamonds and oil have ... provided the bulk of government revenue ..., making possible a greater weight of central government'.⁹⁷ Thus, Nigeria, though endowed with abundant natural resources, presents a scenario where these rich resources have resulted in low growth rates, low levels of human development, and high levels of inequality and poverty. This is partly because various individuals wish to divert as much of that endowment as possible for their own private benefit;⁹⁸ with the understanding that natural resource endowment is exclusively handled by the state and in doing that, 'they

⁹³ The African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

⁹⁴ See < http://legal.un.org/avl/ha/ga_1803/ga_1803.html>accessed 05 February 2016.

⁹⁵ Richard M Auty, *Sustaining Development in Mineral economies: The Resource Curse Thesis* (Routledge 1993) 1.

⁹⁶ Shaxson (n 92) 1123.

⁹⁷ O'Brien, Cruise Donal Band, Rathbone Richard, 'Introduction' in O'Brien, Cruise Donal B, et al (eds) *Contemporary West African States (African Studies Series 65)* (Cambridge University Press 1989) 3.

⁹⁸ Macartan Humphreys, Jeffrey Sachs and Joseph E Stiglitz, *Escaping the Resource Curse* (Columbia University Press 2007) chapter 2, 26.

necessarily maintain and strengthen their hold on resource extraction and allocation’.⁹⁹ However, this can be contrasted with, for example, states like Norway, Australia, Canada, New Zealand and Botswana. Most especially in Norway, unlike Nigeria, ‘the management of the petroleum resources reflects the view among Norwegian decision makers that the resources belong to the nation, and that the development should benefit the society as a whole, including future generations’.¹⁰⁰ Norway is able to manage the government oil fund using transparent measures in ensuring that ‘money from the Fund could not be used to finance purposes which were not given priority in the ordinary budget procedure in Stortinget (the Parliament)’.¹⁰¹ The Norwegian experience suggests that natural resources can be blessings and not just curses. In light of this, one can ask, to what extent can the Norwegian experience be useful in overturning the natural resource curse afflicting Nigeria? Steinar Holden submits that ‘this is hard to assess, in particular when it comes to countries in an entirely different political and economic phase of development’.¹⁰² She further argues that ‘when oil was discovered in Norway, the country had been a stable democracy since it acquired independence in 1905...The state bureaucracy functioned well, with little corruption ... The legal system worked well’.¹⁰³ Leite and Weidmann support the resource curse theory, arguing that capital-intensive resource industries tend to induce more corruption, hampering economic development.¹⁰⁴ This assertion is particularly relevant to the Nigerian oil sector since Nigeria’s rating is below the median rank

⁹⁹ Robert Williams, *Political Corruption in Africa* (Gower Aldershot 1987) 48.

¹⁰⁰ Steinar Holden, ‘Avoiding the Resource Curse, The Norway Case’ (2013) <<http://folk.uio.no/sholden/wp/resource-curse-norway-13.pdf>> accessed 06 April 2016.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ C Leite and J Weidmann, “Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth,” (1999) IMF Working Paper 99/85 (International Monetary Fund) 3-4.

on both the United Nation's Human Development Index and most of the World Bank's Worldwide Governance Indicators.¹⁰⁵

The "resource curse" theory focuses on the inability to promote growth and development despite the abundant resources indicating huge failures on the part of the oil-rich Nigerian state. These failures have many domestic implications, including the undue influence of power constellations and elites, human rights violations, the occurrence of uprisings, ethnic uprisings and insurgency and forms of corruption such as illicit enrichment, cronyism, active and passive bribery and graft. Shaxson gives the example of the paradox of resource curse citing a historic Nigerian incident when: 'Diepreye Alamieyesiegha, the onetime governor of Nigeria's oil-rich Bayelsa state, was arrested for money-laundering in London in 2005, local militants did not repudiate him for stealing oil money, but instead welcomed him as a local son of the soil'.¹⁰⁶ In this example, the abundance of oil resource in Bayelsa state, Nigeria was used as the 'ethnic card, which was to play the card of corruption by promoting the narrow interest at the expense of the wider interest'.¹⁰⁷ Another remarkable resource curse incident was the "Malabu Oil Scandal" involving a former Nigerian Petroleum Minister, Chief Dan Etete, Shell Company and ENI. In this deal, \$1.1 billion was fraudulently paid to Chief Dan Etete with the connivance of the sitting Attorney General of Nigeria (Mohammed Bello Adoke) and the Minister of State for Finance (Yerima Ngama) at the expense of impoverished Nigerian citizens whose natural resources had been hijacked by the oligarchs.¹⁰⁸ It can thus be cogently argued that part of the reason for the endemic grand corruption in Nigeria is from the poor management of abundant

¹⁰⁵ See UNDP's Human Development Report 2015 < http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf > accessed 30 August 2016; < <http://info.worldbank.org/governance/wgi/index.aspx#doc-intro> > accessed 30 August 2016.

¹⁰⁶ Shaxson (n 92) 1134.

¹⁰⁷ *ibid* 1134.

¹⁰⁸ See Global Witness, 'Shell and Eni's Misadventures in Nigeria' < [file:///C:/Users/user/Downloads/Shell's misadventures in Nigeria.pdf](file:///C:/Users/user/Downloads/Shell%20and%20Eni%20misadventures_in_Nigeria.pdf) > accessed 30 August 2016.

natural resources. Shaxson reiterates that ‘mineral dependence turns out to be a curse not just in terms of economic growth, but in terms of violent conflict, greater inequality, less democracy and more corruption’.¹⁰⁹ In sum, the discovery of mineral resources helped in aggravating an already existing problem, particularly in states suffering from dysfunctional political economic and legal systems. Williams gives the example of Nigeria: ‘... the oil boom... And the discovery of oil simply ensured that parasites grew fatter and more bloated’.¹¹⁰ His views derived from the fact that the business-like nature of a state’s economy makes it susceptible to corruption reiterating the views of Sachs and Warner that the sudden exploitation of natural resource stock may create social and economic turmoil.¹¹¹

1.8.4 State Capture Theory

The World Bank defines state capture as ‘the efforts of a small number of firms (or such groups as the military, ethnic groups and kleptocratic politicians) to shape the rules of the game to their advantage through illicit, non-transparent provision of private gains to public officials’.¹¹² Similarly, Joel Hellman and Daniel Kaufmann define “state capture” as the ‘efforts of firms to shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials’.¹¹³ For them, this form of grand corruption is the ‘most pernicious and intractable problem in the political economy of reform; a form of behaviour by

¹⁰⁹ Shaxson (n 92) 1123.

¹¹⁰ Williams (n 99) 96.

¹¹¹ J D Sachs, and A M Warner, ‘The Curse of Natural Resources’ (2001) *European Economic Review*, 45, 828.

¹¹² See The World Bank’s definition of state capture <www1.worldbank.org/publicsector/anticorrupt/STATE%20CAPTURE1.doc> accessed 03 January 2017.

¹¹³ Joel Hellmann and Daniel Kaufmann ‘Confronting the Challenge of State Capture in Transition Economies’ (September 2001) *Finance and Development: a quarterly magazine of the IMF*, Volume 38 number 3.

so-called oligarchs manipulating policy formation and even shaping the emerging rules of the game to their own, very substantial advantage'.¹¹⁴ State capture is also defined as 'the undue and illicit influence of the elite in shaping the laws, policies, and regulations of the state. In essence, this form of capture is a manifestation of grand corruption'.¹¹⁵ State capture connotes grand corruption implying that the state apparatus has been captured by some groups or oligarchies that, capitalising on the gains achieved through illegal payments and favours, can now influence the outcome of public policies. Laurence Cockroft notes that:

Two countries in Africa - Nigeria and Kenya – reflect the same determination by very small and corrupt elites to sustain their position. Thus, the reluctance of General Babangida to implement the long-awaited transfer to multi-party democracy, and the takeover of the process by General Abacha, represent a determination by a small group who were dominant within the military to ensure the survival of the status quo.¹¹⁶

John Mbaku refers to the forces that capture the state as 'a group that control the state and by implication, the allocation of resources...'¹¹⁷ The reason for capturing the state, according to Mbaku, is that it 'allows interest groups to control/or influence the design and execution of policies, the enactment of legislation, and the enforcement of government regulations; and principally for self-enrichment'.¹¹⁸ Mbaku believes that 'in many countries in Africa, those individuals or groups, which have captured political power often use the power to generate benefits and privileges for themselves and their supporters'.¹¹⁹ An important outcome of state capture is the passage of fiscally discriminating legislation which makes allowance for various

¹¹⁴ Hellmann and Kaufmann (n 113).

¹¹⁵ Daniel Kaufmann, 'Human Rights and Governance: the empirical challenge' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University press 2005) 373.

¹¹⁶ Laurence Cockroft, 'Corruption and Human Rights: A crucial Link' (1998) Working Paper <file:///C:/Users/user/Downloads/Corruption%20and%20Human%20Rights_a%20crucial%20link%20TI%20Working%20Paper_.pdf>12 March 2015.

¹¹⁷ Mbaku (n 59) 66.

¹¹⁸ *ibid* 25.

¹¹⁹ Mbaku (n 59)13.

income and wealth transfer schemes.¹²⁰ The late Nigerian military President, General Sani Abacha, epitomised this illicit wealth transfer scheme. The proceeds of his corrupt activities are still being located at different safe havens abroad.¹²¹ Recently, the United States ordered a freeze on \$458 million in assets stolen by former Nigerian dictator Sani Abacha and his accomplices and hidden in European accounts.¹²² According to the Justice Department of the United States, ‘the assets frozen ... along with additional assets named in the complaint ... represent the “proceeds of corruption” during and after the military regime of Abacha, who became president of Nigeria through a military coup on 17 November 1993, and held that office until his death on June 8, 1998’.¹²³ Daniel Kaufmann and Joel Hellmann conclude that ‘the capture economy is trapped in a vicious circle in which the policy and institutional reforms necessary to improve governance are undermined by collusion between powerful firms and state officials who reap substantial private gains from the continuation of weak governance’.¹²⁴

1.8.5 Conclusion

In an effort to define corruption, one is cautioned that ‘attempts to develop a more precise definition invariably encounter legal, criminological and, in many countries, political problems’.¹²⁵ On the other hand, an absence of a definitional consensus should not deter scholarly engagement with corruption; rather, it should drive further critical research. As

¹²⁰ *ibid* 25.

¹²¹ See <http://www.unodc.org/unodc/en/frontpage/nigerias-corruption-busters.html> accessed 30 August 2016; <https://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf> accessed 30 August 2016.

¹²² See ‘US freezes Abacha’s stolen Mn’ *Daily Times* (Abuja, 6 March 2014).

¹²³ *ibid*.

¹²⁴ Hellmann and Kaufmann (n 113).

¹²⁵ See <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf> accessed 18 February 2015.

scholars engage in the search for a unified working definition of corruption, this research among other things, argues for concerted academic engagement on extending the core international crimes beyond their present sphere of competence.

This chapter adopts TI's definition of corruption as 'the abuse of entrusted power for private gain'.¹²⁶ As argued earlier in this chapter, TI's definition, despite shortcomings, is the preferred choice for the purpose of this research as it offers universality and flexibility in working on the thesis topic. TI plays an active role in the global campaign against corruption and most donor agencies follow its prescriptions as a determining factor in deciding who receives developmental aid.¹²⁷ This supports with the views of Grace Morgan that, 'bilateral and multilateral organisations ... must ensure that their assistance is spent as intended, and is not siphoned off into the pockets of public or private interests'.¹²⁸

This research further argues for the upgrading of grand corruption to the status of a crime under international law in view of its overwhelmingly, detrimental impact on human rights. It interrogates why deaths caused by bloodshed attract the attention of international criminal lawyers more than the slow deaths of those deprived of food, water and medicine through corrupt acts. The recent starvation of internally displaced persons (IDP) fleeing from Boko Haram's terrorism in some rehabilitation camps in northern Nigeria highlights examples of recent incidents where factors other than political violence could result in enormous loss of life.¹²⁹ The relevance of this argument is underscored by the fact that only very rarely are socio-

¹²⁶ Transparency International (n 1).

¹²⁷ Kaufmann (n 113); Wayne Sandholtz and Mark M Gray, 'International Integration and National Corruption' (Fall 2003) *International Organisation* / Volume 57 / Issue 04 / Fall 2003, 761-800.

¹²⁸ Grace Morgan, 'Traction on the Ground: From Better Data to Better policy' (2011) *Hague Journal on the Rule of Law* 3: 380-396.

¹²⁹ See 'UN accused of failing as north-east Nigeria at risk of famine' *The Guardian* (London 14 July 2016); Con Coughlin '50,000 children face death by starvation in northern Nigeria' *The*

economic rights violations tackled by any of the available mechanisms of transitional justice;¹³⁰ yet, the constantly expanding literature on transitional justice and international criminal law has remained largely detached from the human rights literature on socio-economic rights. This research also highlights the failure of domestic remedies in grand corruption cases, a response to the doctrine of exhaustion of remedies which holds that individuals should exhaust their avenues of redress in the domestic legal systems before turning to international redress.¹³¹ In essence, it is the intention of this research to argue, like Kale, that ‘remedies are ineffective when domestic laws do not afford adequate relief or when the injured party is prevented from having recourse to them’.¹³² Kale reasons that the domestic remedies are also ineffective if ‘the courts are not independent or the proceedings take too long to dispose of the dispute’.¹³³ Alina Mungiu-Pippidi agrees, ‘if courts and legal battles against corruption are conspicuously missing in this analysis, it is because ... courts are not autonomous from status groups, and legislation is frequently not implemented’.¹³⁴ Mungiu-Pippidi believes that international assistance is crucial ‘to push for the adoption of some “institutional weapons” that an anticorruption coalition or isolated anticorruption entrepreneurs can use’.¹³⁵ It is argued here

Telegraph (London 29 July 2016); See Mo Ibrahim Foundation website ‘An Open Letter on the Unfolding Tragedy in Nigeria’ <<http://mo.ibrahim.foundation/news/2016/open-letter-unfolding-tragedy-nigeria/>> accessed 05 January 2017.

¹³⁰ L Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) *N Y U J Int'l L & Pol* 40 1.

¹³¹ Ndiva Kofele-Kale, ‘Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law’ (2009) Centre for Human Rights and Democracy in Africa <<http://fakoamerica.typepad.com/files/kofele-kale-keynote-address.pdf>> accessed 10 March 2016, 41.

¹³² *ibid* 41.

¹³³ *ibid*.

¹³⁴ Alina Mugui-Pippidi, ‘Corruption: Diagnosis and Treatment’ (2006) *Journal of Democracy* Volume 17 Number 3, 96.

¹³⁵ *ibid* 97.

that establishing international legal regime is a vital link that drives the process of combating grand corruption forward.

The succeeding chapters will interrogate relevant literature, regulation and case law analysing grand corruption, international human rights and international criminal law focusing on the Nigerian state as the case study.

Chapter Two

Grand Corruption in Nigeria: Historical Review

2.1 Introduction

Robert Tignor asserts that ‘perhaps no country in the continent has devoted more attention and energy to continuing allegations of corruption than Nigeria’.¹ Tignor submits that ‘by the time that independence was achieved in 1960, many Nigerians regarded corruption as the main issue by which they and the outside world would judge the country's capacity for self-rule’.² Nigeria is a victim of high-level corruption, bad governance and political instability. Consequently, national development is impaired, political environment remain uncertain and socio-economic rights are grossly unrealised.

While the literature on corruption is copious, there is scarce empirical research on the history of corruption in Nigeria.³ This may be explained in the context that, quite unlike other socially constructed practices, the study of corruption presents great challenges because it occurs in secret. Moreover, while the scandals associated with corruption are always discussed in the literature, there is a little exploration of the institutional, legal, political, economic and social structures that have consistently constructed the landscape which facilitates the continuous

¹ Robert L Tignor, ‘Political Corruption in Nigeria before Independence’ (1993) *Journal of Modern African Studies*, 31, 2, 175.

² *ibid.*

³ Few civil society organisations have conducted empirical investigation on the history of corruption in Nigeria. Evidence from the studies done by Transparency International, the World Bank and Human Rights Watch suggest that Nigeria is faced with an epidemic of grand corruption, yet there is the paucity of research unravelling how it all started. Moreover, most text books on transparency, human rights, politics and corporate governance are incomplete without mentioning cases from Nigeria yet on the other hand lack historical content.

corruption. These gaps and other scholarly output in this area provide the springboard for the analysis in this chapter.

A historical background is essential in providing the context and framework for analysing grand corruption in Nigeria. Hence, this chapter, using a historical lens, seeks to explore this area and aims at encouraging scholarly debates on the relevant structures and the actors constructing corruption in a larger institutional context not as an act of recriminations over the past but, to uncover how we got it wrong from the past and to suggest ways to strategically reposition the future. What then is the origin of grand corruption in Nigeria? How did Nigeria become an endemically corrupt state? Or in the words of Chidi Odinkalu, ‘how has a country so richly endowed blown the opportunities for itself and its generations yet unborn so spectacularly’?⁴ How did Nigeria become a crippled giant?⁵

This chapter examines the underlying bases of grand corruption in Nigeria as a framework for the analysis undertaken in the entire research. What counts as grand corruption in Nigeria? How do we account for its endemic nature? Answers to these and other relevant questions attempted in this chapter will provide the conceptual framework for the succeeding chapters of this research.

⁴ Chidi Anslem Odinkalu ‘Corruption and Governance in Africa: How do we break the cycle in Nigeria?’ (2010) 14. Cleen Foundation Lagos<
<http://www.cleen.org/Corruption%20and%20Governance%20Challenges%20in%20Nigeria%20-%20Final%20Version.pdf>> accessed 16 February 2015.

⁵ Eghosa Osaghae, *Crippled Giant: Nigeria Since Independence* (Hurst and Company 1998)
1.

2.2 Grand Corruption (Colonial Era 1882-1960)

According to Tignor, ‘concerns about corruption were seen as one of the reasons colonial rule was needed as it provided good government in place of oppression and chaos’.⁶ On the contrary, Osoba argues that the British colonial administration laid the foundation of what metamorphosed into endemic grand corruption, emphasising that the scourge remains a national epidemic.⁷ Tignor observes that ‘indeed, from the late colonial period up until the present, critics of those in power have lamented the level of venality, and numerous published reports have catalogued a wide range of iniquities and called for reform’.⁸ He further asserts that ‘a considerable amount of bribery, nepotism, and the use of political office for personal enrichment did exist in late colonial Nigeria. Evidence of administrative malfeasance was palpable...’.⁹ It follows then that British colonialism in Nigeria (1900-1960), contrary to the views of Tignor, can be argued to have been founded on corruption and exploitation legitimised by a system of indirect rule, a major tool for the governance of the native authorities. Onigu Otite agrees that ‘experience of colonialism created a culture of unbridled corruption and fettered democracy’.¹⁰ Walter Rodney was more emphatic as he blamed colonialism for upsetting Africa and in particular, Nigeria’s development.¹¹

The colonial administrative policy of indirect rule in Nigeria created “two classes of publics” among Nigerians as captured by Peter Ekeh, ‘two publics... such that while the primordial public ... was built on a system of accountability and control, based on moral principles, the

⁶ Tignor (n 1) 177.

⁷ S O Osoba, ‘Corruption in Nigeria: Historical Perspectives’ (1996) *Review of African Political Economy* No 69, 372.

⁸ Tignor (n 1) 175.

⁹ *ibid* 176.

¹⁰ Onigu Otite, ‘On Sociological Study of Corruption’ in Femi Odekunle (eds) *Nigeria: Corruption in Development*, (University Press 1982) 12.

¹¹ Walter Rodney, *How Europe Underdeveloped Africa* (Pambazuka Press 2012).

civic public (ruled by the postcolonial state and its institutions) became a contested terrain for private accumulation based on amoral principles'.¹²

To this, Paul Ocheje replies that the 'corruption of public officers existed in Nigeria since the establishment of modern structures of public administration in the country by the British Colonial administration, however, its escalation has coincided with the expansion of administrative structures'.¹³ To corroborate this assertion, Stephen Pierce notes that 'British authorities complained about governmental corruption from the very beginning of the colonial period'¹⁴. Osoba agrees that 'corruption in Nigeria is a kind of social virus which is a hybrid of traits of fraudulent anti-social behaviour derived from British colonial rule and those derived from and nurtured in the indigenous Nigerian context'.¹⁵ The arguments by scholars on where grand corruption originates rest on two sides of a contrived opposition and as such this research agrees with Laura Routley that 'the relationship between corruption and colonialism in Nigeria is an ambivalent one... I find this discussion of the roots of corruption unfruitful to the hybridity of these practices, which cannot simply be traced back to its roots or have their hybrid elements separated out'.¹⁶ I also agree with Chabal and Daloz's views on it as 'long-running, interesting, but ultimately fruitless set of debates in terms of comprehending the rationale of contemporary practices'.¹⁷ The recurrent and converging facts from these diverse arguments which also remains the focal point of this research hinges on the view that over the years, Nigeria has seen

¹² Peter P Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) *Comparative Studies in Society and History* Vol. 17, No. 1, 92.

¹³ Paul D Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences, Act 2000' (2001) *Journal of African Law* 45, 2, 171.

¹⁴ Steven Pierce, 'Looking Like a State: Colonialism and the Discourse of Corruption in Northern Nigeria' (2006) *Society for Comparative Study of Society and History*, 888.

¹⁵ Osoba (n 7) 372.

¹⁶ Laura Routley, *Negotiating Corruption: NGOs, Governance and Hybridity in West Africa* (Routledge 2016) 20.

¹⁷ Chabal P and Daloz J P, *Africa Works: Disorder as Political Instrument* (Oxford 1999) 97-97 cited in Routley (n 16) 20.

its wealth withered by endemic grand corruption which has systematically drained its natural resources, precipitating poverty, and economic crisis which inevitably magnifies dispossession, hunger, disease, illiteracy, human rights violations and insecurity.

There are history records of grand corruption incidents associated with politicians who worked with the colonial administrators. Dr Nnamdi Azikiwe, who became the first president of Nigeria immediately after independence, was indicted in a grand corruption case involving African Continental Bank (ACB) in which he had a personal interest. Dr Azikiwe failed to abide by the rules of the code of conduct for public officers and thus failed to relinquish his personal business interests before assuming office as a public minister. According to Michael Ogbeidi,

In 1956, the Foster-Sutton Tribunal of Inquiry investigated the Premier of the defunct Eastern Region, Dr. Nnamdi Azikiwe, for his involvement in the affairs of the defunct African Continental Bank (ACB) ... The Foster-Sutton Tribunal discovered that Azikiwe did not sever his connections to the bank when he became a Premier. The Tribunal reported that Azikiwe continued to use his influence to promote the interests of the bank.¹⁸

Following indictment by the Tribunal, Dr Azikiwe transferred his interest in ACB to the government of Eastern Nigeria. Chief Obafemi Awolowo, another prominent post-colonial minister and the first premier of the western region, was found guilty of corruption by the Coker Commission in 1962. He was blamed for the diminished fortunes of the Western Region Marketing Board due to his corrupt acts. The Coker Commission found Awolowo responsible for the economic meltdown of the Western Region Marketing Board because he diverted the

¹⁸ Michael M Ogbeidi, 'Political Leadership and Corruption in Nigeria Since 1960: A Socio-economic Analysis (2012) Journal of Nigeria Studies Volume 1, Number 2, <http://www.unh.edu/nigerianstudies/articles/Issue2/Political_leadership.pdf> 30 January 2015; Tignor (n 1) 191.

total of N4.4 million in cash and N1.3 million in overdraft from the National Bank to finance his political ambitions through the sponsorship of the Action Group (AG).¹⁹

Azikiwe and Awolowo became prominent political personalities that received the authority of governance from the colonialist upon Nigerian independence in 1960. The colonial administration made no effort to sanction them despite the overwhelming evidence against them. This episode sent a wrong signal that ‘corruption was not simply an objective reality, standing on its own. It became a symbol and a metaphor, constructed in the midst of political competition’.²⁰ This supports the view that the foundation laid by the British colonial authority could be argued to be primarily a political structure which allowed and at times even encouraged corruption. This chapter argues that these incidents marked the beginning of grand/official corruption in Nigeria, a clear indication of a privatised/oligarchic state. Johnston defines such state as ‘appropriated to the service of private interests by the dominant faction of the elite’.²¹ In this regard, Daniel Agbibo suggests that ‘the failure of the political elites who took over power from the colonialists complicated matters in the postcolonial period, due to their failure to address the root of these problems and, particularly, their inability to transform ... social structures ...’.²²

¹⁹ Ogbeidi (n 18); Eghosa Osaghae, *Crippled Giant: Nigeria since Independence* (Hurst and Company 1998) cited in Jude Uddoh, *Corruption and Nigerian Foreign Policy (1999-2007)* (Authorhouse 2016) 42; Tignor (n 1) 196.

²⁰ Tignor (n 1)176.

²¹ Michael Johnston, ‘What Can Be Done About Entrenched Corruption?’ in Boris Pleskovic and Joseph E Stiglitz (eds) *Annual World Bank Conference on Development Economics* (World Bank 1997) 89-90.

²² Daniel Agbibo, ‘One Step Forward, Two Steps Back: The Political Culture of Corruption and Cleanups in Nigeria’ (2013) *CEU Political Science Journal* 8(3), 280.

2.3 Grand Corruption: A Post-Colonial Experience (Nigeria's First Republic, 1960-1966)

Michael Ogbeidi recounts that 'the First Republic under the leadership of Sir Abubakar Tafawa Balewa, the Prime Minister, and Nnamdi Azikwe, the President, was marked by widespread grand corruption'.²³ Ogbeidi maintains that 'government officials looted public funds with impunity. Federal Representatives and Ministers flaunted their wealth with reckless abandon... Politically, the thinking of the First Republic Nigerian leadership class was based on politics for material gain; making money and living well'.²⁴

The immediate civilian regime after independence did not last long. Grand corruption was pervasive with records of abuse of office, personal material aggrandisement, kickbacks, nepotism, awarding contracts to front companies, lodging public funds into private accounts, over invoicing, approval of substandard projects, disregard of due process, bribery, fraud, stealing and misappropriation of public funds. Ogbeidi submits that 'the First Republic, with Azikiwe as the President, was marked by widespread corruption. Government officials looted public funds with impunity'.²⁵

The unexpected transfer of political power to inexperienced nationalist political elites saddled them with power and wealth which had serious negative implications for good governance and transparency. Sadly, the nationalist politicians were unable manage the instruments governance efficiently, but rather exhibited flagrant abuse of public office for personal gain. Michael Crowder observes that 'by the end of 1965, the politicians had earned almost universal contempt for their corruption, profligacy and lack of real concern for those they ruled and who

²³ Ogbeidi (n 18) 12.

²⁴ *ibid* 6.

²⁵ *ibid*.

had elected them'.²⁶ In the midst of the confusion and disillusionment associated with the first republic politicians, the military launched a coup d'état that immediately overthrew the regime, set aside all democratic institutions and introduced martial law. Ogbeyi argues that 'the 1966 coup was a direct response to the corruption of the First Republic'.²⁷ For Effeh, 'it follows that the ideals for economic emancipation- the supposed inspiration behind the quest for independence- has become the subject of escapist antics, grandiloquent rhetoric, and/or outright buffoonery'.²⁸ However, amidst all this rhetoric, people seemed to overlook the complexities within the system that nourished and sustained the unwavering wind of grand corruption with greater emphasis laid on its manifestations and consequences as reflected in the speeches of succeeding military regimes as will be analysed in the next section (section 2.4).

2.4 Grand Corruption (The Nigerian Military Connection 1966-1999)

The military played prominent roles in sustaining grand corruption in Nigeria as 'corruption, already burgeoning under the early politicians, became entrenched under the military rule'.²⁹ Military coups forcefully circumvent democratic institutions and because of their illegitimacy, it can be argued that the track record of the military indicate that they had little regard for the well-being and welfare of the populace and as such pursued no mandate of accountability and transparency. The military rulers were able to institutionalize their dominance by 'defusing inherent potential sources of opposition, suppressing and placating, employing reversal and

²⁶ Michael Crowder, *The Story of Nigeria* (Faber & Faber London 1962) 260.

²⁷ Ogbeyi (n 18) 7.

²⁸ Ubong E Effeh, 'Sub-Saharan Africa: A Case Study on How Not to Realise Economic, Social and Cultural Rights, And A Proposal For Change' (spring 2005) NorthWestern University Journal of International Human Rights Volume 3 Issue 1, 8.

²⁹ Ngozi Okonjo-Iweala, *Reforming the Unreformable: Lessons from Nigeria* (MIT Press 2012) 4; John Mukum Mbaku, *Corruption in Africa: Causes, Consequences and Cleanups* (Lexington Books 2010) 32.

insistence tactics in a bid to ensure a delicate balance of legitimacy'.³⁰ Fagbadebo argues further that, 'this explains the reasons for the multiplicity of corruption and the further decimation of available resources and potentials for national development'.³¹ The argument reiterates that military intervention in politics is harmful to democracy and accountability. Mbaku notes that 'throughout their tenure in power, Nigeria's several military governments were never able to help the country develop a consistent, predictable, and a fair legal framework for dealing with corruption'.³² Rather, a series of grand corruption scandals characterised several military regimes in Nigeria.

For instance, the English Court of Appeal case, *Trendtex v Central Bank of Nigeria*³³ remains a very important case in the history of Nigerian military's involvement in endemic grand corruption. In the *Trendtex* case, the Nigeria Ministry of Defence ordered 20 million tonnes of cement from about 80 different suppliers, at a cost of over US\$8 billion (in 1975 prices).³⁴ More than 400 ships arrived at the Lagos seaport with the cement consignment, with more arriving daily, completely paralysing a seaport that had no capacity for such shipments. Lord Denning criticised the transaction maintaining that 'yet early in 1975 the government departments then in charge ... had ordered 10 times that quantity ... to be delivered over the next 12 months ... Even for all commodities together, the discharging capacity at Lagos...did not amount to two million tons a year'.³⁵ The main issue with the *Trendtex* case in this context is that Nigeria never needed those quantities of cement at the time, rather, a few high-ranking

³⁰ Omololu Fagbadebo, 'Corruption, Governance and Political Instability in Nigeria' (November 2007) *African Journal of Political Science and International Relations* Vol. 1 (2), 034.

³¹ *ibid* 032.

³² John Mukum Mbaku, *Corruption in Africa: Causes, Consequences and Cleanups* (Lexington Books 2010) 42.

³³ [1977] 1 QB 529 .

³⁴ Effeh (n 28) 11.

³⁵ [1977] 1 QB 529.

government officials used the pretext of importing cement for national development to embark on illicit enrichment thereby showing flagrant abuse of public office for private gain. Ubong Effeh asserts that ‘the *Trendtex* case was to become the prelude to how the country was to be misgoverned, with the Abacha regime taking “Mobutuism” to a different depth, adeptly combining Mobutu’s plundering disposition with a degree of viciousness unparalleled in Nigeria’s history’.³⁶ This period also exposed the ‘Nigerian rulers who had begun to set an example that was to become a living testament to mind-boggling profligacy, if not to supreme folly’.³⁷

Aside from the “Cement Armada Scandal” associated with the General Gowon’s regime,³⁸ the regimes of General Ibrahim Babangida and General Sani Abacha took Nigerian grand corruption to a whole new level.³⁹ For instance, the Iraq/Gulf war led to an exceptional oil boom, a surplus/steady flow of foreign exchange into the Federation account, as well as opportunity for extraordinary rent seeking. This translated to the situation where ‘the sum of US\$12.67 billion earned during the war could not be accounted for by the Babangida-led regime’.⁴⁰ In addition, Osoba argues:

The indiscipline in Babangida’s years in office was ... exemplified by regular budget overruns: N8.3 billion in 1988; N14.6 billion in 1989; N18.6 billion in 1990; N24.6 billion in 1991; and N41.5 billion in 1992, which the self-styled President was able to underwrite using the Central Bank of Nigeria (CBN) Ways and Means Advances to underwrite his regular budget overruns ... consequently, the money in circulation in

³⁶ Effeh (n 28) 11.

³⁷ *ibid* 11.

³⁸ “Cement Armada” scandal symbolised the military wasteful mismanagement of government resources that took place under General Gowon’s regime. The government embarked on a wasteful mass importation of cement that ‘totaled two-thirds of the estimated need of all Africa and which exceeded the production capacity of Western Europe and then Soviet Union’. See Rose-Ackerman (n 17) 30-31.

³⁹ Fagbadebo (n 30) 031.

⁴⁰ Agbiboa (n 22) 282.

Nigeria increased from N11.8 billion when Babangida assumed office in August 1985 to N100.5 billion when he stepped aside in 1993.⁴¹

Paul Ocheje describes the Babangida's regime as having officially sanctioned corruption in the country and made it difficult to apply the only potent measures, ... for fighting corruption in Nigeria in the future.⁴²

The late General Sani Abacha's grand corruption record became a national and international scandal leading Enrico Monfrini to argue that 'Nigeria had long been plagued by corruption, but under General Sani Abacha, corrupt practices became blatant and systematic'.⁴³ General Abacha ousted the interim national Government headed by Ernest Shonekan in a military *coup d'état* in 1993 and became notorious for institutionalising Nigeria's grand corruption.⁴⁴ Monfrini asserts that 'a total of 130 bank accounts in Switzerland were identified as having been used by the Abacha criminal organisation'.⁴⁵ The US Assistant Attorney General, Leslie Caldwell comments that 'rather than serve his country, General Abacha used his public office in Nigeria to loot millions of dollars, engaging in brazen acts of kleptocracy'.⁴⁶ General Abacha's regime marked a dark era for the fight against grand corruption in Nigeria and remains the era when Nigeria's Corruption Perception index rating by the Transparency

⁴¹ Osoba (n 7) 383.

⁴² Ocheje (n 13) 190.

⁴³ Enrico Monfrini, 'The Abacha Case' in Mark Pieth (ed) *Recovering Stolen Assets* (Peter Lang Bern 2008) 50.

⁴⁴ The process of looting and laundering of public fund by General Abacha was quite sophisticated and convoluted, largely because of bank secrecy regimes existing in different jurisdictions, particularly Switzerland. Other jurisdictions that harboured Abacha's loot includes United Kingdom, Luxembourg, Liechtenstein, Jersey and the US.

⁴⁵ Monfrini (n 43) 50.

⁴⁶ See U.S Department of Justice, 'U.S Forfeits over \$480 million Stolen by former Nigerian Dictator in largest Forfeiture ever obtained Through a Kleptocracy Action' <https://www.justice.gov/opa/pr/us-forfeits-over-480-million-stolen-former-nigerian-dictator-largest-forfeiture-ever-obtained>> accessed 10 November 2016.

International was among the worst scores.⁴⁷ General Abacha, his family and cronies⁴⁸ looted the treasury of Nigeria to the tune of about US \$50 Billion.⁴⁹ General Abacha died in June 1998 and since his death, Nigeria through international co-operation with countries like the United Kingdom, Switzerland and Liechtenstein has succeeded in repatriating some of the looted public funds stashed away in foreign banks/safe financial havens.⁵⁰ Notably, Switzerland has repatriated over \$700 Million hidden in different Swiss banks, Jersey returned \$100 Million, \$150 million in Luxembourg, and several hundreds of million Dollars in the USA, United Kingdom, Liechtenstein, and others.⁵¹ Augustine Aminu reports that ‘the assets were held in banks that included Deutsche Bank AG, HSBC Holdings PLC and Banque SBA, according to the lawsuit... in June [2014], after a 16-year legal battle, Nigeria recovered from Liechtenstein, \$228 million stolen by Abacha and his associates... as of last year, Nigeria had recovered about \$1.3 billion of Abacha's money from various European jurisdictions’.⁵² The US recently took control of \$480 million stolen by Abacha on 6th August 2014. US District Judge, John Bates ordered that the funds frozen by the Justice Department, and linked to the Abacha dynasty be forfeited

⁴⁷ The Transparency International Corruption Perception Index for years 1997-1998 were the worst scores Nigeria ever had.

⁴⁸ Emmanuel Onyebuchi Ezeani, ‘Corruption in Nigeria Implication for National Development’ (March/April 2005) *African Renaissance* Vol 2. No.2. (Reports that ‘for instance, a total of US \$10,600,000 million was recovered from Paul Ogwuma. Similarly, the sums of US\$ 167,000,000 and £22,900,000, were recovered from Mr. Gilbert Chagoury, a close business associate of Abacha. In February 2005, the British Minister for Africa told newsmen that over £1.5 billion (about N315.53 billion) of Nigeria’s looted funds were frozen in various British banks. The Minister revealed that £30 million of the looted money belongs to the Abacha family)

⁴⁹ Agbibo (n 22) 284.

⁵⁰ Nigeria recently signed a Memorandum of Understanding with the United Kingdom aimed at facilitating the repatriation of proceeds of corruption stashed in the UK <https://www.gov.uk/government/news/immigration-minister-signs-agreement-with-nigeria-on-returning-stolen-criminal-assets> accessed 10 November 2016; Monfrini (n 43)1.

⁵¹ Ocheje (n 13) 770; Agbibo (n 22) 284; David Smith, ‘Switzerland to return Sani Abacha 'loot' money to Nigeria’ *The Guardian* (London, 18 March 2015).

⁵² See case no 1:13-cv-01832 (JDB) of the US Federal District Court, District of Columbia on Abacha loot to be repatriated to Nigeria; Augustine Aminu, ‘U.S Takes Control Of \$480 Mln Stolen By Abacha’ *Daily Times NG* (Abuja, 8 August 2014).

to US control and ‘the forfeiture judgment includes approximately \$303 million in two bank accounts in the Bailiwick of Jersey, \$144 million in two bank accounts in France, and three bank accounts in the United Kingdom and Ireland with an expected value of at least \$27 million. The ultimate disposition of the funds will follow the execution of the judgment in each of these jurisdictions. Claims to an additional approximately \$148 million in four investment portfolios in the United Kingdom are pending’.⁵³ The case of Sani Abacha and recently the late Duvalier (former Haitian dictator), precipitated the Swiss government to enact the Swiss Restitution of Illicit Assets Act 2010. The Swiss Act is a law instituted to checking the influx of corrupt and illegally acquired funds into Switzerland.⁵⁴

It remains a subject of debate among researchers on why grand corruption flourished during the military era in Nigeria. Scholars argue that the military practice of suspending constitutions to rule with “Decrees” and “Edicts” could have ensured the brazen kleptocratic tendencies recorded in Nigeria.⁵⁵ In the words of Mbaku, ‘in fact, military rule has contributed more than any single factor, to making corruption endemic in Nigeria’.⁵⁶

⁵³ See US Department of Justice ‘U.S Forfeits over \$480 Million Stolen by Former Nigerian Dictator in Largest Forfeiture ever obtained in kleptocracy Action’ <<https://www.justice.gov/opa/pr/us-forfeits-over-480-million-stolen-former-nigerian-dictator-largest-forfeiture-ever-obtained>> accessed 10 November 2016.

⁵⁴ The Swiss Government is committed to returning to Nigeria \$458 million stolen by the late military dictator General Abacha and deposited in Swiss banks. The Swiss have already transferred \$290 million of the money. On June 25, 2014, Nigeria received the sum of euro 167 million from the government of the Principality of Liechtenstein, part of looted funds recovered from the Abacha family. Liechtenstein, with banking secrecy laws like its neighbour Switzerland, is seen as an attractive destination for looted wealth. Nigeria had recovered about \$1.3 billion of Abacha's money from various European jurisdictions as of 2015, with more than a third of that from Switzerland.

⁵⁵For example, see section 6 Constitution (Suspension and Modification) Decree No 1 of 1966 and sec 2 Constitution (Suspension and Modification) Decree No 1 of 1984, now Cap 64, Laws of the Federation of Nigeria 1990; Mbaku (n 32) 38-43.

⁵⁶ *ibid* 39.

2.5 Grand Corruption: Post Military Era to Date (29 May 1999-April 2017)

The coming into power of civilians in Nigeria in 1999 regrettably failed to restore transparency in governance. The civilian democratic regime headed by Chief Olusegun Obasanjo established two major anti-corruption agencies⁵⁷ and ratified some of the regional and international legal instruments on corruption. However, Shehu argues that ‘during the eight-year period of the Obasanjo administration, Nigeria lost between US\$4 billion and US\$8 billion annually to corruption’.⁵⁸

Obasanjo’s regime was inundated by local and global corruption scandals. At the global level, Halliburton-KBR, one of the world’s largest providers of products and services to the oil and gas industry, got entangled in a messy bribery scandal in Nigeria.⁵⁹ In 2012, former Kellogg Brown and Root, CEO Albert Stanley, received 30 months in jail for his complicity in the \$180 million bribery scandal in Nigeria.⁶⁰ The bribe facilitated their bid for a contract for the construction of liquefied natural gas plant in southern Nigeria. Another high-profile case involved Siemens. Siemens was fined about \$1.6 billion for bribery offences, and that remains one of the largest fines for bribery in modern corporate history.⁶¹ The offences leading to these

⁵⁷ The Independent Corrupt Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) are the two anti-corruption agencies in Nigeria to date. Other extra-ministerial departments are The Fiscal Responsibility Commission; The Bureau of Public Procurement and the Nigeria Extractive Industries Transparency Initiative (NEITI).

⁵⁸ A Shehu, ‘Corruption and Development’ (24 November 2011) Presented at the third Lecture of the Institute for Peace And Conflict Resolution, Ministry of Foreign Affairs, Abuja, cited in Musa Idris, ‘Corruption and Insecurity in Nigeria’ (2013) Public Administration Research, Vol 2, No, 1.

⁵⁹ Charles Carter, ‘Corruption and Global Governance’ in Sophie Harman and David Williams (eds) *Governing the World? Cases in Global Governance* (Routledge 2013) 73; See ‘Dick Cheney faces Bribery Scandal in Nigeria’ *BBC News Africa* (London, 2 December 2012).

⁶⁰ Chris Albin-Lackey, ‘Corruption, Human Rights and Activism: Useful Connections and Their Limits’ in Dustin N Sharp (eds) *Justice and Economic Violence in Transition* (Springer 2013) 154.

⁶¹ Siri Schubert and T Christian Miller, ‘At Siemen, Bribery was Just a Line Item’ *The New York Times* (New York, 20 December 2008).

finances were tied to corrupt practices indulged by these companies in Nigeria. Moreover, Willbros Incorporated paid \$32 million to the USA authorities for the same involvement in bribery in Nigeria. It cost Sagem SA \$200 million to bribe senior government officials in Obasanjo's administration in order to win the bid for the National Identity Card Scheme.⁶² In all these cases, this research argues that the involvement of these multi-national corporations in Nigerian bribery cases portray Nigeria as a weak state that tolerates illegalities. It also raises the red flag about the level of corruption in Nigeria. Otherwise, the pertinent question, why is it always happening in Nigeria? A closer look at the Foreign Corrupt Practices Act (FCPA) violations shows that most of the serious cases have a strong presence and affiliation to Nigeria. It is simply pointing to the fact that there is systemic corruption in the entire system, giving rise to many of the situations where it is easy to compromise the set rules.

At the domestic level, 'between 2005 and 2007, state Governors, politicians and public officials allegedly embezzled US\$250 billion hidden in western banks and other offshore financial centres'.⁶³ Other documented cases include indictment and conviction of a one-time Inspector General of the Nigerian Police, the highest ranking police officer in Nigeria at the time, Tafa Balogun. Mr Balogun was indicted for embezzling \$128 million or N13 billion Naira belonging to the Nigerian Police Force. Following a plea bargain, he was fined N4 million and received a light six months imprisonment.⁶⁴ The sentencing of Balogun represented a mockery of justice and in the words of Olaniyan, 'the level of prosecution and punishment of corruption involving high-ranking state officials are simply not commensurate with the gravity of the problem...'⁶⁵

⁶² *The New York Times*, 15 December 2008; see also EFCC Magazine, 2008:48 and ICPC Monitor, 2008:34; Olusola Akinpelu, *Corporate Governance Framework in Nigeria: An International Review* (iUniverse Books 2011) 359.

⁶³ Shehu (n 58).

⁶⁴ *Tafa Balogun v Federal Republic of Nigeria* [2005] 4 NWLR (Pt. 324) 190.

⁶⁵ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014) 9.

It goes further to expose the charade of the Nigerian justice system caused by systemic grand corruption. According to the Human Rights Watch Report 2014, this depicts ‘a weak and overburdened judiciary’.⁶⁶

Some elected state governors in Obasanjo’s administration have been indicted on serious grand corruption offences. Agbibo notes, ‘the first case involved Joshua Dariye, former governor of Plateau state, who was found to operate 25 bank accounts in London alone. Dariye used front agents to penetrate western real estate markets where he purchased expensive properties’.⁶⁷

The London Metropolitan Police determined Dariye had acquired £10 million in benefits through criminal conduct in London, while domestically, the EFCC were able to restrain proceeds of his crimes worth \$34 million.⁶⁸ Another corruption scandal that hit the Obasanjo’s

regime was the arrest on 17 September 2005 of Diepreye Alamieyeseigha, Governor of the oil-rich Bayelsa State. Alamieyeseigha was arrested upon his arrival in London for being in possession of over £100,000 in undeclared cash. Following subsequent raids £1 million in cash was found in his London home and £800,000 (\$1.048 million) in his bank accounts in Britain.⁶⁹

Alamieyeseigha jumped bail and escaped from London.⁷⁰ He returned to Nigeria, where he was impeached, tried and imprisoned. The EFCC played a pivotal role in securing his indictment.

However, how he was able to amass USD \$ 1.5 million in cash, acquire four properties in London worth USD \$7 million and a penthouse in Cape Town valued at USD \$ 1.5million under the supposed watchful eyes of the EFCC remains a mystery. Bolaji Akinola queries how

⁶⁶ See Human Rights Watch Report 2014 < <http://www.hrw.org/world-report/2014/country-chapters/nigeria?page=2> > accessed 10 February 2016.

⁶⁷ Daniel E Agbibo, ‘As it was in the Beginning: The Vicious Cycles of Corruption in Nigeria’ (2013) *Studies in Sociology of Science* Vol.4 No.3, 16.

⁶⁸ *ibid.*

⁶⁹ *R (On application of Alamieyeseigha) v crown* [2006] Crim. LR.669; [2005] EWHC 274 (Admin); Bolaji Akinola, *Authority Stealing: How Greedy Politicians and Corporate Executives Loot the World’s Populous Black Nation* (Author House 2012) 11-23.

⁷⁰ *ibid.*

his asset declaration which was \$547,000 (N68.6 million) as at 1999 could have transformed to £1.8 million within the space of a few years.⁷¹

In another case, a former governor of the oil-rich Delta state, James Ibori was convicted by Southwark Crown Court in London of money laundering offences involving USD \$67 million following his extradition from the United Arab Emirates to stand trial.⁷² Ibori was sentenced to 13 years in prison in the UK and finished serving his prison term in December 2016.⁷³ A major issue arising from the analysis of Ibori's case is a question of why a Nigerian court previously absolved him of the charges. Does it mean that the laws in Nigeria are wrongly crafted or that the judiciary is ineffective? Human Rights Watch answers this asserting that the 'the appearance of judicial impropriety has been striking' while Albin-Lackey, opines that 'Ibori was renowned for fuelling widespread corruption and political violence'.⁷⁴ Generally, I emphasise that Ibori's vindication in a Nigeria Court highlights the depth of decay in the Nigerian judicial system and, as such, the judiciary retains the blame in the Ibori's case.

There are other former state governors who have pending grand corruption cases instituted by the Economic and Financial Crimes Commission (EFCC) which are stalled in Nigerian courts: Orji Uzor Kalu, Chimaroke Nnamani, Saminu Turaki, Reverend Jolly Nyama, Ayo Fayose, and Peter Odili. According to Nuhu Ribadu, 'when you fight corruption, corruption fights

⁷¹ Alexander A Wrage, 'Collective Action: A Compliance Case Study' in Mark Pieth (ed) *Collective Action: Innovation Strategies to Prevent Corruption* (Dick Zurich 2012) 221.

⁷² Albin-Lackey (n 60) 155.

⁷³ Mark Easton, 'Nigeria ex-governor James Ibori released from UK Jail' *BBC News* (London, 21 December 2016).

⁷⁴ Human Rights Watch 'Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission' <https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 28 August 2016; Albin-Lackey (n 60); Human Rights Watch, UK Conviction a Blow Against Corruption: Nigerian politician Stole Millions, Laundered Fortunes overseas (US, 17 April 2012) < <http://www.hrw.org/pt/node/106545> > accessed 10 January 2016.

back'.⁷⁵ The judicial system has remained an unrestrained instrument for the corrupt governors in fighting back using prolonged court adjournments. Moreover, the alleged complicity of some state governors begs the question of why the system in the state administrative machinery is so vulnerable.⁷⁶ Why have some of these governors stolen so much and yet there was an insufficient internal audit at the state levels to check these excesses? The state governors' alleged collusion simply suggests that the entire system may have been compromised.

The vice president to former president Obasanjo, Atiku Abubakar, was also involved in the corruption scandals that tainted the reputation of Obasanjo's administration. Abubakar was accused of diverting more than \$100m in public funds to private interest.⁷⁷ The investigating panel concluded that Mr Abubakar helped divert \$145m from Nigerian government accounts to personal bank accounts held in various parts of the world. A Senate inquiry recommended that Mr Abubakar should be prosecuted for illegally siphoning off public money.⁷⁸ Abubakar's numerous scandals were also linked him to William Jefferson, a Louisiana Democrat. Mr Jefferson was jailed after years of investigation by the US authorities (since March 2005) for using his position to help iGate, a multinational company which sought contracts with Nigeria and other African nations and taking bribes in return. The FBI found \$90,000 stashed in a freezer in his home. Jefferson was a close business ally of Abubakar and has since been sanctioned by the US justice department.⁷⁹ Moreover, many prominent cabinet ministers under

⁷⁵ Okonjo-Iweala (n 29) 92.

⁷⁶ San Daji, 'Former Adamawa Governor, Ngilari Jailed Five Years for Corruption' *ThisDay* (Abuja, 7 March 2017).

⁷⁷ See 'Nigerian vice-president faces corruption charges' *The Guardian* (Abuja, 28 February 2007).

⁷⁸ *ibid.*

⁷⁹ Associated Press, 'Nigeria Leader Sought Money, stake in Deal from Rep Jefferson (6 June 2006).

Obasanjo were investigated and indicted on major grand corruption offences.⁸⁰ The huge number of state officials enmeshed in grand corruption offences shows it as a national problem within a vicious circle of the political elites holding the rest of the Nigerian population captive. This conforms to the doctrine of “state capture”.⁸¹ State capture is defined as ‘the undue and illicit influence of the elite in shaping the laws, policies, and regulations of the state. In essence, this form of capture translates into grand corruption’.⁸²

In relation to former President, Goodluck Jonathan, Remi Adekoya argues that ‘Jonathan’s record on corruption is a disgrace’.⁸³ A recent report from Human Rights Watch states that ‘endemic public sector corruption continued to undermine the enjoyment of social and

⁸⁰ See Usman Mohammed, ‘Corruption in Nigeria: A Challenge to Sustainable Development in The Fourth Republic’ (2013) *European Scientific Journal* February 2013 edition vol.9, No.4 e - ISSN 1857- 7431, 124-129: ‘Senate Speaker Adolphus Wabara resigned after President Obasanjo accused him of accepting Osuji’s N51 million (\$400,000) bribes. Mobolaji Osomo, Housing and Urban Development Minister, was also dismissed from office for respectively bribing legislators to pass a budget and selling government properties unadvertised and below market value; Madam Patricia Olubunmi Etteh, the first female speaker of the House of Representatives was forced to resign following an allegation of misappropriation of public funds in multiple contracts of N628 million (\$5 million). The fund was to be used for the renovation of her official residence, and purchase of 12 official cars; Nasir El-Rufai, the Minister for the Federal Capital Territory alleged that two Senators close to the President, Deputy Senate President, Ibrahim Mantu and Majority Leader, Jonathan Zwingina, asked him for a bribe of N54 million (US\$418,000) to secure approval for his appointment. The Senators were not sanctioned even where El-Rufai’s allegation were not contested by the accused Senators. The former President’s daughter, Iyabo Obasanjo Bello, a Senator of the Federal Republic was involved in two separate scandals. In December, 2007, Iyabo Obasanjo Bello was involved in a contract scandal amounting to N3.5 billion involving her and Mr Schneider, her foreign business partner. According to the EFCC, the Senator used her mother’s maiden name, Akinlawon to conceal her identity in the contract deal. Senator Iyabo Obasanjo, was again involved in another financial scandal of mismanagement of funds in the Ministry of Health. It was this scandal that led to the resignation of Mrs. Adenike Grange and her Deputy, Architect Gabriel Aduku’.

⁸¹ Joel Hellmann and Daniel Kaufmann ‘Confronting the Challenge of State Capture in Transition Economies’ (September 2001) *Finance and Development: a quarterly magazine of the IMF*, Volume 38 number 3.

⁸² Daniel Kaufmann, ‘Human Rights and Governance: the empirical challenge’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005) 373.

⁸³ Remi Adekoya, ‘Goodluck Jonathan’s report card for Nigeria? Must Try Harder’ *The Guardian* (London, 7 May 2013).

economic rights in Nigeria'.⁸⁴ Former President Jonathan did not deny that his administration was undermined by systemic grand corruption as he has constantly referred to it as 'common stealing'.⁸⁵ He has been accused by his political allies of only paying lip service while encouraging corruption through his "body language".⁸⁶ Recently, Jonathan received a letter from Obasanjo⁸⁷ with 'vitriolic criticisms, which include comparing Mr Jonathan's rule to that of the late General Sani Abacha, the widely hated former military dictator'.⁸⁸ In the eighteen page letter, Mr Obasanjo accused Mr Jonathan of failing to tackle Nigeria's many problems, in particular, the endemic grand corruption.⁸⁹

Prominent among the grand corruption cases that emerged from former President Jonathan's regime includes the Police Pension Fund scam where 32.8 billion Naira (US\$210 million Dollars) belonging to the Police Pension Fund was embezzled by serving public officials.⁹⁰ The porous public structure arguably made it possible for the highly placed public officers to siphon off the pension fund. Moreover, in April 2012, the House of Representatives committee investigating the fuel subsidy programme (between 2009 and 2012) released a report showing the misappropriation of US\$6 billion.⁹¹ Ironically, the chairman of the investigating committee,

⁸⁴ See Human Rights Watch Report 2014 < <http://www.hrw.org/world-report/2014/country-chapters/nigeria?page=2> > accessed 10 February 2015.

⁸⁵ Pita Ogaba Agbese, 'Corporate Irresponsibility: The Culpability of Local and Foreign Firms in Corrupt Practices in Nigeria' in Dhirendra K Vajpeyi and Roopinder Oberoi (eds) *Corporate Social Responsibility and Sustainable Development in Emerging Economies* (Lexington Books 2015) 307.

⁸⁶ See 'Jonathan Encouraging Corruption-Tambuwal' *Punch* (Abuja, 10 December 2013).

⁸⁷ See 'Obasanjo's letter to Jonathan: Before It Is Too Late' *This Day Live* (Abuja, 22 December 2013).

⁸⁸ See Print Edition, 'Nigeria's President Loveless letters' *The Economist* (Abuja, 21 December 2013).

⁸⁹ *ibid.*

⁹⁰ See EFCC, N24bn Police Pension Scam: EFCC Tenders More Exhibits (25 June 2014) <<http://efccnigeria.org/efcc/index.php/news/940-n24bn-police-pension-scam-efcc-tenders-more-exhibits> > accessed 27 June 2016.

⁹¹ See < <http://serap-nigeria.org/seraps-paper-the-international-anti-corruption-conference-bangkok-thailand/> > accessed 20 June 2016.

Mr Farouk Lawan, demanded a bribe totalling \$3 million from the subsidy recipients, a bargaining chip for influencing favourable committee recommendations. He is alleged to have collected \$500,000 of the \$3 million bribe solicited from an oil tycoon to drop his company from the investigation.⁹² Farouk has been charged with the offence⁹³ but has continually filed frivolous and vexatious challenges and petitions against the presiding judges in a bid to delay the hearing and determination of his case.⁹⁴

Moreover, revelations from the submitted investigative report into Nigeria's oil and gas industry exposes the depth of corruption in the system. Aminu Tambuwal, a former speaker of the National Assembly laments that 'a total of 15 fuel importers collected more than \$300m two years ago without importing any fuel, while more than 100 oil marketers collected the same amount of money on several occasions...officials in the government of former President Goodluck Jonathan were among those who benefited from the subsidy fund'.⁹⁵ Another leaked report into the Nigerian oil and gas industry revealed a series of financial improprieties, in particular, the report showed that 'oil and gas companies owe the national treasury more than \$3bn in royalties...'.⁹⁶ It emerged that between 2005 and 2011, another \$566 million was owed by companies for the right to exploit an oil block, known as "signature bonuses".⁹⁷

In another major grand corruption scandal, the government of former President Jonathan was accused of shielding the former Petroleum Minister (Diezani Alison-Madueke) from audit and

⁹² See 'Nigerian Farouk Lawan charged over \$3m fuel scam 'bribe' *BBC News Africa* (London, 1 February 2013).

⁹³ *ibid.*

⁹⁴ Tobi Soniyi, 'Judge Withdraws from Lawan \$620,000 Bribery Trial' *This Day live* (Abuja 18 November 2014).

⁹⁵ See 'Nigeria Fuel Subsidy Report 'Reveals \$6bn Fraud' *BBC News Africa* (London, 24 April 2012).

⁹⁶ See 'Nigeria: Oil-Gas Sector Mismanagement Costs Billions' *BBC News Africa* (London, 22 October 2012).

⁹⁷ *BBC News Africa* (n 95).

prosecution for diverting oil revenue totalling about \$20 billion to her own use. Human Rights Watch states that ‘In February 2014, the government suspended the then-Governor of the Central Bank of Nigeria, Sanusi Lamido Sanusi, on allegations of financial impropriety. Sanusi had alleged large-scale corruption by the Nigeria National Petroleum Corporation, which the government has yet to investigate’.⁹⁸ To date, Sanusi insists on the veracity of his claims and it took another corruption allegation, this time, made by another ex-governor of the Nigerian Central Bank, Charles Soludo,⁹⁹ for the former President Jonathan to declare publicly that he has received the result of the forensic financial audit conducted by Price Water Coopers (PWC) on Sanusi’s \$20 billion dollar allegation. The forensic audit concludes that US\$1.48billion was misappropriated thereby giving credence to Sanusi’s allegation.¹⁰⁰

The recent grand corruption case involving the stealing of N32.8 billion (\$210m) from the Police Pension Fund is a clear example of using proceeds of grand corruption to circumvent the justice system.¹⁰¹ In the Police Pension Fund case, the perpetrator received a mere two-year prison sentence or an option of a fine of N750, 000 (\$4,740) supporting the argument that in soft states, the worst perpetrators of corruption are often unlikely to face national justice. Furthermore, the report of a further missing \$20 billion oil revenue¹⁰² by the erstwhile Central

⁹⁸ Human Rights Watch (n 84) 2.

⁹⁹ See Professor Charles Soludo’s letter accusing the serving Finance Minister, Mrs Ngozi Okonjo-Iweala of assisting former president Goodluck Jonathan led government to corruptly misappropriate national funds of about N30 Trillion naira <AdamuAbuh, EmekaAnuforo, Betram Nwannekanma and Yetunde Ayobami-Ojo ‘SERAP Invokes FOI, Urges Okonjo-Iweala to Account for Missing N30tn’ *The Guardian* (Lagos, 02 February 2015).

¹⁰⁰ Ifeanyi Onuba and Okechukwu Nnodim ‘Forensic audit indicts NNPC, Corporation to Refund \$1.48bn’ *Punch* (Abuja, 6 February 2015).

¹⁰¹ See Press Release of the National Judicial Council (NJC) over the suspension of Justice Abubakar Talba of the High Court, Federal Capital Territory (FCT) Abuja from office for a period of one year without pay for the judgment he delivered in the case John Yakubu Yusuf in the Police Pension case (*FRN Vs Esai Dangabar and 5Others*)<<http://njc.gov.ng/news.php>> accessed 06 April 2016.

¹⁰² See Human Rights Watch< <https://www.hrw.org/world-report/2015/country-chapters/nigeria>> accessed 28 August 2016.

Bank Governor and the indictment of the National Security Adviser (NSA), Colonel Sambo Dasuki, for misappropriating and laundering billions of dollars intended for use in combating the Boko Haram insurgency, epitomises the pervasiveness of grand corruption within the system. According to a news report by the Punch newspaper in December 2015, the former finance minister, Okonjo-Iweala agreed that she transferred \$322 million from the looted funds recovered from the late General Sani Abacha to the Office of the NSA for military operations in the North-East. Reacting through her Media Adviser, Mr. Paul Nwabuikwu, Okonjo-Iweala stated that the transfer of the funds was approved after a committee set up by former President Jonathan gave approval for the use of the money and based on the decision of the committee, she personally requested that part of the recovered fund be used for funding security operations while the rest be channelled into developmental projects. There has not been any official/independent audit report or gazette to confirm whether the developmental projects were ever commenced. However, the outcome of the National Security office misappropriations suggests that the entire fund were siphoned off. In contrast to this period, the disbursement of previously recovered loot from the Abacha family (2005-2006) was closely monitored and a World Bank report suggests that to a large extent, the recovered funds at the time may have been channelled into government budgetary spending and some developmental projects.¹⁰³

These events add up to expose how most Nigerian public offices and in particular, the office of the National Security Adviser, colluded with oligarchs to consolidate their capture of the state by ensuring that state departments become money laundering and financial conduit

¹⁰³ See 'Utilization of Repatriated Abacha Loot: Results of the Field Monitoring Exercise' <http://siteresources.worldbank.org/INTNIGERIA/Resources/Abacha_Funds_Monitoring_1221.pdf> accessed 28 August 2016. This is the comprehensive report of utilisation of the Abacha loot from 2005-2006; Ignasio Jimu, 'Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Phillipines and Kazakhstan' (2009) Center for Asset Recovery, Basel Institute of Governance, Working Paper Series No 06.

accessories from where state funds are siphoned off through imaginary projects linked to national security and other white elephant projects. In this light, this thesis argues that “state capture” results in a high level of corruption and remains a vicious cycle within official circles in Nigeria. The controversies of impropriety around the Nigerian Centenary celebrations and the on-going discovery of abandoned cash hauls in different states of Nigeria by the EFCC as a result of the current whistle-blower motivation and reward policy of the government reaffirms the pervasiveness of the grand corruption problem.¹⁰⁴ The whistle-blower reward policy aims at rewarding honest individuals who pass on vital confidential information regarding misappropriated public funds to designated government bodies. When such information lead to tracing and recovery of such funds, the individual receives monetary reward based on the total amount of money reported and recovered.

Gray and Kaufmann have pointed out: ‘where there is systemic corruption, the institution values, and norms of behaviour have already been adapted to a corruption modus operandi ...’.¹⁰⁵ The postulations of Gray and Kaufmann to a large extent mirror the institutional malaise prevalent in Nigeria as argued in this chapter, thereby reiterating the argument that grand corruption is so pervasive in Nigeria that it permeates almost all aspects of the national life.

¹⁰⁴ See ‘Whistle-blowing: EFCC Uncovers Another N4Billion’ <
<https://efccnigeria.org/efcc/news/2467-whistle-blowing-efcc-uncovers-another-n4billion> > accessed 13 April 2017; Allwell Okpi, ‘Centenary of Controversies’ *Punch* (Abuja, 9 March 2014).

¹⁰⁵ Cheryl W Gray and Daniel Kaufmann, ‘Corruption and Development’ (March 1998) *Finance and Development*, Volume 35 Number 1 <<https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf> > accessed 10 January 2015.

2.6 Multinational Corporations (MNCs) and Grand Corruption in Nigeria

The discussion of the endemic grand corruption in Nigeria is inadequate without the scrutiny of the role played by multinational companies (MNCs) in facilitating and sustaining grand corruption. Scholars argue that companies, especially multinationals, are the biggest perpetrators and use a sophisticated network of notional companies and corporate structures to facilitate corrupt practices in developing countries.¹⁰⁶ In essence, grand corruption in Nigeria is to a large extent sustained by the involvement and collusion of multinational corporations operating within and outside Nigeria.¹⁰⁷ The quest for global expansion, global competition and profit maximisation underscores the multinational corporations' exploitation of the endemic corrupt administrations in Africa by offering huge bribes.¹⁰⁸

Leslie Wayne states that 'as business has gone global, so has graft, particularly as companies in rich nations push into poorer regions'.¹⁰⁹ The World Bank estimates that about \$1 trillion in bribes is paid annually to government officials.¹¹⁰ Jeffrey M. Kaplan, a U.S lawyer who specialises in cases brought under the Foreign Corrupt Act, comments that 'you are talking about millions of dollars going to dictators who are selling their national patrimony in countries

¹⁰⁶ S Kapoor, 'Plugging the Leaks: A Very Short Paper on Curbing Capital Flight, Tax Avoidance and Tax Evasion for International Policy Dialogue (2005) Organised by WENT and the Federal Ministry for Economic Cooperation and Development (BMZ) <<http://www.new-rules.org/docs/kapoor4.pdf>> accessed 15 March 2016; J Martens, 'The Precarious State of Public Finance; Tax evasion, Capital Flight and Misuse of Public Money in Developing Countries – and What can be done about it' (2007) Global Policy Forum, 1-54, Online <http://www.globalpolicy.org/eu/en/publ/martens_precarious_finance_%202007.pdf> accessed 15 March 2016).

¹⁰⁷ Olatunde Julius Otusanya, Sarah Lauwo, and Gbadeges Babatunde Adeyeye, 'A Critical Examination of the Multinational Companies' Anti-Corruption Policy in Nigeria' (2012) Accountancy Business and the Public Interest.

¹⁰⁸ *ibid.*

¹⁰⁹ Leslie Wayne, 'Hits, and Misses, in a War on Bribery' *New York Times* (New York, 10 March 2012).

¹¹⁰ See <<http://www.worldbank.org/en/topic/governance/brief/anti-corruption>> accessed 16 December 2016.

where you cannot even get clean water'.¹¹¹ Kaplan argues, 'bribery is endemic to the human condition. If it cannot be rooted out, then you need to do something, and the FCPA is that'.¹¹² This underscores why proper attention should be paid to the complicity of MNCs in fuelling grand corruption in the developing world. One wonders what would have been the state of affairs with U.S companies' business interests abroad without the checks and intervention of the Justice Department through the Foreign Corrupt Practices Act (FCPA) 1977. This is identified because of a large number of indictments against U.S companies operating abroad from FCPA-related violations. According to Otusany, Lauwo and Adeyeye, 'in developing African countries [Nigeria] many MNCs aggressively sought to increase their profits through financial engineering and corruption'.¹¹³ The Africa All Party Parliamentary Group (AAPP) recounts that 'in many cases, western companies and western agents have been guilty of offering bribes to government officials to secure contracts and other advantages'.¹¹⁴ TI adds that bribe money often stems from multinationals based in the world's richest countries.¹¹⁵ Otusanya, Lauwo and Adeyeye argue that this is worrisome considering that 'a large amount of corruption and bribery is also associated with the looting of countries by their rulers; a process that frequently carries the fingerprints of corporations'.¹¹⁶ Incidentally, these funds are re-looted by the political elites thereby contributing to capital flight in Africa, with more than

¹¹¹ Wayne (n 109).

¹¹² *ibid.*

¹¹³ Otusanya, Lauwo, and Adeyeye (n 107) 11.

¹¹⁴ Africa All Party Parliamentary Group (AAPP), 'The Other Side of the Coin: The UK and Corruption in Africa' (March 2006) A Report by the Africa All Party Parliamentary Group <http://www.taxjustice.net/cms/upload/pdf/other_side_of_the_coin_PDF.pdf> accessed 29 January 2016.

¹¹⁵ Transparency International (1999-2013) Corruption Perception Index for 1999-2008 <http://www.transparency.org/policy_research/surveys_indices/cpi/1999to2008> accessed 29 August 2016.

¹¹⁶ Otusanya, Lauwo, and Adeyeye (n 107) 5.

\$400 billion stashed away in overseas safe havens.¹¹⁷ Of the estimated \$400 billion, around \$100 billion has been estimated to have originated from Nigeria.¹¹⁸

Ever since the enactment of the Foreign Corrupt Practices Act (FCPA- discussed extensively in chapter four, section 4.5), there has been a series of revelations about US Corporations making corrupt payments to foreign government officials to win business. Osoba notes that ‘in 1978, the US-based Lockheed Corporation had bribed political and military decision-makers worldwide in order to induce them to buy their planes, Nigeria was the only country named as a victim by the US Congress’.¹¹⁹ AAPPG,¹²⁰ for example, draws attention to numerous cases which demonstrate the role played by foreign companies in Africa in paying bribes and facilitating other forms of grand corruption. The Halliburton bribery case in Nigeria featured prominently as one of the examples given by AAPPG. Though Halliburton and its former subsidiary Kellogg Brown and Root (KBR), agreed to the largest corruption settlement ever paid by a US company under the US Foreign Corrupt Practices Act (FCPA) - \$579 million – their historic guilty plea was only the latest in a string of high-level bribery cases to secure contracts in Nigeria.¹²¹

Halliburton and its subsidiary KBR allegedly paid \$180 million to officials to secure a construction contract for a liquefied natural gas plant on Bonny Island in the Niger Delta. German industrial conglomerate Siemens also recently agreed to pay a \$1.6 billion settlement to the US and European authorities for bribery of officials around the world, including Nigeria. Willbros Incorporated, an oil services company, pleaded guilty to criminal corruption offences under the FCPA, and the company consented to

¹¹⁷ See World Bank Report (n 102); Kapoor (n 106).

¹¹⁸ See AAPPG (n 114).

¹¹⁹ Osoba (n 7) 379. Nigeria was named as the only victim country by the US Congress because it was a cover-up hearing and they knew that Nigeria was the only country where there would not be any transparency to expose the scam and embarrass the US authorities. In the same inquiry, a faceless Greek businessman formerly resident in Nigeria was mentioned but was never located or prosecuted.

¹²⁰ AAPPG (n 114).

¹²¹ Davidson Iriekpen, ‘French Court Fines Etete \$10.5m’ *This Day* (Lagos, 19 March 2007); See ‘French court fines Etete \$10.5m Money laundering’ *The Punch* (Abuja, 19 March 2009).

pay \$32 million in penalties and disgorgement of profit for involvement in the bribery of Nigerian government officials for pipeline contracts in the country. In October 2008, Swiss oil services and logistics company Panalpina withdrew its business from Nigeria following a bribery probe by the U.S. Department of Justice.¹²²

Panalpina pulled out of Nigeria at a time the corporation was already enmeshed in another bribery case involving SAGEM SA, a French company. This was a case concerning Nigeria's national identity card scheme, whereby SAGEM allegedly dispensed more than \$200 million to senior government officials as bribes.¹²³ According to the SEC Press Release, 26 April 2007,¹²⁴ the US conglomerate Baker Hughes Incorporated, allegedly paid approximately \$5.2 million to two agents as bribe inducement for officials in Nigeria, Angola, Indonesia, Russia, Uzbekistan and Kazakhstan. Baker Hughes Incorporated pleaded guilty to three charges of corruption and was fined \$44 million for hiring agents to bribe the aforementioned officials. Royal Dutch Shell Plc pleaded guilty to violations of the Foreign Corrupt Practices Act and agreed to pay \$26 million in criminal fines in connection with the payments to Nigerian customs officials through Courier Subcontractor to obtain preferential treatment during the customs process.¹²⁵ According to another SEC report,¹²⁶ Pride Forasol Drilling Nigeria Limited and Somaser S. N. C., majority owned subsidiaries of Pride Forasol which operated in Nigeria

¹²² See <<https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>> accessed 2 September 2016.

¹²³ See 'Nigeria Ministers on Bribe Charge' *BBC News* (London, 30 December 2003).

¹²⁴ See <<https://www.sec.gov/news/press/2007/2007-77.htm>> accessed 2 September 2016.

¹²⁵ *US v Vetco Gray UK Ltd* 2007 Case No. 4:07-cr-00004 (S.D. Tex.); <http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-07vetcogray-inc-plea.pdf>< accessed 07 July 2016; <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-06-07vetcogray-inc-plea.pdf>>accessed 7 July 2016. Shell Plc's conduct in this business transaction opposes its code of conduct that: 'Shell does not tolerate bribery, insider dealing, market abuse, fraud or money laundering. Facilitation payments are bribe and must not be paid. You must also avoid any real or potential conflict of interest (or the appearance of a conflict) and never offer or accept inappropriate gifts or hospitality'. (Shell Code of Conduct, 2010, p. 10)<[http://wwwstatic.shell.com/static/aboutshell/downloads/who_we_are/code_of_conduct/code_of_conduc t_english_2010.pdf](http://wwwstatic.shell.com/static/aboutshell/downloads/who_we_are/code_of_conduct/code_of_conduc_t_english_2010.pdf)> accessed on 15 February 2015.

¹²⁶ See <<https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>> accessed 3 September 2016.

played a key role in the bribery scheme designed by Pride's managers by authorising illegal payment through agents and tax consultants. Pride Forasol Nigeria through its agent paid between \$15,000 and \$93,000 for Temporary Importation permits (TI), \$15,000 for new TI intervention and \$35,000 for the importation of rigs without completing certain legally required steps. In addition, Pride Forasol Nigeria, also paid \$55,000 and \$65,000 to the Rivers State Internal Revenue and the Bayelsa State Internal Revenue tax officials to reduce the amount of PAYE taxes. The sum of \$52,000 was also paid to the Federal Inland Revenue Service of Nigeria (FIRS) for resolution of VAT tax audit.¹²⁷ Through these several bribery practices, Pride was reported to have obtained improper benefits totalling approximately \$19.3 million. Pride was later indicted by the US SEC, for violating the provisions of the FCPA. As a consequence, Pride agreed to pay disgorgement and prejudgment interest of \$23,529,719 and Pride and its subsidiary Pride Forasol agreed to pay a criminal fine of \$32.625 million.¹²⁸

Amidst these bribery scandals, it is pertinent to state that Section 9 (1) and (2) of the Corrupt Practices and other Related Offences Act 2000 expressly prohibits bribery of public officials. Nonetheless, the MNCs have continued their complicity in bribery of public officials in Nigeria. Nigeria has laws applicable to indigenous companies, however, the extent of the applicability of the laws on MNCs complicity with grand corruption is uncertain. It is on record that the charges and investigation of high-level corruption in Nigeria focus on public officials, yet not much effort is applied to the investigation and prosecution of the MNCs who are the supply source. For instance, when the public officials implicated in the Siemens scandal were charged in court, the only thing the Nigeria government did to the MNC (Siemens) was to suspend and revoke the 128.4 million Naira contract involved. Nigeria's approach to MNC led

¹²⁷ See US District Court for the Southern District of Texas, Houston, 2010.

¹²⁸ See US SEC Press Release, 4 November 2010; Otusanya, Lauwo, and Adeyeye (n 107) 4.

corruption is lopsided. While the Nigerian government pursued and prosecuted some of the officials involved in the corrupt practices listed above, the same aggressive prosecutorial drive has not been extended to the MNCs. This research suggests that Nigeria should follow the example of the US and aggressively pursue foreign companies for foreign-oriented domestic corruption. Moreover, appropriate domestic laws should be enacted to fill the gap in the legislation that has not apportioned the correct sanctions to MNCs found complicit in corruption cases. The government should desist from actions that project its inactivity in prosecuting MNCs as a national fear that corporate prosecution of the MNCs could lead to job losses?¹²⁹

It is also pertinent to note that the “collective action project” on corruption currently sponsored by Siemens Global was started partly as a result of the Siemens bribery scandal in Nigeria and the attendant sanctions by the World Bank and other regulatory bodies.¹³⁰ The table below sets out a list of some of the MNCs involved in high-profile bribery scandals in Nigeria who received various fines from the SEC in the USA. Disgorgement means giving up profits obtained by illegal acts and aims at discouraging unjust enrichment. In the cases in table 2.1, the companies were involved in Nigeria corruption scandals and were fined for the illegal profits which they paid back to the USA Treasury Department.

¹²⁹ Frank Vogel, *Waging War on Corruption: Inside the Movement Fighting the Abuse of Power* (Rowman and Littlefield Publishers 2012) 245.

¹³⁰ See Siemens Global Website: ‘Collective Action’ enables corruption to be fought collectively, with various civil society and interest groups, working to build an alliance against corruption so that the problem can be approached and resolved from multiple angles<<http://www.siemens.com/sustainability/en/core-topics/collective-action/> accessed 10 July 2016.

Table 2.1: Lists of some MNCs charged with Corrupt Practices

NAME OF COMPANY	EXTENT OF BRIBE \$	DISGORGEMENT & INTEREST \$	CRIMINAL FINE \$
GLOBAL SANTAFE CORP.	-	3,758,165	2.1 million
NOBLE CORP.	-	5,576,998	2.59 million
PRIDE INC.	2.7 million	23,529,718	32.625 million
TIDEWATER INC	1.6 million	8,321,362	7.35 million
TRANSOCEAN INC. -	-	7,265,080	13.44 million
ROYAL DUTCH SHELL PLC.	3.5 million	18,149,459	30 million
PANALPINA INC	-	11,329,369	70.56 million

TOTAL	77,930,151	158.665 million
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Source: Extracted from the US SEC Complaint and Administrative Proceedings 2010.

2.7 Conclusion

Human Rights Watch notes that Nigeria is reputed as one of the most disappointing performers in sub-Saharan Africa due to the high incidence of public sector corruption.¹³¹ This has dented the image of the state and may have driven away potential investors. Recently, grand corruption has been blamed for the terrorism and insecurity in Nigeria.¹³² What actually went wrong? Should the law be blamed?

Some scholars argue that the law as set out in the ICPC and EFCC Acts are impeccable. Ocheje remarks ‘these laws, enshrined in Sections 9, 10, 12, 17 of the Corrupt Practices and Other Related Offences Act (2000) are the most comprehensively drafted and tightly worded anti-corruption pieces of legislation in the history of Nigeria’.¹³³ If this is so, why has it been difficult for the ICPC and EFCC to prosecute the high-profile corruption cases pending in different courts in Nigeria? On a closer analysis, this research argues that one of the problems associated with combating systemic grand corruption in Nigeria may be tied to using only criminal law for prosecution. However, what is needed instead are ‘legal tools that empower citizens to challenge corrupt actions and to recover stolen assets to national treasuries as a

¹³¹ Human Rights Watch ‘World Report 2016-Nigeria’ < <https://www.hrw.org/world-report/2016/country-chapters/nigeria>> accessed 01 September 2016; Agbese (n 85) 304.

¹³² See OECD Report ‘Terrorism, Corruption and Criminal Exploitation of Natural Resources’ (2016) <https://www.oecd.org/corruption/Terrorism-corruption-criminal-exploitation-natural-resources-2016.pdf>> accessed 05 November 2016.

¹³³ Ocheje (n 13) 177.

corollary to state investigations and prosecutions'.¹³⁴ Ramasastry remarks that 'if corruption is seen only as a financial crime, then the state has the duty to prosecute wrongdoers rather than to provide victims with rights to a remedy.'¹³⁵

Other scholars advocate strong political will from leaders as one of the ways to combat systemic grand corruption in Nigeria.¹³⁶ Osita Agbu affirms that 'it is not that corruption has not been recognised as the "enemy within," it is, however, that the political will to begin to tackle the problem in Nigeria has been non-existent...'.¹³⁷ Strong political will, international collaborations combined with citizen's involvement through collective action¹³⁸ programmes, and structural reforms of political institutions are advanced as prerequisites in combating grand corruption.¹³⁹ Bearing in mind that an entrenched culture of corruption is exceedingly difficult to transform, and no reform can completely eradicate corruption, Nigeria's efforts need further acceleration in meeting the challenges posed by endemic grand corruption.

Who then should be blamed for Nigeria's systemic grand corruption? While there are many suggestions on the methods to combat the endemic grand corruption in Nigeria, it remains an indisputable fact that grand corruption 'is cancer that eats deep into the fabrics of the economy, politics and social life of the state'.¹⁴⁰ In view of the historical facts, this research argues,

¹³⁴ Anita Ramasastry, 'Is there a Right to be Free from Corruption' (2015) 49 U.C.D.L. Rev. 7032015-2016, 706.

¹³⁵ *ibid.*

¹³⁶ Scholars like S P Riley, Adefolake Adeyeye, S Osoba, Osita Agbu, Robert Klitgaard and Alina Mungui- Pippidi have called for strong political will in combating endemic grand corruption.

¹³⁷ Osita Agbu, 'Corruption and Human Trafficking: The Nigerian Case' (2003) West Africa Review ISSN: 1094-2254 Vol. 4, No. 1.

¹³⁸ See Siemens Global Website: 'Collective Action' enables corruption to be fought collectively, with various interest groups, working together and building an alliance against corruption so that the problem can be approached and resolved from multiple angles <<http://www.siemens.com/sustainability/en/core-topics/collective-action/> accessed 10 January 2016.

¹³⁹ Mark Pieth, 'Collective Action and Corruption' in Mark Pieth (ed) *Collective Action: Innovative Strategies to Prevent Corruption* (Dike Zurich 2012) 18.

¹⁴⁰ E Harrison, 'Cancer of Corruption' (2004) In I Pardo (ed) *Between morality and law: Corruption, anthropology and comparative society* (Ashgate Publishing Limited 2004) 136.

alongside Tignor, that ‘a considerable amount of bribery, nepotism, and the use of political office for personal enrichment did exist in late colonial Nigeria. Evidence of administrative malfeasance was palpable, although public awareness was not automatic’.¹⁴¹ This unfortunate trend has continued unabated and appears to be eating deep into the fabric of the nation. In view of the arguments raised in this chapter, the next chapter analyses the Nigerian legal instruments and the connection between corruption and human rights violations.

¹⁴¹ Tignor (n 1) 176.

Chapter Three

Nigerian Legal Instruments and the Nexus between Corruption and Human Rights

3.1 Introduction

It is not the intention of this chapter to engage in the definitional quandary of human rights.¹ However, the chapter relies on the definition proffered by the United Nations Office of the High Commissioner Human Rights:

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.²

The effects of corruption in Nigeria are devastating, well discussed in the literature and contradicts the basic guarantees of human rights as defined by OHCHR.³ Empirical findings on the level of corruption in Nigeria from data obtained from the World Bank and the Transparency International Indexes remain alarming.⁴

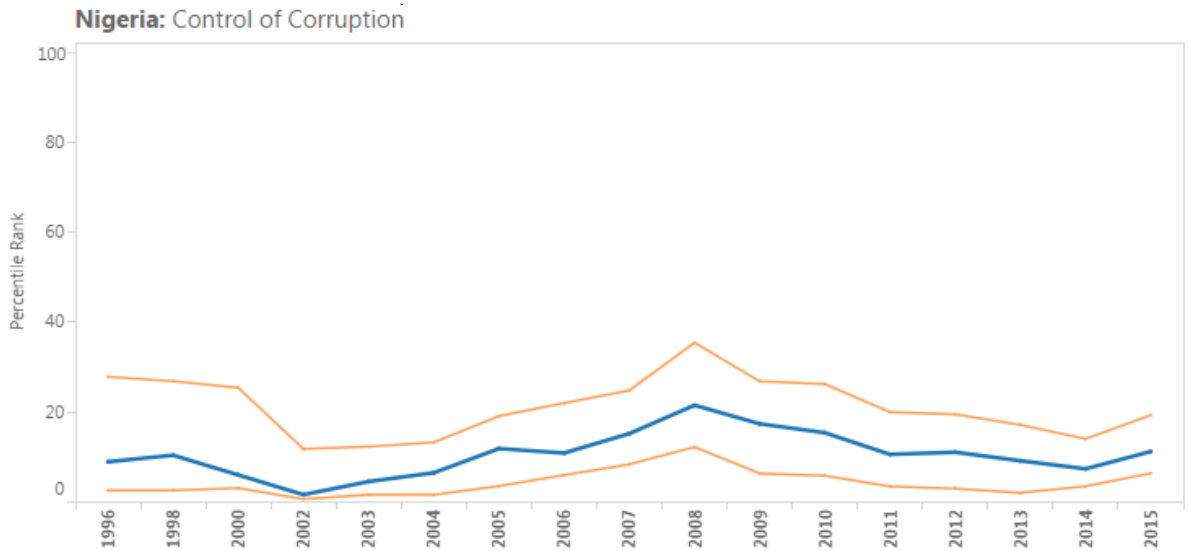
¹ Attempts at endorsing a particular definition of human rights have repeatedly reflected ideological, intellectual, political, moral and emotional disposition of definers and at times, could be either too narrow or too broad to distil.

² Office of the High Commissioner Human Rights (OHCHR), 'What are Human Rights?' <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 20 July 2017.

³ *ibid*; See the speech given by former Secretary General of the United Nations, Kofi Annan, on the preamble United Nations Convention against Corruption (UNCAC) where the consequences of corruption on the economy of states and human rights were clearly stated <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> accessed 9 January 2015; Melvin D Ayogu and Julius Agbor, 'Illicit Financial Flow and Stolen Assets Value Recovery' in S IbiAjayi and LeonceNdikumana (eds) *Capital Flight In Africa, Causes, Effects, and Policy Issues* (Oxford University Press 2015) 359; Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014) 163; Charles Carter, 'Corruption and Global Governance' in Sophie Harman and David Williams (eds) *Governing the World? Cases in Global Governance* (Routledge 2013) 76.

⁴ See World Bank Governance Indicator (WGI) <<http://data.worldbank.org/country/nigeria>> accessed 8 January 2016; Transparency International Corruption perception Index (CPI) <<http://www.transparency.org/research/cpi/overview>> accessed 8 January 2016; Pogge (n1).

Figure 3.1



(Source: World Bank, 2016)

Thomas Pogge writing on the imperative of maintaining the requisite human rights standards by states suggests that ‘the preeminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation, of food, drink, clothing, shelter, education, and health care’.⁵ Pogge’s postulation needs reassessment in view of its relevance to various human rights violations and attendant deprivations which are often tied to endemic corruption in some states.

This chapter assesses the various legal instruments against corruption in Nigeria and attempts to draw causal links between grand corruption and human rights violation. It interrogates why the laws and the anti-corruption agencies are failing to combat corruption. What are the human rights implications of grand corruption in Nigeria? What is the constitutional position on the

⁵ Thomas W Pogge, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms* (Cambridge Polity 2002) 51.

justiciability of socio-economic rights? How have the judiciary intervened in achieving the realisation of socio-economic rights? Could the justiciability of socio-economic rights assist in facilitating transparency in the public sector and could it reduce the high incidence of grand corruption in Nigeria? To analyse these issues, firstly, the chapter will provide some insight into the legal instruments against corruption in Nigeria so as to serve as a foundational basis for structuring the analysis. It will progressively develop the other sections of the chapter: the Nigerian anti-corruption agencies; the structure and the failure of anti-corruption agencies in Nigeria; universal human rights framework; the African Charter on Human and Peoples' Rights and the justiciability of socio-economic rights in Nigeria. The conclusion contextualises a critical assessment of these perspectives in accordance with the arguments developed.

3.2 Legal Instruments against Corruption in Nigeria

Nigeria has a wide range of legal instruments designed to combat corruption.⁶ Public officials are legally required to work within the system of these frameworks that delineate the boundaries of permissible conduct since the law, by 'threatening sanctions for non-compliance,

⁶ Section 15 (5) of the 1999 Nigerian Constitution provides that the state shall abolish corrupt practices and abuse of office; Section 3 of the Fifth Schedule of the 1999 Constitution (part 1) outlaws the operation of a foreign account by any public official; The Criminal Code and the Penal Code (The Criminal Code Act,- Chapter 77 "section 98-99"); The Fifth Schedule of the 1999 Constitution provides for a Code of Conduct for Public Officers at the federal and state levels (The Code of Conduct Bureau and Tribunal Act 1990). It was this provision that became the mandate for the establishment of the Code of Conduct Bureau and Tribunal; Public Complaints Act, 1976 providing for the establishment of the Public Complaints Commission; Corrupt Practices Act, 2000 led to the establishment of the Independent Corrupt Practices and other Related Offences Commission; Corrupt Practices, the Money Laundering Act, 2004; Economic and Financial Crimes Commission (Establishment) Act, 2004; Due Process Offices were established at both the federal and state levels of government to ensure compliance with standard procedures in the procurement and execution of public contracts.

seeks to constrain and guide the behaviour of public officials'.⁷ Given the state of systemic corruption in the Nigerian public and private space, it remains a puzzle that the state with one of the largest number of enacted anti-corruption laws and statutory bodies remains ravaged by endemic grand corruption.

The agencies established with the sole aim of fighting corruption are:

- a, The Independent Corrupt Practices and Other Related Offences Commission (ICPC)⁸;
- b, The Economic and Financial Crimes Commission (EFCC)⁹;
- c, The Code of Conduct Bureau (CCB)¹⁰;
- d, Technical Unit of Governance and Anti-Corruption Reform (TUGAR)¹¹;
- e, The Nigeria Extractive Industry Transparency Initiative (NEIT)¹²;
- f, The Bureau of Public Procurement (BPP)¹³;
- g, Nigeria Financial Intelligence Unit (NFIU)¹⁴.

For the purpose of this chapter, the Independent Corrupt Practices and other Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC) are discussed. These are the specialised anti-corruption agencies with the statutory mandate to

⁷ Okechukwu Oko, 'Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus' (2001-2002) N.Y.U. J. Int'l L. & Pol.424.

⁸ Corrupt Practices and Other Related Offences Act, 2000 is the enabling legal instrument of the The Independent Corrupt Practices and Other Related Offences Commission (ICPC).

⁹ The Economic and Financial Crimes Commission Establishment Act, 2004 is the legal basis for the establishment of The Economic and Financial Crimes Commission (EFCC).

¹⁰ Code of Conduct Bureau and Tribunal Act, 1991 is the legal basis for the establishment of the Code of Conduct Bureau.

¹¹ Tugar is an ad hoc government department established to respond to the critical need for a dedicated institution or department to monitor the ongoing anti-corruption and governance initiatives, evaluate both the structure and their output for impact, access public feedback, and generate empirical data which will feed into the policy framework, and enable reforms.

¹² The Nigeria Extractive Industry Transparency Initiative (NEITI) Act 2007 underscores the establishment of the Nigeria Extractive Industry Transparency Initiative (NEITI).

¹³ The Public Procurement Act, 2007 is the legal basis for the establishment of the Bureau of Public Procurement.

¹⁴ The establishment of the NFIU is based on the requirements of Recommendation 29 of the Financial Action Task Force (FATF) Standards and Article 14 of the United Nations Convention against Corruption (UNCAC). NFIU remains an autonomous agency domiciled within EFCC.

investigate and prosecute large scale public sector corruption. Most of the other agencies mentioned above perform services ancillary to the realisation of the objectives of ICPC and EFCC. Most importantly, the EFCC and the ICPC are permanent and, it is assumed independent bodies, whereas the ‘traditional law enforcement agencies like the police and state justice officials are plagued by corruption themselves and are often susceptible to political and ethnic pressures’.¹⁵

3.3 Nigeria Anti-corruption Agencies (Structure and Failures)

3.3.1 The Independent Corrupt Practices and Other Related Offences Commission (ICPC)

The Independent Corrupt Practices and Other Related Offences Commission was established on the 29th of September, 2000 on the legal platform of the Corrupt Practices and Other Related Offences Act 2000 (the ‘ICPC Act, 2000’). This legislation prohibits and prescribes punishment for corrupt practices. The ICPC is the pioneer agency at the vanguard of Nigeria’s fight against corruption having been invested with the duty to receive complaints, investigate and prosecute offenders. Other duties include education and enlightenment of the public about and against bribery, corruption and related offences. The ICPC also has the task of reviewing and modifying the activities of public bodies, where such practices may aid corruption.¹⁶ As provided for in section 3(3) of the ICPC Act 2000, the ICPC consists of a Chairman and twelve (12) Members, two of whom represent each of the six geo-political zones of the country.¹⁷

¹⁵ Oko (n 7) 444.

¹⁶ See The ICPC’s website <<http://icpc.gov.ng/icpc-history/>> accessed 10 January 2016.

¹⁷ The zones in Nigeria are South- East, South -West, South-South, North - West, North East and North Central.

The duties of the ICPC are set out in section 6 (a-f) of the ICPC Act 2000:

To receive and investigate complaints from members of the public on allegations of corrupt practices, and, in appropriate cases, prosecute the offenders; to examine the practices, systems and procedures of public bodies and where such systems aid corruption, to direct and supervise their review; to instruct, advise and assist any officer, agency, or parastatal on ways by which fraud or corruption may be eliminated or minimized by them; to advise heads of public bodies of any changes in practice, systems or procedures compatible with the effective discharge of the duties of public bodies to reduce the likelihood or incidence of bribery, corruption and related offences; to educate the public on and against bribery, corruption and related offences; to enlist and foster public support in combating corruption.¹⁸

The ICPC chairman is vested with additional powers, including the power to seize movable property in the custody or control of a bank or financial institution, where the property is the subject of any investigation under the ICPC Act;¹⁹ the power to obtain information from any person including relatives, associates and their banks suspected of having committed an offence under the ICPC Act 2000;²⁰ and the power to make an application to Court to prohibit any person from dealing with any property which is the subject matter of an offence under the Act, where the property is held or deposited outside Nigeria.²¹ The ICPC Act 2000 collectively established and redefined nine offences relating to corrupt practices and abuse of office:

- Accepting gratification (section 8).
- Fraudulent acquisition of property (section 12).
- Fraudulent receipt of property (section 13).
- Making a false statement or return (section 16).
- Bribing a public officer (section 8).
- Use of office or position for gratification (section 19).
- Bribery in relation to auction (section 21).
- Bribery in relation to contracts (section 22).

¹⁸ ICPC (n 8) Section 6.

¹⁹ *ibid* Section 45.

²⁰ ICPC (n 8) Section 44

²¹ *ibid* Article 46.

- Failure to report bribery transactions (section 23).

The ICPC has the sole mandate to prosecute corruption committed in public offices, even without the benefit of a prior petition. The general view had been that ICPC could only initiate prosecutions upon receipt of petitions through the general public or the Public Complaints Commission. This general perception about ICPC hampered its ability to prosecute a lot of potential corruption cases for a long time. However, in a landmark decision in *FRN v Alhaji Zakari Sani and Alhaji Abdullahi Amore*²², Hon. Justice Obande F. Ogbuinya of the Court of Appeal, Markurdi on 2 May 2014 made far-reaching pronouncements on the powers of ICPC as provided for in sections 6 [a] and 27 [3] of the Act. The Court notes that ‘a petition is just a guide and it is not ultra vires the powers of the commission to investigate and prosecute offences outside a petition or initiate investigations and prosecutions without a petition’.²³ According to the ICPC, ‘the implication of this landmark judicial pronouncement by the justices of the Court of Appeal has now laid to rest the misconception in some quarters as to whether the ICPC can initiate investigations without relying on petitions’.²⁴

The ICPC-originated convictions up to 2015 show that despite having the legal mandate to investigate, arrest and prosecute without the need for a petition, ICPC has been unable to convict a substantial number of offenders. For instance, the ICPC’s most up to date criminal case database records that most of the cases are stalled due to court bureaucracy. The ICPC Monitor magazine²⁵ summarised the cases in courts between 2001 and 2008 as a total number

²² [2014] NWLR 16 (pt 1433) CA/MK/16C/2012.

²³ *ibid*; See ‘ICPC can prosecute without petitions – Court of Appeal Rules’ <<http://icpc.gov.ng/icpc-can-prosecute-without-petitions-court-appeal-rules/#sthash.H0revtKs.dpuf>> accessed 22 May 2016.

²⁴ *ibid*.

²⁵ ICPC (n 8) ICPC’s Monitor Magazine (2008) 8.

of 146 cases involving 277 persons, out of all these (146) cases, only 15 convictions were obtained. Likewise, the status of criminal cases as of March 2015 show that the trend of 2001-2008 is still sustained.²⁶ The heavy backlog of corruption-related cases²⁷ in Nigerian courts is indicative of the endemic corruption that has permeated even the judicial system. Former President Jonathan was aware of this when he stated in his letter to former Nigeria President, Obasanjo, ‘I can hardly be blamed if the wheels of justice still grind very slowly in our country, but we are doing our best to support and encourage the judiciary to quicken the pace of adjudication in cases of corruption’.²⁸ It cannot be argued that the prosecution department of the ICPC is not competent enough to drive the cases to the conclusion based solely on the testimony of the former President. This research argues that the collusion of corrupt politicians with corrupt judicial staff facilitates the use of legal technicalities that frustrate the prosecution of such cases.²⁹ However, although the ICPC has arraigned a number of prominent Nigerians such as ‘Ghali Umar Na’Abba, former Speaker of the House of Representatives (2002), Fabian Osuji, Head of the Nigerian Federal Ministry of Education (2006), Cornelius Adebayo, Head of the Federal Ministry of Communication and Transportation (2007) and Vincent Ogbulafor, PDP National Chairman (2010), no one among them has been convicted’.³⁰

²⁶ See < file:///C:/Users/user/Downloads/STATUS-OF-CRIMINAL-CIVIL-CASES-AS-AT-MARCH-2015-PART-1%20(3).pdf> accessed 01 November 2016.

²⁷ See file:///C:/Users/user/Downloads/STATUS-OF-CRIMINAL-CIVIL-CASES-AS-AT-MARCH-2015-PART-1%20(1).pdf> accessed 08 October 2016.

²⁸ See ‘President Jonathan’s Reply to Obj’s Letter’ *This Day* (Abuja, 23 December 2013).

²⁹ A Nigerian High Court Judge, Justice Abubakar Talba was sanctioned by the Judicial Service Commission for complicity in the “Pension Fund Fraud case” (*Esai Dangabar v FRN* [2012] LPELR-19732 (CA). Recently, Justice Adeniyi Ademola of the Abuja Division High Court is charged to court by the Federal Government for corruption related offences involving huge sums of bribe money; see Ikechukwu Nnochiri ‘Judicial Corruption: FG Slams 15-Count Charges on Justice Ademola, Wife’ *Vanguard* (Abuja, 15 November 2016).

³⁰ Johnson Nna Nekabari and Adeniran Jacob Oni, ‘The Institutional Approach to Anti-graft Crusade: The Case of The Independent Corrupt Practices Commission in Nigeria’ (2012) *African Journal of Social Sciences* Volume 2 Number 1 116-129, ISSN 2045-8460 (Online) 125.

Nekabari and Oni argue that ‘the greatest obstacle to the activities of ICPC ...in eradicating corruption in recent times has been the incessant withdrawals of case files of criminal charges against very privileged persons and politically exposed persons by the Attorney General and Minister of Justice Mr Mohammed Bello Adoke...’.³¹ ‘Adoke, has within the last eight months of his tenure withdrawn about 25 high-profile cases ...the most recent was his letter dated 28 January 2011, to the acting chairman of ICPC calling for the withdrawal of Minister of State for Health, Mr Suleiman Bello’s case file who was alleged to have received N11.2 million from Governor Murtala Nyako ...’.³² The incessant withdrawal of high-profile cases is often tied to the interference from the Attorney-General’s and presidency offices and is denting the image of the ICPC and casting doubt on its competence to carry out its statutory functions.

On the positive side, the ICPC has recovered huge sums of money from corrupt public officials. ICPC recovered N20.1 million Naira from some staff of the Federal Government College, Odogbulu, Ogun State in 2016.³³ ICPC also recovered lost N23 billion pension funds stashed away illegally in forty different bank accounts.³⁴ They also recovered N497 million as accrued interest from the recovered N23 billion lost pension funds accounts.³⁵ A total of N11 billion was discovered as funds misappropriated from the customs, prisons and immigrations pension funds in 2016. The funds were scattered in 10 different accounts and the ICPC was able to consolidate them into three accounts.³⁶ These recoveries indicate that given the proper structure

³¹ *ibid* 125; Section 174 of the 1999 Constitution of Nigeria gives the Attorney General prosecutorial powers in criminal matters. However, events in Nigeria has led to uncontrolled abuse of such powers. Mr Adoke represents one of such Attorney generals in Nigeria that took controversial stance on grand corruption cases.

³² Nekabari and Oni (n 30) 125.

³³ See ICPC News, April 2016, 8 file:///C:/Users/user/Downloads/ICPC-News-Vol-11-No-2-April-2016%20(2).pdf> 05 October 2016.

³⁴ See ICPC News, January 2016,5 file:///C:/Users/user/Downloads/ICPC-News-Vol-11-No-1-January-2016%20(1).pdf> accessed05 October2016.

³⁵ *ibid* 5.

³⁶ *ibid*.

and administrative competence, the ICPC could contribute robustly to the mission of combating grand corruption in Nigeria.

3.3.2 The Economic and Financial Crimes Commission (EFCC)

Former President Olusegun Obasanjo established the Economic and Financial Crimes Commission (EFCC) three years after the establishment of the ICPC. The EFCC (Establishment) Act of 2004 mandates the EFCC to combat financial and economic crimes. The EFCC is empowered to prevent, investigate, prosecute and penalise economic and financial crimes and is charged with enforcing the provisions of other laws and regulations relating to economic and financial crimes including: money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deals, smuggling, human trafficking, child labour, illegal oil bunkering, illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes, and prohibited goods.³⁷ The EFCC is also responsible for identifying, tracing, freezing, confiscating, or seizing the proceeds derived from terrorist activities. EFCC is also host to the Nigerian Financial Intelligence Unit (NFIU), vested with the responsibility of collecting suspicious transaction reports (STRs) from financial and designated non-financial institutions, analysing and disseminating them to all relevant government agencies and other Financial Intelligent Units all over the world.³⁸

The EFCC from the onset has been at the forefront of the government's anti-corruption project. The EFCC has investigated and prosecuted a number of high-profile cases, securing

³⁷ EFCC Establishment Act, (2004) Article 46<<https://efccnigeria.org/efcc/>> accessed 20 November 2016.

³⁸ *ibid.*

convictions for some of them. Nevertheless, the EFCC is faced with the challenge of remaining an unbiased commission in the midst of political intrigues, monetised politics and judicial impropriety. People have criticised EFCC for not doing enough to stop the endemic grand corruption in Nigeria. This is argued, because, irrespective of the legislative and executive backing, the EFCC has performed relatively less efficiently than the Hong Kong system on which it was modelled.

The EFCC is also criticised for over-reliance on “plea bargaining”, a notorious bargain chip regularly used by the EFCC in obtaining settlement of most of the high-profile cases.³⁹ It appears that in Nigeria, official kleptocrats rely on “plea bargaining” as a legal way of circumventing the full legal sanctions for engaging in corrupt acts. Plea bargaining, a practice common in America, is a legal process that allows ‘prosecutors and trial judges offer defendants concessions in exchange for their pleas’⁴⁰ it consists of ‘the exchange of official concessions for a defendant’s act of self-conviction’.⁴¹ One of the most prominent corrupt families in Nigeria, the Abacha clan, is known to have bargained in 2002 to keep \$1billion in return for handing over \$100 billion of the Abacha looted funds to the federal government.⁴² While this settlement defeats good moral principle, transparency and accountability, the

³⁹ Plea bargain featured in the seminal grand corruption case involving a former Nigerian Police chief, Tafa Balogun, in 2003. EFCC used the instruments of plea bargaining in mitigating his prison sentence to six months with a fine of N4 million (Naira) after embezzling \$128 Million of the Police fund. See also *Federal Republic of Nigeria v Alamiyeseigha* [2006] 16 NWLR (Pt 1004) Pg 123; and *Federal Republic of Nigeria v Lucky Igbinedion* [2014] LPELR-22760 (CA).

⁴⁰ Albert W Alschuler, ‘Plea Bargaining And its History’ (1979) Columbia law Review Vol 79 no 1, 1.

⁴¹ *ibid* 3.

⁴² Robert Rotberg (ed), *When States Fail* (Princeton University Press) 214.

issues with the legal framework? Oko argues that the laws on corruption in Nigeria are carefully crafted and issues of pervasive corruption have nothing to do with legal drafting.⁴⁷ Oko reiterates that ‘Combating corruption, especially in a country like Nigeria where it is endemic, pervasive, and deep-rooted, must involve much more than the promulgation of laws and setting up an independent commission. To be effective, an anticorruption regime must involve multifaceted strategies that address the underlying structural and social problems that spur corruption’.⁴⁸ Olaniyan argues differently insisting that the fight against corruption in Nigeria fails because ‘... these acts are nearly always approached from a criminal law and enforcement dimension ...’,⁴⁹ devoid of human right ingredients that put the victims in focus with guarantees for their human rights protection. Olaniyan further posits that the application of such a “restrictive approach” is fundamentally flawed, the ‘approach has proved counter-productive, thus making durable and sustainable solutions to the problem elusive’.⁵⁰ Olaniyan further criticises the justice system for paying lip service to the prosecution of corruption in Nigeria, adding that ‘comparatively, few high-ranking officials are prosecuted, and corruption cases that are taken to court proceed at a snail’s pace and serve no more than a symbolic purpose’.⁵¹ The process of “plea bargain” was further cited also by Inyang, Peter and EJOR as an impediment to combating corruption in Nigeria. Through this process, indicted corrupt officials merely relinquish a part of their loots while still enjoying the remainder, and at the same time evade prison terms.⁵² This sends the wrong signal to the public that, after all, it is still profitable to be corrupt. Human Rights Watch identifies cases against, Tafa Balogun, the

⁴⁷Oko (n 7) 404.

⁴⁸ *ibid* 454.

⁴⁹ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014) 4.

⁵⁰ *ibid* 8.

⁵¹ *ibid* 8.

⁵² See Inyang, Peter and EJOR (n 44) Olaniyan (n 49) 9; and Alschuler (n 40).

former police Chief, Lucky Igbinedon, former Edo State governor, Diepreye Alamieyesiegha former governor of the oil-rich Bayelsa State and Chief Olabode George, the Chairman of the Nigerian Ports Authority as among the key plea bargain cases that involved dropping some of the most serious charges against the accused.⁵³ EFCC argues differently, its acting chairman, Ibrahim Magu stated that:

One of the big challenges we have in the effective prosecution of the war on corruption is that of very senior lawyers who Nigeria has been very kind to...When we have corruption cases, cases of people who have stolen food from the mouths of our children; when we have cases of people who have stolen money meant to build hospitals and buy drugs. When we have cases of people who have stolen all the money meant to buy guns for our soldiers to fight Boko Haram, when we have all these cases of wicked people who have stolen Nigeria's money, they run to these same senior lawyers...Give them part of the stolen money and mobilise them to fight us, to delay us in court and to deny Nigerians of justice. These are the people who do not want justice for the common man.⁵⁴

The Socio-Economic Rights and Accountability Project (SERAP) observed that the government is not committed to the anti-corruption agencies. SERAP avers that the government meddles with the statutory roles of the anti-corruption agencies to the extent that 'governments have not allowed them to perform their statutory duties independently and effectively'.⁵⁵ In other words, by implication, anti-corruption frameworks and agencies may be gimmicks employed by some states as ploys for attracting donor funds, whereas there is no evidence of political will to back the anti-corruption projects.⁵⁶ Some writers argue strongly that regimes without strong political will to combat grand corruption are totally dishonest with

⁵³ Human Rights Watch (n 46).

⁵⁴ See EFCC Website 'War on Corruption: Victory is Certain!' < <https://efccnigeria.org/efcc/news/1714-war-on-corruption-victory-is-certain>> accessed 20 December 2016.

⁵⁵ See Adetokunbo Mumuni 'Legal Redress for Victims of Corruption: Enhancing the role of civil society to bring and to represent victims in legal proceedings' (2010) Socio-Economic Rights and Accountability Project (SERAP) < <http://serap-nigeria.org/seraps-paper-the-international-anti-corruption-conference-bangkok-thailand/>> 20 January 2016.

⁵⁶ Oko (n 7) 404.

their intentions.⁵⁷ For instance, Paul Okojie and Abubakar Momoh opine that anti-corruption laws and initiatives fail because ‘countries enter into bilateral or multilateral treaties on anti-corruption without a sincere desire to implement them. Therefore, “donor treaties” proliferate for the purpose of satisfying the demands of international financiers’.⁵⁸ This research argues that the failure of the anti- corruption agencies, aside from discriminatory prosecutorial practices, is mostly tied to the deficiency of laws that exclude human rights considerations by emphasising criminal law procedures.⁵⁹

3.4 Corruption and Human Rights in Nigeria

Human rights represent the ‘vision of creating conditions whereby persons and cultures may be free from persecution and deprivation’.⁶⁰ This remains a ‘common denominator for advocates and critics alike’.⁶¹ The concept of human rights has been described as ‘one of the greatest inventions of civilisation [which] can be compared to its impact on human social life to the development of modern technological resources and their application to medicine, communication and transportation’.⁶²

⁵⁷ John Mukum Mbaku, *Corruption in Africa: Causes, Consequence and Cleanups* (Lexington Books 2010) 145.

⁵⁸ Paul Okojie and Abubakar Momoh, ‘Corruption and the Crisis of Development in Nigeria’ (2005) Paper presented at the conference on ‘Redesigning the State? Political Corruption in Development Policy and Practice’, held at Manchester Metropolitan University <<http://www.sed.manchester.ac.uk/research/events/conferences/documents/Redesigning%20The%20State%20Papers/Okojie.pdf>> accessed 14 March 2016.

⁵⁹ Olaniyan (n 49) 4-9.

⁶⁰ Elizabeth Swanson and Alexandra Schulthesis, ‘Human Rights and Literature: The Development of an Interdiscipline’ in Elizabeth Swanson and Alexandra Schulthesis (eds) *Theoretical Perspectives on Human Rights and Literature* (Routledge 2012) 1.

⁶¹ *ibid* 1.

⁶² C Nino, *The Ethics of Human Rights* (Claredon Press 1991) 1 cited in Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (2nd Edn, Oxford University Press 2009) 286.

The entrenched interdependent, interrelated and indivisible guarantees of human rights jurisprudence raise salient questions around the human rights realisation, especially in Africa. Within the ambit of this research, such questions are: How can a human rights-based approach deliver meaningful improvements to the corruption crisis in Africa? Has the human rights agenda become more relevant to the needs of Africans or is it overtly tilted to western concepts? The subsequent sections in this chapter will address these issues.

3.5 Universal Human Rights Framework

Human rights are universal, inalienable, indivisible, interrelated and interdependent. To violate the human right of someone else is to treat that person as though they were not a human being. Meaning that advocating for human rights is demanding respect for the human dignity of all people.⁶³

According to the Office of the High Commissioner for Human Rights, ‘universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. The International human rights law lays down obligations on Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups’.⁶⁴

⁶³ Michelo Hansungule, ‘The Historical Development of International Human Rights’ in Azizur Rahman Chowdhury and MdJahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (Brill 2010) 33; Joshua Castellino, ‘Civil and Political, Rights’ in Azizur Rahman Chowdhury and MdJahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (Brill 2010) 63.

⁶⁴ See <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 2 January 2015.

The United Nations Charter ('UN Charter') promotes universal respect for and observance of human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion.⁶⁵ The UN Charter upholds the equal rights of men and women.⁶⁶ Following the UN Charter, three major international instruments commonly referred to as the International Bill of Human Rights were adopted.⁶⁷ They are the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶⁸ The UDHR is 'the first authoritative international footprint on the path towards the collective affirmation by the international community to the supremacy of the human being over man-made institutions'.⁶⁹ Thus, the global recognition of human rights started with the adoption of the Universal Declaration of Human Rights (UDHR) on '10 December 1948 with 48 votes in favour, none against and eight abstentions'.⁷⁰ The 'UDHR was adopted by Resolution 217 (111) which consists of five parts ... the Declaration has 30 articles covering the most important fundamental human rights'.⁷¹ Subsequently, the General Assembly adopted the Declaration as 'a common standard of achievement for all peoples and all nations'.⁷² While the declaration is clearly not a treaty and therefore lacks any enforcement provisions, it is a set of principles to

⁶⁵ UN Charter, Articles 1(3) and 55(c).

⁶⁶ UN Charter, Article 8.

⁶⁷ Hansungule (n 63) 49.

⁶⁸ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'; *ibid* 49.

⁶⁹ *ibid* 4.

⁷⁰ Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 76.

⁷¹ *ibid* 76.

⁷² *ibid*.

which United Nation Member States are obliged to show commitment for the sake of guaranteeing human dignity. Moreover, over the past 50 years, the UDHR has acquired the status of customary international law. However, governments have not applied this customary law equally. According to Joshua Castellino, an internal divide among opposing ideologies during ‘the negotiation and deliberations stages at the Commission on Human Rights, resulted in the bifurcation of the human rights agenda into civil and political rights on the one hand, and economic, social and cultural rights on the other’.⁷³ Vinodh Jaichand states that ‘civil and political rights have been unfortunately referred to as the “first generation” of human rights while economic, social and cultural rights are the so-called “second generation” ... This nomenclature is unfortunate because it has the effect of prioritising rights, one right over the other and which is detrimental to all human rights.’⁷⁴ Most states, including Nigeria, despite ratification of the ICESR, still treat socio-economic rights as non-justiciable rights.⁷⁵

The treatment of socio-economic rights as mere rights to be progressively realised has created judicial impasse as well as an untold hardship to the people, leading to the questions on why sustain the narrow definition of human rights? This is also boosting the campaign to place socio-economic rights on par with civil and political rights. Francis Moore argues that the ‘right to eat is as fundamental as the right not to be tortured or jailed without charges’.⁷⁶ Accordingly, in 1993, the Vienna Declaration and Programme of Action sought to correct this misperception

⁷³ Joshua Castellino, ‘Civil and Political, Rights’ in Azizur Rahman Chowdhury and MdJahid Hossain Bhuiyan(eds) *An Introduction to International Human Rights Law* (Brill 2010) 54.

⁷⁴ Vinodh Jaichand, ‘An Introduction to Economic, Social and Cultural Rights: Overcoming the Constraints of Categorization through Implementation’ in Azizur Rahman Chowdhury and MdJahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (Brill 2010) 75.

⁷⁵ See Chapter II of the Constitution of the Federal Republic of Nigeria: Fundamental Objectives and Directive Principles of State Policy < <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>> accessed 2 January 2015.

⁷⁶ Francis Moore, ‘What are Human Rights’ in Anuradha Mittal and Peter Rosset (eds) *America Needs Human Rights* (Food First Books 1999) 166.

by restating the original intent that ‘all human rights are universal, indivisible and interdependent and interrelated’.⁷⁷

3.6 The African Charter on Human and Peoples' Rights (1981)

The African Charter on Human and Peoples’ Rights (hereinafter ‘The African Charter’) was ‘adopted in June 1981 at the 18th Conference of Heads of State and Government of the OAU’.⁷⁸

The African Charter is a robust and innovative human rights document aimed at the promotion and protection of human rights and basic freedoms in the continent of Africa. Known popularly as the “Banjul Charter”, the African Charter substantially departs from the narrow formulations of other regional and universal human rights instruments like the European Convention on Human Rights and the American Convention on Human Rights by fully recognising civil, political, economic, social and cultural rights. The 68 articles of the Charter are divided into four chapters: Human and Peoples’ Rights; Duties; Procedure of the Commission; and Applicable Principles. The Protocol to the ‘African Charter’ on the establishment of an African Court of Human Rights was adopted in 1998.

The Protocol came into effect on 20 May 2004.⁷⁹ As of 6 October 2016, fifty-three countries have ratified the African Charter, fifty-four African countries are State Parties while twenty-four Member States have ratified the Protocol. The Charter ties the concepts of human rights to peoples’ rights and duties on individuals. The African Charter is an amalgam of three

⁷⁷ World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, Part I, paragraph 5.

⁷⁸ Rehman (n 70) 309.

⁷⁹ The African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

“generations” of rights: civil and political rights; economic, social, and cultural rights; and group and peoples’ rights.⁸⁰

According to Chowdhury, Shastri and Bhuiyan, ‘African Charter reflects a high degree of specificity due in particular to the African conception of the term “right” and the place it accords to the responsibilities of human beings’.⁸¹ African conception of the term right involves the peculiar way Africans conceive human rights by incorporating the ethnic diversities, traditional values, duties and culture of the continent as embodiment of the concept and principles of human rights. Richard Kiwanuka argues that ‘even in its imperfect form, the Banjul Charter is still the source of hope for a much needed system of international protection of human rights in Africa’.⁸² However, Mutua criticised the imposition of duties on individual members of African societies as the most controversial provisions of the African Charter.⁸³ This research argues likewise that the imposition of duties on individual members of African societies hampers the full realisation of human rights as by imposing such duties on individuals, the Charter indirectly empowers the States to use the pretence of such duties to derogate on certain human rights. Kiwanuka gave an example of such derogation as ‘the freedom of movement (art 12) could be derogated by the duty to place one’s physical and intellectual

⁸⁰ The African Charter contains socio-economic and cultural rights, which includes: Article 15: Right to work; Article 16: Right to health; Article 17(1): right to education; Article 17(2): Right to participate in the cultural life of one’s community; Article 17 (3): Duty of state to promote & protect the moral and traditional values recognised by the community; Article 18(1): Recognition of family as the natural unit & basis of a society; Article 18(2): Right of the family to be assisted as the custodian of morals and traditional values; Article 18(3): Protection of the rights of women and children, and Article 18(4): Rights of the aged and disabled.

⁸¹ Azizur Rahman Chowdhury, V. Seshaiyah Shastri, Md. Jahid Hossain Bhuiyan ‘Role of Regional Human Rights Instruments in the Protection and Promotion of Human Rights’ in Azizur Rahman Chowdhury and MdJahid Hossain Bhuiyan (eds) *An Introduction to International Human Rights Law* (Brill 2010) 297.

⁸² Richard Kiwanuka, ‘Human Rights Protection in Africa: The Continuing Debate’ (1988) 21 *Comp. & Int’l L.J. S. Afr.* 421.

⁸³ Makau Mutua, ‘The African Human Rights System in a Comparative Perspective’ (1993) 3 *Rev. Afr. Comm. Hum. & Peoples’ Rts.* 5, 8; See Article 27 African Charter.

abilities at the service of the national community (art 29, par 2)'.⁸⁴ Article 29 (1) indirectly passes the state's welfare responsibilities to individuals by suggesting that '... to respect his parents at all times; to maintain them in case of need ...'.⁸⁵ Moreover, due to the various cultural and religious trajectories of Africa, what is permissible in one state could be a taboo in another state, and this being the case, it becomes impossible to achieve a normative human rights standard with such impositions.

Despite the human rights guarantees given by the African Charter, it is confronted with several drawbacks. Mutua states that 'perhaps the most serious flaw in the African Charter concern its "claw-back" clauses. These clauses permeate the African Charter and permit African states to restrict basic human rights to the maximum extent allowed by domestic law'.⁸⁶ Mutua further asserts:

This is especially significant because most domestic laws in Africa date from the colonial period and are therefore highly repressive and draconian. The post-colonial state, like its predecessor, impermissibly restricts most civil and political rights, particularly those pertaining to political participation, free expression, association and assembly, movement, and conscience. Ironically, it is these same rights that the African Charter further erodes.⁸⁷

Vincent Nmehielle asserts that 'the effect of claw-back clauses as expressed in the African Charter is that it seriously emasculates the effectiveness of the Charter as well as its uniform application by member states'.⁸⁸ Nmehielle reasons that 'instead of the Charter having primacy, the various national laws of the member states actually assume a primary place ... the

⁸⁴ Kiwanuka (n 82) 431.

⁸⁵ Article 29 (1) African Charter.

⁸⁶ Mutua (n 83) 6.

⁸⁷ *ibid.*

⁸⁸ Vincent O Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (Martinus Nijhoff Publishers 2001) 166.

effectiveness of the Charter will thus be reduced since it would appear to be subject to national standards as laid down by domestic law'.⁸⁹

The African Charter does not provide any right of derogation for the States Parties in public emergencies.⁹⁰ This omission according to Mutua 'is all the more serious because the Charter in effect permits states through the "claw-back" clauses to suspend, de facto, many fundamental rights in their municipal law'.⁹¹ Mutua recommends inserting a 'provision on non-derogable rights, and another specifying which rights states can derogate from, when, and under what conditions'.⁹² This suggestion would add substance to the Charter and could enhance the realisation of human rights in Africa.

Finally, it is important to reiterate that the serious human rights abuses associated with most dictators in Africa brought the need for a regional human rights framework. The distinctive contributions of the African Charter to the human rights corpus, which include the concept of duty and the inclusion of the "three generations" of rights in one instrument makes it a unique framework. Yet, the lack of robust enforcement mechanisms to date remains a factor undermining the realisation of the Charter.

3.7 Justiciability of Socio-Economic Rights in Nigeria

There are numerous scholarly engagement on the justiciability of socio-economic rights in Nigeria and this centres on legality of judicial interpretation and the competence of courts to arbitrate on it. While socio-economic rights form an important part of the rights currently

⁸⁹ Nmehielle (n 88) 166.

⁹⁰ Lalit Kumar (ed), *Major Human Rights Instruments* (Isha 2006) 89.

⁹¹ Mutua (n 83) 6.

⁹² *ibid* 8.

enunciated in the Nigerian Constitution, its realisation, unlike civil and political rights has remained a subject of contention. Research has also tied the endemic corruption in Nigeria as part of the obstacle impeding the justiciability of socio-economic rights.⁹³ The International Council on Human Rights explains further:

Corruption implies that the state is not taking steps in the right direction. When funds are stolen by corrupt officials, or when access to health care, education and housing is dependent on bribes, a state's resources are clearly not being used maximally to realise economic and social cultural rights.⁹⁴

Justiciability of socio-economic rights simply refers to whether or not a duty exists to facilitate judicial remedies if a violation of socio-economic right has occurred. Justiciability or enforceability raises the question: if the executive arm of government refuses to provide facilities guaranteed by socio-economic rights, are there rights under the Nigerian Constitution to approach the courts for a judicial remedy? While the debate on the enforcement mechanisms for socio-economic and civil and political rights continues, emerging case law indicates that socio-economic rights are becoming realisable in some jurisdictions.⁹⁵ The 1979 Constitution of Nigeria is credited as the first Constitution of Nigeria to contain provisions on “Fundamental Objectives and Directive Principles of State Policy”. Thereafter, it was restated in Chapter II of the 1999 Constitution of Nigeria still retaining the title “Fundamental Objectives and

⁹³ Obiajulu Nnamuchi, ‘Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria’ (2008) *Journal of African Law*, Vol.52. No1, 12.

⁹⁴ International Council on Human Rights Policy, ICHRP, ‘Corruption and Human Rights: Making the Connection’ (2009) ICHRP, Geneva, Switzerland cited in Chris Albin-Lackey, ‘Corruption, Human Rights and Activism: Useful Connections and Their Limits’ in Dustin N Sharp (eds) *Justice and Economic Violence in Transition* (Springer 2013) 148.

⁹⁵ The seminal case on this matter being *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), where the Constitutional Court found, on a ‘reasonableness analysis’, that while the applicant’s ‘right to access adequate housing’ had been infringed, the Constitution ‘expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately’. Thus the Court issued a ‘declaratory order’ only, requiring the state authorities ‘to devise, fund, implement and supervise measures to provide relief to those in desperate need’.

Directive Principles of State Policy”. This section of the constitution is core to the realisation of socio-economic rights and consists of 12 sections (Sections 13 to 18).⁹⁶

The key constitutional provision in Nigeria, establishing the non-justiciability principle is Section 6 (6) (c) of the 1999 Nigerian Constitution:

The judicial powers vested in accordance with the foregoing provisions of this section (c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.⁹⁷

Accordingly, section 6 (6) (C) rendered Chapter II non-justiciable. Historically the Court of Appeal in *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*⁹⁸ had the first opportunity to define the judicial attitude in the adjudication of socio-economic rights based claims. The facts of the case related to a circular dated 26 March 1980 and issued

⁹⁶ See The 1999 Constitution of Nigeria : Right to general welfare and security : the security and welfare of the people shall be the primary purpose of government (S. 14(2)(b); Right to participatory governance system: participation by the people in their government shall be ensured in accordance with the provisions of this Constitution (S. 14(2)(c); Provision of Transportation: adequate facilities for movement of people, goods and services throughout the Federation (S. 15(3)(a); Provision of Physiological needs: suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens (S. 16(2)(d); Right to employment: all citizens, without discrimination on any group whatsoever, [shall] have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment (s. 17(3)(a); Conditions of work: [it shall be ensured that] conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life (S. 17(3)(b); Also, the state is to put in place policies to ensure that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused (S. 17(3)(c); Right to health: adequate medical and health facilities for all persons (S. 17(3) (d); Gender sensitive rights - Right to equal pay: for equal work without discrimination on account of sex, or on any other ground whatsoever (S. 17(3) (e); Right of the child: children, young persons and the aged are [entitled to be] protected against any exploitation whatsoever, and against moral and material neglect (S. 17(3)(f); Right to public assistance in conditions of need (S. 17(3)(g); Right to education, from cradle to grave: free, compulsory and universal primary education; free secondary, university education and adult literacy programme (S. 18(3)(a) to (d).

⁹⁷ Section 6 (6) (c) of the 1999 Nigerian Constitution.

⁹⁸ [1981] 2 NCLR 350.

by the Lagos state government purportedly abolishing private primary education in the state. *Archbishop Okogie and others* relying on the relevant provisions of the 1979 constitution challenged the circular as unconstitutional on the grounds that:

- It violated their rights to participate in sectors of the economy other than the major sectors of the economy (S. 16(1) (c), a ‘non-justiciable’ section of the of the 1979 Constitution).
- the responsibility of the Government to provide equal and adequate educational opportunities at all levels is restricted to government but does not preclude the plaintiffs (i.e. private sector) from providing educational services; (S. 18, CFRN, 1979).
- It violated their constitutionally guaranteed fundamental right to hold opinions, receive and impart ideas without interference (S. 36(1) of the 1979 Constitution, an expressly identified justiciable section of the Constitution).⁹⁹

Their application filed in the Federal Court of Appeal by *Archbishop Okogie and others* raised among others the questions:

Whether or not the provision of educational services by a private citizen or organization comes under the classes of economic activities outside the major sectors of the economy in which every citizen of Nigeria is entitled to engage in and whose right so to do the state is enjoined to protect within the meaning of section 16(1) (c) of the Constitution of the Federal Republic of Nigeria.¹⁰⁰

Justice Mamman Nasir in his ruling set out the rationale for Directive Principles of State Policy as aimed to identify the ultimate objectives of the nation and lay down the policies which are expected to be pursued in the nation’s quest to realise its objectives. Justice Nasir also examined the contradictory provisions of sections 13 and 6 (6) (c) of the 1979 Constitution and concluded that:

While Section 13 ... makes it a duty and responsibility of the judiciary among other organs of government, to conform to and apply the provisions of Chapter II, Section 6(6)(c) of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles. It is clear that section 13 has not made chapter II justiciable.¹⁰¹

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *Archbishop Okogie and others* (n 99) 350 para.1-2.

Justice Nasir underlined that ‘the obligation of the judiciary to observe the provisions of chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed ... subject to the express provision of the Constitution’.¹⁰² The judge also clarified ‘the arbiter for any breach of and guardian of the fundamental objectives ... is the legislature itself or the electorate’¹⁰³ as ‘it is clear from the provisions of section 4(2) and item 59(a) of the Exclusive Legislative List in the Second Schedule to the Constitution’¹⁰⁴ that the National Assembly ‘has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter II of the Constitution’.¹⁰⁵ Until such authorities are established, it will be ‘mere speculation to say which functions they may perform or in which way they may be able to enforce the provisions of chapter II’.¹⁰⁶ The rulings in *Okogie’s* case emphasised that the courts had no intention to make socio-economic rights justiciable even though the court acknowledged that it was amenable to the Plaintiffs strictly on the basis that sections 16(1) (c) and 18 of the Constitution guarantee their rights to undertake business enterprises within the economy and hindering them would amount to a violation of their fundamental rights under Section 36 of the 1979 Constitution. The court held that fundamental rights in chapter IV of the 1979 Constitution are superior to Directive principles in chapter 11 of the same Constitution.

The rulings on other prominent cases decided after *Archbishop Okogie and others* including: *Oronto Douglas v Shell Petroleum Development Company Limited* (case on environmental protection);¹⁰⁷ *Aiyeyemi and Others v The Government of Lagos State and Others* (case on the

¹⁰² *ibid* paragraphs 2-3.

¹⁰³ *ibid* paragraphs 7-8.

¹⁰⁴ The 1979 Constitution with parallel provision in the 1999 Constitution.

¹⁰⁵ *Archbishop Okogie and others* (n 99) para.1.

¹⁰⁶ *ibid*.

¹⁰⁷ [1999] 2 NWLR Part 591.

planned eviction of the former Maroko, Lagos residents);¹⁰⁸ *Mojekwu v Mojekwu*;¹⁰⁹ *Bello v Attorney General of Oyo State*¹¹⁰ and *Ukeje v Ukeje*¹¹¹ showed that justiciability of socio-economic rights remain elusive in Nigeria.

However at the regional level, the reliance on the provisions of the African Charter provided an alternative route towards exploring the realisation of socio-economic rights in Nigeria. The African Charter¹¹² ratified on 22 June 1983 is now part of the municipal laws of Nigeria¹¹³ having been incorporated at the sub-constitutional level complies with section 12 (1) of the 1999 Constitution of Nigeria.¹¹⁴ The African Charter upholds the justiciability of socio-economic rights,¹¹⁵ and has in paragraph 8 of the preamble foreclosed the ideological rift between socio-economic rights and civil and political rights by stating that: ‘ ... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights ... ’.¹¹⁶

The jurisprudence of the African Charter was tested in the Supreme Court case of *Abacha v Fawehinmi*,¹¹⁷ a case about the use of the African Charter on the enforcement of fundamental

¹⁰⁸ Unreported Suit No M/474/2003.

¹⁰⁹ [1997] 7 NWLR Part 283.

¹¹⁰ [1986] 5 NWLR Part 45 828.

¹¹¹ [2001] 27 WRN 142.

¹¹² Transposed into Nigerian law as: The African Charter on Human and People’s Rights Act, CAP10, LFN, 1990.

¹¹³ *Ogugu v The State* [1994] 9 NWLR (Pt 366) 1.

¹¹⁴ No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

¹¹⁵ Article 15: Right to work; Article 16: Right to health; Article 17(1): right to education; Article 17(2): Right to participate in the cultural life of one’s community; Article 17 (3): Duty of state to promote & protect the moral and traditional values recognised by the community; Article 18(1): Recognition of family as the natural unit & basis of a society; Article 18(2): Right of the family to be assisted as the custodian of morals and traditional values Article 18(3): Protection of the rights of women and children, and Article 18(4): Rights of the aged and disabled.

¹¹⁶ Preamble to the African Charter (Para.8).

¹¹⁷ [2001] 51 WRN 29.

rights arising from the unlawful arrest and detention of the human rights lawyer and activist, chief Gani Fawehinmi by the military government at the time. The main issue that faced the Supreme Court of Nigeria was ‘the value of the African Charter on Human and Peoples’ Rights in the domestic legal system. The Supreme Court held that the African Charter which is incorporated into Nigerian laws remains binding and Nigerian courts must give effect to it like all other laws falling within the judicial powers of the courts. However, the Supreme Court emphasised that the provisions of the African Charter are not superior to the Nigerian Constitution.¹¹⁸ The ruling of the Supreme Court in *Abacha v Fawehinmi* raised a critical legal point that socio-economic rights in Chapter II of the Nigerian Constitution are enforceable under the African Charter but are unfortunately not justiciable in Nigeria because the provisions of the African Charter are not superior to the Nigerian Constitution. Succinctly, socio-economic rights in the African Charter cannot be justiciable in Nigerian courts owing to constitutional stipulations.¹¹⁹ Hence, the Supreme Court stand explains why Nigerian courts are still refraining from exercising jurisdictions in matters of socio-economic rights realisation despite the express guarantees contained in the African Charter.

However, while it is clear that the socio-economic rights are non-justiciable in Nigeria reading from section II of the 1999 Constitution, some scholars argue that socio-economic rights are indeed to some extent justiciable where relevant legislations are enacted to guarantee it.¹²⁰ This would mean compliance to section 13 and item 60(a) of the Exclusive Legislative List where

¹¹⁸ *ibid.*

¹¹⁹ Section 1 (3) of the Nigerian Constitution stipulates: ‘If any other law is inconsistent with the provisions of the constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.’

¹²⁰ S T Ebobrah, ‘The Future of Socio-Economic and Cultural Rights Litigation in Nigeria’ (2007) 1(2) *Review of Nigerian Law and Practice* 119 (109-124); Aisosa Jennifer Isokpan, ‘The Role of the Courts in the Justiciability of Socio-Economic Rights in Nigeria: Lessons from India’ (2017) *NAUJILJ* 8 (2) 2017.

the organs of government have the duties of giving effect to the provisions of Chapter 11 of the Constitution. The decisions in *A.G Lagos State v A.G Federation*¹²¹ and the resultant enactment of the Federal Environment Protection Agency Act represents a decision that expressly underscores the leeway to circumventing the provisions of section 6 (6) of the 1999 Constitution by the courts on the footing of valid legislative enactments. Hence, the contents of Chapter 11 can be the subject of legislative enactments and in view of such enactments, courts can enforce the provisions of such a law notwithstanding the limitations contained in section 6(6)(c). Okeke and Okeke argue that ‘there are ways by which Chapter II of the constitution can be made justiciable and these are contained within the very section 6 (6) (c) that made chapter II of the Constitution non-justiciable’.¹²² This argument is restated in the case of the *Federal Republic of Nigeria v Anache & 3 ors*,¹²³ where Niki Tobi (JSC) observes that ‘in my humble view section 6 (6) (c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words “except as otherwise provides by this Constitution”. This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts’. Accordingly, the court, in *Federal Republic of Nigeria v Anache*,¹²⁴ upheld the position affirming that since Section 6 (6) (c) is qualified by the phrase, “save as otherwise provided by this Constitution”, the justiciability of Chapter II is not entirely barred. Furthermore, in *Olafisoye v Federal Republic of Nigeria*,¹²⁵ the Supreme Court ruled that the non-justiciability of section 6(6) (c) of the Constitution is not sacrosanct as the subsection provides also a leeway

¹²¹ [2002] 9 NWLR (Pt 772) 222 at 391.

¹²² GN Okeke and Chika Okeke, ‘The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria’ (2013) IOSR Journal of Humanities and Social Sciences (IOSR-JHSS) Volume 7, Issue 8, 11.

¹²³ [2004] I SCM 36, 78 cited in Okeke and Okeke, *ibid* 11.

¹²⁴ [2004] 14 WRN.

¹²⁵ [2005] 51 WRN 52.

through using the words, “except as otherwise provided by this Constitution”. The implication is that where the Constitution provides, in another section, the principles that make a section or sections of Chapter II justiciable, it will be so interpreted by the Courts.¹²⁶

The Constitutional position remain that chapter II of the 1999 Constitution of Nigeria is non-justiciable.¹²⁷ However, in some few restricted cases and circumstances, there have been counter arguments upholding justiciability. For instance, where the ‘implementation of Chapter II infringes on rights in Chapter IV (fundamental rights), particularly on the right of the private investment in education and where statutes enacted to actualise Chapter II provisions are challenged’.¹²⁸

It is inferred that the non-justiciability of Chapter II of the 1999 Nigerian Constitution is politics rather than law.¹²⁹ It ‘amounts to the practice of using legislation to modify the provisions of the constitution, ...’¹³⁰ The wider implication is that judges should adopt proactive,

¹²⁶ *ibid.*

¹²⁷ *Jonah Gbemre & Ors v Shell Petroleum Development Company of Nigeria Ltd & Ors* [2005] AHRLR 151 (NgHC 2005). Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005. In this case involving gas flaring and environmental degradation and the right to life and healthy environment, the applicants sought a declaration that the constitutionally guaranteed fundamental rights to life and dignity of the person as enshrined in sections 33(1) and 34(1) of the constitution and articles 4, 16 and 24 of the African Charter Act include also the right to a healthy environment. The Court rejected the case on the grounds that the African Charter is not applicable to it.

¹²⁸ *Attorney General of Ondo State v Attorney General of the Federation & ors* [2002] 9 NWLR (Pt.772) 222. The Supreme Court held that courts cannot enforce any of the provisions of Chapter II of the constitution until the National Assembly has enacted specific laws for their enforcement; [2002] 6.S.C (Pt.1), 1. The Supreme Court, per Uwaifo, JSC, justified the enactment of the Act on the Fundamental Objectives and Directive Principles of State Policy, citing examples drawn from Indian jurisprudence.

¹²⁹ C Odinkalu, ‘Lawyering for a Cause: The Femi Falana Story and the Imperative of Justiciability of Socio-Economic Rights in Nigeria’ (2012) Text of Public Lecture in Honour of Femi Falana, SAN, delivered at The Polytechnic, Ibadan, 12.

¹³⁰ Okeke and Okeke (n 122) 11.

progressive and purposive interpretation of the laws as opposed to restrictive and conservative interpretations. Justice Kayode Esho emphasised such judicial activism:

It would be tragic to reduce Judges to a sterile role and make an automation of them. I believe it is the function of Judges to keep the law alive, in motion, and to make it progressive for the purpose of arriving at the end of justice, without being inhibited by technicalities, to find every conceivable, but acceptable way of avoiding narrowness that spells injustice. Short of being a legislator, a Judge, to my mind, must possess an aggressive stance in interpreting the law.¹³¹

This judicial innovation could be achieved by judges applying the principles in section 16 (1) (b) of the 1999 Nigerian Constitution.¹³² So far, ‘judicial attitude to socio-economic rights litigation in Nigeria is characterised by great caution and subtle passivity. ... Nigerian courts are almost always incapable of or unwilling to entertain socio-economic rights claims’.¹³³

Further limitations to the realisation of socio-economic rights are enforcement mechanisms and the fear that extending constitutional protection to socio-economic rights could undermine the doctrine of separation of powers. The separation of powers argument implies that the powers would be concentrated in the courts at the cost of the elected public officials. This thesis argues that it is more productive for socio-economic rights to be protected at the constitutional level rather than at the legislative level as this will ensure a more permanent, fundamental guarantee enjoyed by all as opposed to the whims and the discretion of the legislators and politicians. The realisation of socio-economic rights should be viewed as entitlements and as fundamental rights could prompt further government attention and engagement. This is to say that

¹³¹ *Trans bridge Trading Company Limited v Survey International Limited* [1996] 4 NWLR (Part 37) 576 at 596-597.

¹³² Section 16 (1) (b): Control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.

¹³³ Stanley Ibe, ‘Beyond justiciability: Realising the promise of socio-economic rights in Nigeria’ (2007) 7 *African Human Rights Journal*, 241.

entrenching socio-economic rights as fundamental rights will ensure that sufficient public resources are channelled into social spending. Amy Makinen concurs that ‘the constitutional entrenchment of socio-economic rights raises the priority of social programs in the eyes of the legislators, and may encourage groups to lobby for increased benefits’.¹³⁴

Despite the legal conundrums inherent in the justiciability of socio-economic rights in Nigeria, this thesis argues that realising socio-economic rights is relevant to combating systemic grand corruption in Nigeria.

3.8 Nexus between Grand Corruption and Human Rights in Nigeria

The fight against corruption is arguably linked to the struggle for actualisation of human rights. In other words, corruption and human rights are intertwined in different ways. While not all acts of corruption could constitute human rights violations, it is vital to establish the issue of causality. In so doing, one may begin by asking the question: ‘does the corrupt act itself violate the right concerned, or are there other circumstances involved?’¹³⁵ This section examines how corrupt acts in Nigeria can run contrary to the state’s institutional obligation to realise the socio-economic rights of the people.

Human rights conventions enumerate the legal obligations of a government to the people and emphasises protection of people from abuse. These obligations include guaranteeing that all people resident in a country enjoy equality, a fair justice system, and access to goods and public services, among other rights. However, the ability of a government to protect and fulfil these

¹³⁴ Amy Makinen, ‘Rights, Review and Spending: Policy Outcomes with Judicially Enforceable Rights’ (2001) 39 *European Journal of Political Research* 23, 43.

¹³⁵ Martine Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (Intersentia 2012) 195.

rights at times are undermined by the endemic level of corruption in the state. In a quest to strike a balance between guaranteeing human rights protection and good governance, it appears that the commitment made by states to combat corruption runs parallel to the commitments to promote, respect and fulfil human rights. This is the nexus of corruption and human rights. Albin-Lackey argues that the ‘focus on corruption-human rights nexus offers an easy point of entry for mainstreaming human rights group to work on progressive realisation issues, using the methodologies they are more comfortable with’.¹³⁶ Albin-Lackey goes on to say that when socio-economic rights are undermined by systemic corruption, such rights violations can be challenged using the different national, regional and international mechanisms that exist to monitor compliance with human rights standards. However, where these mechanisms are disabled (like the provisions of chapter II of the 1999 Constitution of Nigeria), such clauses become a direct burden on the people.

Since Nigeria presents as a state with a very high incidence of corruption, global indicators suggest that corruption impedes sustainable development and disproportionately affects the economically and socially vulnerable, weakens the rule of law, erodes public trust in government and permeates critical institutions of the state.¹³⁷ Systemic corruption may imply that the State is not taking steps in the right direction. For instance, when funds are stolen by corrupt officials, or when access to health care, education and housing is dependent on bribes, a state’s resources are clearly not being used maximally to realize socio-economic rights.¹³⁸

Olaniyan argues that:

¹³⁶ Albin-Lackey (n 94)148.

¹³⁷ See UNDP/Global Financial Integrity, 2013, ‘Illicit Financial Flows from the Least Developed Countries: 2002–2011’ <www://iff.gfintegrity.org/iff2013/2013report.html> accessed 04 January 2016.

¹³⁸ Albin-Lackey (n 94) 148.

Theoretically, corruption has implications for a state's human rights obligations in at least three ways. First, corruption, per se, is a human rights violation, insofar as it interferes with the right of the people to dispose of their natural wealth and resources, and thereby increases poverty and frustrates socio-economic development. Second, corruption can lead to a multitude of human rights violations. Third, corruption is a violation of the obligations to respect, protect, promote, and fulfil human and peoples' rights. These presumably will include a state's failure to create conditions to achieve human rights (and access to effective remedies in cases of violations) or to establish effective and independent anticorruption mechanisms to combat corruption.¹³⁹

Arguing further that the research has tied non realisation of socio-economic rights to incidents of corruption, Olaniyan cites more examples of corrupt practices that could contravene human rights as 'the siphoning-off of public funds (whether the funds are derived from illicit enrichment, embezzlement, abuse of office, trading in influence or even the proceeds of bribery) into private bank accounts of senior state officials'.¹⁴⁰ The siphoned funds would have been the same funds that could have been injected into public social projects, for example, infrastructural provisions and upgrades. In the absence of these much needed funds, the social projects are abandoned, and as such, the vital things ensuring man's enjoyment of the right to life are jeopardised. Take, for instance, hospitals without drugs, bedding and trained staff as well as lack of good roads which leads to regular accidents and loss of life and inadequate water facilities leading to poor hygiene and water/air borne diseases. Moreover, the politics surrounding non-justiciability of socio-economic rights in Nigeria to a very large extent infringes on the human rights of people. It also creates an avenue for illicit enrichment, abuse of office and money laundering as state budgets earmarked for the provision of essential services are siphoned off by high-ranking government officials taking advantage of the state's weak and dysfunctional institutions.

¹³⁹ Olaniyan (n 49) 12.

¹⁴⁰ *ibid* 12.

In Nigeria, public stealing appears to be institutionalised. Recent examples include embezzlement of civil servant's pension funds by a cartel comprising top ranking public servants. This particular case involved a permanent secretary, Atiku Abubakar Kigo, and five other senior civil servants in the Federal Civil Service (Esai Dangabar, Ahmed Wada, John Yisufu, Veronica Onyegbula and Sani Zira) who stole NGN32.8 billion accruing from the Police Pension Funds in Abuja between January 2009 and June 2011.¹⁴¹ The diversion of funds meant for the Universal Basic Education programme (UBE) in Nigeria presents another tragic case where funds budgeted for education purposes were embezzled by public servants.¹⁴² In *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission*,¹⁴³ SERAP alleged the violation of the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights. The ECOWAS Court ruled that the right to education can be enforced before the Court and dismissed all objections brought by the Federal Government of Nigeria through the Universal Basic Education Commission (UBEC), that education is 'a mere directive policy of the government and not a legal entitlement of the citizens'.¹⁴⁴ The core of the argument in this section is that the impact of uncontrolled grand corruption falls on the ordinary people, their socio-economic needs will simply not be met 'when the resources to provide those needs are stolen, diverted into private pockets, and then stashed abroad'.¹⁴⁵

¹⁴¹ *Dangabar v FRN* [2012] LPELR- 19732 (CA); Oscar Edoror Ubhenin, 'An assessment of the effectiveness of the Nigerian 2004 pension reform policy' *Pensions* (2012) 17, 289–304; on money laundering and financial safe havens, see <http://www.unodc.org/pdf/Star_Report.pdf> accessed 23 January 2015.

¹⁴² See Nekabari and Oni (n 30).

¹⁴³ ECW/CCJ/APP/08/08.

¹⁴⁴ *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission*, ECW/CCJ/APP/08/08, 34.

¹⁴⁵ Olaniyan (n 49) 206.

3.9 Conclusion

Corruption is not a victimless crime. It impacts directly on individuals and by so doing affects their rights. This is why this study seeks to increase our understanding of the adverse consequences of grand corruption on peoples' rights by highlighting how grand corruption, international criminal law, human rights and the state's capacity in containing it are intertwined.

To address the questions driving this chapter: why are the laws and the anti-corruption agencies failing in the bid to combat corruption? How has grand corruption affected human rights in Nigeria? The analysis presented in this chapter suggests that the laws fail mostly as a result of the ingrained culture of corruption, political and judicial complicity which sabotage efforts to tackle corruption. While this chapter is not intended to chronicle the overwhelming corruption scandals in Nigeria (chapter two has addressed this issue), evidence of corruption scandals, including; the infamous Abacha loot,¹⁴⁶ the James Ibori's case¹⁴⁷, Alamiyesh's case¹⁴⁸,

¹⁴⁶ Abacha's loot chronicled by StAR on < http://www.unodc.org/pdf/Star_Report.pdf > accessed 23 January 2015. Nigeria had recovered about \$1.2 billion of Abacha's money from various European jurisdictions as of December 2014, with more than a third of that from Switzerland. These achievements are mostly at the behest of the StAR Initiative; Akin Akindele, *Geo-Political Road Kill Book #8: Revisiting Africa's Failing Quest for Liberty, Justice & Progress* (Xlibris Corporation 2009) 116.

¹⁴⁷ Melvin D Ayogu and Julius Agbor, 'Illicit Financial Flow and Stolen Assets Value Recovery' in S Ibi Ajayi and LeonceNdikumana (eds) *Capital Flight In Africa, Causes, Effects, and Policy Issues* (Oxford University Press 2015) 359.

¹⁴⁸ *Federal Republic of Nigeria V Alamiyeseigha* (Charged for Money Laundering in London but jumped bail and returned to Nigeria where he was tried and sent to prison).

Joshua Dariye's case,¹⁴⁹ the police pension fund scam,¹⁵⁰ the missing oil subsidy funds,¹⁵¹ and recently the Diezani Alison Madueke's¹⁵² case all point to the systemic grand corruption in Nigeria and how the Nigerian judiciary has aided in hindering the fight against grand corruption.

Hence, from the point of view of the analysis of human rights issues followed in this chapter, the research submits that if we are to go by the supposition that human rights fulfilment signify actions aimed at establishing a level playing ground where rights deprivation and persecution are unacceptable, it becomes important to assert that corruption leads to deprivation and is a pointer as to how it affects human rights. In this context, this chapter argues that the non-justiciability of socio-economic rights in Nigeria is mostly attributable to endemic grand corruption. It reiterates that funds needed to actualise the socio-economic rights are the same funds hidden in different overseas financial safe havens by corrupt public officials.¹⁵³ There have been calls for the review of the 1999 Constitution of Nigeria to ensure the realisation of socio-economic rights and, propel the government to invest in social infrastructure, thereby plugging most of the conduits for official leaks and grafts. This is yet to happen and goes to reiterate the need for legal intervention backed by the commitment and political will to achieve the needed reform.

¹⁴⁹ *Federal Republic of Nigeria v. Dariye* (Former Plateau State governor charged for Embezzlement, Bribery, Illicit Enrichment in London but jumped bail and returned incognito to Nigeria).

¹⁵⁰ *Dangabar v FRN* [2012] LPELR- 19732 (CA).

¹⁵¹ Lamido Sanusi, 'Unanswered questions on Nigeria's missing oil revenue billions' *Financial Times* (London 13 March 2015). The Central Bank Governor, Lamido Sanusi was suspended and later sacked from the job for questioning an estimated \$20billion revenue alleged to have been misappropriated by the Nigerian National Petroleum Corporation.

¹⁵² See EFCC Nigeria, 'Diezani-Alison Madueke: What an Appetite' <<https://efccnigeria.org/efcc/news/2706-diezani-alison-madueke-what-an-appetite>> accessed 11 August 2017.

¹⁵³ Akindele (n 146) 116.

It is well settled in the Indian Supreme Court ruling in *State of Maharashtra Tr.C.B.I v Balakrishna Dattatrya Kumbhar* and the South African Constitutional Court ruling of *Hugh Glenister v President of the Republic of South Africa & Ors* that there is a close link between corruption and human rights. In the Indian case, Ms. Jayaram, a popular leader, was sentenced to four years imprisonment on charges that she illegally enriched herself in the first of her three consecutive terms as chief minister. The Indian Supreme Court in this case held that ‘corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights’ violation in itself, as it leads to systematic economic crimes’.¹⁵⁴ The Constitutional Court of South Africa also held that ‘it is incontestable that corruption undermines the rights in the Bill of Rights and imperils democracy’.¹⁵⁵ The Court also highlighted the obligation of the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.¹⁵⁶ Reading from the jurisprudence of India and South Africa, it is obvious that the Courts articulated corruption as a human rights violation. Unfortunately, it is damning that no court in Nigeria has made such a pronouncement despite the myriad of corruption cases before them. Moreover, reading the South African and Indian court rulings in conjunction with the ECOWAS Court ruling on the justiciability of the right to education, it becomes obvious that corruption hinders the ability of states to combat poverty and also precludes the state from delivering on its human rights obligations. It also appears that Nigeria is in violation of its treaty obligations by failing to make socio-economic rights justiciable according to the provisions of the ratified African Charter¹⁵⁷. Thus,

¹⁵⁴ *State of Maharashtra Tr. CBI v Balakrishna Dattatrya Kumbhar* (2012) 9 S.C.R. 601 (India).

¹⁵⁵ *Hugh Glenister v President of The Republic of South Africa & Ors* (CCT48/10) [2011] ZACC 6, 176-77.

¹⁵⁶ *ibid* 82.

¹⁵⁷ African Charter, Articles 1, 2, 17 21 and 22.

considering that the legal framework of the universal human rights instruments makes socio-economic rights fundamental and inalienable, the universal human rights instruments supports the demand for the realisation of these rights despite their categorisation. It also becomes plausible to demand, like Ndiva Kofele-Kale, ‘a corruption-free society’.¹⁵⁸ This entails the total rejection of the everyday culture of corruption and impunity and an insistence on making people’s rights count, and at the same time, realisable.

This chapter acknowledges the numerous legal instruments against corruption in Nigeria but argues that grand corruption has diminished the supposed effectiveness of the legal instruments. This chapter suggests a human rights approach in dealing with the grand corruption issues in Nigeria as it appears, human rights argument may be capable of precipitating the much needed reform in the present circumstance of other institutional failures. Finally, the chapter contextualises the relationship existing within law, human rights, grand corruption and state capacity and argues for the need to synthesise the various concepts in order to tackle the malaise of grand corruption in Nigeria.

¹⁵⁸ Ndiva Kofele-Kale, ‘The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law’ (2000) *The International Lawyer* Vol. 34, No. 1, 149-178.

Chapter Four

International and Regional Legal Instruments on Corruption

4.1 Introduction

The existence of corruption in different countries of the world deflates the claim that corruption is a domestic political issue. Corruption is a global phenomenon and therefore deserves a global coalition against it. Moreover, the sustained campaign by various governments, non-governmental organisations/civil societies,¹ and the general public attests to the damage caused by corruption, thus precipitating the need for aggressive steps in controlling it. Over the years, global corruption scandals have confirmed that corruption cuts across a diverse range of institutional, organisational and cultural settings.² The scandals have clarified the previously held view that corruption is a problem that is confined to a specific sector or to the developing world.³ The consequences of corruption are significant and known to affect people worldwide.

¹ The Transparency International with its headquarters in Berlin, Germany has championed the campaign against corruption; The World Bank and the International Monetary Fund have also played prominent roles in combating corruption worldwide.

² Transparency International in 'Global Corruption Report 2004' published a list of heads of government who allegedly embezzled large amounts of public funds. This list illustrates through estimates, the funds allegedly embezzled by some of the most notorious leaders of the last 20 years. The 10 leaders in the list are not necessarily the 10 most corrupt leaders of the period and the estimates of funds allegedly embezzled are extremely approximate: Mohamed Suharto President of Indonesia, 1967–98 US \$ 15 to 35 billion, GDP per capita US \$ 695; Ferdinand Marcos President of Philippines, 1972–86 US \$ 5 to 10 billion, GDP per capita US \$ 912; Mobutu Sese Seko President of Zaire, 1965–97 US \$ 5 billion, GDP per capita US \$ 99; Sani Abacha President of Nigeria, 1993–98 US \$ 2 to 5 billion, GDP per capita US \$ 319; Slobodan Milosevic President of Serbia/Yugoslavia, 1989–2000 US \$ 1 billion, GDP per capita n/a; Jean-Claude Duvalier President of Haiti, 1971–86 US \$ 300 to 800 million US, GDP per capita \$ 460; Alberto Fujimori President of Peru, 1990–2000 US \$ 600 million US, GDP per capita \$ 2,051; Pavlo Lazarenko Prime Minister of Ukraine, 1996–97 US \$ 114 to 200 million US \$ 766; Arnoldo Alemán President of Nicaragua, 1997–2002 US \$ 100 million, GDP per capita US \$ 490; Joseph Estrada President of Philippines, 1998–2001 US \$ 78 to 80 million US, GDP per capita \$ 91<http://issuu.com/transparencyinternational/docs/2004_gcr_politicalcorruption_en/23?e=0; http://www.transparency.org/whatwedo/publication/global_corruption_report_2004_political_corruption> accessed 30 October 2015.

³ Clare Fletcher and Daniela Herrmann, *Internationalisation of Corruption: Scale, Impact and Counter measures* (Ashgate Publishing Ltd 2012) 101-106; Lists numerous examples of political

Scholars and analysts have linked corruption with political instability, human rights violations, the exacerbation of poverty, insecurity, forced migration, the erosion of public confidence in institutions and many other negative outcomes.⁴ Corruption remains a major obstacle to political, social and economic development in many parts of the world.

Globally, there is evidence of changing attitudes about corruption gleaned from the myriad of international, regional and state legal instruments aimed at combating it. Charles Carter argues that ‘contemporary globalisation of anti-corruption laws can at least partly be understood as a manifestation of the collective realisation by states that emerging threats are increasingly transnational-such as corruption...- and thus require international response’.⁵

The international response to combating corruption raises so many questions, for instance: How did corruption become a serious subject in international law? What is the nexus between the international attempts to combat corruption and international human rights projections? Are the global campaigns against corruption propelled by international commercial concerns? What propelled the subject of corruption to the top of international agenda? What is the role of international law and its effectiveness in countering corruption?

This chapter, though certainly provoked by the above questions, does not pretend to give definite answers. It seeks to contribute to the body of scholarship on the understanding of the development of anti-corruption frameworks under international law by answering the

leaders entangled in corruption: Former Indonesian President Suharto; Benazi Bhutto of Pakistan; India’s Narasimha; former Prime Minister Ehud Omert of Israel; Germans’ Helmut Kohl; Former President Nicholas Sarkozy of France; former Italian prime Minister, Silvio Berlusconi; Tunisian former President, Ben Ali; former military president Sani Abacha of Nigeria; former Prime Minister of Thailand, Thaksin Shinawatra; and former President Hosni Mubarak of Egypt.

⁴ Secretary-General Lauds Adoption by General Assembly of United Nations Convention against Corruption, SG/SM/8977GA/10200, SOC/CP/271 (3 November 2003) <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> accessed 18 November 2015.

⁵ Charles Carter, ‘Corruption and Global Governance’ in Sophie Harman and David Williams (eds) *Governing the World? Cases in Global Governance* (Routledge 2013) 76.

following question: what is the status, direction, and development of the treatment of corruption under international law? In essence, this chapter attempts to answer research question number two by interrogating how the existing regional and international legal treaties and frameworks facilitate the fight against corruption.⁶ The chapter critically evaluates The United Nations Convention against Corruption (2003) (hereinafter ‘UNCAC’); The African Union Convention on Preventing and Combating Corruption (2003) (hereinafter ‘AU Convention’); the ECOWAS Protocol on the Fight against Corruption (2001) and the Foreign Corrupt Practices Act (1977) (FCPA). Although a U.S statute, the FCPA is widely regarded as the model to all legal instruments on anti-corruption.

The chapter argues that, by excluding human rights considerations in the framing of most of the Conventions, there exists an accountability gap in the current international and regional anti-corruption legal frameworks, which requires additional approaches to combat the problems posed globally by the high incidence of grand corruption.

4.2 The United Nations Convention against Corruption 2003 (UNCAC)

The ‘United Nations Convention against Corruption is the only legally binding universal anti-corruption instrument. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem’.⁷ It is the only global legal instrument on corruption representing an in-depth

⁶ Research question number two: How have existing international, regional and domestic legal frameworks facilitated the fight against corruption?

⁷ See ‘United Nations Office on Drug and Crime (UNDOC) <<https://www.unodc.org/unodc/en/treaties/CAC/>> accessed 03 February 2016.

unified international response to the problem of corruption. UNCAC is regarded as the most exhaustive and multifaceted international anti-corruption treaty to date.⁸ UNCAC was approved in 2003 by resolution 54/4 of 31 October 2003 of the UN General Assembly and following the process of ratification, the Convention came into force on 14 December 2005. The UNCAC has 181 State Parties and 140 signatories as at 12 December, 2016.⁹ Nigeria ratified the UNCAC on 14 December 2004. UNCAC does not provide any concise definition of the term “corruption”. Rather, it lists a number of offences including: bribery; embezzlement; trading in influence; abuse of functions; illicit enrichment; laundering; concealment and obstruction of justice.¹⁰ By so doing, it creates a situation whereby states may not have the same obligations regarding all the offences. UNCAC has 71 articles embedded in eight chapters:

- Chapter I, General Provisions (Articles 1-4)
- Chapter II, Preventive Measures (Articles 5-14)
- Chapter III, Criminalization and Law Enforcement (Articles 15-42)
- Chapter IV, International Cooperation (Articles 43-50)
- Chapter V, Asset Recovery (Articles 50-59)
- Chapter VI, Technical Assistance and Information Exchange (Articles 60-62)
- Chapter VII, Mechanisms for Implementation (Articles 63-64), and
- Chapter VIII, Final Provisions (Articles 65-71).

However, the four main highlights of UNCAC are: prevention, criminalisation, international cooperation and asset recovery.¹¹

⁸ Lucinda A Low, ‘The United Nations Convention against Corruption: The Globalization of Anticorruption Standards, The Awakening Giant of Anticorruption Enforcement’ (2006) <http://www.stepto.com/assets/attachments/2599.pdf>> accessed 10 November 2015.

⁹ See United Nations Office on Drugs and Crime, United Nations Convention against Corruption, adopted 31 October 2003 and entered into force 14 December 2005.

¹⁰ See articles 15-25 UNCAC outlining a series of offences deemed as corrupt.

¹¹ See United Nations Office on Drugs and Crime (n 9).

UNCAC **preventive measures** highlight the necessity for State Parties to initiate, adopt and implement crucial policies at the public and private levels.¹² Importantly, article 6 mandates States Parties to establish independent anti-corruption agencies and agencies capable of implementing anti-corruption policies enumerated in article 5 of UNCAC. Other preventive measures include the promotion of the participation of civil society in preventing public corruption as well as raising public awareness on corruption.¹³ As part of the preventive measures, article 6 (3) of UNCAC obligates state parties to inform the Secretary-General of the United Nations about agencies likely to assist other State Parties in implementing measures aimed at combating corruption. Finally, all preventive measures should ‘reflect the principles of the rule of law, proper management of public affairs and the public property, integrity, transparency and accountability’.¹⁴

UNCAC contains an **obligation to criminalise** certain corrupt practices and related offences in both the public and private sphere.¹⁵ UNCAC failed to provide a concise definition of corruption but rather preferred a peculiar approach that provides for the criminalisation of different forms of corrupt behaviour extending beyond the usual bribery of public officials.¹⁶ Indira Carr opines that ‘the stance it adopts is of a holistic nature and it expects the engagement of the public sector, the private sector, the financial sector, and the judiciary in the prevention of corruption’.¹⁷ Moreover, UNCAC makes a clear distinction between mandatory and optional offences in terms of criminalisation.¹⁸ Offences falling within the ambit of mandatory

¹² Articles 5, 7 and 12 UNCAC.

¹³ Article 13 UNCAC.

¹⁴ Article 5 (1) UNCAC.

¹⁵ See Article 12, 15 and 21 UNCAC.

¹⁶ See Articles 15-27 UNCAC.

¹⁷ Indira Carr, ‘The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions?’ (2006) MJIEL Vol 3 Issue 3.

¹⁸ See Low (n 8) 7-12; Carr (n 17) 19-25.

criminalisation include active and passive bribery of national and public officials;¹⁹ active bribery of foreign public officials and officials of public international organisations;²⁰ embezzlement;²¹ laundering of the proceeds of corruption;²² obstruction of justice;²³ and participation.²⁴ The offences that are optional to criminalise pursuant to UNCAC are: passive bribery of foreign officials and officials of public international organisations;²⁵ trading in influence;²⁶ abuse of functions;²⁷ illicit enrichment;²⁸ private sector bribery;²⁹ private sector embezzlement;³⁰ concealment;³¹ and attempt and preparation.³² Other procedural measures supporting criminalisation measures include; use of investigative techniques³³ and protection of witnesses, victims and whistle-blowers.³⁴

International cooperation is another unique provision of UNCAC as outlined in chapter IV (articles 43-50) and entails obligations on States Parties to assist one another in gathering and transferring evidence of corruption for use in courts in cross border criminal matters. International cooperation also includes provisions on extradition. Lucinda Low submits that ‘in contrast, the international cooperation chapter -- as is the case with other conventions -- is predominately self-executing. However, even these provisions do not operate in a vacuum, but

¹⁹ Article 15 UNCAC.

²⁰ Article 16 UNCAC.

²¹ Article 17 UNCAC.

²² Article 23 UNCAC.

²³ Article 25 UNCAC.

²⁴ Article 27 UNCAC.

²⁵ Article 16 (2) UNCAC.

²⁶ Article 18 UNCAC.

²⁷ Article 19 UNCAC.

²⁸ Article 20 UNCAC.

²⁹ Article 21 UNCAC.

³⁰ Article 22 UNCAC.

³¹ Article 24 UNCAC.

³² Article 27 (2) and (3) UNCAC.

³³ Article 50 UNCAC.

³⁴ Articles 32-33 UNCAC.

interact with existing treaties in the areas of extradition and mutual legal assistance as well as national laws'.³⁵ International cooperation remains a fundamental provision of UNCAC.

Asset Recovery appears in Chapter V of UNCAC and is one of the outstanding provisions of the treaty. It provides for seizure, freezing and repatriation of all assets linked to proceeds of corruption.³⁶ This provision has ensured the tracing and repatriation of millions of stolen funds from Nigeria from countries like USA, Switzerland, Liechtenstein, Germany and United Kingdom.³⁷ The Abacha loot hidden in Europe, America, Asia and the Pacific, the Caribbean and the Middle East was traced using the assets recovery mandate of UNCAC. Switzerland took it further by enacting the Swiss Restitution of Illicit Assets Act (RIAA) 2010 commonly known as “Lex Duvalier” to facilitate the quick location of proceeds of corruption hidden under the veil of the Swiss bank secrecy laws.

Although UNCAC appears comprehensive, it still suffers from a number of deficits. Several provisions may be undermined by the wordings of the treaty. UNCAC is not strongly worded and has left loopholes in the manner in which member states have implemented the criminalisation mandate. Clauses like “states shall endeavour to” and “states shall consider to” are used instead of the much stronger term “states shall”.³⁸ Martine Boersma argues that ‘the effectiveness of several provisions might be undermined by their wordings...this makes numerous preventive provisions optional’.³⁹ Boersma states that ‘apart from the many optional

³⁵ See Low (n 8) 4.

³⁶ Articles 53, 54, 55, and 57 UNCAC.

³⁷ Melvin D Ayogu and Julius Agbor, ‘Illicit Financial Flow and Stolen Assets Value Recovery’ in S IbiAjayi and LeonceNdikumana (eds) *Capital Flight In Africa, Causes, Effects, and Policy Issues* (Oxford University Press 2015) 359. Nigeria had recovered about \$1.2 billion of Abacha's money from various European jurisdictions as of last year, with more than a third of that from Switzerland. These achievements are mostly at the behest of the StAR Initiative.

³⁸ Articles 29 and 30 UNCAC.

³⁹ Martine Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (Intersentia Ltd 2012) 93.

provisions which UNCAC contains, the use of numerous safeguard clauses can harm the effectiveness of the instrument. Several provisions are made subject to principles of domestic law, national constitutions etcetera'.⁴⁰

UNCAC does not make any reference to human rights in any of the seventy-one articles, although there are references to “good governance” and “rule of law” in its preamble. The reasons for the omission of human rights was not obvious. However, it could be inferred that it was an attempt to obviate the link between corruption and human rights. This explicit omission has continuously derailed the argument linking corruption and human rights. In the same vein, civil society was accorded a weak role in the entire convention. The near exclusion of civil society by UNCAC undermines the all-important role that “collective action”⁴¹ programmes play in the global effort at combating corruption.

In addition, UNCAC did not prescribe any particular sanction for any of the offences it listed. Rather, it states that the level of sanctions should take into account the gravity of the offence.⁴² Carr argues that there is an expectation that a convention that creates a long list of corruption and corruption related offences should provide an equally exhaustive list of sanctions.⁴³

Further, UNCAC does not contain express review mechanisms. Rather, it stipulates that ‘Pursuant to paragraphs 4 to 6 of this article, the Conference of the State Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention’.⁴⁴ The lack of review, enforcement and monitoring

⁴⁰ *ibid.*

⁴¹ ‘Collective Action Initiative’ enables corruption to be fought collectively by various interest groups, working together and building alliances against corruption so that the problem can be approached and resolved from multiple angles (Siemens).

⁴² Carr (n 17) 34.

⁴³ *ibid* 34.

⁴⁴ Article 63 (7) UNCAC.

mechanisms indicate lack of commitment to strict enforcement of UNCAC. State parties have indirectly received a mandate to use their discretion in deciding when to incorporate the Convention into domestic legislation.

U4, an anti-corruption civil society publication on UNCAC, argues that the stance of the Convention on the presumption of innocence versus burden of proof is worrisome.⁴⁵ For instance, ‘article 20 on illicit enrichment is controversial, because it imputes criminal behaviour to individuals whose assets cannot be explained in relation to their lawful income. This has led to criticism by human rights advocates, who argue that such requirements reverse the presumption of innocence protected by many legal systems’.⁴⁶ However, according to U4, ‘defenders of the provision argue that prosecutors still shoulder the burden of proof, as they must demonstrate, beyond reasonable doubt, the lack of legal avenues for the accumulation of excess wealth’.⁴⁷

UNCAC is also criticised because it ‘fails to forcefully tackle political corruption, one of the major concerns of citizens around the world... The Convention also refrains from referring to any specific political system and, by doing so, omits the important role parliaments can play in holding governments to account’.⁴⁸ Moreover, Article 30 (2) UNCAC has a provision for immunity, Article 30 (2) provides a *carte blanche*, which accords the state parties the opportunity to grant immunity from prosecution to corrupt officials. This is a major downside of the Convention, particularly as it relates to Nigeria, where constitutional “immunity”

⁴⁵ See U4 Anti-Corruption Resource Centre ‘UNCAC in a Nutshell’ <<http://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf>> accessed 10 October 2015. 3.

⁴⁶ *ibid* 3.

⁴⁷ *ibid* 3.

⁴⁸ *ibid* 3.

protects certain public office holders from prosecution for corruption offences while in office and remains a major impediment to combating corruption.⁴⁹

4.3 African Union Convention on Preventing and Combating Corruption (2003)

The African Union Convention on Preventing and Combating Corruption (AU Convention) is another landmark anti-corruption instrument. It was adopted on 11 July 2003 and entered into force in August 5 2006. To date, 37 countries have ratified the convention and are State Parties to it and Nigeria ratified the AU Convention on 26 September 2006. The AU Convention encompasses both private and public sector corruption and draws no distinction between petty and grand corruption.⁵⁰ The AU Convention sets forth three fundamental principles that are crucial for an anti-corruption framework, namely; prevention, criminalisation and cooperation.

Prevention of corruption is a key principle of the AU Convention, which calls state parties to establish domestic anti-corruption agencies, bodies or commission.⁵¹ State parties are also required to ensure probity in accounting and auditing standards,⁵² while at the same time making asset declaration by public servants obligatory.⁵³ Other provisions by the AU Convention as preventive measures include: Public education and mobilisation involving the

⁴⁹ The immunity clause in Section 308 of the 1999 Nigerian Constitution protects the President and Vice President as well as governors and their deputies from prosecution while in office.

⁵⁰ Article 1 of the AU Convention refers to public officials irrespective of official status/hierarchy.

⁵¹ Article 5 (3) AU Convention.

⁵² Article 5 (4) AU Convention.

⁵³ Article 7 (1) AU Convention.

participation of the media and the civil society,⁵⁴ and ensuring accessibility to the right information required in combating corruption.⁵⁵

The AU Convention calls for the **criminalisation** of a number of offences by state parties at domestic level.⁵⁶ The AU convention provided for mandatory criminalisation of active and passive bribery and other forms of corrupt acts.⁵⁷ The AU Convention failed to define corruption, but adopted the same broad view and categorisation as UNCAC.⁵⁸ Article 11 recommends adopting legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector.⁵⁹

Cooperation is another fundamental principle of the AU Convention. Throughout the convention, various obligatory provisions set out the platform for international cooperation in order to enhance mutuality in legal assistance, enforcement, extradition, investigations, confiscation/seizures and repatriation of proceeds of corruption.⁶⁰

The follow-up mechanism: Article 22 of the AU Convention contains follow-up mechanisms and provides for an Advisory Board of eleven members elected by the AU Executive Council, having broad responsibilities for promoting anti-corruption work, collecting information on corruption and on the behaviour of multinational corporations operating in Africa, advising governments, developing codes of conduct for public officials, and building partnerships. The Advisory Board is required to submit regular progress reports to the Executive Council detailing the success of States Parties in compliance with the provisions of the AU Convention.

⁵⁴ Article 5 (8) and Article 12 AU Convention.

⁵⁵ Article 9 AU Convention.

⁵⁶ Article 2 (3) AU Convention.

⁵⁷ Articles 4 and 5 (1) AU Convention.

⁵⁸ Article 4 AU Convention.

⁵⁹ Article 11 AU Convention.

⁶⁰ Articles 15, 16, 18 and 19 AU Convention.

There are also requirements that States Parties report their progress annually to the Advisory Board a year after entry into force of the AU Convention.

The AU Convention like the UNCAC has a number of **drawbacks**. It failed to provide a concise definition of corruption opting for the broad categorisation which, like, UNCAC, has hampered the efficiency of the convention. Moreover, Indira Carr argues that what can be ‘considered as a shortcoming of the convention relates to regulation of the financial and the banking sector, which is largely missing in the convention’.⁶¹ The AU Convention fails to cater for the liability of legal persons for the participation in the offences as listed in the Convention. The AU Convention also contains no ‘provisions relating to the accountability of NGOs, which would have added value to the text’.⁶² The AU Convention fails to provide a long period of limitation and does not require liability of legal entities. Carr points out that ‘in terms of sentencing, a significant gap in the AU convention is that it does not provide for legal sanctions or penalties’.⁶³ The AU Convention also fails to deal with judicial independence, which would involve measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. An independent judiciary could be instrumental in effectively combating corruption, and the judicial system in Nigeria has remained a major hindrance in the fight against corruption.⁶⁴ Money laundering was omitted by the AU Convention and this is worrisome because money laundering activities leads to siphoning of funds from the public treasury and diverting them to safe financial havens. This has proved popular for most corrupt

⁶¹ Indira M Carr, ‘Corruption in Africa: Is the African Union Convention on Combating Corruption the Answer?’ (May 8 2009) *Journal of Business Law* 111-136.

⁶² *ibid*

⁶³ *ibid.*

⁶⁴ Ayogu and Agbor (n 37) 360.

Nigerians, for instance, the late General Abacha and convicted Delta state former governor, James Ibori.⁶⁵ Olaniyan identified the weaknesses of the AU Convention as:

First, failing to comprehensively address the critical link between corruption, especially large-scale corruption and human rights, and failure to provide effective remedies for victims of corruption. Second, the AU Convention, suffers from excessive use of claw-back clauses which tend to limit or undermine some of its progressive provisions. For example, article 7, 8 and 14 represents such clauses which could seriously emasculate the effectiveness of the Convention as well as its uniform application by member states. If not properly construed, the clauses could defeat, frustrate, or annul the fundamental objectives of the Convention: eradication of corruption and promotion and protection of internationally recognised human rights, including economic, social and cultural rights. Third, the Convention lacks any serious, effective or meaningful mechanism for holding states accountable for the obligations they assume under it, or for resolving disputes among state parties, including a potential claim by one party that another is failing to properly carry out its obligations.⁶⁶

The AU convention unlike the UNCAC mentions human rights but fell short of prescribing ways the Convention could help to mitigate the devastating impact of corruption on human rights or how the Convention can combat corruption by incorporating human rights principles as a tool.

4.4 The ECOWAS Protocol on the Fight against Corruption (ECOWAS Protocol) 2001

The ECOWAS Protocol on the Fight against Corruption (ECOWAS Protocol) was signed on 21 December 2001 and has not, as at 20 April 2017, entered into force as the ratification of at

⁶⁵ Ayogu and Agbor (n 37) 359.

⁶⁶ Kolawole Olaniyan, 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004) 1 AHRLJ 74-92.

least nine signatory states is required.⁶⁷ The ECOWAS Protocol was adopted with the following objectives:

- i) To promote and strengthen the development in each of the State Parties effective mechanisms to prevent, suppress and eradicate corruption;
- ii) To intensify and revitalise cooperation between State Parties, with a view to making anti-corruption measures more effective;
- iii) To promote the harmonisation and coordination of national anticorruption laws and policies.⁶⁸

The ECOWAS Protocol obliges State Parties to adopt the necessary legislative measures to criminalise active and passive bribery in the public and private sectors;⁶⁹ illicit enrichment,⁷⁰ false accounting,⁷¹ aiding and abetting corrupt practices,⁷² and the laundering of the proceeds of corruption.⁷³ It also requires State Parties to ensure protection of witnesses/victims⁷⁴ and to provide each other with judicial and law enforcement cooperation.⁷⁵ The ECOWAS Protocol requires State parties to harmonise their national anti-corruption laws,⁷⁶ put in place effective preventive measures against corruption⁷⁷ and introduce appropriate sanctions.⁷⁸

The categories of obligation within the ECOWAS Protocol are preventive measures,⁷⁹ criminalisation,⁸⁰ and international cooperation⁸¹ and follow-up mechanism.⁸²

⁶⁷ ECOWAS Protocol on the Fight against Corruption adopted in Dakar, December 2001. November 2015. Article 22.

⁶⁸ *ibid.* Article 2.

⁶⁹ Articles 6 (5) (b) ECOWAS Protocol.

⁷⁰ Article 6 (3) (b) ECOWAS Protocol.

⁷¹ Article 6 (4) (a) ECOWAS Protocol.

⁷² Article 6 (5) (a) ECOWAS Protocol.

⁷³ Article 7 ECOWAS Protocol.

⁷⁴ Articles 8 and 9 ECOWAS Protocol.

⁷⁵ Article 15 ECOWAS Protocol.

⁷⁶ Article 18 ECOWAS Protocol.

⁷⁷ Article 5 (a-j) ECOWAS Protocol.

⁷⁸ Article 10 ECOWAS Protocol.

⁷⁹ Article 5 ECOWAS Protocol.

⁸⁰ Article 6 ECOWAS Protocol.

⁸¹ Article 15 ECOWAS Protocol.

⁸² Article 25 ECOWAS Protocol.

Preventive measures adopted to combat corruption in the public and private sectors by the ECOWAS Protocol include: requirements for asset declaration; code of conduct in the public service; access to information, whistle-blower protection; procurement standards; transparency in political party funding; civil society participation; establishing, maintaining and strengthening independent national anti-corruption agencies.

The ECOWAS Protocol provides for criminalising a wide range of offences including trading in influence, illicit enrichment, and offences relating to public and private sector corruption, including the liability of legal persons.

The international cooperation framework in the ECOWAS Protocol provide avenues for improving mutuality in African law enforcement and a framework for the confiscation and seizure of assets.

The follow-up mechanism of the ECOWAS Protocol provides for the establishment of a Technical Commission to monitor the implementation of the protocol at both national and sub-regional levels; gathering and disseminating information; organising training programmes and technical assistance to State parties.

However, the ECOWAS Protocol has a number of weaknesses. It failed to proscribe penalties for non-compliance with the provisions of the protocol for states parties. By so doing, it has failed to set up a uniform guideline for states parties. Moreover, the Protocol does not include any specific reference to the criminal intent requirement. The consequence of this, according to Olaniyan, is ‘this may have serious implications as to the interpretation of the obligations of any state under these instruments, and can potentially produce inconsistency in the application

of their criminalisation provisions, as states may need to decide this within their domestic jurisdictions'.⁸³

The provision on the protection of victims in the ECOWAS Protocol failed to include specific implementation measures or state's accountability procedures. The ECOWAS Protocol failed to spell out appropriate legal sanctions against errant states parties and does not have definite judicial and legal frameworks for investigating and prosecuting corruption. It also avoided providing for the consequences of corruption on the victims.

The ECOWAS Protocol is also weakened by the absence of serious enforcement or implementation mechanisms. The Technical Commission, comprised of experts drawn from different ministries (finance, justice and internal affairs) and reflecting the bureaucracy of member states, is vested with the duties of monitoring, information dissemination, training and states' assistance but due to technicalities fall short of achieving the enforcement and implementation obligations.⁸⁴

4.5 The Foreign Corrupt Practices Act (FCPA) 1977

The promulgation of the Foreign Corrupt Practices Act (hereinafter "FCPA") brought the subject of corruption in state affairs into international limelight. Prior to the enactment of the FCPA, corruption was rampant in most nations. For instance, in Germany, bribes were tax deductible as an ordinary and necessary business expense while international organisations, like The World Bank and the International Monetary Fund, resisted the attempt to

⁸³ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing Limited 2014) 163.

⁸⁴ *ibid* 187.

internationalise corruption and its impact.⁸⁵ In the U.S, many years before the enactment of the FCPA, the U.S. Congress identified the overseas behaviour of their Government contractors as particularly disturbing.⁸⁶ Particularly, in the 1970s, a bribery scandal involving the Lockheed Corporation (now Lockheed Martin Corporation), Northrop Corporation, and oil companies (Gulf Oil Corporation, Phillips Petroleum Company, and Ashland Oil, Inc.) necessitated the urgent need for legislation prohibiting overseas corruption.⁸⁷

However, the “Watergate Scandal” became the catalyst that brought the fight against bribery and corruption to international attention.⁸⁸ The Watergate scandal triggered high-profile inquiries that investigated the role of major US corporations in political funding. According to Posadas, the result of the investigation ‘led to further inquiries into corporate involvement in foreign political campaigns, with questionable payments and contributions being made to foreign government officials. The hearings conducted by Congress on these issues revealed facts and events damaging to the stability and reputation of some foreign governments’.⁸⁹ The fallout of the “Watergate Scandal” led to the resignation of President Nixon and the eventual U.S legislative response in the form of the Foreign Corrupt Practices Act (FCPA) 1977. The FCPA is an Act that set the pace for regulating global corrupt practices and in this vein, the U.S government has robustly enforced FCPA across the world wherever Americans and their business interest lies. It has extra-territorial features and thus applies generally to various sorts

⁸⁵ David Hess and Thomas W Dunfee, ‘Fighting Corruption: A Principled Approach The C2 Principles (Combating Corruption)’ (2000) 33 Cornell International Law Journal 594.

⁸⁶ Jessica Tillipman, ‘The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences’ (September 2011) Briefing Papers (Thomson West) No. 11-9.

⁸⁷ See Spalding, ‘Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets’ (2010) 62 Fla. L. Rev. 351, 360; Posadas, ‘Combating Corruption Under International Law’ (2000) 10 Duke J. Comp. & Int’l L. 345, 349.

⁸⁸ Alejandro Posadas, ‘Combating Corruption Under International Law’ (2000) 10 Duke Journal of Comparative & International Law, 348.

⁸⁹ *ibid* 348.

of U.S and non-U.S persons and businesses. Moreover, personal and business transactions of Americans in many cases can give rise to liability even where the corrupt act takes place entirely outside the jurisdiction or territory of the United States. The extraterritorial features of the FCPA has three key attributes. The major drawback of the extraterritorial provisions of the FCPA is that while it concentrates on U.S citizens and their business affairs, it places no obligation on third countries who may be complicit in such transactions. For example, as mentioned in other chapters of this thesis, some U.S citizens and companies were fined for corrupt transactions in Nigeria but Nigerian citizens and companies who connived with them have not been prosecuted at the time of this writing. While it may be argued that the U.S may be respecting the sovereignty and territorial integrity of a country like Nigeria in this instance, it still casts heavy doubt on the efficacy of the extraterritorial reach of the FCPA.

The FCPA became the first national statute to criminalise the bribery of foreign officials. Fletcher and Herrmann argue that the U.S is ‘acutely aware of the international dimensions of the problem at hand, U.S officials were determined to try to use the FCPA to extend liability to competitor companies in foreign countries. During the mid-1970s, therefore, they also began to propose international rules against corruption’.⁹⁰ Sandholtz and Gray submit that ‘The United States provided the impetus for enunciating clear norms against corruption’.⁹¹ While this is indisputable, research indicates that years after entry into force of the FCPA, the continuing involvement of American companies in corrupt acts overseas highlights the seriousness of the involvement of U.S companies in international corruption. For instance, the top 10 most expensive settlements in FCPA history include eight large U.S. based companies:

⁹⁰ Fletcher and Herrmann (n 3) 58.

⁹¹ Wayne Sandholtz and Mark M Gray, ‘International Integration and National Corruption’ (Fall 2003) *International Organisation* / Volume 57 / Issue 04 / Fall 2003, 769.

Siemens AG, Halliburton/KBR, BAE Systems, JGC Corporation, Daimler AG, Alcatel-Lucent, Panalpina, and Johnson & Johnson.⁹² Moreover, at the time of this writing, the companies that settled the three most expensive FCPA enforcement actions by paying approximately \$1.8 billion in fines, are Siemens AG, a German Multinational corporation, (\$800 million); Halliburton/KBR, \$579 million⁹³; BAE Systems, (\$400 million).⁹⁴ The Halliburton/KBR's payment of \$579 million and Siemens AG payment of \$800 million were payments of particular relevance to this research as they involved companies listed on the U.S stock exchange and under the watch of FCPA that operates in Nigeria. Halliburton and Siemens were enmeshed in serious corruption scandals in Nigeria involving acquisition of various contracts from the Federal government. The corruption scandals and subsequent U.S fines on the companies exposes the complicity of MNCs in systemic grand corruption in Nigeria.⁹⁵

The major highlights of the FCPA are anti-bribery prohibitions,⁹⁶ recordkeeping and internal control provisions.⁹⁷ The Department of Justice is responsible for the criminal enforcement of

⁹² See the FCPA Blog, 'J&J Joins the New Top Ten' (April 82011)<<http://www.fcpcblogger.com/blog/2011/4/8/jj-joins-new-top-ten.html>> accessed 20 November 2015.

⁹³ *United States of America v Brown & Root LLC*, No. 09-071 (S.D TEX.2009); <http://fcpa.shearman.com/?s=matter&mode=form&id=179>> accessed 12 September 2016.

⁹⁴ See, e.g., *United States v. Siemens Aktiengesellschaft*, No. 08-367 (D.D.C. filed Dec.15, 2008); *SEC v. Siemens Aktiengesellschaft*, No. 1:08-cv-02167 (D.D.C. filed Dec. 15, 2008); *SEC v. Halliburton Co. and KBR, Inc.*, No. 4:09-CV-399 (S.D. Tex. filed Feb. 11, 2009); DOJ Press Release No. 10-209, "BAE Systems PLC Pleads Guilty and Ordered To Pay \$400 Million Criminal Fine" (Mar. 1, 2010).

⁹⁵ Halliburton and its subsidiary KBR Inc allegedly paid \$180 million to officials to secure a construction contract for a liquefied natural gas plant in Bonny Island in the Niger Delta. KBR and Halliburton have agreed to pay \$177 million in disgorgement to settle the SEC's charges. Kellogg Brown & Root LLC has agreed to pay a \$402 million fine to settle parallel criminal charges brought today by the U.S. Department of Justice. The sanctions represent the largest combined settlement ever paid by U.S. companies since the FCPA's inception. See U.S. Securities and Exchange Commission <http://www.sec.gov/news/press/2009/2009-23.htm>> 09 November 2015.

⁹⁶ 15 U.S.C.A. §§ 78dd-1 et seq.

⁹⁷ 19/ See 15 U.S.C.A. § 78m.

the anti-bribery provisions involving domestic concerns and foreign companies and nationals.⁹⁸ The Department of Justice is also responsible for the criminal enforcement of “wilful” violations of the provisions on books and records.⁹⁹ The provisions on the preservation of accounting records are ‘presumably designed to make it impossible, or at least difficult for companies to maintain “slush funds” for illegal purposes or otherwise conceal illicit payments in legislative accounts’.¹⁰⁰

The U.S. Securities and Exchange Commission (SEC) is responsible for civil enforcement of the books-and-records provisions, as well as for civil enforcement of the anti-bribery provisions as applied to “issuers”—any U.S. or foreign company, or an officer, employee, agent, or stockholder thereof, that either issues securities (or American Depositary Receipts) or must file reports with the SEC.¹⁰¹ The Federal Bureau of Investigation (FBI) now plays a prominent role in FCPA matters, including through its specialised “International Corruption Unit” dedicated to the investigation of overseas corruption. All three agencies have specialised units dedicated to the enforcement of the FCPA.¹⁰²

The jurisdiction of the FCPA is technically transnational as it applies ‘to any act in furtherance of’ an improper payment taken within the United States, regardless of the nationality of the party engaging in the improper activity.¹⁰³ Thus, the anti-bribery provisions apply to both U.S. and foreign concerns, if the conduct occurs in any area over which the United States asserts

⁹⁸ Department of Justice, Lay-Persons Guide to the FCPA Anti-bribery Provisions, <<http://www.justice.gov/criminal/fraud/fcpa/docs/laypersons-guide.pdf>> accessed 20 November 2015; 15 U.S.C.A. §§ 78dd-1(d)–(e); 78dd-2(e)–(f); 28 C.F.R. §§ 80.1–80.16.

⁹⁹ 15 U.S.C.A. § 78ff (a).

¹⁰⁰ Olaniyan (n 83) 31.

¹⁰¹ 15 U.S.C.A. § 78dd-1(a); see also Tillipman, ‘Foreign Corrupt Practices Act Fundamentals’ (September 2008) Briefing Papers No. 08-10, 8.

¹⁰² See Tillipman *ibid* 8-9.

¹⁰³ *ibid* 8.

“territorial jurisdiction”.¹⁰⁴ Jurisdiction under the accounting provisions of the FCPA affects individuals or companies that meet the definition of “issuer”. However, according to Tillipman, ‘in recent enforcement actions, the Government has continued to expand FCPA jurisdiction, especially in regard to foreign companies and individuals. Since 1998, the FCPA anti-bribery prohibitions have applied to both “issuer” and non-“issuer” foreign companies and individuals that commit an act in furtherance of the bribe while in the territory of the United States’.¹⁰⁵ Olaniya submits that ‘the physical presence of the bribing party on the U.S territory is not required, and the bribe itself does not have to take place within a U.S territory as long as some action leading to the eventual payment of the bribe occurred in the United States’.¹⁰⁶ Olaniya surmises that ‘this provision thus extends the FCPA’s reach to any foreign conduct when, for example, a phone call or email can be tracked back to a US territory’.¹⁰⁷

The FCPA has a number of shortcomings, despite being regarded as the forerunner of the global fight against corruption. The FCPA does not apply to foreign affiliates of U.S. companies, hence, companies affiliated with U.S. firms could hide under the veil of this shortcoming and commit corrupt acts.

¹⁰⁴ Tillipman (n 101) 3.

¹⁰⁵ *ibid* 3.

¹⁰⁶ Olaniyan (n 83) 31.

¹⁰⁷ *ibid*; see also for example, in 2011, JGC Corporation resolved FCPA allegations, agreeing to a settlement including \$218.8 million for the bribery of Nigerian government officials. The Criminal Information included allegations that JGC aided and abetted a co-conspirator in causing “corrupt U.S. dollar payments” to be wire transferred from a bank account in Amsterdam, “via correspondent bank accounts in New York,” to bank accounts in Switzerland, to be used, in part, for the bribery of Nigerian government officials; DOJ Press Release No. 11-431, ‘JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees To Pay \$218.8 Million Criminal Penalty’ (April 6 2011); *United States v JGC Corp.*, No. 11-cr-260, 22 (April 6 2011).

The FCPA does not include bribery between private concerns. This could be contrasted with the UK Bribery Act, 2010 (sections 1, 6 and 9) that outlaws bribery involving foreign officials, private individuals and companies.

Olaniyan argues that the FCPA ‘excludes “greasing payments” for “routine government actions” by foreign officials, such as obtaining official documents, the provision of basic utilities, and so on’.¹⁰⁸ Olaniyan further argues that ‘it also excludes the legality of payments under the law of the host country or the reimbursement for allowed travel and lodging arising out of promotional activities aimed at obtaining or retaining new business’.¹⁰⁹ This places U.S companies at a competitive disadvantage and undermines their competitiveness in the global business arena.¹¹⁰ Meaning that their inability to bribe corrupt nations leads to contract losses.

4.6 Conclusion

In response to corruption as a global problem impeding economic growth, international and regional institutions have over the last decade, drafted an impressive array of international conventions, declarations and guidelines to combat corruption. Thus, the proliferation of anti-corruption frameworks indicates remarkable advances in recognising corruption as an international problem demanding global commitment in order to combat it. The need for the international effort against corruption is heightened by the fact that owing to continuous globalisation and advancement in technology, the consequences of corruption in one country now extend to other countries. The known consequences of grand corruption like

¹⁰⁸ Olaniyan (n 83) 31.

¹⁰⁹ *ibid* 32.

¹¹⁰ Jan Wouters, Cedrick Ryngaert and Ann Sofie Cloots, ‘The International Legal Framework Against Corruption: Achievements and Challenges’ (2013) 14 *Melbourne Journal Of International Law* 209.

‘underdevelopment, unemployment, insurgency, violence and insecurity in one country can lead to forced migration resulting in the influx of refugees and mercenaries to other parts of the globe as is currently the aftermath of the Arab Spring’.¹¹¹ These consequences are borne by the people.

The anti-corruption Conventions, though carefully drafted with a global outlook, are still bedevilled with deficiencies. Among others, are the lack of review and enforcement mechanisms meaning that when State Parties fail to comply with the provisions of a convention that receive little or no sanction for defaulting on treaty obligations. The Conventions erroneously assume that all forms of corruption are the same irrespective of their scope. This is a significant weakness as ‘persistent incidents of large-scale corruption also precipitate systemic distortions of critical institutions of governance’.¹¹² The conventions failed to agree on a concise definition of the term “corruption”. While it is often argued that by purposely omitting a precise definition of corruption, the conventions ensure more extensive applicability, the issue remains that by choosing vague terminologies, the conventions limit their applicability to certain behaviours. Additionally, this accords State Parties discretion in deciding the manner by which they interpret given obligations which usually are closely connected to their cultural practices and domestic legal systems. In systemically corrupt states with a dysfunctional justice system, this poses a hindrance to the fulfilment of the treaty obligations. According to Olaniyan, ‘the utility value of criminal law is limited, in countries where the criminal justice system itself is overridden by corruption’.¹¹³ Most of the

¹¹¹ See UNDOC ‘Arab Spring Highlights Rejection of Corruption and Cry for Integrity (2011) < <http://www.unodc.org/unodc/en/frontpage/2011/October/arab-spring-highlights-peoples-rejection-of-corruption-and-cry-for-integrity-says-unodc-chief.html> > accessed December 3 2015.

¹¹² Olaniyan (n 83) 20.

¹¹³ *ibid* 13.

Conventions especially the UNCAC failed to incorporate human rights protection as their cardinal objective. Raj Kumar believes that the conventions got it wrong at this point as the exclusion of human rights from corruption discourse has the potential to stir up public unrest.¹¹⁴ Olaniyan opines that the exclusion of ‘human rights content renders the Conventions almost entirely a toothless tiger... by focusing strictly on the criminal aspects of corruption, without entrenching its human rights dimensions, the Convention (African Union Convention) excludes the possibility of remedies for victims of official corruption’.¹¹⁵ For Olaniyan, ‘the drafters of the Convention (AU Convention) missed an important opportunity to build on developing international statements, such as the Council of Europe Civil Law Convention on Corruption, in this area’.¹¹⁶

In addition to the shortcomings of the conventions analysed in this chapter, there are concerns that corruption is exploitative of the public, leads to the abuse of power, contributes to discrimination in the making and the formulation of laws, and unquestionably creates an uneven enforcement and application of law, as the wealthy and politically connected can escape punishment for any wrongdoing.¹¹⁷ At the receiving end are vulnerable people whose human rights are violated daily.

Surprisingly, the proliferation of anti-corruption conventions has not adequately addressed the issue of the link between corruption and human rights, which prompts the question of, whether international law condones acts of corruption?¹¹⁸ Olaniyan argues:

¹¹⁴ Raj C Kumar, ‘Human Rights Approaches of Corruption mechanisms- Enhancing the Hong Kong Experience of Corruption Prevention Strategies’ (2004) 5 San Diego International Law Journal 349.

¹¹⁵ Olaniyan (n 66) 99.

¹¹⁶ *ibid* 91.

¹¹⁷ *ibid* 76.

¹¹⁸ Sanja Pesek, ‘Combating Impunity: Transitional Justice and Anti-Corruption’ (2014) Freedomhouse 1-2.

The approach adopted by the Anti-Corruption Convention appears to presume the adequacy and effectiveness of the accountability institutions and the systems designed to protect human rights, or that state interest and those of individuals or groups are the same, and will always coincide. However, in practice, this is rarely the case. The absence of provisions in the Convention for adequate compensation for individuals or groups whose human rights are violated as a result of corruption means the interests of states and their agents would continue to predominate.¹¹⁹

Olaniyan further reiterates ‘nevertheless, it is clear that a human rights approach to corruption would not only help to increase the implementation of the Convention, but also enhance international accountability in respect of human rights, especially in Africa where respect for those rights is the exception, rather than the rule’.¹²⁰

So far, it is only the AU Convention that mentions human rights briefly in the preamble¹²¹ while the other conventions are silent on the subject. Corruption has implications for state’s human rights obligations. It is argued in this thesis that incorporation of human rights principles by the Conventions could assist in reconceptualising the theoretical and conceptual nexus between corruption and human rights. Zoe Pearson notes that ‘moving from an economic and political perspective on corruption to a human rights approach involves shifting from viewing corruption as a misappropriation of wealth and distortion of expenditure ..., to viewing corruption and the tolerance by states as also a breach of fundamental rights’.¹²² Lyal Sunga

¹¹⁹ Olaniyan (n 66) 76.

¹²⁰ *ibid.*

¹²¹ See the AU Convention preamble (paragraphs 3 and 4): Cognizant of the fact that the Constitutive Act of the African Union, inter alia, calls for the need to promote and protect human and peoples’ rights, consolidate democratic institutions and foster a culture of democracy and ensure good governance and the rule of law; The Member States of African Union aware of the need to respect human dignity and to foster the promotion of economic, social, and political rights in conformity with the provisions of the African Charter on Human and People’s Rights and other relevant human rights instruments.

¹²² Zoe Pearson, ‘An International Human Rights Approach to Corruption’, in Peter Larmour and Nick Wolanin (eds) *Corruption and Anti-Corruption* (Asia Pacific press 2001) 46.

and Ilaria Bottiglier reiterate that ‘human rights based approach in anti-corruption strategies can strengthen democracy and the rule of law and promote the enjoyment of human rights’.¹²³

Finally, the analysis and argument explored in this chapter suggests that the corruption Conventions have failed to effectively combat corruption partly as a result of its inability to address the technical errors inherent within the Conventions which this research has highlighted. Moreover, the undue neglect of human rights principles within anti-corruption Conventions have the potential to frustrate the establishment of ‘significant accountability mechanisms and normative standards for implementing long-term durable, sustainable, and broad legal and institutional reforms against corruption’.¹²⁴

¹²³ Lyal s Sunga and Ilaria Bottiglier, ‘In-Depth Study on the Linkages between Anti-Corruption and Human Rights for the United Nations development program’ (2007) Raoul Wallenberg Institute.

¹²⁴ Olaniyan (n 83) 13.

Chapter Five

Socio-Economic Rights: The Normative Gap in International Criminal Law

5.1 Introduction

International criminal law remains a significant global platform for responding to, and remedying major forms of violence afflicting global society. It is ‘... the dominant accountability mechanism for episodes of mass atrocity...’¹ And in this regard, attempts to respond to the past, and deter future, atrocity which it achieves by processes which ‘lie in its purported ability to identify, punish and end impunity for the authors of violence ...’² Evelyne Schmid opines that ‘international law is best considered a normative system that operates within, and for, the social context of an imperfect and diverse international community, composed of states, individuals and other organs of society’.³ Within the framework of international criminal law is embedded the concept of human rights, which forms the platform on which the response to and deterrence of atrocities is anchored. The identification, punishment and end to impunity do not happen in abstraction but are linked to human rights violations. However, the rhetoric that all human rights are indivisible, interdependent and interrelated and therefore deserving equal respect according to the Vienna Declaration and Programme of Action remains a mirage in the light of the reality that socio-economic rights retain second class status; thereby making them more susceptible to breaches than observance.

¹ Mark A Drumbl, ‘The Future of International Criminal Law and Transitional Justice’ in William A Schabas, Yvonne McDermott and Niamh Hayes(eds) *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Asghate Publishers 2013) 545.

² Tor Krever, ‘Ending Impunity? Eliding Political Economy in International Criminal Law’ in Ugo Mattei and John Haskell (eds) *Research Handbook on Political Economy and Law* (Edward Elgar Publishing 2015) 299.

³ Evelyne Schmid, *Taking Economic Social and Cultural Rights Seriously in International Criminal Law* (Cambridge 2015) 17-18.

Socio-economic rights and their alleged nature as aspirational, programmatic, or non-justiciable have received an extensive discussion in scholarly writings.⁴

While it is not the intention of this chapter to attempt a holistic analysis of socio-economic rights, it is pertinent to reiterate that when rights do not specify concrete legal obligation, they lack normative content. Javaid Rehman emphasises the normative gap in international human rights law, arguing that ‘... in practice human rights law continues to be constrained and limited...not only are there substantive weaknesses in existing rights, the application of these rights is impaired by the absences, weaknesses and limitations of implementation mechanisms and procedures’.⁵ Mark Drumbl highlights the normative gap in the international criminal law, especially its over-reliance on ‘the provenance of collective violence and organisational massacre’⁶ in the exclusion of ‘post conflict justice, a broader paradigm that includes diverse accountability modalities and more sublime modalities ...’.⁷

This chapter sets out to appraise the normative gap in international law as regards the realisation of socio-economic rights on the basis that ‘further confusion arises in relation to the position of economic, social and cultural rights which carry no obligations of immediate implementation and are more in nature of aspirations or goals’.⁸ In achieving this, it interrogates why international criminal law fails to deal with the roots of social and economic conflict and, rather, deals only with atrocities committed during conflict. It views this from the perspective

⁴ Michael J. Dennis and David P. Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ (July, 2004) Reporter: 98 A.J.I.L. 462.

⁵ Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 5.

⁶ Drumbl (n 1) 545.

⁷ *ibid* 545.

⁸ Javaid Rehman, ‘An Analysis of the Rights of Minorities in International Law’ (DPhil Thesis, University of Hull 1995) 15.

of corruption as a form of violence and conveys the devastating impact on individuals and societies, similar to the devastation caused by pervasive acts of physical violence. What are the limitations and possibilities of realising socio-economic rights in international and domestic laws? The illustrations for this chapter are drawn from instruments of international criminal and international human rights law, the Nigerian legal system and case law as well as from other parts of the world to explore the issues raised. The main arguments are further developed into three sections: section two discusses Socio-Economic Rights in Transitional Justice: Inclusions, Exclusions & Misconceptions; section three discusses Socio-Economic Rights in International Criminal Law: Limitations and Possibilities and section four concludes the arguments in the chapter.

5.2 Socio-Economic Rights in Transitional Justice: Inclusions, Exclusions & Misconceptions.

The need to address the violence that originates from economic crimes remains a blind spot of transitional justice despite the recent attraction of the subject to scholars,⁹ policy makers and some truth commissions. The United Nations defines transitional justice as ‘full set of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve

⁹ See Samuel P Huntington, ‘The Third Wave: Democratization in the Late Twentieth Century’ in Neil Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (Volume I. General Considerations: United States Institute of Peace 1995) 65–81; Arthur Paige ‘How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009) 329–332; Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’ *International Journal of Transitional Justice* 3 (2009) 7; Guillermo O’Donnell and Philippe Schmitter, ‘Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies’ in Kritz, *Transitional Justice*, 57–64.

reconciliation'.¹⁰ Transitional justice also refers to 'the measures that are designed and implemented to redress the legacies of massive human rights abuses that occur ...under....regimes, thereby strengthening human rights norms that were previously systematically violated'.¹¹ Transitional justice is defined within the confines of this research as processes involving redress and restorative mechanisms in response to established wrongs perpetrated in a given time. The scope of such redress remains controversial being that vital components like distributive justice are still not holistically incorporated in the process suggesting that the parameters of transitional justice are too limited.

The UN subsumes transitional justice within the precincts of international human rights law, international humanitarian law, international criminal law and international refugee law. From the preceding definitions, it appears that transitional justice is construed and defined in such a way that it focuses mostly on political violence in war-torn and post-conflict countries. The overt emphasis on outrageous violations in the form of physical violence underlines the argument as to whether transitional justice should depart from the normative principles which the UN argues, are aimed at assisting in the 'complex but vital work of rule of law and development'¹², but rather, address matters concerning distributive justice and allied deprivations which are precursors to physical violence.

Sharp notes that '... the blind spots of transitional justice mirror historic divisions and hierarchies within international human rights law'.¹³ Yet, '... the proper role of transitional

¹⁰ Kofi Annan, UN Secretary-General, *The Rule of Law in Conflict and Post-Conflict Societies* (United Nations 2004) 4.

¹¹ Pablo De Greiff, 'Theorizing Transitional Justice' in Nomos Li (eds)*Transitional Justice* (New York University Press 2012).

¹² Kofi Annan (n 10) 3.

¹³ Dustin Sharp, 'Addressing Economic Violence in Times of Transition' in Dustin N Sharp (eds) *Justice and Economic Violence in Transition* (Springer 2014) 2.

justice with respect to economic violence-including violations of economic and social rights, corruption and plunder of natural resources¹⁴ is far less certain. Economic violence and economic justice have sat at the periphery of transitional justice work'.¹⁵ These postulations beg some important questions: why is economic violence so relegated in transitional justice mechanisms? Can transitional justice 'grapple with larger and deeper dimensions of economic violence'?¹⁶

According to the United Nations, 'concepts such as ... and transitional justice are essential to understanding the international community's efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve the conflict. They serve both to define our goals and to determine our methods'.¹⁷ Socio-economic rights, as encapsulated in the International Covenant on Economic, Social and Cultural rights (ICESCR) include the right to education, the right to adequate housing, the right to a fair remuneration for work, the right to health, and the right to freedom from destitution. These rights impacts directly on vulnerable groups such as those with disabilities, children, the elderly, minority communities or the unemployed. It is beyond the scope of this chapter to deal exhaustively with the provisions of the ICESCR.¹⁸

¹⁴ See the speech of Yomi Osinbajo, Nigeria Vice President on the current dilemma of the Nigerian economy due to sustained endemic corruption. Osibanjo avers 'Our country's external reserves stands at \$27bn few days ago, but the total amount lost just to corruption in the provision of security equipment in the military is close to \$15bn, which is more than half of current reserves of the country'. Ola Ajayi, 15bn lost to corruption affected Nigeria's economy –Osinbajo (*Vanguard*, Abuja 03 May 2016).

¹⁵ Sharp (n 13) 2.

¹⁶ *ibid* 4.

¹⁷ Kofi Annan, *The Rule of Law in Conflict and Post-Conflict Societies*, Report of the Secretary General (New York United Nations 2004) 4.

¹⁸ Chapter three of this thesis has addressed the provisions of ICESCR.

This section contextualises the argument around the relationship existing between socio-economic rights and transitional justice, and in particular, the rights and the obligations they impose together with inclusions and exclusions. This research argues like Schmid and Nolan, that ‘looking at the linkage between ESR and transitional justice in practice, it is often relatively straightforward to assess compliance with the obligations to respect and protect ESR, as well as the obligation of non-discrimination, in the context of identifying and assessing violations during a past armed conflict or situation of widespread violence’.¹⁹ In attaining this linkage, methods used in achieving the ESR obligations include the tripartite typology (respect, protect and fulfil), ‘conceptualizing ESR obligations in terms of those which are immediate and those which are progressive; defining the duties imposed by such rights into obligations of conduct and the obligations of result’.²⁰ According to Schmid and Nolan:

The obligation to respect prohibits the state from interfering with existing enjoyment of rights, for instance by arbitrarily destroying food or water sources. The obligation to protect tasks the state with ensuring that non-state actors do not interfere with people’s enjoyment of ESR, such as by adopting and enforcing legislation to protect against abuses in the workplace by private companies. The obligation to fulfil implies that state parties are obliged to do whatever it takes to overcome obstacles to the full enjoyment of the right in question, including both the immediate and progressive duties it imposes.²¹

Article 2 (1) of the ICESCR specifically provides in this regard that:

Each State Party to the Convention undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

¹⁹ Evelyne Schmid and Aoife Nolan, ‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice’ (2014) *The International Journal of Transitional Justice*, 8 (3), 367.

²⁰ See Ida E Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ *Human Rights Law Review* 5(1) (2005) 81–103; Schmid and Nolan, *ibid* 377.

²¹ Schmid and Nolan (n 19) 366.

Thus, the question of whether the transitional justice system has incorporated socio-economic rights remains elusive despite suggestions that, ‘there are also countervailing considerations to broadening the mandate of transitional justice measures to include violations of social and economic rights, or at least economic crimes, including questions about the capacity and effectiveness of measure that have a hard enough time satisfying their more traditional, narrower, mandates’.²² The United Nations envisage that ‘the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of restoration of the rule of law with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task’.²³ The UN is of the view that ‘it [corruption] requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in the Government, a lack of official respect for human rights and, more generally, a lack of peace and security’.²⁴

It is worthy to note at this point that Truth Commissions are iconic mechanisms of transitional justice and from 1974-2004, thirty-four Truth Commissions were established worldwide but only three dealt with economic crimes.²⁵ Why has this very important link been missing over

²² Pablo De Greiff, ‘Articulating the Links between Transitional Justice and Development’ (2009) International Centre for Transitional Justice <https://www.ictj.org/sites/default/files/ICTJ-Development-SocialIntegration-ResearchBrief-2009-English.pdf> accessed 10 May 2016.

²³ Kofi Annan (n 10) 3.

²⁴ *ibid.*

²⁵ The Truth Commissions that dealt with economic crimes are Chad, Liberia and Sierra-Leone; Kathryn Sikkink and Carrie Booth Walling, ‘Errors about Trials: The Emergence and Impact of the Justice Cascade’ (27 March 2006) Paper Presented at the Princeton International Relations Faculty Colloquium.

the years? It is argued further, by Carranza, that ‘an engagement with corruption would allow transitional justice mechanisms, particularly truth commissions, to frame their work within a larger factual context. By exposing the extent of grand corruption or the scale of economic crimes, these mechanisms would reveal that the depth of the damage caused by perpetrators goes beyond violence directed against their opponents or against citizens targeted by repressive measures’.²⁶ This argument would also suggest that the consequences of grand corruption which include, ‘the diminution of agency, the depletion of social capital or growth of distrust, and the weakening of institutions can be curbed through the application of measures whose mission is to reaffirm basic norms and strengthen institutions that give force to these norms’.²⁷

The foregoing suggests that it is customary and normative for transitional justice to be associated with societies emerging from violent political crisis, aiming at ‘meeting the immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left unaddressed’.²⁸ According to Dustin Sharp, ‘a more balanced approach is to reconceptualise and reorient the “transition” of transitional justice, not simply as a transition to democracy and the “rule of law,” the paradigm under which the field originated, but as part of a broader transition to “positive peace” in which justice for both physical violence and economic violence receives equal pride of place’.²⁹ It is argued that such

²⁶ Reuben Carranza, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?’ (2008) *International Journal of Transitional Justice* 2, 319.

²⁷ Roger Duthie, ‘Transitional Justice, Development and Economic Violence’ in D.N Sharp (eds) *Justice and Economic Violence in Transition* (Springer 2014) 173; Pablo De Greiff, ‘Articulating the Links between Transitional Justice and Development’ (2009) *International Centre for Transitional Justice* <https://www.ictj.org/sites/default/files/ICTJ-Development-SocialIntegration-ResearchBrief-2009-English.pdf> accessed 10 May 2016.

²⁸ See United Nations Security Council, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’ (2004) < <http://www.ipu.org/splz-e/unga07/law.pdf> > 20 August 2017.

²⁹ Dustin N Sharp, ‘Addressing Economic Violence in Times of Transition: Toward a Positive Peace Paradigm for Transitional Justice’ (2012) *Fordham International Law Journal*, Vol. 35:780, 784.

‘a reorientation would not guarantee or even mandate greater emphasis on economic concerns in all cases’,³⁰ however, this suggested trajectory could be an important step in the direction of bringing socio-economic rights into the purview of transitional justice practice and policy. For instance, incidents of grand corruption that pervade Nigeria may not present as many challenges to civil and political rights as they do to socio-economic rights. Abusive conduct that deprives people of their rights to health, food, education and other socio-economic rights may inflict more serious damage than violations of civil and political rights. In Nigeria, as in many other developing countries, it is likely that more people die from food deprivation and poor health infrastructure than from the disenfranchisement of voters. A recent case at hand would be the starvation at the camp of the internally displaced persons (IDP) fleeing Boko Haram terrorism that has been highlighted in chapter one. Despite the devastating impact of corruption on the lives of vulnerable people, ‘looters of public treasuries in Africa also derive support from or are emboldened by the international legal regime. International legal practice is dominated by a number of anachronisms which frustrate any effort to mount an effective international campaign against the impunity of rogue leaders’.³¹ Yet, research indicate that some prominent scholars have watered down the import of further engagement in the exploration of socio-economic rights within the ambit of normative transitional justice and international criminal law. Lars Waldorf, for instance, doubts the efficacy of any attention paid to socio-economic rights related matters in international criminal law in the context of transitional justice processes.³² Nevertheless, Waldorf still concurs with other scholars that there is indeed bias in the way that international criminal law deals with matters relating to

³⁰ Sharp (n 29) 784.

³¹ Paul Ocheje, ‘Refocusing International Law on the Quest for Accountability in Africa: The Case against the other Impunity’ (2002) 15 *Leiden Journal of International Law*, 4, 763.

³² Lars Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’ (2012) 21 *Social & Legal Studies*, 2, 171-86 cited in Evelyne Schmid (n 3) 25.

violation of socio-economic rights. Paige Arthur suggests that those pushing for the inclusion of socio-economic rights in the transitional justice system are the same people leading ‘the effort to get social and economic rights recognised as equal counterparts to civil and political rights’.³³ Arthur argues that those pushing for the inclusion are invariably asking for a paradigm shift within transitional justice mechanisms that would focus on socio-economic rights as part of the transitional justice normative framework as well as allied civil and political rights issues.³⁴ Similarly, Naomi Roht-Arriaza argues that ‘broadening the scope of what we mean by transitional justice to encompass the building of a just as well as a peaceful society may make the effort so broad as to become meaningless’.³⁵ While Roht-Arriaza’s arguments are entirely legitimate, they should be treated with caution in the sense that relegating some economic factors that drive political strife could jeopardise the place of the international human rights and criminal law system and as such would be regressive in the long run. This thesis would rather argue as Sharp for ‘a careful analysis of the drivers of conflict and the social, political, and financial capital that can be marshalled to effect change via the various mechanisms of transitional justice in the wake of conflict’.³⁶ Other scholars have also argued for a change from “transitional justice” to “transformative justice”.³⁷ This suggests that a shift in nomenclature could, perhaps, bring closer into focus the need to address ‘a broader conception of violence that would encompass often equally devastating forms of “economic

³³ Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,’ (2009) *Human Rights Quarterly* 31(2), 342.

³⁴ *ibid* 342.

³⁵ Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice’ in Naomi Roht-Arriaza and Javier Mariezcurrena (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press 2006) 2.

³⁶ Sharp (n 13) 19.

³⁷ Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’, (2014) *International Journal of Transitional Justice* 8(3).

violence”— including violations of economic and social rights, endemic corruption, and large-scale looting of natural resources such as oil, diamonds, and timber’.³⁸

The need to address the dissenting views of some scholars on the inclusion of socio-economic rights in transitional justice is reflected in a recent OHCHR publication that states that ‘lack of knowledge among transitional justice stakeholders of economic, social and cultural rights and of the mechanisms available to protect them constitutes [a] challenge for a nuanced assessment of the pros and cons of including these rights into transitional justice endeavours’.³⁹ The former United Nations High Commissioner for Human Rights Louise Arbour supports this view. She unequivocally stated that transitional justice should incorporate socio-economic rights violations:

Transitional justice should take up the challenge that mainstream justice is also reluctant to rise to acknowledging that there is no hierarchy of rights and providing protection for all human rights, including economic, social and cultural rights...A comprehensive transitional justice strategy would therefore want to address the gross violations of all human rights during the conflict and, I suggest, the gross violations that gave rise or contributed to the conflict in the first place.⁴⁰

The UN, in essence, argues robustly that ‘nevertheless, transitional justice can contribute to the fight against impunity for violations of economic, social and cultural rights, and to their prevention, by laying the foundations for forward-looking reforms and agendas’.⁴¹ This research argues, like Carranza, that economic crimes impact adversely on the people through acts culminating in the deprivation of essential provisions and infrastructures, hence, ‘an

³⁸ Sharp (n 13) 10.

³⁹ See Office of the High Commissioner for Human Rights (OHCHR), ‘Transitional Justice and Economic, Social and Cultural Rights,’ <[http:// www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf](http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf)>accessed 10 April 2016, 53.

⁴⁰ Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) *New York University Journal of International Law and Politics* 40, no. 1, 4.

⁴¹ The United Nations Human Rights, Office of the High Commissioner, *Transitional Justice, Transitional Justice and Economic, Social and Cultural Rights* (The United Nations Press 2014) 6.

impunity gap is created when transitional justice mechanisms deal with only one kind of abuse ignoring accountability for large-scale corruption and economic crimes'.⁴² All these constitute human rights violations in themselves and arguably their investigation is a practical necessity especially in transition processes.⁴³ In sum, the structural violence occasioned by the endemic corruption in Nigeria has a wider impact than direct political violence, and such structural violence fuels direct violence. Carranza reiterates that:

Victim countries would benefit from having a transitional justice mechanism as an alternative means of dealing with the legacies of corruption and economic crimes. As stand-alone asset recovery efforts are not often part of a comprehensive agenda to extract accountability from former rulers, situating these initiatives in a transitional justice context could only be beneficial.⁴⁴

The transitional justice system may not be the panacea for addressing issues of injustice associated with the non-realisation of socio-economic rights, however, an impunity gap is created and enhanced when transitional justice mechanisms deal with only one kind of abuse while ignoring accountability for large-scale corruption and economic crimes. This highlights the import of the question as to 'whether transitional justice should also engage deeper issues of distributive justice and structural violence that predate conflict and which may have in part helped to precipitate it'?⁴⁵ In answering this, it is advocated that addressing compelling socio-economic deprivations could form part of the strategic goals of any transitional justice

⁴² Carranza (n 26) 329.

⁴³ The dearth of infrastructure in Nigeria is often tied to structural recklessness linked to grand corruption and causes immeasurable deaths. For instance, fatality statistics from the transport and health sectors tied to poor road networks and unserviceable health sector are overwhelming. See Actionaid Nigeria, 2015 seminal research linking poverty and deprivations in Nigeria to endemic grand corruption; Actionaid, 'Corruption and Poverty in Nigeria, A Report' <http://www.actionaid.org/sites/actionaid/pc_report_content.pdf> accessed 01 December 2016.

⁴⁴ Reuben Carranza (n 26) 318.

⁴⁵ Sharp (n 13) 4.

undertaking.⁴⁶ This research argues that there appears to be no convincing reason why the inclusion of socio-economic rights in transitional justice frameworks could not be accommodated if transitional justice is geared towards redressing legacies of past abuses of which failure to resolve in a timely manner may serve to ‘obfuscate and legitimate very serious human rights abuses’.⁴⁷ More so, ‘failure to address these concerns may ultimately undermine the goals of transitional justice itself, including the prevention of a relapse into conflict’.⁴⁸ This research agrees with Sharp that there is the need ‘to replace the historic emphasis and exclusion of economic violence with a more nuanced, contextualised, and balanced approach to the full range of justice issues faced by societies in transition. In this, we would take one step forward in moving beyond the constructed and self-imposed blind spots and biases in the field of transitional justice’.⁴⁹

5.3 Socio-Economic Rights in International Criminal Law: Limitations and Possibilities

Socio-economic rights include a number of entitlements, such as ‘the right to work; social security; the protection of the family;...the right to an adequate standard of living; which includes adequate food, clothing, and housing and continuous improvement of living conditions; the right to the highest attainable standard of mental health; the right to education; ...’.⁵⁰ Defined more expansively, socio-economic rights are ‘those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water,

⁴⁶ Jane Alexander, ‘A Scoping Study of Transitional Justice and Poverty Reduction,’ (January 2003) final report for DFID, 3.

⁴⁷ See Paul Collier et al., *Breaking the Conflict Trap: Civil War and Development Policy* (World Bank and Oxford University Press 2003) 22.

⁴⁸ Sharp (n 13) 26.

⁴⁹ *ibid.*

⁵⁰ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 366.

shelter, education, health care and housing'.⁵¹ These rights concern the material well-being of the people and in particular, the vulnerable and downtrodden in society. The link between these rights and their actualisation leaves a huge gap and has challenged international human rights law. According to Ilias Bantekas and Louis Oette, 'the gap between the promise embodied in international human rights law and actual practice is frustrating ... It is no longer self-evidently good or considered able to provide solutions to the myriad contemporary challenges'.⁵² This discrepancy undermines the tripartite typology of '*to respect, protect and fulfil*',⁵³ the philosophy underscoring international human rights law. While this tripartite typology 'is often invoked as part of the strategy to break down the hierarchy between the two sets of rights socio-economic rights and civil and political rights',⁵⁴ however, in reality, for implementation based reasons, the 'two sets of rights are [are] fundamentally different in their normative character as civil and political rights are mostly considered "negative", precise and cost-free rights subject to immediate implementation whereas economic, social and cultural rights are regarded as "positive", vague and resource-demanding rights subject to progressive realisation'.⁵⁵

A positive right is a right that requires or whose main feature entails the presence of duties on others to act in ways that protect or promote it. Thus, within the literature, 'socio-economic rights are mostly seen as "positive rights", requiring the state to expend resources to provide a remedy, whereas civil and political rights are "negative rights", which simply require the state

⁵¹ Gerhard Erasmus, 'Socio-Economic Rights and their Implementation: The Impact of Domestic and International Instruments' (2004) *International Journal of Legal Information*, Vol 32, Issue 2, 243.

⁵² Bantekas and Oette (n 50) 1.

⁵³ Henry Shue, *Basic Rights: Affluence and U.S Foreign Policy* (2nd edn, Princeton University Press 1996) 160.

⁵⁴ Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 3.

⁵⁵ *ibid* 7.

to refrain from unjust interference with individual liberty'.⁵⁶ While there is currently no consensus over the constellation of the “negative or positive” nature of these rights,⁵⁷ what is certain is that the process of realising civil and political rights might be relevant within the context of socio-economic rights discourse and, moreover, both sets of rights encompass a variety of obligations that overlap to a considerable extent.⁵⁸ Other evidence of where negative and positive rights overlap could be illustrated by the case of a right to fair hearing, which is a civil and political right adjudication. Contrary to the generally held view that civil and political rights are not resource intensive, such a case could involve a very expensive court process. *Airey v Ireland*⁵⁹ represents one such case that suggests that the right to a fair trial could involve the right to access to legal aid which is cost-intensive and of which the State bears the burden. Another powerful example is the right to vote, which is a civil and political right involving huge positive expense. In comparison, the right of protecting the privacy of people on welfare requires minimal expense. Thus, the protection of civil and political rights may at some time involve the imposition of positive duties and public expenditure which may not realistically be less than what would have been the case in the realisation of socio-economic rights. This serves to repudiate assumptions that only socio-economic rights demand intensive resource. Such

⁵⁶ Ellen Wiles, ‘Aspirational principles or Enforceable Rights? The Future of Socio-Economic Rights in National Law’ (2006) *American University International Law Review*, Volume 22, Issue 1, Article 4, 45.

⁵⁷ Scholars have also argued that civil and political rights also encompass “positive” costly elements and are to some extent subject to progressive realisation; socio-economic rights also have elements of “negative” cost-free character that may need to be completed immediately. See Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 13 for detailed discussion on scholar’s divergent views.

⁵⁸ See *Lopez Ostra v Spain*, 9 December 1994, § 51, 20 EHRR 277. This case on environmental pollution highlights the challenges courts face while adjudicating cases where “negative and positive” obligations crisscross. The cited case shows that the courts assent to the views that “negative and positive” obligations of the rights are closely interlinked. It is often difficult to draw a distinction between the two obligations.

⁵⁹ (1979-80) 2 EHRR 305. This case highlights that the right of effective access to the courts may entail legal assistance.

claims are therefore questionable and may depend on the individual case. Sustained debates on the merits of the “negative and positive” obligations dichotomy may not add substance to the core of providing proper human rights protection. Rather, efforts should be geared towards remedying the aberration in human rights jurisprudence where some ‘human rights are more vaguely worded and more resource demanding than others’.⁶⁰

In the light of these considerations, do socio-economic rights have a place in international law? Can international criminal law address socio-economic rights violations? Does lack of international jurisprudence hamper the realisation of socio-economic rights? What are the limitations and possibilities? These questions are fundamental and beg for answers since the neglect or denial of socio-economic rights customarily does not impose criminal liabilities. The arguments around socio-economic rights within the ambit of the transitional justice system remains a hazy area in international criminal law yet, the former United Nations Secretary-General and Louise Arbour have variously pleaded for a deeper exploration of transitional justice mechanisms.⁶¹

This section will expound the fundamentals of both the substantive and procedural issues around the concept of socio-economic rights in international criminal law. A starting point is to set out once again the definition of international crimes. International crimes are ‘conducts outlawed by international law or conducts states deem that must be prevented and repressed by international cooperation or both’.⁶² Ilias Bantekas defines it as ‘any act entailing liability of the perpetrators and emanating from treaty or custom’.⁶³

⁶⁰ Koch (n 54) 26.

⁶¹ Arbour (n 40) 1-28, 15-16; See also the Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice, March 2010, 10.

⁶² Schmid (n 3) 5.

⁶³ Ilias Bantekas, *International Criminal Law* (4th Edn, Hart Publishing 2010) 8.

In dealing with the concept of socio-economic rights violations, the central dissenting views lie in the ‘position that certain abuses fall outside the scope of international criminal law because their underlying factual conduct primarily affects people’s access to socio-economic rather than civil and political rights. This situation raises serious and contentious questions about the scope of current international law’.⁶⁴ As stated earlier, the current normative framework in international criminal law is predicated on the assumption that international crimes are confined to the violations of certain civil and political rights and may not extend to other inhumane violations that are socio-economic in nature, like those affecting housing, education, health care, water, sanitation and working conditions. As set out in chapter 7 of this thesis, the core international crimes as contained in the Rome Statute of the International Criminal Court (ICC) include war crimes, genocide, crimes against humanity and aggression. This research argues that grand corruption could be considered as an international crime falling within the ambit of crimes against humanity under Article 7 (1) (k) of the Rome Statute. Grand corruption is responsible for siphoning resources from government spending on social infrastructure, mainly education, health care, housing, water and sanitation.

Nevertheless, there is a reluctance within the realm of international criminal law to consider grand corruption as an international crime, let alone to link it to direct violation of socio-economic rights. However, there are causal links between grand corruption and socio-economic rights violations. Drawing from the tripartite typology of “*to respect, protect and fulfil*”, there are indications that ‘a nuanced analysis of the definition of crimes showed that many types of abusive conduct depriving people of their rights to food, health, water, education, participation

⁶⁴ Schmid (n 3) 6.

in cultural life, food or other socio-economic ought to be prioritised within the ambit of international criminal law'.⁶⁵

It is also vital to emphasise that obstacles in the form of meeting certain legal criteria, fulfilling the elements of a crime, evidentiary challenges and presentation of valid witnesses make the task of bringing socio-economic rights within the ambit of international criminal law herculean. Despite these obstacles, Louise Arbour has argued that though 'efforts to address the legacy of widespread human rights abuses display a bias towards civil and political rights'⁶⁶, it is still pertinent to pursue the merits of considering the treatment of the most egregious violations of socio-economic rights within the context of the bias in relation to widespread human rights abuses.⁶⁷ Arbour's views are not held in isolation. Sigrun Skogly states that 'there are possible violations of economic and social human rights that are sufficiently severe to merit an inclusion into the crimes against humanity concept, such as deliberate starvation or forced evictions'.⁶⁸ Schmid submits that 'cases of traditional looting of personal property, the burning of civilian homes in armed conflicts or the starvation of detainees are among the most straightforward examples demonstrating that dealing with abuses of socio-economic is not inherently more complex than the prosecution of abuses touching upon people's civil and political rights'.⁶⁹

The limitations of these arguments lie in a number of facts. 'Normative advancements in the field of socio-economic rights have not completely eradicated uncertainty as to whether socio-economic rights can be understood as similar to other human rights'.⁷⁰ This begs the question

⁶⁵ Schmid (n 3) 312.

⁶⁶ Arbour (n 40) 9-10.

⁶⁷ *ibid.*

⁶⁸ Sigrun Skogly, 'Crimes against Humanity-revisited: Is there a role for socio-economic and social rights?' (2001) 5 *International Journal of Human Rights*, 1, 58.

⁶⁹ Schmid (n 3) 327.

⁷⁰ *ibid* 23.

whether the way that crimes against humanity are understood in the international instruments could give room for the inclusion of socio-economic violations.⁷¹ The principle of legality, a bedrock of international criminal law, poses serious hurdles to such aspirations. The principle of legality requires specificity, precise and unambiguous prescriptions. Van Den Herik reiterates:

This fundamental principle of criminal law encapsulates several dimensions. In addition to the prohibition of retroactivity, it also requires that crimes be prescribed with sufficient clarity and precision so as to provide fair warning to individuals about what constitutes criminal conduct. Such requirements contrast sharply with the relatively vague formulation of socio-economic rights, in particular, as they have been codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The imprecise wording, or softness, of socio-economic rights, may thus present a certain technical barrier that hinders direct criminalization.⁷²

Arguably, the principle of legality precludes international lawyers from engaging with subjects of violations of socio-economic rights as it prescribes the rules of legal interpretations to conform to international normative practices. This is unwarranted since ‘legislative drafting of this nature would render criminal laws rigid and inflexible and unsusceptible to future social, economic and other developments’.⁷³ Furthermore, current political affairs suggest that post-conflict state building based on civil and political rights violation alone has not been successful. Moreover, considering the fact that socio-economic rights violations often lead to civil and political rights violations, it is plausible that both should be dealt with using the same platform. It is a matter of necessity and not an aspiration that this limitation should be addressed. Bantekas however, cautions that ‘if the criminal law was exclusively vague ... it would allow great latitude to judges and would ultimately offend the rule against the employment of

⁷¹ *ibid* 11.

⁷² Larrisa Van Den Herik, ‘Economic, Social and Cultural Rights-International Criminal Law’s Blind Spot?’ (2013) Grotius Centre Working Paper (2013/002-ICL), 6.

⁷³ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 727.

analogies'.⁷⁴ The argument around the principle of legality in international criminal law should, therefore, be conducted in a way that recognises that 'a balance between the two extremes is necessary and within the parameters of legitimacy'.⁷⁵

The legal impossibility argument further hinders the chance of socio-economic rights attaining the same international criminalisation standard as civil and political rights. It presumes that socio-economic rights jurisprudence needs holistic legal modification before international legal regimes could engage with it. It supposes that the neglect of socio-economic rights in international criminal law may have been deliberate. In this regard, Schmid observes that 'the practice of tribunals and quasi-judicial mechanisms, scholars, policy-makers and non-governmental organisations have generally tended to accept the traditional view that the consideration of the abuses of socio-economic rights has little or no place in international criminal law'.⁷⁶ This is developed by Van Den Herik:

On the one hand, international criminal law as a form of criminal law is based upon principles of a classic liberal criminal law system which emphasises respect for the independence of the individual, in particular, the defendant. On the other hand, the human rights perspective, and possibly its very origin, focuses on the protection of victims. This paradox leads to a tension, in substantive international criminal law in particular, whereby it is difficult to reconcile strict methods and principles of interpretation, such as *in dubio pro reo*, with the teleological and more victim-oriented interpretation methods which are typical in human rights.⁷⁷

Another barrier to the international criminalisation of socio-economic rights is the argument that it spells out positive obligations. Positive obligations denote the responsibilities of States to secure the full enjoyment of fundamental rights by individuals and are contrasted with

⁷⁴ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 624.

⁷⁵ *ibid* 22.

⁷⁶ Schmid (n 3) 9.

⁷⁷ D Robinson, 'The Identity Crisis of International Criminal Law, (2008) 21 *Leiden Journal of International Law* 4, 925- 963. Cited in Van Den Herik (n 72) 3.

negative obligations which require states to abstain from rights violations. Positive obligations are tied to the failure to act by states (to secure the enjoyment of fundamental human rights) as opposed to the normative criminal law requirement of the commission of an act rather than omission. Article 7 (2) (a) of the Rome Statute of the ICC elaborated on these elements of crime as a fundamental requirement in all ICC prosecutions, and as a ‘filtering prism to identify the existence of a crime’.⁷⁸

Socio-economic rights are also described as vague and unenforceable in nature. This does not mean that it is a proven fact, but this has been an argument against the practical realisation of socio-economic rights in many jurisdictions. Thus, by its substantive and procedural nature, international criminal law is less disposed to deal with such rights as they are assumed as essentially unbecoming for judicial determination. It follows that the argument is that socio-economic rights do not conform to the principle of legality and have no clearly defined prescriptions.

From the analysis given by Arbour, it appears that socio-economic rights in contemporary international criminal law jurisprudence remain relegated as ‘aspirational expectations to be fulfilled by market-driven or political processes alone’.⁷⁹ Notwithstanding these obstacles, Van Den Herik maintains that socio-economic rights stand the chances of attaining the legal status currently enjoyed by adjudications on civil and political rights despite the widely held notion that they are ‘less susceptible to international criminalization and entailing obligations of result rather than obligations of conduct’.⁸⁰ As a caution, Van Den Herik states that ‘there cannot be any direct ‘transplants’ given that the two bodies of law are very distinct’. The argument of this

⁷⁸ Schmid (n 3) 43.

⁷⁹ Arbour (n 40) 4.

⁸⁰ Van Den Herik (n 72) 3.

author is that *de lege lata*, the international criminal law can already engage (and has engaged) with many claims that factually relate to violations of socio-economic rights.

Notwithstanding the multifarious issues identified as working against the possibility of socio-economic rights garnering the same international criminal law relevance as civil and political rights, some scholars have expressed optimism that socio-economic rights could feature more in the processes set up to address issues of transitional justice. Paul Ocheje canvasses for expunging the unwarranted dichotomy between socio-economic rights and civil and political rights primarily at the ICC jurisdiction.⁸¹ Ocheje argues that ‘whereas the disapproval of breach of civil and political rights is virtually universal, breach of social and economic rights is yet to receive the unanimous condemnation of humankind. This unequal treatment of human rights has created the unfortunate impression that violators of social and economic rights can do so with impunity’.⁸²

5.4 Concluding Remarks

The Vienna Declaration of Rights 1993 reaffirms the universality, indivisibility and interdependence of human rights, thereby reiterating that both civil and political and socio-economic rights are of equal relevance at all the times. The evolving nature of international law that appears to have created a huge rift between the two classes of human rights is now exposed to scrutiny for the current bias existing between the two classes of rights. The reality remains that ‘the position of socio-economic rights at the international level reflects these attitudes of negativity or ambivalence about enforcement on the international level, which

⁸¹ Paul Ocheje (n 31) 4, 765-766.

⁸² *ibid* 750.

persist despite the United Nations' efforts to realign approaches to the two covenants'.⁸³ Ultimately, it is time international law sheds this bias and begin to give equal attention to the realities of socio-economic rights violations.

Grand corruption fuels human rights abuses and may constitute a violation of socio-economic rights. It is also a subject of international criminal law due to its international nature. At the domestic, regional and international level, a range of instruments with penal characteristics address certain corrupt acts. Grand corruption, as argued strongly in other chapters of this thesis, could constitute a human rights violation when juxtaposed with the tripartite typology of the state's obligations to respect, protect and fulfil. A typical example is where a government tolerates corruption among the ruling elites, which is often tied to failure to fulfil socio-economic obligations. Moreover, a state's tolerance of corruption as exemplified by the endemic grand corruption cases in Nigeria also violates the state's duty to fulfil the rights to social security among others.⁸⁴ The assertion of President Muhammadu Buhari of Nigeria in a recent anti-corruption conference in London that 'the abuse and misuse of public office for private gain has been a constant feature of governance in Nigeria for the past 30 years. In the last two decades, especially, corruption – with its corresponding devastating socio-economic consequences on national development and the well-being of our people ...'⁸⁵ suggests the direct link between grand corruption and violations of socio-economic rights in Nigeria and re-emphasises the government's acceptance of its failure to protect, respect and fulfil socio-

⁸³ See Wiles (n 56) 39.

⁸⁴ See President Muhammadu Buhari, 'My Plan to Fight Corruption in Nigeria' (12 May 2016), A paper presented at the UK/Commonwealth Corruption Conference <<https://www.gov.uk/government/publications/against-corruption-a-collection-of-essays/against-corruption-a-collection-of-essays>> accessed 13 May 2016.

⁸⁵ *ibid.*

economic rights. It is argued that international criminal law is condoning impunity arising from cases of endemic grand corruption through legislative insensitivity. Ocheje states;

There are many examples of international interventions to penalize regimes that have been adjudged guilty of oppression and repression, but, although expressions of sympathy for the plight of the poor is not in short supply in the international community, no single instance of such intervention to liberate a country from poverty or economic despoliation comes to mind.⁸⁶

I conclude by reiterating the views of Ruth Gavison that ‘the answer to the question of which concerns should be seen as rights or as human rights should be determined by our analysis of the urgency of the needs, their relations to human dignity, and the need to give them the special protection generated by rights’.⁸⁷ In other words:

In addition, given the indivisibility of human rights, we must abandon for good the erroneous notion that one class of rights (civil and political rights) require full recognition and respect, while another class (social, economic and cultural rights) does not require observance of any kind. From an international normative perspective, the notion that social, economic and cultural rights are not legal rights has been superseded for good. The idea that social rights are non-actionable is purely ideological and not scientific; they stand out as authentic and genuine fundamental rights that are actionable, demandable and that require serious and responsible observance. For this reason, they should be demanded as rights, and not as gestures of charity, generosity or compassion.⁸⁸

Hence, there is no reason for concluding that socio-economic rights cannot be the subject of international criminal law concern despite the normative gaps identified within the international criminal law framework in this chapter. More so, as argued, grand corruption has

⁸⁶ Ocheje (n 31) 750.

⁸⁷ Ruth Gavison, ‘On the Relationships between Civic and Political Rights and social and Economic Rights’ in JM Coicaud, MW Doyle and AM Gardner (eds) *The Globalisation of Human Rights* (United Nations Press 2003) 36-37.

⁸⁸ Flavia Piovesan, *Social, Economic and Cultural Rights and Civil and Political Rights* (2006) Sur vol.1 no.se São Paulo, 3.

substantive international criminal law aspects that should place it within the ambit of international criminal law and transitional justice mechanisms.

Chapter Six

International Criminal Law and Grand Corruption

6.1 Introduction

There appears to be a close link between international criminal law and grand corruption. However, this relationship is not legally substantive, particularly at the international level. While appreciating that both concepts are intertwined, scholars have written extensively on some legal technicalities that may preclude international criminal law from prosecuting grand corruption.¹ Starr argues:

Grand corruption cannot be prosecuted internationally without some legal basis. The ideal option would be widespread ratification of a new treaty, or an amendment to the ICC's Rome Statute spelling out the elements of the crime. This would remove any doctrinal doubt and would send a clear, loud signal as to what conduct is prohibited- valuable in terms of fairness to defendants as well as potential deterrent and norm-shaping effects.²

This suggests, inter alia, that using the jurisprudence of international criminal law to prosecute grand corruption remains a difficult task. This chapter explores ways of situating grand corruption within the purview of international criminal law bearing in mind that corruption is

¹ Ndiva Kofele-Kale, 'Patrimonicide: The International Economic Crime of Indigenous Spoliation' *Vanderbilt Journal of Transnational Law* 28 (1995), 45-118; Ndiva Kofele-Kale, 'Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law' (2009) Centre for Human Rights and Democracy in Africa <http://fakoamerica.typepad.com/files/kofele-kale-keynote-address.pdf> >accessed 10 October 2015; Ndiva Kofele Kale, 'The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law' (2000) *The International Lawyer*, 34, 149-178; Chile Eboe-Osuji, 'Kleptocracy: A Desired Subject of International Criminal Law That is In Dire Need of Prosecution by Universal Jurisdiction' in Evelyn A Ankumah and Edward K Kwakwa (eds) *African Perspective on International Criminal Justice* (Special Series 3; African Legal Aid 2005) 121-132.

² Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' 101 *Northwestern University Law Review* (2007) 1297.

a treaty-based or transnational crime,³ not yet conceptualised as a crime under international law (*stricto sensu*). Crimes under international law involve individual criminal responsibility, and are punishable under international law, primarily by the ICC.⁴

Thus, by inquiring into the appropriateness of the mechanisms of international criminal law for combating grand corruption, the chapter interrogates the relationship between international criminal law and grand corruption. The chapter examines the forms of grand corruption that qualify for international criminalisation.⁵ It further explores the Rome Statute as a possible instrument for prosecuting grand corruption while also advancing other ways through which international criminal law could prosecute grand corruption.

6.2 International Criminal Law and Grand Corruption

International criminal law (ICL) ‘is a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, international terrorism) and to make those persons who engage in such conduct criminally liable’.⁶ International criminal law is a relatively new branch of international law

³ Transnational crimes refers to treaty-based crimes which do not necessarily fall within the competence/jurisdiction of the ICC.

⁴ Cherif Bassiouni, *Introduction to International Criminal Law*, (Martinus Nijhoff Publishers 2012) 120. Bassiouni drew up a list of twenty-eight offences which he considers as international crimes, including the core international crimes and treaty-based crimes.

⁵ The United Nations Convention against Corruption (UNCAC) is relied upon as an excellent point of reference in dealing with issues arising from classifying the types of corruption. In chapter 111 of the UNCAC, an overview of this classification was made: bribery, embezzlement, trading in influence, abuse of functions and illicit enrichment.

⁶ Antonio Cassese, Paola Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *International Criminal Law* (Oxford University Press 2013) 3; Ilias Bantekas, *International Criminal Law* (4th edn, Hart Publishing 2010) 3.

and it continues to evolve.⁷ The existence of international criminal law depends on the sources and processes of international law, and according to Cassese, Gaeta, Baig, Gosnell and Whiting ‘it simultaneously derives its origin from and continuously draws upon both international humanitarian law and human rights law, as well as national criminal law’.⁸ Stephen Hall posits that the ‘emergence of international human rights law and the international criminal law means that the international law’s material space extends even into areas which were, until a few decades ago, considered sensitive matters of exclusive domestic jurisdiction’.⁹ International criminal law as a body of law evolved after the establishment of the international tribunals for the former Yugoslavia and Rwanda.¹⁰

6.2.1 Defining International Criminal Law

International criminal law has been defined by various scholars. Bassiouni broadly defines international criminal law to include the criminal law aspects of international law as well as the international aspect of national criminal law.¹¹ Bassiouni’s definition falls within the ambit of international criminal law *largo sensu*, covering both direct and indirect systems of enforcement, prosecution of crimes by international tribunals and by domestic authorities based

⁷ *ibid* 4; Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 717; International Bar Association (IBA) ‘Manual on International Criminal Law’ (2011) 25.<file:///C:/Users/user/Downloads/International_Criminal_Law_Manual%20(1).pdf>accessed 12 January 2016.

⁸ Cassese et al (n 6) 5.

⁹ Stephen Hall, ‘Researching International Law’ in Mike McConville and Wing Honh Chui (eds) *Research Methods in Law* (Edinburgh University Press 2010) 181-182.

¹⁰ International Bar Association (n 7).

¹¹ M Cherif Bassiouni, *The Sources and Content of International Criminal law: Crimes* (2nd edn, New York Transnational Publishers 1999) 3,125, 9.

on treaties.¹² Cryer and Werle define international criminal law (*stricto sensu*) with a narrower perspective as encompassing all norms that establish, exclude, or otherwise regulate responsibility for crimes under international law.¹³ The definition of Cryer and Werle refers to core international crimes, namely, war crimes, genocide, crimes against humanity and crimes against peace.¹⁴ Core international crimes provide for international criminal liability that persists irrespective of whether any criminal liability is prescribed under domestic laws.¹⁵ The International Bar Association (IBA) defines international criminal law as ‘a body of international rules prescribing international crimes and regulating principles and procedures governing the investigation, prosecution and punishment of these crimes’.¹⁶

6.2.2 What Constitutes International Crimes?

Since the Nuremberg and Tokyo trials, which occurred after the Second World War, the definition of the crimes classified as international crimes has been undergoing intense examination and refinement.¹⁷ The International Bar Association agreed that there is neither a universally accepted definition of an international crime nor general criteria for determining the scope and content of an international crime.¹⁸ However, general criteria drawing on the characteristics of international crime are adopted as a guideline in defining international crimes. In particular, the ICC’s preamble refers to the crimes that are of most concern to the

¹² ‘Treaty based crimes’ are used in this context to refer to crimes which due to treaty stipulations oblige states to criminalise certain offences at the domestic level (see section 2.2).

¹³ Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 3; Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2009) 29.

¹⁴ Ilias Bantekas (n 6) 9.

¹⁵ *ibid.*

¹⁶ International Bar Association (n 7).

¹⁷ Valerie Epps and Lorie Graham, *International Law* (Aspen Publishers 2011) 310.

¹⁸ International Bar Association Handbook (n 7) 26.

international community as a whole and recognises that such crimes threaten the peace, security and well-being of the world so such crimes merit inclusion as international crimes.¹⁹ It appears that the language employed in the Rome Statute in its preamble restricts the classification and jurisdiction of international crimes to constitute “the most serious crimes of concern to the international community as a whole”. While not being exhaustive in the definition of the two dominant themes “threat to international peace” and “shocking the conscience of mankind”, the Rome Statute has evidently placed a very high threshold in recognising international crimes. However, in line with these general criteria for classifying international crime, genocide, war crimes, crimes against humanity, and crimes of aggression are regarded as “core” international crimes or international crimes in a narrow sense (*stricto sensu*). The international courts and tribunals, including ICTY, ICTR and ICC, have been given jurisdiction over these crimes.²⁰ In a broader sense (*largo sensu*), other crimes have been classified as international crime; these are also referred to as “Treaty Crimes” and without purporting to be exhaustive and in no particular order include, the following: piracy; torture; terrorism; slavery; international trafficking in illicit drugs; international hostage-taking; trading in women and children; serious apartheid offences; international postage offences; and pollution of the sea. Transnational crimes are treaty-based crimes and do not fall under the ICC’s jurisdiction and grand corruption is viewed as a transnational crime. Thus, transnational crimes are not autonomous from the treaties in which they are contained and require participating states to criminalise on the basis of their existing principles of criminal law.²¹

¹⁹ ICC Statute (17 July 1998) UN Doc/A/CONF.183/9, paras (3)- (4).

²⁰ International Bar Association Handbook (n 7) 28.

²¹ N Boister, ‘Transnational Criminal law? (2003) European Journal of International Law 953, 957- 59.

The Preamble to the United Nations Convention against Corruption (UNCAC), recognises corruption as a transnational crime. Specifically, in chapter III, UNCAC contains obligations to criminalise certain corrupt practices and related offences in both the public and private spheres. Other regional anti-corruption instruments have similar provisions for the criminalisation of corrupt acts. In particular, Article 2 (3) of the AU Convention provides for a harmonised criminalisation of acts of corruption and related offences at the national level. Notwithstanding that grand corruption has been criminalised in many jurisdictions, and Nigeria in particular,²² this research interrogates why grand corruption still remains in the category of transnational crimes. In agreement with Sonja Starr, I emphasise the same questions, ‘would a shift in focus enable better use of international resources’?²³ ‘What changes in approach would be necessary’?²⁴

6.2.3 Grand Corruption within the Context of International Criminal Law

‘International criminal law is the law that governs international crimes. It may be said that this discipline of law is where the penal aspects of international law, including that body of law protecting victims of armed conflict known as international humanitarian law, and international aspects of national criminal law, converge’.²⁵ Cassese defines it as ‘a body of international rules designed to proscribe certain categories of conduct (...) and to make such persons who engage in such conduct criminally liable’.²⁶ Despite the classification of international crimes

²² Nigeria is a dualist State and is required by the constitution to transpose and incorporate international treaties before they become domestic law.

²³ Starr (n 2) 1263.

²⁴ *ibid* 1263.

²⁵ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press 2002) 3.

²⁶ Cassese et al (n 6) 3.

in the paradigm of *stricto sensu* and *largo sensu*, the crux of the argument of this research is anchored in locating the subject of grand corruption within the jurisprudence of international criminal law. In this regard, the reasoning of Ilias Bantekas that ‘the prohibition of certain conduct by treaty or by custom always entails criminal liability under international law, irrespective of whether the prohibited conduct is defined as a universal crime or an offence to be further elaborated through domestic law’²⁷ remains a focal point. For Bantekas, this process represents the first step in the criminalisation process.²⁸ Sonja Starr shares similar views with Bantekas for she notes that ‘international criminal law is generally understood to be a mechanism for, responding to, punishing, and preventing war crimes and mass atrocities’.²⁹ Sunga and Bottigliero argue that ‘the optimal starting point in the development and implementation of effective anti-corruption strategies through a multilateral institutional framework must be the relevant emerging international legal norm and mechanisms’.³⁰ Kofele-kale opines that ‘the breach of the independent right to a corruption-free society should be treated as a crime under international law’.³¹ He claims that ‘one can safely conclude that an emerging customary law norm that treats corruption as a crime under international law draws strong support...’.³² While Kofele-kale’s claims remain unsubstantiated, other international criminal law scholars like Bantekas, Starr, Boersma, Acheampong and Ocheje have suggested that grand corruption deserves upgrading to a crime under international law while others, like

²⁷ Ilias Bantekas and Susan Nash, *International Criminal Law* (Routledge-Cavendish 2007) 12.

²⁸ *ibid.*

²⁹ Starr (n 2) 1257.

³⁰ Lyal s Sunga and Ilaria Bottigliero, ‘In-Depth Study on the Linkages between Anti-Corruption and Human Rights for the United Nations Development Program’ (2007) (Raoul Wallenberg Institute).

³¹ Kofele-Kale (n 1) 152.

³² *ibid* 172-173.

Eboe-Osuji, Wolf and Acquaaah-Gaisie, suggest that it has already acquired the status through customary international norms.

Paul Ocheje argues that the ‘harrowing consequences of official corruption for African societies elevate corruption to the level of a breach of the social and economic rights recognised in international human rights law’.³³ Ocheje suggests the ‘elevation of corruption to the status of a crime in positive international law and expansion of the jurisdiction of the International Criminal Court to include official corruption and looting of public funds’.³⁴ Bantekas is more definitive and suggests that corruption might fulfil the requirements of the crime of extermination (Article 7 (2) (b) of the Rome Statute).³⁵ Acquaaah–Gaisie, Sonja Starr and Ubong Effeh expresses similar opinions that the ‘requirements set by (Article 7 (2) (K) of the Rome Statute are met considering the effects of grand corruption on human rights.’³⁶ However, Starr suggests that ‘it is broadly accepted that some kind of international interest is necessary to justify international criminalisation, as is some degree of seriousness’.³⁷ The Rome Statute in its preamble retains the language that restates the seriousness of limiting jurisdictions to ‘the most serious crimes of concern to the international community as a whole’.³⁸ While the vagueness relating to the degree of international interest and seriousness required for the international criminalisation of crimes remains open to debate and interpretation, Sunga and

³³ Paul Ocheje, ‘Refocusing International Law on the Quest for accountability in Africa: The Case Against The (Other) Impunity (2002) *Leiden Journal of International Law* 15, 749-779.

³⁴ *ibid.*

³⁵ Ilias Bantekas ‘Corruption as an International Crime and a Crime against Humanity: An Outline of Supplementary Criminal Justice Policies’ (2006) *Journal of International Criminal Justice* 4, 474.

³⁶ Starr (n 2) 1297; Acquaaah-Gaisie ‘Curbing Financial Crime Among Third World Elites’ 379; Ubong E Effeh, ‘Sub Saharan Africa: A Case Study on How Not to Realise Economic, Social and Cultural Rights, and a Proposal For Change’ (2005) *NorthWestern Journal of International Human Rights* 3. These writers argue that the consequences of corruption on peoples’ rights meet the threshold set in Article 7 (2) (k) of the Rome Statute.

³⁷ Starr (n 2) 1268.

³⁸ Rome Statute of the International Criminal Court.

Bottigliero argue that corruption should be treated as ‘a matter of international legal concern rather than as a matter falling within the exclusive domestic jurisdiction of individual states’.³⁹ These restrictive definitions do not sustain a pattern of argument more likely to favour the upgrading of grand corruption as a crime under international law.

According to Dinstein, in order to attain this status, ‘the practice of States is the conclusive determinant in the creation of international law (including international criminal law), and not the desirability of stamping out obnoxious patterns of human behaviour’.⁴⁰ Moreover, Bantekas and Nash posit that ‘the legal basis for considering an offence to be of international import is where existing treaties or customs consider the act as being an international crime’.⁴¹ Arguing from these points, it would appear that grand corruption in particular merits inclusion as an international offence as an existing treaty (UNCAC) considers it to be an international crime. However, while it is certain that grand corruption has international dimensions, international efforts to combat it over the years have been grossly inadequate and ineffective.⁴² Accordingly, could it be inferred that crimes affecting economic and social interests are by their nature less harmful than the other crimes widely held as core international crimes? While this is not the case, the reality is that there is an overt emphasis and focus on violent crimes by international criminal law, thereby according undue preference to civil and political rights at the expense of socio-economic rights. There also are scant arguments as to why grand corruption should not

³⁹ Sunga and Bottigliero (n 30).

⁴⁰ Y Dinstein, ‘International Criminal Law’, 20 *Israel Law Review* (1985), 206, 221.

⁴¹ Bantekas & Nash (n 27) 6.

⁴² Former United Nations Secretary General Kofi Annan rightly wrote in 2004 that: ‘Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish’. See preamble to the United Nations Convention against Corruption.

be criminalised by international criminal law.⁴³ The dearth of such arguments underscores the merit in the case for the criminalisation of grand corruption by the international criminal law regime.

In summary, it appears that action has not matched rhetoric in dealing with the devastating impact of grand corruption and, thus, the role of international criminal law in combating corruption has remained inadequate. The effects of grand corruption, as argued in the previous chapters, in many respects surpass that of other international crimes that have garnered international sympathy and recognition. Sonja Starr argues that ‘if a population is sufficiently vulnerable and a diversion of funds sufficiently large relative to the total amount available to serve the population’s need, it is clear that great suffering or health injury will follow from the diversion in the ordinary course of events’.⁴⁴ It is thus pertinent to emphasise the devastating effect of grand corruption on ordinary people and to inquire how international criminal law could aid in combating the scourge. This becomes an option owing to the failings of some national courts, particularly in Nigeria, to prosecute grand corruption cases to logical conclusions.⁴⁵

To proceed further with the argument, it is pertinent to restate that amongst the forms of corruption listed in chapter III UNCAC, bribery (passive), embezzlement and illicit enrichment are the forms this chapter recommends for the purpose of consideration for international

⁴³ Karen Alten and Juliet Sorensen ‘Let Nations, Not the World Prosecute Grand Corruption’ U.S News (April 30 2014)-They argue that corruption should be left under States’ jurisdictions considering that the ICC is clearly overwhelmed by its caseloads. They also cited the opposition from America and Russia towards the mandate of ICC as a major consideration against the international criminalisation of corruption.

⁴⁴ Starr (n 2) 1281.

⁴⁵ So far, apart from the cases involving Tafa Balogun, Bode George and Diepreye Alamieyesha that were concluded in the courts with the conviction of the accused, lots of other high-profile cases have been pending in Nigerian courts at the time of this writing.

criminalisation. Article 15 of UNCAC defines passive bribery as ‘the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties’.⁴⁶ Article 17 UNCAC defines embezzlement as ‘the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position’.⁴⁷ Article 20 UNCAC defines illicit enrichment as ‘a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income’.⁴⁸ The justification for advancing bribery (passive), embezzlement and illicit enrichment lies in the mandate given by UNCAC to state parties to criminalise the offence within the domestic legislations. This is opposed to some other corruption offences with the optional mandate for criminalisation. Articles 30 (1) and 26 (4) of UNCAC suggest appropriate sanctions in line with relevant corruption offences. The author maintains that while international criminal law may not totally eradicate the global menace of grand corruption, it is still the choice expressed by many scholars and stakeholders, especially, Kofele-Kale.⁴⁹

Despite these facts, international criminal law remains crisis-based due to the practices that put international tribunals’ focus on crimes committed in crisis situations, predominantly warfare while neglecting other abuses whose impact is similar. The violations of the ‘right to housing, food, and education, work, health or other ESCR through corrupt acts are not always beyond

⁴⁶ Article 15 UNCAC.

⁴⁷ Article 17 UNCAC.

⁴⁸ Article 20 UNCAC.

⁴⁹ Ndiva Kofele-Kale, ‘Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law’ (2009) Centre for Human Rights and Democracy in Africa, 4<<http://fakoamerica.typepad.com/files/kofele-kale-keynote-address.pdf>>accessed 10 October 2015.

the realm of international criminal law; however, to date, most transitional justice mechanisms have not realised that violations of certain ESCR rights can constitute... crimes against humanity in peace times'.⁵⁰ This trend is worrying as, at times, the effect of corruption on people leaves a more devastating impact, for instance, 'lack of access to water can prove more deadly than a massacre by firearms',⁵¹ and the 'same is true for the wilful hindrance of humanitarian assistance'.⁵² In human rights language, such scenarios can often be understood as violations of socio-economic rights, particularly where states fail to respect these rights, such as by directly interfering with the enjoyment of people's access to housing, food, education or health, or where states fail to protect persons within their jurisdiction from abuses by non-state actors. Some of the questions for this research pertinent to this section are:

- 'Have the international criminal tribunals emphasised crisis situations and security threats while ignoring longer-term, systemic causes of human suffering?'⁵³
- Could "other inhumane acts of a similar character" be used to extend the reach of the Rome Statute?

This leads to the consideration of the third research question: How can international criminal law conceptualise grand corruption as a crime under international law to be prosecuted as a crime against humanity? The Global Organisations of Parliamentarians against Corruption (GOPAC) strongly support the project of upgrading corruption to an international crime. GOPAC offers a number of options in this regard.⁵⁴ Moreover, Kofele-kale reiterates that '...

⁵⁰ Evelyne Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) Heidelberg Journal of International Law Vol 71 No 3, 540.

⁵¹ A Zemmali, 'The Protection of Water in Times of Armed Conflict' (1995) Int'l Rev. Red Cross 308, 550.

⁵² Alex De Waal, *Famine Crimes: Politics, and the Disaster Relief Industry in Africa* (Oxford International African Institute 1997) cited in Evelyne Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) Heidelberg Journal of International Law Vol 71 No 3, 524.

⁵³ Starr (n 2) 1257.

⁵⁴ See Global Organisations of Parliamentarians Against Corruption (GOPAC) 'Prosecuting grand corruption as an international crime' (2013) <

The focus has now shifted to the ICC Assembly of State Parties to persuade it to take another look at the Rome Statute of the ICC with a view to amending Articles 5 and 7 to include indigenous spoliation as one of the crimes within the court's jurisdiction'.⁵⁵

Kofele-Kale concludes that he hopes 'decent people would be revolted by the excesses of a Pinochet, a Sani Abacha, the Omar Bongos and Obiang Nguemas or an Ondong Ndong and would as a consequence share this research's view that depredations of this sort qualify as a crime against humanity'.⁵⁶ In *Prosecutor v. Erdemovic*, the International Criminal Tribunal for the former Yugoslavia defines crimes against humanity as '... Inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must per force demand their punishment'.⁵⁷ The definition of crimes against humanity cited in *Prosecutor v. Erdemovic* accordingly is the crime this research argues grand corruption is akin to, particularly, within the context of the Nigerian State.

6.3 The Rome Statute of the International Criminal Court

The International Military Tribunal (hereinafter, "IMT") in Nuremberg is the precursor of the International Criminal Court (ICC). The IMT at Nuremberg was 'formally established by the London agreement of 8 August 1945 between the governments of Great Britain, the U.S, France, and the Union of Soviet Socialist Republic'.⁵⁸ The IMT was principally established 'to

http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf> accessed 20 February 2016.

⁵⁵ Kofele-kale (n 49) 4.

⁵⁶ *ibid* 5.

⁵⁷ See *Prosecutor v. Erdemovic*, Sentencing Judgment, Case No. IT-96-22-T, Trial Chamber I, 29 Nov. 1996, reprinted in 108 I.L.R. 180 (1996).

⁵⁸ T Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoire* (London Bloomsbury 1999) Cited in Ilias Bantekas, *International Criminal Law* (Hart Publishing 2010) 389.

prosecute German war criminals; the London Charter gave the IMT jurisdiction over crimes against peace, war crimes and crimes against humanity'.⁵⁹

The preamble to the Rome Statute reflects many principles, including 'affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation ...'.⁶⁰ According to the ICC handbook,⁶¹ the history, relevance and scope of the Rome Statute are encapsulated in these words:

On 17 July 1998, 120 States adopted a statute in Rome - known as the Rome Statute of the International Criminal Court ("the Rome Statute") - establishing the International Criminal Court. For the first time in the history of humankind, States decided to accept the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals after the entry into force of the Rome Statute on 1 July 2002. The International Criminal Court is not a substitute for national courts. According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The International Criminal Court can only intervene where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators. The primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes. A well-informed public can contribute to guaranteeing lasting respect for and the enforcement of international justice.⁶²

Accordingly, the United Nations reiterates that:

The International Criminal Court was established to bring to trial the perpetrators of the most serious crimes of concern to the international

⁵⁹ See Article 6 of the Tribunal Charter; Tonya J Boller, 'The International Criminal Court: Better than Nuremberg?' *Ind. Int'l & Comp. L. Rev.* Vol.14.

⁶⁰ See Preamble to the Rome Statute of the International Criminal Court <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed 01 November 2015.

⁶¹ See ICC Handbook, *Understanding the International Criminal Court* (The Hague Netherlands) 1.

⁶² *ibid.*

community as a whole, i.e. the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (once a provision is adopted defining the latter crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime). The jurisdiction of the International Criminal Court is complementary to national criminal jurisdictions. By establishing the International Criminal Court the States party to the Statute aimed to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes, and to secure the peace, security and well-being of the world, in conformity with the purposes and principles of the Charter of the United Nations, and in particular the principle that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.⁶³

The Rome Statute has a global reach with excess of 120 State parties and ‘representing all regions: Africa, the Asia Pacific, Eastern Europe, Latin America and the Caribbean, as well as Western European and North America’.⁶⁴ The decisions of the ICC are not retroactive.⁶⁵

The ICC’s administrative composition presents it as a core permanent international criminal court. The judicial arm has eighteen full-time judges elected for a renewable tenure of nine years by the Assembly of State Parties (ASP). There is also a requirement of requisite knowledge of criminal law proceedings attached to the posts of these judges. Articles 34 to 39 of the Rome Statute deals with the administrative matters and running of the ICC in general. Principles like the independence of the judges and the enormous powers attached to the office of the prosecutor make the ICC a unique international criminal court.⁶⁶

On the issue of jurisdiction, ‘States surrender their judicial sovereignty to ICC with respect to the crimes enumerated in the Statute when they become parties to the Rome Statute. In essence, States agree to submit to the jurisdiction of the Court, which may exercise its jurisdiction in

⁶³ See United Nations Diplomatic Conferences < <http://legal.un.org/diplomaticconferences/icc-1998/icc-1998.html>> accessed 09 October 2015.

⁶⁴ ICC Handbook (n 61) 3.

⁶⁵ Article 24 (1) Rome Statute of the International Criminal Court.

⁶⁶ Articles 40-48, the Rome Statute.

situations where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party. Also, a State not a party to the Statute may decide to accept the jurisdiction of the ICC. These conditions do not apply when the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the Office of the Prosecutor'.⁶⁷ The ICC was recently under threat from the African Union, which raised the possibility of running a parallel court that might undermine the ability of the ICC to attain its jurisdictional mandate. Cases against certain African heads of States, in particular, Uhuru Kenyatta of Kenya and Omar Al-Bashir of Sudan by the ICC, opened a plethora of debates as to the relevance of the ICC to the African continent. Is ICC anti-Africa? Does ICC indulge in selective justice? These are the questions currently been debated by scholars relating to the relationship between the African States and ICC.⁶⁸ It is not within the scope of this research to discuss this exhaustively; however, these questions are pertinent to this research as one of the key arguments pursued is arguing for the ways of using the ICC as an instrument of combating grand corruption in Nigeria. Also, given the corruption records of some of the incumbent African leaders, would corruption trials present a realistic possibility where these rulers are in power and use their powers to make the African Union cut relations with the ICC?

The implications of this to anti-corruption battle is grave hence, the ICC remains central to this research. The ICC by its scope prosecutes individuals not groups or States, which makes it ideal for the thesis arguments. 'Any individual who is alleged to have committed crimes within

⁶⁷ ICC Handbook (n 61) 5. Article 4 (1) (2) of the Rome Statute gave it an international jurisdiction: 1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. 2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

⁶⁸ Scholars like Cherif Bassiouni; Douglas Hansen; Charles Taku; Abdul Tejan-Cole; Margaret de-Guzman and Kamari Clarke debated on the subject of African's anti-ICC stance <<http://iccforum.com/africa>>accessed 4 December 2015.

the jurisdiction of the ICC may be brought before the ICC. In fact, the Office of the Prosecutor's prosecutorial policy is to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes, and does not take into account any official position that may be held by the alleged perpetrators'.⁶⁹ Thus, the ICC extends no immunity to any individual, whether in political authority or not (Article 27 (2)). The absence of any immunity clause adds to the credibility of the ICC as the presence of immunity clause in some domestic constitutions remains a major hindrance in the fight against corruption in such States. For instance, section 308 of the 1999 Constitution of Nigeria still provides for the "immunity clause" for some elected officers and has shielded certain political office holders from legal prosecution while in office, notwithstanding the weight of any corruption allegation against them.

Article 5 (1) of the Rome Statute sets out the crimes within the jurisdiction of the Court:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.⁷⁰

The Nuremberg Tribunal and the ICC Statute are to a large extent interrelated. It is not an overstatement to reiterate that the Rome Statute extended the competence of the IMT in many aspects.

⁶⁹ ICC Handbook (n 61) 5.

⁷⁰ Rome Statute of the International Criminal Court Article 5, Jul. 17, 1998, 2187 U.N.T.S.

6.3.1 Article 7 of the Rome Statute (Crimes against Humanity)

Article 7 forms the first focal point of the analysis of this chapter and defines “crime against humanity” as ‘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 sterilisation, 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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (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.⁷¹

In so doing, the Rome Statute provides the ICC with broad universal jurisdiction to investigate and prosecute anyone who perpetrates an international criminal act, so long as the perpetrator’s state is a party to the Statute and the acts were committed after the Statute entered into force on July 1, 2002. Crimes against humanity have evolved over the years and now refer to atrocities committed in peacetime as well as in wartime. Moreover, ICC prosecution is restricted by the complementarity principle of the Rome Statute (articles 17-20 and 53), which limits ICC jurisdiction to crimes that the host state is unwilling or unable to actively pursue. In this regard, many states have enacted legislation that provides for the investigation and prosecution of crimes that fall under the jurisdiction of the ICC.

⁷¹ Article 7, the Rome Statute.

The historical antecedents of the ICC is not the focus of this chapter as it has been extensively addressed by others.⁷² Nevertheless, it is worth noting that during the *Travaux Préparatoires* (official record of negotiation) of the Rome Statute, offences of an economic nature, such as financial crimes were mooted by Libya and Cuba, but from the official documents, elicited no further debate or action and thus were excluded from incorporation within the jurisdiction of the ICC.⁷³ Nigeria delegates made no suggestions for the inclusion of financial crimes in the Rome Statute. In this regard, Neil Boister argues that the exclusion of treaty crimes from the Rome Statute was undermined by feelings of uncertainty and irreconcilable opinions by different member states.⁷⁴ Arguably, there were concerns about trivialising the mandate of the ICC as well as the need to preserve its reputation. Opposition from key states like the USA helped to compound matters and thus, treaty crimes were foreclosed and more attention was paid to the core international crimes. Despite this, the analysis in this thesis will focus on the relevance of the Rome Statute towards the legitimacy of international prosecutions for the crime of grand corruption.

The emergence of the ICC undoubtedly strengthened the place of international criminal law (*stricto sensu*) by reiterating the so-called core international crimes entrenched in Articles 5 to 9 of the Rome Statute. The core international crimes remain offences that are firmly established in customary international law. Although the main focus of the ICC has been in armed conflicts,

⁷² Tonya J Boller, 'The International Criminal Court: Better than Nuremberg?' *Ind. INT'L & Comp. L. Rev.* Vol.14; Ilias Bantekas and Susan Nash, *International Criminal Law* (Routledge-Cavendish 2007).

⁷³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome, 15 June-17 July 1998. Official Records, Volume 11: Summary of the plenary meetings and of the meetings of the Committee of the Whole, p.102, para.82 <http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol_II_e.pdf> accessed 07 October 2015; Martine Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (Intersentia Ltd 2012) 291-293.

⁷⁴ Neil Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics' (1998) 3 *Journal of Armed Conflict Law* 27.

the ICC it is argued, remains a desirable means of responding to serious long-term crimes such as grand corruption.⁷⁵ However, beyond the jurisprudence of these core international crimes, the evolution of certain transnational crimes has given impetus to the exploration of the provisions of the Rome Statute for potential to prosecute other offences including grand corruption, thereby attempting to conceptualise them as crimes under international law, which arguably would fall under international law *stricto sensu*.

Grand corruption, the focus of this thesis, lends to this paradigm shift being that the crippling impact of grand corruption in Nigeria may properly be considered a crime against humanity under Article 7 (1) (k) of the Rome Statute. “Other inhumane acts” arguably remain ‘a residual category whose drafters did not require exhaustive enumeration because its purpose was to encompass all serious conduct that was not otherwise found within the list of acts that give rise to crimes against humanity’.⁷⁶ The drafters of the Rome Statute anticipated that some inhumane acts like grand corruption could unleash situations that could be more precarious than warfare. When read with Article 21 of the Rome Statute, Article 7 (1) (k), encourages a form of judicial activism and provides a route for navigating the uncharted world of international criminality. It provides avenues whereby, given appropriate cases, gross human rights abuses and violations can be challenged as serious crimes against humanity. Relying on the enormous power given to the ICC by the Rome Statute, the Socio-Economic Rights and Accountability Project (SERAP), petitioned the Prosecutor of the ICC in 2009:

To use your position and powers to examine and investigate whether the systemic/grand corruption in Nigeria amounts to a crime against humanity within the jurisdiction of the International Criminal Court, and to prevail on the Nigerian government to fulfil its obligations to effectively and fairly investigate and prosecute all allegations of grand corruption since 1985. Nigeria is a state

⁷⁵ Starr (n 2).

⁷⁶ Bantekas (n 72) 194.

party to the Rome Statute and deposited its instrument of ratification on 27 September 2001.⁷⁷

The extent of engagement the ICC had with this petition is uncertain as the office of the Prosecutor has not reacted officially to the petition, but SERAP has set a precedent by relying on the extensive powers of the ICC to push for the international criminalisation of grand corruption. The International Law Commission supports the view that the core test of crimes against humanity is that they must be instigated or directed by the government or by any organisation or group.⁷⁸

The Rome Statute provides a review mechanism in Article 123 whereby treaty crimes like grand corruption could potentially be dealt with. Despite this provision, there are concerns that endemically corrupt states can conspire to frustrate such provisions. Some signatories to the ICC Charter are countries where systemic corruption is rife, according to research data from Transparency International and the World Bank. Moreover, opposition to the use of the ICC for potentially prosecuting grand corruption is widespread. The overall performance of the ICC is criticised as being below people's expectations and as a result, it may be argued that it makes no sense to expand its jurisdiction when it is often saddled with heavy workload and struggles to cope with such enormous workload. The prolonged trial of Thomas Lubanga of the Congo⁷⁹ is often cited as one of the clear cases of ICC's ineptitude while the collapse of Uhuru

⁷⁷ Socio Economic Rights and Accountability Project (SERAP) 'ICC Petitioned over Systemic Corruption in Nigeria' < <http://serap-nigeria.org/icc-petitioned-over-systemic-corruption-in-nigeria/>> accessed 11 September 2015.

⁷⁸ William Schabas, 'State Policy as an Element of International Crime' (2008) *Journal of Criminal Law and Criminology*, Vol 98, Issue 3 Spring, Article 6, 965.

⁷⁹ See ICC, Thomas Lubanga Dyilo 'https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx' accessed 07 November 2015.

Kenyatta case has attracted much criticism.⁸⁰ Nevertheless, the subject of corruption is not totally absent in the functioning of the Rome Statute. Article 70 (1)⁸¹ contemplates corruption within the administrative bodies of the ICC. Esther Hava is critical of restricting the inclusion of corruption to the administrative arms of the ICC arguing that ‘... it is clear that such provisions, while necessary for ensuring the proper functioning of the Court, are far from ideal when it comes to achieving the goal stated at the start of this report, i.e. preventing impunity in the most serious cases of Grand Corruption’.⁸²

6.3.2 Grand Corruption as an Inhumane Act

Grand corruption leads to gross economic and social deprivation resulting in inefficiency in governance, inhumane treatment of the citizenry as well as the unwillingness of the authorities to investigate or prosecute such cases. It is in line with this argument that this research argues specifically, that Article 7 (1) (k) of the Rome Statute provides a ground of prosecuting such “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health” caused by grand corruption as crimes against humanity. Yury Fedotov of the United Nations Office on Drugs and Crime (UNDOC) admits that:

Corruption ... Impacts the vulnerable, so much that universal primary education cannot exist if bribes are needed to enter children into school systems ... Reductions in child mortality are more difficult where payments are required to

⁸⁰ See BBC News, ‘ICC Drops Uhuru Kenyatta Charges for Ethnic Violence’ <<http://www.bbc.co.uk/news/world-africa-30347019>> accessed 07 November 2015.

⁸¹ Article 70 (1) of the Rome Statute deals with the offences against the administration of justice. It concerns issues on administrative corruption within the ICC.

⁸² Esther Hava, ‘Grand Corruption: Strategies for Preventing International Impunity’ (2015) 2 Indonesian Journal of International & Comparative Law, 481.

obtain medical assistance. This could be the difference between eating or going hungry, and in some cases, ... even between living and dying.⁸³

In *Prosecutor v Katanga and Ngudjolo Chui*, the ICC Pre-Trial Chamber 1 defined inhumane acts as ‘serious violations of international customary law and basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of similar nature and gravity to the acts referred to in Article 7 (1).⁸⁴ This is the basis from which the argument of this chapter is constructed. Although a subject of robust scholarly engagement, Article 7(1) (k) jurisprudence implies that the ICC has broad discretion to charge individuals with crimes that are not listed expressly in the Rome Statute.⁸⁵ Similarly, ad hoc tribunals (namely, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) also have prosecuted “other inhumane acts” as crimes against humanity.⁸⁶

⁸³ See UNDOC ‘Arab Spring Highlights Rejection of Corruption and Cry for Integrity (2011) < <http://www.unodc.org/unodc/en/frontpage/2011/October/arab-spring-highlights-peoples-rejection-of-corruption-and-cry-for-integrity-says-unodc-chief.html> > accessed December 3 2015.

⁸⁴ ICC *Prosecutor v Katanga and Ngudjolo Chui*, Decision Pre-Trial Chamber 30 September 2008, ICC-01/04-01/07, Section 448 as noted by Werle, *Principles of International Criminal Law* ,p 340 section 921.

⁸⁵ *Prosecutor v Katanga and Ngudjolo Chui* Case No. ICC-01/04-01/07-717; William Schabas, *The International Criminal Court: A Commentary on The Rome Statute* 181–86 (2010) (providing an overview of Article 7(1)(k) application).

⁸⁶ See the Statute of the International Criminal Tribunal for Rwanda, Article 3(i), U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (Nov. 8, 1994) (prohibiting “other inhumane acts” if committed “as part of a widespread or systematic attack against any civilian”); Statute of the International Criminal Tribunal for the Former Yugoslavia Article 5(i), U.N. SCOR, 48th Sess., 3217th mtg. at 1–2 (May 25, 1993) (barring “other inhumane acts” if committed “in armed conflict, whether international or internal in character, and directed against any civilian population on national, political, ethnic, racial or religious grounds”); see also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 688–97 (Sept 2, 1998) (interpreting the “other inhumane acts” provision of the ICTR Statute to include coerced nudity of Tutsi women); *Blagojević & Jokić*, IT-02-60-T, Judgment, 623–30 (recognizing as “other inhumane acts” under the ICTY Statute the forced bussing of thousands of women, children, and elderly on the basis that they were not told where they were going, that they were abused by Serb soldiers, and that they were subjected to unbearable conditions.; See Rome Statute, Article 22 (mandating that the “definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”). Article 21(2) (“The Court may apply principles and rules of law as interpreted in its previous decisions”).

Starr argues that grand corruption can fall within the scope of “inhumane act” as codified in Article 7(1) (k). GOPAC supports Starr adding that this could be effective ‘if grand corruption is defined in a manner that makes it explicit that it is restricted to inhumane acts that cause great suffering, or serious injury to body or to mental or physical health’.⁸⁷ Acquaaah-Gaisie maintains that ‘large-scale corruption causes death of infants, devastation by diseases such as AIDS and malaria, denial of a decent education, results as serious as the repercussions of armed conflict’.⁸⁸ GOPAC however, cautions that:

There are concerns that equating corruption with crimes against humanity may be unreasonable, since the devastation caused by corruption is not as obvious as in, for example, genocide or slavery. Expanding the scope of “other inhumane acts” to include corruption may encourage political actors to try to further stretch the definition and pursue political vendettas through the ICC.⁸⁹

The argument of GOPAC, as coherent as it appears, may not really be plausible when consideration is given to the current socio-economic state in Nigeria, particularly the security threat, unemployment, infrastructural decay and non-payment of workers’ wages. The increasing security threat by Boko Haram, Niger Delta Avengers and MEND are linked to the consequences of pervasive grand corruption.⁹⁰ Does this loss of lives and properties not equate to “other inhumane acts”? In the words of Yury Fedetov, ‘the millions of people ... have inspired the world and shown their hatred of corruption and corrupt societies...an emphatic rejection of corruption and a cry for integrity’.⁹¹

⁸⁷ GOPAC (n 54) 6.

⁸⁸ Gerald Acquaaah-Gaisie, ‘Grand Corruption-A Crime Against Humanity’ The Global Business and Technology Association International Conference Lisbon (2005) 1,5-6.

⁸⁹ GOPAC (n 54) 6.

⁹⁰ UNDOC (n 83).

⁹¹ *ibid.*

6.4 Other Ways International Criminal Law can Prosecute Grand Corruption

Scholars have suggested that while the Rome Statute may not be the ideal platform for the prosecution of grand corruption, there are other potential areas that if judicially explored, could help in placing grand corruption under serious legal scrutiny. Judge Mark Wolf strongly argues for the establishment of an “International Anti-corruption Court”, while GOPAC in a paper published on 8 November 2013 listed the following options as alternative routes for combating grand corruption and ending the culture of impunity at all levels of governance:

- i, National Courts with Universal Jurisdiction
- ii, Regional Courts
- iii, Creating New Mechanisms.

6.4.1 An International Anti-Corruption Court (IACC)?

Judge Mark Wolf is a strong advocate of the establishment of an International Anti-Corruption Court (IACC) as a platform for the global prosecution of grand corruption. Wolf makes the case that ‘grand corruption is a crime in virtually every country. It is also a violation of the United Nations Convention against Corruption, which more than 100 countries have ratified, and the OECD Convention on Combating Bribery of Foreign Officials, which 40 nations have signed. A commitment to combat, grand corruption is also a requirement of membership in the WTO’.⁹² Wolf argues that ‘corruption is not a victimless crime’⁹³ but rather impacts adversely

⁹² Judge Mark Wolf, ‘The case for an International Anti-Corruption Court’ (July 2014) *Governance Studies at Brookings* <<http://www.brookings.edu/~media/research/files/papers/2014/07/international-anti-corruption-court-wolf/anticorruptioncourtwolffinal.pdf>> accessed 08 October 2015.

⁹³ *ibid* 4.

on the vulnerable people who witness the diminishing of the substance of the rule of law through acts attributable to graft. These acts lead to innumerable catastrophic consequences for the most vulnerable people and, as such, should be dealt with by the establishment of an International Anti-Corruption Court. The blueprint of Wolf is:

An International Anti-Corruption Court (“IACC”), similar to the ICC or as part of it, should now be established to provide a forum for the criminal enforcement of the laws prohibiting grand corruption that exist in virtually every country, and the undertakings that are requirements of various treaties and international organisations. Staffed by elite investigators and prosecutors as well as impartial judges, an IACC would have the potential to erode the widespread culture of impunity, contribute to creating conditions conducive to the democratic election of honest officials in countries which have long histories of grand corruption, and honor the courageous efforts of the many people, particularly young people, who are increasingly exposing and opposing corruption at great personal peril.⁹⁴

Wolf advocates for an international anti-corruption court to be staffed by an elite corps of investigators and experienced impartial judges.⁹⁵ The court should operate on the ‘principle of complementarity and empowered by the international law to hear civil fraud and corruption cases brought by private whistle-blowers’.⁹⁶ The IACC should, in essence, have both criminal and civil jurisdictions. Judge Wolf opines that while the ICC may not really be the proper platform to prosecute grand corruption due to overwhelming administrative, technical and political issues confronting it, the IACC may be the best option and may enjoy the support of the USA which never supported the ICC due to issues they argue impinges on their national interest.

⁹⁴ Wolf (n 92)14.

⁹⁵ *ibid* 10.

⁹⁶ *Ibid*; See <http://whistle.finance.gov.ng/Pages/default.aspx>> accessed 25 March 2017.

Whistle-blowing is now officially compensated in Nigeria. The government reports huge sums of money recovered as a result of recent government open policy of rewarding authentic whistle-blowers from December 2016, see Anthony Maliki, Hamisu Muhammed, Adelanwa Bamgboye, John Chuck Azu, Abbas Jimoh, Latifat Opoola ‘Whistleblowers Smiling to the Bank’ *Dailytrust* (Abuja, 24 March 2017).

The proposals of Judge Wolf were criticised by some scholars. Mathew Stephenson in particular, argues that the contribution of Wolf to the discourse at its best, ‘adds to the existing debate on this topic’.⁹⁷ What this means is that Wolf’s proposals look attractive, but, unrealistic. According to Stephenson, the proposal of Wolf constitutes an attempt at infringement on state sovereignty. States would oppose undue intrusion into their national issues and this would work against the proposal of Judge Wolf. Moreover, Wolf believed that America would support the proposed IACC despite its opposition to the ICC, although there is no guarantee that this would happen. Besides, the claim by Wolf that, ‘American companies generally behave ethically and, in any event, are significantly deterred from paying bribes by the threat of prosecution for violating the FCPA’⁹⁸ is controversial considering the number of bribery scandals in which American companies trading abroad were involved.⁹⁹ Stephenson adds further that Wolf failed to take into consideration the fact that certain states like Afghanistan, Argentina and Thailand practice patronage politics. He also doubts if corruption hotspot states like Nigeria, China, Russia, Brazil, India, Indonesia, Saudi Arabia, and South Africa could be trusted to embrace Wolf’s proposal.¹⁰⁰ In the absence of these states, how would the court function efficiently? There are also issues with the enforcement mechanisms which are overtly high-handed and may not reflect the human right standards on which the battle against grand corruption is premised. The threat of state expulsion from the WTO should they fail to sign onto the IACC would impact negatively on the downtrodden.¹⁰¹

⁹⁷ See Mathew Stephenson, ‘The Case Against an Anti-Corruption Court’ (31 July 2014) The Global Anti-Corruption Blog < <http://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/>> accessed 11 November 2015.

⁹⁸ Wolf (n 92) 6.

⁹⁹ See section 2.6 on Multinational Corporations and Grand Corruption in Nigeria.

¹⁰⁰ Stephenson (n 97) 3.

¹⁰¹ Wolf (92) 9.

In sum, Stephenson argues:

There are a number of ways Judge Wolf's proposed IACC could actually prove counterproductive — eroding the international norm against anticorruption, emboldening some leaders to resist other forms of pressure to clean up their acts, possibly triggering a backlash among citizens in certain countries who resent the intrusiveness of the IACC, and — for those countries that remain outside the IACC despite Judge Wolf's proposed sanctions — cutting them off from the economic opportunities and international engagement that might, in the long-term, do more to reduce corruption than the punishment of a handful of officials from a few, likely very poor, countries.¹⁰²

Despite the sustained criticism against the principal model advanced by Judge Wolf, his writing has added substantially to the project of devising alternative ways of combating grand corruption at the global level.

6.4.2 National Courts with Universal Jurisdiction

The suggestion of exploring the option of establishing national courts with universal jurisdiction has emerged within the debates around the internationalisation of the crime of grand corruption. The doctrine of universality entails the ability of states to prosecute certain offences without territorial limitations. In essence, an offence like grand corruption can be prosecuted by any state irrespective of where the act occurred or the nationality, or country of domicile of the perpetrator.

The establishment of national courts with universal jurisdiction is not a new concept. However, the discussion paper by GOPAC and the opinion of Judge Mark Wolf in the Brookings paper highlights the topical nature of the subject and encourages strong scholarly scrutiny.¹⁰³ Within

¹⁰² Stephenson (n 97) 5.

¹⁰³ *ibid.*

the scope of international criminal law, the '*Pinochet and Habre*¹⁰⁴ cases involved attempts to use universal jurisdiction to prosecute leaders for various heinous crimes committed by their regimes over the course of many years. The analysis of the outcome of the *Pinochet* and *Habre* cases is not within the scope of this chapter, but it is worth mentioning that very few universal jurisdiction prosecutions have been tried post, *Pinochet*. Moreover, when juxtaposed with a recent Act (Organic Act No 1/2014) passed in Spain to limit the power of Spanish judges to pursue criminal cases involving human rights abuses committed outside the country, it shows that significant doubt has been cast on the merits of arguing for the use of universal jurisdiction in prosecuting crimes of grand corruption. Notwithstanding the shadows over the merits of universal jurisdiction, a national court with universal jurisdiction, according to GOPAC is advantageous because 'its effectiveness does not require a majority of states to co-operate. Even a small group of motivated states that are highly committed to applying universal jurisdiction could have a significant impact'.¹⁰⁵ Sarah Ali opines that 'there are ample reasons to consider a legal anti-corruption mechanism that transcends state borders: the flow of capital that emanates from grand corruption is global, and victims of such high-level fraud are absolutely powerless within their own legal systems'.¹⁰⁶ Bringing the notion of universal court jurisdiction to bear on the Nigerian experience, it appears that courts of universal jurisdiction can, to a large extent, assist in combating the scourge of grand corruption ravaging the state due to the dysfunctionality of the Nigerian justice system. Perhaps, a national court with universal jurisdiction could mitigate the culture of ingrained corruption, particularly in the

¹⁰⁴ *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* 3 WLR 1,456 (H.L. 1998); Human Rights Watch, 'Senegal: Hissène Habré Verdict Scheduled 30 May', 3 May 2016 < <http://www.refworld.org/docid/5729b3544.html>> accessed 29 September 2016.

¹⁰⁵ GOPAC (n 54) 4.

¹⁰⁶ Sarah Ali, 'Do we need an International Criminal Court to Prosecute Grand Corruption?' (7 July 2015) Corporate Compliance Trend < <http://cctrends.cipe.org/do-we-need-an-international-court-to-prosecute-grand-corruption/>> accessed 22 November 2015.

judiciary. The criminal justice system in Nigeria has been criticised for complicity in grand corruption cases. Lawyers and judges are accused of using technicalities to derail the course of justice. An empirical study by the Human Development Initiative (HDI) Network in Nigeria posits that ‘some lawyers and judges conspire to frustrate, rather than advance, justice through frivolous applications and adjournments, respectively’.¹⁰⁷ In a recent Supreme Court ruling, Justice Sylvester Nwali (JSC) stated that ‘it is not the duty of learned Counsel to resort to motions aimed principally at delaying or even scuttling the process of determining whether or not there is substance in the charges as laid. In my view, this motion is a disservice to the criminal process and a contemptuous lip service to the fight against corruption. The tactics employed here are only one of the means by which the rich and powerful cripple the criminal justice process’.¹⁰⁸

Nuhu Ribadu, a former head of the Economic and Financial Crimes Commission (EFCC) in Nigeria, gave credence to the postulations of the HDI and Justice Nwali adding that ‘it has become an ‘art’ for defence attorneys to ensure that financial crime cases do not go on and substantive cases are never tried on their merits. Defence attorneys delay and prolong cases by a tactic of applying for stay of proceedings and, where such application is granted, they accuse judges of bias, which provide grounds for an application to transfer their cases to other judges’.¹⁰⁹ Hence, the suggestion that invoking the doctrine of courts with universal jurisdiction may help to settle the complicity of the Nigerian justice system sounds attractive but, it also presents a number of challenges. Citizens may react negatively or resent its intrusiveness into

¹⁰⁷ Bolaji Owasanonye, *Justice or Impunity? High-profile Cases Crawling or Gone to Sleep* (Human Development Initiative 2014) 2.

¹⁰⁸ *Dariye v FRN* [2015] LPELR-24398 (SC) 34-35.

¹⁰⁹ See Nuhu Ribadu, ‘Obstacles to the prosecution of Corrupt Practices and Financial Crimes in Nigeria (November 23-24, 2004) Paper presented to the House of Representative Committee on Anti-Corruption, National Ethics and Values in Kaduna <www.efcc.ng.org> accessed 10 November 2015.

their domestic affairs. Also, the 2014 Act in Spain could be followed in other jurisdictions and this may undermine the option of considering courts with universal jurisdiction.

6.4.3 Regional Courts

Another very strong option canvassed by scholars is the establishment of regional courts charged principally with the prosecution of corruption-related offences. Regional human rights courts arguably benefit from acceptability and credibility while administering international justice as opposed to the ICC that has received numerous criticism of bias against the African continent.

Regional courts exist in Africa, Europe, and America and according to GOPAC ‘an advantage of regional courts is that they can hold member states accountable to the anti-corruption conventions those states have ratified, and eventually prosecute (or at the very least denounce) those who violate these conventions’.¹¹⁰ In support of the efficacy of regional courts as an option for consideration in the quest for international prosecution of grand corruption, GOPAC refers to the success of the grand corruption court action brought against Nigeria by the Nigerian NGO, the Socio-Economic Rights and Accountability Project (SERAP) at the Economic Community of West African States (ECOWAS) Community Court of Justice. SERAP argued that Nigerians’ right to education had been breached by massive corruption in the public education budget, and cited an international convention, the African Charter on Human and Peoples’ Rights, as the applicable law. This marked the first time that a regional

¹¹⁰ GOPAC (n 54) 5.

human rights court has explicitly considered corruption as a violation of human right. The case also resulted in the recovery of N3.4 billion that had been stolen from the education budget.¹¹¹

Arguments in favour of the regional courts appear stronger and more realistic given that ‘countries would presumably have already submitted to their jurisdiction, so the sovereignty objection would get less traction. Second, a regional grouping would be less vulnerable to charges of outside interference and neo-imperialism. However, it’s not clear how effective such courts would be; the greatest benefit may be that an adverse ruling will empower domestic civil society groups and opposition factions’.¹¹² In this regard, it would be worthwhile expanding the scope of the regional courts to cover cases of grand corruption taking a cue from the ECOWAS court ruling against Nigeria.

Regional courts as a platform for the prosecution of grand corruption is criticised on the ground that it may be unduly influenced by regional politics, particularly in Africa. Most of the African justice systems are already compromised due to the systemic nature of grand corruption and there may be concerns that its spill over effects might preclude the court from functioning well. There are concerns about adequate funding to keep it afloat and GOPAC cautions that ‘the collective web of regional courts is far from global in reach, and even in regions where such courts do exist, many do not have jurisdiction over economic crimes such as corruption’.¹¹³

¹¹¹ *ibid*; Community Court of Justice, ECOWAS (2009). Registered Trustees of the Socio-Economic Rights and Accountability Project (*SERAP*) v. *Federal Republic of Nigeria and Universal Basic Education Commission*. ECW/CCJ/APP/08/08. Abuja, Nigeria. *Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 (n.d).

¹¹² Stephenson (n 97) 4.

¹¹³ GOPAC (n 54) 5.

6.4.4 Creating New Mechanisms

There are other ways to prosecute grand corruption at the international and regional level aside from the options already discussed. One of the most innovative ways emphasizes asset recovery mechanisms. This ensures that funds laundered abroad are traced and repatriated to the States from where they were looted. This is the process pursued by the current Nigerian administration and it appears to be yielding dividends as some of the financial safe havens where Nigerian funds were laundered have started returning them. The prime example is the Abacha loot returned from Switzerland, The United Kingdom, and the United States of America. The drawback of this mechanism is that most repatriated funds are duly re-looted by other state officials and this keeps going in a vicious cycle.¹¹⁴

Stephenson suggests ‘reforms to banking and bank secrecy laws ... domestic political movements and entrepreneurial (and often heroic) domestic law enforcement agents are also making a difference. And broader political reform will likely help too, in the long term...’¹¹⁵

GOPAC outlines the following measures:

1. Amending the UNCAC to include provisions requiring States Parties to incorporate grand corruption crimes into their universal jurisdiction legislation, or requiring States Parties to collaborate with regional and international authorities in the prosecution of grand corruption.
2. Amending the OECD or Civil Law Conventions to include an endorsement of laws that reward citizen-plaintiffs for representing their countries in matters of transnational corruption.

¹¹⁴ The recovered Abacha loot repatriated to Nigeria from Switzerland were meant for infrastructural upgrade and other capital projects of the State. Some part of the recovered Abacha loot were disbursed as security budget for combating Boko Haram Terrorism. The National Security Adviser, Sambo Dasuki was accused of misappropriating the fund. As mentioned elsewhere in this research, Dasuki is currently standing criminal trial in Nigeria for unaccounted \$2 billion security budget. Some of Dasuki’s allies have started returning their share of the loot. See ‘N4.7 billion: Obanikoro Returns N134 million to EFCC ... says I’ll repay N430 million in 2017’ *Punch* (Abuja 30 November 2017).

¹¹⁵ Stephenson (n 97) 4.

3. Developing technology-based tools for detecting and deterring corruption, such as Information Communication Technologies (ICTs) that could help capture evidence of corruption in the act and facilitate the prosecution of the perpetrators.¹¹⁶

6.5 Conclusion

Grand corruption remains a serious concern to the international community and which has defied global solution. International law and grand corruption are intertwined as the transnational nature of grand corruption places it under international focus. The pervasive nature of grand corruption attests to the failure of the domestic justice system in dealing with the scourge and thus demands intervention from the international community in the form of the ICC or the other mechanisms detailed in this chapter. The devastation caused by grand corruption is to some extent, analogous to the subject of genocide which prior to 1948 was treated as mass murder and had not sufficient judicial weight attached to it. However, the intervention of the Polish Jurist, Raphael Lemkin highlighted the deficiencies attached to the name and promoted the re-naming as “genocide”.¹¹⁷ Ever since the 1948 Genocide Convention was passed, the international community now treats cases of genocide with utmost seriousness. Such grave and concerted international effort are thus required in anti-corruption cases and legislation.

This chapter thus reiterates the words of other agencies and scholars, including Sonja Starr, Ilias Bantekas, Ndiva Kofele Kale, Martine Boersma, Transparency International, the World Bank, Human Rights Watch, GOPAC and especially Judge Wolf that the ‘best hope is an international forum for the effective prosecution of grand corruption, eroding the culture of

¹¹⁶ GOPAC (n 54) 7.

¹¹⁷ Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington 1944).

impunity, and contributing to the opportunity for democratic elections to produce honest officials with the will to serve the public good in countries which have long been led by corrupt criminals'.¹¹⁸ There seems to be no generally accepted model that could presently remedy the devastating consequences of grand corruption which former Secretary General, Kofi Annan describes as an 'insidious plague'¹¹⁹ that destroys the capacity of governments to protect the rights and improve the plight of the people they are constituted to serve. At its best, the ICC, an international platform could be the body for combating the scourge. In comparing grand corruption to crimes against humanity, this chapter argues that grand corruption requires immediate action due to its severity and this action could be met by international intervention through the instruments of the ICC, notwithstanding its numerous shortcomings.

¹¹⁸ See Wolf (n 92) 14.

¹¹⁹ See Speech of the Secretary General on the Adoption of the United Nations Convention against Corruption < <https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> > accessed 20 November 2016.

Chapter Seven

Grand Corruption: A Crime against Humanity?

7.1 Introduction

The Rome Statute did not include corruption as a crime against humanity. The Rome Statute gave primacy to civil and political rights, so a series of other social injustices like grand corruption were left to the post-transitional reform era. This is despite the fact that grand corruption could be more prevalent and egregious like genocide and war crimes. The thought of including grand corruption as a crime against humanity has thus generated enormous scholarly debate, especially when juxtaposed with other crimes within the definition and contextualization of the customary norm of international criminal law.

The scope of this chapter is to holistically examine the crime of grand corruption in relation to other enumerated criminal offences that constitute crimes against humanity. This is contextualised using these sub-headings: categories of international crimes; crimes against humanity; does corruption merit inclusion as a crime against humanity? The chapter concludes by summarising the arguments raised within the chapter and in so doing, provides the necessary platform for arguing that corruption should be criminalised as a crime against humanity under international law.

7.2 Categories of International Crimes

According to William Schabas, ‘the concept of international crimes has been around for centuries. They were generally considered to be offences whose repression compelled some international dimension’.¹ The necessity for classification into international crimes stems from ‘the need to ensure that there is no impunity for state-sponsored crimes and the objective heinousness of the offence act as somewhat competing justifications for the exercise’.² The consequences that flow from classifying crimes as international crimes include: ‘possible exercise of universal jurisdiction, a duty to prosecute or extradite, a prohibition on statutory limitation and a justification for prosecution before international courts’.³

International crimes were specifically featured in the Charter of Nuremberg International Military Tribunal based on the London Agreement of 8 August 1945,⁴ and according to Schabas, ‘all four crimes within the jurisdiction of the Court were prosecuted, at least in an earlier and somewhat embryonic form, by the Nuremberg Tribunals and the other post-war courts’.⁵ The recent codification of international crimes garnered international impetus through the work of the International Law Commission, a body of experts assembled by the United Nations and vested with the ‘codification and progressive development of international law’.⁶ The result was the adoption of the Rome Statute of the International Criminal Court (ICC Statute) in Rome on 10 July 1998, during a diplomatic conference attended by most of the then

¹ William S Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017) 79.

² *ibid* 90.

³ *ibid*.

⁴ The IMT Charter contained two provisions- the crime against peace and the crime against humanity (Article 6 (a) and (c)).

⁵ Schabas (n 1) 90.

⁶ *ibid* 8.

189 Member States of the United Nations'.⁷ The ICC is a body with universal⁸ jurisdiction with its own international legal personality and legal capacity.⁹ Thus, the ICC provides for the creation of an international criminal court with power to try and punish the most serious violations of human rights in cases when national justice fails at the task.¹⁰

The International Criminal Court has jurisdiction over four categories of international crimes: Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.¹¹ These crimes are 'set in Articles 6-8bis of the Rome Statute, completed by the elements of crimes, correspond in a general sense to the state of customary international law'.¹² Schabas notes that 'most of the development in the definition of these crimes is attributed to the evolution of customary law, whose content is not always easy to identify with clarity'.¹³ Seemingly, the 'four categories of crimes are drawn from existing definitions and use familiar terminology'.¹⁴ These crimes were described in the preamble to the Statute and Article 5 as 'the most serious crimes of concern to the international community as a whole'.¹⁵ In particular, the preamble described the crimes as 'unimaginable atrocities that deeply shock the conscience of humanity'.¹⁶ Article 1 specifically described it as 'the most serious crimes of international concern'.¹⁷ It is not the intention of this chapter to treat the four categories of international crimes exhaustively,

⁷ Jescheck Hans-Heinrich, 'The General principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (March 2004) *Journal of International Criminal Law* Volume 2 No.1.

⁸ Article 13 (b) of the Rome Statute.

⁹ Article 4 (1) of the Rome Statute.

¹⁰ Schabas (n 1) ix.

¹¹ Article 5 (1) of the Rome Statute.

¹² Schabas (n 1) 92.

¹³ *ibid* 92.

¹⁴ *ibid*.

¹⁵ Preamble to the Rome Statute of the International Criminal Court.

¹⁶ *ibid*.

¹⁷ Article 1 of the ICC Statute.

however, the crime of genocide will be discussed briefly due to its relationship with crimes against humanity, the major focus of this chapter.

Genocide, a word coined by Raphael Lemkin in his 1944 work¹⁸ has been described as ‘the ultimate crime’¹⁹ and the crime without a name by Winston Churchill.²⁰ The massacre perpetrated by the Ottoman Empire against its Armenian population is widely acknowledged as the first recorded case of genocide in international law, even though no international action was taken due to the fact that it was seen as ‘a form of retroactive criminal legislation and therefore no prosecutions were ever undertaken on an international level for the genocide of the Armenians’.²¹ However, the Armenian case reawakened the sense of responsibility amongst nation states that ‘states are not allowed to commit crimes of a mass scale upon their population...’.²² While genocide was not codified at the time at the international level, it was the case of the Jewish Holocaust that led to the adoption of the Genocide Convention in 1948. Genocide has a ‘detailed and technical definition as a crime against the law of the nations’²³ and in its preamble recognises that at all ‘periods of history, genocide has inflicted great losses to humanity’.²⁴ In contemporary international criminal law, 1993 marked a critical year around the concept of genocide when in response to massive atrocities in Croatia and Bosnia-Herzegovina, the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY became the first international criminal tribunal

¹⁸ Raphael Lemkin, *Axis Rule in occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for World Peace Washington 1944).

¹⁹ P Akhavan, ‘Enforcement of the Genocide Convention: A Challenge to Civilization’ (1985) 8 *Harvard Human Rights Journal*, 229.

²⁰ Leo Kuper, *Genocide, its Political Use in the Twentieth Century* (Yale University Press 1981)12.

²¹ Schabas (n 1) 107.

²² Ilias Bantekas, *International Criminal Law* (Hart Publishing Ltd 2010) 204.

²³ William Schabas, *Genocide in International Law: Crimes of Crimes* (University of Cambridge United Kingdom 2000) 1.

²⁴ *ibid.*

since Nuremberg and the first ever mandated to prosecute the crime of genocide. Thereafter, the Rwandan violent crisis led to the Security Council establishing the International Criminal Tribunal for Rwanda (ICTR). The establishment of the Rome Statute of the International Criminal Court (ICC), the first permanent international criminal court in 1998 saw the listing of genocide in Article 6 as one of the core international crimes. In essence, the Rome Statute's drafting process, the ICC's ongoing case against the President of Sudan, Hassan Ahmad Omar Al Bashir, and the Rwandan crisis charts the trajectories for the international law of genocide. Specifically, in 2007, the International Court of Justice (ICJ) issued a ground-breaking ruling addressing state responsibility to prevent and punish genocide in the case of *Bosnia and Herzegovina v Serbia and Montenegro*.²⁵

7.3 Crimes against Humanity

Crimes against humanity 'outrage the conscience of mankind'²⁶ and as such elicit a state of moral urgency and exceptionalism. According to David Luban, the concept suggests offences that 'aggrieve not only the victims and their own communities, but all human beings, regardless of their community and that, these offences cut deep violating the core of humanity that we all share and distinguishes us from other beings'.²⁷ As per Bassiouni, 'crimes against humanity is basically founded on the formulation of Article 6 (c) of the London Charter... Thus a discussion of crimes against humanity at the ... ICC as well as the mixed-model tribunals is

²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007; 43.

²⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (111) (UDHR) Art 5.

²⁷ David Luban 'A Theory of Crimes against Humanity' 29 Yale Journal of International Law, 4.

part of the evolution of the customary international law that started with Article 6 (c) of the London Charter'.²⁸

Furthermore, the recent practice of states and international tribunals suggests that there is no requirement for armed conflict in establishing cases of crimes against humanity.²⁹ They can be perpetrated during peace time.

Crimes against humanity were codified in the Nuremberg Charter (Article 6 (c)), Tokyo Charter (Control Council Law no 10), the Statutes of ICTY (Article 5) and the ICTR (Article 3). While it is not the intention of this chapter to trace the historical paths leading to the emergence of the concept of crimes against humanity, this chapter will focus on Article 7 of the Rome Statute, and will in addition draw on the judgements from the *ad hoc* tribunals and scholarship on crimes against humanity where necessary in contextualising the argument of the chapter. According to Article 7 (1) of the Rome Statute, for an offence to be classified as a crime against humanity, it must be:

Committed as part of a widespread or systemic 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, Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparative 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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court
- i. Enforced disappearance of persons

²⁸ Cherif Bassiouni, *Crimes against Humanity: Historical Evolution* (Cambridge University Press 2011) xxxv.

²⁹ Interlocutory Appeals Decision on the Jurisdiction, *Tadic* (9IT-94-1), 2 October 1995, S.140-141.

- 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.³⁰

Drawing from the definition of the concept, these five necessary condition emerges:

- i, there is an attack
- ii, the relevant acts are part of the attack
- iii, the attack must be widespread and systematic
- iv, the attack must be directed against a civilian population
- v, there must be knowledge of the attack (the *mens rea* or mental element).

7.4 Attacks

Encapsulated within Article 7 (2) (a) of the ICC (attack directed against any civilian population), the term “attack” connotes violence and armed conflict. While the initial conception of the concept of crimes against humanity tilted towards violence, later developments and jurisprudence have moved beyond this as it could happen outside of known armed conflicts. However, if strictly construed on the line of armed conflict, as espoused by Article 5 of the Statute of the ICTY, it could preclude grand corruption for consideration as a crime against humanity as this identified a direct link between crimes against humanity and armed conflict. On the contrary, Article 3 of the ICTR and Article 7 of the ICC made no link to armed conflict. This was further strengthened in the decisions of *Tadic* in the ICTY and *Akayesu* in the ICTR ‘an attack may be non-violent in nature, like imposing a system of apartheid... or exerting pressure on a population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systemic manner’.³¹ Similarly

³⁰ Article 7 of the Rome Statute.

³¹ Judgment, *Akayesu* (ICTR-96-4-T), Chamber 1,2 September 1998, par.581.

in the *Semanza*³² judgment, the attack could be directed also against a civilian population. Thus, the Chamber explained in the *Semanza* judgment that in connection with crimes against humanity, the prosecutor must prove: that there was an attack; the attack was widespread and systematic; the attack was directed against civilian population; the attack was committed on national, political, ethnic, racial or religious grounds, and the accused acted with the knowledge that his act (s) formed part of the attack. Reading from the above judicial pronouncements, an attack, therefore need not involve the use of violence or armed forces.³³ In essence, it is in line with the stipulations of Article 7 of the ICC Statute that extermination, the exertion of pressure or inhumane treatment against a civilian population will qualify as an attack. According to Agbor, ‘an attack in itself does not constitute a crime against humanity’.³⁴ It is merely a ‘vehicle for the commission of crimes against humanity’. Agbor further argues that ‘it is the framework or foundation, with and upon which the enlisted crimes are perpetrated’.³⁵ Can this argument be sustained within the context of the crime of grand corruption? This could be answered by considering the elements of crimes against humanity as contained in the Rome Statute.

³² *The Prosecutor v. Laurent Semanza* (Judgement and Sentence), ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003
<<http://www.refworld.org/docid/48abd5a30.html>> accessed 10 January 2016.

³³ ICTR Trial chamber, December 18, 2008, Paragraph 2165; ICTR Trial Chambers, February 25, 2004 Paragraph 698.

³⁴ Avitus A Agbor, *Investigations to Crime against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of International Criminal Chambers for Rwanda (ICTR)* (Martinus Nijhoff Publishers, 2013) 106.

³⁵ *ibid* 106.

7.5 Widespread and Systematic

In *Prosecutor v. Tharcisse Muvunyi*,³⁶ the ICTR ruled that ‘in accordance with customary international law, the twin elements “widespread” or “systematic” should be read disjunctively and not as cumulative requirements’.³⁷ “Widespread” ‘refers to the scale of the attack and the multiplicity of victims; “systematic” reflects the organised nature of the attack, excludes acts of random violence, and does not require a policy or plan’.³⁸ However, the judgment reiterates that ‘the existence of such a plan or policy may, for evidential purposes, be relevant in proving that the civilian population was the target of the attack or of its widespread or systematic character’.³⁹

7.6 Directed against any Civilian Population

The conditions to be met in attacks directed at a civilian population were defined in *Akayesu*⁴⁰. “Civilian population” was ‘defined as people not taking an active part in hostilities, members of the armed forces who have surrendered or otherwise laid down their arms, and those who, either for sickness, injury, detention or otherwise, have been placed *hors de combat*. The presence of non-civilians within a group of “civilians” as defined above, does not deny the population of its essential civilian character’.⁴¹ The *Bagilishema* Trial Chamber added, relying

³⁶ *The Prosecutor v. Tharcisse Muvunyi* (Judgment and Sentence), ICTR-2000-55A-T, International Criminal Tribunal for Rwanda (ICTR), 12 September 2006, <<http://www.refworld.org/docid/48abd529d.html>> accessed 26 August 2016.

³⁷ *ibid* 512.

³⁸ *Muhimana*, Judgement (TC), para 527; *Kajelijeli*, Judgement (TC), paras 871-872; *Semanza*, Judgement (TC), para 329; *Musema*, Judgement (TC), paragraphs 203-204.

³⁹ *Muvunyi* Case (n 36) Paragraph 512.

⁴⁰ *Akayesu*, Judgement (TC) Paragraph 582; *Musema*, Judgement (TC) Paragraph 207; *Semanza*, Judgement (TC) Paragraph 330.

⁴¹ *ibid*.

on *Blaškić*, that in determining the existence of a “civilian population” as a constitutive element of crimes against humanity, the Chamber must consider ‘the specific situation of the victim at the moment the crimes were committed, rather than his status’.⁴² The situation of the civilian population was explained further on enquiry as to whether the crime has to be committed against the entire people. The court in *Prosecutor v Bisengimana*⁴³ held that the ‘term population does not require that crimes against humanity be directed against the entire population of a geographical territory or area’.⁴⁴ Hence, it follows according to the decision in *Muvunyi* that ‘it is irrelevant whether the particular victim of a crime against humanity was a member of a listed group if it can be proved that the perpetrator targeted the civilian population on one of the enumerated discriminatory grounds’.⁴⁵

7.7 Knowledge or Mental Elements of Crimes against Humanity

Bassiouni submits that ‘the mental or subjective element is required in major crimes and in some lesser ones in almost every legal system in the world. It is considered the essential basis for the determination of criminal responsibility or culpability, depending upon whether national legal systems consider the mental element an element of responsibility or culpability’.⁴⁶

Bassiouni maintains that ‘but in all systems, it is predicated on a number of legal assumptions or presumptions, most notably freedom of will, mental capacity, and knowledge of the law’.⁴⁷

Bantekas states that ‘despite the complexities associated with the legal definition of *intent*, its

⁴² *Bagilishema*, Judgement (TC) Paragraph 79, citing *Blaškić*, Judgement (TC) Paragraph 214.

⁴³ ICTR Trial Chamber April 13, 2006 Paragraph 50.

⁴⁴ *Prosecutor v Paul Bisengimana* Case No. ICTR-00-60-T Paragraph 50.

⁴⁵ *Akayesu* (TC), para. 584; *Muhimana* (TC), para 529.

⁴⁶ M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2014) 512.

⁴⁷ *ibid* 411.

lay counterpart is not removed from its common meaning. In general terms, it means acting with a desire to bring about a particular result'.⁴⁸ Bantekas further argues that 'this broader mental element, the *dolus*, consists of a very high degree of awareness as to the necessary features of the *actus reus*, in addition to the desires to bring it about'.⁴⁹ It is pertinent to distinguish between the concepts *dolus directus* (in the first and second degree) and *dolus eventualis*. *Dolus directus* in the first degree entails that the perpetrator knows of, and wants to achieve the consequences of the criminal action. *Dolus eventualis* is a situation in which the suspect is aware that the risk of the objective elements of the crime may result from his or her actions or omissions and accepts, such as an outcome by reconciling himself or herself with it or consenting to it'.⁵⁰

Bassiouni clarifies that 'there are two doctrinal approaches to the presumption of knowledge and ignorance at International criminal law. One approach is to treat the question as part of the mental element of criminal responsibility; the other is to treat it as an evidentiary question needed to prove the mental element'.⁵¹ It is pertinent to state that Article 22 of the Rome Statute provides in its second paragraph that 'the definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'. This is a caution that crimes codified in the Rome Statute may not be broadly interpreted.

The Rome Statute does not use the two conventional concepts: *actus reus* and *mens rea*. Rather, it defines the mental element in Article 30 as follows:

⁴⁸ Bantekas (n 22) 40.

⁴⁹ *ibid* 40.

⁵⁰ Martine Boersma, *Corruption: A violation of Human Rights and a Crime under International Law* (Intersentia Ltd 2012) 323-324.

⁵¹ *ibid* 515.

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (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. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.⁵²

Despite the enumeration of the mental elements of the crimes in the Rome Statute in Article 30, it is criticised as ‘far short of covering all the issues pertaining to the mental element’⁵³. Bantekas, however, is of the view that ‘the situation of intent of the first and second degree in the context of the ICC Statute is certainly a lot clearer because the drafters of the Statute paid attention to the need to clarify the various mental states as to leave no room for arbitrary analogies or judicial innovations’.⁵⁴ According to Bantekas, ‘Article 30 of the ICC Statute is adamant from the outset that the general rule applicable to all its crimes and forms of liability will be *intent* and *knowledge*’.⁵⁵ This is an innovation which places the Rome Statute a step ahead of all the post-WWII treaties. The 1949 Geneva Conventions, the 1977 Protocol thereto, and other treaties which never contemplated the elucidation of the elements of crime creation of international tribunals.⁵⁶ Article 21 of the ICC Statute permits Article 30 to resort to other sources of law and this suggests a potential conflict in view of the provisions of Article 22.

In sum, the mental element of a crime against humanity consists of both (i) knowledge of the contextual element and (ii) *mens rea* required for the specific criminal act.⁵⁷ The decision in

⁵² Article 30 Rome Statute.

⁵³ Bassiouni (n 46) 520.

⁵⁴ Ilias Bantekas, *International Criminal Law* (Hart Publishing 2010) 42.

⁵⁵ *ibid* 42.

⁵⁶ *ibid* 41.

⁵⁷ Simeon Chesterman, ‘An Altogether Different Order: Defining the Elements of Crimes against Humanity’ (2010) *Duke Journal of Comparative Law*, 10, 314.

Bemba (confirmation of Charges Decision, para. 362) which sets aside *Lubanga* (confirmation of Charges Decision, para. 352) confirms that *dolus eventualis* was excluded from the ambit of Article 30 of the Statute. This is to argue that in considering grand corruption as an international crime, the issue of “intent” needs closer scrutiny as future convictions would depend on how far the “intent” of the accused has been established.

7.8 Does Grand Corruption Merit Inclusion as a Crime Against Humanity?

The consequences of grand corruption suggest a close affinity to crimes against humanity. It is therefore not morally contestable that the inclusion of grand corruption in the Rome Statute is desirable but is it feasible and legally achievable? Within the scope of this research, passive bribery, illicit enrichment and embezzlement are the three major aspects of grand corruption under analysis.

As espoused earlier in this chapter, article 7 (1) (k) of the ICC Statute is the platform for the argument that grand corruption merits inclusion as a crime against humanity. Article 7 (1) (k) provides ‘other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health’. According to Schabas, this is ‘where the Rome Statute leaves the door open for some evolution... the final paragraph of the list of crimes against humanity ...’⁵⁸. Does grand corruption fit into other inhumane acts of a similar character that intentionally causes great suffering or serious injury to body or to mental or physical health? Is Article 7 (1) (k) a ‘residual category, providing crimes against humanity with the flexibility to cover serious violations of human rights that are not specifically

⁵⁸ Schabas (n 1) 119.

enumerated in the other paragraphs of the definition, on the condition that they be of comparable gravity'.⁵⁹

To begin answering the questions, it is essential to emphasise that for a crime against humanity to occur under customary international law, there must be an attack against a civilian population where the attack is widespread or part of a systematic policy.⁶⁰ On the issue of the “attack”, recent jurisprudence in international criminal tribunals shows that there is no longer the need to establish links with armed conflict. According to Schabas, ‘in the celebrated *Tadic* jurisdictional decision, the Appeals Chamber of the ICTY described the nexus as obsolescent, and that there is no logical basis for this requirement and it has been abandoned in subsequent state practice with respect to crimes against humanity’.⁶¹ Crimes against humanity could happen in peace time and in war time.⁶² The argument dissociating attacks from armed conflict emerges in *Akayesu*⁶³ and *Kamuhanda*⁶⁴. The idea that a crime against humanity could happen in peace time reinforces the argument that grand corruption could fit into the category. Who then are the people capable of committing crimes against humanity? Bassiouni and Drumbl,⁶⁵ outline three types of people who commit crimes against humanity: policy makers, intermediate agents, and low-level executors. This research argues that Bassiouni and Drumbl’s classification includes that group of oligarchs inflicting pains on Nigerians through policies that impoverished and created an undue hardship on the civilians. Accordingly, ‘the policy

⁵⁹ *ibid* 119.

⁶⁰ Article 7 (1) ICC Statute; Article 5 ICTY Statute; Article 3 ICTR Statute.

⁶¹ Schabas (n 1) 109.

⁶² In *Semanza* (ICTR Appeal Chamber, May 20, 2005), the Court held that the prosecutor did not need to prove the existence of armed conflict nor does it require that the crime be committed in the context of armed confrontation.

⁶³ ICTR-96-4-Trial Chamber 1,2 September 1998 Paragraph 581.

⁶⁴ ICTR Trial Chamber, January 22, 2004 Paragraph 661.

⁶⁵ Drumbl 2007, 25; Bassiouni 2011a, 18 cited by Gwilym David Blunt, ‘Is Global Poverty a Crime against Humanity?’ (November 2015) *International Theory / Volume 7 / Issue 03 / November 2015*, 555.

makers are the most important because they are the moral authors of the crime. These are the agents who have the power to commission of the crime without having a direct connection to the material element of the crime'.⁶⁶ The deliberate diversion of \$2 billion funds meant for the fight against Boko Haram terrorists in Nigeria into private pockets was a clear case of an attack on the civilian population orchestrated by acts of grand corruption.⁶⁷ Given the jurisprudence on "attack on civilian population", it could be argued that grand corruption meets the threshold for inclusion as a crime against humanity.

Another major test to be met under Article of the Rome Statute in the contextual element of crimes against humanity is the presence of 'widespread and or systematic attack directed against any civilian population'. The definition of the terms widespread or systemic is found in *Akayesu*. A widespread attack is one that is 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.⁶⁸ Systemic is 'thoroughly organised and following a regular pattern of on the basis of a common policy involving substantial public or private resources'.⁶⁹ This element, therefore, serves to link what would otherwise be disparate acts, but given a subject like grand corruption, is very hard to establish due to its secretive nature of transactions as well as its transnational features. Perhaps, this could be the reasoning behind Schabas argument that right from the outset, 'there was no consensus on including treaty crimes within the jurisdiction of the Court and they were

⁶⁶ *ibid* 555.

⁶⁷ See 'Nigeria's Former security Chief Accused of stealing \$2b from Boko Haram Fight' *The Telegraph* (London 18 November 2015); Eva Anderson and Mathew Page, *Weaponizing Transparency: Defence Procurement Reform as a Counterterrorism Strategy in Nigeria* (Transparency International 2017)

⁶⁸ *Akayesu* Paragraph 580.

⁶⁹ *ibid* Paragraph 580

excluded at the Rome Conference'.⁷⁰ He, however, suggests that despite this, 'the possibility of amending the list of crimes at a Review Conference is explicitly foreseen'.⁷¹

The civilian population is another requirement to be fulfilled under Article 7 (1) of the ICC Statute for a crime to be categorised as an international crime. The court in *Prosecutor v Bisengimana*⁷² held that the 'term population does not require that crimes against humanity be directed against the entire population of a geographical territory or area'.⁷³ Restated in *Muvunyi*, 'it is irrelevant whether the particular victim of a crime against humanity was a member of a listed group if it can be proved that the perpetrator targeted the civilian population on one of the enumerated discriminatory grounds'.⁷⁴ It goes on to say that civilian classification is not subject to any form of territoriality. The mere fact that civilians are occupying a given locality at a given time of an incident would suffice in satisfying this condition. For example, given the grand corruption issues in Nigeria, displaced civilians living in the Boko Haram ravaged Northeast region of Nigeria would satisfy the threshold raised in Article 7 of the ICC Statute.

The requirement of knowledge and intent is another core condition for qualification as a crime against humanity. Crimes against humanity require an *actus reus* and a *mens rea* as well as the contextual elements. The contextual element of crimes against humanity differentiates a crime under international law and a crime under domestic jurisdiction. The *Kunarac* Trial Chamber of the ICTY stated that the accused must either intend to commit the offence, that his acts were part of an attack on civilians, or that he 'took the risk' that his acts would be part of such an

⁷⁰ Schabas (n 1) 96.

⁷¹ Ibid; Rome Statute Article 123 (1).

⁷² ICTR Trial Chamber April 13, 2006 Paragraph 50.

⁷³ *Prosecutor v Bisengimana* (n 44) Paragraph 50.

⁷⁴ *Akayesu* (TC) Paragraph 584; *Muhimana* (TC), Paragraph 529.

attack.⁷⁵ The ICC Statute described knowledge in the context of trials as ‘awareness that circumstance exists or a consequence will be a likely outcome’.⁷⁶ This is complemented by the requirement of intention in Articles 7 (1) (k) and 7 (2) example of the ICC Statute, at least in the context of torture, persecution, extermination, and, most importantly for our case, ‘other inhumane acts’. It is important to note that intent here does not need to be discriminatory insofar as it targets a specific person or group. There does not need to be detailed knowledge of the attack.

This seems to exclude grand corruption as intentionality of this sort does not characterise those who might harm the global poor. Hence, if we are contemplating the crime of grand corruption, the contextual element could arguably consist of the deliberate large-scale diversion of State funds. The *mens rea* requirement is very difficult to attain due to the applicable standard of Article 30 which does not cover *dolus eventualis*. Article 30 is limited to *dolus directus* in the first and second degree. This is a major threshold recognised by the ICC statute in Article 30. The case laws of *Lubanga* laid the initial controversial precedent, but was overturned by the decision in *Bemba*, which clearly deviates from *Lubanga* and re-emphasised that *dolus eventualis* is not covered in Article 30.

7.9 Conclusion

This chapter considered whether grand corruption meet the requirements of the elements of crimes against humanity to merit inclusion as an international crime under article 7 (1) (k) of the ICC Statute. It has been argued that as the definition of an attack is not contingent on the

⁷⁵ *Kunarac* (TC) Paragraph 434.

⁷⁶ Article 30 (3) Rome Statute.

presence of war or armed conflict, the crime of grand corruption cannot be dismissed. The crime of grand corruption also cannot be described as isolated, but rather forms part of a widespread and systemic policy pursued by some states.

Some scholars have objected to upgrading corruption to the status of a crime against humanity. Albin-Lackey vehemently criticises the move adding that ‘corruption as a crime against humanity argument is at best an example of serious overreaching. Such arguments often seem to reflect misguided efforts to fix a square peg into a round hole with the idea that if the ruse is pulled off, the real-world results would be good ones’.⁷⁷ Albin-Lackey criticised the seminal work of Bantekas stating that though it was well-intentioned, ‘this argument puts the cart squarely before the horse’.⁷⁸ He maintains that corruption is ‘too sprawling a phenomenon to be crammed entirely inside a human rights analysis’.⁷⁹ The views of Albin-Lackey, though meriting further examination, are not the arguments followed by this thesis. Examples of the perpetration of grand corruption in some African countries and in particular Nigeria appear to have fulfilled the requirement of being ‘inhumane acts of similar character [as acts such as murder, extermination and enslavement]⁸⁰ intentionally-causing great suffering or serious injury to body or mental or physical health’⁸¹. Scholars like Kim Lim agree that grand corruption merits inclusion as a crime against humanity under Article 7 (1) (k).⁸² Lim cites Nigeria as a state with serious grand corruption cases that should compel the international

⁷⁷ Chris Albin-Lackey, ‘Corruption, Human Rights and Activism: Useful Connections and their Limits’ in Dustin N Sharp, (eds) *Justice and Economic Violence in Transition* (Springer New York 2014) 160.

⁷⁸ *ibid* 160.

⁷⁹ *ibid*.

⁸⁰ Article 7 (1) Rome Statute.

⁸¹ Article 7 (1) (k) Rome Statute.

⁸² Kim Lim, ‘Upholding Corrupt Investors Claim Against Complicit or Compliant Host States-Where Angels Should Not Fear to Tread’ in Karl P Sauvant (eds) *Yearbook on International Investment Law and Policy 2011-2012* (Oxford University Press) 631-634.

community to act urgently and seriously in vindicating the rights of the civilians suffering from systematic and widespread attack due to grand corruption. Lim cited the case of former President Ibrahim Babangida whose loot could have prevented many deaths had the stolen funds been invested into health care, social services and other infrastructural upgrades in Nigeria.⁸³ Sonja Starr also argues like Lim that ‘grand government corruption ... the large-scale ransacking of treasuries by the heads of States and their associates ... has catastrophic consequences that are foreseeable to the perpetrators: extreme poverty, and decimated government services, resulting in widespread deaths from food-borne diseases, water-borne diseases, and HIV/AIDS... International criminal tribunals could contribute meaningfully to the fight against kleptocracy’.⁸⁴ Starr submits that there is indeed ‘strong legal argument for treating grand corruption as a crime against humanity, without necessitating the adoption of new treaties ... grand corruption could fall within the category of “other inhumane acts,” long recognised under customary international law and included in the Rome Statute’.⁸⁵ Starr clearly advocates for the ‘eventual expansion of international criminal law’s focus beyond crisis crimes’.⁸⁶ While it is not the intention of this chapter to contest international law’s crisis response and intervention in periods of extreme violence in places such as the former Yugoslavia, Rwanda, Sierra-Leone, Cambodia, Liberia, South Sudan, Libya, Congo and East-Timor, it is a nuanced view that the overt crisis focus ‘diverts attention from structural issues of global injustice and the politics of everyday life’.⁸⁷ It is apt to ask if ‘international criminal tribunals emphasised crisis situations and security threats while ignoring longer-term, systemic

⁸³ Lim (n 82) 162-163

⁸⁴ Sonja B Starr ‘Extraordinary Crimes at ordinary Times: International Justice Beyond Crisis Situations’ (2007) 101 *NorthWestern Univ.L. Rev.* 3.

⁸⁵ *ibid* 1299.

⁸⁶ *ibid* 1265.

⁸⁷ Hilary Charlesworth, ‘International Law: A Discipline of Crisis’, (2002) 65 *Modern L.Rev.*

causes of human suffering'.⁸⁸ 'Should a shift in focus enable better use of international resources?'⁸⁹ Should the facilities of the international tribunals not be fully maximised in 'addressing systemic human rights abuses committed in places that have not undergone an extraordinary crisis or political transition'?'⁹⁰ Ndiva Kofele-Kale also identified grand corruption as an international economic crime worth international codification.⁹¹

As earlier stated in this chapter, grand corruption may not have completely met the requirements of crimes against humanity, yet the argument should not be discharged as generally baseless as suggested by Albin-Lackey. Rather, the international tribunals should harness genuine claims to assess how grand corruption is harming people in real life circumstances. A step further could be taken on two prominent petitions written from Nigeria that have presented provable claims for the Prosecutor of the ICC to act on.⁹² Peter Eigen of Transparency International submits that 'corruption always inevitably causes a range of human rights abuses ... If the rights to basic health care, education and sanitary conditions are part of human rights, then corruption must be seen as a violation of the most basic economic and social rights'.⁹³

⁸⁸ Starr (n 84) 1264.

⁸⁹ *ibid* 1263.

⁹⁰ *ibid* 9.

⁹¹ Ndiva Kofele-Kale, 'The Right to a Corruption-Free Society as an Individual and Collective Human Rights: Elevating Official Corruption as a Crime Under International Law', 34 *Int'l Lawyer* 149.

⁹² SERAP in 2008 and Femi Falana in January 2016 have written well-publicised open petitions to the Prosecutor (ICC) alleging serious grand corruption cases that could fall within the definitions of crimes against humanity. While these letters were acknowledged by the Prosecutor's office, no concrete decision has been taken on it.

⁹³ Peter Eigen, 'Chasing Corruption around the World- How Civil Society organisations Strengthen Global Governance' (October 2004) Stanford Institute for International Studies < <http://iis-db.stanford.edu/evnts/3922/Eigen10'04.pdf>> accessed 10 February 2016.

Grand corruption has not been accommodated within the competence of the Rome Statute for some unstated reasons. So far, the most plausible option in accommodating the crime of grand corruption within the purview of the Rome Statute is found within Article 7, precisely, Article 7 (1) (k) of the Statute. Thus, taken together and distilled into their essential ingredients, the elements related to Article 7 (1) (k) which had been dealt with in this chapter, where satisfied, may entail that ‘the prosecution may not need to prove other additional elements constituting a specific kind of inhumane act. This is because any other “inhumane act” constitutes, under long-standing customary law, a crime against humanity’.⁹⁴ According to Starr, ‘to convict a person for an “other inhumane act” an international criminal tribunal need not define “grand corruption”, or any similar term. The charge would simply be “other inhumane acts”, although the specific material facts would have to be pleaded in indictment’.⁹⁵ How far this suggestion can go is a matter to be resolved over time through robust scholarly activism. International criminal law is still evolving and though a crisis-focused discipline, it demands urgent action from the international community to curb the menace of grand corruption. This chapter advances the claim that grand corruption merits upgrading to a crime against humanity, and submits that this argument cannot be dismissed based on the deficiency of the requisite elements. Rather, it is suggested that a holistic synergy with the crimes enunciated in Article 7 and in particular, Article 7(1) (k) of the Rome Statute, could facilitate a possible upgrade to the status of a crime against humanity.

⁹⁴ Starr (n 84) 1299.

⁹⁵ *ibid* 1299.

Chapter Eight

Summary, conclusions and recommendation

“The state shall abolish all corrupt practices and abuse of power”

Section 15 [5] Constitution of the Federal Republic of Nigeria, 1999.

8.1 Introduction

Corruption is a global scourge and the World Bank estimates that ‘about \$1 trillion dollars is paid each year in bribes around the world, and the total economic loss from corruption is estimated to be many times that number’.¹ The bribery aspect of corruption is not the only aspect. This research emphasises other aspects like illicit enrichment and embezzlement.² Furthermore, the ‘World Bank estimates that each year US\$ 20 to US\$ 40 billion, corresponding to 20% to 40% of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas’.³

The purpose of this research, therefore, is to appraise the concept of grand corruption in Nigeria from the lens of international human rights and international criminal law. Broadly, the researcher used four research questions in the thematic framing of the research:

RQ1. How can grand corruption violate human rights in Nigeria?

RQ2. How have existing international, regional and domestic legal frameworks facilitated efforts at combating grand corruption?

¹See < <http://www.worldbank.org/en/topic/governance/brief/anti-corruption>> accessed 16 December 2016.

² United Nations Convention against Corruption, adopted 31 October 2003 and entered into force 14 December 2005. Articles 16, 17 and 20.

³ <https://www.oecd.org/cleangovbiz/49693613.pdf>> accessed 24 August 2016.

RQ3. How can international criminal law conceptualise grand corruption as a crime under international law prosecutable as a crime against humanity?

RQ4. Why are violations of socio-economic rights less susceptible to international criminalisation?

Appendix vi dealt with the methodology and the participants' responses to the thirteen interview questions. The interview questions derived directly from the research questions and showed the elite's perceptions on various issues relating to grand corruption in relation to international human rights and international criminal law. The thematic findings in line with the analysis of the four research questions are presented below:

8.1.1 RQ1. How can grand corruption violate human rights in Nigeria?

Within scholarly literature, there are arguments suggesting that some human rights are violated by grand corruption. However, the question in this research is the question of how corrupt acts violate human rights in Nigeria? The former Irish President and United Nations High Commissioner for Human Rights, Mary Robinson argues that 'analysing corruption in the light of its impact on human rights could well strengthen public understanding of the evils of corruption and lead to the stronger sense of public rejection'.⁴

The thirteen interviewees in this research unanimously agreed that grand corruption violates human rights in Nigeria. Similarly, the response by the interviewees that grand corruption violates human rights is in agreement with the views of the United Nations that corruption leads to violation of the government's human rights obligation, '... the corrupt management of public resources compromises the government's ability to deliver an array of services, including

⁴ Mary Robinson quoted in Transparency International (TI), Global Corruption Report, Berlin (2004).

health, educational and welfare services, which are essential for the realisation of economic, social and cultural rights'.⁵

It is imperative to review the various connections between corruption and human rights as well as the oppositions that exist against making such a crucial connection. This entails focusing on the realisation of socio-economic rights as well as civil and political rights. This research emphasised the impact of grand corruption on socio-economic rights because these rights are still not justiciable in Nigeria. The African Charter on Human and Peoples Rights, as expressed in the preamble, affirms that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'⁶ and presumes a binding obligation on courts in Nigeria to hold the rights and obligations enacted by it enforceable. In recognition of this, Nwodo J, of the Federal High Court ruled that Chapter II rights such as the right to health of prison inmates can be enforced by the court through the provisions of the African Charter.⁷ The African Charter, in its preamble, cited earlier in this chapter, recognises socio-economic rights of individuals from member states. This guarantee becomes conditional in light of international law, which suggests that states can only be held accountable for the obligations they voluntarily assume through ratification of international and regional human rights treaties, as well as their constitutional and statutory provisions. This research contests this principle in that it gives states leeway to abdicate their responsibility if they fail to ratify international

⁵ United Nations Office of the High Commissioner for Human Rights 'Human Rights and Anti-corruption'
<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx>
accessed 13 March 2016.

⁶ Preamble to the African Charter, Paragraph 8 and now domesticated in Nigeria as Formerly Cap 10 LFN 1990 now Cap A9, LFN 2004 (African Charter Act).

⁷ *Odafe and others v Attorney General of the Federation* [2004] (AHRLR) 205 at 211 <
<http://www.chr.up.ac.za/index.php/browse-by-country/nigeria/419-nigeria-odafe-and-others-v-attorney-general-and-others-2004-ahrlr-205-nghc-2004.html>> accessed 01 September 2016.

treaties that oblige them to ensure the satisfaction of socio-economic rights of their citizens. It is noteworthy that a violation of a human right occurs only when a state fails to act in order to fulfil its obligation to respect, protect, fulfil, and recognise the human rights of persons in its jurisdiction. In essence, the practical conduct of a state is assessed in relation to the effort they are making to ensure their behaviour is in order and guided by the prevailing international standard. The terms “breach” and “violation” should only be applied where a legal obligation clearly exists.

The recognition of socio-economic rights as an essential component of human rights is no longer in contention. Nigeria is a signatory to many international and regional treaties that oblige states to ensure the recognition, respect, protection and fulfilment of the human rights of its citizens. To what extent does the preponderance of grand corruption constrain the Nigerian government’s ability to fulfil its obligation regarding the realisation of the socio-economic rights of its citizens according to the stipulations of ratified international and regional treaties? It is apparent that grand corruption plays a vital role in the inability of the Nigerian government to fulfil its obligations of respecting and fulfilling certain human rights of the citizens. The situation in Nigeria as espoused in this thesis is that the courts have not developed a consistent jurisprudence regarding the fulfilment of socio-economic rights having relied on restrictive rather than purposive interpretations of the Constitution and case laws. Thus, issues relating to the realisation of socio-economic rights in Nigeria remain aspirational and open to diverse judicial interpretation until the Constitution is amended. Notwithstanding, the argument of the thesis is in agreement with United Nations Human Rights (Office of the Commissioner) that:

The corrupt management of public resources compromises the government’s ability to deliver an array of services, including health, educational and welfare

services, which are essential for the realisation of economic, social and cultural rights. Also, the prevalence of corruption creates discrimination in access to public services in favour of those able to influence the authorities to act in their personal interest, including by offering bribes. The economically and politically disadvantaged suffer disproportionately from the consequences of corruption because they are particularly dependent on public goods.⁸

8.1.2 RQ2. How have existing international, regional and domestic legal frameworks facilitated efforts at combating grand corruption?

Research question two (number 2) seeks to understand how international, regional and domestic legal frameworks assist in combating grand corruption. The literature cited in this research indicates that there are multiple ways that the existing legal frameworks at all levels have facilitated the battle against grand corruption. From the commencement of UNCAC to the AU Convention, and down to the domestic acts of Nigeria (EFCC Act and ICPC Act), all efforts have been made to tackle corruption legally. The areas of international co-operation in terms of information and intelligence gathering, personnel training as well as tracing and repatriation of stolen public fund have yielded appreciable results. However, these legal frameworks have not been without technical challenges. For instance, there are no enforcement mechanisms, no specialised anti-corruption police, no special anti-corruption courts, and mostly, budgetary constraints among others frustrate the functioning of the legal frameworks.

The recommendation of this research is for the government to streamline the existing legal frameworks and institutions. There is also the need to delineate the borders of the law to avoid duplication, infringement and convolution of functions. The mandate of EFCC, ICPC and Code of Conduct Bureau (CCB) criss-cross one another in many instances and where an agency is

⁸<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx>
> accessed 24 August 2016.

not sure of its functions, it indirectly affects its performance and leads to the erosion of public confidence. The government needs to incorporate all the ratified treaties into domestic law in order to ensure their domestic application.

8.1.3 RQ3. How can international criminal law conceptualise grand corruption as a crime under international law to be prosecuted as a crime against humanity?

Considering that ‘crimes against humanity bear the strongest relationship with human rights, principally consisting of the most serious offences against human dignity’,⁹ there are sufficient grounds to conceptualise grand corruption as a crime against humanity and for it to be prosecuted as such. It continues to be a subject of contemporary global economic, political, social and cultural debate that grand corruption indirectly causes untold hardship to the citizens of a country where it was perpetrated. Its effects, no doubt, cause great suffering, serious injury to the mental and physical health of those affected as ‘it weakens the ethical fabric of the civil service and prevents the emergence of well-performing government capable of developing and implementing public policies that promote social welfare’.¹⁰

The case of Nigeria is a classic example of the vulnerable suffering untold hardship as a result of grand corruption ravaging the country. It has led to the inability of the government to provide basic social services, infrastructural development, employment for the youth population, good health care and free education. It is so devastating that the current President of Nigeria,

⁹ Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 740.

¹⁰ The World Bank, ‘Helping Countries Combat Corruption: The Role of the World Bank’ <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 28 September 2016.

Muhammed Buhari, has said that, ‘Nigerians need to kill corruption or corruption will kill the country’.¹¹

However, notwithstanding scholarly efforts at establishing causal links between grand corruption and the inhumane acts as captured in Article 7 (1) (k) of the Rome Statute, there are some legal technicalities that need to be satisfied before grand corruption can be conceptualised and prosecuted as a crime against humanity. For instance, satisfying the elements of crimes against humanity and also elements of “other inhumane acts” as encapsulated in Article 7 (1) (k). In particular, “other inhumane act” has been criticised by William Schabas who states that ‘this category lacks precision and is too general to provide a yardstick’.¹² Despite the challenges of surmounting the threshold of “other inhumane acts” Sonja Starr asserts that the consequences flowing from grand corruption acts demand a concerted effort in demanding the international criminalisation of grand corruption. Starr points out that ‘if a population is sufficiently vulnerable and a diversion of funds sufficiently large relative to the total amount available to serve the population’s need, it is clear that great suffering or health injury will follow from the diversion in the ordinary course of events’.¹³ The research argues that a further enlargement of the scope of “other inhumane acts” and the precise listing of its constituents could benefit the concept of grand corruption in attaining the status of an international crime.

¹¹ See ‘British High Commissioner, Paul Ackwright Speaks on the UK Perspective on Anti-Corruption (2 February 2016) < <https://www.gov.uk/government/world-location-news/british-high-commissioner-paul-arkwright-speaks-on-the-uk-perspective-on-anti-corruption>> accessed 28 September 2016.

¹² William Schabas, *An Introduction to International Criminal Law* (University Press Cambridge) 109.

¹³ Sonja Starr, ‘Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations’ 101 *Northwestern University Law Review* 1257 (2007) 1281.

8.1.4 RQ4. Why are violations of socio-economic rights less susceptible to international criminalisation?

The fourth research question relates to the reasons for socio-economic rights being less susceptible to international criminalisation. Socio-economic rights in international law as earlier defined in this research ‘include a variety of rights, such as: (i) the right to work and to just and favourable conditions of work; to rest and leisure; to form and join trade unions and to strike; (ii) the right to social security; to protection of the family, mothers and children; (iii) the right to an adequate standard of living, including adequate food, clothing and housing; (iv) the right to the highest attainable standard of physical and mental health; (v) the right to education; and (vi) the right to participate in cultural life and enjoy the benefits of scientific progress’.¹⁴ Considering the scope of socio-economic rights, why is it less susceptible to international criminalisation? As argued in chapter six, socio-economic rights, unlike civil and political rights have retained second-rank status in practice and this results in the lower status accorded to them in most domestic legal frameworks. Further, international criminal law is overtly crisis focused.¹⁵ Starr proffers three reasons for the crisis-focus nature of international criminal law, ‘its historical and doctrinal roots, the theories used to support international criminalisation, and the mechanisms by which the tribunals come into existence and take jurisdiction over cases’.¹⁶ This research argues that the basic necessities of life classified as socio-economic rights are not realised in Nigeria owing to the consequences of grand corruption, including within the justice system. According to Justice Nwali (JSC) ‘if the medical facilities are not available locally to meet their medical needs, it is only because due to corruption in high places the

¹⁴ See the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, entered into force 3 January 1976 (Annex A).

¹⁵ Starr (n 13) 1266.

¹⁶ *ibid* 1266.

country cannot build proper medical facilities equipped with the state of the art gadgets'.¹⁷ Inferring from the point of view of Justice Nwali and the high incidents of official looting in Nigeria, it is argued that there is causal links between the non-realisation of socio-economic rights and grand corruption. Moreover, the arguments made here and in chapter five attempts to answer research question no 4 by suggesting that the progressive nature ascribed to socio-economic rights is an indication of the lip-service paid to the presumed interrelatedness, interdependence and indivisibility of all human rights. In reality therefore, socio-economic rights are accorded second-rank status compared to civil and political rights. This explains why violations of socio-economic rights are less susceptible to international criminalisation.

The lower status accorded to socio-economic rights in domestic legislations is evidenced in the 1999 Nigeria Constitution where chapter II classifies them as “Fundamental Objectives and Directive Principle of State Policy” rather than as “Fundamental Rights”. However, as argued in chapter three of this thesis, enforceability of socio-economic rights in Nigeria may still be realisable given certain defined parameters. Hence, the recommendation is that socio-economic rights should be made justiciable.

8.2 Recommendations

The responses on the theme from the semi-structured interviews as well as the review of other scholarly work underscores the formulation of the following suggestions and recommendations:

¹⁷ *Dariye V FRN* [2015] LPELR-24398 (SC) 34-35.

8.2.1 Legal and Institutional Reform

There is currently no single panacea to the scourge of grand corruption in Nigeria. However, it appears that the fundamental remedy is legal and institutional reform. There is evidence that weak institutions sustain corruption, while weak justice systems help to consolidate it. This research recommends the strengthening of Nigeria's legal and institutional framework to reflect global best practices and standards. The research recommends legal reform to enact proactive laws that respond to present realities and dynamics of society. In particular, it recommends the strengthening of the anti-corruption institutions, especially the EFCC and the ICPC. It proposes the merger of the two major anti-corruption agencies. The merger would help to streamline the functions of the agencies, foreclosing the gaps and institutional lapses which impede their success. The 1999 Constitution of Nigeria should be reviewed to expunge offensive clauses like Section 308 that provided the "immunity clause" for serving government officials. This provision of the Constitution has hindered the efforts to combat grand corruption in Nigeria as serving government officials could not be prosecuted while still in office.

8.2.2 Judicial Reform

This research recommends the overhaul of the judicial system which, as it stands, aids corruption through direct involvement in bribery by judicial officers as well as through using legal technicalities to defeat the course of justice.¹⁸ An example is the backlog of high-profile corruption cases pending in different courts for a number of years. The sentencing of Mr Ibori in London after he had been exonerated by a Nigerian court exposes judicial complicity and makes strong case on the need to embark on judicial reform. Moreover, the pending court cases

¹⁸ See 'Nigerian Supreme Court Judge Charged with Corruption' *BBC News* (London 21 November, 2016).

against judges involved in high-profile bribery and illicit enrichment makes good case for thorough judicial reform. Moreover, a recent publication of “National Corruption Survey” by the National Bureau of Statistics restates that the judicial system is the second most corrupt public bodies in Nigeria.¹⁹ This research, among others, recommends judicial overhaul involving innovations and activisms like mandatory retirement of corrupt judges, training and re-training of judges for specialised roles to enable them to imbibe the principles of international best practices in combating grand corruption.

8.2.3 Global Cooperation

The research recommends international collaboration as essential for combating corruption partly due to the lack of success by the Nigerian government. The research has given examples of public funds stolen from Nigeria and laundered abroad, and recommends that only collaboration with international bodies and institutions could facilitate repatriation of such funds. For example, cooperation with Switzerland, United Kingdom, USA, and Luxembourg have already yielded results and these countries have commenced repatriating illegal funds deposited by corrupt Nigerian government officials. The recommendation, therefore, is that Nigeria should intensify efforts at international cooperation in areas of intelligence gathering, tracing, and training in order to maximise the international gains arising from such

¹⁹ National Bureau of Statistics ‘National Corruption Survey: Corruption in Nigeria- Bribery as Experience by the Population Vol. 1 (2017) < file:///C:/Users/user/Downloads/NBS_NATIONAL_CORRUPTION_SURVEY_2017_RECOVERED%20VOLUME%201_.pdf > accessed 01 September 2017.

collaborations. Such cooperation has ensured high-profile prosecutions like James Ibori²⁰ in the UK and Dan Etete of Malabu Oil & Gas in France and the UK²¹.

8.2.4 International Criminalisation

The research recommends international criminalisation and upgrading of grand corruption to be at par with other core international crimes. This would ensure that there would be no hiding place for corrupt Nigerian officials. The research recommends further that efforts should be made by the government to support the upgrading of grand corruption to an international crime. Nigeria as a party to the ICC, having ratified the ICC Statute and in line with the anti-corruption policies of President Buhari's administration should be at the forefront of the campaign to upgrade the status of corruption to an international crime.²²

8.2.5 Expedited Prosecutions

The unresolved high-profile cases in Nigeria continue to undermine efforts at combating grand corruption. This research proposes an expedited prosecution procedure and recommends the establishment of specialised anti-corruption courts to fast-track prosecutions. Statistics from the anti-corruption agencies, especially the EFCC, show a worrying list of pending high-profile cases.²³ Grand corruption cases awaiting prosecution include the case of the current Senate

²⁰ *R v Ibori* (James Onanefe) [2013] ECWA Crim 815; [2014] Cr. App. R. (S.) 15; See Stolen asset Recovery Initiative < <http://star.worldbank.org/corruption-cases/node/19585>> accessed 24 August 2016.

²¹ *Energy Venture Partners Limited v Malabu Oil and Gas Limited* [2014] ECWA Civ 1295.

²² Nigeria could achieve this using the review mechanisms in Article 123 of the Rome Statute.

²³ See < http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Ibori_Nigeria_EFCC_High_Profile_Cases.pdf> Accessed 24 August 2016.

President, Bukola Saraki (case on appeal by the federal government), some sitting Judges, past State Governors, prominent serving and retired public officials and, other cases that originated from the scandal of the missing National Security funds and Nigeria National Petroleum Corporation funds. It is the recommendation that these cases should be fast-tracked.²⁴

8.3 Limitations of Research

Resource constraints affected the design of the study, so was a major limitation of the research as this made findings from the research field work limited to selected elites and confined to Abuja and Lagos, Nigeria. Moreover, as with most qualitative research, the researcher's bias and subjectivity presented an issue. The researcher was aware of the issues, especially the bias entering into the data collection and analysis. Hence, the researcher took measures to ensure that the data collection and analysis were not tainted with researcher's bias and subjectivity. Some of the precautionary measures taken include the recording of the interviews and taking field notes. Given these constraints, the research findings may not be generalizable. However, the research highlights some important trends and dynamics within the elite sample group. This research assessed grand corruption within the ambit of international human rights and international human rights law. It did not analyse other forms of corruption, for instance, petty corruption and therefore the research does not claim to be holistic nor is the data generalizable.

8.4 Opportunities for Future Research

Having outlined the gains and limitations of this research, I suggest that future research could undertake the mixed research method and triangulation in order to assess more data during field

²⁴ In the case of *Taiye Oshoboja v Alhaji Surakatu Amida & ors* [2009] 12 SC (pt 11) 107, the Supreme Court ruled that it is the duty of the court to discourage prolonged litigation.

work. Also, a comparative study of other African countries like Guinea Bissau, Guinea and South Sudan could help to diversify and generalise the findings of this research.²⁵

A further study on whistle-blowing as a tool for combating grand corruption, the impact of grand corruption on gender, children's rights and minority rights are other areas that have been under-researched and which future research could explore.

8.5 Contribution to Knowledge

This research has taken an empirical, country-specific, and interdisciplinary approach in addressing the concept of grand corruption within the context of international human rights and international criminal law. The use of elite interviews increases the validity of the research data, accentuates the richness of the study and increases its originality. As a result, the research findings enhances our knowledge and understanding of grand corruption within an endemic country-specific context. This research also extends other similar research findings and contributes to the ongoing and evolving scholarly engagement in grand corruption particularly in emerging economies. It is a pointer to future and emerging researchers who might have interest in researching grand corruption within socio-legal or legal doctrinal context. This research has highlighted the normative gaps in international criminal law and international human rights law in relation to the treatment of socio-economic rights, in particular, its direct relationship with grand corruption. The research is also a valuable guide to governments, national and international policy makers.

²⁵ The 2016 Corruption Perception Index lists Guinea Bissau, Guinea and Sudan as the most corrupt African States.

Finally, although other scholars have written on grand corruption and human rights,²⁶ it has been on a general, global and doctrinal sphere and it is hoped that the result of this study will attract other researchers to the field.

8.6 Summary

This research subjected the concept of grand corruption to intense academic scrutiny by interrogating case law, treaties, and other relevant legal human rights instruments. It particularly examined the impact of grand corruption upon human rights, as well as the analysis of accountability processes at the domestic level.

Grand corruption, owing to its devastating consequences, work against the realisation of certain human rights, and since human rights are worthy of protection, the onus is on international criminal law in conjunction with other regional and domestic legal systems to promote the requisite protection of such human rights. Nigeria's endemic corruption suggests that combating grand corruption is beyond the capacity of a nation-state and reinforces the urgent need for international collaboration and intervention. The recommendations suggested in this

²⁶ Chris Albin-Lackey, 'Corruption, Human Rights and Activism: Useful Connections and Their Limits' in Dustin N Sharp (eds) *Justice and Economic Violence in Transition* (Springer 2013) 148; Martine Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (Intersentia 2012) 195; Ndiva Kofele-Kale, 'Economic Crimes and International Justice; Elevating Corruption to the Status of a Crime in Positive International Law' (2009) Centre for Human Rights and Democracy in Africa <http://fakoamerica.typepad.com/files/kofele-kale-keynote-address.pdf> >accessed 10 March 2016; Zoe Pearson, 'An International Human Rights approach to Corruption', in Peter Larmour & Nick Wolanin (ed) *Corruption and Anti-Corruption* (Asia Pacific Press 2001) 50; Raj Kumar, 'Corruption and Human Rights: Promoting Service in India' (2003) *Columbia Journal of Asian Law*, 17, 31-72; Laurence Cockroft, 'Corruption and Human Rights: A crucial Link' (1998) Working Paper <file:///C:/Users/user/Downloads/Corruption%20and%20Human%20Rights_a%20crucial%20link%20_TI%20Working%20Paper_.pdf> 12 March 2016.

study could help in combating grand corruption while also helping in the realisation of human rights especially socio-economic rights.

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SCOIL TAIGHDE IARCHÉIME / GRADUATE RESEARCH SCHOOL
Professor Mary McNamara

14th March 2016

Florence Anaedozie

Re: Ethical Clearance Ref 15-91

Dear Florence,

I am pleased to inform you that the following project:

*'A Critical analysis of grant corruption with reference to international human rights
and international criminal law: the case of Nigeria'*

which you submitted to the Research Ethical Committee has been approved. The committee would like to wish you very best of luck with the rest of research project. If you have any further queries, please do not hesitate to contact Aisling Heyenga on (01) 402 7920 or at aisling.heyenga@dit.ie.

Yours sincerely

Aisling Heyenga
Dublin Institute of Technology
Research Ethics Committee

Appendix ii: Introductory Letter



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Dublin Institute of Technology, Aungier Street, Dublin 2, Ireland
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AN ROINN DLÍ / DEPARTMENT OF LAW:

TO WHOM IT MAY CONCERN

I am writing to confirm that Florence Nkem Anaedozie is currently a registered PhD student at the Dublin Institute of Technology (DIT). The title of the PhD thesis is: 'A Critical Analysis of Grand Corruption with Reference to International Human Rights and International Criminal Law: The Case of Nigeria.' The undersigned is principal PhD supervisor for this research project.

For the purposes of this research, Florence Anaedozie is conducting interviews in Nigeria in the period from May 30th to June 5th 2016 with the approval of the Research Ethics Committee of the DIT. I would appreciate any assistance you could provide in facilitating the research being conducted by Florence Anaedozie. I would be happy to provide any further reference or information you may require in this regard.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Stephen Carruthers'.

Dr Stephen Carruthers

9th May 2016

Email: Stephen.carruthers@dit.ie

Tel: 00353-(0)1- 4023085



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AN ROINN DLÍ / DEPARTMENT OF LAW:

CONSENT FORM

Title of Research project: A Critical Analysis of Grand Corruption with Reference to International Human Rights and International Criminal Law: The Case of Nigeria.

Researcher's name: Florence Nkem Anaedozie (Tel 353899596592)

Names of supervisors: Dr Stephen Carruthers (Law Department)
Dublin Institute of Technology
Email: Stephen.caruthers@dit.ie, Tel: (+353) 14023085.

Names of supervisors: Dr Kevin Lalor,
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Dublin Institute of Technology
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The purpose of the research is to analyse grand corruption in Nigeria in relation to international human rights and international criminal law, with the aim of interrogating how grand corruption violates human rights and how international criminal law can assist in combating grand corruption.

If you agree to participate in this project, you will take part in a semi-structured interview. This interview will focus on your expert views on corruption and is not about actual causes of corruption in Nigeria. It will last for approximately 30 minutes in a designated venue chosen by you.

The information will be gathered using a tape recorder and personal jotted notes. The data generated will be used by the researcher for the purpose of completing her PhD dissertation, and as the basis for published academic scholarship. However, all the information you will provide will be treated with strict confidentiality and to ensure maximum security, the data will be encrypted in my working laptop. This means that you will not be identified through the research work; assumed names will be used to protect your confidentiality. All the data from the interview (transcript) will be encrypted and kept in a locked cabinet in Dublin Institute of Technology (DIT). Data (transcript) are available to you on request at any time during the course of the research. At the end of the project all identifying information will be deleted/destroyed in keeping with the laws of the institution.

Appendix iv

Sample Interview Questions

A, How would you define grand corruption and how would you assess the level of grand corruption in Nigeria considering the Transparency International's Corruption Perception Index rating of Nigeria in 2015?

B, How would you assess the impact of grand corruption on human rights and do you think that grand corruption violates human rights?

C, How do you evaluate the international, regional and domestic legal frameworks on corruption using Nigeria as a reference point?

D, In your opinion, what drives the preponderance of grand corruption in Nigeria?

E, what do you think encourages judicial corruption in Nigeria?

F, Can you suggest how the justice system can effectively tackle grand corruption in Nigeria? Can you also suggest lessons to be learnt from the justice system of the state of South Africa in the recent President Zuma's case and also Israel after the sentencing of their former Prime Minister- Ehud Olmert?

G, How can anti-corruption agencies in Nigeria fight grand corruption more efficiently?

H, How would you suggest the financial institutions should contribute in fighting grand corruption in Nigeria? Do you think that repatriating proceeds of grand corruption as done by countries like Switzerland has helped in the battle against grand corruption?

I, Would you support an international approach in combating grand corruption?

J, In your opinion, do you think that making grand corruption an international crime could help combat grand corruption in Nigeria?

K, Would you advocate for the establishment of a national anti-corruption court and anti-corruption hotline?

L, How effective are the legal protection for whistle-blowers in Nigeria?

M, How would you assess the Administration of the Criminal Justice Act, 2015?

N, How would you rate the prosecution of high-profile individuals involved in cases of grand corruption and would you argue for allocating more fund into the investigation and prosecution of corruption cases in Nigeria?

O, How would you react to the insincerity surrounding disclosure of financial interests including asset declaration by top civil servants and politicians in Nigeria?

P, what is your opinion on the views of Transparency International that “Missing revenues are depriving Nigerian citizens of a fair share of this wealth that could go to improving health, education and creating employment for the youth”?

Appendix v

List of Personal Publications

Anaadozie Florence, 'Has Systemic Grand Corruption Shaped Boko Haram's Terrorist Landscape in Nigeria'? (2015) *Journal of Innovative Research and Development*, Volume 4, Issue 5.

Anaadozie Florence, 'Is Grand Corruption the Cancer of Nigeria? A Critical Discussion in the Light of an Exchange of Presidential Letters' (2016) *European Scientific Journal*, Vol 12, No 5.

Anaadozie Florence, 'Has the Emergence of Female Suicide Bombers in Nigeria Depicted the Exploitation of Feminine Vulnerability? A Critical Appraisal of Boko Haram's Female Suicide Bombers in Nigeria' (2016) *Journal of Innovative Research and Development*, Volume 5, Issue 3.

Anaadozie Florence, 'Combating Grand Corruption in Nigeria from the Lens of the Administration of Criminal Justice Act 2015: Progression or Retrogression'? (2016) Paper Presented at the Socio-Legal Studies Conference (SLSA) 2016, The Lancaster University.

Anaadozie Florence, 'Exploring the Linkages between the Military and Grand Corruption in Nigeria. A Constitutional Aberration'? (2016) A Paper accepted for Conference Presentation at the African Studies Association of the UK (ASAUK) Conference, University of Cambridge.

Appendix vi

Grand Corruption: Methodology and Analysis of Empirical Field Work

This appendix presents the research methodology and findings from the data collected from field work which involved conducting interviews with thirteen selected elite Nigerians living in Lagos and Abuja, Nigeria. The sample is not intended to represent people in high economic, social or political standing, but rather special people were chosen because of who they are and the positions they occupy and for particular reasons relating to the research.

The purpose of elite interviews, according to Jennifer Hochschild is ‘to acquire information and context that only that person can provide about an event or process: ...’.¹ The use of the elite interviews aims at eliciting the opinion of those specialised personnel on issues around grand corruption in Nigeria in particular, how they ‘understand and explain the trajectory of the event or process’.² The elite interviews can also give substance to prior analyses pursued in the previous chapters of this research from their views on the viability of institutional mechanisms operating in Nigeria. Qualitative, interpretive analysis enabled me to elicit themes and categories emerging from the response of the participants. To ensure reliability and validity of the interview data, I reviewed the validity by presenting the results of the data transcripts to the original participants and received feedback and correction from the interviewees.

The sample size of thirteen participants satisfies the concept of saturation in research sampling.³ After obtaining approval from The Dublin Institute of Technology Research Ethics

¹ Jennifer Hochschild, ‘Conducting Intensive Interviews and Elite Interviews’ (2009) Workshop on Interdisciplinary Standards for Qualitative Systematic Research <<http://scholar.harvard.edu/jlhochschild/publications/conducting-intensive-interviews-and-elite-interviews>> accessed 02 May 2016.

² *ibid.*

³ Barney Glaser and Anslem Strauss, *The discovery of grounded theory: Strategies for qualitative research* (Aldine Publishing Company 1967) cited in Mark Mason, ‘Sample Size and PhD

Committee (Appendix i) and having secured approval for the funds for the fieldwork, the fieldwork began (Appendix ii: field trip introductory letter).The thirteen semi-structured interviews (appendix iv: sample interview questions) were conducted from May-June 2016 in (Abuja and Lagos) Nigeria, exploring elite individual’s views on corruption. The reason for selecting Abuja and Lagos for this case study is that most of the federal ministries, donor agency offices and non-governmental organisations of interest are located in the present and former capital cities (Abuja and Lagos). The interviewees (Appendix iii: consent letter) were asked similar questions with the aim of decoding their attitudes, perceptions and expectations. The research data was then transcribed, coded and analysed to discover existing conceptualisations of grand corruption within the target expert groups. The end result reflects the views of experts on issues around grand corruption in the public sector in Nigeria.

Table Appendix vi/1 provides a brief overview of the thirteen interviews with government ministries/departments, donor agencies, academia, non-governmental organisations and the other stakeholders. Names and other identifiers have been removed from the data throughout in order to ensure participant anonymity.

Table Appendix vi/1

SECTOR	DEMOGRAPHY/EXPERTS	INTERVIEWS
NON-GOVERNMENTAL ORGANISATIONS	Organisational heads	4

Studies Using Qualitative Interviews’ (2010) Forum Qualitative Social Research, Vol 11, No.3, Art. 8. The concept of saturation in research implies when the collection of a new data does not shed any further light on the subject of investigation.

GOVERNMENT	Higher/middle Management	4
MINISTRIES/DEPARTMENTS		
OTHER STAKEHOLDERS	Elites in academia, industry and business	5

The researcher used manual coding and transcription in analysing the interview data generated in the study. Hence, I did an open coding using line by line assessment of the data to generate codes. This exercise is extremely time-consuming but has the benefit of identifying many rich concepts and maintaining a very close tie with the data. The coding process involved recognising an important moment and encoding it prior to a process of interpretation. Open coding helps the researcher to break apart and separate the data analytically, leading to thematic conceptualisation. The themes identified in the transcripts were accordingly organised into sub-themes because using themes as an analytic device is a useful way of scaling up analysis and aligning it with the research questions. The elite interviews explored the core of socio-legal interaction in order to capture the dynamics of grand corruption in social, economic, cultural, political, and legal systems. The expert views are of prime importance because they are better informed, more vocal and are generally, the opinion leaders. The expert views are also considered adequate to give a qualitative texture to the perceptions of citizens within the context of the research.

Appendix vi/1 Social Characteristics of Respondents

A total of thirteen participants were interviewed as mentioned earlier. Ten were men and three were women and all aged 25-67 years. All the participants were university graduates from various disciplines and have an average of six years working experience in anti-corruption and allied projects.

Participant's Profile: Table Appendix vi/2

<i>Participants</i>	Gender	Age	Academic Qualification	Occupation/Business
<i>P1</i>	Male	48-55	University Degree	Public Service Executive
<i>P2</i>	Male	60-65	University Degree	Legal practitioner
<i>P3</i>	male	50-59	University Degree	Civil Society Executive
<i>P4</i>	Male	45-55	University Degree	Civil Society Executive
<i>P5</i>	Male	43-50	University Degree	Civil Society Executive
<i>P6</i>	Male	28-35	University Degree	Legal Practitioner
<i>P7</i>	Male	48-55	University Degree University Degree	Academia
<i>P8</i>	Female	26-32	University Degree	Public Service Executive
<i>P9</i>	Female	35-40	University Degree	Civil Society Organisation
<i>P10</i>	Female	50-55	University Degree	Academia

<i>P11</i>	Male	48-55	University Degree	Academia
<i>P12</i>	Male	32-36	University Degree	Academia
<i>P13</i>	Male	32-36	University Degree	Academia

Appendix vi/2 Presentation of Findings

The findings of the research field trip which derive from data analysis will be presented in nine recurrent themes and categories. These themes and categories originate from the thematic coding of the interview transcripts, a reflection of the views of the interviewees.

The views expressed by each interviewee where highlighted will be presented using interviewee identifier captions “P1-13”, representing the aggregate numbers of all the interviewees. The reason for this is to preserve participant’s confidentiality.

The themes that emerged are:

1. Understanding the meaning of grand corruption.
2. Perception of corruption in Nigeria by Transparency International.
3. Causes of Grand Corruption in Nigeria.
4. Judicial Corruption.
5. Law Reform
6. International Criminalisation of Grand Corruption
7. Human Rights and Grand Corruption
8. Prosecution of High-profile Corruption cases in Nigeria.

9. Institutional Frameworks.

Appendix vi/2a Understanding Grand Corruption

Most of the interviewees understood the meaning of grand corruption as the type of corruption that occurs at the top echelon of governance. They were able to relate the meaning with vivid examples from Nigeria. For instance, the first question was “how would you define grand corruption?” Interviewee no P5 defined grand corruption as “a condition of pervasive and systemic financial indiscretion at the highest official levels of governance at both public and private sectors, which disregards due process, transparency and citizen rights to good governance and consequently bleed public finances and increases all costs in an economy”. Across the interviewees, there is a consensus that grand corruption happens at the apex level and mostly in the public sector. Interviewee no P5 extended the definition of grand corruption to the private sector. However, some contested the use of the term “grand” arguing that there is really no rationale why the prefix should be added to the term “corruption”. According to one of the interviewees, it was the categorisation of the concept that has sabotaged the battle against corruption. The participant argues further that people now indulge in other forms of petty corruption because the categorisation means that weight should be attached only to big corruption. In essence, the classification takes a top-bottom approach rather than the bottom-top approach. As argued in chapters one and two of this thesis, there is no universally accepted definition of the term “corruption”, yet, the meaning of “grand corruption” was understood by all the interviewees.

Appendix vi/2b Perception by Transparency International (TI)

The participants agreed wholly with the results of the annual survey by TI in Nigeria. All the participants unanimously support TI's ranking of Nigeria as an authentic reflection of Nigeria's state of affairs. According to TI in 2016, with an index score of 28, Nigeria is the 136th least corrupt nation out of the 176 countries surveyed. Nigeria is also the 3rd most corrupt country in West Africa after Guinea and Guinea-Bissau according to the 2016 Corruption Perception Index that measures corruption in the public sector. The measurement is based on a scale of index score 0 to 100 (a score of 0 is "very corrupt" and 100 is "very clean"). This record is a point higher than previous Nigeria's best ranking on TI's corruption Perception Index (CPI). Nigeria was ranked 144th in 2013, 139th in 2012 and 143rd in 2011 with the 2016 position surpassing that of 2013 by eight places.

What is the implication of this for the fight against corruption in Nigeria? It shows an improvement on the corruption rating of Nigeria but on closer critical analysis, it does not really look good for Nigeria. Placed on a comparable plane with a country like Norway with similar deposit of natural resources, it becomes clear that Nigeria really has not had a very impressive performance. Norway has consistently ranked as one of the least corrupt countries in the world. Why is the "natural resource curse" or the "Dutch disease syndrome" not applicable to Norway? It goes to show that there is an urgent need for institutional reform within the Nigerian public sector.

Appendix vi/2c Causes of Grand Corruption in Nigeria

The interviewees listed various perceived causes of grand corruption in Nigeria. Interviewee no P3 lists the causes of grand corruption as ‘unqualified leaders, weak enforcement structure, poor remuneration, poor minimum wages, large unregulated sectors, weak sanctions, poor accountability structure, poor incentive for integrity, lack of transparency in private and public sector and very weak judiciary’. Interviewee No P7 lists the causes of grand corruption in Nigeria as ‘greed, impunity, lack of transparency in government decision process, a culture that celebrates prosperity over integrity, poverty mind-set, and economic uncertainty. But most importantly corruption thrives in Nigeria because one can steal and get away with it. An efficient justice system will deter corruption’. The exploration of this line of argument concurs with the arguments of Transparency International that ‘the lower-ranked countries in our index are plagued by untrustworthy and badly functioning public institutions like the police and judiciary ... Grand corruption thrives in such settings’.⁴ Thus, an understanding of the fundamental causes of corruption may lead to ways of combating it or at least limit its practices to avoid it posing more threat to the realisation of the rights of the vulnerable. The participants in the research were consistent with their answers on themes around the lack of transparency, greed, weak sanctions and the weak judiciary.

Appendix vi/2d Judicial Corruption

All the participants bemoaned judicial corruption and argue that a transparent judiciary would enhance government’s resolve to combat grand corruption. The interviewees cited cases of

⁴ See Transparency International ‘Corruption Perception Index 2016’ < http://www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 20 March 2017.

judicial interferences, unnecessary adjournments, bribery within the judiciary and cronyism as the issues in question. Interviewee no P3 stated that there is huge judicial corruption in Nigeria because judges believe that just ‘because I can get away with it. A lot of corruption in Nigeria is done simply because (A) nobody is going to catch me and if they catch me, I will share and if I share, I will not go to jail’.⁵ The meaning of this is that judges are rarely caught for brazen acts of corruption. They use the proceeds of corruption to fight back when there are indications that they may be held accountable. Interviewee No P3 agrees that there are multiple instances of judicial corruption but blames poor remuneration of judges. Interviewee P3 states that ‘I am not comfortable with the salaries and allowances of judicial officers. So to cut off or take off those things [corruption], the government, the judicial officers must be adequately paid and catered for ... and so, when a judge is handling a case, ... political cases are known cases in Nigeria where the judge looks at the offer and knows that even if he works for the 35 years of his life, the benefits and pensions he was going to get is not up to the money he makes in that one scoop, so he takes the money’.⁶ Interviewee P1 states that weak structures in governance drive judicial corruption.

These support the argument of the thesis in chapter one that in issues of grand corruption, the ability of the courts in Nigeria in providing effective judicial remedies is questionable in view of the myriads of judicial scandals caused by corruption of the judiciary in Nigeria.⁷

⁵ Taken from the Transcript of Interviewee No P3.

⁶ *ibid.*

⁷ The conduct of the notorious Judge in the “Pension Fund” case has cast serious doubt on the credibility of Nigerian courts. This Judge was suspended after serious outcry from the public; See *FRN V Esai Dangabar*. The complicity of Justice Abubakar Talba in perverting the course of justice by an alleged injudicious discretion was so obvious that the Judicial Service Commission suspended him without pay from service for one year; See Lanre Adewole and Tunde Oyesina, ‘Pension scam trial Judge suspended’ *Nigerian tribune* (Lagos, 27 April 2013).

Appendix vi/2e Law Reform

A recurrent theme in the interviews was the need for law reform. One respondent, Interviewee P9 succinctly stated, ‘I recommend efficient and proactive laws that respond to present realities of the country... I mean, law with a touch of reality’. Interviewee P9 went on to add that, ‘to a large extent, legal framework is grossly irresponsive enough to manage and sustain social dynamics of the country’.⁸ Interviewee P5 argues on the contrary that ‘Nigeria is not lacking in anti-corruption frameworks and instruments. For instance, besides several statutes and laws criminalising financial misdemeanours in both public and private spaces, the key prime frameworks of the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC) were empowered institutions to fight financial and other corrupt practices’.⁹ Interviewee No P2 supports law reform arguing that law reform could address the institutional lapses that breed grand corruption. Accordingly, law reform stands to trigger accountability in all sectors of the economy. This is also an argument of Olaniyan, that Nigeria needs ‘significant accountability mechanisms and normative standards for implementing long-term durable, sustainable, and broad legal and institutional reforms against corruption’.¹⁰

Appendix vi/2f International Criminalisation of Grand Corruption

To the question, ‘do you think that making grand corruption an international crime could help combat grand corruption in Nigeria’? The participants (100%) agreed that grand corruption should be made an international crime. The interviewees gave various reasons for supporting

⁸ Taken from the Transcript of Interviewee P9.

⁹ Taken from the Transcript of Interviewee P5.

¹⁰ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014)13.

this view. For instance, interviewee No P13 stated: ‘Yes, I think that grand corruption should be made an international crime and a crime against humanity because of its devastating effects, especially the deprivation of the citizens’ enjoyment of their human rights’.¹¹ Interviewee no P5 asserted: ‘yes, I believe that grand corruption should be made an international crime because it has inter-jurisdictional characteristics and repercussions. Some of the money laundering objectives could also be to fund international crimes and terrorist activities’.¹² Interviewee no P3 stated: ‘yes, the legal frameworks are important, but at the end of the day you need the institutions and the institutional arrangements between the countries in order to make these things work’.¹³ Interviewee P9 answers ‘yes, long overdue’. Interviewee P12 agrees to the international criminalisation of grand corruption, stating that ‘making grand corruption an international crime would definitely help in combating grand corruption in Nigeria. There would be no place to hide for corrupt officials’. The views of the interviewees align with the suggestions of some scholars. Bantekas and Sonja Starr variously argued for the international criminalisation of grand corruption. Starr suggests that ‘international criminal law is generally understood to be a mechanism for, responding to punishing, and preventing war crimes and mass atrocities’.¹⁴ The World Bank and TI support the international criminalisation of grand corruption. This is also a view robustly argued by this project and emphasised in chapters six and seven of this thesis.

¹¹ Taken from the transcript of interviewee No P13.

¹² Taken from the transcript of interviewee No P5.

¹³ Excerpt taken from transcript of interviewee no P3.

¹⁴ Ilias Bantekas ‘Corruption as an International Crime and a Crime against Humanity: An Outline of Supplementary Criminal Justice Policies’ (2006) *Journal of International Criminal Justice* 4, 474; Sonja Starr, ‘Extraordinary Crimes at ordinary Times: International Justice Beyond Crisis Situations’ (2007) *North Western Univ. L. Rev.* 1, 7.

Appendix vi/2g Human Rights and Grand Corruption

Most of the interviewees lament the impact of grand corruption on human rights. Asked this question, ‘how would you assess the impact of grand corruption on human rights and do you think that grand corruption violates human rights?’ Interviewee P6 replied: ‘grand corruption impeded on human rights so much that it denies citizens of their basic needs. It is my opinion that grand corruption violates human rights. This is because, the public funds meant to provide social infrastructures like health care, roads, employment, the right to justice, etc to the people are embezzled or looted and citizens are subjected to severe hardship. Grand corruption is a serious violation of human rights’. Interviewee P5 submits that:

Grand corruption violates the rights of citizens to good things of life, which are akin to human rights. Grand corruption has depleted resources that could have been used to provide housing, health, education and other social infrastructure that would have sustained human and citizen welfare. Several trillions of Naira are reported to have been stolen from the public treasury and stashed in foreign economies, which denied the citizen of the country the economic benefit accruable from its use for public service provision.

Appendix vi/2h Prosecution of High-Profile Grand Corruption Cases in Nigeria

The participants were asked ‘how would you rate the prosecution of high-profile individuals involved in cases of grand corruption?’ Interviewee No P7 states that ‘the process is biased and tainted with corruption...corruption trial should be encompassing and not directed only at the opposition’. Interviewee P7 thinks that ‘a good effort so far but the magnitude of corruption negates its significance’. Interviewee P6 responds that ‘I rate them very poor. This is because the prosecution seems “cosmetic” to me. It is highly selective. Also, the names of those that returned their fair part of the loot were not named or shamed. The trial is like a “child play”

cum revenge mission on the part of the government’. Interviewee P12 responds that ‘there is still a long way to go in the prosecution of high-profile individuals in cases of grand corruption in Nigeria. Such cases tend to drag on for too long in Nigeria compared to other countries (Cases of South Africa President Zuma and Israeli Prime Minister Ehud Olmert)’. Interviewee P5 responds that ‘I approve of the efforts at prosecuting high-profile individuals involved in cases of grand corruption. However, this effort could not be rated at this point because it has not yielded any result. Nevertheless, it is significant that the anti-corruption agencies have a free hand to carry out their statutory rules, without counter influences from political influencers’. Olaniyan agrees with the views of most of the interviewees by criticising the justice system as paying lip service to the prosecution of corruption in Nigeria, adding that ‘comparatively, few high-ranking officials are prosecuted, and corruption cases are taken to court, proceed at a snail’s pace and serve no more than a symbolic purpose’.¹⁵ Similarly, a closer look at the list of EFCC convictions in 2016 published on its website shows that none of the highly publicised high-profile cases was on the list.¹⁶

Appendix vi/2i Institutional Frameworks

The role of institutional frameworks in combating corruption in Nigeria was one of the dominant themes that occurred across the board in the interviews. Most interviewees (50%) suggested that the institutional frameworks are not sufficient as a stand-alone option or a one-shot endeavour in order to combat corruption. It should be viewed as a challenging long-term

¹⁵ Olaniyan (n 10) 8.

¹⁶ See EFCC website <
<https://efccnigeria.org/efcc/images/RECORD%20OF%20CONVICTION%202016%20Complete.pdf>
> accessed 08 October 2016.

undertaking. For instance, interviewee No P3 states ‘... It is not the agencies who should fight corruption, it is the society who should fight corruption with the agencies having a role because unless the change is anchored by the people, as soon as you change regimes, it reverses and that has been the cycle in Nigeria’s history’.¹⁷ Participant No P13 argued that the institutional frameworks need independence, stating that ‘the independence of the agencies must be respected and ensured in order for them to fight corruption effectively’.¹⁸ Interviewee no P2 suggested that ‘the anti-corruption agencies must be given freedom of actions. They must equally be well-funded and the political will to say no matter whose ox is gored if this is late this year, you understand, it again boils down to political will’.¹⁹ The same argument was advanced by interviewee No P5 who stated: ‘Anti-corruption agencies can tackle grand corruption when appropriate political support is deployed from the executive branch. This political will guarantees heads of anti-corruption agencies the independence to investigate and prosecute grand corruption cases’.²⁰

The views of some of the interviewees emphasise the relevance of the anti-corruption agencies in combating corruption, but unanimously agree that there is a need for collaborative effort as well as robust political will by the executive organ of government to allow these institutional bodies to discharge their duties with full autonomy. This is in agreement with the views of the World Bank that ‘successful anti-corruption efforts depend upon political will. This includes both the political will to initiate the fight against corruption in the first place and subsequently the will to sustain the battle over time until results are achieved’.²¹ The World Bank further

¹⁷ Interviewee No P3’s transcript note.

¹⁸ Taken from the transcript of interviewee No P13.

¹⁹ Excerpt from the transcript of interviewee No P2.

²⁰ Taken from the views of interviewee no P5.

²¹ Derick W Brinkerhoff, ‘Assessing Political Will for Anti-corruption Efforts: An Analytic Framework (2000) Public Admin. Dev. 20. 231-252 <<http://info.worldbank.org/etools/docs/library/108384/session4I.pdf>> accessed 02 September 2016.

asserts that ‘strong domestic political will to embark on the long and winding road to asset recovery is fundamental to successful asset recovery.

Appendix vi/3 Conclusion

This appendix presented data originating from the elite interviews conducted in this research. The selected elite opinions were presented according to the themes of the research. The interviewees unanimously agreed that endemic grand corruption violates human rights in Nigeria being that it undermines government ability to protect certain human rights and provide the basic infrastructures needed by the people. The interviewees also suggested that international co-operation in the form of international criminalisation of grand corruption could help in combating grand corruption being that the domestic legal and judicial systems have failed over time. In particular, their views highlight the limitations of the Nigerian justice system often blamed for the unending high-profile corruption cases. So far the enactment of the Administration of Criminal Justice Act (ACJA) 2015 has not achieved the anticipated goal of fast tracking the prosecution of the backlog of grand corruption cases. Kofele-Kale in this respect comments that ‘corruption in the judiciary is fertile ground for impunity, uncertainty and unpredictability for those who seek recourse to justice, in particular, the poor and the disadvantaged’.²² Kofele-Kale’s argument goes to say that the corrupt acts of the judiciary preclude people from demanding their rights as individuals. The interviewees also suggested

²² Ndiva Kofele-Kale, ‘Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law’ (2009) Centre for Human Rights and Democracy in Africa <http://fakoamerica.typepad.com/files/kofele-kale-keynote-address.pdf> >accessed 10 March 2016.

enhanced institutional co-operation, legal reforms and intervention as substantive ways of combating grand corruption in Nigeria.