

**THE CASE FOR AN INTERNATIONAL ANTI -CORRUPTION COURT  
A TRANSPARENCY INTERNATIONAL PERSPECTIVE  
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“Untouchables.” Come rain, come shine, they’re never going to court, not while there’s somebody close to them in power. That’s because of the politics involved.”<sup>1</sup>

Prosecutor in the Anti – Corruption Court, Uganda, May 21 2013

“This Court is tired of trying tilapias when crocodiles are left swimming.”

Justice Bosco Kautsi, former head of the Anti – Corruption Court, Uganda, during a ruling convicting an engineer during the Commonwealth Health Heads of Government Meeting scandal, June 29, 2010<sup>2</sup>

This paper looks at those concepts and documented evidence that provides reasons justifying the setting up of an International Anti – Corruption Court. The paper does not pretend to do justice to the issue but merely tease out certain glaring and compelling reasons for considering international prosecution when all else on the domestic front fails. There are many other considerations that can be advanced that support the concept such as the transnational nature of corruption and principle of complementarity or reject the concept but these are not explored in this paper.

### **Environments that Justify International Anti – Corruption Court Intervention**

In nations where as in several countries in Africa, grand corruption is perpetrated mainly through the political system which is built on patronage, in such cases there is the feeling that corruption is rewarded rather than punished. The corrupt elite are never punished, never resign, and are never dismissed. They act with *impunity* and are guaranteed immunity. Even where they are arrested and prosecuted often their protection from high up makes a travesty of the law. Soon the case is dismissed for lack of evidence, or other technicality and they are reinstated to higher positions of power. More often the *social damage* they cause is rarely addressed. Attention is rarely paid to the victims of corruption because of the erroneous belief in law that corruption is a victimless crime.

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<sup>1</sup> “Letting the Big Fish Swim”, Failures to Prosecute High level Corruption in Uganda,  
<https://www.hrw.org/report/2013/1021/Letting-big-fish-swim/failures-prosecute-high-level-corruptionuganda>

<sup>2</sup> Letting the Big Fish Swim”, Failures to Prosecute High level Corruption in Uganda,  
<https://www.hrw.org/report/2013/1021/Letting-big-fish-swim/failures-prosecute-high-level-corruptionuganda>  
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## **Why an international response**

### **Grand Corruption in the face of Impunity**

*Grand corruption* perpetrated by the elite protected by or involving political actors needs an international response because it undermines human rights, by unlawfully interfering with resources that should be available to realize fundamental rights such as the right to health, education, food, water and energy. Grand corruption occurs when politicians and state agents mandated to make and enforce the law in the name of the people, are misusing this authority to sustain their power, amass and protect ill-gotten wealth and status.<sup>3</sup> Whether it is grand corruption through illicit appropriation for private gain or petty corruption that renders access to services costly for ordinary citizens because of bribes; corruption has disastrous consequence on the exercise of fundamental rights. In addition, it breeds impunity that is direct defiance to the rule of law and accountability because it undermines the very institutions created to eradicate it such as law enforcement and judiciary.

Judge Mark L. Wolf in arguing for the establishment of an international anti- corruption court equated the serious economic damage and human right abuses caused by corruption to the genocide and egregious abuses of human rights that informed the creation of the International Criminal Court in 2002. He argued this in the context of what he saw as failed international efforts to tackle grand corruption:

“An international Anti-Corruption Court “IACC” similar to the ICC or as a 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 organizations.”

Various internationally acclaimed surveys from reputable institutions tell us that:

- Developing world loses \$10 through corruption for every \$1 in aid (UNDP)
- \$1 trillion in bribes per year (World Bank)
- \$2.1 trillion of assets illegally moved across borders (UNODC)
- \$ 3.1 trillion lost through tax evasion and other evasions to tax havens (TJN)
- \$ 50-\$80 billion a year in illicit financial flows (Report of HLP on IFF from Africa)<sup>4</sup>

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<sup>3</sup> GOPAC, “Fighting Grand Corruption through existing international institutions and conventions” Global Organization of Parliamentarians Against Corruption, UNCAC Conference of State Parties, 4 November 2015

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When financial markets crash, economies fail, social unrest ensues and the weak and vulnerable suffer the brunt of recession, budget cuts in public spending result in loss of safety nets and human security.

Our concern as anti - corruption activists globally is grand corruption in countries where there is unfortunately the most impunity. Impunity is the exemption from punishment; or the immunity from detrimental effects, as of an action. TI is currently running a campaign called #end impunity. The 23 November 2015 marked the International Day to End Impunity. At Transparency International we view impunity as getting away with bending the law, beating the system or escaping punishment. Impunity is anathema to the fight against corruption.

### **Social Damage<sup>5</sup>**

Lately there is also emerging the concept of social damage. It comes from the idea that corruption especially that perpetrated by politicians, public officials and social elites has far reaching social consequences that victims be it individuals or communities suffer for a long time. As I have already alluded it is a lie to claim that corruption is victimless crime. When financial markets crash, economies fail, social unrest ensues and the weak and vulnerable suffer the brunt of recession. Budget cuts in public spending result in people dying in hospitals, leave those relying on public projects homeless or landless and many uneducated or unemployed. Environments are destroyed, livelihoods lost, affecting present and future generations. These are not exaggerations but documented realities, consequences of which reverberate through generations.

Social damage is premised on the idea that public trust is tangible, as is good governance in the protection of collective rights and public interest. Promoters of this concept propose that as the problems, costs and consequences of corruption have become well known and prosecutions related thereto have also increased, it is time for the victims to become more salient in international anti-corruption frameworks which so far have focused more on the perpetrators than the victims. They argue the focus should be on reparations. (Here talk a little about TJ concepts of social damage reparations from war or other conflict state.)

### **Can International Frameworks support Judicial Justice in an International Court?**

International frameworks such as the American Foreign Corrupt Practices Act of 1977 (FCPA), the Organization of American States (OAS) Anti -Corruption Convention of 1997, OECD Convention for Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, (I will speak of the CoE Criminal and Civil law last because I have cause for doing that). The United Nations Convention against Transnational Organized Crime and its Protocols (UNTOC), the Southern African Development Community Protocol Against Corruption (SADC Protocol) adopted in 2005. The Economic Community of West African States (ECOWAS)

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<sup>5</sup> Repairing Social Damage out of corruption cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica, Dr Juanita Olaya, Kodjo Attiso and Anja Roth, <http://14iacc.org/wpcontent/uploads/SocialDamagePaper20.01.2011.pdf>

has a similar Protocol. The latter was has only been ratified by one country and therefore has not come into force. The African Union Convention on Preventing and Combating Corruption of 2003 and the United Nations Convention Against Corruption (UNCAC) also of 2003 are all necessary to support the International Anti -Corruption Court. However, they all have one salient weakness of relying on the states to implement; when in some cases these very states have no political will because they owe their continued existence to corruption. None of these instruments make mention directly or indirectly to the possibility or desirability of setting up an international anti – corruption court.

## WHY NATIONAL INSTITUTIONS FAIL

### THE POLITICAL WILL ANALYSIS

In most countries where corruption is deep rooted the argument is often advanced that there is no political will. Political will is often described as one of those ideals that can be a will o’ the wisp because of its elusiveness, often spoken of as an indispensable component in the arsenal required to fight corruption, but never really grasped. Political will is often defined as the ghost in the machine of politics, the motive force that generates political action. Yet for those of us, funders, governments, think tanks, business and civil society advocacy groups trying to generate change, it is elusive, hard to pin down, hence the description of it as a will o’ the wisp.

It is also often not clear whether the will to generate political action should be coming from governments, the people, mandated institutions or a triangulation of the three. “Charney Research concludes “It is hard to define, hard to grasp and harder still to measure.” They proceed to say that political will is a combination of 3 factors: opinion + intensity + salience. Whatever its definition what we do know is in the fight against corruption at national level especially, conclusions drawn are that there is a deficit, or lack of political willingness to deal with corruption in effective and conclusive ways.

As a result, national institutions which may have an anti – corruption agency, law enforcement as represented by the police and the justice system fail because the government leadership in charge of them and the people depending on them do not exert the requisite *opinion + intensity + salience*, at the same time and to the same degree. In such instances political will fails. The only alternative becomes an international consensus on how to punish perpetrators of grand corruption who have the domestic protection of the political elite through patronage, hence their status as the so called “Untouchables.”

### DEALING WITH A CULTURE OF IMPUNITY

TI joins all stakeholders that believe that there could be a mechanism to establish an international court on corruption for perpetrators and collaborators of grand corruption. As TI we are deeply concerned about the *grand corruption* that exists because of a *culture of impunity*, and as a consequence is neither investigated, prosecuted nor punished. Furthermore, there is evidence that grand corruption is also linked to criminal activity, often organized crime,

making Judge Mark L Wolf's case for an anti-corruption court that may or may not be a part of the ICC desirable.

It is common knowledge that the enormous wealth obtained by corrupt officials in countries where grand corruption and impunity are rife is laundered through a series of complex financial transactions, invested abroad and are hidden in different tax havens and exotic destinations by corrupt politicians with the participation of their families and networks. In some countries it is criminals such as drug lords who have politicians in their pockets. In others it is the political elite who through their own wanton impunity inadvertently create a class of organized criminals and cartels and terrorists.

From our perspective as TI Zimbabwe a further analysis of why impunity accompanies corruption is because of the culture of the "big man" or as they call him in Zimbabwe "Chef". This culture which has its foundations in the traditional African culture where the hierarchy in chieftaincies not based on merit but some atavistically understood superiority of certain families who are owed loyalty and they in turn owe loyalty to some other protection higher up the ranks.

More importantly in considering the need for the international court is the fact that grand corruption destroys democracies. When democratic institutions stop functioning because they are captured by the political elite and government officials, human rights violations balloon. Many social injustices occur in such societies resulting in people losing livelihoods, land, homes, savings and in worst cases, lives. When the rule of law is replaced by graft the weakest in society suffer. Creating safety nets for the poor becomes nigh impossible.

In many countries including my own there is evidence that there is a correlation between high levels of corruption and increased human rights violations and human insecurity. Desperate communities have no chance against systems that are focused on protecting and promoting the corrupt by giving them immunity which they obtain through rent-paying and patronage. Only those high level corrupt individuals who have fallen out of favor are prosecuted. Unfortunately, this selective approach to addressing corruption distorts the cause and call for justice. It locates what is supposed to be flagships for the rule of law in anti-corruption and justice, within a circle of impunity, making it difficult for civil society advocacy and rule of law to take credit for the punishment. In fact, it is never the best opportunity to fight corruption through political parties or factions thereof. Politicians and political parties have a tendency to politicize and whip up populism on these issues. By so doing focusing on the perpetrators without equal focus on the damage caused and victims involved. Bringing politics and populism to anti-corruption advocacy distorts or undermines the opportunities that would otherwise arise from the corruption issue for far-reaching, broader reforms in policy, law and institutions, which is what we advocates of zero tolerance are really after. As anticorruption activists we do not fight corruption as an end in itself; we fight corruption in order to achieve good governance, equal opportunities for economic activity for everyone, equality in development, access to justice for all and freedom of participation and expression among other promises of democracy.

### COMPLICITY OF THE INTERNATIONAL COMMUNITY

There is also the complicity of other nations to contend with. These nations turn a blind eye, or participate knowingly, resultantly fueling the grand corruption status of corrupt states because of their interest in foreign investments and official favors meted out by corrupt public officials. Illicit financial flows happen because there are receiving nations of these illicit resources who actively or passively benefit. In Africa approximately \$70 billion<sup>6</sup> are lost to IFFs every year. This happens because international agreements on cooperation, technical assistance, freezing, recovery and repatriation of assets and extradition of perpetrators are not being effectively enforced or respected across all participating state parties to the UN Convention Against Corruption for example. In some countries some state parties openly repudiate the provisions of these instruments.

As we meet, the issue of stolen assets and their recovery is still a contentious issue at the level of the UNCAC CoSP. In fact, the matter tabled for resolution at the UNCAC for five years is now being rolled over as a provisional agenda item for CoSP 7 because a consensus cannot be reached on what should constitute the mandate of the Committee on Asset Recovery. This is despite all state parties reiterating their commitment in draft Resolution 2/6 to fight illicit enrichment which they agree “poses serious challenges to the stability and security of states, undermines institutions, ethical values and justice and jeopardizes sustainable development and the rule of law”<sup>7</sup>

In light of this we may say that current efforts are less than satisfactory. An International Anti – Corruption Court with its own investigators, prosecutors and impartial judges becomes an attractive alternative where international process, drag, stall, and where interest in implementation and enforcement waxes and wanes at the whim of political interests of the state parties. TI as a member and secretariat to the UNCAC Civil Society Coalition, (a Coalition that is fighting for full observer status by the way), I can share how extremely polarized some of these position can be on different resolutions. Most times the groupings are aligned according to their political – economy ideologies. Rarely are they ever on the issues as tabled. This makes advocacy that much more complex and protracted, requiring more resources and time than the UNCAC Civil Society can invest to move things along.

I point this out in order to draw attention to the point that establishing an International Anti - Corruption Court should go beyond emulating the International Criminal Court but offer an improved version of it by learning lessons from its recent challenges, especially the global challenge to its perceived lack of impartiality that it has faced since its establishment. More recently the withdrawal from the ICC by Burundi, Gambia, and South Africa provide lessons for us. These defecting African countries have accused the ICC of having a bias against Africa. This not being the platform for unpacking the ICC and its recent challenges, let me hasten to say the important lesson to draw from this is that similar accusations have been levelled against developed countries by African countries in the arena of corruption. There is the same feeling

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<sup>6</sup> Global Financial Integrity Report

<sup>7</sup> UNCAC CoSP 6 \_ Advance Unedited Version

that African countries are targeted for poor rankings in indices on corruption. This is used to explain why international investors are potentially not attracted to investing in Africa. African governments then look around the globe and see the duplicitous behavior of developed countries that are legally and often illegally benefiting from stolen assets and other financial investment money of corrupt individuals, corporations or states. Moreover, there are also other countries with entrenched corruption where developed economies seem happy to invest. Convincing governments and societies that feel they have been at the receiving end of this bias to support the idea of establishing an International Anti - Corruption Court is likely to meet with spirited resistance from countries who already perceive they are at the receiving end of the unfair criticism, deserved or not.

Besides these perceptions of racial profiling by the Western developed countries, modelling the IACC on the ICC raises other crucial questions such as the legal principles that would apply for example the principle of complementarity on which the ICC is based and the exercise of universal jurisdiction for core international crimes.<sup>8</sup> Testing the acceptability and applicability of these principles on the IACC will take years and huge consensus building on these and many other issues.

Anticipated challenges do not negate the possibility of an International Anti-Corruption Court with its own investigators, prosecutors, and impartial judges is an attractive and enticing possibility in countries captured by impunity and grand corruption at the domestic front. Such a court would hopefully not be subjected to the geo - political considerations of governments. The court would be able to act beyond the dictates of the UNCAC and other regional instruments that can fail because of lack of political will, impunity, weak institutions and other considerations at the domestic level.

Where evidence to corrupt activities has been substantively established the IACC would be able to initiate its own investigations, prosecute and punish, through its powers to subpoena any government, corporations or individuals and compel cooperation from any of these. An International Court would overcome the domestic shortcomings of lacking independent media, judiciary, and independent anti – corruption agencies. The latter are rarely well resourced.

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<sup>8</sup> The principle of complementarity on which the ICC is based entails that the ICC can only investigate and prosecute core international crimes which the national jurisdictions are genuinely not willing or unable to prosecute. The principle reflects a realization that it is preferable that such crimes are investigated and prosecuted in the country where they occurred. It was created as an admissibility principle of the ICC. Universal jurisdiction, on the other hand, is a jurisdictional basis of last resort which many national criminal justice systems provide for, when core international crimes cannot be prosecuted on the basis of the principle of territoriality (in the state where the crimes occurred), active nationality (in the state of the alleged perpetrator) or passive nationality (in the state of the victim). In its pure form, universal jurisdiction enables prosecution of core international crimes committed in a foreign state, by a foreign citizen, against foreign victims, when neither has a personal link to the forum state.

Even so a report by TI UK shows that there is a tendency to step up in cooperation if there is bilateral political support for such international prosecution. Alternatively, cooperation is sought so that there is the good will of the country being investigated.

Judge Mark L Wolf asks “how is this supposed to work where officials of the country suspected of laundering dirty money are the ones involved in perpetrating such corruption?” It is clear that the recovering country or the country with interest will have to take sides when in reality domestic politicians are involved in furthering oppression of citizens already reeling under dictatorships and other injustices. This in itself is an injustice.

## POSSIBLE LESSONS AND GLOBAL BEST PRACTICE THAT CAN BE ADOPTED BY THE IACC,

### EXPLORING WHAT SHOULD BE THE OBJECTIVES OF THE IACC

Both the Council of Europe (CoE) Conventions on Civil Law and Criminal Law offer best practice that we can draw from on aspects of civil and criminal law consequences of corruption. I focus here specifically on the need for compensation.

In Article 1 the CoE Civil Law Convention on Corruption states

“Each party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption to enable them to defend their rights and interests including the possibility of obtaining compensation for damage.”<sup>9</sup>

When I read this I said well -done COE!

At Article 3

“Each State Party is to provide internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Such compensation may cover damage, loss of profits and non- pecuniary loss”

In our experience captured in our documentaries on Women and Land (<https://www.youtube.com/watch?v=2EA7x4s&rMU&t=17s>) and Land and Corruption (<https://www.youtube.com/watch?v=bcQC1shUUd0>) in Chipinge area, the non-pecuniary damages are huge. The IACC may have to incorporate truth, peace and reconciliation processes normally associated with transitional justice. There are no words to express the pain and suffering as well loss of enjoyment of life because of callous, corrupt decision that internally displace families, who loss farming land and grazing land, without compensation or paltry compensation.

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<sup>9</sup> Repairing Social Damage out of corruption cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica, Dr Juanita Olaya, Kodjo Attiso and Anja Roth <http://14iacc.org/wpcontent/uploads/SocialDamagePaper20.01.2011.pdf>



The CoE Criminal Conventions complement the Civil Law Convention in Article 34 on corporate liability emphasizing the importance of the possibility to hold legal persons liable for criminal offences such as “active bribery, trading in influence and money laundering.”

Article 34 of the UNCAC calls on state parties to take measures on consequences of corruption according to their national laws and “consider a relevant factor in legal proceeding to annul or rescind a contract, withdraw a concession or other similar instruments or take any other remedial action.”

## CONCLUSIONS

The paper has tried to highlight key corruption causes and consequences that domestic law has failed and to address for decades. These are grand corruption and human rights, impunity and the rule of law, social damage and international legal frameworks and reasons why national frameworks fail such as lacking political will. There can be no real recommendations for a paper of this nature.

However best practice already exists in the form of the Council of Europe Civil Law on corruption that can be applied or adapted for domestic implementation. Thorough research still needs to be carried out as it would inform both sides of the debate, for or against. This would generate robust debate by bringing in many other voices especially to platforms such as the 7th UN Convention Against Corruption Conference of State Parties that will be held in 2017 and the International Anti-Corruption Conference which starts in a week. These are of course one of only a few global and international platforms that occur throughout the world that can be spaces for advocating for the idea.