universität wien

MASTER-THESIS

Titel der Master Thesis /Title of the Master's Thesis

„Towards an International Adjudication of Corruption: Analysis of General and Procedural Limits at International Adjudicative Bodies“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2017 / Vienna 2017

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	A 992 628
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	International Legal Studies
Betreut von / Supervisor:	Assoz. Prof. MMag .Dr. Christina Binder, E. MA.

CONTENTS

1 INTRODUCTION 3
1.1 Background 3
1.2 Methodology 4
2 GENERAL OVERVIEW ON CORRUPTION 6
2.1 Concept of Corruption 6
2.1.1 Concept of Grand Corruption 7
2.1.2 Concept of Acts of Corruption 8
2.2 Determinants of Corruption 10
3 INTERNATIONAL LEGAL FRAMEWORK 11
4 INTERNATIONAL ADJUDICATIVE BODIES 15
4.1 International Adjudicative Bodies – Definition 15
4.2 International Adjudicative Bodies – Classification 16
4.2.1 International Court of Justice 17
4.2.2 WTO Appellate Body 18
4.2.3 International Criminal Court 18
4.2.4 International Human Rights Adjudicative Bodies 20
4.2.5 International Centre for Settlement of Investment Disputes 25
5 LIMITS AT INTERNATIONAL ADJUDICATIVE BODIES 28
5.1 General Limits at International Adjudicative Bodies 28
5.1.1 Concept of Corruption 28
5.1.2 Attitude towards Corruption 31
5.1.3 Role of Adjudicators 37
5.2 Procedural Limits at International Adjudicative Bodies 41
5.2.1 Jurisdiction and Admissibility 41
5.2.2 Onus Probandi 52
5.2.3 Legal Sanctions/Remedies 56
6 INTERNATIONAL NON- ADJUDICATIVE ALTERNATIVES 61
6.1 UNCAC Review Mechanism 61
6.2 United Nations Human Rights Review Mechanism 62
6.2.1 Human Rights Council - Advisory Committee 63
6.2.2 Universal Periodic Review 64
6.2.3 Special Procedures of the Human Rights Council 65
6.2.4 Treaty- Based Monitoring Mechanisms 68
7 CONCLUSION 74
8 BIBLIOGRAPHY 81

"Corruption is an evil that knows no boundaries"[1]

1 INTRODUCTION

1.1 Background

One of the greatest achievements of the century in the anti-corruption field was celebrated in 2015: the entry into force of the United Nations Convention against Corruption (UNCAC)[2]. In the awake of this event, the international legalization of corruption reached its maximum expression and proved that joint efforts of the international community are needed to tackle corruption. Action towards these joint efforts is reflected in Goal 16 of the United Nations Agenda for Sustainable Development[3].

However, the state of affairs of the fight against corruption cannot be deemed as a fully success story[4][5].

Corruption- related cases, many of them categorized as "grand corruption" cases, have undergone national judiciary scrutiny in the past decade. In early 2015 the world was shocked when the FIFA scandal reached the public's attention. An indictment was filed against the former vice-president of Guatemala, who was accused of taking millions of dollars in bribes in a scandal that has rocked the government,[6] and the Car Wash case in Brazil became other multi-million bribery scandal. In 2016, the world was perplexed upon the public release of what came to be known as the biggest leak in history, namely the "Panama Papers"[7]. Said investigation had

[1] Martin Kreutner, 'Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields' (Follow-up to the outcome of the Millennium Summit United Nations Summit for the adoption of the post-2015 development agenda, New York 25 September 2015)

[2] United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005 UNGA Res 55/25 (UNCAC).

[3] United Nations Sustainable Development Goals. Goal 16.5: "substantially reduce corruption and bribery in all its forms 16.6 develop effective, accountable and transparent institutions at all level". <http://www.un.org/sustainabledevelopment/peace-justice/> Last accessed 16.05.2017

[4] Joshua Carroll, 'Meet the women fighting corruption and saving mothers lives in India', *The Guardian* (London, 24 August 2015) <http://www.theguardian.com/global-development-professionals-network/2015/aug/24/the-women-fighting-corruption-and-saving-mothers-lives-india-> Last accessed 16.05.2016

[5] Erin Fuchs, 'One of America's most notorious jails has finally closed after years of shocking corruption' *Business Insider*, (London, 26 August 2015) <http://uk.businessinsider.com/baltimore-jail-closed-2015-8?r=US&IR=T> Last accessed 16.05.2016

[6] 'Guatemala ex-President Otto Perez indicted for corruption' *BBC* (London, 05 September 2015) <http://www.bbc.com/news/world-latin-america-34194227> Last accessed 07.06.2016

[7] See < https://panamapapers.icij.org/> Last accessed 07.06.2016

a huge impact at national and international levels and set the foundations in some jurisdictions to launch criminal investigations against alleged perpetrators of acts of corruption.

The *internationalization* of corruption, previously regarded as a matter of internal political affairs and thus handled domestically, lead to suggest that a collective international solution is the optimal way to address such phenomenon. [8] [9]

The international legalization and codification process was boosted in the mid 1990's by the exponential adoption of anti-corruption related international instruments. The UNCAC was regarded as the repository of joint efforts which fills loopholes of the existing international anti-corruption legal framework characterized by the lack of uniformity, coherence and conformity.[10]

Despite the adoption of several international and regional anti-corruption instruments, the adjudication of acts of corruption at an international level has currently still not fully achieved. Following this same line, not even the "UNCAC provides for international mechanisms to hold a government accountable in case it fails to effectively enforce the obligation to fight corruption and to prosecute grand corruption."[11]

With a focus on grand corruption (See Subchapter 2.2), general and procedural limits encountered at international adjudicative bodies when dealing with acts of corruption will be identified in order to shed light on the international adjudication of corruption.

1.2 Methodology

This master thesis will explore the adjudication of corruption at an international level. For the purposes of this master thesis, an introduction to the concept of corruption and grand corruption, followed by an enunciation and analysis of the relevant anti-corruption legal framework and the international adjudicative bodies to be studied, will be developed in Chapters 2 to 4. General and procedural limits encountered by international adjudicative bodies will be identified in Chapter 5. Chapter 6 provides an analysis on how non-adjudicative bodies address corruption related cases and may contribute to the adjudication of corruption. Lastly, the conclusion of this thesis is presented in Chapter 7.

[8] Zoe Pearson, 'An International Human Rights Approach to Corruption' (2001) in Peter Larmour and Nick Wolanin (eds.), *Corruption and Anti-Corruption* (Canberra 2001), 30-61

[9] Clare Fletcher and Daniela Hermann, *The Internationalization of Corruption* (Gower Publishing Limited 2012)

[10] Indira Carr, 'Corruption, legal solutions and limits of law' (2007) 3 International Journal of Law in Context 227

[11] Florian Kling, 'Corruption as a Crime within the Jurisdiction of the International Criminal Court?' Research Paper submitted to the Faculty of Law of the University of the Western Cape, in partial fulfillment of the requirements for the degree of Master of Laws, 23 October 2003.

In order to identify where the limits to address corruption- related cases at international adjudicative bodies are, case law and reports of the international adjudicative and non-adjudicative bodies under scrutiny have been analyzed. The research has been conducted using the following keywords:

- International Court of Justice: search function, using keyword "corruption"
- International Criminal Court: search function, using keyword "corruption"
- European Court of Human Rights: search function, using keyword "corruption", "bribery", "trade of influence"
- Inter-American Court of Human Rights: search function, using keyword "corruption", "bribery", "trade of influence"
- ECOWAS Court: search function, using keyword "corruption", "bribery", "trade of influence"
- International Centre for Settlement of Investment Disputes: search function, using keyword "corruption", "bribery"
- WTO Appellate Body: search function, using keyword "corruption"
- Human Rights Council - Advisory Committee: search function, using keyword "corruption", "bribery"
- Universal Periodic Review: search function, using keyword "corruption", "bribery", "trade of influence"
- United Nations Special Reppartours: search function, using keyword "corruption", "bribery"
- Treaty-based Monitoring Mechanisms: search function, using keyword "corruption"

Results given by search functions are indicated in the respective Chapters, Subchapters and Sections.

2 GENERAL OVERVIEW ON CORRUPTION

In order to delve into the research question, it is preliminarily required to address conceptual issues, *inter alia*, the concept of corruption. Despite the fact that it goes beyond the main aim of this master thesis to theorize about the definition of corruption, it is, however, necessary to provide the reader with a general understanding of corruption and the notion of grand corruption and acts of corruption.

2.1 Concept of Corruption

Flows of ink have been devoted into the search of a general universal definition of corruption; however, not even the negotiators of the currently most comprehensive international anti-corruption instrument –UNCAC- could agree on a universal notion to enshrine in such an instrument.

As enunciated, controversy begins with the definition of corruption: there is no single, consistent and universally recognized definition of corruption at international level[12]. The concept varies across nations, legal systems, jurisdictions and cultures in which it is employed. In an attempt to define the term, scholars highlight certain elements and give prevalence, for example to the public sector over the private one, the economic motive (personal gain) over other motives to commit an act of corruption.

Several pragmatic shortcomings can be encountered due to the discrepancies on the term and the lack of a joint or universal definition[13] (see Section 5.1.1). With no further intention of being entrenched in a conceptual discussion, corruption is indisputably a universal phenomenon[14] [15].

[12] 'Countering Grand Corruption Paper submitted by the Government of Peru' Conference of the States Parties to the United Nations Convention against Corruption, Sixth Session (St. Petersburg 4 November 2015) UN Doc CAC/COSP/2015/CRP.9, paragraph 2; or UNHRC 'Report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights' (2015) UN Doc A/HRC/28/73

[13] Clare Fletcher and Daniela Hermann, *The Internationalization of Corruption, Scale, Impact and Countermeasures* (2012) 7. So polemic can be the efforts to find a general definition that a prominent anti-corruption scholar even discredited the efforts to search a definition and referred it as a *waste of time*. He pledged that "some colleagues start to avoid definitions claiming that most cases of corruption are unambiguously perceived by most observers".

[14] Berihun Adugna Gebeye, 'Corruption and Human Rights: Exploring the Relationships' (2012) Human Rights & Human Welfare, Working Paper No. 70, University of Denver

[15] The same is true in the search of a "universal definition" of the concept of human rights. It is a dynamic and evolving concept and many scholars argue that the lack of a rigid definition actually allows adaptability of the term to new concepts. See Manfred Nowak., *All human rights for all: Vienna manual on Human rights* (Ed. NW Verlag, 2012) 21-60 and Jack Donnelly, *Universal human rights in theory & practice* (Cornel University Press, 2003) 63

For the purposes of the hereby thesis adhering to a minimalistic definition of corruption (A minimalist approach identifies that "no precise definition can be found which applies to all forms, types and degrees of corruption" [16]) shall serve the purpose of defining corruption, which is understood as "the abuse of entrusted power for private gain" in detriment of the rights of others[17] with a focus on the public sector.

2.1.1 Concept of Grand Corruption

As with the definition of corruption, *mutatis mutandis*, grand corruption is not defined in any international instrument; however, an attempt to define such a notion is found in the preamble paragraph 3 of the UNCAC which expresses concern "about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States."[18]

The term grand corruption was already used in 1994 by Moody-Stuart who defines it as "the misuse of public power by heads of State, ministers, and top officials for private pecuniary profit"[19]. *Mutandis mutandi* with the definition of corruption, this definition emphasizes only the high-level governmental position of the perpetrators, whereas there are other indicators and factors which help to identify and define grand corruption. One indicator is the amount of money abducted - Transparency International provides the following classification: grand, petty and political corruption[20]-. Consequences of an act classified as grand corruption can also constitute an indicator; for example, taking into consideration the broad erosion of the rule of law, or the economic instability and distrust in good governance which follows as a consequence of the commitment of a grand corruption crime. External interests which distort the highest levels of a political system to private ends are also an indicator[21]. The essence and motives to commit such

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[16] Amanda L.Morgan, *Corruption: causes, consequences and policy implication - A Literature Review* (The Asia Foundation, 1998)

[17] Transparency International, *The Plain Language Guide* [2009]

[18] Supra note 2

[19] Rosie Waterhouse, 'The good business guide to bribery' *The Independent* (27 March 1994) < http://www.independent.co.uk/news/uk/home-news/the-good-business-guide-to-bribery-1431991.html> Last accessed 07.06.2016

[20] See http://www.transparency.org/whoweare/organisation/faqs_on_corruption> Last accessed 24 April 2016. Arvind K. Jain in 'Corruption a review' (2001) Journal of Economic Survey 73 describes three categories of corruption which "[...] differ from each other in terms of the decisions that are influenced by corruption, by the source of misuse power of the decision maker [...]" He explains that grand corruption refers to the act of the political elite by which they exploit their power to make economic policies. The emphasis is given to the character of the perpetrator but not the quantity of money abducted.

[21] United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators (UN 2005)

crimes lays on the discretional power elites have to change or implement a national policy to its own interest, and consequently, in detriment of the population.[22]

Rose Ackerman defines grand corruption as those acts of corruption committed at high levels which are intrinsically linked with acts committed at a governmental level, involving public tenders/international transactions or deal cut by multinational companies.[23] This definition has been severely criticized since there are no certainties in terms of the amount of money abducted, who is the subject involved (determine the hierarchical role at a governmental level), what is the risk or the impact and detrimental consequences on the population. The lack of certainty in this definition is complemented by Starr who defines grand corruption as "a large-scale ransacking of public treasuries and resources by head of sates and their families and associates"[24].

Grand corruption is defined as the type of corruption which "takes place at high levels of the political system, when politicians and state agents entitled to make and enforce the laws in the name of the people, is misusing this authority to sustain their power, status and wealth. Essentially, grand corruption not only breaks national laws, but more seriously still, it distorts and undermines the rule of law itself"[25]. In practical terms, grand corruption consists mainly of offences mentioned in Chapter III of UNCAC which are committed by high level officials (perpetrators), involves a great quantity of money and the damage on the population is of great nature as it infringes fundamental rights of at least a great part of a state's population.

This Section introduced the typology of corruption which will be analyzed in this master thesis.

2.1.2 Concept of Acts of Corruption

The purpose of this Section is to identify and define acts of corruption which will enable at a later stage to identify those illicit maneuvers which might be analyzed, addressed and condemned at the different international adjudicative *fora*.

Corruption is not a crime *per se* but the term is generally used to group certain criminal acts which encompass the general notion of an abuse of entrusted power as defined above (See

[22] Supra note 20

[23] Susan Rose-Ackerman, 'Grand corruption and the ethics of global business' (2002) Centre for Advanced Study in the Behavioral Sciences.

[24] Sonja Starr, 'Extraordinary crimes at ordinary time: international justice beyond crisis situations' (2007) Northwestern University Law Review, Vol. 101, 2007; Harvard Public Law Working Paper No. 133

[25] GOPAC. 'Fighting Grand Corruption through Existing International Institutions and Conventions' (04 November 2015). The costs of grand corruption are explained in detailed in Supra note 23. See also Supra note 12 [para. 2]

Subchapter 2.1)[26]. The most frequent corrupt practices incontrovertibly accepted as acts constituting corruption within the international community which have been receipted by the UNCAC[27] range from bribery to embezzlement, trading in influence, abuse of functions and illicit enrichment.

A myriad of acts of corruption comprises the catalog enshrined in the UNCAC which states parties to the convention must or should enshrine in their legal systems. Hereinafter definitions[28] of such acts are provided in order to establish a general understanding of such acts:

- The prototypical act of corruption is considered to be bribery which "takes place when a person with authority accepts or solicits a bribe to exercise a function in a particular way. A kickback is similar to a bribe but usually refers to a payment given in return for receiving a contract, which is 'kicked back' to someone involved in awarding the contract"[29]. It is considered to be a *victimless crime* since the injured party is the public itself.
- "Trading in influence or influence peddling is a form of bribery. […] Typically this form of corruption can be perpetrated by those in prominent positions or with political power or connections. Such persons' connection to power, that is to say their 'influence', is traded for money or an undue advantage"[30].
- "Illicit enrichment refers to a situation in which officials cannot explain their wealth in relation to the income they lawfully earn. The wealth that is not explicable may be the proceeds of a bribe or a form of stealing such as embezzlement, misappropriation, concealment of property, money laundering or false accounting"[31].
- Embezzlement, misappropriation or other diversion of property by a public official.

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[26] Scholars, international organizations and NGOs differ in the understanding of corruption as a crime *per ser* or as a term which contains corruption-related crimes. For the first approach see: Robert Klitgaard, *A Holistic Approach to the Fight against Corruption* (Claremont Graduate University, 2008), and Supra note 12. For the later, see: John McFarlane, 'Transnational crime corruption, crony capitalism and nepotism in the twenty-first century' (2001) in Peter Larmour and Nick Wolanin (eds.), *Corruption and Anti-Corruption* (Canberra 2001).

[27] It is worth-noting that within the drafting-process of the UNCAC, states decided to draw the attention to corrupt practices committed by public official whereas leaving the responsibility to states to criminalized corruption practices within the private sector.

[28] The definitions herein introduced are not being subject-matter of study. The author is aware about the controversial discussions among academia and practitioners on the definition of each act of corruption but decided not to delve into such analysis since it may distort the focus of this thesis.

[29] Anti-Corruption Resource Centre. 'Types of corruption' <http://www.u4.no/articles/the-basics-of-anti-corruption/> Last accessed 28.10.2017

[30] Idem 29 [See Article 18 UNCAC for a more comprehensive definition]

[31] Idem 29

- Abuse of function. Article 19 of UNCAC defines it as **"**the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."[32]

The definitions provided above are regarded as acts of corruption at a national level. It is evidenced that not all countries proscribe these behaviors equally; ergo certain components of acts of corruption vary across different jurisdictions, making certain acts lawful in certain jurisdictions but still awful[33].

2.2 Determinants of Corruption

With the aim to understand this phenomena, three elements should coexist which may provide the *stare* of corruption. Someone should have discretionary powers to change national policies or design regulations which may circumvent the population's interest towards one's own benefit with the *locus motive* to have an economic benefit out of the use of this power and finally a fragile legal/judicial system in which the likelihood of detection and/or penalty for such wrongdoing is considerably low[34].

"The widespread generalization that offenders are more deterred by the probability of conviction than by the punishment when convicted turns out to imply in the expected-utility approach that offenders are risk preferrers"[35] contributes to state that the existence of a well-functioning legal regime may act as a deterrent. The higher the probability of detection is, the lower the incentive is to commit an act of corruption. Following this argument, at an international level, it can be stated that even when the legal framework to prosecute corruption does exist, the adjudication at this level is relatively poor. This evidences the need to have an international consistent, comprehensive and effective enforcement legal regime.

[32] Supra note 2 [Art. 19]
[33] Nikos Passas, 'Lawful but awful: 'Legal Corporate Crimes'' (2005) 34 Journal of Behavioral and Experimental Economics 771-786.
[34] Arvind K. Jain, 'Corruption a review' (2001) Journal of Economic Survey.
[35] Gary S. Becker, 'Crime and Punishment: An Economic Approach, Journal of Political Economy [1968] The University of Chicago Press, 173

3 INTERNATIONAL LEGAL FRAMEWORK

The aegis of this Chapter is to identify the international anti-corruption legal framework, and the respective instruments constituting it, which are addressed alongside this master thesis and set the grounds to bring acts of corruption into the scrutiny of international adjudicative bodies[36].

A panoply of international and regional instruments constitutes the existing international legal framework have been adopted to tackle corruption[37]. At an international level, it should be restated that the UNCAC is deemed to be the most comprehensive instrument which addresses corruption through universal lens. Interesting to note is that the limits to assess acts of corruption at international adjudicative bodies (See Chapter 5) are somehow captured and reflected in the nature of this convention by recognizing that criminal sanctions (at national level) may not be sufficient and therefore it is pertinent to translate the condemnation of corrupt practices into all relevant fields of law, *inter alia*, administrative law[38] and take other measures beyond the criminalization of corruption. As a result of the text of the UNCAC, it is mandatory for each state party to take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption[39]. However, it is only suggested that "[I]in this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action"[40].

As already stated in the precedent Chapter 2, UNCAC criminalizes bribery of national officials, foreign public officials, officials of public international organizations, bribery in the private sector, embezzlement of property both in the public and private sector, trading in influence, illicit enrichment, abuse of function, and laundering and concealing the proceeds of corruption, all of this contained in Chapter III of such an instrument which deals with the criminalization and law enforcement, always at national level. A comprehensive approach to this Chapter includes taking complementary measures to encourage such criminalization, such as promulgating law enforcement or criminalizing the use of physical force, threats or the offer of a bribe to induce

[36] Deliberatively the antecedents and history of national and international anti-corruption legal framework are hereby omitted.
[37] Richard Kreindler, 'Jurisdiction and the unclean hands doctrine' in Kaj Hobér, Annette Magnusson, & Marie Öhrström (authors) *Between East and West: essays in hounour of Ulf Franke* (Juris Publishing, 2010)
[38] United Nations Office on Drugs and Crime Vienna. 'Technical guide to the United Nations Convention against Corruption' (New York, 2009)
[39] Supra note 2 [Art. 34]
[40] Ibid

false testimony or to interfere in the giving of testimony or production of evidence[41]. Chapter IV of UNCAC contains a series of measures which deal with international cooperation, including the extradition of perpetrators, mutual legal assistance and less-formal forms of cooperation. All in all, UNCAC considers the impact of corruption in different levels of society including "not only [..] the economic consequences of corruption but also its developmental and political impacts"[42].

Another instrument worth mentioning is the United Nations Convention against Transnational Organized Crime[43] (UNCTOC). The scope of this convention focuses on the fight against transnational organized crime and demand ratifying states that they take a series of measures against targeted crimes. These measures include, among others, the adoption of legislative measures to create domestic criminal offences, which include money laundering and corruption[44]. Worth noting is that given its scope, corruption is evoked in the context of acts of corruption linked to organized crime and the adopted text on the criminalization of corruption provides a definition of a specific act of corruption, namely, bribery[45]. The only international element of this act is enunciated in Article 8.2 of UNCTOC, by which states are invited to establish "as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant"[46]. Apparently the reason why bribery was the only act of corruption enshrined in the UNCTOC answers to certain requests during the negotiation stage of such convention[47].

The World Bank and the International Monetary Fund statutes devoted some language in anti-corruption but the purpose and scope of their respective statutes limits its application[48].

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[41] Indira Carr, 'Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?' (2007) European Journal of Crime, Criminal Law and Criminal Justice 121–153

[42] Jan Wouters, Cedric Ryngaert and Ann Sofie Clootsthe, 'International legal framework against corruption: Achievements and Challenges' (2013) Melbourne Journal of International Law 14 209-280

[43] United Nations Convention against Transnational Organized Crime (adopted by 15 November 2000 UNGA Res 55/25) (UNCTOC)

[44] Measures are herein focused in the subject-matter of this work. For further details, please refer to: <https://www.unodc.org/unodc/treaties/CTOC/ > Last accessed 28.10.2017

[45] Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations Publications, New York, 2006) 75

[46] Supra note 43 [Art. 8.2]

[47] See reasoning in 'Report of the informal preparatory meeting of the open-ended intergovernmental ad hoc committee on the elaboration of a comprehensive international convention against organized transnational crime' (Buenos Aires 31 August - 4 September 1998) 7, and in Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. 'Progress Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime' (Vienna, 5-16 June 2000) 4

[48] World Bank. Dealing with Governance and Corruption Risks in Project Lending: Emerging Good Practices (February 2009)

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [49] was the catalyst which first framed anti-corruption efforts at an international level. "Its aim is to 'assure a functional equivalence' on bribery of foreign public officials 'without requiring uniformity or changes in fundamental principles' of a state's legal system" [50] and strengthen the economic perspective with a more limited scope in the anti-corruption field.

As an outcome of the boost of the anti-corruption international legislative process, which has been evidenced from the begging of the 1990s, many instruments were adopted at a regional level:

- OAS Inter-American Convention against Corruption[51]. Corruption is assessed from the perspective that it constitutes a risk for democratic institutions and this concept is therefore reflected in the aegis of this instrument.
- Convention on the fight against corruption involving officials of the European communities[52].
- Convention on the Protection of the European Communities' Financial Interests ('EU Convention') which covers the misappropriation of EU funds through fraudulent statements.
- Southern African Development Protocol Against Corruption [53], which aims to harmonize and align the definition of corruption among its member states in order to facilitate cross-border cooperation.
- African Union Convention on preventing and combating corruption[54].

Within the framework of the Council of Europe, the Criminal Law Convention on Corruption[55] and the Civil Law Convention on Corruption[56] were adopted.

[49] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (entered into force 15 February 1999)
[50] Supra note 42
[51] Organization of American States Inter-American Convention against Corruption (entered into force 06 March 1997)
[52] Convention on the fight against corruption involving officials of the European communities (entered into force 28 September 2005)
[53] Southern African Development Protocol Against Corruption (entered into force 6 August 2003)
[54] African Union Convention on preventing and combating corruption (entered into force 5 August 2006) Parties: 37
[55] Criminal Law Convention on Corruption (entered into force 1 July 2002) and its additional protocol to the Criminal Law Convention on Corruption (entered into force 1 February 2005)
[56] Civil Law Convention on Corruption (entered into force 1 November 2003)

In the field of international investment law, no multilateral investment treaties [57] include corruption provisions whereas regional investment treaties, like the Treaty Establishing the European Community[58], have dealt with the issue since 1959. Corruption or corruption related provisions are dealt with in bilateral investment treaties. The first of those treaties to include a corruption provision was the BIT between Austria and Uzbekistan[59].

In the field of international human rights law, whereas there are no international or regional human rights instruments which address corruption, a series of human rights instruments (soft law) has been adopted which recognizes the link between corruption and human rights. The synergy between human rights and corruption was formally addressed for the first time in the framework of the UN Human Rights bodies in 2003 on the occasion of the adoption of the Human Rights Council (HRC) Resolution 23/9[60] on the negative impact of corruption on the enjoyment of human rights. The link between anti-corruption efforts and human rights, and the importance of exploring how to use United Nations Human Rights mechanisms more effectively in this regard was recognized therein. The Human Rights Council Advisory Committee was mandated to "make recommendations on how the Council and its subsidiary bodies should consider this issue"[61], order which culminated in the report A/HRC/28/73[62].

The enunciation above provided will assist to identify whether international adjudicative bodies might have jurisdiction *ratione materiae* to deal with corruption related cases and identify how corruption is conceptualized in each field. Further legal instruments will be enunciated alongside this thesis but do not distort the purpose of the enunciation herein.

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[57] Energy Charter Treaty (entered into force 17 December 1994)

[58] Treaty Establishing the European community the Treaty on European Union, the Treaty of Nice and the European Constitution **(**entered into force 1 January 1958)

[59] There are 25 BITs which contain corruption clause according to search tool of the UNCTAD <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults> Last accessed 28 May 2015

[60] UNHRC 'The negative impact of corruption on the enjoyment of human rights' (20 June 2013) UN Doc A/HRC/RES/23/9

[61] See <http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/NegativeImpactCorruption.aspx> Last accessed 28 October 2017

[62] UNHRC 'Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights' (2015) UN Doc A/HRC/28/73

4 INTERNATIONAL ADJUDICATIVE BODIES

The aim of this Chapter is to introduce the concept of international adjudicative bodies, identify those bodies subject of analysis in this thesis and address their main composition and characteristics relevant to the assessment of corruption related cases. Strong emphasis will be given to establish the link between corruption and each forum. Ergo, this Chapter will ultimately provide an overview on how corruption is or might be dealt with, *prima facie*, within each jurisdiction.

4.1 International Adjudicative Bodies – Definition

Not only judicial but also non-judicial bodies with international character are subject of study in this thesis, all of them referred to as "international adjudicative bodies"[63]. All of these bodies present common denominators which allow identifying them under this same term. A first general denominator which explains the ratio of encompassing judicial and non- judicial bodies into this term can be found in the etymology of the word a*djudication*[64]. The trait of adjudication involves two or more individuals (natural persons or legal entities), an adversarial procedure and a law-based decision-making process by which a decision with a binding nature is reached. These elements are identified in both judicial and arbitral procedures despite of main differences between them[65]. The international character of these bodies is another common denominator. The international character is given by several factors but it is mostly referred to the legal personality of such bodies. Their legal personality is found within the umbrella of an international instrument establishing such bodies as an international independent one or as an organ of an international organization. Last but not least, at least one party to the dispute is a subject of international law.

Following the common denominators above mentioned, academia seem to agree "that international adjudicative bodies are:

(a) international governmental organizations, or bodies and procedures of international governmental organizations, that

[63] Romano, Cesare P.R., Alter, Karen J. and Yuval, Shany, 'Mapping international adjudicative bodies, the issues, and players' in Cesare P.R. Romano, Alter, Karen J. and Yuval, Shany (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press, 2015)

[64] From its Latin origin it can be attributed the "ad" to "to" and "judicare" to "to judge"

[65] Differences between judicial and arbitral procedures are assumed to be understood.

(b) hear cases where one of the parties is, or could be, a state or an international organization, and that

(c) are composed of independent adjudicators, who

(d) decide the question(s) brought before them on the basis of international law

(e) following pre-determined rules of procedure, and

(f) issue binding decisions"[66]

The international adjudicative bodies identified hereinafter address the elements *ut supra* mentioned being incontestably in their nature international adjudicative bodies.

4.2 International Adjudicative Bodies – Classification

The classification of international adjudicative bodies contributes to a better understanding of their nature and scope which ultimately will assist to identify the general and procedural limits of these bodies when they understand in corruption- related cases. According the jurisdiction *ratione personae*, two main areas of focus can be identified:

(a) bodies dealing with inter-state disputes: *Lex generali*, those bodies which deal inter-state disputes where states can be held accountable for any beach of obligations enshrined in international treaties/conventions [67], which could be mingled with international obligations arising out of international anti-corruption instruments. In particular, these are the International Court of Justice (ICJ) and the World Trade Organization Appellate Body (WTOAB).

(b) bodies dealing with individual/state disputes: *Lex generali*, those bodies which have mandate to enforce international human rights conventions by understanding issues where member states to such conventions can be held accountable for breaches of human rights conventions and might be mingled with international anti-corruption obligations. The bodies under study are, in particular, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR), together with Economic Community of West African States (ECOWAS) Community Court of Justice. The latter will be only studied as per its jurisdiction to understand in human rights related cases. The International Criminal Court (ICC) is as well enshrined into this category, although the *rationae materia*

[66] Supra note 63

[67] Within this thesis, these terms are used interchangeable. Please refer to Art. 2.1.a of the Vienna Convention on the Law of the Treaties, supra note 189.

of its jurisdiction is of criminal nature. The International Centre of Settlement of Investment Disputes (ICSID) is also included in this category; however, dealing with investment related disputes.

4.2.1 International Court of Justice

An introduction to this international adjudicative body is deemed necessary. Acknowledged as the "principal judicial organ"[68] of the United Nations, the ICJ is the judicial body that "decides cases on the basis of international law as it exists at the date of the decision"[69] and only member states of the United Nations may be parties in contentious proceedings before this court[70].

The ICJ is "the only court of a universal character with general jurisdiction"[71], the latter subject to the consent given by states. The membership to the United Nations makes states *ipso facto* parties to the Statute of the ICJ[72]. In this regard, "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"[73].

A matter brought before the ICJ must be a legal dispute in order to attribute jurisdiction *ratione materiae,* and is a requirement enshrined in Article 36.2 of the Statute. To dispel doubts on jurisdictional matters, the ICJ noted in the Nuclear Tests case that "the existence of a dispute is the primary condition for the Court to exercise its judicial function"[74].The court may hear any legal dispute concerning

(a) the interpretation of a treaty,

(b) any legal question of international law,

(c) the existence of any fact which, if established, would constitute a breach of an international obligation,

(d) the nature or extent of the reparation to be made for the breach of an international obligation.[75]

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[68] Charter of the United Nations (entered into force 24 October 1945) (UN Charter) Art. 92
[69] Malcolm N. Shaw, *International law* (Cambridge University Press, Sixth edition, 2008)
[70] Statute of the International Court of Justice (entered into force 24 October 1945) Art. 34
[71] ICJ. T*he Republic of Equatorial Guinea seeks to institute proceedings against France before the International Court of Justice. It requests France to accept the Court's jurisdiction*. ICJ Press Release No. 2012/26
[72] Supra note 68 [Art. 93]
[73] Statute of the International Court of Justice Art. 36 (1)
[74] *Nuclear Tests Case (New Zealand v France)* (Judgement) [1974] ICJ Rep 1974, p. 457, para. 253, 270–1
[75] Vaughan Lowe, *International law* (Clarendon Law Series, Oxford University Press 2007)

Rationa personae, the ICJ has competence over disputes concerning states which have accepted its jurisdiction *via* a special agreement, a jurisdictional clause in a treaty, a declaration or by virtue of the rule of *forum prorogatum*.

The work of the ICJ as adjudicatory body supports the rule of law[76] and, therefore, corruption related cases might be presented before the ICJ as a breach to an international obligation enshrined in an international instrument amounting to state responsibility, which would set the grounds for a legal dispute to be understood under the jurisdiction of the ICJ. A detailed analysis based on these introductory remarks on the limits to bring a corruption- related legal dispute before the ICJ will be further conveyed in Chapter 5.

4.2.2 WTO Appellate Body

Another international adjudicative body which has jurisdiction to understand disputes between member states is the Dispute Settlement Body of World Trade Organization (WTO); more precisely the WTO Appellate Body[77]. Scarce literature is devoted to analyze whether the WTO Appellate Body should address corruption-related breaches at its Dispute Settlement Body (DSB). In fact, a fundamental detrimental reason to address corruption issues before this body is the lack of anti-corruption legal framework applicable within the umbrella of the WTO which limits the jurisdiction *ratione materia*. Acknowledging the WTO dispute settlement mechanism as an international adjudicative body, this thesis will not further analyze this forum since it only concludes in conjectural and hypothetical answers[78].

4.2.3 International Criminal Court

Founded in 2002 under the Rome Statute[79], the International Criminal Court (ICC) became the maximum expression of the internationalization of criminal law, it was regarded to be the result

[76] Peter Tomka, H.R. Judge, 'Inaugural Hilding Eek memorial lecture' (Stockholm Centre for International Law and Justice. The Rule of Law and the Role of the International Court of Justice in World Affairs, 2 December 2013)
[77] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the final act embodying the results of the Uruguay round of multilateral trade negotiations (Marrakesh, 15 April 1994) Art. 17
[78] Colette van der Ven, 'Should the WTO Outlaw Transnational Bribery?' *GAB | The Global Anticorruption Blog* (18 July 2014)
[79] Rome Statute of the International Criminal Court. (entered into force 01 July 2002 A/CONF.183/9) (Rome Statute)

of a structured jurisdiction for the prosecution of crimes of international bearing and "represents the symbolism of a global court of last resort and ultimate appeal"[80].

Following the principle *nulla poena sine lege*, the ICC has jurisdiction over crimes listed in the Rome Statute. The ICC focuses on crimes which hamper and jeopardize humanity in situation of crises or armed conflicts, in particular, genocide, war crimes, crimes against humanity, and the crime of aggression[81]. Despite the stated, it has been argued that "the ICC may actually be […] equipped to respond to serious long-term crimes such as grand corruption"[82]. This point will be further developed in Section 5.2.1.

For a crime to fall within the jurisdiction of the ICC three conditions must be satisfied:

(a) it must fall within the group of crimes referred to in Article 5 and defined in Articles 6, 7 and 8 of the Statute[83] (jurisdiction *ratione materiae*),

(b) it must fulfill the temporal requirements specified under Article 11 of the Statute (jurisdiction *ratione temporis*), and

(c) it must meet one of the two alternative requirements embodied in Article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*).

ICC's jurisdiction over a case or 'situation' may be triggered in any of the following cases:

(a) where a situation or offence takes place in or by a national of a State party

(b) where the territorial State or the State of the nationality of the accused are parties to the Statute

(c) where the Security Council acting under Chapter VII of the UN Charter refers a situation to the ICC prosecutor[84].

Whereas a party to the Rome Statute is subject to the jurisdiction of the ICC, non-state parties under Article 12.2 (that is, the territorial state or the state of the alleged perpetrator's nationality) can accept its jurisdiction with regard to a specific case or situation by lodging a declaration to that effect[85].

[80] GOPAC. Prosecuting Grand Corruption as an International Crime (18 November 2013)
[81] ICC. 'Understanding the International Criminal Court' (Public Information and Documentation Section)
[82] Ibid
[83] Supra note 79 [Art. 6-8]
[84] Supra note 79 [Art. 12]
[85] Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited Second Edition, 2003)

As for the required standard of proof, Article 53.1 (a)–(c) sets forth the factors which open an investigation into a situation, and which should be read together with the requirements of Rule 48 of the ICC Rules of Procedure[86].

With reference to the link between corruption and international criminal law, it has been largely discussed within scholars whether the *numerus clausus* of crimes under the jurisdiction of the ICC should be opened to other international crimes, including e.g. treaty crimes. Corruption is considered by many scholars a crime *per se* (if taking into consideration solely acts of corruption at national level) and, the plea for discussion among academia addresses the question on whether corruption should be internationally addressed before the ICC, and, in the affirmative, how this could be materialized. A further analysis of grand corruption as an international crime under the Rome Statute, procedural and jurisdictional challenges to deal with corruption related cases within the jurisdiction of the ICC will be dealt with in Chapter 5.

4.2.4 International Human Rights Adjudicative Bodies

Human rights adjudicative bodies' action against corruption is explained due to the intricate connection between human rights and corruption. In this regard, scholars are owners of different perspectives on how this link is established. Anukansari[87] asserts that the linkage is based on a power-relation perspective which focuses on who does what to whom and consequently leads to the conformation of a direct or indirect violation of human rights; which means that a violation of human rights can be the consequence of any of the three casual links between corruption and the violation of human rights - direct, indirect or remote cause-. Gebeye states that the impact of corruption is the factor that establishes this link with human rights. He further explains that this impact can be seen in different areas but, most importantly, it affects the "protection of human rights and the promotion of human freedoms […]"[88]. The approach is recognized as the so-called "negative relationship between corruption and human rights"[89]. Furthermore, the author focuses on the tripartite state obligation to respect, protect and fulfill human rights and argues that "the

[86] Rules of Procedure and Evidence (Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A)
[87] Kanokkan Anukansari 'Corruption: the catalyst for violation of human rights' (2010) Transparency International Thailand <http://www.nacc.go.th/images/journal/kanokkan.pdf> Last accessed 24.09.2017
[88] Supra note 14. He stresses as well the disproportionate impact on most vulnerable people.
[89] Joel M. Ngugi, 'Making the Link Between Corruption and Human Rights: Promises and Perils' (2010) American Society of International Law JSTOR

existence of corruption in a state per se shows the failure of the State towards its human rights obligations"[90].

Whereas this link has been extensively discussed in academia, evidence of this link can scarcely be found in international human rights treaties. "Although there are ten core human rights treaties and numerous regional treaties, none of these treaties explicitly mentions corruption at all"[91]. An historical explanation relies on the fact that the international legalization of corruption has experienced its outburst in the mid 90s, more than 40 years later of the entry into force of the first set of human rights treaty. *Mutatis mutandi*, international corruption-related instruments do not directly delineate how corruption can affect people's rights, or in the case this link is evidenced, the text of the instrument does not enjoy a binding nature *vis-à-vis* the states parties to such an instrument. For instance, a linkage between corruption and human rights can be attested in the Foreword of the UNCAC "[…] corruption […] leads to violations of human rights […]"[92] as well as similar wording is used to make reference to such a link in other international anti-corruption treaties[93]. Pilapitiya states that the need for compliance of the rule of law implies that "there can be no rule of law without protection of rights. The rule of law requires that all citizens have equal rights and equal protection before the law" [94]; this is somehow reflected in the Operative Paragraph 9 of the Preamble and Article 5.1 of UNCAC.

However, uncertainty is evidenced if acts of corruption (or corrupt behavior) are equated as human rights violations in order to assess corruption-related cases at international human rights adjudicative bodies. Corruption could be perceived as a violation of human rights and could be addressed by human rights adjudicative bodies as a violation to the obligations to respect, fulfill and protect human rights contained in multilateral/regional human rights treaties. States have the obligation to take measures to protect the enjoyment of human rights and, *a fortiori*, the lack to impose measures against corruption, which constitutes a detriment to the full enjoyment of human rights, might amount to the incapability to fulfill international human rights obligations. To support such an argument, the ICHRP report argues that "corruption amounts to a violation of

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[90] Supra note 14

[91] Ralph Hemsley, 'Human Rights & Corruption States' Human Rights Obligation to fight Corruption' (2015) Journal of Transnational Legal Issues

[92] Supra note 2 [Foreword]

[93] Criminal Law Convention on Corruption (entered into force 1 July 2002) Preamble, para. 4, Civil Law Convention on Corruption (entered into force 11 November 2003) Preamble, para. 4, African Union Convention on Preventing and Combating Corruption (adopted 1 July 2003 and entered into force 5 August 2006) Preamble, para. 4-5 and Art 3.2

[94] Thusitha Pilapitiya, 'The Impacts of corruption in the Human Rights Based Approach to Development' (2004) UNDP Oslo Governance Center 26

human rights because a state must use the maximum of its available resources to achieve the full realization of economic, social and cultural rights"[95]. In this same line, it is an undisputed and undeniable that corruption is perceived as a detriment to the full enjoyment of human rights[96]. Despite the *ut supra* mentioned, the lack of an international human rights binding obligation to fight against corruption is not asserted[97].

A *fortiori*, it can be concluded that not only when there is a violation of human rights but also an imminent violation of such rights, "[…] all human rights adjudicative institutions could act to force accountability and so create disincentives for corruption"[98]. In this regard, it has been addressed that "these bodies can fold corruption cases into their specific mandates and detect gaps in anti-corruption legislation which amounts to a breach of human rights to offer methodological recommendations for law enforcement" [99]. Whether human rights bodies have jurisdiction and resources to deal with corruption-related cases will be discussed further in Chapter 5.

4.2.4.1 ECOWAS Court

Pursuant to Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States, the Community Court of Justice (ECOWAS Court) was established[100] as the "principal legal organ" of the Community[101].

The ECOWAS Court understands in matters brought by member states and the Commission for failure of member states to fulfill their obligations under community law; including, after the entry into force of the Protocol A/P.l/7/91 on the Community Court of Justice, cases of violation of human rights that occur in any member state, among others powers to interpret, decide and

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[95] Supra note 91
[96] Supra note 60
[97] Supra note 91
[98] International Council on Human Rights Policy. 'Corruption and Human Rights: Making the Connection' (Switzerland , 2009) 23 "While they do not replace traditional anti-corruption mechanisms – primarily the criminal law – they can give cases prominence, may force a state to take preventive action, or may deter corrupt officials from misusing their powers. They can therefore both raise awareness and have a deterrent effect."
[99] Kaitlin Beach 'Coming Along for the Ride: Regional Human Rights Courts Should Demand Government Measures to Affirmatively Address Corruption) *GAB | The Global Anticorruption Blog* (8 July 2016)
[100] Legal framework regulating its organizational framework, powers, jurisdiction, competences are set out in Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.
[101] Protocol A/P.L/7/91 on the Community Court of Justice (entered into force 30 June 2004) Art 2

adjudicate[102]. ECOWAS court has jurisdiction to understand in violations of human rights that occur in a Member State [103] and an allegation brought by individuals on the breach of human rights obligations against a Member State might constitute a legal dispute to be administered by the ECOWAS court. Moreover, it understands in issues regarding the application of any treaty, convention or related instruments of the community. Regarding the latter, it would have the adjudicative power to understand in issues brought by member states over cases resulting of the interpretation or application of Economic Community of West African States Protocol on the Fight against Corruption, once in force.

In terms of evidence, the ECOWAS Court may request the parties to produce any document and provide information or explanation as required. The refusal to provide any document will be formally noted[104].

As above mentioned, the way in which the ECOWAS court might address corruption issues is two-folded. It could be materialized as a breach of provision deriving from the ECOWAS Protocol on the fight against corruption after its entry into force[105] or it may address corruption as a violation of human rights. Indeed, the ECOWAS court was the first regional human rights adjudicatory body which had explicitly considered corruption as a violation of human rights in the case brought in 2010 by the Nigerian NGO Socio-Economic Rights and Accountability Project (SERAP case)[106]. Further analysis of this case will be provided in Chapter 5.

4.2.4.2 European Court of Human Rights

Under the framework of the European Convention on Human Rights [107] as adopted by 47 member states of the Council of Europe, the European Court of Human Rights (ECtHR) was established as the judicial organ which hears matters concerning the interpretation and application of human rights provisions brought before the ECtHR as an alleged breach of one or more provisions enshrined in the afore mentioned convention and respective protocols.

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[102] See <http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5> Last accessed 28.10.2017

[103] Supplementary Protocol A/SP.1/01/05amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English Version of such Protocol Art. 9. 4

[104] Ibid Art. 15 – 18

[105] The ECOWAS Protocol was signed in 2001 but has not entered into force yet.

[106] Supra note 80

[107] Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedom (entered into force 1 November 1998)

The ECtHR has jurisdiction over inter-state cases, although this has not been exploited yet, and cases where the application is submitted by any person, non-governmental organization or group of individuals claiming to be the victim/s of a violation by a Contracting Parties to the Convention or Protocols[108].

Together with the application, documents supporting the claim shall be submitted to the ECtHR; encompassing what it is refers to as evidence. According to the Annex to the Rules of Procedure Concerning Investigations[109], a chamber may, at request of a party or of its own motion, adopt any investigatory measure which considers capable of clarifying the facts of the case. A chamber "may also appoint a judge to conduct an inquiry or carry out an investigation or take evidence in some other manner"[110]. The powers of the chamber are of great value for bringing evidence on cases of human rights violations linked to corruption.

The ECtHR has dealt with more than 60 cases where a reference to corruption is made and p*rima facie*, 15 cases have been associated with an infringement of human rights. In the majority of the cases corruption mingled with the method to obtain evidence from suspected individuals (undercover police investigations), but no specific link was made[111].

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[108] Convention for the Protection of Human Rights and Fundamental Freedoms (signature 4 November 1950 and entered into force in 1953) (European Convention on Human Rights) Art 34

[109] Rules of European Court of Human Rights, Annex to the Rules of Procedure Concerning Investigations (14 November 2016) Rule A1 1- 6

[110] Idem [Rule A1 1- 6]

[111] *Catan and Others v. the Republic of Moldova and Russia* (Merits and Just Satisfaction) (ECtHR 2012); *Creangă c. Roumanie* (Merits and Just Satisfaction) (ECtHR 2012); *Cumpana and Mazare v. Romania* (Merits and Just Satisfaction) (ECtHR 2004); *Cyprus v. Turkey* (Just Satisfaction) (ECtHR 2014); *EL-MASRI v. the Former Yugoslav Republic Of Macedonia* (Merits and Just Satisfaction) (ECtHR 2012); *Georgia v. Russia (I)* (Merits) (ECtHR 2014); *Guja v. Moldova* (Merits and Just Satisfaction) (ECtHR 2008); *Hirst v. the United Kingdom* (No. 2) (Merits and Just Satisfaction) (ECtHR 2005); *H.L.R. v. France* (Merits and Just Satisfaction) (ECtHR 1997); *Karácsony and Others v. Hungary* (Merits and Just Satisfaction) (ECtHR 2016); *Kart v. Turkey* (Merits and Just Satisfaction) (ECtHR 2009); *Karácsony and Others v. Hungary* (Merits and Just Satisfaction) (ECtHR 2016); *J.K. and Others v. Sweden* (Merits and Just Satisfaction) (ECtHR 2016); *Maktouf and Damjanović v. Bosnia And Herzegovina* (Merits and Just Satisfaction) (ECtHR 2013); *Maktouf Et Damjanović c. Bosnie-Herzégovin*e (Merits and Just Satisfaction) (ECtHR 2013); *Mouvement Raëlien Suisse v. Switzerland* (Merits and Just Satisfaction) (ECtHR 2012); *Mozer v. The Republic of Moldova and Russia* (Merits and Just Satisfaction) (ECtHR 2016); *M.S.S. v. Belgium and Greece* (Merits and Just Satisfaction) (ECtHR 2011); *N.C. v. Italy* (Merits and Just Satisfaction) (ECtHR 2004); *Paksas v. Lithuania* (Merits and Just Satisfaction) (ECtHR 2011) ; *Perna v. Italy* (Merits and Just Satisfaction) (ECtHR 2003); *Ramanauskas v. Lithuania* (Merits and Just Satisfaction) (ECtHR 2008); *Reangă V. Romania (*Merits and Just Satisfaction) (ECtHR 2012); *Refah Partisi (The Welfare Party) and Others v. Turkey* (Merits) (ECtHR 2003); *Selmouni v. France* (Merits and Just Satisfaction) (ECtHR 1999); *Sisojeva and Others v. Latv*ia Application no 60654/00 (ECtHR 15 January 2007); *Stoll v. Switzerland* (Merits and Just Satisfaction) (ECtHR 2013); *X c. Lettonie* (Merits and Just Satisfaction) (ECtHR 2013); *Yumak and Sadak v. Turkey* (Merits and Just Satisfaction) (ECtHR 2008)

4.2.4.3 Inter-American Court of Human Rights

Similar to the legal nature of already described international human rights adjudicative bodies, the Inter-American Court of Human Rights (IACHR)[112] is the judicial organ of a Inter-American human rights system.

Its jurisdiction comprises all cases concerning the interpretation and application of the American Convention on Human Rights (Pact of San Jose) or the interpretation of other treaties governing the protection of human rights in the American region[113]. Consent has to be expressed by States Parties to the Pact of San Jose.

Cases must be first reviewed by the Commission which will decide on their admission based on the requirements set forth in Article 46 of the aforementioned Pact.

In the application and respective reply[114], the parties to a dispute have to specify the evidence to be produced and submitted. The IACHR may obtain, *suo motu*, any evidence which considers relevant and pertinent to the case. However, such prerogative is, *prima facie*, limited to the hearing of witness - whether this encompass any other kind of evidence is unclear-. This competence is empowered by the possibility to "request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point"[115]. The IACHR may as well order one of its members to conduct measures in order to gather evidence. This provides the IACHR with more freedom in terms of manpower to gather the required evidence. There is no specific momentum for exercising this power, having freedom to exercising at any stage of the proceedings. The IACHR has dealt with corruption related cases which will be analyzed in Chapter 5.

4.2.5 International Centre for Settlement of Investment Disputes

A recognized centre which deals with international investment arbitration related disputes is the International Centre for Settlement of Investment Disputes. Founded under the ICSID

[112] The Statute of the Inter-American Court has been adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No.448).
[113] American Convention on Human Rights (adopted 22 November 1969 and entered into force 18 July 1978) (Pact of San Jose) Art.64
[114] Rules of Procedure of the Inter-American Court of Human Rights (approved 16-24 November 2000) Art. 43
[115] Idem [Art. 44]

Convention[116], its participation has grown steadily over the years, which speak out on the international reach that may have the awards rendered under the framework of the ICSID.

In a nutshell, ICSID tribunals understand legal disputes on a foreign direct investment between a national of a Contracting Party to the Convention and a Contracting Party, which has given its consent to address the matter under the ICSID umbrella. Upon a request of either party to institute arbitration proceedings, an arbitral tribunal is established and proceedings are initiated[117] according the applicable rules of procedure[118]. One of the competences of tribunals is to call upon the parties to produce documents or other evidence[119].

In international investment arbitration, acts of corruption are not indeed a recent phenomenon but "the frequency with which they occur and the complexity of their consequences has increased significantly in the last few years."[120]

It is impossible to deny a tight link among corruption practices and the effects of corruption in the international investment field and specially using arbitration as a dispute settlement mechanism to, at least incidentally, address it. Cremades states that "the unique features of investment arbitration are of particular relevance when it comes to the treatment and consequences of corruption."[121] He identifies the key role of public international law during arbitral procedures, on the interpretation of BITs and in determining state responsibility for the breach of any investment standard of protection.[122]

However, there are some difficulties to deal with acts of corruption within the scope of ICSID tribunals. Corruption takes different shapes during the arbitral procedure: a. corruption practices arise from the evidence introduced by the parties, although neither party introduces allegations of such wrongdoing; b. a state could raise the defense of investor corruption (by participating in or endorsing the act of corruption), or c. vice versa, the investor could raise the defense of state

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[116] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force 14 October 1966) (ICSID Convention)

[117] Idem [Art. 36 -38]

[118]Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (amended 2003)

[119] Supra note 116 [Art. 43]

[120] Institute of World Business Law. Introduction to Addressing Issues of Corruption in Commercial and Investment Arbitration (34th Annual Meeting of the ICC, 24 November 2014)

[121] Bernardo Cremades, 'Corruption and Investment Arbitration' in *Global Reflections on International Law, Commerce and Dispute Resolution* (Liber Amicorum in honour of Robert Briner, ICC Publication 2005)

[122] On the private sector side, a study suggests that "investors are fully aware of the risks of corruption and that there is no evidence that domestic corruption would constitute a significant barrier for foreign investment. The study is to be found in U. Wetizel and S. Berns, 'Cross-border takeovers, corruption and related aspects of governance' (2006) Journal of International Business Studies and its comments in Wouters, J., Ryngaert, C., & Cloots, A. S., *The Fight against Corruption in International Law* (Leuven Centre for Global Governance Studies, 2006)

corruption. To these latter options, corruption takes the form of what is referred to as "corruption defense". Introduced by either party to the dispute, the corruption defense poses a significant challenge to arbitral tribunals which have to consider whether they have jurisdiction to understand the allegation of an act of corruption; the burden of proof and standard of evidence which shall be applicable, the applicable law and, lastly, the legal consequences of declaring that an act of corruption has been committed[123].

Bringing a corruption defense to the attention of the arbitral tribunal can be beneficial to the submitting party of such defense. From the claimant's perspective, alleging host state corruption may create a fair, transparent and predictable environment for international commercial transactions. Seeking to declare a contract void, by alleging the corruption defense, may accelerate the arbitral proceedings since it may exercise pressure on the state to settle. These advantages may be undermined by the risk of damaging future business relationships with the state and risk of having a reverse effect, in the form of a corruption counterclaim. Moreover, it may discredit the state's position before international organizations (e.g. such as the IMF) or constitute the grounds of a possible breach of international obligations (e.g. breach of Article 1 (c) of the UNCAC)

Conversely, host states may be interested in eradicating corruption to maintain institutional legitimacy since facing corruption allegations before arbitral tribunals may increase distrust in political and economic environment for future foreign direct investments or question a State's legal stability. Moreover, as it is stated by Muchlinski: "Firms should also avoid involvement in bribery and other forms of corruption; [t]hese standards could be used to assess the conduct of a foreign investor in a given case. Failure to meet these minimum ethical standards could act as a factor in determining whether the investors' complaint of unfair and inequitable treatment is properly made."[124]

How corruption is addressed in the field of international investment arbitration with a special focus on the corruption defense brought by investors and host states before the ICSID and the general and procedural limits encountered by ICSID tribunal to deal with corruption will be further detailed in Chapter 5.

[123] Michael Sc Hwang and Kevin Lim, 'Corruption in Arbitration— Law and Reality' (2011) Singapore: Asian International Arbitration Journal 7, it can be found a thorough analysis on the legal issues faced by arbitral tribunals. Scholars distinguished "between issues of corruption which arise at the primary tribunal level before the award is rendered, and those which arise thereafter if the award is challenged before reviewing national courts, which may be asked to set aside or refuse enforcement of the award"

[124] Peter Muchlinski, 'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard' (2006) 55(3) International and Comparative Law Quarterly 527-558

5 LIMITS AT INTERNATIONAL ADJUDICATIVE BODIES

This Chapter addresses the general and procedural limits which can be encountered by international adjudicative bodies when addressing corruption related cases, more specifically grand corruption related cases.

5.1 General Limits at International Adjudicative Bodies

This Subchapter will address three limits which might be or are encountered by international adjudicative bodies when corruption or an act of corruption is evidenced in a case under analysis. The concept of corruption, the attitude of international adjudicative bodies towards corruption and the role of adjudicators are subsumed under the term "general limits" for the purpose of this thesis.

5.1.1 Concept of Corruption

A first limit to the analysis of corruption-related cases before international adjudicative bodies is the concept of corruption. As *ut supra* mentioned (Chapter 2), there is no single universally accepted definition of corruption. As stated in Chapter 2, the concept of corruption is referred to within academia as culturally diverse. This cultural diversification enshrined in different concepts of law is evidenced in the composition of international adjudicative bodies. International adjudicative bodies, e.g., international criminal bodies, bring "together judges, prosecutors, and other court personnel from different backgrounds and legal cultures creates obstacles to efficient trial"[125]. This brings a first limit to the adjudicative bodies since the understanding of corruption is not uniform; e.g., bribery may be understood differently across national legal systems despite the international obligation that state parties to UNCAC to transpose the therein stated concepts into national legislation. There is a tautological problem based on the question on "[…] how universal legal concepts might conflict with local

[125] Richard Dicker and Elise Keppler, 'Beyond The Hague' (2004) Human Rights Watch in <https://www.globalpolicy.org/component/content/article/163/28276.html> Last accessed 28.10.2017

understandings of law and justice […]"[126]. The same constellation applies to the definition of grand corruption where there is only a discussion at the academic level, and not even legalized nor recognized under international customary law.

Following this same limit, in the *Impact of Cultural Diversity on International Criminal Proceedings*[127], the author refers to the cultural diversity found in international criminal proceedings, specifically in the concept of justice. A conceptual problem is described when it comes to establish what is considered to be a crime to be prosecuted before international criminal adjudication, and therefore, what is understood to be justice under this framework. The same question is posed regarding corruption: should it be punishable before the international community and what is considered to be justice? These questions are key in order to analyze whether the ICC would have jurisdiction *rationae materia* to bring a corruption related case. Having an uniformed concept of corruption or acts of corruption will assist to determine what the elements of international acts of corruption under the jurisdiction of the ICC are and what would be considered justice if such acts of corruption are brought under international criminal adjudication. Resorting to anti-corruption instruments appears to be the most sensitive method to determine such a concept. When it comes to the international legal framework, the UNCAC and its interpretation is taken as a point of reference since it enunciates those acts of corruption which are already internationally recognized. Complementarily, in the United Nations Convention against Transnational Organized Crime[128] ("UNCTOC") two corruption offences are enshrined[129], with a focus on those acts of corruption linked to transnational organized crime, in particular acts of corruption involving foreign public officials[130].

In the case *Inmunities and Criminal Proceedings (Equatorial Guinea v. France)*, the ICJ is confronted with the closest case in which an act of corruption, as enunciated in the UNCAC and UNCTOC, incidentally engenders the applicability of an instrument which makes reference to an act of corruption. The grounds of the pledge are based on the alleged criminal immunity enjoyed under the UNCTOC by a high-level public official of the applicant state. If the ICJ decides to

[126] This is an excerpt from the report 'The Impact of Legal and Cultural Diversity on International Justice' of the 2006 Brandeis Institute for International Judges <www.brandeis.edu/ethics/internationaljustice > Last accessed 28.10.2017

[127] Jessica Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4 *Journal of International Criminal Justice* 745-764

[128] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 and entered into force 29 September 2003 UNGA Res 55/25) (UNCTOC).

[129] Supra note 43 [Art. 8-9]

[130] Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (United Nations Publications, New York, 2006) 75

understand on the merits of the case, the case submitted by Equatorial Guinea[131] might reflect this dilemma on the definition of acts of corruption. *Prima facie*, the definition of the act of corruption committed under French jurisdiction might not represent a challenge before the ICJ since it is neither contested by Equatorial Guinea or appears as one of the points of the pledge. Worth noting is that Equatorial Guinea does not make reference to the nature of the crime but it makes reference to an anti-corruption international legal framework. It must be stated that neither the definition nor the scope of the act of corruption as presented in the UNTOC were brought as the subject matter of the legal dispute before the ICJ.

In the human rights field, the ECtHR "does not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their (state's) institutions"[132], which leaves to state that, at least regionally, the acknowledgement given to the concept of corruption is aligned with the doctrine and literature. In fact, the ECtHR recognizes that corruption undermines citizens' trust, it does however not make reference to the link between corruption and human rights but limits its reference to the attitude of citizens *vis-à-vis* governmental institutions.

Whereas the notion of corruption is not specifically addressed within human rights international adjudicative bodies' case law, the link between human rights and corruption has been recognized by non-adjudicative bodies. In 2001, when reviewing the situation on human rights in Paraguay, the Inter-American Organization Commission on Human Rights made a reference to the link between corruption and human rights by stating that corruption is an important element to monitor whether OAS member states safeguard democratic institutions, and that corruption is a factor which should be taken into consideration when analyzing the situation on human rights in a country.[133] Two specific links are mentioned: the first between corruption and economic, social and cultural rights, and the second between corruption and discrimination[134].

Nothing deriving from international human rights legal framework can be seen as an additional value to the definition of corruption or acts of corruption.

Last but not least, no further development on the concept of corruption or acts of corruption has been found in the case law of the ICSID. Rouf explains that given the diverse arbitral practice in corruption related matters, there is an absence of a uniform definition of corruption and the

[131] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* ICJ Application no. 2016/37

[132] *Creangă c. Roumanie* (Merits and Just Satisfaction) (ECtHR 2012) para. 108

[133] CIDH. Tercer Informe sobre la Situación de los Derechos Humanos en Paraguay 2001. OEA/Ser./L/VII.110, doc. 52: Capítulo II, G, para. 53. "[…] De acuerdo con las anteriores consideraciones, la corrupción existente en Paraguay afecta seriamente la institucionalidad democrática y es un factor importante a tomar en cuenta al analizar la situación de los derechos humanos en el país […]"

[134] Idem

different approaches taken by arbitrators are explained[135]. Despite the stated, the undeniable nature of corruption as "contrary to international public policy" triggered the parties to investment disputes to allege that an act of corruption has been committed.

Whereas resorting to the legal framework applicable to/by each international adjudicatory body could be one sensitive method to search for a uniform concept, this might not be effective when corruption is not regulated under such a framework. As evidenced, there are few and certainly not enough references to the concept of corruption, acts of corruption or grand corruption within the pronouncements of international adjudicatory bodies. A clear consequence of the lack of an uniform concept of grand corruption has an impact on the scope of competence of these bodies.[136]

5.1.2 Attitude towards Corruption

Addressing corruption in the international adjudicative system poses several challenges and one of them refers to the different ways that international adjudicative bodies address or might address corruption related cases given the jurisdiction *ratione materie* of each body.

It is worth noting that international adjudicative bodies might have to deal with two aspects regarding certain international obligations relating to corruption: the concept of state responsibility and individual criminal responsibility. The breach of international obligations related to the fight against corruption might constitute a wrongful international act. Not only states but also individuals might assume responsibilities *vis-à-vis* such a wrongful international act. This responsibility is dual and amounts not only to a wrongful international act on the state's side but also to a criminal offense on the side of the individual. The ECtHR stated that "there is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts" [137]. This dual responsibility is clearly visible on certain cases which are part of the jurisprudence of the ICJ, specifically in cases where the ICJ had to deal with criminal related matters. Following K.J. Keith's statement that "one State may bring a case

[135] Mohamed Abdel Raouf, 'How should international arbitrators tackle corruption issues?' (2009) ICSID Review, Foreign Investment Law Journal, 24, 119

[136] Supra note 127

[137] *Jones and Others v The United Kingdom* Application nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014)

against another before the Court on criminal justice matters"[138], he enumerates in his paper those cases where such matters of criminal nature have been addressed by the ICJ.

Corruption- related cases might be presented before the ICJ as a breach of an international obligation enshrined in an international anti-corruption instrument, amounting to what is known as state responsibility, and therefore set the grounds for a legal dispute to be understood under the ICJ jurisdiction. A legal dispute to be addressed before the standing of the ICJ could be manifested as a state's international wrongful act or as the cause of a breach of an international obligation which is attributable to an act of corruption committed by a state[139]. In both cases a corruption related case might be the subject matter of a legal dispute presented before the ICJ.

The attitude of ICC towards corruption would be to prosecute an international crime with corruption related elements. It is clear that the type of corruption which might be addressed within this body is grand corruption. In this regard, scholars have developed two mainstream theories which support grand corruption as an international criminal offense subject to be prosecuted under international criminal adjudication: either as a new crime to be included in the Rome Statute or as an element of the crime against humanity. The viability of these options will be further developed in Section 5.2.1. As of the current state of affairs, such analysis is merely conjectural and not based on jurisprudence.

Furthering to the stated in Section 4.2.4 regarding the link between corruption and human rights, corruption could be perceived by human rights adjudicative bodies in three different ways:

(a) as a direct or indirect violation of human rights.

(b) as a violation to the obligations to respect, fulfill and protect human rights contained in regional human rights treaties[140]. States have the obligation to take measures to protect the enjoyment of human rights and, *a fortiori*, the lack to impose measures against corruption – which constitutes a detriment of the full enjoyment of human rights- might amount to an incapability to fulfill international human rights obligations[141]. This negative impact was recognized in the Human Rights Council's report on the negative impact of corruption on

[138] Kenneth James Keith and Kenneth Keith, 'The International Court of Justice and Criminal Justice' (2010) 59 International and Comparative Law Quarterly, para. 895-910

[139] No further analysis will be given to the responsibility of states for international wrongful acts but it must be acknowledged <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> Last accessed 28.10.2017

[140] Supra note 98 [p. 23]. It is argued that states have the obligation "to respect", "to protect" and "to fulfil" human rights. When corruption interferes with these obligations, then the state is guilty of failing to protect human rights.

[141] Anne Peters, 'Corruption and Human Rights' (2015) Basel Institute on Governance, Working paper series, 20, para. 7-30.

the enjoyment of human rights[142] where it is established that the need to link these two issues is key a. to give the fight against corruption a human perspective, b. to make states accountable for violation of human rights since states as duty bearers of human rights obligations are responsible for respecting, protecting and fulfilling said rights, and c. to open up new opportunities for litigation or monitoring in order to increase the participation of civil society through either individual complaint mechanism or state ones.

(c) corruption is considered a direct, indirect or remote cause for the breach of a human rights related obligation[143].

Human rights international adjudicative bodies have addressed this link in different ways.

In the ECOWAS Court's landmark decision it is stated that "there must be a clear linkage between the act of corruption and a denial of the rights to education"[144]; which proves that corruption is a cause for a human rights violation. The violation is construed upon the omission of Nigeria to prosecute the officials who diverted the funds allocated to the respective education institution. This reasoning is academically framed by the International Council on Human Rights Policy which suggest a model where the rules on distribution of public resources (and identify three: allocation, inclusion, and accountability) are interrelated with the influence of corruption in this process, which proves that corruption undermines people's human rights. It is explained that the "[r]ules of allocation define the criteria for distributing public resources. Rules of inclusion define who participates (how and when and in what processes). Rules of accountability determine the responsibilities of each actor involved and mechanisms for enforcing victims' rights. Corruption subverts all three, and the more this subversion diminishes these rules, the less space there is for human rights"[145].

Interestingly, the ECOWAS Court has taken the report produced by SERAP and referenced the acts of corruption which applied to the diversion of funds for education, but did not resort to any classification or definition of any of these acts.

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[142] Supra note 12

[143] Michael Bryane and Hajredin Habit contest the fact that corruption is a cause of human rights violations but state that "it exacerbates (or attenuates) such human rights violations" in Bryane, Michael and Habit, Hajredini, 'Topics in Anti-Corruption Law: What Does Kosovo Teach Us About Using Human Rights Law to Prosecute Corruption Offences?', <https://web.hku.hk/~bmichael/publications/HTML%20Papers/Human%20Rights%20in%20Kosovo%20Paper.htm#_Toc250617580 > Last accessed 28.10.2017

[144] *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Another* Application no. 12/07 (ECOWAS Court 30 November 2010) para. 19

[145] International Council on Human Rights Policy. Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities (Switzerland, 2010)

The ECtHR has dealt with fifteen cases where corruption has been associated with an infringement of human rights, more specifically the right to a fair trial (Article 6 of Convention)[146], freedom of speech (Article 10) and right to humane treatment (Article 3). The ECtHR outweighs the freedom of speech over individual rights to be free from defamation, in this case. In the course of investigations to prove the commission of an act of corruption (bribery), the method to obtain evidence from suspected individuals (undercover police investigations)[147] has been regarded as a violation to such an article. ECtHR sets a boundary to the fight against corruption which must be conducted within the limits of the law and free of arbitrariness.

Within the Inter-American human rights system, during the visits of the Commission to member states, the Commission has addressed corruption as an impediment to the full enjoyment of human rights, which strengthens impunity and undermines the rule of law[148]. "The Commission emphasizes the close link between corruption and the effective enjoyment of the human rights of the people"[149] and considers the direct and negative impact on the (mis)allocation of resources. Recently, the Commission applauded Panama's efforts to get rid of corruption in the prison system, where corruption is seen as a detriment to prisoners since it affects certain rights, e.g. the achievement of the essential purposes of prison sentences, and brings inequality and an unbalance among prisoners[150]. Lastly, in its report on the situation on Honduras, it made a reference (with negative connotation) to the State's response to the serious structural problems of violence, impunity, corruption, and organized crime since the State intervenes with armed forces in many spheres and functions[151].

There were nine cases brought before the IACHR with a corruption-related token but six cases specifically entrench corruption with an infringement of human rights, more specifically the right to live[152], the right to humane treatment[153] and the right to a fair trial[154]. Corruption has been

[146] *Guja v. Moldova* (Merits and Just Satisfaction) (ECtHR 2008) and *Cumpana and Mazare v. Romania* (Merits and Just Satisfaction) (ECtHR 2004)

[147] *Guja v. Moldova* (Merits and Just Satisfaction) (ECtHR 2008); *Sisojeva and Others v. Latv*ia Application no 60654/00 (ECtHR 15 January 2007); *Ramanauskas v. Lithuania* (Merits and Just Satisfaction) (ECtHR 2008); *N.C. v. Italy* (Merits and Just Satisfaction) (ECtHR 2004); *Cumpana and Mazare v. Romania* (Merits and Just Satisfaction) (ECtHR 2004); *Creangă c. Roumanie* (Merits and Just Satisfaction) (ECtHR 2012)

[148] Inter-American Commission on Human Rights. OAS Press Release No. 15/96, Press release No. 1/93 and Press release No. 125/16. The Inter-American Commission on Human Rights welcomes the efforts undertaken by the Panamanian State to combat corrupt acts in the penitentiary system, by dismantling a corruption network.

[149] Inter-American Commission on Human Rights. OAS Press Release No.59/08

[150] Similar approach on corruption is evidenced as one of the threats that inmates in prisons are exposed to. See: Inter-American Commission on Human Rights. OAS Press Release No. 033/16

[151] Press releases of years 1992 - 2016 on corruption. Situation in Honduras, Panama and Haiti Jamaica and Brazil.

[152] Supra note 113 [Art. 4]

dealt with as a direct and indirect cause of violation of the rights mentioned above and also it has been brought to the attention of the court only to provide a background of the of the respective case. As a direct cause of violation of a right, corruption is brought in the case of *Acevedo-Jaramillo et al. v. Peru*[155] before the Commission and the IACHR to justify the inaction of the state *vis-à-vis* domestic judgments which ordered the restitution of the claimants to their old job posts in the municipality government.[156] In the case of *Juvenile Reeducation Institute v. Paraguay*[157], the existence of corruption as a fact attributable to the state has been considered by the IACHR as to constituting a violation of Article 5 of the American Convention to the detriment of all the inmates interned at the center. In the case of *Kichwa indigenous people of Sarayaku v. Ecuador*[158], the state was found responsible of having delegated the obligation to consult to the interested private company, which caused the commission of acts of corruption like bribery towards the indigenous population, and the cause of violation of the right the property of the indigenous communities. In *Tibi v. Ecuador*[159], even when authorities were implicated on bribery accounts for accepting payments of inmates in exchange of access to food and protection, this act of corruption was not been explicitly considered a violation as a direct consequence of corruption.

Regarding cases where there is a violation of a human right as an indirect consequence of corruption, like in the case *Sawhoyamaxa v. Paraguay*[160], corruption in the system of restitution of indigenous land is denounced and, given it has been proven, the lack of restitution is a violation of collective rights of indigenous people. Last but not least, in *López Mendoza vs. Venezuela*[161], the IACHR highlighted that the fight against corruption is of great importance and it will take it into consideration when a case is presented before it and the court must render judgment on it[162]. Again, the domestic administrative procedure which involved fraudulent administration of public funds was the bedrock of the case before the IACHR. However, the IACHR deliberately made no pronouncements regarding internal criminal and criminal,

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[153] Supra note 113 [Art. 5]
[154] Supra note 113 [Art. 8]
[155] *Acevedo Jaramillo y otros v. Perú* (Judgment) (IACHR 7 February 2006)
[156] Idem [para. 162]
[157] *Juvenile Reeducation Institute v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs) (IACHR 2 September 2004) para. 171
[158] *Kichwa indigenous people of Sarayaku v. Ecuador* (Merits and reparations) (IACHR 27 June 2012)
[159] *Tibi v.Ecuador* (Preliminary Objections, Merits, Reparations and Costs) (IACHR 7 September 2004)
[160] *Sawhoyamaxa vs. Paraguay* (Merits, Reparations and Costs) (IACHR 29 March 2006)
[161] *López Mendoza vs. Venezuela* (Merits, Reparations and Costs) (IACHR 1 September 2011)
[162] Idem. Translation by the author: "la lucha contra la corrupción es de suma importancia y tendrá presente esta circunstancia cuando se le presente un caso en que deba pronunciarse al respecto".

administrative or disciplinary responsibility, since it lacks jurisdiction to understand in criminal related matters.

As to the last body to be analyzed, it is impossible to deny a close link between corrupted practices and the effects of corruption in the international investment field. Cremades states that "the unique features of investment arbitration are of particular relevance when it comes to the treatment and consequences of corruption"[163]. One of these features refers to counterfeit grand corruption committed by high-level officials, as addressed in *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*[164]. In the international investment field, corruption takes different shapes. Arbitral tribunals faced a dilemma: to declare the contract void/voidable (if contrary to national law) or illegal (if contrary to public international order). Arbitral tribunals had to undergo the following assessment to solve said dilemma, which consists of two steps: 1. declare that the corrupt practice is a legally reproachable act (under national law or public international order) and 2. establish a causal link between the corrupt practice and the illegality of the contract of investment. Parties to an arbitral dispute have introduced before the ICSID allegations of acts of corruption, or the state/investor has raise the corruption defense of the investor/state corruption (by participating in or endorsing the act of corruption).

Multilateral investment treaties *per se*[165] do not include corruption related provisions; however, other international investment treaties have dealt with the issue since 1959, like the Treaty Establishing the European Community[166], and in particular, the first bilateral investment treaty to include a corruption provision was the BIT between Austria and Uzbekistan, which entered into force in 18 August 2001[167]. Worth mentioning is how corruption is enshrined in BITs. Contentwise, the wording of those provisions can be grouped as follows: 1. "to ensure that measures and efforts are undertaken to prevent and combat corruption"[168], 2. "Each Party shall encourage enterprises […] to voluntarily incorporate […] statements of principle that have been endorsed or are supported by the Parties; [t]hese principles address issues such as […] anti-

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[163] Supra note 121

[164] *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*, Case No. ARB/01/14 (ICSID 3 March 2006) and other cases which involve senior governmental officials: *World Duty Free Company Ltd. v. Republic of Kenya*, Case No. ARB/00/7 (ICSID 4 October 2006)

[165] Supra note 57

[166] Supra note 58

[167] According to the search tool of the UNCTAD < http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults> Last acceded 28 May 2017, there are 27 BITs which contain corruption-related clause.

[168] Agreement between Japan and Ukraine for the promotion and protection of investment (entered into force 26 November 2015)

corruption"[169], and "each Contracting Party shall endeavor to: […] uphold anti-corruption practices in accordance with the United Nations Convention Against Corruption […]"[170], and 3. "EMPHASISING the necessity for all governments and civil actors alike to adhere to UN anti-corruption efforts, most notably the United Nation Convention against Corruption (2003)"[171] (The latter is a provision within the Preamble). The obligation to take measures to prevent and combat corruption, uphold anti-corruption practices, and to encourage the private sector to incorporate principles which address corruption amounts to an international obligation which could be brought against a state in case of infringement.

The attitude of international adjudicative bodies towards corruption, or grand corruption, varies according to the scope of competence and jurisdictional reach of each body. Corruption is/could be considered a breach of an international obligation, a breach of human rights and international obligations to respect, fulfill and protect, or as the cause to assert international individual criminal responsibility. It is also dealt with as a direct or indirect cause of the violation of human rights and a defense used by parties to an arbitral dispute to seek void effects to contracts.

5.1.3 Role of Adjudicators

Under this Subchapter, the analysis will be focused on how adjudicators address and deal with corruption related cases.

The role of international adjudicators in this new era of the proliferation of international adjudicative fora has been intensified. It is not only expected of adjudicators to resort to the normative interpretation but, in many cases, to norm creation, also known as judicial legalization[172]. The role of international adjudicators in their judicial function has been discussed and it has been determined that this role is somehow special. It does not restrict itself to the interpretation and solving of a legal dispute, but stretches to their role in the consolidation of the international normative order. The necessity of judicial legislation in certain under-developed

[169] Bilateral Investment Treaty, the Government of Canada and the Government of the Republic of Côte d'Ivoire (signature 30 November 2014 but it is not yet in force) Art. 15.2

[170] Agreement between the Republic of Guatemala and the Republic of Trinidad and Tobago on the reciprocal promotion and protection of investments (signature 13 August 2013 but it is not yet in force) Art. 17

[171] Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria (signature 8 April 2013 but not yet in force) Preamble

[172] Laurence Boisson de Chazournes and Sarah Heathcote, 'The role of the new international adjudicator' (95th annual meeting American Society of International Law, 2001) 129-138

areas of international law answers to the complexity of achieving an agreement between negotiators due to the variety of types of law. The question whether anti-corruption law might be considered as one of these areas, is, in the personal view of the author of this work, clear. This might assist to develop anti-corruption legislation within international tribunals and clear-cut international conceptual queries, such as concept, list of acts of corruption, enforcement and cooperation.

However, factors like the cultural diversity, their different legal backgrounds and the limitations given by the legal framework they abide to, precondition the extent of their role when assessing corruption related cases.

The ICJ has not dealt with any case intermingled with corruption, and even in its closest opportunity to understand in a related matter, has no jurisdiction to understand until one party of the legal dispute consents to the jurisdiction of the court[173]. The latter makes it difficult to assess the role of the adjudicators of this maximum tribunal. As per the statute of the ICJ, none of the fifteen appointed judges have the nationality of the same state, and the composition of the court has to represent the main forms of civilization and principal legal systems. Five judges represent the permanent members of the Security Council and the rest of the United Nations five regional groups, and are elected by the UN General Assembly and Security Council. Despite the efforts to guarantee the principle of "geographical equitable distribution" for the members of international adjudicative bodies, a western *impronta* is evidenced in the composition of the ICJ. The role of judges in general and civil law systems differ and might have a saying in the approach given when a corruption related case is presented before the jurisdiction of the ICJ.

A similar situation applies to the ICC. Both the nomination and election of the judges of the ICC are made by state parties of the Assembly of Parties and elected by the same organ of such international organizations. Academia[174] has claimed that the nomination and election are based on vote- trading and are mainly conducted at a political level, which attempts to legitimate the voting procedure. Impartiality, independence and qualifications are claimed to be at stake when the nomination within the states and the election before the Assembly of Parties are tainted with political interests. Adopting or not adopting this line of research and its conclusions, and with no intentions to be posed as a detractor of the nomination/election procedure at the ICC, the

[173] Supra note 131

[174] Hoile, David, *Justice Denied the Reality of the International Criminal Court* (The African Research Centre, 2014), and P Sands, QC, Philippe, et.lt, *Selecting International Judges: Principle, Process, and Politics, A Groundbreaking Study of International Judicial Appointments* (Oxford University Press, 2010)

practical implementation of the procedure as described in the Rome Statute needs undoubtedly not to be in detriment of the requirements prone by the statute. If the ICC were to prosecute perpetrators of international acts of corruption (grand corruption), the expertise on the subject from at least one member of the ICC should be guaranteed given the challenges that the investigation and prosecution of such crime might pose. Different judicial systems have a strong impronta in the role of adjudicators in criminal proceedings, having either an inquisitive or adjudicate role in national criminal proceedings. The attitude of judges is directly related to legal culture and the understanding of corruption and acts of corruption.

Adjudicators in human rights bodies can only work with existing of acts of corruption or corruption itself. The lack of references in international human rights treaties to corruption pose a difficult challenge for adjudicators to use either a harmonized concept or any concept derived from the applicable instruments. Given their role, the question is whether it is actually necessary to create theories about corruption as long as the link between corruption and human rights is crystallized[175]. The composition also follows the principle of geographical distribution and election by the organs in their respective human rights regional systems.

Adjudicators in the investment field are elected by the parties of a dispute, following the proceeding that the parties have chosen. They have take up different approaches when a corruption allegation has been brought by the parties of the dispute. Adjudicators can take a positive attitude, by e.g. determining the legality of the contracts which are allegedly tainted with corruption[176], as addressed in the Wena Hotels Ltd v The Arab Republic of Egypt Case[177]. Contrary to this, silence on corruption allegations has also been the case[178], or also referred to as "passive or indifferent position"[179]. A positive attitude, asserting an "extra mile" of the adjudicators was evidenced in the case F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago[180], where cross-allegations regarding corruption were introduced by both parties. Although these allegations were dropped, the arbitrators' concern on how these allegations were

[175] Supra note 144

[176] In *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("PETROBANGLA")*, Cases Nos. ARB/10/11 and ARB/10/18 (ICSID August 18, 2013), the tribunal established that it must examine "whether any instance of bribery and corruption in which the [c]laimant has been or may have been involved deprives the [c]laimant from having its claims considered and ruled upon by the present [t]ribunal"

[177] *Wena Hotels Ltd v The Arab Republic of Egypt*, Case No. ARB/98/4 (ICSID December 8, 2000).

[178] *Lucchetti Enterprises, S.A. and Lucchetti Peru, S.A. (Peru) v. Republic of Peru*, Case No. ARB/03/4 (ICSID February 07, 2005)

[179] Supra note 135

[180] Supra note 164

brought in the initial submissions, and the way in which they were then ultimately withdrawn at the very end of the hearing, convinced them not to leave the issue aside. The tribunal affirmed that

> "to leave the matter simply there without making it plain that this Tribunal […] is bound to take the most serious view of allegations of State corruption – if backed by proper evidence […] It follows that, if allegations of corruption had been made and had proved to be well-founded, it would have had a most substantial effect on the view of the case taken by the tribunal, and most particularly so if and when it came to the point at which the actions or omissions of the State came to be measured against the standard of treatment for foreign investment laid down in the BIT"[181].

Following this line of reasoning, the tribunal drew the attention to the fact that the claim became a case dealing with serious allegations of corruption against highly placed persons in the service of the state. However, it found that there was not enough evidence to prove said allegations[182]. It abstained from analyzing corruption allegations since, in such a case, it would have needed to conduct a serious investigation, and concluded, "the Tribunal must avoid the possibility of any such perceived but unintended unfairness"[183].

As evidenced above, in judicial adjudicative bodies the cultural diversity as well the diverse legal background of the adjudicators are two factors which have an effect on the attitude of adjudicators towards allegations of corruption. Internationally legal framework is not clear-cut on the subject matter and therefore poses a normative challenge to adjudicators to take action. Even when it is argued that the proliferation of international adjudicative fora and the new roles of adjudicators may broaden their scope of action, it is being evidenced that in international judicial bodies this action has been limited to sporadic cases in the human rights field. On the other hand, adjudicators in the investment field have shown a stronger involvement towards the fight against corruption by addressing, prima facie, such phenomena. Concerning the later, the degree on their involvement is mainly attributed to the flexibility of their procedures.

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[181] Ibid [para. 212]
[182] Ibid [para. 210 -212]
[183] Ibid

5.2 Procedural Limits at International Adjudicative Bodies

There are certain procedural limits which are encountered at the international adjudicative bodies under analysis. In this Subchapter, these limits are identified and allow the assessment of whether corruption related cases can be brought before these bodies considering the status quo of their mandates. Jurisdiction of these bodies will be addressed (*ratione personae* and *ratione materia)*, followed by an account on the burden of proof and evidence and legal sanctions which could be imposed to guarantee compliance with (anti-corruption) international obligations.

5.2.1 Jurisdiction and Admissibility

The contentious jurisdiction of the ICJ can only be invoked by and against states that have specifically agree to submit the jurisdiction of this court. Ergo, to hear a legal dispute, the parties to the dispute have to express their consent to the ICJ's jurisdiction. As stated in Section 4.2.1, Article 36.1 of the ICJ's statute sets forth that one of the forms to give consent to the jurisdiction of the ICJ is the conferral through a provision enshrined in treaties or conventions. The ICJ Handbook[184] provides an updated list of all those treaties or conventions which foresee this conferral. Indeed, as already stated in this work, both, the UNCAC and UNCTOC foresee this conferral provision.

To illustrate the above, in the application submitted by Equatorial Guinea[185], the applicant state argues that the jurisdiction of the ICJ is to be found under Article 35.2 of the UNCTOC in its relevant part:

> "[…]. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court."[186]

[184] The International Court of Justice Handbook. <http://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> Last accessed 28.10.2017
[185] Supra note 131
[186] Supra note 43

Read together with Article 4 of the same convention, the jurisdiction of the ICJ is operative as long as the dispute could not be settled through negotiation or arbitration. To prove such requirement, the applicant state stated that "France has given Equatorial Guinea official notification of its refusal to settle the dispute between the two States by means of negotiation and arbitration"[187]. Same provision is to be found in the UNCAC[188]; however, it has not been invoked by the time of writing this thesis.

Not many states accept the compulsory jurisdiction of ICJ, introducing the so-called "reservations" to the dispute settlement clause in treaties. Reservations *purport to exclude or modify the legal effects of certain provisions of a treaty*, as defined in Article 2.1.d of the Vienna Convention on the Law of the Treaties (1969)[189]; ergo, they are a restrictive element to resort to this international dispute settlement mechanism. There are a number of reservations which provide the opt-out of the jurisdiction of ICJ in the anti-corruption instrument. Article 66.2 of the UNCAC sets forth the jurisdiction of the ICJ as the settlement of disputes mechanism for a dispute arising out of that convention. Reservations to this article have been introduced by 43 state parties out of 180 states parties to the UNCAC.

The number of reservations made by states on the jurisdiction of the ICJ and the scarcity of disputes that are brought before the *locus standi* of the ICJ evidence the restricted jurisdictional standing the court has to deal with anti-corruption related cases[190].

As mentioned in Section 4.2.1, a "first possibility […] is where the parties bilaterally agree to submit an already existing dispute to the ICJ and thus to recognize its jurisdiction for purposes of that particular case. Such an agreement conferring jurisdiction on the Court is known as a "special agreement" or "compromis""[191]. Another option is the forum prorogatum. Elements which validate the consent through *forum prorgatum* are the explicit consent or that such consent can be clearly deduced from the relevant conduct of a state[192]. "On occasion, a State has tried to

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[187] Ibid

[188] Supra note 2 Art. 66. 2: *Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court*.

[189] Vienna Convention on the Law of the Treaties (entered into force 27 January 1980)

[190] Laurence R. Helfer, 'The Effectiveness of International Adjudicators' in Karen J. Alter, Cesare Romano & Yuval Shany (eds.), *Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 464-482

[191] Supra note 184

[192] Cases where consent has been deduced: *Anglo-Iranian Oil Co.* (United Kingdom v. Iran) [1952] ICJ Judgment, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Judgment

bring a case before the ICJ whilst recognizing that the opposing party has not consented to the Court's jurisdiction and inviting it to do so; to date, there have been only two instances where a State against which an application has been filed has accepted such an invitation: Certain Criminal Proceedings in France (Republic of the Congo v. France); Certain Questions of Mutual Assistance in Criminal Matters (Djiboutiv vs. France). Such acceptance means that the case now exists […]"[193]. A fourth manifestation of consent is the unilateral declaration of a state on the court's jurisdiction "[…] with reciprocal effect on other States. […] such declarations may be "tailored" to fit the needs and interests of those States making them, in particular by determining the scope of the acceptance of the Court's jurisdiction or determining the classes or categories of disputes falling within such jurisdiction".[194] To date, around 64 states have submitted their unilateral declaration, though with a number of reservations imposing time or subject matter limits.

Given the little number of cases submitted before the ICJ where consent has been conferred by special agreement (23.8% of total cases heard by the ICJ)[195] and by *forum prorgatum*, considered to as a "fairly rear situation"[196] and considering the limits imposed by reservations to unilateral declarations, it can be stated that it could be difficult to state that consent to the court's jurisdiction over corruption legal disputes, or even grand corruption, could be granted through any of these three forms of consent.

Apart from the far-fetching subject-matters dealt with by the ICJ (e.g. maritime and delimitation of frontiers), the ICJ had heard new subject-matters, e.g. environmental related cases[197]. Including corruption as a subject-matter in international law, the ICJ could understand in such matter since it attempts against the rule of law, principle which has been cherished by the international community, including the ICJ. Its work as adjudicative body supports the rule of law[198] and corruption- related cases might be presented before the ICJ as a breach of an international obligation enshrined in an international instrument.

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[193] Supra note 184
[194] Supra note 76
[195] Eleven cases out of 140 contentious cases have heard by the ICJ, where consent has been conferred by special agreement.
[196] Supra note 184
[197] Latest application: Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia) or Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) Proceedings joined with Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) on 17 April 2013
[198] Supra note 76

To illustrate the aforementioned, the ICJ had to assess the 2012 request entitled "Application instituting proceedings including a request for provisional measures" made to the registry of the ICJ by the Republic of Equatorial Guinea[199]. The request sought the "annulment by the Government of the French Republic of the proceedings and investigative measures against Mr. Teodoro Obiang Nguema Mbasogo, President of the Republic of Equatorial Guinea, and Mr. Teodoro Nguema Obiang Mangue, Guinean Minister of Agriculture and Forestry, the current Vice-President of the Republic of Equatorial Guinea"[200][201]. The proceedings to which the annulment was sought refer to the indictment filed by SHERPA and Transparency International France (TI France) in which it was alleged that Teodoro Nguema Obiang Mangu (TNO)'s "lavish possessions were vastly out of proportion with his official income: according to the US Department of Justice, which initiated civil proceedings in order to confiscate his US-based assets, TNO has spent more than $300 million worldwide between 2000 and 2011, while his salary as Minister of Agriculture and Forestry is estimated at less than $100,000 per year"[202]. On the basis of allegations of existing corruption-related maneuvers, French judges seized movable property of the accused. Equatorial Guinea asserted that the judicial procedural actions, including criminal proceedings and investigative measures against its president and current vice-president, "violate the principles of equality between States, non-intervention, sovereignty and respect for immunity from criminal jurisdiction"[203]. The ICJ was asked to "bring a halt to [the] criminal proceedings" and to "take all measures necessary to nullify the effects of the arrest warrant issued against the Second Vice-President of Equatorial Guinea and of its circulation"[204]. In contraposition to the indictment orders issued by the courts of Paris against Teodoro Nguema Obiang Mangue, the defense of Equatorial Guinea stated that the investigation carried by national authorities presented certain obstacles *certeris paribus* based on diplomatic immunity (jurisdictional immunity) enjoyed by TNO at that time, as he was the representative of Equatorial Guinea at UNESCO[205]. The ICJ reached to the conclusion that "no action shall be taken in the

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[199] Supra note 131
[200] Supra note 71
[201] Anton Moiseienko 'Equatorial Guinea v France: What are the Limits on Prosecution of Corruption-Related Money Laundering by Foreign Officials?' *EJIL: Talk! Blog of the European Journal of International Law* (29 July 2016)
[202] Transparency International France. '"Biens mal acquis" case: teodorin obiang refuses to appear before judicial authorities' (13 July 2012)
[203] Supra note 71
[204] Supra note 131
[205] Transparency International France. 'Teodorin Obiang Nguema indicted in Bien Mal Acquis case' (20 March 2014)

proceedings unless and until France consents to the Court's jurisdiction in this case"[206]. No reply was given by France[207].

Whereas the case emerged given criminalized acts of corruption under French jurisdiction, and may amount to grand corruption; however, the legal dispute still concerns the immunity from criminal jurisdiction and the legal status of premises of Equatorial Guinea as part of their diplomatic mission and state property.

It is worth considering that the jurisdiction *ratione materiae* and *personae* of the ICJ is distinctive and must not be bewildered with other international judicial institutions with adjacent adjudicative fields, *inter alia*, the ICC. In this line, an undisputable, *prima facie*, aspect of the ICJ's jurisdiction *rationae materiae* is its non-interference in criminal matters. However, in order to assess grand corruption cases, the link between state responsibility and criminal law is considered to be indispensable; showing that the resound trajectory of the court indicates that indeed the court should incidentally involved in criminal related cases.[208] Jurisprudence has shown that the ICJ did assert topics of criminal law in particular in two instances. A first link between these two fields of law is referring to the national criminal jurisdiction and immunities from that jurisdiction and a second link evidencing the connection between individual criminal responsibility and state's responsibility.

Antecedents of the first link are evidenced in the Arrest Warrant case in which the Court held that "Belgium had acted unlawfully in issuing an arrest warrant against the Minister of Foreign Affairs of the Democratic Republic of Congo in respect of alleged war crimes"[209] and, by not recognizing the immunity of a Head of State, Belgium committed a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State."[210] As it is evidenced, issues of universal jurisdiction over crimes and jurisdictional immunity were *prima facie* assessed.

The second link suggested by Judge Keith referring to the principles of individual criminal liability and responsibility of states. In the opportunity of attributing or not responsibility to the Federal Republic of Yugoslavia for alleged acts of genocide committed in Bosnia-Herzegovina, the ICJ had to decide "whether the States Parties to the Genocide Convention, in addition to having an obligation to enact the relevant legislation to prosecute or extradite alleged offenders and to cooperate in repressing genocide, were also themselves under the obligation not to

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[206] Supra note 71
[207] As of 14 January 2017
[208] *Arrest Warrant (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Rep 2002
[209] Supra note 208
[210] Idem

commit the defined acts of genocide."[211] Jude Keith states that the 2007 judgment contains enough reasons to sustain a positive answer to the question whether the States Parties to the Genocide Convention are as well under the obligation not to commit acts of genocide. He mainly returned to the argument made but not decided in *Djibouti vs. France* where the ICJ observed that *duality of responsibility continues to be a constant feature of international law*. Even when states cannot commit international crimes[212], they might be held responsible subject to the same obligations as individuals, without these obligations being characterized as criminal. This statement is framed as the duality of responsibilities (of states and individuals), a concept introduced by Judge Keith. This concept purports that an obligation may be dual and bounds states and individuals.

When looking into a corruption-related case, out of this dual responsibility, a state can be held responsible for the omission of an international substantive obligation enshrined in the UNCAC as well as when the alleged perpetrator is held responsible for the commitment of same obligation under international law. However, for this constellation to be feasible, the crime should be recognized as an international crime. Acts of corruption enshrined in UNCAC shall be criminal offences internationally recognized but they cannot be claimed as international crimes.

Jurisdiction ratione materie might not present *prima facie* a limit considering the fetch- fetching subject matters brought within the last decades, e.g. environmental issues but there are still other limits to overcome. The consent of states to submit to the jurisdiction of the ICJ is a first limit. A second limit amounts to the ICJ's jurisdiction to understand in criminal cases.

As of international criminal law the ICC has jurisdiction to understand in cases where crimes of international bearing have been allegedly committed. As mentioned in Chapter 4, the ICC has jurisdiction over crimes which comply with three conditions. The first condition is that crimes must fall within the group of crimes referred to in Article 5 and defined in Articles 6, 7, and 8 of the Rome Statute. Article 5 of the Rome Statute sets forth the *numerus clausus* of international crimes over which the court has jurisdiction *ratione materie*: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression. From Article 6 to 8 the elements of these crimes are listed, which is complemented by the document "Elements of

[211] Supra note 138

[212] Crawford, James, 'The International Law Commission's Articles on State Responsibility' (CUP, Cambridge, 2002) 16–20 suggested that States can commit international crimes. This proposal was overruled by States and later the International Law Commission itself.

Crime[213]. The second condition of ICC's jurisdiction relates to the fact that the crimes must fulfill the temporal requirements specified under Article 11 of the Statute (jurisdiction *ratione temporis*). Last but not least, the third condition establishes that the crimes must meet one of the two alternative requirements embodied in Article 12 of the Statute (jurisdiction *ratione loci or ratione personae*). Articles 25 to 28 of the Rome Statute set forth the requirements to bring alleged perpetrators to the international criminal courtroom. The principle of individual criminal responsibility enshrined in the foundational instrument of the ICC indicates that the ICC prosecutes only individuals, excluding groups, states or legal entities from criminal liability. Any individual who is alleged to have committed any of the crime/s within the jurisdiction of the ICC may be brought before the ICC. "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."[214] This principle is clearly in line with the concept of grand corruption, by which the subject criminally liable is a Head of State or high rank officials.

In order to comply with the first condition, scholars have developed several proposals in order to bring (grand) corruption under the scrutiny of the ICC. Kofele-Kale was one of the first scholars to put corruption under the scrutiny of international criminal law and suggested the international criminalization of corruption as an international economic crime, which must be included within the *ratione materie* of the ICC jurisdiction[215]. Boersma has examined whether it is possible to conceptualize certain forms of corruption as a crime under international law[216]. Following the same line of thought, Starr deals with the international criminal prosecution of corruption as one potential strategy for overcoming the current "crisis focus of international criminal law"[217]. Luis Moreno Ocampo describes seven different ideas to prosecute (grand) corruption at an

[213] Elements of Crimes (International Criminal Court) (2011)
[214] International Criminal Court. Understanding the Criminal Court <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf > Last accessed 16.05.2016
[215] Ndiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes* (Ashgate Publishing Limited, 2006)
[216] Martine Boersma, 'Corruption: A Violation Of Human Rights And A Crime Under International Law?' (2012) School of Human Rights Research Series 56
[217] Corruption as a crime against humanity: Office of the High Commissioner for Human Rights and the Government of Poland, U.N. Conf. on Anti-Corruption Measures, Good Governance and Human Rights, Background Note, 3, HR/POL/GG/SEM/2006/2 (Nov. 8–9, 2006) [hereinafter Conference on Anti-Corruption Measures] (acknowledging that elements of the U.N. human rights system have commented on the inability of states to comply with their obligations as a result of corruption).

international level[218], out of which two are relevant ideas for the purpose of this thesis. As evidenced, academia is entrenched in lengthy theoretical discussions on how the ICC should understand cases of grand corruption by means of:

(a) modifying the Statute in order to internationally criminalize acts of corruption (with a focus on grand corruption), or

(b) applying a broader interpretation to the already typified crimes in the Rome Statute as to encompass acts of grand corruption within their scope.

(c) (incidental) applying current provisions of the Rome Statute that relate to economic crimes under the jurisdiction of the ICC, connected with the crimes of genocide, crimes against humanity or war crimes. The ICC could prosecute whoever provides financial support to contribute to the commission of genocide. Referring to the case of Jean Pierre Bemba, former vice- president of the Democratic Republic of Congo, Luis Moreno Ocampo states that there is a network of companies who supported the actions of Mr. Bemba to commit the crimes who was found guilty before the ICC[219].

Option (a) is difficult to materialize. The crucial general denominator of crimes listed in Article 5 of Rome Statute is that all of them enjoyed the status of customary international law and there were incorporated in the Statute as a vivid reflection of those crimes already tried at pre-existing international criminal courts[220]. A free-rider scholarly opinion claims that apartheid was not recognized as customary international law, though it has been introduced as one of the crimes interpreted as crimes against humanity. During the negotiations of the Rome Statue, transitional crimes, in particular, drug trafficking and terrorism, have been considered and brought before the preparatory meetings of the state parties as one of those crimes to be included in such a statute, suggesting that these offences were of international concern and threatened the sovereignty of states[221]. Detractors of this inclusion stated that if the ICC were to understand in these crimes, the sovereignty of states would be in jeopardy. Additionally, they stated that the efforts towards

[218] Luis Moreno Ocampo, 'Ways Forward in Prosecuting Grand Corruption (Part 1 of 3)' (Second panel at the Fifth Forum of Parliamentarians, 2013) <https://www.youtube.com/watch?v=9jzeGG40IUM> Last accessed 28.10.2017

[219] Mr. Bemba was found guilty, on 21 March 2016, of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging) <https://www.icc-cpi.int/car/bemba> Last accessed 28.10.2017

[220] Supra note 218

[221] 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome' (New York, 15 June -1 7 July 1998)

international cooperation would be in full detriment of the purposes of fighting corruption.[222] The analogy with grand corruption is evident.

The efforts of the international community to combat corruption internationally, or at least to recognize the need to harmonize the definition of acts of corruption and the elements of these crimes are reflected in the legalization movement of corruption. Even when, legalization is difficult to materialize, modifying the Statute in order to internationally criminalize acts of corruption has been seen as the most viable one to address grand corruption before the ICC. However, it is irrefutably a long-term aim and might face similar arguments to be included in the case of corruption.

Option (b) provides that (grand) corruption is equated with crimes against humanity, proposal which has been addressed by a number of scholars. Bearing in mind the understanding that crimes against humanity are an attack against any civilian population, where the attack is widespread or part of a systematic policy, it has been stated that "there may be sufficient justification to prosecute grand corruption as a crime against humanity under Article 7.1.k of the Rome Statute, 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."[223] By confronting elements of grand corruption with Article 7.1.k of the Rome Statute, many of the elements listed therein are present in grand corruption cases as analyzed by Boersma[224].

Clearly advantages of considering grand corruption as a crime against humanity is that the ICC would have *locus standi* to prosecute the perpetrators of such crimes. Jose Ugez-Moreno establishes that the circumstances to prosecute grand corruption cases are given since the principle of complementary is addressed when states are unable or unwilling to prosecute crimes of corruption. Deterrents of applying this interpretation express their concerns to equate corruption with crimes against humanity, e.g. concerns on the construction of the crime, its scope or the political consequences of prosecuting such crime. It is argued that "while grand corruption may meet the actus reus test of crimes against humanity, the mens rea, the clear intent to eventually destroy part of a population, is typically missing"[225].

[222] Neil Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?' (2012) Criminal Law Forum, Springer
[223] Supra note 80
[224] Supra note 216 [p. 344]
[225] Supra note 85

International human rights adjudicative bodies, namely ECOWAS court, ECtHR and IACHR, have jurisdiction to hear cases of alleged infringements of human rights. Given the attitude towards corruption and jurisdiction *ratione materia*, none of these bodies have dealt with corruption a as a direct or indirect violation of human rights (See Section 5.1.2).

A different scenario is presented if corruption is considered to be a violation of the obligations to respect, fulfill and protect human rights contained in multilateral/regional human rights treaties[226]. Even when not strictly categorized, the IACHR has mandated the respondent state to conduct an investigation of the allegations of acts of corruption arisen at this instance. This could be the omission of the state to comply with such a human rights mandate and, therefore, constitute a violation to the obligation to protect human rights.

The casual link of corruption as a direct, indirect or remote cause for the breach of a human rights related obligation[227] has been addressed by the ECOWAS court and the IACHR[228]. The later has identified corruption as direct but also as an indirect cause for violation of human rights. Corruption has been as well considered to be an aggravating circumstance to the infringement of human rights.

From the analyzed case law from the *ut supra* mentioned human rights adjudicative bodies, it can be stated that corruption is mainly addressed by the courts as a direct/indirect cause of violation/infringement of human rights. Whether an alleged infringement of human rights is under the scrutiny of human rights adjudicative bodies, being the direct or indirect cause of violation aggravates the violation and consequences of the act in detriment of the victims.

ICSID arbitral tribunals have understood allegations of corruption as a jurisdictional issue, as it is against the principle of legality. On this account, legality clauses are interpreted in "the majority of investment tribunals interpreted these clauses 'as depriving an investment made in

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[226] Surpa note 98 [p. 23]. It is argued that states have the obligation "to respect", "to protect" and "to fulfil" human rights. When corruption interferes with these obligations, then the state is guilty for failing to protect human rights.

[227] Bryane Michael and Habit Hajredin contest the fact that corruption is a cause of human rights violations but state that "it exacerbates (or attenuates) such human rights violations" in Bryane Michael and Habit Hajredini 'Topics in Anti-Corruption Law: What Does Kosovo Teach Us About Using Human Rights Law to Prosecute Corruption Offences?' (University of Hong Kong) <https://web.hku.hk/~bmichael/publications/HTML%20Papers/Human%20Rights%20in%20Kosovo%20Paper.htm#_Toc250617580 > Last accessed 28.10.2017

[228] *Acevedo Jaramillo y otros v. Perú* (Judgment) (IACHR 7 February 2006), *Juvenile Reeducation Institute v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs) (IACHR 2 September 2004) para. 171, *Kichwa indigenous people of Sarayaku v. Ecuador* (Merits and reparations) (IACHR 27 June 2012), *Tibi v.Ecuador* (Preliminary Objections, Merits, Reparations and Costs) (IACHR 7 September 2004), *Sawhoyamaxa vs. Paraguay* (Merits, Reparations and Costs) (IACHR 29 March 2006), *López Mendoza vs. Venezuela* (Merits, Reparations and Costs) (IACHR 1 September 2011)

breach of the domestic law of the host State from investment treaty protection"[229]. In *Inceysa Vallisoletana S.L. v. Republic of El Salvador*[230], El Salvador introduced a jurisdictional objection by stating that it had not given consent to the jurisdiction of the ICSID for claims about investments construe on fraud and corruption [versus the concept of legal investments]. The tribunal accepted that El Salvador's consent to ICSID jurisdiction did not extended to investment which were made in a fraudulent manner, thus disrespectful of domestic law. Consequently, the tribunal stated that "there was no jurisdiction on a number of grounds, including that the investment was not made in accordance with the laws of El Salvador"[231]. No further reference was made regarding the corruption allegation introduced by El Salvador. Following the *stare decisis*, the arbitral tribunal concluded in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*[232] that it lacked jurisdiction *ratione materiae* give that there was no "investment in accordance with law" since the "compliance with the host state's laws is an explicit and hardly unreasonable requirement in the Treaty […]" and the purchase of shares in the Terminal 3 project, […], is not an "investment" which is covered by the BIT. However, in the final observations of his dissenting opinion, Mr. Bernardo M. Cremades, expressed the opposite. He assured that arbitral tribunals may have to deal with any illegal conduct by the investor but, interestingly enough, continued arguing that "[t]he question is the proper time and context to consider and evaluate the proof and consequences of illegality"[233] (in this case referring to the alleged acts of corruption committed by the investor). These illegal acts can also be dealt with by national courts which have the jurisdiction to understand in this matter. Another argument brought by the parties to pledge for the jurisdiction over corruption allegations is attributed to the inherit jurisdiction to ICSID tribunals to investigate such allegations by stating that "international tribunals have jurisdiction to make enquiries and decisions beyond the scope of their technical mandate where circumstances so require."[234]

[229] Umirdinov Alisher, 'Sharing Responsibilities on Corruption Allegations in Investor-State Arbitration The Contribution of Metal-Tech v. Uzbekistan' <http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/23373/1/02.Umirdinov%20Alisher.pdf> Last accessed 16.05.2016
[230] Inceysa Vallisoletana S.L. v. Republic of El Salvador, Case No.ARB/03/26 (ICSID August 02, 2006)
[231] Idem
[232] Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, Case No. ARB/03/25 (ICSID 2007)
[233] Idem 5
[234] *RSM Production Corporation v. Grenada*, Case No ARB/05/14 (ICSID 29 October 2009)

5.2.2 Onus Probandi

General principles of onus probandi in both civil and general law systems establish that the alleging party bears the burden of proof to the support the claim. However, there are various authorities indicating that the burden of proof can be shifted in some circumstances. The principle of onus probandi within the ICJ has been addressed in the case of certain Norwegian Loans [235] where the principle on the subject [is]:

> "(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting".[236]

There is no particular reason to state why a breach of an international obligation deriving from UNCAC could prove a particular circumstance to shift the burden of proof. However, the particular circumstances of the case may determine the difficulty to which may be attributed. Further analysis of this issue would be merely conjectural.

Similar is the case within ICC. There are certain parameters regarding the onus probandi and challenges inherent to the all ICC proceedings: a. the difficulty to collect evidence in a country; b. the location of witnesses; c. the need for translation of documents and testimonies; d. the need to establish the contextual elements of international crimes, among others[237]. These challenges might be also intensified given the high-level status of alleged perpetrators of grand corruption crimes, which may discourage whistle-blowers and witnesses to testify. Furthermore, grand corruption crimes do not produce concrete, individualized victims, and bearing in mind that certain acts of corruption are victimless crimes identifying them may also present a challenge. Collection of evidence and burden of proof will also vary depending on whether grand

[235] *Certain Norwegian Loans (France v Norway)* (Judgment) [1957] ICJ Rep 1957, p.9
[236] Idem
[237] 'Expediting proceedings at the International Criminal Court, War Crimes Research Office International Criminal Court Legal Analysis and Education Project' (2011) <https://lawlibrary.blogs.pace.edu/2011/06/21/expedite-proceedings-international-criminal-court/> Last accessed 28.10.2017

corruption is understood a standing-alone crime judiciable before this adjuratory body or a crime against humanity. Again, further analysis would be merely hypothetical.

If human rights adjudicative bodies stretch their jurisdiction to understand cases where corruption is understood as the a direct or indirect cause of violation of human rights, the plaintiff would have to prove the link between corruption and a breach of human right, and prove that corruption could be the cause of this alleged violation. In the *SERPA case* before the ECOWAS court, the court understood that it is not sufficient to submit a single report which states that corruption distorts the enjoyment of a specific human right, but a verdict/judgment issued by national courts proving a punishable act of corruption is required to be able to consider such evidence as a basis for its own decision. This sets for the plaintiff a high threshold of proof. The ECtHR makes reference to the methods of collecting evidence to prove bribery as a violation of right to fair hearing[238]. The IACHR in the case of *Acevedo-Jaramillo et al. v. Peru*[239], corruption is brought before the Commission and the IACHR as the cause of state's inaction *vis-à-vis* the already rendered domestic judgments which ordered the restitution of the claimants to their old job posts in the municipality government. The Commission stated that the state has failed to prove before the commission how the alleged "corruption circle" is related with the case put before by the claimants. [240] It has been addressed that corruption could be also be proven as structural discrimination[241] where a particular case is found to be part of a systematic structural situation which give rise to a violation of human rights, in case for example of force disappearance of persons[242] and massive and structural sexual violations[243]. Even when this method could be well-applied in a corruption context, the IACHR have not make use of it to prove corruption.

The only international adjudicatory body where adjudicators have evaluated the proof of an act of corruption and apply it as an element for their *stare decidere* is the ICSID. In such cases, evidence plays a key role in corruption related cases and at the same time it is a huge obstacle for

[238] *Ramanauskas v. Lithuania* (Merits and Just Satisfaction) (ECtHR 2008)
[239] *Acevedo Jaramillo y otros v. Perú* (Judgment) (IACHR 7 February 2006)
[240] Idem [para. 162]
[241] Claudio Nash Rojas, Pedro Aguiló Bascuñán and María Luisa Bascur, 'Corrupción y Derechos Humanos: Una mirada desde la Jurisprudencia de la Corte Interamericana de Derechos Humanos' Campos Centro de Derechos Humanos Facultad de Derecho Universidad de Chile (2014)
[242] *Velasquez Rodriguez v. Republic of Honduras* (Judgment) (IACHR 29 July 1988)
[243] *González et al. ("Cotton Field") v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs) (IACHR 16 November 2009)

the alleging party to comply with the high standard of proof required by these arbitral tribunals. It is indeed indicated that:

> "[s]ome arbitral tribunals add to this that circumstantial evidence must be "clear" […]or indices of corruption must be "serious".[…] Rather than being an expression of a higher standard, these decisions seem to indicate that circumstantial evidence, because of its nature, requires a multitude of indices which allow one to conclude that corruption is established. Some indices for corruption may, of course, be given more or less weight than others in the circumstances of each case, and no rigid rules may be stated in this respect."[244]

There are two important considerations when seeking to prove an allegation of corruption: the burden of proof and the standard of proof. Generally, the burden of proof rests with the party alleging a claim or in case of an affirmative defense. This rule has been followed by the tribunals to the extent of rejecting a petition of reversal of the burden of proof "because negative evidence is very often more difficult to assert than positive evidence, the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards"[245]. Regarding the standard of proof, even when "there is no universally accepted standard of proof to be applied to corruption allegations raised in international arbitration proceedings"[246], tribunals had set a high standard of proof, perhaps to highlight the seriousness of corruption allegations and to counterbalance the difficulty of proving those allegations by other means other than "indicia". In *Plateau des Pyramides*[247], the Egyptian Government requested that the arbitral tribunal declare the claimants' arguments unfounded for reasons of corruption. The arbitral tribunal found that the allegations were not supported by the evidence in the record and were based on merely suppositions. Consequently, it overruled the corruption allegation[248]. In *African Holdings Company of America Inc and Société Africaine de*

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[244] Florian Haugeneder and Christoph Liebscher, '*Corruption and Investment Arbitration: Substantive Standards and Proof*' in Christian Klausegger et al (eds), *Austrian Arbitration Yearbook 2009*, at 538, 555–56 (Wolters Kluwer, 2009)

[245] *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, Case No. ARB/05/15 (ICSID June 1, 2009)

[246] Sidley Austin, 'Corruption as a Defence in International Arbitration: Are there Limits?' (2014) The International Comparative Legal Guide to: International Arbitration 2014 11th Edition 10

[247] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Case No. ARB/84/3 (ICSID 05 20, 1992)127 and 132

[248] Idem [para. 132] "thus, the allegations concerning irregular contacts and connections are not supported by the evidence in the record and are based on suppositions, guilt by association and what the Respondent describes as

Construction au Congo SARL v Democratic Republic of the Congo[249], the arbitral tribunal stated that it "[was] prepared to consider any corrupt practice as a very serious matter, but would require an irrefutable proof of this practice, such as those resulting from criminal prosecution in countries where corruption is a criminal offense"[250]. By using this high standard regarding proof, the tribunal concluded that the required evidence had not been filed by the respondent and claimed that the respondent "base[d] its claims on general considerations concerning the Mobutu period and related political events"[251]. In *Niko Resources Ltd v People's Republic of Bangladesh, BAPEX and PETROBANGLA* [252] the tribunal recognized the difficulty of proving acts of corruption, and their limited resources to render a judgment on the very existence of the said acts, the tribunal emphasized that any judgment must not, at any extent, be based on inferences. As the alleged acts were committed in Bangladesh, the tribunal shifted the responsibility to investigate and collect proof of corruption to national courts. Concluding that no ongoing investigations led to any proceedings at the national level, the tribunal avowed that rendering a judgment on the commission of an act of corruption would be based on mere inferences. Thus it rejected the corruption defense, the arbitral tribunal affirmed that "corruption is unlawful in domestic and international law"[253] and the prohibition of bribery forms part of international public policy, having its existence a negative effect on the general principle of party autonomy. Consequently, it was stated that a "contract in conflict with international public policy cannot be given effect by arbitrators, [and those] which have as their object the corruption of civil servants have been denied effect by international arbitrators" [254] and were declared void or unenforceable.
A more permissive approach was drawn in *Metal-Tech Ltd. v. Republic of Uzbekistan*[255] where the tribunal stated that international law must be applicable and thus the Latin maxima <maxim actori incumbat probation> applied. As these allegations were already proven in the evidence introduced, there was no need to support the allegations with further proof. The tribunal

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"commencement de preuve". On such grounds, it is simply not possible to reach the findings of fact and conclusions requested by the Respondent."

[249] *African Holdings Company of America Inc and Societe Africaine de Construction au Congo SARL v Democratic Republic of the Congo* , Case No. ARB/05/21 (ICSID 28 July 2008)

[250] Idem 52

[251] Idem 52

[252] *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("PETROBANGLA")*, Cases Nos. ARB/10/11 and ARB/10/18 (ICSID 18 August 2013)

[253] Idem [para. 430]

[254] Idem [para. 434]

[255] *Metal-tech ltd. v. the Republic of Uzbekistan*, Case No. ARB/10/3 (ICSID 4 October 2013)

concluded by stating that "corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence"[256].

The lack of resources to conduct an investigation and competency to instruct on investigations limits the decision making of the ICSID tribunals on allegations on corruption; which basically explains the tendency to resort to national jurisdiction to avail a decision on corruption presented before it.

5.2.3 Legal Sanctions/Remedies

In this Section the legal sanctions available at international adjudicative bodies will be analyzed, together with the challenges that might and are posed when applying to a corruption- related case.

Legal consequences imposed to the debtor party constitute, depending on the field of law, cession of the wrongdoing and reparation. Reparation encompasses restitution, compensation, rehabilitation and satisfaction. *Per se*, reparation "is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[257] This principle can be found in several international statutory instruments of each of the analyzed forum.

Before turning into the individual analysis of each body's available measures for reparation, it is worth mentioning that compliance to such measures is important to evaluate their effectiveness. Compliance is understood as the recognition of the final and binding nature of a decision, and the actions taken in consequence, by (both) parties to a dispute of a decision rendered by an international adjudicative body. At an international level, compliance entrenches several national governmental levels, which challenges the practical implementation of the decision containing reparatory measures and affecting the compliance rate of such decisions.

ICJ as the primary organ of the United Nations will be first analyzed. Whereas there is no specific reference to reparation measures in the ICJ statute, the International Law Commission affirmed this principle in the Draft Articles on Responsibility of States for Internationally Wrongful Act[258]. Cases of reparation may, in principle, involve compensation[259], and in many

[256] Idem [para. 243]
[257] *Factory At Chorzów (Germany v Poland)* (Merits, Judgment) [1928] PCIJ Series A No 17, ICGJ 255 29
[258] International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)

cases, the parties are left to the decision to reach an agreement on the amount of compensation. Compliance to the ICJ decisions in cases where the ICJ has ordered to take appositive action[260] has been challenged by academia. Compliance with final judgments of ICJ has improved after Nicaragua case in despite of the number of years needed to achieve substantial compliance[261]. After this point in time, academia has also sifted its opinion stating that the compliance of states towards ICJ judgments is only *partially* challenged. The only present case before the ICJ where corruption is linked to the subject matter of the case (*Equatorial Guinea vs. France*), the reparation requested is linked to the breach of international obligations regarding the Vienna Convention on Diplomatic Relations and the United Nations Convention against Transnational Organized Crime, and general international law. In the memorial submitted to the ICJ, the reference to reparations is to be found in para. 45, d, II of the application memorial:

> "to order the French Republic to make full reparation to the Republic of Equatorial Guinea for the harm suffered, the amount of which shall be determined at a later stage."[262]

Lastly, in terms of compliance, it would be difficult and inadvisable to predict any judgment of the ICJ, and therefore, the parties' intention to comply with any decision.

Articles which regulate the penalties of the *numerus clausus* of international criminal acts enshrined in the Rome Statue establish the basic parameters on penalties which should be followed in the sentence proposed by the prosecutor. In the case that acts of grand corruption would be understood as a crime against humanity, Article 77 of the Rome Statute may apply. Such article sets forth that the ICC may imposed as a penalty imprisonment with a maximum of 30 years and limits imposing life imprisonment only if justified by the extreme gravity of the offence and the individual circumstances of the perpetrator. Imposing fine or forfeit is additionally included as a penalty in the article. The Rome Statute, the rules of procedure and evidence, principles of international law are the sources where the ICC based the penalties to be imposed to the perpetrator. It is unanswered whether the penalties may vary according the acts of

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[259] Examples of compensation as a restitution measure can be found in: *Corfu Channel (United Kingdom v Albania)* (Judgment on Preliminary Objections) [1949] ICJ Rep 1948, p. 15 and *The Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment) [2007] ICJ Rep 2007, p. 582, para. 160-162

[260] *Land, Island and Maritime Frontier Dispute (El Salvador and Nicaragua (intervening) v Honduras)* (Judgment) [1990] ICJ Rep 1990, p. 92, para. 351, *Territorial Dispute (Libya v. Chad)* (Judgement) [1994] ICJ Rep 1994, p. 9, *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 1997, p. 7 and *Avena and Other Mexican Nationals (Mexico v United States)* (Judgment) [2004] ICJ Rep 2004, p. 12

[261] Llamazon Aloysius P., 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) EJIL Vol. 18, No. 5, 815-852

[262] Supra note 131

grand corruption (being bribery, embezzlement, trading of influence) in correlation to national criminal laws or the penalty imposed to all acts of grand corruption shall be imposed in analogy with the penalty for the commission of crimes against humanity. In the first case, negotiation and an amendment to the Rome Statute should be required.
In this regard, it would also be interesting to evaluate whether an act of corruption may aggravate the penalty if it is considered to be an element of another crime, as e.g. war crime.

Article 15.4 of the ECOWAS Treaty establishes the binding nature of judgments of the ECOWAS court and Article 19.2 of the 1991 Protocol provides that the decisions of the court shall be final and immediately enforceable. To guarantee compliance the court could refuse to entertain any application brought by the offending member state until such a state enforces the court's decision. The nature of the decisions might reinforce anti-corruption objectives (such as prosecution of alleged perpetrators of acts of corruption) while imposing obligation to do or refraining from some actions which constitute a breach of human rights. In the landmark case of ECOWAS Court, the court rejected the order of the plaintiff petitioning the arrest and prosecution of the alleged suspects given the lack of evidence to render judgment on the allegation of corruption, among other reasons. The argument brought by the court which lead to reject the petition, leaves open the case to argue that in the case the plaintiff would have submitted "sufficient/adequate" to support the plea of the commission of at least one alleged act of corruption, the court could understand in the matter and, could have the resources to render judgment in a context of a human rights violation related to corruption

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The ECtHR outweighed the importance of reporting issues of general public interest, like an alleged commission of an act of corruption in the award of public contracts with the type of legal sanctions imposed. [263] Within this line, guaranteeing anti-corruption advocators with a reasonable legal certainty does contribute to the fight against corruption.

[263] *Cumpana and Mazare v. Romania* (Merits and Just Satisfaction) (ECtHR 2004) 113. Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention (see paragraph 91 in fine above) to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputation, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power (see paragraph 93 above). Investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession.

The IACHR has imposed certain remedies which might have an impact in anti-corruption, for example, it has order to establish a mechanism of complaints against abuses of police force in prison and human rights related trainings programs to police force, penitentiary staff, public officials involved in the penitentiary system[264]. Even when the IACHR has been reluctant to address cases of corruption as human rights violation, nevertheless it stressed out the importance to address corruption issues as a way to improve compliance of human rights. In particular, the IACHR, in the context of the situation in the prison of Curado, Brazil, mandated the state of Brazil to conduct an investigation giving special attention to the allegations of corruption and illegal trafficking of arms submitted by governmental agents and the prisoners within the prison[265]. The next and last judgment of the IACHR reaffirms and broaden the scope of the measures to be imposed to Brazil but does not make reference to allegations of corruption. In two cases, rights of anti-corruption defenders were found to be breached by the respective State. However, neither specific measures were imposed nor a judgment has been rendered which might shed some light on how to address corruption or the link of these corruption allegations to the violation of human rights[266].

The ICSID tribunals have two mainly legal consequences which steam from a viable corruption defense: 1. the contract is found null and void by applying domestic law. This was followed in *World Duty Free Ltd. v. Kenya*[267], where the arbitral tribunal refused to enforce a contract based on the argument that a contract tainted by corruption is unenforceable or 2. the contract is invalid since it is contrary to international public policy[268].

A form of equitable relief which may account on the State's participation in an act of corruption and determine its legal consequences might be one of the legal resources available. This form has been given certain recognition in the 2013 *Metal-Tech Ltd. v. Uzbekistan* award, where the ICSID tribunal concluded that "because of this participation, which is implicit in the very nature

[264] *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela* (Preliminary Objection, Merits, Reparations and Costs) (IACHR 5 July 2006) , *Tibi v.Ecuador* (Preliminary Objections, Merits, Reparations and Costs) (IACHR 7 September 2004), *Nadege Dorzema Et Al. V. Dominican Republic* (Merits, reparations and costs) (IACHR 24 October 2012)

[265] *Medidas provisionales respecto de Brasil asunto del Complejo Penitenciario de Curado* (Merits) (IACHR 14 November 2014)

[266] *Ivcher-Bronstein v. Peru* (Merits, Reparations and Costs) (IACHR 6 February 2001) and *González Medina and family v. Dominican Republic* (Preliminary objections, merits, reparations and costs) (IACHR 27 February 2012) para. 126

[267] Supra note 164164

[268] Supra note 244

of corruption, it appears fair that the Parties share in the costs" of the arbitral proceedings.[269] Tribunals should also consider awarding alternative remedies in conjunction with their giving effect to the corruption defence, such as restitution[270], by which, for example, "might include ordering restitution at least of the claimant's initial investment, or the costs incurred in performing the contract"[271]. Within the ICSID, a robust international legal and institutional framework which allows investors to seek an award on their corruption defence and ICSID tribunals which have issue awards that hold all states to their treaty obligations.[272] Clearly, the effectiveness of such awards limiting to declare the contract void or null is not fully achieved, but may have an impact in any internal proceedings which might be open as its consequence.

[269] Supra note 255
[270] International Institute for the Unification of Private Law. 'UNIDROIT Principles of International Commercial Contracts' (2010) 134
[271] Bienven Emma Rose, 'International arbitral tribunals and corruption: not so duty free' (2017) Journal of International Law University of Pennsylvania
[272] Idem

6 INTERNATIONAL NON- ADJUDICATIVE ALTERNATIVES

This Chapter aims to identify those international non-adjudicative mechanisms which might contribute to the international adjudication of corruption. The UNCAC Review Mechanism and Human Rights Review Mechanism will be therein analyzed.

6.1 UNCAC Review Mechanism

The aim of this Subchapter is to establish whether a definition of grand corruption can be found within the reports issued in the context of the UNCAC review mechanism and whether those cases tainted with corruption and addressed in the analyzed international adjudicative bodies are addressed in these reviews as an element to assess compliance with the obligations enshrined in the UNCAC.

By Resolution 3/1, the Conference of the states parties to the United Nations Convention against Corruption adopted "the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption ("the Mechanism")"[273]. This mechanism aims to assist the States Parties to the UNCAC on the implementation of the UNCAC as well as further cooperation among States Parties in two cycles: the first cycle is focused in Chapters III (Criminalization and law enforcement) and IV (International cooperation) (2010–2014), and a second cycle in Chapters II (Preventive measures) and V (Asset recovery) (2015– 2019). It involves a multi-staged peer review mechanism by which each state party is reviewed by two peers. Reviewing state parties submit a report, which is based on the self-assessment report submitted by the reviewed state party and the required country visits outcomes if they were prior agreed with the reviewed state party. As the review and related reports are confidential and their publication remains a discretionary power of each party, only the executive summaries of the review reports have been analyzed.

90 executive summaries of reviewed state parties from the first to the seventh session of the implementation Review Group of the United Nations Convention against Corruption were analyzed in the two strings as above-mentioned[274]. Only one report[275] identifies two types of

[273] CAC/COSP/ 3, Res 3/1 (Doha, Qatar, 9 - 13 November 2009)

[274] CAC/COSP/IRG/2011/CRP.2, CAC/COSP/IRG/2011/CRP.4, CAC/COSP/IRG/2012/CRP.4, CAC/COSP/IRG/2012/CRP.6, CAC/COSP/IRG/2012/CRP.8, CAC/COSP/IRG/I/1/1/Add.3, CAC/COSP/IRG/I/1/1/Add.4, CAC/COSP/IRG/I/1/1/Add.5, CAC/COSP/IRG/I/1/1/Add.6, CAC/COSP/IRG/I/2/1, CAC/COSP/IRG/I/2/1/Add.1, CAC/COSP/IRG/2013/CRP.3, CAC/COSP/IRG/2013/CRP.4,

corruption, albeit no definition is provided. The report praises the target of the Prevention and Combating of Corruption Bureau of Tanzania has self-imposed which aims to combat grand and petty corruption cases. This aim was identified in the report as a successes and good practice in implementing Chapter III of the Convention.

Regarding the second question posed, there is no evidence in the executive summaries of any cross-reference to cases already dealt with in international adjudicative bodies.

6.2 United Nations Human Rights Review Mechanism

As evidenced before in Chapter 5, human rights adjudicative bodies address corruption-related cases, though not cases of grand corruption, by alluding to the link between human rights and corruption. Whether corruption is seen as an essential factor contributing to a chain of events that eventually leads to the violation of a human right (direct orindirect link) or as a violation of a human right, the analysis to this linkage within the scope of United Nations Human Rights review mechanisms (UN HR review mechanisms) could contribute to fighting corruption.

CAC/COSP/IRG/2013/CRP.7, CAC/COSP/IRG/2013/CRP.8, CAC/COSP/IRG/2013/CRP.10, CAC/COSP/IRG/2013/CRP.11, CAC/COSP/IRG/I/1/1/Add.9, CAC/COSP/IRG/I/1/1/Add.10*, CAC/COSP/IRG/I/1/1/Add.11, CAC/COSP/IRG/I/2/1/Add.8, CAC/COSP/IRG/I/2/1/Add.9, CAC/COSP/IRG/I/2/1/Add.10, CAC/COSP/IRG/I/2/1/Add.11, CAC/COSP/IRG/I/2/1/Add.13, CAC/COSP/IRG/I/2/1/Add.14, CAC/COSP/IRG/I/1/1/ADD.12, CAC/COSP/IRG/I/1/1/ADD.13, CAC/COSP/IRG/I/1/1/ADD.14, CAC/COSP/IRG/I/1/1/ADD.15, CAC/COSP/IRG/I/1/1/ADD.16, CAC/COSP/IRG/I/2/1/ADD.17, CAC/COSP/IRG/I/2/1/ADD.18, CAC/COSP/IRG/I/2/1/ADD.19, CAC/COSP/IRG/I/2/1/ADD.20, CAC/COSP/IRG/I/2/1/ADD.21, CAC/COSP/IRG/I/3/1, CAC/COSP/IRG/I/3/1/ADD.1, CAC/COSP/IRG/I/3/1/ADD.2, CAC/COSP/IRG/I/3/1/ADD.3, CAC/COSP/IRG/I/3/1/ADD.4, CAC/COSP/IRG/I/3/1/Add.9, CAC/COSP/IRG/I/1/1/ADD.17, CAC/COSP/IRG/I/2/1/ADD.22, CAC/COSP/IRG/I/2/1/ADD.23, CAC/COSP/IRG/I/2/1/ADD.24, CAC/COSP/IRG/I/2/1/ADD.25, CAC/COSP/IRG/I/2/1/ADD.26, CAC/COSP/IRG/I/2/1/ADD.28, CAC/COSP/IRG/I/3/1/ADD.5, CAC/COSP/IRG/I/3/1/ADD.6, CAC/COSP/IRG/I/3/1/ADD.7, CAC/COSP/IRG/I/3/1/ADD.8, CAC/COSP/IRG/I/3/1/ADD.9, CAC/COSP/IRG/I/3/1/ADD.10, CAC/COSP/IRG/I/3/1/ADD.11, CAC/COSP/IRG/I/4/1, CAC/COSP/IRG/I/2/1/ADD.27, CAC/COSP/IRG/I/2/1/ADD.30, CAC/COSP/IRG/I/2/1/ADD.31, CAC/COSP/IRG/I/3/1/ADD.15, CAC/COSP/IRG/I/3/1/ADD.16, CAC/COSP/IRG/I/3/1/ADD.17, CAC/COSP/IRG/I/3/1/ADD.18, CAC/COSP/IRG/I/3/1/ADD.19, CAC/COSP/IRG/I/3/1/ADD.20, CAC/COSP/IRG/I/3/1/ADD.21, CAC/COSP/IRG/I/4/1/ADD.4, CAC/COSP/IRG/I/4/1/ADD.5, CAC/COSP/IRG/I/4/1/ADD.6, CAC/COSP/IRG/I/4/1/ADD.7, CAC/COSP/IRG/I/4/1/ADD.8, CAC/COSP/IRG/I/4/1/ADD.9, CAC/COSP/IRG/I/4/1/ADD.10, CAC/COSP/IRG/I/4/1/ADD, CAC/COSP/IRG/I/2/1/ADD.33, CAC/COSP/IRG/I/2/1/ADD.34, CAC/COSP/IRG/I/4/1/ADD.27, CAC/COSP/IRG/I/4/1/ADD.28, CAC/COSP/IRG/I/4/1/ADD.29, CAC/COSP/IRG/I/4/1/Add.30, CAC/COSP/IRG/I/4/1/ADD.31, CAC/COSP/IRG/I/4/1/ADD.32, CAC/COSP/IRG/I/4/1/ADD.33, CAC/COSP/IRG/I/4/1/ADD.34, CAC/COSP/IRG/I/4/1/ADD.35, CAC/COSP/IRG/I/4/1/ADD.3, CAC/COSP/IRG/I/4/1/ADD.37, CAC/COSP/IRG/I/4/1/ADD.38, CAC/COSP/IRG/I/4/1/ADD.39.

[275] CAC/COSP/IRG/I/3/1/Add.9

This Subchapter will address how UN HR review mechanisms have dealt with the link between corruption and human rights state's compliance and how these findings might have an impact on the international adjudication of corruption.

6.2.1 Human Rights Council - Advisory Committee

The synergy between human rights and corruption was formally addressed for the first time in the framework of United Nations Human Rights bodies in 2003, on the occasion of the adoption of the Human Rights Council (HRC) Resolution 23/9276 on the negative impact of corruption on the enjoyment of human rights. The link between anti-corruption efforts and human rights, and the importance of exploring how to use UN HR mechanisms more effectively in this regard was recognized therein. The United Nations Human Rights Council Advisory Committee was mandated to "make recommendations on how the Council and its subsidiary bodies should consider this issue"[277], which culminated in the report A/HRC/28/73 of 2015.

As part of the drafting process of such report, States, United Nations bodies, International Organizations and Non-Governmental Organizations were invited to answer a questionnaire. Question number six of said questionnaire reads: "How can the United Nations human rights mechanisms be utilized for anti-corruption efforts?"[278] 36 States submitted their answers[279]; the content of which can be summarized as follows: 1. foster intergovernmental cooperation in matter of justice, 2. command the United Nations specialized agencies to organize awareness raising events on corruption, 3. recommend and provide technical assistance and 4. share information, results and conclusions. The only state which considered that UN HR review mechanisms were not an appropriate way to bear anti-corruption efforts was the USA. Due to the confidentiality character of the HRC complaint procedure it was not possible to have access to it and perform an analysis.

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[276] Supra note 60

[277] United Nations Human Rights Council Advisory Committee. The Negative Impact of Corruption on the Enjoyment of Human Rights Questionnaire. <http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/NegativeImpactCorruption.aspx> Last accessed 16.05.2016

[278] Idem

[279] Idem [Responses received]

6.2.2 Universal Periodic Review

It is interesting to note that in the first cycle (2008-2011) of the Universal Periodic Review ("UPR"), 68[280] out of 193 States received recommendations relating to corruption which were focused on a. signing or ratifying the UNCAC, b. implementing anticorruption strategies/laws, and c. promoting the independence of the judiciary or encouraging the access to justice. Despite the fact that corruption seemed to be a threat to the enjoyment of human rights and is therefore mentioned within the framework of UPR, corruption is not referred to as a cause of human rights violations.

During the second cycle (2012- 2016) 74 States received a corruption- related recommendation[281]. Corruption- related issues, such as public health as to "reduce the risks of corruption and combat informal payments including by raising public awareness of the right to free health care and dismissing offending staff"[282] and the independence of the judiciary and access to justice[283] were mentioned in many of the aforementioned recommendations. The link between the negative effects of corruption and the enjoyment of economic rights is evidenced, namely as regards to the development of the economy in order to "create a suitable business environment that is conducive to attract more foreign investments which in the longer term will contribute to the economic and social development of the country"[284]. Furthermore, an indirect reference is made to the right to education by recommending that a state should "take the necessary measures to combat corruption in the educational system"[285]. The right to non-discrimination is safeguarded if measures are taken to "eliminate corruption in the mechanisms for the processing of residence and work permits for citizens of non-European Union member States"[286].

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[280] See States which received recommendations at: <http://www.upr-info.org/database/index.php?limit=0&f_SUR=153&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly> Last accessed 28.10.2017

[281] See < https://www.upr-info.org/database/> Last accessed 28.10.2017

[282] UNHRC 'Report of the Working Group on the Universal Periodic Review - Democratic Republic of the Congo' (07 July 2014) UN Doc A/HRC/27/5

[283] The following countries received recommendations regarding independence of judiciary: Afghanistan, Albania, Benin, Brazil, Cambodia, Comoros, Dominican Republic, Ecuador, India, Indonesia, Montenegro, Romania, Serbia, Ukraine, Kazakhstan, Kenya, Liberia, Mali, Mexico, Mozambique, Nicaragua, Paraguay Pakistan, Peru and Russian Federation.

[284] The following countries received recommendations regarding creating a suitable business environment: Bangladesh, Benin and Equatorial Guinea.

[285] The following countries received recommendations regarding education: Cambodia, Indonesia.

[286] The following countries received recommendations regarding residence and work permits: Cyprus and Republic

In summary, within the framework of the UPR, although it is evidenced from the recommendations forwarded to states under the UPR that corruption is not considered a corruption-related human rights violation but the link is indisputably proven. Furthermore, states were called to "strengthen efforts in fighting against corruption, which negatively affects the enjoyment of human rights by everyone"[287].

6.2.3 Special Procedures of the Human Rights Council

For the purpose of this thesis, only those annual reports published since 2006[288] issued by United Nations Special Rapporteurs which mandates are most probably related to a corruption- related human rights violation are analyzed hereunder[289].

6.2.3.1 UN Special Rapporteur on the situation of human rights defenders

Created in 2000, the aim of the UN Special Rapporteur on the situation of human rights defenders is to support the implementation of the Declaration on Human Rights Defenders[290] and gather information on the current situation of human rights defenders around the world.[291] The

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of Congo.

[287] UNHRC 'Report of the Working Group on the Universal Periodic Review – Vietnam' (2 April 2014) UN Doc A/HRC/26/6

[288] The year 2006 was chosen as the key date to start the analysis according to the creation of the HRC.

[289] Reports analyzed: United Nations, Human Rights Council. Report of the Special Rapporteur on the situation of human rights defenders: UNHRC 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani' (3 March 2008) UNDoc A/HRC/7/28/Add.4; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya' (12 February 2009) UNDoc A/HRC/10/12; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya' (2010) UNDoc A/HRC/13/22; UNGA 'Report of the Special Rapporteur on the situation of human rights defenders'(4 August 2011) UNDoc A/65/223; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya' (21 December 2011) UNDoc A/HRC/19/55; 'Report of the Special Rapporteur on the situation of human rights defenders' (16 January 2013) UNDoc A/HRC/22/47; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya' (23 December 2014) UNDoc A/HRC/25/55; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst' (29 December 2014) UNDoc A/HRC/28/63; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst' (4 March 2015) UNDoc A/HRC/28/63/Add.1; UNGA 'Situation of human rights defenders' (30 July 2015) UNDoc A/70/217; UNHRC 'Report of the Special Rapporteur on the situation of human rights defenders' (22 February 2016) A/HRC/31/55/Add.1

[290] UNGA 'Declaration on human rights defenders' (8 March 1999) UNDoc A/RES/53/144

[291] Special Representative of the Secretary-General on the situation of human rights defenders. Mandate. <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Mandate.aspx > Last accessed 16.06.2016

analysis whether corruption advocates have enjoyed attention of the UN Special Rapporteur is key due to the relevant contribution of these groups in the fight against corruption, and may contribute to defend their rights within human rights adjudicatory system. In the 2011 report it was noted that "journalists and media workers […] have been targeted for their research on topics such as crime, **corruption**, trafficking, torture, impunity, environmental issues and forced evictions, [and have been] arrested and detained for monitoring demonstrations"[292]. Furthermore, it was highlighted that "journalists and media workers were mainly targeted due to their work on environmental issues, human rights violations committed by the State, [and] corruption (…)"[293]. In the 2013 report, the Special Rapporteur welcomed "the initiatives by a number of States to pass legislation that (...) protects those who disclose public interest information that is relevant for the promotion and protection of human rights and those who report on corruption by public officials"[294].

As it can be observed in the 2011 report, corruption was regarded as a direct violation of human rights which is a matter of concern for the protection of anti-corruption and human rights defenders. The recognition of corruption advocates who deserve the states' protection is worth mentioning.

In a nutshell, out of the eight reports, three reports (2009, 2011 and 2013) make an observation regarding corruption.

6.2.3.2 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[295]

Corruption was regarded twice as a cause of restriction of the freedom of opinion, as a cause of violence exerted upon journalists and their killing[296] and as a cause of restriction of a greater systematic dissemination of information to the public. Again, the attention was placed on corruption not only as an obstacle to fully enjoy the right to freedom of opinion and expression

[292] Supra note 289 [Reports analyzed: UNDoc A/HRC/19/55]

[293] Ibid [Reports analyzed: UNDoc A/HRC/19/55. In the same line, the 2009 Annual Report also denounced the constant threaten and attacks towards anti-corruption defenders. Supra note 289, UNDoc A/HRC/13/22]

[294] Supra note 289 [Reports analyzed: UNDoc A/HRC/19/55]

[295] The following documents were analyzed but no corruption-related issue was found: UNGA 'Report of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression' (21 August 2014) UNDoc A/69/335, and UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (30 April 2009) UNDoc A/HRC/11/4

[296] UNHRC 'Report of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression' (25 March 2010) UNDoc A/HRC/14/23/Add.2

but also as the cause of the violation of the human rights mentioned herein. Most importantly, it is recognized that "(..) the right to freedom of opinion and expression should also be understood to be […] an important tool for combating impunity and corruption (…)"[297].

6.2.3.3 Working Group on Arbitrary Detention

Out of six reports of the Working Group on Arbitrary Detention (WG), three different connections to corruption were found[298] . The WG identified as a form of corruption providing sexual "services" to the police force in exchange for prison release[299] and called upon states to become a party to the United Nations Convention against Corruption[300]. The reason given for issuing these recommendations was that corruption makes the whole system of guarantees devoid of any content and reduces the credibility of the entire justice administration system[301]. In its 2009 annual report, the WG highlighted the devastating effects caused by corruption on the effective fulfillment of human rights, including the right to be free from arbitrary detention[302]. Finally, it shared "the opinion of those who believe in the necessity of linking the fight against corruption with the enjoyment of human rights"[303].

[297] UNHRC 'Report of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion' (20 April 2010) UNDoc A/HRC/14/23
[298] The following documents were analyzed: UNHRC 'Report of the Working Group on Arbitrary Detention, A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court' (30 June 2014) UNDoc A/HRC/27/47; UNHRC 'Report of the Working Group on Arbitrary Detention' (30 June 2013) UNDoc A/HRC/27/48; UNHRC 'Report of the Working Group on Arbitrary Detention' (24 December 2012) UNDoc A/HRC/22/44; UNHR 'Report of the Working Group on Arbitrary Detention' (19 January 2011) UNDoc A/HRC/16/47; and UNHRC 'Report of the Working Group on Arbitrary Detention' (18 January 2010) UNDoc A/HRC/13/30
[299] UNHRC 'Report of the Working Group on Arbitrary Detention' (10 January 2008) UNDoc A/HRC/7/4
[300] UNHRC 'Report of the Working Group on Arbitrary Detention' (16 February 2009) UNDoc A/HRC/10/21
[301] UNHRC 'Report of the Working Group on Arbitrary Detention' (26 December 2011) UNDoc A/HRC/19/57 and UNHRC 'Report of the Working Group on Arbitrary Detention' (9 January 2007) UNDoc A/HRC/4/40
[302] Supra note 300 [para. 56]
[303] Idem

6.2.3.4 UN Special Rapporteur on extrajudicial, summary or arbitrary execution[304]

The only reference to corruption was made in the 2008 annual report, wherein the high level of corruption in detention centers, the poor education and training and/or capacity of the staff to fight against it have been noted. What it is interesting to highlight is the fact that the Special Rapporteur encouraged states to take measures to overcome this situation in order to increase the education and training of the prison staff[305]. In summary, corruption is mentioned in only one report.

6.2.4 Treaty- Based Monitoring Mechanisms

The analysis will be conducted on the basis of the Periodic Reports which characterizes treaty-based monitoring mechanisms. Furthermore, according to the particularities of each monitoring mechanisms, individual or inter-states complaints shall be looked into.

6.2.4.1 Committee on Economic, Social and Cultural Rights[306]

As the guardian of the International Covenant on Economic, Social and Cultural Rights[307,] the Committee on Economic, Social and Cultural Rights (CESCR) is in charge of addressing its concerns and recommendations to states parties to such treaty in the form of concluding

[304] The following documents were analyzed but no corruption-related issue was found: UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (1 April 2014) UNDoc A/HRC/26/36; UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (9 April 2013) UNDoc A/HRC/23/47; UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (10 April 2012) UNDoc A/HRC/20/22; UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (23 May 2011) UNDoc A/HRC/17/28; UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' (27 May 2009) UNDoc A/HRC/11/2, and United Nations Economic and Social Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Mr. Philip Alston)' (8 March 2006) UNDoc E/CN.4/2006/53

[305] UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (2 May 2008) UNDoc A/HRC/8/3

[306] The following documents were analyzed: UN CESCR 'Report on the fiftieth and fifty-first sessions' (24–29 November 2013) E/2014/22, UN CESCR 'Report on the 34th and 35th sessions' (25 April-13 May 2005) E/2006/22 UN CESCR 'Report on the 36th and 37th sessions' (1-19 May 2006) E/2007/22- E/C.12/2006/1; UN CESCR 'Report on the 40th and 41st sessions' (28 April-16 May 2008, 3-21 November 2008) E/2009/22; UN CESCR 'Report on the 44th and 45th sessions' (4–22 May 2009, 2–20 November 2009) E/2010/22; UN CESCR 'Report on the 44th and 45th sessions' (3–21 May 2010, 1–19 November 2010) E/2011/22-E/C.12/2010/3; UN CESCR 'Report on the 46th and 47th sessions' (2–20 May 2011, 14 November–2 December 2011) E/2012/22- E/C.12/2011/3

[307] International Covenant on Economic, Social and Cultural Rights (entrered into force 3 January 1976)

observations. It receives communications from individuals and considers inter-state complaints[308].

In 2007, the negative effect of corruption on economic, social and cultural rights (ESCR) was reflected by noting that "corruption and nepotism continue to be widespread, preventing the equal enjoyment of economic, social and cultural rights"[309]. However, no follow-up on the issue is evidenced in the 2014 annual report.

It is worth mentioning the CESCR's straight forward request to a state party to provide detailed information about the progress made in combating corruption in its next periodic report. Three years later, Afghanistan received the following recommendations from the CESCR: "(…) adopt a legal framework to combat corruption and impunity, in conformity with the international standards; (b) train lawmakers, national and local civil servants and law enforcement officers on the economic and social costs of corruption; (c) take measures to prosecute cases of corruption". Moreover the CESCR requested to be provided with detailed information in the next periodic report[310]. The same is true for the 2012[311] report, where both the levels of corruption within the bodies of State parties and the request to take appropriate measures were mentioned.

The concern regarding corruption as an impediment to the equal enjoyment of ESCR, led the CESCR to take direct action and request from states to implement appropriate measures to prosecute cases of corruption.

In a nutshell, out of eight reports, six have a reference to corruption.

There are six pending individual complaints being dealt with by the CESCR, none of which appears to be dealing with a corruption-related case[312].

[308] Committee on Economic, Social and Cultural Rights. Monitoring the economic, social and cultural rights. <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> Last accessed 28.10.2017

[309] UN CESCR, E/2007/22- E/C.12/2006/1, para. 453

[310] UN CESCR, E/2011/22 E/C.12/2010/3, para. 80, 170, 189, 351, 354

[311] UN CESCR, E/2012/22 E/C.12/2011/3, para. 152, 227, 239, 294

[312] See pending cases before the CESCR at: <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx> Last accessed 28.10.2017

6.2.4.2 Committee on the Rights of the Child [313]

The Committee on the Rights of the Child (CRC) is "the body of 18 independent experts that monitors the implementation of the Convention on the Rights of the Child (Convention)"[314] by its state parties. A periodic reporting review, according to which states must issue a report every five years, is in place as well as an individual complaint procedure, which has not yet come into force[315]. Out of the 140 analyzed periodic reports corruption was mentioned in 20 opportunities in the form described below[316].

The CRC found in several concluding observations that the effects of corruption constitute a violation of several rights protected by the Convention. Even when this affirmation was not expressly written in its observations, the negative impact of corruption on the allocation of resources to effectively improve the promotion and protection of children's rights was

[313]The following documents were analyzed but no corruption-related mention was found: 2014: CRC/C/HUN/CO/3-5, CRC/C/HRV/CO/3-4, CRC/C/FJI/CO/2-4, CRC/C/VEN/CO/3-5, CRC/C/IDN/CO/3-4, CRC/C/JOR/CO/4-5, CRC/C/LCA/CO/2-4, CRC/C/IND/CO/3-4, CRC/C/KGZ/CO/3-4, CRC/C/PRT/CO/3-4, CRC/C/DEU/CO/3-4, CRC/C/RUS/CO/4-5, CRC/C/COG/CO/2-4; CRC/C/LTU/CO/3-4, CRC/C/TUV/CO/1, CRC/C/STP/CO/2-4, CRC/C/CHN/CO/3-4; CRC/C/KWT/CO/2, CRC/C/LUX/CO/3-4, CRC/C/MCO/CO/2-3, CRC/C/UZB/CO/3-4; CRC/C/ARM/CO/3-4, 2013: CRC/C/GNB/CO/2-4, CRC/C/SVN/CO/3-4, CRC/C/GUY/CO/2-4, CRC/C/MLT/CO/2, CRC/C/GIN/CO/2, 2012: CRC/C/LBR/CO/2-4, CRC/C/ALB/CO/2-4, CRC/C/CAN/CO/3-4, CRC/C/AND/CO/2; CRC/C/AUT/CO/3-4; CRC/C/BIH/CO/2-4; CRC/C/NAM/CO/2-3, CRC/C/CYP/CO/3-4, CRC/C/AUS/CO/4, CRC/C/VNM/CO/3-4, CRC/C/GRC/CO/2-3, CRC/C/TUR/CO/2-3; CRC/C/DZA/CO/3-4, CRC/C/MMR/CO/3-4, CRC/C/MDG/CO/3-4; CRC/C/TGO/CO/3-4; CRC/C/COK/CO/1; CRC/C/THA/CO/3-4; CRC/C/SYR/CO/3-4; CRC/C/KOR/CO/3-4; CRC/C/SYC/CO/2-4; CRC/C/ISL/CO/3-4; CRC/C/PAN/CO/3-4 2011: CRC/C/ITA/CO/3-4; CRC/C/CZE/CO/3-4; CRC/C/BHR/CO/2-3; CRC/C/KHM/CO/2; CRC/C/CUB/CO/2; CRC/C/FIN/CO/4; CRC/C/EGY/CO/3-4; CRC/C/SGP/CO/2-3; CRC/C/UKR/CO/3-4; CRC/C/NZL/CO/3-4; CRC/C/LAO/CO/2; CRC/C/BLR/CO/3-4; CRC/C/DNK/CO/4; 2010: CRC/C/ESP/CO/3-4; CRC/C/GTM/CO/3-4; CRC/C/SDN/CO/3-4; CRC/C/MNE/CO/1; CRC/C/NIC/CO/4; CRC/C/AGO/CO/2-4, CRC/C/BDI/CO/2; CRC/C/LKA/CO/3-4; CRC/C/MKD/CO/2; CRC/C/GRD/CO/2; CRC/C/ARG/CO/3-4; CRC/C/NGA/CO/3-4, CRC/C/JPN/CO/3; CRC/C/BEL/CO/3-4; CRC/C/TUN/CO/3; CRC/C/NOR/CO/4; CRC/C/ECU/CO/4; CRC/C/MNG/CO/3-4, CRC/C/CMR/CO/2; CRC/C/SLV/CO/3-4; CRC/C/PRY/CO/3; CRC/C/TJK/CO/2; 2009: CRC/C/MOZ/CO/2; CRC/C/PHL/CO/3-4, CRC/C/BOL/CO/4 , CRC/C/PAK/CO/3-4, CRC/C/QAT/CO/2, CRC/C/ROM/CO/4, CRC/C/SWE/CO/4, CRC/C/BGD/CO/4; CRC/C/FRA/CO/4; CRC/C/NER/CO/2, CRC/C/MRT/CO/2; CRC/C/NLD/CO/3; CRC/C/MWI/CO/2; CRC/C/PRK/CO/4; CRC/C/MDA/CO/3; CRC/C/TCD/CO/2 2008: CRC/C/GBR/CO/4; CRC/C/BTN/CO/2; CRC/C/DJI/CO/2; CRC/C/ERI/CO/3; CRC/C/GEO/CO/3; CRC/C/SLE/CO/2 (idem BGR para 17); CRC/C/SRB/CO/1; 2007: CRC/C/VEN/CO/2; CRC/C/MDV/CO/3; CRC/C/SVK/CO/2; CRC/C/URY/CO/2; CRC/C/MYS/CO/1; CRC/C/KEN/CO/2; CRC/C/KAZ/CO/3; CRC/C/SUR/CO/2; CRC/C/HND/CO/3; CRC/C/CHL/CO/3 2006: CRC/C/KIR/CO/1; CRC/C/OMN/CO/2; CRC/C/JOR/CO/3; CRC/C/IRL/CO/2; CRC/C/ETH/CO/3; CRC/C/SEN/CO/2; CRC/C/BEN/CO/2; CRC/C/WSM/CO/1; CRC/C/SWZ/CO/1; CRC/C/TZA/CO/2; CRC/C/LBN/CO/3; CRC/C/MEX/CO/3; CRC/C/COL/CO/3; CRC/C/TKM/CO/1; CRC/C/LIE/CO/2; CRC/C/LTU/CO/2; CRC/C/HUN/CO/2; CRC/C/MUS/CO/2; CRC/C/GHA/CO/2; CRC/C/AZE/CO/2, CRC/C/TTO/CO/2, CRC/C/THA/CO/2; CRC/C/SAU/CO/2 and CRC/C/PER/CO/3.

[314] Convention on the Rights of the Child (entered into force 2 September 1990 UNGA 44/25)

[315] Committee on the Rights of the Child. Monitoring children's rights. <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> Last accessed 28.10.2017

[316] As of March 2015

implied[317]. The rights to be protected upon the existence of corrupted practices are recognized in the process of adoption, when states parties are urged to investigate all cases of corruption in the adoption process and ensure that all persons responsible are prosecuted and punished accordingly[318]. Furthermore, it found that corruption has a negative effect on the quality of education [319] and in broader terms addressed corruption as the tool that assists to "divert resources that could otherwise improve the implementation of the rights of the child and weakens the efficiency and efficacy of budgetary allocations for children (…)"[320]. In several opportunities, the CRC requested state parties to implement and strengthen all necessary measures to prevent and combat corruption[321] as well as to reinforce institutional capacities to detect, investigate and prosecute corruption effectively.[322] Even though it was highlighted that corruption is "a serious obstacle to the effective use of the state party's resources and the implementation of the Convention"[323], that may affect different rights of the child and therefore requested states parties to strengthen measures to combat corruption, CRC recommendations lack of a follow-up procedure to verify their compliance.

[317] CRC/C/BGR/CO/2, para 16; CRC/C/COG/CO/1; para 14 and CRC/C/UZB/CO/2, para 52
[318] CRC/C/KGZ/CO/3-4, para 44; CRC/C/OPSC/ARM/CO/1, para 18 and CRC/C/GTM/CO/3-4, para 6
[319] CRC/C/UZB/CO/3-4, para 59 and CRC/C/LKA/CO/3-4, para 63
[320] CRC/C/LBR/CO/2-4, para 18, 19
[321] CRC/C/HRV/CO/3-4, para 13; CRC/C/IND/CO/3-4, para 17; CRC/C/GIN/CO/2, para 19; CRC/C/ALB/CO/2-4, para 16; CRC/C/DZA/CO/3-4, para 20; CRC/C/MMR/CO/3-4; CRC/C/MDG/CO/3-4, para 67; CRC/C/SYR/CO/3-4, para 20 – 21; CRC/C/KHM/CO/2, para 17; CRC/C/UKR/CO/3-4, para 64 65; and CRC/C/CHN/CO/3-4, para 89
[322] CRC/C/COG/CO/2-4, para 17 and CRC/C/THA/CO/3-4, para 21- 22
[323] CRC, CRC/C/UZB/CO/3-4, para 14.

6.2.4.3 Committee against Torture[324]

The Committee against Torture (CAT) monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[325] and every state party must submit a report every four years. It considers individual complaints or communications from individuals claiming that their rights under the Convention have been violated. Moreover it undertakes inquiries and considers inter-state complaints.

With the same rationale as the rest of the monitoring mechanisms, the outcomes of the annual reports provide the CAT with comprehensive disaggregated data on the number of investigations, prosecutions and sentences handed down for human trafficking, on the provision

[324] The following documents were analyzed but no corruption-related mention was found: 2014–2006: CAT/C/AUS/CO/4-5; CAT/C/USA/CO/3-5; CAT/C/HRV/CO/4-5; CAT/C/VEN/CO/3-4; CAT/C/BDI/CO/2, para 13 (slight reference to independence of the judiciary" Judicial authorities found to be responsible for corruption or abuse of power should be punished"); CAT/C/KAZ/CO/3; CAT/C/SWE/CO/6-7; CAT/C/UKR/CO/6; CAT/C/SLE/CO/1, para 18 slight reference to state party obligation to reinforce measures in place for countering police and judicial misconduct) ; CAT/C/THA/CO/1; CAT/C/GIN/CO/1; CAT/C/VAT/CO/1; CAT/C/CYP/CO/4; CAT/C/URY/CO/3; CAT/C/BEL/CO/3; CAT/C/BFA/CO/1; CAT/C/POL/CO/5-6; CAT/C/PRT/CO/5-6; CAT/C/LVA/CO/3-5; CAT/C/AND/CO/1; CAT/C/KGZ/CO/2; CAT/C/UZB/CO/4; CAT/C/MOZ/CO/1; CAT/C/JPN/CO/2; CAT/C/GTM/CO/5-6; CAT/C/GBR/CO/5; CAT/C/NLD/CO/5-6; CAT/C/KEN/CO/2 (para 16: slight reference to arbitrary arrest and police corruption); CAT/C/MRT/CO/1; CAT/C/EST/CO/5; CAT/C/BOL/CO/2; CAT/C/QAT/CO/2; CAT/C/TJK/CO/2; CAT/C/PER/CO/5-6; CAT/C/SEN/CO/3; CAT/C/GAB/CO/1; CAT/C/NOR/CO/6-7; CAT/C/MEX/CO/5-6; CAT/C/RUS/CO/5; CAT/C/TGO/CO/2; CAT/C/CZE/CO/4-5; CAT/C/ARM/CO/3 (slight reference: efforts to eliminate corruption in prisons); CAT/C/GRC/CO/5-6; CAT/C/ALB/CO/2; CAT/C/RWA/CO/1; CAT/C/CUB/CO/2; CAT/C/CAN/CO/6; CAT/C/DJI/CO/1; CAT/C/MDG/CO/1; CAT/C/MAR/CO/4; CAT/C/PRY/CO/4-6¸ CAT/C/BGR/CO/4-5; CAT/C/DEU/CO/5; CAT/C/LKA/CO/3-4; CAT/C/BLR/CO/4; CAT/C/FIN/CO/5-6; CAT/C/KWT/CO/2; CAT/C/SVN/CO/3; CAT/C/MCO/CO/4-5; CAT/C/IRL/CO/1; CAT/C/GHA/CO/1 (no document in web page); CAT/C/MUS/CO/3; CAT/C/TKM/CO/1; CAT/C/TUR/CO/3; CAT/C/MNG/CO/1; CAT/C/ETH/CO/1; CAT/C/KHM/CO/2; CAT/C/LIE/CO/3; CAT/C/SYR/CO/1; CAT/C/CHE/CO/6¸ CAT/C/JOR/CO/2; CAT/C/FRA/CO/4-6; CAT/C/AUT/CO/4-5; CAT/C/CMR/CO/4; CAT/C/MDA/CO/2; CAT/C/COL/CO/4¸ CAT/C/SVK/CO/2; CAT/C/YEM/CO/2; CAT/C/ESP/CO/5; CAT/C/SLV/CO/2; CAT/C/AZE/CO/3; CAT/C/CHL/CO/5; CAT/C/ISR/CO/4; CAT/C/HND/CO/1; CAT/C/NIC/CO/1; CAT/C/NZL/CO/5; CAT/C/TCD/CO/1; CAT/C/PHL/CO/2; CAT/C/LTU/CO/2; CAT/C/MNE/CO/1; CAT/C/ECU/CO/3; CAT/C/DRC/CO/1; CAT/C/FRA/CO/3; CAT/C/GEO/CO/3; CAT/C/GTM/CO/4; CAT/C/GTM/CO/4; CAT/C/KOR/CO/2; CAT/C/QAT/CO/1; CAT/C/USA/CO/2; CAT/C/TGO/CO/1; CAT/C/GUY/CO/1; CAT/C/TJK/CO/1¸ CAT/C/ZAF/CO/1; CAT/C/RUS/CO/4; CAT/C/RUS/CO/4; CAT/C/MEX/CO/4. 2007: CAT/C/HUN/CO/4; CAT/C/BDI/CO/1; CAT/C/NPL/CO/2, CAT/C/DNK/CO/5; CAT/C/ITA/CO/4; CAT/C/LUX/CO/5; CAT/C/POL/CO/4; CAT/C/UKR/CO/5; CAT/C/NET/CO/4; CAT/C/JPN/CO/1; CAT/C/NOR/CO/5; CAT/C/EST/CO/4; CAT/C/LVA/CO/2; CAT/C/BEN/CO/2; CAT/C/PRT/CO/4; CAT/C/UZB/CO/3; CAT/C/DZA/CO/3, CAT/C/MKD/CO/2, CAT/C/AUS/CO/3; CAT/C/ZMB/CO/2; CAT/C/SWE/CO/5; CAT/C/IDN/CO/2¸ CAT/C/CRI/CO/2¸ CAT/C/ISL/CO/3; CAT/C/KAZ/CO/2¸ CAT/C/CHN/CO/4; CAT/C/SRB/CO/1; CAT/C/KEN/CO/1 (para 12 arbitrary arrest); CAT/C/BEL/CO/2 and CAT/C/MAC/CO/4

[325] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987 UNGA Res 39/46)

of redress to the victims and on measures taken to combat alleged corruption among law enforcement officials[326].

Throughout the concluding observations, several corruption-related issues and the link between the two topics can be observed which, consequently, remains undeniable. Firstly, the CAT identified corruption as the hindrance to enjoy an independent judiciary [327] and judicial misconduct[328]. Furthermore, it requested that all necessary measures to combat widespread corruption in the prison environment[329] be taken. Interestingly enough, the CAT recommended certain measures to achieve an effective implementation of anti-corruption legislation[330].

Taking into consideration the 16 decisions[331] adopted by the CAT, it can be noted that corruption was mainly understood as an indirect violation of human rights. In two of them the claimant alleged to be threatened with death owing to the fact that he/she was involved in the fight against corruption (as a public official and a journalist). More generally, it was stated that the current corrupted environment in the claimant's home country implied that his/her life was at risk.

In a nutshell, out of 134 reports, 15 mentioned corruption. As to the individual complaints, 16 out of 303 communications make a reference to corruption.

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[326] CAT/C/KAZ/CO/3, para 21

[327] CAT/C/BFA/CO/1, para. 17: (b) Provide the judiciary with the human and financial resources that it needs to guarantee its independence by ending any political influence on the judicial system and combating corruption more assiduously; CAT/C/KGZ/CO/2, para. 12; CAT/C/KGZ/CO/2, para. 12; CAT/C/NIC/CO/1, para. 14.; CAT/C/TCD/CO/1, para. 24-25; CAT/C/BEN/CO/2, para. 13 and CAT/C/IDN/CO/2 , para. 22

[328] CAT/C/GAB/CO/1, para. 14 c and CAT/C/BGR/CO/4-5, para. 12.

[329] CAT /C/GIN/CO/1, para. 14 e, CAT/C/PRY/CO/4-6, para 16 and CAT/C/CMR/CO/4, para. 15 c.

[330] CAT/C/KHM/CO/2, para. 12 and CAT/C/AUT/CO/4-5, para. 8

[331] CAT/C/38/D/298/2006, CAT/C/40/D/293/2006, CAT/C/41/D/306/2006, CAT/C/40/D/293/2006, CAT/C/49/D/346/2008, CAT/C/35/D/254/2004, CAT/C/34/D/221/2002, CAT/C/28/D/164/2000, CAT/C/47/D/428/2010, CAT/C/40/D/309/2006, CAT/C/50/D/392/2009, CAT/C/49/D/435/2010, CAT/C/46/D/357/2008, CAT/C/39/D/308/2006, CAT/C/51/D/438/2010, and CAT/C/47/D/365/2008.

7 CONCLUSION

As previously stated, the international legalization and adjudication of corruption have not reached the same level of development. Addressing (grand) corruption at international adjudicative bodies becomes tangential due to the international character of this phenomenon and the negative impact and effects of those (grand) corruption-related offences on human rights, the enjoyment of good governance, and the normal economic development of a state.

Whereas there are existing elements enshrined in anti-corruption international instruments to hold states and individuals accountable for (grand) corruption offences, there are limits encountered by and present at international adjudicatory bodies which discourage its adjudication.

A first limit is the lack of a universal definition of corruption. Given this lack, resorting to the legal framework applicable to each international adjudicatory body could be one reasonable method to search for a concept; however, it is not effective when corruption is not regulated nor addressed under such a framework. Furthermore, and as evidenced, there are little and certainly not enough references to the concept of corruption, acts of corruption or grand corruption within the pronouncements of international adjudicatory bodies.

The attitude towards corruption of international adjudicatory bodies mirrors the field of law under which each body has its mandate and the respective jurisdiction. The ICJ, in the field of general public international law, could understand in legal disputes where breaches of international anti-corruption obligations are alleged, although not yet so addressed. In the field of international criminal law, the ICC may focus on the prosecution of perpetrators of international corruption crimes, pending their recognition as international crimes and, following the principle *nulla poena, nullum crimen*. On the side of human rights bodies, the attention to victims and the detrimental effects on their human rights have been considered key to address corruption despite the constrains of jurisdiction *ratione materia* of human rights bodies. Lastly, ICSID arbitral tribunals understand cases tainted by corruption from an economic perspective. Worth noting is that the assessment of cases tainted with corruption will depend on the jurisdiction, competence and capabilities of each adjudicatory body. These factors result in different ways on how to

address, deal with, prosecute - if such is the case- legal disputes with a component of corruption. Cultural diversity and the interconnection with different legal backgrounds, among others, dictate the reasoning of adjudicators. The attitude taken by adjudicators towards corruption is limited to the statutory instruments of their bodies, which makes it difficult to overstretch their given competences. However, the few cases where adjudicators have make pronouncements overstretching their competences have helped to assist the development of the judicial legalization of corruption, only evidenced in certain cases decided by ICSID tribunals and one case rendered by the IACHR.

Admissibility and jurisdiction are considered to be (procedural) limits at international adjudicatory bodies to address corruption-related cases. Considering subject matters of importance within the last decades, e.g. environmental issues, corruption might be also presented as a new subject-matter before the ICJ. Nevertheless, there are limits to overcome which might refrain states from bringing a legal disputable question concerning corruption before the ICJ. The consent of states to submit to the jurisdiction of the ICJ is a first limit. As stated, legal disputes can only be heard by the ICJ if both parties have given their consent. From the four manifestations of consent, resorting to the jurisdictional clause enshrined in international instruments seems to be the most viable option, as evidenced in the *Immunities and Criminal Proceedings case*[332]. Secondly, the jurisdiction of the ICJ to understand in criminal cases and cases of universal jurisdiction is strongly contested. As above stated, bringing a dispute before the ICJ under the framework of the UNCAC should be considered as a last resort of state parties to UNCAC. By means of the existing UNCAC review mechanism, states are subject to a periodic review which "must be a technical inter-governmental review, not a game of name and shame, so that states must measure progress against themselves, not against each other"[333] and efforts are made in order to enhance this review mechanism. Acts of (grand) corruption could be enshrined within the scope of jurisdiction of the ICC by means of: a. modifying the Rome Statute in order to internationally criminalize acts of corruption (more specifically, grand corruption); b. applying a broader interpretation to the already typified crimes as to encompass acts of grand corruption within their scope, or c. (incidental) applying current provisions of the Rome Statute

[332] Supra note 131
[333] Antonio Maria Costa (3rd Session of the Conference of States Parties to the United Nations Convention against Corruption, Doha, Qatar, November 2009) <http://www.unodc.org/unodc/en/corruption/index2.html> Last accessed 28.10.2017

that relate to economic crimes under the jurisdiction of the ICC, connected with the crimes of genocide, crimes against humanity or war crimes. The last option is the most viable one in a short-term period, but no official pronouncements of states or case law is evidenced to this date. From the analyzed case law from the *ut supra* mentioned human rights adjudicative bodies, it can be stated that corruption is, in its majority, addressed by these bodies as a direct or indirect cause of an infringement of human rights. ICSID arbitral tribunals have understood allegations of corruption as a jurisdictional issue and parties to a dispute have alleged that they are part of the inherent jurisdiction to such tribunals.

The *onus pobandi* and standard of proof are other limits which obstruct the assessment of (grand) corruption within these bodies. Even when there is no evidence of any specific hindrance to overcome regarding *onus pobandi* and standard of proof within the ICJ, there are inherent challenges to prove allegations of corruption applicable to all cases. Challenges inherent to all ICC proceedings might be intensified given the high-level status of alleged perpetrators of grand corruption crimes, and the fact that identifying victims is difficult given that grand corruption crimes do not produce concrete, individualized victims. The collection of evidence and burden of proof will also vary depending on wheather or not (grand) corruption is understood as judiciable before the ICC. Human rights adjudicatory bodies have mandated the party alleging the link between corruption and human rights to produce evidence, and the standard of proof required has been highly demanding. ISCID tribunals opt to resort to national courts when an allegation of corruption is brought before them, or have set such a high standard of proof that it makes impossible for the alleging party to produce such evidence.

Last but not least, legal consequences imposed to the debtor party constitute, depending on the field of law, cession of the wrongdoing and reparation. This principle is found in several international statutory instruments of each of the analyzed fora. ICJ would have the means for reparation, but not yet proven. The ICC competence to impose penalties will depend on how (grand) corruption is viewed. Human rights adjudicative bodies might reinforce anti-corruption objectives, or impose obligations to do (such as ordering the prosecution at national level of alleged perpetrators of acts of corruption) or a mandate to refrain from actions which constitute an infringement of human rights. Within the ICSID, such arbitral tribunals have issue awards that hold states liable for the breach of treaty obligations, although the effectiveness of such

awards declaring the contract void or null is not fully achieved, but may have an impact in any internal proceedings which might be open as its consequences[334].

The contribution of non-adjudicative bodies to the adjudication of (grand) corruption has proven to be little to non-existent. There is no report produced as a result of the UNCAC review mechanism which has made cross-references to cases already dealt with in international adjudicatory bodies. Within the human rights field, even when corruption has been recognized by certain reports resulting from the UNHR review mechanisms in different ways: as an impediment to the full enjoyment of human rights and as a phenomenon which affects an environment that suits the enjoyment of human rights well, among others, there are no cross-references evidenced in the analysis of cooperation with international adjudicative bodies.

As a final statement, fragmentation in the treatment of corruption in each international adjudicative body causes uncertainty regarding international redress followed by a latent impunity issue. All in all, it is indisputable to state that enforcing the efforts to internationally adjudicate (grand) corruption will contribute to the fight against it.

[334] Supra note 271

ABSTRACT

International adjudication has not reached many areas of international law, which, however, have already been largely legalized.

Corruption is regarded as an international phenomenon whose international legalization process suffered an outburst since mid-90s. The range of current regional and international anti-corruption related international instruments evidences an exponential normative development; however, the international adjudication of corruption-related cases has not been fully achieved.

Addressing corruption at international adjudicative bodies becomes tangential due to its international character. Concerning these bodies, the occasional treatment of corruption in global, regional, judicial and arbitral manner cannot be denied. The relative scarcity of international adjudication of corruption may be explainable given the limits encountered by those bodies when addressing and assessing cases tainted with corruption manifestations.

The fragmented international adjudicative fora encompassed by specialized bodies coupled with the uneven thematic coverage present a first limit to the assessment of corruption before these bodies. Their jurisdiction *rationae materiae*, the admissibility of cases, the inquisitive or adversarial role of adjudicators, and the applicability of principles of burden of proof are general and procedural limits to the assessment of corruption cases in international adjudicative bodies.

This master thesis aims to identify those general and procedural limits, hindrances and boundaries encountered by international adjudicative bodies when assessing cases tainted with corruption. In order to achieve this objective, existing international adjudicative bodies, including judicial and arbitral ones, will be analyzed to advocate for the in/ viability of the adjudication of corruption.

ABSTRAKT

Obwohl viele Bereiche des internationalen Rechts weitgehend legalisiert wurden, lässt die internationale Adjudikation dieser Bereiche immer noch auf sich warten.

Korruption wird als internationales Phänomen verstanden, dessen internationaler Legalisationsprozess Mitte der 90er Jahre einen Aufschwung erlebte. Die hohe Anzahl an Rechtsinstrumenten, die mit regionalen und internationalen Anti-Korruptionsbewegungen zusammen hängen, ist Beweis der exponentiellen normativen Entwicklung der internationalen Adjudikation von Korruption.

Korruption in internationalen adjudikativen Rechtskörpern anzugehen ist anhand des internationalen Charakters tangential. Die gelegentliche Behandlung und Aufarbeitung von Korruption in diesen Rechtskörpern in einem globalen, regionalen, gerichtlichen und schiedsgerichtlichen Stil ist unbestreitbar. Diese gelegentlichen Analysen (im Gegensatz zu regelmäßigen) können erklärt werden, indem die Einschränkungen betrachtet werden, die die Rechtskörper in ihrer Aufgabe, Fälle von Korruption zu bewerten und beurteilen, limitieren.

Fragmentierte internationale adjudikative Foren, zusammen mit der unzureichenden Aufarbeitung des Themas, stellen eine erste Schwierigkeit in der rechtlichen Festsetzung von Korruption dar. Ein vorherrschendes Problem: eine umfassende Festsetzung des Begriffs der Korruption und strukturierte Rahmenbedingungen für Korruptionsfälle. Viele Faktoren fließen in dieses Problem mit ein, mit unter die sachliche Zuständigkeit (rationae materiae) der Rechtskörper, die Motivationen der Schiedsrichter, die Anwendungsmöglichkeit der Beweislast, sowie generelle und verfahrensrechtliche Einschränkungen. Diese Masterarbeit ist ein Versuch generelle und verfahrensrechtliche Einschränkungen, sowie Hindernisse und Grenzen, im Umfang internationaler adjudikativer Rechtskörper zu identifizieren. Um dieses Ziel ermöglichen zu können, werden existierende adjudikative Rechtskörper (inklusive gerichtliche und schiedsgerichtliche Rechtskörper) analysiert, um die Beständigkeit der internationalen Adjudikation von Korruption zu unterbinden.

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