GRAND CORRUPTION AS A CRIME AGAINST HUMANITY.

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ABSTRACT

The pictures of the effects of corruption may not be as dramatic as those of war, yet the stories of human suffering occasioned by corruption are nonetheless compelling. Herein, and in light of the recent declaration of grand corruption as a crime against humanity, it is shown that grand corruption meets the threshold to be investigated and prosecuted as a crime against humanity. The elements of crimes against humanity are analyzed and grand corruption depicted in the analyses. The writings of various scholars are in this intellectual discourse weaved together to vividly show forth grand corruption as a monster offering salient case studies of Guinea and Kenya.

METHODOLOGY

To effectively assess and evaluate the theme grand corruption as a crime against humanity, the study largely adopted qualitative approaches of data collection. This is because the study of efficacy or lack thereof does not lend itself easily to easy observation or measurement. The study commenced with a desk literature review and analysis of the legal statutes governing the same. It has some limitations as its findings and conclusions cannot be termed as absolutely representative. Data will secondarily be collected with a major focus on books, electronic materials and internet sources mainly obtained from the library.
INTRODUCTION

Corruption is endemic and deeply ingrained in many regions, it shows no sign of subsiding and may be getting worse, hence the inventions of both domestic law and international instruments to combat corruption. Grand corruption 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, are misusing this authority to sustain their power, status and wealth.” Essentially, grand corruption not only violates national laws, but more seriously still, it distorts and undermines the rule of law itself. Grand corruption is systemic, becoming an integrated and essential aspect of the very economic, social and political systems that should combat it.

Crimes against humanity are defined as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The nexus to armed conflict and discrimination *animus* are not a requirement for proof of Crimes against Humanity. Grand corruption as a crime against humanity leads to an intriguing question as to whether the two have anything in common, and this research paper will go ahead to prove the same.

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2 Anti-corruption resources centre, corruption glossary available at www.u4.no/document/faqs5.cfm#grand corruption.  
3 Ibid  
COMMON ELEMENTS

1. THE WIDESPREAD OR SYSTEMATIC

a. Widespread

It should be noted that a prosecutor only needs to satisfy either the widespread or the systematic element so as to successfully succeed in prosecution of crimes against humanity.6 The concept of widespread as an element of crimes against humanity was introduced in the 1990s as an accepted formulation for the contextual threshold, thus contributing to clarity and consistency in this area of law and therefore an attack requires at least some minimal aspect of the two, widespread generally connotes the large scale of the attack and the number of the victims7 but it should be noted that no numerical limit has been set; the issue must be decided on the facts. Widespread is typically known to refer to the cumulative effects of numerous inhumane acts; it could also be satisfied by a singular massive act of extraordinary magnitude.8

Akin grand corruption attacks a wide number of victims consequently due to looting of national funds and thus deaths resulting from hunger and illnesses, this fact was acknowledged by the East Timor Truth Commission, which calculated that 84,200 of the 102,800 victims in the country died of hunger and illness rather than being killed outright or forcefully disappeared during the Indonesian occupation.9 Further The Corruption Perceptions Index 2013 serves as a reminder that the abuse of power, secret dealings and bribery continue to ravage societies around the world, South Sudan being highly corrupt with a score 14 thus further proving the widespread element when one considers the affected population in terms of what they will lack consequently due to corruption.

b. Systematic

The term systematic has been defined in various ways. Earlier decisions had set high thresholds: in Akayesu, it was defined as (1) thoroughly organized (2) following a regular pattern, (3) on the basis of common policy and (4) involving substantial public or private resources.10 In Blaskic, it was defined as requiring (1) thoroughly organized, (2) large scale or continuous commission of linked crimes, (3) significant resources and

6 Robert Cryer et al, “an introduction to international criminal law and procedure”(2010) pg236
7 Tadic, ICTY Ch II 7.5.1997 para 206; Kunarac et al ICTY T. Ch. II 22.2.2001 Para. 428
8 Kordic. ICTY T. Ch.26.2.2001 Para 176; Blaskic ICTY T CH. 1.3.3.2000 PARA 2006;ILC Draft Code,pp.94-5.
9 Gabriel Dolan, “Grand corruption is a crime against humanity” (2009).
10 Akayesu, ICTR T. Ch. 1.2.9.1998 para. 580.
implication of high level authority. However this threshold was later made simpler to organized nature of the acts or organized pattern of conduct and therefore consistent with the ordinary meaning of the term, it may be the hallmark of ‘systematic’ is the high degree of organization, and that features such as pattern, continuous commission, use of resources, planning and political objectives are important factors.

The periphery of grand corruption constitutes continuous commission, use of resources, and planning. Corruption also is evident from Kroll report, Ndungu report, and also scandals; maize scandal and the fact that Kenya Land Alliance has shown how 1,189 acres of Karura forest lost the treasury SH.8 billion. Borrowing extensively from Githongo Diary it was quite clear that by June 2004 ministers and high ranking officials in government were involved with fictitious firms in procuring non-existent security-related services and equipment under the names of several fictitious companies, chief among them Anglo Leasing Finance Company Limited and Infotalent Company Limited. When Githongo pressed the relevant officials about these fake contracts, monies were paid back to the treasury but the then president never questioned why the funds were missing. Prosecution of grand corruption in various courts has led to recovery of resources which had been embezzled by the highest levels of national government instead of being directed to improvement of social economic rights whose infringement has successive consequences which at the end results to death due hunger and illnesses.

In conclusion the resources factor shows the nexus between grand corruption and crimes against humanity.

2. ATTACK DIRECTED

Crimes against humanity are special and unique in that, an attack here is not in the same sense as in the law of war crimes where an attack needs to involve the use of armed forces and encompass mistreatment of the civilian population. But refers to the broader course of conduct, involving prohibited acts, of which the acts of the accused form part. Multiple acts or multiple victims have been indicated by the ICC and Tribunal Jurisprudence as factors that must be present inorder to warrant the label ‘attack directed against a civilian population.’ The acts may be of different types. This requirement of ‘multiple acts’ does not mean that ‘widespread’ is a requirement in all

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12 Kunarac, ICTY T. Ch. II 22.2.2001 para 429; Tadic, ICTY T Ch. II 7.5.1997 para. 648.
14 SERAP V Federal Republic of Nigeria and Universal Basic Education Commission ECW/ccj/APP/08/08 nd in 2010 where it resulted to recovery of 3.4 Billion naira. see also; Gabriel op. cit., n9
15 ICC Elements, Crimes against Humanity Introduction para.3; Kunarac ICTY A. Ch. 12.6.2002 para. 86; Akayesu ICTR T. Ch 1.2.9. 1998para. 581
16 The ICC statute, Art.7 (2) (a); Tadic ICTY T. Ch 7.5.1997 para.644; Akayesu ICTR T. Ch 1 2.9.1998 para. 205
17 The ICC Statute, Art 7 (2) (a); Kunarac ICTY T. Ch. II 22.2.2001 para.415.
18 Kayishema ICCTR T. Ch. II 21.5.1999 para.122.
cases. Both terms measure scale, but ‘multiple’ is a low threshold and ‘widespread’ is a high threshold.\textsuperscript{19}

However there has been a major concern on the policy element with regards to the ‘attack directed’ element, but the ICC statute and the ICTY are of the opinion that nothing in the statute or in customary international law required proof of the existence of a plan or policy to commit these crime.\textsuperscript{20} The ICC statute has been adopted by a great number of states purporting to be a strong indicator of customary law.\textsuperscript{21} Moreover, the statute does not limit or prejudice in any way existing or developing rules of international law for purposes other those of the statute.\textsuperscript{22}

For the above reasons, grand corruption establishes a nexus simply because even if A highly ranked government official is an element to grand corruption it necessary does not need to be proved, the perspective behind this being, to make organizations liable. Following ‘multiple victims’ factor attacks following the mistreatment of the civilian population is evident due the rise of social economic rights infringement as it was in Nigeria.\textsuperscript{23} Moreover the 2007 post election violence in Kenya was as a result of the allegations that the elections were rigged. Considering the assertions were true then grand corruption must have played a hand in rigging, resulting to all manner of mistreatment and atrocities to civilian population, hence the conclusion that grand corruption possesses the ‘attack directed element.’

3. ANY CIVILIAN POPULATION.

This element forms the central innovation and raison d’être of crimes against humanity. The word ‘any’ provides that the law of crimes against humanity not only protects enemy nationals, it also covers, for example crimes by a state against its own subjects.\textsuperscript{24} The nationality of the victim is irrelevant, \textit{ipsos facto} then, effects of grand corruption on non-nationals will not fall under technicality, to the detriment of substantial justice.

The term civilian connotes crimes directed against the affected, while the term ‘population’ indicates that a larger body of victims is visualized. The reference to population implies ‘crimes of a collective nature’ but does not require that the entire population be targeted.\textsuperscript{25} With regards to a targeted group of pregnant women research has shown that countries which tackle corruption can quadruple their national per capita incomes reducing Child mortality rate to fall as much as 75%, but only if

\textsuperscript{19} Robert \textit{op. cit., pg. 237.}
\textsuperscript{20} Kunarac ICTY A Ch12.6.2002 para. 98 see also Guenael Mettraux, ‘Crimes Against Humanity in the Jurisprudence of the International law journal 237 at 270-82
\textsuperscript{21} Robert \textit{op. cit., pg.239}
\textsuperscript{22} The ICC Statute, Art 10
\textsuperscript{23} SERAP CASE \textit{op. cit., n 14.}
\textsuperscript{24} War crimes commission,history,193
\textsuperscript{25} Tadic ICTY T Ch. II 7.5.1997 para.644; Kunarac ICTY T.Ch.
corruption is reduced.\textsuperscript{26} Equatorial Guinea’s per capita gross domestic product (GDP) is equivalent to some of the world’s top-tier economies but it has the 19\textsuperscript{th} highest child mortality rate in the world, according to 2010 United Nations and World Bank statistics.\textsuperscript{27}

4. MENTAL ELEMENT

The mental element requisite requires that the accused must also be aware of the ‘broader context in which his actions occur.’\textsuperscript{28} Hence the knowledge of his context is necessary in order to make one culpable for a crime against humanity as opposed to an ordinary crime or war crime.\textsuperscript{29} It is not required that the perpetrator had detailed knowledge of the attack or its characteristics.\textsuperscript{30} The knowledge may be inferred from the relevant facts and circumstances.\textsuperscript{31} The mental requirement relates to knowledge of the context, not motive.\textsuperscript{32} After the Second World War, several cases dealt with instances where individuals had denounced others to the Nazi regime, for personal opportunistic reasons. Such persons were held liable for crimes against humanity, because even though they acted out of personal motives, their actions were objectively part of the persecutory system, and they acted with knowledge of the system and the likely consequences.

The above being the case, then it will be easy to subject grand corruption to the periphery of crimes against humanity since the mental requirement relates to knowledge of the context and not the motives. This position was held on the basis that perpetrator of grand corruption always have knowledge of the context, merely for they plan how not to be associated with the act of corruption and that thought visits with the sister(\textit{mens rea}).this is against what was held traditionally.\textsuperscript{33}

CONCLUSION

The arguments above prove beyond reasonable doubt that grand corruption has all the elements and similar effects to those of crimes against humanity and for this reason grand corruption should be granted the status of the prohibited acts under Article 7 of The Rome Statute and as a result the International Criminal Court will have jurisdiction to prosecute on the same.

\textsuperscript{26} The Lebanese transparency association, ‘youth against corruption.’
\textsuperscript{27} Katy Migiro, ‘Make corruption a crime against humanity’ Tomson Rauters foundation 14 Oct. 2013.
\textsuperscript{28} Tadic ICTY A. Ch 15.7.1999 para. 248
\textsuperscript{29} Tadic ICTY A. Ch. II 7.5.1997 para. 656.
\textsuperscript{30} ICC Elements, Crimes against Humanity Introduction, para. 2, statutes that it is not required that the perpetrator ’had knowledge of all characteristics of the attack or the precise details of the plan or policy of the statute or organization’, see also Blaskic ICTY T.Ch. 13.3.2000 para.251; Kunarac ICTY A. Ch. 12.6.2002 para. 102
\textsuperscript{31} ICC Elements, General introduction, para. 3.
\textsuperscript{32} Tadic ICTY A. Ch. 15.7.1999 paras. 271-2.
\textsuperscript{33} Bentekas, Illas, ‘Corruption as an International Crime and Crime against Humanity.'