

On the criminality accountability of UN officials*

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Resumen

Este ensayo plantea la problemática derivada de no contar con un sistema penal que busque sancionar a los funcionarios o agentes de la Organización de las Naciones Unidas que abusen de su posición o influencia, para obtener privilegios o cualquier tipo de ventaja social, política o económica.

Los funcionarios de dicha organización cuentan con una vía libre a la impunidad debido a la falta de un sistema penal mundial que los juzgue por los crímenes cometidos en ejercicio de su cargo.

Ejemplos de esto son (i) la violación masiva de mujeres en el Congo por parte de los Cascos Azules, o (ii) los negocios de los cuales se lucraron numerosos funcionarios de la entidad en desarrollo de acuerdos ilegales con el gobierno de Irak, relacionados con el acuerdo de Petróleo por Comida pactado con dicho país.

Finalmente, se argumenta a favor de la necesidad de crear un nuevo sistema penal para los funcionarios o agentes de las Naciones Unidas, y se sugieren algunas ideas preliminares sobre cómo alcanzar dicha meta.

Abstract – Master's Thesis

This work introduces the problems derived from the inexistence of a criminal law system aimed at punishing the officials and agents of the United Nations Organization, that abuse their position or influence, in order to obtain privileges or any type of social, political or economic advantage.

The officials of said organization have a green light to impunity, due to the lack of a global criminal law system that may judge them for crimes committed during the term of exercise of their position.

Examples of this are (i) the massive sexual abuse of women in Congo by UN Peacekeepers, or (ii) the deals with the Iraqi government related to the Oil for Food Program, through which several officials enriched themselves.

Finally, the paper argues in favor of the creation of a new criminal law system for officials or agents of the United Nations, and It suggest some preliminary ideas of how to reach that goal.

Palabras clave

Naciones Unidas, Oficiales, Delincuencia de Cuello Blanco, Corrupción, Corte Penal Internacional, Gobernanza Global, Excepcionalismo, Petróleo por Comida, Competencia, Cooperación, Republicanismo, Derecho Penal, Coautoría y Participación, Estado de Derecho, Abuso de la Posición Oficial.

Key words

United Nations, Officials, White Collar Crime, Corruption, International Criminal Court, Scandal, Liability, Global Governance, Exceptionalism, Oil for Food, Competence, Cooperation, Republicanism, Criminal Law, Aiding and Abetting, Rule of Law, Color of Office.

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Introduction

The expanding role and growing importance of the United Nations poses the need of creating norms, mechanisms and institutions, designed to hold UN officials criminally accountable for committing or aiding and abetting white collar crimes.

The current system of diplomatic immunities, added to the difficulty, and many times, impossibility, for domestic courts, to try UN officials, for that type of crimes constitutes an unjustified *status quo* that fosters and tolerates corrupt practices within the UN system.

The victims of UN corruption are the constituents of a global public sphere, namely (i) global citizens and UN member states, on the one hand, and (ii) the citizens and states deemed to benefit from UN activities and funding.

The preservation of that *status quo* severely undermines the credibility and legitimacy of the UN. In many cases it jeopardizes the possibility of achieving peace and security in areas of intervention. Also, it puts at risk the feasibility of successfully achieving the goals pursued by myriad of UN activities.

This problem is even greater, if we consider that the most egregious corruption episodes involving UN officials have taken place in countries and regions with huge humanitarian catastrophes, such as Iraq, Kosovo, Darfur, and Rwanda.

Below I aim to show, in the first place, the seriousness and extension of the problem of white collar criminality by UN officials, and will argue for the need of criminal accountability as a means to combat and punish corruption.

Second, I will argue that the main victims of these abuses are the abovementioned constituents.

Third, I will assert that preserving the current *status quo* is a mistake, and that reform proposals aimed at fostering criminal accountability by member states under traditional jurisdictional norms does not contribute to solve the problem.

Fourth, I will try to make the case for the need of counting with criminal accountability institutions at the international level with the capacity and competence to hold accountable UN officials involved in corruption scandals. I also elaborate on some of the crimes that I believe should be punished.

Lastly, I will mention some ideas of institutional design that might be useful as a means to achieve the construction of a system of criminal accountability of UN officials.

1. The Problem

1.1 General Remarks

Corruption is generally viewed as one of the most common and serious crimes by citizens worldwide and by state governments.¹ In 2004 the World Bank estimated that more than \$1 trillion –the equivalent to 3% of gross world product– is paid in bribes every year.² Corruption has been defined by the World Bank as the abuse of public office for private gain.³ In furtherance of the fight against corruption, Transparency International prepares annual reports whereby respondents give their view on the levels of corruption in nation-states around the globe.⁴ Only recently, however, a real concern with regard to the grave impact of corruption within the context of the United Nations (UN) has started to grow.

An extremely naïve perception that prevailed during years assumed that UN officials were

¹ See Conclusions of the meeting of the G8 Foreign Ministers' Meeting, Miyazaki, Japan, 13 July, 2000. "We therefore call for the adoption of the United Nations Transnational Organized Crime Convention and Related Protocols by the end of this year. Corruption also undermines democratic institutions and accountability, economic development and international cooperation. We call for the ratification and effective implementation of the OECD Anti-Bribery Convention".

² Bhargava, Vinay. Curing the Cancer of Corruption. In: Global Issues for Global Citizens. Chapter 18, 341-370, 343.

³ *Id.* at 341.

⁴ 2009 Global Corruption Barometer, Transparency International. 2. www.transparency.org

immune to the temptation of corruption. That perception has been progressively dismantled during the past two decades. Egregious cases, such as the oil-for-food program, just to mention one, triggered a strong alarm about this type of corruption. However, the measures undertaken by the UN in reaction to those cases seem insufficient, when compared to the gravity of the conducts and to the extent of the problem. It is my contention that criminal accountability is needed in that type of cases.

UN officials' corruption is particularly serious given (a) the importance of the mission of the UN to achieve peace, international security and human development, (b) the universal trust that states and global-citizens deposit on it, (c) the huge impact that its action has over countries with harsh conditions of violence or social backlash, and (d) the direct effect that it has as a combustible of domestic corruption, whereby the revenues of corruption are thereafter monopolized by corrupt government officials, their family members or cronies, or brokers and middlemen.⁵

The General Assembly, aware of the need of preventing and fighting corruption at all levels, in the *2005 World Summit Outcome Document*, resolved to:

“24. (c) To make the fight against corruption a priority at all levels and welcome all actions taken in this regard at the national and international levels, including the adoption of policies that emphasize accountability, transparent public sector management and corporate responsibility and accountability, including efforts to return assets transferred through corruption, consistent with the United Nations Convention against Corruption. We urge all States that have not done so to consider signing, ratifying and implementing the Convention;”⁶

The Convention itself, however, is insufficient to address the need of punishment of UN officials involved in conducts typically considered to be criminal in modern states.

⁵ Bhargava, Vinay. *Supra*, 343.

⁶ A/60/L.1. September 15, 2005. *World Summit Outcome*. P.7.

At most, the UN imposes a duty on states to fight against corruption and adjudicate corruption cases, but that doesn't seem to be a feasible solution.

The lack of teeth of the UN to fight corruption within its own personnel is a major problem. As it also occurs with UN peacekeepers accused of sexual exploitation and harassment⁷, the UN lacks of legal authority to prosecute wrongdoers in corruption cases. The best it can do is impose administrative or disciplinary sanctions, and repatriate the wrongdoers to the countries of origin, with the hope that they will be prosecuted by a local court, which is almost never the case.⁸

Below I will exemplify the gravity of the problem by providing an oversight to the General Reports of the Office of Internal Oversight Services of the UN, and by presenting a general picture of corruption of UN officials in the context of the intervention in Iraq.⁹ Other cases left unaddressed here, among many others, are misconduct of UN official in Kosovo, South Lebanon¹⁰,

⁷ Schaeffer, Brett. *Critical Reforms Required for U.N. Peacekeeping*, September 8, 2009. P. 1. <http://www.heritage.org/Research/Reports/2009/Critical-Reforms-Required-for-UN-Peacekeeping>

⁸ Murphy, Ray (2006) 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel', *International Peacekeeping*, 13: 531-546, 532.

⁹ Generalized misconduct also occurred in the UN intervention in Congo. The UN Office of Internal Oversight Services (OIOS) played a vital role in the investigation for accusations of misconduct against UN officials. Its report centered on an extended behavior of sexual crimes committed by UN peacekeepers and civilians, in detriment of the persons they were deemed to protect. In May 2005 it was reported that 152 peacekeeping personnel and 5 UN staff members had been summarily dismissed. Despite those actions, a widespread perception prevails in the sense that peacekeeping personnel crimes remains in impunity (...) It is very important that such conducts are not left criminally unaddressed, particularly as they are unintended, yet almost inevitable, consequences of UN peacekeeping operations. This is also the case for corruption involving UN officials. Bhargava, Vinay. *Id.* at 352.

¹⁰ Murphy, Ray (2006). *Supra*, 543. (Asserting that in September 2005 the UN announced “it would

Somalia and Darfur, where the contingents also had a role in corrupt practices.

In this section I will not elaborate on the specific mode of the *corruption-related-crimes* committed by UN officials. For now, it should be enough to say that those crimes involved activities defined by criminal legislations around the globe as (i) abuse of color of office (traffic of influences or undue abuse of official position), (ii) money laundering, (iii) illicit enrichment, (iv) bribery, (v) scheme to defraud, and even (vi) insider trading, by *extra-neus* agents.

In section V I elaborate further on some *specific crimes* for which I think UN officials should be held accountable. I also elaborate there on some important distinctions that must be made with regard to (a) the specific role displayed by UN officials in the crimes which they allegedly commit, and (b) the *mens rea* element with which they ought to act with regard to the *specific crimes* above mentioned, all of which shall be taken into account in determining their criminal liability and the gravity of their conduct.

1.2 General Reports of the Office of Internal Oversight Services

The Office of Internal Oversight Services (OIOS) of the UN and the defunct UN Procurement Task Force unmasked some of the most egregious cases of fraud, mismanagement, and corruption by UN officials. An OIOS audit concluded that in 2005 of \$1 billion in Department of Peacekeeping Operations (DPKO) procurement contracts approximately “\$265 million was subject to waste, fraud, or abuse”.¹¹

In 2007, after reviewing a large number of contracts adding up to \$1.4 billion dollars, a different OIOS report concluded that at least 40% of them were tainted by corruption.¹²

replace the Ukraine contingent part of the UN force in South Lebanon due to ‘significant financial misconduct’.)

¹¹ Schaeffer, Brett. *Supra*, 4.

¹² Schaeffer, Brett. *Supra*, 4.

After several inquiries and similar investigations, in 2008 the head of OIOS, Inga-Britt Ahlenius said:

“We can say that we found mismanagement and fraud and corruption to an extent we didn’t really expect.”¹³

In 2009, the annual Report of OIOS portrayed the case of a fraudulent scheme aimed at misappropriating UN fund originally allocated for a humanitarian project.

“The former OIOS Procurement Task Force (PTF-R009/08) substantiated claims that a staff member participated in a scheme to defraud the United Nations and embezzle funds of the United Nations Development Fund for Women. The funds had been allocated for a humanitarian project aimed at assisting the people of Iraq. The evidence showed that the fraudulent scheme was achieved by steering \$350,000 allocated for the project to a preferred vendor and subsequently assigning a substantial part of this amount to the personal use of the staff member. The matter is pending outcome of the internal disciplinary process.”¹⁴

That same year the Report emphasized the need of acting steady fast in the recovery of almost \$15,000,000 of over costs that had been paid to two contractors as of 2005. As late as 2009 those funds had not been recovered.

“6. In its review of the supply of rations to the United Nations Transitional Administration in East Timor/United Nations Mission of Support in East Timor (AP2005/682/06, issued in November 2005), OIOS recommended that the Procurement Division, in conjunction with the Office of Legal Affairs, take action to recover \$7.9 million² in excess payments to a contractor. Subsequently, as part of its comprehensive management review of procurement by the Department of Peacekeeping Operations (AP2005/600/20, issued in January 2006), OIOS recommended that the Department address accountability for the \$7.3 million overpayment for transportation costs. (...)

¹³ Schaeffer, Brett. *Supra*, 5.

¹⁴ OIOS, A/64/326(Part I) (24 Aug 2009) http://www.un.org/Depts/oios/pages/annual_reports.html

Delays in addressing the issue may result in further losses.”¹⁵

Further, in the General Report of OIOS of 2010, the following conclusion was made:

“56. In UNOCI, OIOS investigated a report of fraudulent claims for reimbursement of travel expenses by various United Nations officials. It was further reported that the budget allotted to official travel had been overspent for the previous five years (...) The Advisory Committee on Administrative and Budgetary Questions expressed concern about the high level of travel expenditure. OIOS found deficiencies in the reimbursement process for the travel allotment resulting in over expenditures for years 2004 to 2007. For example, the initial budget allocation for fiscal year 2006/07 was set at \$256,000; however, the total expenditure amounted to \$2,033,000.”¹⁶

Aside from the importance of having auditing mechanisms that aid to control the budget and expenditures of UN officials or missions, and of imposing disciplinary sanctions for mismanagement, it is apparent from the conclusions of OIOS’ Reports that something beyond bad management have taken place in several occasions. For example, spending \$2,033,000 when the allocated funds for that expenditure were \$256,000, seems criminal on its face. An over cost of \$1,777,000 is simply too much, considering that the resources spent were almost eight times the resources allocated.

Even though OIOS audits did not necessarily picture criminal behavior but also pictured poor and/or negligent management, an important number of reported anomalies involved fraudulent, deceptive or abusive conducts, worthy of criminal punishment.

Iraq

The Iraq *oil-for-food scandal* is probably the best well known scandal of corruption implicating

UN officials. Vinay Barghava summarizes the facts of the *oil-for-food scandal* as follows:

“In 1996, Iraq agreed to the UN-Supervised Oil-for-Food Programme, which allowed the Iraqi government to sell oil as long as it used the revenue to buy humanitarian goods for its citizens. When the program ended following the U.S.-led invasion in 2003, over \$64 billion worth oil had been sold, of which \$39 billion had been used to purchase food. However, reports started surfacing that the Iraqi government had been imposing surcharges on the oil and collecting kickbacks from companies supplying the humanitarian goods. A U.N. investigation in 2005 found that \$1.8 billion in illicit payments had been diverted from the program and that much of the purchased food was unfit for human consumption. More than 2,200 companies were involved (figure 18.2). Illicit kickbacks came from companies and individuals from 66 different countries, and illicit surcharges were paid by companies from around 40 countries.”¹⁷

Further, an Independent Inquiry Committee, headed by Paul Volcker, former chairman of the Federal Reserve Bank of the United States, prepared a report on the abuses committed during the implementation of the *oil-for-food* program.¹⁸ The Committee was created by initiative of UN Secretary General Kofi Annan. It was endorsed afterwards by the UN Security Council by means of Resolution 1538, 2004.¹⁹ The Committee counted with

¹⁷ Bhargava, Vinay. *Supra*, 343.

¹⁸ <http://www.britannica.com/bsps/additionalcontent/18/23307545/THE-ACCUSATIONS-AGAINST-THE-OIL-FOR-FOOD-PROGRAM-THE-VOLCKER-REPORTS> May 11, 2010.

¹⁹ SC/1538, 2004. “The Security Council, Expressing the desire to see a full and fair investigation of efforts by the former Government of Iraq, including through bribery, kickbacks, surcharges on oil sales, and illicit payments in regard to purchases of humanitarian goods, to evade the provisions of resolution 661 (1990) of 6 August 1990 and subsequent relevant resolutions, Concerned by public news reports and commentaries that have called into question the administration and management of the Oil-for-food Programme (hereinafter the Programme) established pursuant to resolution 986 (1995) of 14 April 1995 and subsequent relevant resolutions, including allegations of fraud and corruption, Affirming

¹⁵ OIOS, A/64/326(Part I)/Add.1 (26 Aug 2009) http://www.un.org/Depts/oios/pages/annual_reports.html

¹⁶ OIOS, A/64/326(Part II) (23 Feb 2010) http://www.un.org/Depts/oios/pages/annual_reports.html

over 60 permanent staff members and its estimated functioning cost in furtherance of all the investigation reaches \$30,000,000!²⁰

The Committee concluded that Iraq benefited from a scheme whereby a surcharge was collected from each oil barrel sold. The surcharge was, of course, illegal. By means of an elaborate scheme, revenue collected from the surcharges would be finally allocated to the Iraqi central bank, to Iraqi officials, foreign officials, individuals and contractors. Further, the Committee concluded that Iraq had most prominently benefitted from kickbacks paid by contractors selected to provide humanitarian aid and food. The Committee adds that Iraq received around 1.5 billion from those kickbacks.²¹

The scheme to defraud the oil-for-food program worked as shown in the charts below.

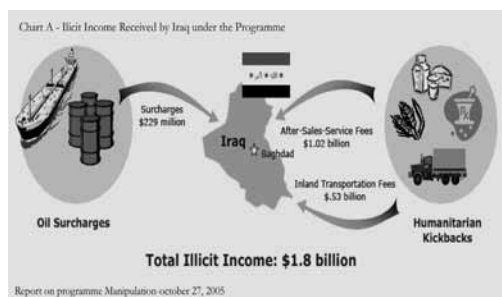


Chart 1. Source: Volcker Report²²

that any illicit activity by United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts under the Programme, is unacceptable (...) Affirming the letter of its President of 31 March 2004 welcoming the Secretary-General's decision to create an independent high-level inquiry to investigate the administration and management of the Programme and taking note of the details relating to its organization and terms of reference, 1. *Welcomes* the appointment of the independent high-level inquiry (...)"

²⁰ <http://www.iic-offp.org/about.htm#6.%20How%20many%20people%20work%20in%20the%20IIC>

²¹ Independent Inquiry Committee into the United Nations Oil-For-Food Programme, Report on Programme Manipulation, Chapter One, Summary of Report on Programme Manipulation. (Volcker Report).

²² Id.

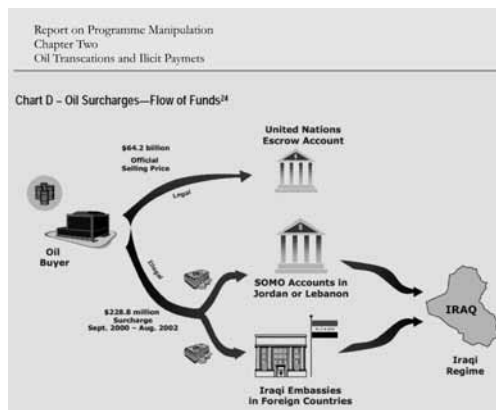


Chart 2. Source: Volcker Report²³

I will not elaborate further on the details of the fraudulent scheme here. It is explained in depth in the Volcker Report.

Against all odds, some high UN officials and businessmen involved in the *oil-for-food* scandal were charged and/or tried by US officials for their criminal activity.²⁴ United States' courts were competent to try those cases because the defendants had used bank accounts in the US to receive revenues of their activities. Furthermore, the over broad and highly criticized mail fraud statute²⁵ served as a fish net to indict the defendants for using (e)mails within US soil in furtherance of schemes to defraud.

Three cases are particularly noteworthy.

Alexander Yakovlev

Yakovlev, a Russian citizen, was the first UN official to be convicted for crimes related to the oil-for-food scandal.

After the release of the conclusions of the Volcker report, Kofi Annan waived Yakovlev's immunity and he was tried by a US court. According to the Volcker report,

²³ Id.

²⁴ <http://www.msnbc.msn.com/id/10741998/> May 11, 2010, and <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/16/AR2007011600706.html> May 11, 2010.

²⁵ Enciso Vanegas, Camilo Alberto. Burn! Chopping Down the Inquisitor's Stake, Arguments against the Mail Fraud Statute.

Yakovlev had tried to bribe Societe Generale de Surveillance S.A., in connection with an oil inspection contract under the oil-for-food program.²⁶

The Committee also came across evidence proving that he had received at least \$950,000 in kickbacks from corporations that had been selected as contractors in transactions adding up to \$79,000,000.²⁷ Yakovlev was accused of wire fraud and money laundering for accepting approximately \$1,000,000 in bribes from UN contractors. He pleaded guilty in 2005.²⁸

Benon V. Sevan

As of January 16, 2007, Benon V. Sevan, Chipriot national, was indicted by a Manhattan prosecutor for taking \$160,000 in bribes, abusing of his position as head of the *oil-for-food* program.²⁹ Mr. Sevan intended to block efforts to review and investigate corruption accusations under the program. He allegedly instructed his staff that complaints about illegal payoffs should be filed before the whistleblower's country.³⁰

However, Mr. Sevan was never tried in court. He fled to his native Cyprus, and never faced the charges raised against him by a US prosecutor.³¹ Obvious reasons make apparent that he will not stand trial in the future for his conduct in the oil-for-food program. Of course, Mr. Sevan's has a right to a presumption of innocence, and I do not make any claim on his innocence or guilt. Yet it seems plainly wrong that Mr. Sevan can turn away and ignore the serious accusations against him, by flying back home. Likewise, it doesn't seem probable that

²⁶ <http://www.foxnews.com/story/0,2933,165164,00.html>

²⁷ Id.

²⁸ Id.

²⁹ <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/16/AR2007011600706.html> May 11, 2010.

³⁰ <http://www.timesonline.co.uk/tol/news/politics/article583823.ece> May 11, 2010.

³¹ <http://www.heritage.org/Research/Reports/2009/02/Oil-for-Food-Revisited-The-UN-Should-Not-Pay-Benon-Sevans-Legal-Fees>

a Chipriot court will prosecute Mr. Sevan for his role in the *oil-for-food* program.

The story does not end here, however. I will come back to Mr. Sevan in Section 4 below.

Tongsun Park

South Korean businessman Tongsu Park was arrested in Houston, United States, in 2006. He had been indicted for receiving bribes from Iraq in the oil-for-food program. In July he was convicted on conspiracy charges. He was the first person convicted in relation to the oil-for-food scandal.³²

Mr. Park admitted taking more than \$2,500,000 from Iraq government to bribe senior UN officials. His objective was to persuade them to ease economic sanctions against Iraq after the Gulf War.³³ His trial also unveiled a network of businessmen and politicians that aimed to ease UN sanction against Iraq after Kuwait's invasion, in 1990. The efforts of that group apparently led to the oil-for-food program.

Mr. Park "funneled hundreds of thousands in cash from the South Korean government to influential members of Congress. After the case broke, Park fled to South Korea. But after bribery charges against him were dropped, he agreed to return to the United States and testify before Congress about his activities."³⁴

Mr. Park's conviction is just one of the many cases of corruption involving corporate managers.³⁵ However, the scope of this paper

³² <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/22/AR2007022201650.html?sub=AR>

³³ Id.

³⁴ Id.

³⁵ Regardless of its accuracy, Wikipedia summarizes some of the major corruption cases of corporate managers in relation to the oil-for-food program, as follows: "On April 1, 2010, Daimler AG plead guilty to bribery charges brought by the US Justice Department and the U.S. Securities and Exchange Commission and will pay \$185 million (US) as settlement, but remains subject to a two-year deferred prosecution agreement and oversight by an independent monitor. The German automaker of Mercedes-Benz vehicles was accused of

does not reach criminal liability of contractors or outsiders. That topic could be matter of a later essay. Mr. Park's case, however, is relevant to show some of the problems arising from corruption of UN officials and the extent of corruption within the UN.

After reviewing the cases mentioned above, it is relevant to ask what would have happened had US prosecutors and courts not exercised their jurisdiction against the defendants. Furthermore, what would have happened if no territoriality nexus with a country with a strong judicial system had been present in those cases? Moreover, what would have happened if the individuals charged had fled the country filing the indictment, as it occurred in Mr. Sevan's case? I believe that the most reasonable guess is to say that nothing would have happened. The persons charged would be out of the reach of justice.

One last issue is worth mentioning. The corruption in Iraq influenced also the internal

violating the terms of the United Nations' Oil for Food Program with Iraq by including kickbacks 10 percent of the contract values to the Iraqi government. The SEC said the company earned more than \$4 million from the sale of vehicles and spare parts. The SEC case was sparked in 2004 after David Bazzetta, a former auditor at then DaimlerChrysler Corp, filed a whistle-blower complaint after he was fired for raising questions about bank accounts controlled by Mercedes-Benz units in South America. Bazzetta alleged that he learned in a July 2001 corporate audit executive committee meeting in Stuttgart that business units "continued to maintain secret bank accounts to bribe foreign government officials," though the company knew the practice violated U.S. laws. The investigation for the case also revealed that Daimler made some \$56 million in bribes related to more than 200 transactions in 22 countries that earned the company \$1.9 billion in revenue and at least \$91.4 million in illegal profits. "Using offshore bank accounts, third-party agents and deceptive pricing practices, these companies [Daimler AG and its subsidiaries] saw foreign bribery as a way of doing business," said Mythili Raman, a principal deputy in the Justice Department's criminal division. "It is no exaggeration to describe corruption and bribe-paying at Daimler as a standard business practice," Robert Khuzami, director of the SEC's enforcement division, said in a statement. Judge Richard J. Leon of United States District Court in Washington, approved the plea agreement and settlement, calling it a "just resolution."

affairs of the country, and in a certain way legitimized what has been a common practice for centuries, but aggravating it, namely corruption. The Iraqi Deputy Prime Minister Barham Salih stated:

"Uncontrolled levels of corruption in Iraq are fuelling the country's sectarian conflict and creating a political economy of violence. The political economy of this conflict is very much rooted in the alarming levels of corruption we are dealing with. A lot of the money from many sectors of the economy is diverted to sustain the violence."³⁶

Unfortunately, the lack of legitimacy of the UN after the *oil-for-food* program makes it very difficult for the UN to advocate for transparency in that context, without looking hypocritical.

1.3 Additional Funds, New Responsibilities, Greater Risks

The foregoing cases of corruption by UN officials are probably only the tip of the iceberg of a major and increasing problem. The general impunity surrounding those cases, as well as many others, is a huge incentive to engage in additional illegal activities, in a world where UN action is increasingly necessary.

For example, in between 1945 and 1990, despite myriad of conflicts that evidently put at risk international peace and security, the UN only established 18 peace operations.³⁷ In contrast, after the end of the cold war, the UN was resumed a broad range of activities. In the 2005 World Summit Outcome document, the General Assembly stated that the mobilization of financial resources for development of poor countries or with economies in transition was central to a global partnership for development, in furtherance of the Millennium Development Goals.³⁸ In the same document, the GA assured:

³⁶ Cited by Looney, Robert E., *Reconstruction and Peacebuilding Under Extreme Adversity: The Problem of Pervasive Corruption in Iraq*. P. 1.

³⁷ Schaeffer, Brett. *Supra*, 2.

³⁸ A/60/L.1. September 15, 2005. 2005 World Summit Outcome. P.5-6.

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“a) We are encouraged by recent commitments to substantial increases in official development assistance and the Organization for Economic Cooperation and Development estimate that official development assistance to all developing countries will now increase by around \$50 billion a year by 2010, while recognizing that a substantial increase in such assistance is required to achieve the internationally agreed goals, including the Millennium Development Goals, within their respective time frames; b) We welcome the increased resources that will become available as a result of the establishment of timetables by many developed countries to achieve the target of 0.7 per cent of gross national product for official development assistance by 2015 and to reach at least 0.5 per cent of gross national product for official development assistance by 2010 as well as, pursuant to the Brussels Programme of Action for the least developed countries, 0.15 per cent to 0.20 per cent for the least developed countries by no later than 2010, and urge those developed countries that have not yet done so to make concrete efforts in this regard in accordance with their commitments; (...) h) We resolve to operationalize the World Solidarity Fund established by the General Assembly and invite those countries in a position to do so to make voluntary contributions to the fund;”³⁹ (emphasis added)

In addition, the document states:

“103. We request the Secretary-General to establish a multi-year standing Peacebuilding Fund for post-conflict peacebuilding, funded by voluntary contributions and taking due account of existing instruments. The objectives of the Peacebuilding Fund will include ensuring the immediate release of resources needed to launch peacebuilding activities and the availability of appropriate financing for recovery.”⁴⁰

Whereas that huge amount of resources provides a magnificent opportunity to aid countries in extreme situations of violence, poverty, transitional justice proceedings, or analogous situations, it is also provides global cronies with a major opportunity to make business and defraud funds and projects des-

tinued to benefit those societies and individuals at risk. A strong message of zero-tolerance against UN officials engaged in corruption schemes should be sent as soon as possible.

According to Brett Schaeffer by the end of June 2009 the UN DPKO was directing and providing support to sixteen peace-keeping operations and two peace building operations.⁴¹ The size of those operations is breathtaking. By 2009 they involved approximately 93,000 uniformed personnel from 118 countries, more than 20,000 volunteers, and more that “2,000 military observers, police, international and local civilians, and UN volunteers are involved in the two political or peace building missions.”⁴² Moreover, according to Schaeffer the budget of the DPKO from July, 2009 to June, 2010, was of \$7.75 billion!

Summarizing, the responsibilities and resources of the UN have grown from monitoring cease-fires, demilitarized zones and post-conflict security, to much more complex peace operations such as “complex military interventions, civilian police duties, human rights interventions, reconstruction, overseeing elections, and post-conflict reconstruction.”⁴³

Those interventions create the appropriate ground where a corrupt bureaucracy can flourish⁴⁴, and provide almost unlimited funds that make the dreams of any crony come true, unless determined action is taken.

2. Victims and the Global Public Sphere

2.1 General Remarks

Mark Philip has described public corruption as a triadic relation. Three main actors are

⁴¹ Schaeffer, Brett. *Supra*, 3.

⁴² *Id.* at 3.

⁴³ Schaeffer, Brett. *Supra*, 2.

⁴⁴ *Id.* at 4. According to Schaeffer: “This stress [of current level of UN activity] has contributed to serious problems of mismanagement, misconduct, poor planning, corruption, sexual abuse by U.N. personnel, unclear mandates, and other weaknesses.”

³⁹ *Id.*

⁴⁰ *Id.* at 26.

involved in the unlawful activity. The first party is the occupant of the public office; the second party is the intended (lawful) beneficiary of that office; and the third party is the actual beneficiary of the particular exercise of that office.⁴⁵

In the context we are analyzing the first party would be the UN official abusing of its office; the second party would be the contractor, state agent, or any other third party benefiting from an unlawful behavior of the UN official; and the third party, the victim, would have a triple nature. Firstly, global citizens that trust in the work and transparency of the UN, and that rely on its effective work as an effective mechanism to preserve international peace and stability. Secondly, the immediate citizens of the host country or countries supposed to benefit from the role of the corrupt official. Thirdly, member states of the UN that contribute to the UN system, relying on the transparency of its officials, are also deceived.

2.2 Citizens of the host state

The citizens of the host state are stakeholders of UN activity. In many occasion UN interventions need to be done without express authorization of the host state. Moreover, it is not possible to ask the citizens of the host state if they do agree with the intervention. In occasions there is no time for that. Imminent risks need to be addressed quickly in order to prevent humanitarian catastrophes. This is more likely in an era in which the notion of responsibility to protect has gained importance in the international community.⁴⁶

Citizens of the intervened countries have a right to benefit from the funds and projects allocated and designed from their benefit. Corruption of UN officials obstructs the exercise of that right, and in many occasions even worsens the actual situation of the persons that UN activity is supposed to help.

⁴⁵ Philip, Mark (2008) 'Peacebuilding and Corruption', *International Peacekeeping*, 15: 3, 310 – 327, 315.

⁴⁶ Outcome Document of the 2005 UN summit. <http://www.un.org/summit2005/documents.html>

For example, in the Iraq case studied above, one of the non intended consequences of UN intervention has been massive and futile expenditure in infrastructure. That infrastructure has become an easy target for rebels and a financial drain for the United States, the UN and the Iraqi government.⁴⁷ As a consequence, rebel groups have benefited from stealing oil and other hydrocarbon from the weak infrastructure, thus literally fueling their illegal activities. Finally, and more importantly, Iraqi citizens have suffered detriment as the resources from the oil within their territory has been used to fill the pockets of corrupt officials and not to invest in projects aimed at benefiting the life quality of Iraqis.

The corruption of UN officials has also paved the road for a pervasive, structural, and extended corruption in Iraq. That situation fosters criminal networks that may become important actors in the struggle for power, and that, of course, may affect in a negative way the rule of law, international relations, and regional stability.⁴⁸ The right to peace of individuals of Iraq is therefore endangered. This is likely to occur also in other settings in which UN corruption tacitly or explicitly endorses corruption.

2.3 Global demos

Complex theoretical and philosophical debates are currently in vogue with regard to the existence and nature of a *global demos*. I will not elaborate on this particular issue here. I assume that that *global demos* exists, and that it has rights and duties, which it owes to individuals and communities around the globe, and even to individuals that haven't yet been born, i.e. ecological duties. That *global demos* interacts in a global public sphere with sovereign states, international organization and even NGOs.

⁴⁷ Looney, Robert E., *Reconstruction and Peacebuilding Under Extreme Adversity: The Problem of Pervasive Corruption in Iraq*. P. 1.

⁴⁸ Holt, Victoria K. and Boucher, Alix J. (2009) 'Framing the Issue: UN Responses to Corruption and Criminal Networks in Post-Conflict Settings', *International Peacekeeping*, 16: 1, 20 -32.

I believe, however, that the *global demos* has two different facets. The first is the politically organized group of nation-states, and the second is the demos composed by citizens of those states, understood as universal *multitude*.⁴⁹ That multitude does not respond to a centralized source of power nor to any government or power structure. That multitude is composed by global citizens. The global demos as a key player of the international arena will become increasingly important in the years to come, if proposals by scholars and politicians such as the creation of a global parliament move forward.⁵⁰

I believe that corruption of UN official jeopardizes the goal of preserving international peace and security, and consequently harms the rights and interests of the *global demos*. As the UN is an almost entirely universal organ, guided by common values accepted by its member states (who act as agents of their own nationals), grave harm to such values by UN officials must be punished. One form of grave harm to the UN values is corruption.

The delegation and participation models of authority⁵¹ become relevant when analyzing UN power and accountability issues. Whereas some believe that the UN reports to its member states under a delegation model, I believe, that the UN and its officials are directly accountable to the people affected by their actions, under the participation model.

As not only the immediate victims of corruption cases are affected by them, but also the global public sphere composed by global citizens is harmed, I believe that the UN as visible organ of the *global demos* should hold corrupt officials under its own jurisdiction,

imposing on them appropriate criminal sanctions.

The *global demos* is thus also a stakeholder of UN activity, and its rights should be protected with the strongest tool that the rule of law has at its disposal: criminal law.⁵²

2.4 Member States of the UN

Member States are the third type of victim of corruption by UN officials. The largest part of the funds of the UN comes from member states of the organization. The constituents of the UN, therefore, have a legitimate expectation that the funds allocated by them to the UN will be used lawfully and for the purposes for which the funds were disbursed. One could expect, therefore, that member states would be the most interested parties in creating an international system of criminal accountability for UN officials.

However, this is not necessarily true. Paradoxically, the member states that contribute with more resources to the functioning of the UN are at the same time states with a strong proclivity toward judicial exceptionalism. The United States, for example, have repeatedly rejected the possibility of having US citizens tried by foreign or international courts.⁵³ Therefore, it seems apparent that several obstacles must be overcome in order to have the United States support a new system of criminal accountability for UN officials. This is particularly true, when those officials are US citizens or residents.

The problem of this is that when US citizens or residents get involved in corruption cases, the likeliness of a successful prosecution and adjudication of the case at hand relies almost entirely in the discretion of the United States President and his Attorney General. In sensitive cases for political actors, contractors or donor of political campaigns, political inter-

⁴⁹ Virno, Paolo. *A Grammar of the Multitude. For an Analysis of Contemporary Forms of Life*. 2004. Virno, Paolo. *Multitude: Between Innovation and Negation*. 2008.

⁵⁰ Falk, Richard and Strauss, Andrew. 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', *Stanford Journal of International Law*, Volume 36, Number 2, 3-31.

⁵¹ Aoi, Chiyuki et Al. *Unintended Consequences of Peacekeeping*. Centre for International Political Studies. University of Pretoria. P. 13.

⁵² Megret, Frederic. 'The vicarious responsibility of the United Nations', pp. 250-267, in Aoi, de Coning & Thakur, footnote 2.

⁵³ Goldsmith, Jack. *The Terror Presidency: Law And Judgment Inside The Bush Administration*, New York: W.W. Norton & Company, 2007. Chapter 1.

est may lead to a deadlock where nobody is investigated for the unlawful activities.

The important thing is that nation-states have a legitimate expectation that their contribution, and the contribution of all other states to the UN will be used for legitimate purposes, with transparency and strong accountability mechanisms.

3. Consequences of Preserving the *Status Quo*

3.1 General Remarks

The preservation of the Status Quo regarding criminal conducts by UN officials is unacceptable. That Status Quo may be better characterized as a situation that preserves a vacuum of power that is abused by corrupt agents in their own benefit and at the expense of the global demos, citizens of host states, and the international community.

Vacuum of power generally leads to corruption, violence and anarchy. Recalling Plato's Ring of Gyges tale, introduced to the reader in the voice of Glaucon in *The Republic*, in an overwhelming number of cases individuals will engage in criminal conducts unless they are constrained by the fear of punishment, or unless their ethical standards stand particularly high.⁵⁴

Vacuums of power are very likely to be present in cases where the UN is deemed to act, pursuant to peacekeeping/peacebuilding/responsibility to protect interventions, in connection with humanitarian catastrophes. As a consequence of the vacuum of power, a permissive environment for all types of violence and criminality arises. This is par-

ticularly true for post-conflict conditions, where the breakdown of social and cultural norms, law and order, and socio-economic infrastructure⁵⁵, have been severely eroded, thus allowing international and domestic corruption.

The UN General Assembly has repeatedly manifested its concern on the issue of domestic and international corruption. Pursuant to the defeat of that cancer, the UN enacted the UN Convention Against Corruption, UNCAC, which might be considered the first anticorruption convention. It aims to promote reforms within states directed to prevent corruption, criminalize and enforce legal norms and decision against persons engaged in criminal conduct, promotes international cooperation in the fight against corruption, and fosters measures aimed at assuring assets recovery.⁵⁶ UNCAC, however, does not solve in any the jurisdictional problems addressed in this paper (corruption by UN officials). It only intends to solve problems related to the transnational asset recovery provision, which was a ground breaking development in the fight against private and public corruption.⁵⁷

Other interesting efforts in the fight against corruption have been made through the enactment of the OECD Antibribery Convention,⁵⁸ which makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain an international business deal⁵⁹, and the creation of the Financial Action Task Force on Money Laundering, whose purpose is to develop and promote national and international policies to fight money laundering and terrorist organizations financing.⁶⁰

⁵⁴ Plato. *The Republic*. Chapter 2. "For all men believe in their hearts that injustice is far more profitable to the individual than justice, and he who argues as I have been supposing, will say that they are right. If you could imagine any one obtaining this power of becoming invisible, and never doing any wrong or touching what was another's, he would be thought by the lookers-on to be a most wretched idiot, although they would praise him to one another's faces, and keep up appearances with one another from a fear that they too might suffer injustice."

⁵⁵ Aoi, Chiyuki et Al. *Supra*, 2.

⁵⁶ Bhargava, Vinay. *Supra*, 356.

⁵⁷ Bhargava, Vinay. *Supra*, 357.

⁵⁸ The OECD Convention on Combating Bribery of Foreign Public Official in International Transactions.

⁵⁹ In the United States, the Foreign Corrupt Practices Act complies a similar purpose.

⁶⁰ Bhargava, Vinay. *Supra*, 357.

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In any case, the preservation of the Status Quo proves to be an undesirable state of things for preventing corruption by UN officials. The Status Quo fosters (a) impunity, (b) endangers international peace and aggravates non intended consequences of UN interventions in host states, and (c) fosters additional corruption.

3.2 Impunity

Presently, there are only two types of responses against corrupt activities by UN officials: First, the imposition of disciplinary and administrative sanctions against the involved party; second, the waiver of UN immunity and the prosecution and adjudication by a domestic court against the official. None of these alternatives seems to be convenient. On the contrary, I believe that both leave an open leeway for corruption, as it will be explained in a subsection below.

3.2.1 Insufficiency of disciplinary/ administrative sanctions

It is often contended that the only possible and desirable sanction against UN officials for corruption cases is the imposition of disciplinary and/or administrative sanctions. I contend here that if those sanctions are effectively imposed, the overall reputation and public image of the person involved is harmed, and in some cases a part of the misguided or misappropriated assets of the UN are recovered, but further than that nothing really happens. Those sanctions are effective from a disciplinary standpoint, but completely ineffective to deter and punish the wrongdoing. The harm done by the official remains unpunished, the credibility of the UN is destroyed, and impunity triumphs.

The Kantian call for justice is thus ignored, and harm to other individuals and the society as a whole takes place and remains without sanction.

“The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the

Pharisaic maxim: “It is better that one man should die than that the whole people should perish”. For if justice and righteousness perish, human life would no longer have any value in the world.”⁶¹

In addition, disciplinary and administrative proceedings can easily fireback against the UN. Above I said that I would retake below the case of Mr. Sevan. Now is the time. According to the Heritage Foundation, Sevan’s lawyers are seeking \$880,300 plus interest from the United Nations for legal fees incurred by Mr. Sevan in furtherance of his defense for his activities as UN official in the *oil-for-food* program.⁶² Recently, the United Nations Administrative Tribunal⁶³ ordered the United Nations to pay “all reasonable legal fees” to Benon Sevan for issues related to the disciplinary he faced before the UN.

The UN confirmed that the organization would abide by the tribunal’s decision. It’s a huge contradiction that while Mr. Sevan is facing criminal charges before a US court for his activity as a UN official, at the same time he is awarded by the UN highest administrative tribunal with a sum aimed to indemnify him for damages pursuant to his legal expenses.⁶⁴

⁶¹ Kant, Immanuel. *The Philosophy of Law*. W. Hastie tr. 1887. Cited by Kadish, Sanford H. et al. *Criminal Law and Its Processes, Cases and Materials*. Eight Edition. P. 80.

⁶² <http://www.heritage.org/Research/Reports/2009/02/Oil-for-Food-Revisited-The-UN-Should-Not-Pay-Benon-Sevans-Legal-Fees>

⁶³ The Administrative Tribunal, composed of seven members, was created by the General Assembly in 1950 to deal with employment related disputes between UN staff and the organization.

⁶⁴ <http://www.heritage.org/Research/Reports/2009/02/Oil-for-Food-Revisited-The-UN-Should-Not-Pay-Benon-Sevans-Legal-Fees> The indignation of right wing scholars for the decision of the UN administrative tribunal was expressed as follows: “The U.N.’s decision to pay Sevan his legal costs is an affront to American taxpayers, who currently give over \$5 billion a year to the United Nations and deserve accountability and respect for the rule of law. For the United Nations to even consider paying what could amount to nearly \$1 million in legal fees is a disgrace and is yet another stain on the reputation of the world body.”

3.2.2 Domestic investigation and adjudication

Different corruption schemes and scenarios are possible at the international level. Let us take a look, as an example, to one of them: UN corruption in states with harsh humanitarian crises. In those states, the vacuum of power and low level of respect for the rule of law in the host countries of the intervention makes it almost impossible to reasonably believe that domestic courts will have the capacity, autonomy and interest in prosecuting UN cronies.

In spite of decisions of the General Assembly, such as those made in the sixty second and sixty third sessions, whereby the GA strongly urged states to undertake in their domestic criminal laws, cooperative investigations against UN officials and experts-on-mission engaged in criminal activity, effective prosecution is not probable.⁶⁵

The reasons for that conclusion are, among others, (i) lack of interest of domestic prosecutors or courts to investigate and adjudicate cases against the persons involved⁶⁶, (ii) lack of prosecutorial capacity to collect evidence against wrongdoers, (iii) lack of awareness and knowledge to identify and uncover complex schemes to defraud and perform international corruption, (iv) high vulnerability of domestic courts to bribes and kickbacks in furtherance of trials pursued in local courts, (v) political implications of prosecuting nationals from other countries, that might be seen as putting at risk the national interest of the host country, (vi) difficulties deriving from diplomatic immunity and lack of extradition treaties between countries.⁶⁷

⁶⁵ A/64/100.

⁶⁶ See Furham, Johannes. Legal problems concerning the lack of accountability of UN peacekeeping forces. *Raizes Juridicas*. Curitiba, v.2, n.2 jul./dez. 2006. P. 29-42. P. 32 (signaling similar problems for UN peacekeepers involved in cases of sexual abuse)

⁶⁷ Furham, Johannes. *Supra*, 33. Similar problems arise in connection with immunity granted in Status of Forces Agreements (SOFAs) for personnel working in peacekeeping operations, involved with sexual abuse crimes.

All this factors contribute to impede the prosecution and adjudication of criminal charges of corruption against UN officials, and leaves the door open for additional criminal conduct.

An additional difficulty that must be mentioned in this context, is the lack of legitimacy deriving from unequal sentencing practices of different member states. While US courts could sentence individuals to several decades of imprisonment, it is highly probable that courts of several other countries could sentence individuals for exactly the same conduct to only a year or little more than that; not to mention the option that they would have to apply to parole or other type of privileges. That does not seem fair from any perspective. In that scenario, UN officials accused of mismanagement or corruption could go forum shopping, looking for the jurisdiction with the most lenient punishment for the crimes committed. That practice must not be tolerated.

3.2.3 Danger to international peace and security and aggravation of non-intended consequences

The intervention of the UN in countries in conflict is likely to have non intended consequences. As countries in conflict are highly complex systems, it is logical to expect responses to interventions in “a nonlinear fashion.”⁶⁸

One of the non intended consequences is the exacerbation of corruption, bolstered by the financial aid provided by the UN.⁶⁹ The UN can, indirectly and unconsciously end up financing local corrupt lords, and persons and organizations engaged with organized crime, if it doesn't count with strong management controls over the disbursement and use of the funds provided, and even worse, if its officials engage in criminal conduct with others aimed at defrauding UN aid.

Moreover, when corruption is used as a means to prevent violent disintegration, and

⁶⁸ Aoi, Chiyuki et Al. *Supra*, 2.

⁶⁹ Aoi, Chiyuki et Al. *Supra*, 2.

counts with additional resources disbursed by the UN, in the context of peacebuilding or peacekeeping operations, the whole reform agenda is severely undermined, and it may even become the “crutch” on which corrupt leaders rely to stay on power in an anarchic environment.⁷⁰ This situation aggravates if we take into consideration the fact that corrupt governments lack political legitimacy, fact that can lead to violence by people frustrated by the “venality of public officials”⁷¹ or by organized crime oriented to usurp power.

The *2005 World Summit Outcome Document* implicitly recognizes the intrinsic relation between transnational crime and corruption:

“111. We express our grave concern at the negative effects on development, peace and security and human rights posed by transnational crime, including the smuggling of and trafficking in human beings, the world narcotic drug problem and the illicit trade in small arms and light weapons, and at the increasing vulnerability of States to such crime. We reaffirm the need to work collectively to combat transnational crime.

112. We recognize that trafficking in persons continues to pose a serious challenge to humanity and requires a concerted international response. (...)

113. We urge States that have not yet done so to consider becoming parties to the relevant international conventions on organized crime and corruption and, following their entry into force, for them to implement them effectively, including by incorporating provision of those conventions into national legislation and by strengthening criminal justice systems.”⁷²

All the above has, therefore, a close relation not just with problems of lack of social and economic progress, but particularly, with the creation and preservation of conditions likely to undermine key social institutions and political stability.⁷³ Unfortunately, the UN system

lacks teeth to impose criminal accountability over officials involved with corruption scandals, even in the worst cases.

4.2.4 Fostering of additional corrupt practices and harm to the legitimacy of the UN

Preserving the *status quo* and tolerating impunity will only serve as an incentive to corrupt officials to further engage in criminal activity. It is a fact that corruption and impunity call for more corruption.

Furthermore, the lack of criminal accountability of UN officials negatively impacts UN legitimacy.⁷⁴ Just as corruption scandals in sovereign states parliaments undermine democracy and legitimacy of the state, endangering in many occasions the existence of the state itself, at the global level, corruption of UN officials undermines its every day expanding role as a new world Leviathan.

For those who believe that the UN represents the promise of a new world government, legitimacy should be nursed as the most valuable living creature. The UN has repeatedly insisted in its goal of fostering democracy not only within states, but also at the international level.⁷⁵

It would therefore be certainly incoherent to say that the goal of achieving democratic governance does not apply to the organization itself, but only to its member states. Therefore, a new type of criminal accountability is required against UN officials. Below I further elaborate on this issue and draw some initial thoughts on how the construc-

⁷⁰ Rose-Ackerman, Susan (2008) ‘Corruption and Government’, *International Peacekeeping*, 15: 3, 328-343.

⁷¹ Rose-Ackerman, Susan (2008), *Supra*, 332.

⁷² Furhman. *Id. at. 27.*

⁷³ Bhargava, Vinay. *Id. at 346.*

⁷⁴ See Schaeffer, Brett. *Supra*, 2. (in the same line of thought, but specifically directed to the need of reform to prevent abuse of peacekeepers in UN operations).

⁷⁵ See Pettit, Philip. Two-dimensional Democracy, National and International. IILJ Working Paper 2005/8 (History and Theory of International Law Series, www.iilj.org (discussing a consideration of what “democracy should require in the international domain: in the context of international organizations and, more generally, cooperation among national governments”))

tion of that type of accountability could be achieved.

4. Criminal accountability over egregious corruption cases

4.1 General Remarks

In Section 2 I pointed out the growing scope of action of the UN in current world affairs. That growth signals the construction process of a new global Leviathan, namely the United Nations. The question we should ask is whether the UN and its officials should have unfettered power, or whether the institutional design should intend to control the exercise of such power under the limits of the rule of law.

The General Assembly stated in the 2005 World Outcome Summit document:

“15. We pledge to enhance the relevance, effectiveness, efficiency, accountability and credibility of the United Nations system. This is our shared responsibility and interest.⁷⁶ (...) Recognizing the need for universal adherence and implementation of the rule of law at both the national and international levels, we: 134. (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;⁷⁷”

It seems very clear that the General Assembly has recently renewed its vows, in the same line of the original Charter of the UN, pursuant to the promotion of the rule of law and democracy.

“11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.⁷⁸”

⁷⁶ *Id.*

⁷⁷ *Id.* at. 30.

⁷⁸ A/60/L.1. September 15, 2005. World Summit Outcome. P.2.

It is my contention that criminal accountability of UN officials is a necessary means to enhance the rule of law and the checks and balances system of the UN. Only through criminal accountability, UN officials would have a real deterrent to engage in criminal conduct, by the fear of investigation and severe criminal punishment. At the same time, punishment would reinforce the validity of the UN legal framework.⁷⁹

4.2 UN Jurisdiction over its own officials

The UN should ensure the creation of criminal accountability that would enable the organization to prosecute and adjudicate cases of white collar crime. The UN should assume competence over the most egregious crimes of its own officials, by promoting the adjudication of jurisdiction to the ICC of crimes such as those contemplated in the document of the UN Action Against Corruption in Bribery.

In that document, the most serious corruption-related offenses are deemed to be: bribery, fraud, speed money payments, illicit political contributions, abuse of power, color of office and/or breach of trust, misappropriation of public funds, and conflict of interest⁸⁰; to which I would add illicit enrichment, money laundering, and insider trading.⁸¹

⁷⁹ A clarification must be made at this point. Criminologist and criminal lawyers have discussed throughout centuries the issue of the real deterrent effect of criminal laws. Some assure that criminal laws are useless pursuant to such end, and others assert the contrary. Pursuant to this article I assume as a given that criminal law does work as a deterrent of corrupt behavior of UN officials, and that, moreover, it is necessary not just because of its deterrence effects, but also because punishment is a fair and just response to the abuse of power and of color of office.

⁸⁰ United Nations Crime Prevention and Criminal Justice Division. United Nations Action against Corruption and Bribery. September 1997. P. 8-11.

⁸¹ This crime takes place when a public official cannot justify the source of any income or asset within its patrimony.

Pursuant to this proposal, the ICC could endeavor to prosecute only the most egregious corruption cases, based on wide prosecutorial discretion. Rationales to define when a case is egregious could be the amount of money involved in the transactions, the scope of the damage of the unlawful activity, the number of persons involved in the conspiracy to commit the crime, and/or the ranking of the officials involved.

4.3 Complicity

The competent prosecutor should have the right to indict the alleged wrongdoers as principals or aiders and abettors of the criminal activities. Further, it would be possible to adopt the United States Model Penal Code, that finds that aiders and abettors are equally liable for the crimes committed by the principal as their own. However, the distinction between the two categories of participants would be useful pursuant to sentencing issues.

4.4 Required mens rea element of specific crimes

The specific crimes for which the ICC should assume jurisdiction should obviously require a specific mental state. The required mens rea element could be present, depending on the nature of each crime, when the agent commits the actus reus with purpose, intent, recklessness, or negligence. Of course, however, the nature of the mens rea element present on each occasion would have an important impact on the sanction to be imposed in each case. But this could be subject of a different paper.

4.5 Punishment

The punishment system for UN officials could work in exactly the same way as it does for criminals under Section X of the Rome Statute. No reform would be needed in that regard. Therefore, the sanction imposed would be enforced in a member state that previously manifested to the ICC its availability to receive convicted parties.⁸²

⁸² Rome Statute. Article 103 and following.

5. Institutional Reform of the ICC

5.1 Enhancing competence of the International Criminal Court

The competence of the ICC could be enhanced through article 123 of the Rome Statute. According to such article, after seven years of the entry into force of the statute, the Secretary General of the UN must invite member states to a conference whereby amendment proposals to the statute will be evaluated.

According to article 123, the review of the Rome Statute may comprehend the crimes listed under article 5, but is not limited to them. Therefore, if the proposal of centralizing criminal accountability of UN officials obtained widespread approval by member states, that kind a accountability could be included in the Rome Statute.

Schaeffer argues against what I hereby propose. He asserts that:

“The abusers and their governments must face real consequences to create incentives for effective enforcement. The remedy should not involve countries yielding jurisdiction over their personnel to the U.N. or to a non-national judicial authority, but it should entail commitments by member states to investigate, try, and punish their personnel in cases of misconduct.”⁸³

Schaeffer contention is naïve. It is simply not reasonable to believe that member states will comply with the “obligation” to try and convict UN officials within its territory. This is particularly true in countries with non liberal governments or high corruption levels.

I believe, on the contrary, that the ICC could play a significant role, as I have stated, in the promotion of the rule of law, checks and balances, and democratic global governance. In a certain way, it can do something similar to what has been achieved by the ICJ at other level:

⁸³ Schaeffer, Brett. *Supra*, 12.

“134. (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court’s work (...)”⁸⁴

The role of the ICC could be facilitated by a cooperative relationship with OIOS. The highly specialized knowledge that OIOS has developed in the process of auditing UN work can prove particularly useful for ICC prosecutors and courts.

“12. Aside from the overall structure of the Investigations Division, OIOS has also begun to further develop its capacity to conduct specialized investigations. The primary consideration in this has been the distinction between the two main types of cases investigated by OIOS, namely sexual exploitation and abuse and financial, economic and administrative cases, and the need to ensure that qualified teams investigate these cases effectively. The skills and experience required for these types of cases vary significantly, and the experience of OIOS over the years provides a compelling argument for concentrating specialized investigators within three regional centres: New York; Vienna; and Nairobi.

13. In addition, the Investigations Division focused on ensuring that the competencies and knowledge developed by the Procurement Task Force were incorporated into the knowledge base of the Investigations Division. In particular, the Division conducted a survey of the Procurement Task Force best practices and lessons learned.”⁸⁵

This is important because it would substantially reduce the cost of creating a new bureaucracy of prosecutors and judges deemed to adjudicate corruption cases. What could be done is to compartmentalize internally the ICC so personnel with specific knowledge on international corruption could focus

on that type of cases, whereas personnel involved with international humanitarian law violations could focus on those more traditional kind of violations to international criminal law.

5.2 Complementary and Subsidiarity

This is a complex issue that would need to be addressed in a later work.

Conclusions

Summarizing, it is apparent that corruption of UN officials is one of the most serious problems faced by the international community today. None of the existing mechanisms to sanction the officials involved in wrongdoing of that kind seems strong or effective enough to address the problem and punish the parties responsible.

The victims of the wrongdoing are citizens of host countries, the global demos, and the member states of the UN system. Those parties are deprived of the honest services of the corrupt officials, and regional and international peace and security are put at risk. Strong measures should be imposed to deter that kind of wrongdoing and to punish the individuals responsible. Criminal liability is one of the most important types of measures that need to be adopted.

The most convenient thing to do in furtherance of the creation of criminal accountability institutions and mechanisms appropriate to combat corruption, is to enhance the competency of the ICC. The crimes for which the ICC should assume competency are the most relevant conducts to which UN cronies have resorted in furtherance of their unlawful activities. The punishment imposed by a sentence of the ICC could be enforced in state members of the Rome Statute, as provided under Chapter X of the statute.

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⁸⁴ *Id.* at. 30.

⁸⁵ A/64/326(Part I) (24 Aug 2009), P. 9.

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