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SPECIALISED ANTI-CORRUPTION COURTS: A MEANS OF PROMOTING SUSTAINABLE TRANSFORMATION IN AFRICA?*

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ABSTRACT

Corruption is inimical to Africa's quest for socio-economic transformation. Available empirical evidence highlights a sustained increase of corruption globally, with an equal emphasis on interdisciplinary interventions. There are also strong arguments for institutional specialisation in the judicature to buttress anti-corruption initiatives. As a result, specialised anti-corruption courts (SACCs) quickly are gaining traction in Africa, at the expense of conventional courts. This paper examines the rationale for SACCs and the variegated institutional SACC design choices by providing an overview of selected African countries. It highlights the position of these courts within the criminal justice system, their size and composition, their jurisdiction and, where relevant, synergies with other complementary institutions. In the main, SACCs provide much needed efficiency, integrity and expertise in the criminal justice system. The paper also examines challenges which SACCs encounter in Africa. Lastly, it provides a brief discussion of calls for an International Anti-Corruption Court.

1 INTRODUCTION

Corruption is extractive in nature and has radical effects upon economies. It requires interdisciplinary solutions.[1] The perilous consequences of economic crime and cybercrime are well-documented. A collaborative study published by the Center for Strategic & International Studies (CSIS) and McAFee in February 2018

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1 Nwabuzor A (2005) "Corruption and Development: New and Initiatives in Economic Openness and Strengthened Rule of Law" 59 *Journal of Business Ethics* 121-138 at 130.

estimates daily activity for malicious scans at 80 billion; new malware at 300 000; phishing at 33 000; ransomware at 41 000; and records lost to hacking at 780 000.[2] Pricewaterhouse Cooper's (PwC) 2018 Global Economic Crime and Fraud Survey shows a 77% upward trend in economic crimes in South Africa.[3] The developmental dichotomy between the North and South is attributable, to a large extent, to corruption. The growing popular antipathy to corruption resulted in the African Union (AU) dedicating 2018 as the Anti-Corruption Year at its 30th Assembly of Heads of State and Government.

Several legal instruments have been put in place to promote good governance in Africa. They include the African Charter on Democracy, Elections and Good Governance, adopted on 30 January 2007; the African Charter on the Values and Principles of Public Service and Administration, adopted on 31 January 2011; and the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, adopted on 27 June 2014. Furthermore, Africa has embarked on an ambitious strategic trajectory which, if realised, will reduce corruption significantly by 2063.[4] In terms of Agenda 2063, especially Aspiration 3, recent efforts are focused upon strengthening the rule of law.[5] Additionally, Goal 16 of the United Nations Sustainable Development Goals also contributes to the anti-corruption debate.[6]

The rationale for, the design of and the extent to which specialised anti-corruption courts (SACCs)[7] may deal with the pernicious effects of corruption[8] and

2 Lewis J (21 February 2018) *Economic Impact of Cybercrime — No Slowing Down* Center for Strategic and International Studies at 5, available at https://www.csis.org/analysis/economic-impact-cybercrime (visited 21 August 2019).

3 Pricewaterhouse Coopers (2018) *The Dawn of Proactivity: Countering Threats from Inside and Out* at 4, available at https://www.pwc.co.za/en/assets/pdf/gecs-2018.pdf (visited 26 August 2019).

4 African Union *Agenda 2063: The Africa We Want*, available at https://au.int/en/agenda2063/overview (visited 26 August 2019).

5 Aspiration 3: "An Africa of good governance, democracy, respect for human rights, justice and the rule of law."

6 Goal 16: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."

7 For a succinct analysis of SACCs in Uganda, see Nanyunja B (2015) "An Analysis of the Anti-Corruption Division of the High Court of Uganda" (Unpublished LLM Dissertation, University of the Western Cape).

8 For an expansive definition of corruption, see World Bank (1997) *Helping Countries Combat Corruption: The Role of the World Bank* at 19-20, available at http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf (visited 21 August 2019). See also Meon PG & Sekkat K (2005) "Does Corruption Grease or Sand the Wheels of Growth?" 122 *Public Choice* 69-97 at 70.

mete out punishment for crimes of corruption[9] have been considered in scholarship.[10] Courts play a crucial role in the fight against corruption.[11] They are enjoined to adjudicate matters expeditiously, and to assist litigants to obtain redress through a fair, open and objective process.[12] Corruption is a covert crime,[13] which makes it arduous for the ordinary court machinery to adjudicate corruption matters expeditiously.[14] This proposition is supported by Nanyunja who conceptualises corruption as a "complex activity typically conducted under the veil of secrecy" and adds that "corruption may be difficult for conventional law enforcement agencies to detect, investigate and prosecute".[15] Carson confirms this line of thought and supports the need for "institutional specialisation" whereby a

9 See Laiton C (28 April 2019) "Why Mnangagwa's Anti-Corruption Crusade is Fast Losing Steam" *The Standard*, available at https://www.thestandard.co.zw/2019/04/28/mnangagwas-anti-corruption-crusade-fast-losing-steam/ (visited 21 August 2019); Maripe T (2019) "Zimbabwe: Unpacking the Effectiveness of Zimbabwe's Corruption Courts" *AllAfrica.Com*, available at https://allafrica.com/stories/201901080695.html (visited 21 August 2019).

10 See, for example, Stephenson MC & Schutte SA (December 2016) "Specialised Anti-Corruption Courts: A Comparative Mapping" *U4 Issue* No 7, Anti-Corruption Resource Centre, available at https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping/ (visited 21 August 2019); Zimmer M (2009) "Overview of Specialised Courts" 2(1) *International Journal for Court Administration* 46-60; Shapi B (4 February 2015) "Corruption Court Completes Two Cases" *Botswana Daily News*, available at https://allafrica.com/stories/201502050592.html (visited 21 August 2019); Martini M (2014) "Anti-Corruption Specialisation: Law Enforcement and Courts" *Transparency International Anti-Corruption Helpdesk Answer*, available at https://www.transparency.org/whatwedo/answer/anti_corruption_specialisation_law_enforcement_and_courts (visited 21 August 2019); Niyonkuru A (2013) "Anti-Corruption Court of Burundi: When the Question of Jurisdiction Arises in Reverse Direction" 16 *Konrad Adenauer Stiftung African Law Study Library* 35-45.
It is fascinating to note that scanty or no attention has been paid to empirical studies to test the effectiveness of specialised courts in relation to the ordinary court machinery.

11 Stephenson & Schutte (December 2016) at 5.

12 Stephenson & Schutte (December 2016) at 10. See sections 164 and 165 of the Constitution of Zimbabwe Amendment Act 20 of 2013 for confirmation of this point.

13 The United Nations Convention against Corruption has captured effects of corruption in its Preamble: it poses a serious threat to the stability and security of societies; it undermines the institutions and values of democracy, ethical values and justice; it jeopardises sustainable development and the rule of law; linked with other forms of crime, corruption involves vast quantities of assets which may constitute a substantial proportion of the resources of a state.

14 Stephenson & Schutte (December 2016) at 1 support this proposition. They suggest that anti-corruption courts were created out of frustration at the inefficiency and incapacity of the conventional court structure to deal with corruption matters.

15 Nanyunja (2015) at 14.

specific component within the judicature is assigned to deal with corruption-related matters.[16] The World Bank considers that:

> Corruption is embedded in the political economy of Africa. A number of studies describe the interaction between various forms of corruption and how it is intrinsically linked to the way power is exercised.[17]

The table below highlights empirical trends in cybercrime globally, with specific focus on its deleterious ramifications for Gross Domestic Product (GDP).

Regional Distribution of Cybercrime in 2017[18]

Region (World Bank)	Region GDP (USD, trillions)	Cyber Crime Cost (USD, billions)	Cyber Crime Loss (% GDP)
North America	20.2	140-175	0.69 to 0.87%
Europe & Central Asia	20.3	160-180	0.79-0.89%
South Africa	2.9	7 to 15	0.24 to 0.52%
Latin America & Caribbean	5.3	15 to 30	0.28 to 0.57%
Sub-Saharan Africa	1.5	1 to 3	0.07 to 0.20%
MENA	3.1	2 to 5	0.06 to o.16%
World	**$75.8**	**$445 to $608**	**0.59 to 0.80%**

As can be seen, the scourge deals an enormous blow to the quest for socio-economic transformation in Africa. As a result, SACCs have been applauded for three major rationales: their efficiency; their expertise; and their integrity.[19] Nanyunya argues that:

> specialised courts may be able to alienate the burden on existing courts and to adjudicate corruption-related cases more expeditiously, offering particular advantages in cases involving sensitive matters or prominent individuals.[20]

She goes further to assert that SACCs provide:

16 Carson L (2015) "Institutional Specialisation in the Battle against Corruption: Uganda's Anti-Corruption Court" *The Public Sphere* 13-25 at 14.

17 World Bank (2010) *Silent and Lethal: How Quiet Corruption Undermines Africa's Development Efforts* Africa Development Indicators: World Bank at 3.

18 The table has been reproduced from Lewis J (21 February 2018) *Economic Impact of Cybercrime-No Slowing Down* Center for Strategic and International Studies at 7, available at https://www.csis.org/analysis/economic-impact-cybercrime (visited 21 August 2019).

19 Stephenson & Schutte (December 2016) at 10-14.

20 Nanyunja (2015) at 15.

> strong guarantees of transparency and independence that may not be practically or politically feasible to extend to the judicial system as a whole.[21]

Practically speaking, institutional specialisation discourse concerning SACCs is relevant largely because of recent efforts to promote sustainable development, as contained in the Sustainable Development Goals (2030) and Agenda 2063, specifically Aspiration 3;[22] the negative social, economic and political effects of corruption; the continued global upsurge in economic crime and cybercrime, which costs the global economy trillions of dollars annually; and the persistent calls for an international corruption adjudicative body (the so-called Wolf Proposal). Ultimately, the discussion on SACCs is linked intrinsically to jurisdiction and design choices.

Goredema posits that SACCs have varied rationales: they serve to complement anti-corruption investigating and prosecuting structures; the complexity and scope of contemporary corruption require specialisation; they are efficient; and specialised courts develop jurisprudence pertaining to economic crime. He considers also that they should be supported by regulation, research, investigation and prosecution.[23]

Whilst subscribing to the factors which justify the establishment of these courts, the paper also articulates some of the contemporary challenges which affect the proper functioning of SACCs, such as judicial officers' lack of or limited proficiency in adjudicating economic crimes;[24] infrastructural deficits; jurisdiction; and politicisation or selective prosecution. It also proffers certain credible intervention strategies. The criticisms that have been levelled against the SACC model include the arguments that ordinary courts can adjudicate economic crimes; that all crimes have become complex; that specialised courts, like any other court, may lack independence; that corruption cannot be contained through the criminal justice system only; and that there are not enough resources to set up new structures.[25]

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21 Nanjunja (2015) at 15.

22 According to this "transformational" and "ambitious" target, "corruption and impunity will be a thing of the past" by 2063.

23 Goredema C (15 November 2018) "Anti-Corruption Courts: Lessons from around the Globe" Judicial Service Commission of Zimbabwe, available at https://jsc.org.zw/jscbackend/upload/Publications/anticorruption-Goredema.pdf (visited 21 August 2019).

24 Judicial officers encompass judges, magistrates, prosecutors and support staff.

25 Goredema (15 November 2018).

Perhaps the most logical and relevant questions regarding SACCs include, but are certainly not limited to, the following:

i) Can anti-corruption courts act as pilots of reform or do they divert scarce resources from judicial reform?
ii) What role can special anti-corruption courts play to support principles of judicial integrity?
iii) How is the integrity of specialised corruption courts ensured?[26]

These questions indicate that there has been steady and robust engagement with SACCs as a field of inquiry. Although this is commendable, extensive research and engagement still are required globally to assess their real practical impact and to clarify the relationship between the creation and purpose of these courts. Literature in the anti-corruption sphere — including law — is replete with judicial discontent about corruption and other related unethical practices.[27]

As a precursor to the discussion of SACCs, it is essential to look briefly at the judiciary's perception of corruption. The Constitutional Court of South Africa, in *South African Association of Personal Injury Lawyers*, held that:

> Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of other rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.[28]

Subsequent case law has delivered a similar message.[29] In this connection, the *Shaik* case is authority for the legal proposition that:

> courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.[30]

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26 These questions were considered at a symposium organised by the U4 Anti-Corruption Resource Center. See UNODC *Are specialist anti-corruption courts an effective means to strengthen judicial integrity and the rule of law?, a*vailable at https://www.unodc.org/documents/ji/discussion_guides/Are_specialist_anti-corruption_courts_an_effective_means_to_strengthen_judicial_integrity_and_the_rule_of_law.pdf (visited 26 August 2019).

27 Nanyunja (2015) at 36-40 scrutinises some of the decisions of the Anti-Corruption Division in Uganda and finds that the court started off by prosecuting high profile matters but went on a downward spiral over the years.

28 *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC) para 4.

29 See *S v Selebi* 2012(1) SA 487 (SCA); *S v Shaik* 2007 (1) SA 240 (SCA).

30 *S v Shaik* 2007 (1) SA 240 (SCA) para 223.

The major functions of SACCs (and, of course, the judiciary) are to resolve disputes between or among parties, and guarantee ethical relationships. The overall purpose, however, remains intact in that the court's primary duty is to uphold, respect and promote entrenched constitutional imperatives. This dovetails with past and present efforts to fight corruption by establishing, reforming and strengthening the legal system, both at national and regional levels.[31]

2 SPECIALISED ANTI-CORRUPTION COURTS IN A GLOBAL CONTEXT

There has been a steady growth of scholarship in this area. Stephenson & Schutte, Carson, Nanyunja and others have led the way. Their researches examine mainly the justification of and contemporary challenges which befall SACCs. SACCs have not been defined exhaustively. One pragmatic approach has taken the stance of conceptualising them by looking at the nature of their jurisdiction, that is, as specialists in corruption matters. Stephenson & Schutte, for example, propose the following definition of a SACC:

> a judge, court, division of a court, or tribunal that specialises substantially (though not necessarily exclusively) in corruption cases.[32]

In this paper, a SACC is understood as any court which is endowed with general or exclusive adjudicative competence to hear, determine and/or provide an equitable remedy or appropriate relief in matters involving economic crime and/or cybercrime. It is a court, forum, tribunal or body which falls squarely under and is bound by judicial norms and standards.

The Philippines usually is acknowledged as having created the first SACC in the 1970s, in the form of the *Sandiganbaya*.[33] Since then, the world has experienced a significant trickle down, with some 17 countries reported to have implemented this model by 2016. Recently, Zimbabwe, Botswana, Uganda, Kenya, Burundi, Malaysia, Tanzania, Madagascar followed suit.[34] By 1999, the SACC model had reached its zenith. Generally, anti-corruption courts are creatures of statute and, in exceptional circumstances, a product of constitutional injunction.[35]

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31 This is evident from the fact that the African Union, the Council of Europe, the Organisation of American States, the Organisation for Economic Co-operation and Development and the United Nations all have enacted anti-corruption treaties.

32 Stephenson & Schutte (December 2016) at 6.

33 Stephenson & Shutte (December 2016) at 7.

34 Florian Schatz "Madagascar Anti-Corruption Courts — Aiming for Effectiveness and Independence", available at https://www.U4.no/madagascar-anti-corruption-courts-aiming-for-effectiveness-and-independence (visited 22 August 2019).

35 For instance, the 1973 and 1987 Constitutions of the Philippines, and laws regulating SACCs in the Ukraine and Botswana.

However, their establishment is met most often with scepticism. Nyanyunja argues that in Uganda:

> The establishment of the ACD came with mixed attitudes. Some people had faith that the court was a sign of judicial intolerance of corruption, while others saw it as a move by the government to fight political opponents or prosecute poor people as corruption scapegoats. However, the courts surprised many. It started off its operations with a grand corruption case, which raised hopes about the future fight against grand corruption, since politicians, as perpetrators of grand corruption, till then had been seen as untouchable.[36]

Some scholars situate the origin of this trend in the 1990s, when the fight against corruption began to be prioritised internationally. Carson cites the United Nations Convention against Corruption which provides that:

> Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.[37]

In the African context, Article 20(5) of the African Union Convention on Preventing and Combating Corruption stipulates that:

> State Parties undertake to adopt necessary measures to ensure that national authorities or agencies are specialised in combating corruption and related offences by, among others, ensuring that the staff are trained and motivated to effectively carry out their duties.

According to Carson, these legal instruments provide a basis for institutional specialisation in anti-corruption.[38]

In Zimbabwe, the late Robert Mugabe was at the helm of power from independence in 1980 until late November 2017, during which time the country slumped into an economic and political abyss. According to scholarly, empirical researches and international perceptions indices, the country moved swiftly to regressive governance under Mugabe and corruption took its toll on society and

36 Nanyunja (2015) at 2-3.
37 Article 36 of the United Nations Convention against Corruption. See Carson (2015) at 14.
38 Carson (2015) at 14.

the economy.[39] The post-Mugabe regime has managed to build its political and economic strategy upon, *inter alia*, an anti-corruption platform. This is apparent from its economic blue-print, titled the *Transitional Stabilisation Programme (2018-2020)*, and controversial *Zimbabwe is Open for Business* mantra. The "renewed" policy thrust has created room for certain legal reforms directed at promoting and ensuring exceptional corporate governance in public and private entities, improved public procurement systems, implementing ease of doing business measures, and creating formidable anti-corruption agencies.[40] This period is characterised by the prosecution on corruption charges of business tycoons and leaders who served under the Mugabe regime.[41]

In January 2018, during the official opening of the country's Legal Year, the Chief Justice referred to the need to create SACCs.[42] This anti-graft project was operationalised in March of the same year with the Harare and Bulawayo Magistracy being used as pilot projects.[43] The Judicial Service Commission recently launched another SACC in Mutare.[44] The Zimbabwean model is diametrically opposed to Uganda's, in the sense that the Zimbabwean specialised courts are located within the magistracy. It must be noted that the structure of the judicature is set out in section 162 of the Constitution, with the Constitutional Court at the apex, followed by an appellate Supreme Court and the High Court (including

39 See *Trading Economics* (2018) "Zimbabwe Corruption Rank", available at https://tradingeconomics.com/zimbabwe/corruption-rank (visited 26 August 2019); Nyoni T (2017) "The Curse of Corruption in Zimbabwe" 1(5) *International Journal of Advanced Research and Publications* 285-291 at 285.

40 See Chingono N (26 July 2019) "Missing US$3bn an Indictment on Mnangagwa's Government" *The Zimbabwe Independent*, available at https://www.theindependent.co.zw/2019/07/26/missing-us3bn-an-indictment-on-mnangagwas-government/(visited 27 August 2019); Sithole-Matarise E (20 December 2017) "Zimbabwe's Mnangagwa Promises Zero Tolerance in Corruption Fight" *Reuters* available at https://www.reuters.com/article/us-zimbabwe-politics/zimbabwes-mnangagwa-promises-zero-tolerance-in-corruption-fight-idUSKBN1EE25P (visited 27 August 2019).

41 See Magaisa A (24 May 2018) "The Trouble with Govt's Anti-Corruption Organ" *The Independent*, available https://www.theindependent.co.zw/2018/05/24/trouble-govts-anti-corruption-organ/ (visited 27 August 2019); Moyo A (9 August 2019) "President Fires Jailed Mupfumira" *The Herald*, available at https://www.herald.co.zw/president-fires-jailed-mupfumira/ (visited 27 August 2019).

42 *Veritas* "Chief Justice Malaba's Speech Opening the 2018 Legal Year — 15 January 2018" at 6, available at http://www.veritaszim.net/node/2311 (visited 27 August 2019).

43 Katongomara A (16 January 2018) "JSC Sets up Anti-Corruption Courts" *Chronicle*, available at https://www.chronicle.co.zw/jsc-sets-up-anti-corruption-courts/ (visited 27 August 2019).

44 Madzianike N (28 May 2019) "Anti-Graft War Goes a Gear up … as Special Court Opens in Mutare" *The Herald*, available at https://www.herald.co.zw/anti-graft-war-goes-a-gear-up-as-special-court-opens-in-mutare/ (visited 27 August 2019).

specialised ones like the Labour Court, the Administrative Court and the Fiscal Court). The Magistrates' Courts occupy the lower end of the judicial hierarchy.

The current period also has seen the resignation of a number of members of the Zimbabwe Anti-Corruption Commission (ZACC). A record 52 cases have gone before the Anti-Corruption Courts, of which 23 were finalised whilst 29 remained pending as at December 2018. This period has been marked by high profile cases involving former ministers and other prominent individuals, such as Samuel Undenge, Psychology Maziwisa, Oscar Pambuka, Moses Julius Juma, Tendai Hombiro, Moses Nyango, Gathry Chiredzero, Claudius Muzvimba and Jason Machaya.[45]

The Judicial Service Commission's target of implementing SACCs across the country's ten provinces has been sluggish due to financial and administrative constraints.[46] There are limited resources available to construct courtrooms and meet the accommodation, transport and remuneration needs of staff. Also, experts have raised concerns about the "lack of clarity on the jurisdiction of the Anti-Corruption Courts".[47] In the main, *The Standard* newspaper authenticates research findings on the politicisation of SACCs in Africa, observing that:

> We cannot talk of fighting corruption by arresting former ministers, former government officials and business people who were suspected to have committed corruption almost a decade ago while other individuals who are committing the very same offences are being protected by the system.[48]

3 RATIONALE FOR THE CREATION OF SPECIALISED ANTI-CORRUPTION COURTS

This section deals with the *why* question. It examines various rationales for the creation of SACCs. It considers SACCs in the light of these rationales and distinguishes them from conventional courts.

3.1 Efficiency Rationale

Although there are several reasons for the establishment of SACCs, efficiency, expertise and integrity often are singled out as major justifications. The principle which characterises almost all legal systems is that justice must be delivered quickly and efficiently. This principle is justified by the maxim "justice delayed is

45 Laiton (28 April 2019).
46 Laiton (28 April 2019).
47 See Laiton (28 April 2019) where a well-known Professor of Law in Zimbabwe, Lovemore Madhuku, is quoted extensively.
48 Laiton (28 April 2019).

justice denied." In this regard, it is argued that the need to achieve efficiency in the courts and in the entire justice system is one of the key drivers of the creation of SACCs, both in Africa and globally.

SACCs and the general courts complement one another, in the sense that reformers fear that anti-corruption investigations and prosecutions might not lead to convictions if brought before corrupt judges in the general courts.[49] As a result, the anti-corruption trajectory is pivotal to bringing efficiency to the public service and thereby promoting a sound economic environment for doing business.[50] In the light of this circumstance, the immediate justification and common rationale for the creation of SACCs is the desire to increase the efficiency with which the judicial system resolves corruption cases.

In cases where courts of general jurisdiction are tainted by corruption and subordination, establishing a specialised judicial body enables a country to use more efficient selection procedures and form a staff comprised of honest and independent judges.[51] Arguments for the founding of anti-corruption courts include: improving work efficiency by reducing work load (due to defined court jurisdiction and comparatively fewer cases to consider); advancing professional specialisation of judges (due to their consideration of the same or similar types of cases); as well as using innovative approaches to the work organisation and documents flow.[52]

Indeed, most jurisdictions that have adopted SACCs have cited the desire for increased expediency in the processing of cases as one of the most public justifications.[53] Generally, efficiency and expediency are fundamental principles

49 Bolongaita E (August 2010) "An Exception to the Rule? Why Indonesia's Anti-Corruption Commission Succeeds Where Others Don't – A Comparison with the Philippines' Ombudsman" *U4 Issue 4*, available at https://www.u4.no/publications/an-exception-to-the-rule-why-indonesia-s-anti-corruption-commission-succeeds-where-others-don-t-a-comparison-with-the-philippines-ombudsman (visited 22 August 2019).

50 Open Society Initiative for Eastern Africa (OSIEA) & Transparency International Rwanda (2017) *Effectiveness of Anti-Corruption Agencies in East Africa: Rwanda. A review by OSIEA and Transparency International,* available at https://tirwanda.org/IMG/pdf/effectiveness_of_anti-corruption_agencies_in_ea.pdf (visited 22 August 2019).

51 Sliusar A (16 February 2017) "Anti-Corruption Court in Ukraine: Preconditions for the Establishment and Guarantees for the Efficiency" *Transparency International Ukraine*, available at https://googleweblight.com/i?u=https://ti-ukraine.org/en/news/anti-corruption-court-in-ukraine-preconditions-for-the-establishment-and-guarantees-for-the-efficiency/&grqid=c5uJwyxx&s=1&hl=en-ZW (visited 22 August 2019).

52 Stephenson & Schutte (December 2016) at 10-14.

53 See, for example, Patricolo C (9 June 2018) "Ukraine Sets Up New Anti-Corruption Court" *Emerging Europe*, available at https://emerging-europe.com/news/ukraine-sets-up-new-anti-corruption-court/ (visited 22 August 2019).

coveted by every justice system in all cases. Most importantly, cases of corruption need to be dealt with promptly and speedily in order to sustain public confidence in the government of the day and attract foreign direct investment. In this regard, Stephenson & Schutte argue that:

> the urgency of making progress in the fight against corruption means that extensive judicial delays in dealing with corruption cases are particularly problematic, especially since such delays threaten to undermine public confidence in the government's commitment and capacity to combat corruption effectively.[54]

Also, cases of corruption are peculiar and substantial delays in processing them escalate the risk that perpetrators or their allies may exert undue influence on witnesses, interfere with evidence, or take other action to impede the ordinary and impartial operation of the justice system. While such concerns are not unique to corruption cases, they are especially acute in this sphere. In many countries, the prosecution or enforcement approach (legal accountability) faces criticism for not producing tangible results. At the same time, this is a crucial function for any democratic society and it is not possible to achieve a high standard of integrity and accountability without a well-functioning system of courts, laws, police and public prosecutors. It is in this context that the creation of SACCs is considered to be imperative.[55]

The underlying logic is simply that a specialised court, which handles only corruption cases or like offences, normally will be staffed by a favourable ratio of judges and therefore will be able to process cases expeditiously. Besides improving the judge-to-case ratio, a specialised court may enable those overseeing the judicial system to assign more capable judges to corruption cases, thereby promoting the efficient resolution of such cases.[56]

Whereas the cited factors sometimes aid SACCs to process cases more speedily than the ordinary courts, this is not always the case: many SACCs are as swamped as the regular court system. What is more, this advantage does not accrue at all in those countries that do not limit their special anti-corruption judges to hearing only anti-corruption cases. In Bangladesh, for example, although certain designated "special judges" preside over corruption cases, these judges also must deal with regular cases and other (non-corruption) special cases, which means —

54 Stephenson & Schutte (December 2016) at 10.

55 Disch A *et al* (2009) *Anti-Corruption Approaches: A Literature Review* NORAD at 22, available at https://norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/study2_2008.pdf (visited 22 August 2019).

56 Disch *et al* (2009) at 10.

according to critics — that they remain overburdened and unable to ensure timely adjudication of corruption cases.[57]

In order to achieve their intended outcomes, some SACCs prescribe deadlines for the conclusion of cases. These deadlines vary a great deal across countries, in part because of other differences in the structure, function and organisation of the courts.[58] However, such an arrangement does contribute a great deal to efficiency in prosecuting and fighting corruption. For example, the Corruption Crimes Court of Palestine is distinguished for its particularly constricted time limits. As a matter of statutory obligation, this court has to entertain any case brought before it within 10 days and to make findings within 10 days after the hearing, subject to a permissible postponement of no more than seven days.[59]

If African SACCs are founded upon similar rules, then no doubt they can become a progressive mechanism for promoting a sustainable path to transformation on the continent. Still, such SACCs may face the challenge that, as a matter of practice, they find it difficult, if not impossible, to meet the required statutory deadlines. In other words, they may entail regressive elements which may serve to undermine the objects of these courts.[60]

Another way in which the specialised courts may promote efficiency and contribute progressively to African development and transformation could be through the rules which guide their operational processes. Needless to say, these processes may vary from one jurisdiction to another.[61] Some SACCs are courts of first instance, with appeals being taken directly to the country's supreme appellate court, thereby by-passing the usual intermediate appellate courts (such as High Courts). This kind of arrangement is followed, for example, in Burundi[62] and Cameroon.[63] However, Botswana subscribes to a different procedure altogether. In Botswana, corruption cases still begin in the Magistrates' Court and the Special

57 Chowdhury GS (2007) "Country Report: Bangladesh" in *Resource Material Series No 71* Tokyo: UNAFEI at 103-112.

58 Chowdhury (2007) at 104.

59 Article 16(3) of the Palestinian Law by Decree No (7) 2010 Pertaining to the Amendment of the Law of Illegal Gain No (1) 2005, available at http://www.pacc.pna.ps/ar/cp/plugins/spaw/uploads/files/Anti-Corruption%20Law%202010%5B1%5D.pdf (visited on 23 August 2019).

60 Danida Fellowship Centre (10 October 2018) "The Decline in Cases at Uganda's Anti-Corruption Court", available at https://dfcentre.com/the-decline-in-cases-at-ugandas-anti-corruption-court/ (visited 26 August 2019).

61 Stephenson & Schutte (December 2016) at 6-7.

62 Niyonkuru (2013) at ii.

63 Fombad CM (2015) *Update: Researching Cameroonian Law* Hauser Global Law School Program, New York University School of Law, available at https://www.nyulawglobal.org/globalex/Cameroon1.html (visited 23 August 2019).

Anti-Corruption Division of the High Court remains an appellate tribunal.[64] As a result, the creation of an SACC in Botswana has not sped up case processing as much as its proponents had hoped. The standpoint adopted in this paper, therefore, is that, once established, SACCs ought to adopt progressive and effective procedures that will not derail their goals of curbing corruption, and thus pave a way for transformation in Africa.

3.2 Expertise Rationale

Another justification for the creation of many SACCs in Africa, one which is related closely to but distinct from that of efficiency, is the need for expertise in handling cases of corruption. After all, many corruption cases, especially those involving complex financial transactions or elaborate schemes, are more complicated than the run-of-the-mill cases that make up the criminal dockets of many generalist judges.[65]

3.3 Integrity Rationale

An important reason for creating SACCs is to sustain the integrity of the judiciary when it comes to the handling corruption cases. It should be the norm that corruption cases are heard by an impartial and independent tribunal, free from both corruption and undue influence by politicians or other powerful actors. These courts ought to suffice as mechanisms for eliminating the culture of impunity.[66]

Regrettably, the creation of these courts does not extinguish the chances of corruption and continued impunity. The usual worry raised in this respect is that of political interference in the adjudication of corruption cases, resulting in the courts shielding powerful wrongdoers from legal accountability. In some countries — for example, Burundi[67] and Cameroon[68] — critics have observed that the government is able to manipulate the anti-corruption courts, and anti-corruption prosecutions more generally, so as to harass political opponents.[69] Again, the creation of SACCs is no guarantee that these courts themselves will not be corrupted.[70] For instance,

64 Shapi (4 February 2015).
65 Shapi (4 February 2015).
66 Shapi (4 February 2015).
67 Tate T (2013) "A Commitment to End Corruption or Criminalize Anti-Corruption Activists? A Case Study from Burundi." 5(3) *Journal of Human Rights Practice* 478–483.
68 *Know Your Country* (2016) "Cameroon, Risk & Compliance Report", available at https://goo.gl/PRnxQT (visited on 27 July 2018).
69 In Afghanistan, anti-corruption courts are biased against foreign nationals, who are treated as scapegoats for the country's corruption problems while powerful domestic figures are not seriously penalised.
70 Shapi (4 February 2015).

in the Philippines a judge was dismissed from the anti-corruption court because of accusations of complicity in corruption offences.[71] In other words, judicial corruption is another regressive aspect which may impede the work of SACCs.

There is a need to act against corrupt judges in all African countries. Our judiciaries can no longer do their jobs because too much money and too many powerful people have intruded into the criminal justice process. What is required in such a situation is SACCs staffed by fearless and morally superior judges who are never afraid to do their jobs, even should the heavens fall.

The rule of law must prevail in all African economies if the continent is to find its way to genuine transformation. In turn, the availability of a professional and independent judicial system is one of the key guarantees of the existence of a state built upon the rule of law. Such a system aims to fulfil two critical tasks: from the one side, to guarantee a proper application of laws and serve as a safeguard against the abuse of power by authorities; from the other side, to provide certainty of punishment for those who violate the law.[72]

4 JURISDICTION, APPEALS AND REVIEWS

Special anti-corruption courts vary in the scope of their substantive and procedural jurisdiction. Simplifying somewhat, there are three main lines (aside from the distinction between original, appellate and review jurisdiction) along which the jurisdiction of SACCs may diverge. These are:

- the specific offences covered;
- the magnitude of the offence (usually measured by the amount of money involved); and
- the seniority of the government officials allegedly involved.[73]

Most SACCs deal with a broad range of corruption and corruption-related crimes. Furthermore, the specialised courts classified as anti-corruption courts have an extended jurisdiction which includes not only corruption and related economic crimes but also other serious crimes.[74] While the jurisdiction of most SACCs is understood in terms of the nature of the offence rather than its magnitude, in some circumstances the SACC can hear only cases involving sufficiently large sums.[75] One such example is Cameroon's Special Criminal Court, which has

71 Stephenson & Schutte (December 2016) at 13.
72 Sliusar (16 February 2017).
73 Stephenson & Schutte (December 2016) at 23.
74 Stephenson & Schutte (December 2016) at 23.
75 Stephenson & Schutte (December 2016) at 23.

exclusive jurisdiction over embezzlement cases involving especially large amounts; other embezzlement cases are heard by the ordinary courts.[76]

A rather regressive approach would be to limit an SACC's jurisdiction not only to certain offences but also to particular offenders. This approach is followed in Burundi, which restricts the jurisdiction of its anti-corruption court to certain individuals or officers. Although this court has broad jurisdiction over a range of corruption offences, only Burundi's Supreme Court can rule on criminal charges brought against a range of high-level government officials, including ministers, deputies, senators, generals, provincial governors and senior judges.[77]

In principle, there is no single right answer to the question of the appropriate substantive jurisdiction for an SACC,[78] since the different approaches that may be adopted in each case entails distinct potentialities. This is why an analysis of SACCs shows that different models have been adopted. Some courts may have limited jurisdiction and hear only certain criminal offences, such as corruption offences committed by senior public officials or bribes above a certain amount. This is the approach adopted in countries such as Croatia and Slovakia. Other SACCs, such as the Indonesian Court for Corruption, are responsible for hearing all corruption cases.[79]

In terms of another approach, the SACC can sit as the court of first instance in the more serious corruption cases. In most countries where anti-corruption judicial institutions are established, they function as anti-corruption courts of first instance, with appeals going directly to the supreme courts and with no cassation provided. This model is applied in Slovakia and Croatia, as well as in Burundi, Cameroon, Nepal, Pakistan, and Senegal.[80] The SACC can serve also as the court of appeal in other corruption cases, which are considered in the courts of general jurisdiction. Appeal cases against the verdicts of the SACC are brought before the Supreme courts, which can be vested also with powers to review the decisions of the SACC.[81]

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76 Iliasu M (2014) "The Creation of the Cameroon Special Criminal Court: Better Days for Criminals" at 74, available at https://univ-dschang.academia.edu/MELOILIASU (visited 23 August 2019).

77 Stephenson & Schutte (December 2016) at 17.

78 Stephenson & Schutte (December 2016) at 23.

79 Martine M (28 January 2014) *Anti-Corruption Specialisation: Law Enforcement and Courts* Transparency International Anti-Corruption Helpdesk at 3-5, available at https://www.transparency.org/files/content/corruptionqas/Anti-corruption_specialisation_Law_enforcment_and_courts_2014.pdf (visited 23 August 2019).

80 Stephenson & Schutte (December 2016) at 18-20.

81 Nanyunja (2015) at 36.

The hierarchy of SACCs, from court of first instance to supreme anti-corruption court, within and across African jurisdictions remains to be settled.

5 INTERNATIONAL ANTI-CORRUPTION COURT

The idea of institutional specialisation has permeated scholarship and has triggered thoughts on the possibility of establishing an international anti-corruption adjudication body. This *sui generis* model is the brainchild of Judge Mark Wolf.[82] It has generated more adversaries than proponents and more questions than answers. Its adversaries argue that the available institutions are sufficient to handle corruption matters and what the world needs is proper implementation and political will instead of more ineffectual bodies.[83]

In the main, Judge Wolf justifies his call for an International Anti-Corruption Court (IACC) in the following terms:

> An International Anti-Corruption Court (IACC), similar to the ICC or as part of it, should now be established to provide a forum for the criminal enforcement of the laws prohibiting grand corruption that exist in virtually every country, and the undertakings that are requirements of various treaties and international organisations.[84]

He continues:

> Staffed by elite investigators and prosecutors as well as impartial judges, an IACC would have the potential to erode the widespread culture of impunity, contribute to creating conditions conducive to the democratic election of honest officials in countries which have long histories of grand corruption, and honour the courageous efforts of the many people, particularly young people, who are increasingly exposing and opposing corruption at great personal peril.[85]

The Wolf proposal has not gained traction in international law. The intent of this paper is to highlight a paradigm shift in institutional specialisation in anti-corruption, but it does not endorse the idea of an IACC. It takes the view that the

82 See National Endowment for Democracy (6 June 2017) "Forum Q & A: Judge Mark Wolf on Kleptocracy and the International Anti-Corruption Court, available at https://www.ned.org/judge-mark-wolf-international-anti-corruption-court/ (visited 26 August 2019).

83 See Stephenson M (21 July 2014) "The Case against an International Anti-Corruption Court" *The Global Anticorruption Blog*, available at https://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/ (visited 27 August 2019).

84 Wolf M (July 2014) "The Case for an International Anti-Corruption Court" *Governance Studies at Brookings* at 1, available at https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf (visited 23 August 2019).

85 Wolf (July 2014) at 1.

current national, regional and international institutions are adequate for combating corruption.

This paper has reiterated the negative effects of corruption at various levels, including the highest levels, of government and which often goes unpunished. Such grand corruption occurs when:

> politicians and state agents entitled to make and enforce the law in the name of the people, are misusing this authority to sustain their power, status and wealth.[86]

The existence of grand corruption in Africa and other parts of the world necessitates and justifies multi-dimensional approaches to anti-corruption.

The erstwhile Secretary-General of the United Nations, the late Kofi Annan, perceived of corruption as:

> an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.[87]

This depiction highlights the serious hindrance which corruption constitutes to economic, political and social progress in Africa and the world. It is an obstacle which affects the realisation of human rights and the rule of law in democratic societies. As stated above, it is facilitated by the culture of impunity which is prevalent in almost all jurisdictions, both within and without Africa.

Judge Wolf argues in this regard that powerful, corrupt leaders understandably do not permit the honest, energetic investigation and prosecution of their friends, families and, indeed, themselves. Rather, to perpetuate the culture of impunity on which corruption depends, they often prompt the persecution of those who expose official misconduct.[88] An example of this is the case of former President Goodluck Jonathan of Nigeria who dismissed the country's Central Bank Governor after he informed the Nigerian Senate that the treasury was missing

86 Global Organisation of Parliamentarians against Corruption (2013) *Prosecuting Grand Corruption as an International Crime* at 3, available at http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf (visited on 23 August 2019).

87 Foreword to the United Nations Convention against Corruption at iii, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (visited 23 August 2019).

88 National Endowment for Democracy (6 June 2017).

billions of dollars in expected oil revenue.[89] Whilst Judge Wolf's concerns are justified, this paper argues against the establishment of an IACC and supports the creation of SACCs at national level instead.

Judge Wolf asserts that an IACC modelled on or as part of the International Criminal Court (ICC) is needed. The ICC was established because some states were unwilling or unable to prosecute international crimes in instances where political leaders are the primary perpetrators of genocide, crimes against humanity and war crimes. It was established as an alternative forum for the prosecution of these crimes. It is constituted only to complement national systems. If a country is willing and able to investigate and prosecute international crimes, the ICC defers to it.[90] Similar principles ought to be the foundation of an IACC. Grand corruption is a crime in virtually every country. It is also a violation of the United Nations Convention against Corruption, which 186 countries have ratified,[91] and of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which 43 nations have signed.[92] A commitment to combating grand corruption is also a requirement for membership of the WTO. Grand corruption, like those offences within the jurisdiction of the ICC, should be recognised expressly as a criminal violation of international law. In any event, an IACC would be a new forum only for prosecuting violations of universal obligations of honesty, rather for the enforcement of new norms.[93]

What is more, some adherents of the international human rights institutions may fear that creating an IACC will dilute the focus on genocide and

89 Nossiter A (20 February 2014) "Governor of Nigeria's Central Bank is Fired after Warning of Missing Oil Revenue" *New York Times*, available at http://www.nytimes.com/2014/02/21/world/africa/governor-of-nigerias-central-bank-isfired-after-warning-of-missing-oil-revenue.html (visited 23 August 2019).

90 See Wolf ML (2018) "The World Needs an International Anti-Corruption Court" 147(3) *Daedalus* 144-156.

91 UNODC "Signature and Ratification Status as at 26 June 2018", available at https://www.unodc.org/unodc/en/corruption/ratification-status.html (visited 26 August 2019).

92 OECD "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status as of May 2018", available at https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (visited 26 August 2019).

93 Stephenson M (4 October 2018) "Guest Post: Is an International Anti-Corruption Court a Dream or a Distraction?" *The Global Anticorruption Blog*, available at https://globalanticorruptionblog.com/2018/10/04/guest-post-is-an-international-anti-corruption-court-a-dream-or-a-distraction/ (visited 27 August 2019).

crimes against humanity.[94] The counter-argument is that:

> the international anti-corruption movement has the potential to enhance and augment human rights rhetoric enormously. Both movements rely on arguments about justice and the rule of law, and both appeal to the human instinct for fairness.[95]

However, the weight of opinion is that the establishment of an international anti-corruption adjudicative body likely will be a futile exercise. This paper shares that opinion.

6 CHALLENGES, OPPORTUNITIES AND TRENDS

We have seen that SACCs have been established globally and that several African countries, such as Kenya (2003), Burundi (2006), Uganda, Cameroon, Senegal, Botswana (2013), Tanzania (2016) and Zimbabwe (2018), have followed suit. These courts provide an opportunity to reduce severe court backlogs in corruption cases. SACCs allow judicial officers, prosecutors, support staff and investigators trained in economic crimes to deal with corruption cases expeditiously and efficiently.

However, the ambitions embedded in SACCs often are threatened by seriously insufficient skills and knowledge on the part of judges who, for the most part, find it difficult to comprehend the nature of corruption crimes. The problem is exacerbated by the inadequacy or absence of key infrastructure, which increases delays in dealing with corruption matters. As a result, the administration of justice is undermined in the face of tenacious and widespread corruption. Intervention strategies could include: increasing the capacity of judicial officers in areas such as financial literacy and cyber technologies; providing more funding for the procurement essential resources; and appointing fit and proper persons to preside over corruption matters. Whereas these kinds of interventions do not guarantee success, they do provide a platform for action.

The SACC model is congruent with the current African Union drive to promote Africa's socio-economic transformation under the auspices of Agenda 2063. It remains to be seen, though, how this model will work in countries, such as Zimbabwe, where SACCs are in their infancy.

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94 Alter K & Sorensen J (30 April 2014) "Let Nations, Not the World, Prosecute Corruption" *US News & World Report*, available at http://www.usnews.com/opinion/articles/2014/04/30/dont-add-corruption-to-the-internationalcriminal-courts-mandate (visited on 23 August 2019).

95 Wolf (July 2014) at 42.