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RESEARCH MASTERS

IMPERIALISM, EXTRATERRITORIALITY AND
JURISDICTIONAL COMPETENCE OF STATES IN ANTI-
CORRUPTION REGULATION: CRITICAL ANALYSIS OF THE
LEADING INSTRUMENTS

THE UNIVERSITY OF KENT, CANTERBURY

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Dedication

To my beloved parents

ABSTRACT

Transnational Business relations have assumed phenomenal importance in the globalised world of the 21st Century. Corruption in international business relations however has become a global problem with a distorting effect on the international markets. The Foreign Corrupt Practices Act 1977 (Hereinafter, FCPA) and the UK Bribery Act 2010 (Hereinafter, UKBA) are part of a few anti-corruption laws adopted to fight bribery and corruption beyond the national level. However, the application of national anti-corruption laws across territorial borders raised the issue of legality and propriety of extraterritorial measures and their effects on sovereignty and jurisdictional competences of states. Therefore, this dissertation critically examines the effects of the practice of the doctrine of extraterritoriality on the states within the Economic Community of West African States (ECOWAS) region. This dissertation argues that the present regulation of corruption in international business transactions through the use of the doctrine of extraterritoriality presents an unfair and unequal regulatory framework. The dissertation examines five related research questions. First, how compatible are the extraterritorial jurisdiction inherent in the FCPA and UK Bribery Act laws with the doctrine of extraterritorial application of domestic laws in international legal practice? Second, is there an effective international legal framework which is put in place to curb the bribery of foreign officials in international business and will extraterritorial jurisdiction equitably applied help to foster the development of this framework? Third, what beneficial or other effects would the presence of multiple extraterritorial domestic anticorruption laws have on the international community generally? Fourth, to what extent do developing countries possess equal extraterritorial regulatory strength in the international regulation of corruption? Lastly, with what strategies and in what ways can the unfairness in the extraterritorial regulatory framework of corruption in international business transaction be mitigated?

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Securities and Exchange Act 1934

The Foreign Corrupt Practices Act 1977

Draft Penal Code (Angola) 2011

UK Bribery Act 2010

International Conventions

Convention on Combating Bribery of Foreign Public Officials In International Business Transactions 1998

Charter of the United Nations 1945

Mutual Legal Assistance Treaties 2003

OECD, Recommendation of the Council Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade 1967

United Nations Convention Against Corruption 2005

TABLE OF ABBREVIATIONS

Department of Justice.....	DOJ
Foreign Corrupt Practices Act (US).....	FCPA
International Business Transactions.....	IBT
Multinational Corporations.....	MNCs
Securities and Exchange Commission (US).....	SEC
Serious Fraud Office (UK).....	SFO
The Bribery Act (UK).....	UKBA

International Conventions and Organisations

Organisation for Economic Co-operation and Development.....	OECD
Organisation for Economic Cooperation and Development, Convention on Combating Bribery and Foreign Officials in International Business Transactions.....	OECD Convention
United Nations Convention Against Corruption.....	UNCAC
Transparency International.....	TI
International Monetary Fund.....	IMF
United Nations.....	UN
World Trade Organisation.....	WTO
European Union.....	EU
European Bank for Reconstruction and Development.....	EBRD
African Union Anti-Corruption Convention.....	AUACC

CHAPTER ONE

IMPERIALISM, EXTRATERRITORIALITY AND JURISDICTIONAL COMPETENCE OF STATES IN ANTI-CORRUPTION REGULATION: CRITICAL ANALYSIS OF THE LEADING INSTRUMENTS

INTRODUCTION

Bribery's insidious nature has consumed the international climate of business. The globalisation of business has in turn engendered the globalisation of bribery and corruption thereby necessitating international legal frameworks to combat this dangerous practice.¹ Due to the peculiar nature of national business and its efficacious treatments, up until recently, national laws have been regarded as best to fight bribery of foreign officials as the relationship is a closely symbiotic one.

However, the international anti-bribery regulatory and compliance frameworks have been established in more modern times more precisely since the 1970s within the complexities of varied regulatory systems, structures and enforcement mechanism. Part of these international regulatory frameworks are extraterritorial national laws which are established to fight bribery in international business transactions (IBT). The increase of foreign bribery has distorted business efficacy, weakened democracy and development, and created unfair and inefficient market competition.² Consequently, international strategies to fight corruption are now a major priority in policy agenda around the world. In fact, in recent years, the fight against corruption has been intensified through the advent of multiple international laws and treaties on curbing bribery and its perennial effects on development. These international instruments include the Organisation of Economic Cooperation and Development (OECD), the World Bank, Transparency International (TI), the International Monetary Fund (IMF), the United Nations (UN), World Trade Organisation (WTO), European Union (EU), European Bank for Reconstruction and Development (EBRD), United Nations Convention against Corruption, African Convention on Preventing and

¹ Ellen S. Podgor, 'Globalisation and the Federal Prosecution of White Collar Crime' (1997) 34 Am. Crim. L. Rev. 325, 330-332

² Elizabeth Spahn, 'Implementing Global Anti-Bribery Norms: From the FCPA to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption' (2013) 23 Indiana International and Comparative Law Review 1, 1-4

Combating Corruption, African Union Anti-Corruption Convention.³ Notably, the key national instruments having strong extraterritorial elements are the United States of America's FCPA and the UKBA.⁴

The present regulation of corruption in IBTs is advanced but also shows the unfairness and the inequities which exists in the international regulation of corruption. These inequities arguably undermine the sovereignty and jurisdictional competence of developing states. The current regulatory framework mostly favours countries with major exports and with sophisticated regulatory systems. A possible view therefore holds that the present system of regulation is birthed solely for the protection of the economic interest of a few elite states. Indeed the present regulatory system can be argued to be more concerned about the protection of states national interests rather than the prevention of bribery in IBT. The practice of economic sovereignty appears to be very closely aligned with the strict workings of territoriality in international law and international relations.

The emerging difficulty however rests with the fact that the current application of extraterritoriality in the field of international regulation of corruption in trade practices presents an actual picture of unfair regulatory framework which undermines the sovereignty and jurisdictional competence of developing states. Not only that the history of extraterritoriality is entrenched in the practice of protection of certain states' interest leading to the establishment of colonialism, its present practice continues to be Eurocentric in nature.⁵

The extraterritoriality principle has been commonly defined as the application of national laws across borders.⁶ The transnational nature of bribery and corruption in

³ Indira Carr, 'Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?' (2007) 15 Eur. J. Crime Crim. L. & Crim. Just. 121, 125

⁴ Tonya Putman, 'Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere' (2009) International Organisation 63, 462-465; H. Lowell Brown, 'Extraterritorial Jurisdiction Under the 1998 Amendments to the FCPA: Does the Government's Reach Now Exceed Its Grasp?' (2001) 26 N.C.J. Int'l L. and Com. Reg. 239, 292-293

⁵ Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (Routledge 2015) 17

⁶ See Anthony J. Colangelo, 'A Unified Approach to Extraterritoriality' (2011) 97 Virginia Law Review, 5, 121; Hannah L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 American Journal of Comparative Law 1, 639; Austen Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) Vanderbilt Law Review 61, 1454-1456; Anthony J. Colangelo, 'What is Extraterritorial Jurisdiction?' (2014) Cornell Law Review 99, 1303-1306; Putman

IBTs has triggered increased assertiveness of extraterritorial anti-bribery legislations.⁷ The interconnectedness of the countries of the world in relation to business transactions and international commerce was revealed by the dozens of instances of bribery and corrupt relationships between the developed and the less/under developed nations of the world as established in many decided cases and cross-national investigations.⁸

This dissertation will draw upon examples of the pertinent transnational developments in treaty law, case law and investigations across the areas of business corruption and grand corruption including the bribery of foreign officials, money laundering and corruption involving persons in high level offices.

1.1 Extraterritoriality: A Challenge to Weaker States

Controversy lingers as to whether international public law is Eurocentric in nature and international relations is stacked against the interest of developed states. There is a view that this situation affects African states very severely and the states in the Economic Community of West African States (ECOWAS) states may be used as a prism to examine this effect.⁹ This dissertation examines these concerns and seeks to demonstrate that there are grave regulatory inequities in the established systems of domestic application of anti-bribery legislations. These inequities have been rationalised as inevitable, and a result of the economic fate of nations that can hardly be changed. The hypothesis to be tested, therefore, is that both unintentionally and sometimes intentionally the leading economic jurisdiction of Europe and the West generally as well as their domestic institutions have undermined the sovereignty and jurisdictional competence of developing states in order to maintain the economic and political interests of a few elite western states.

(n 3) 462-463; Restatement (Third) of the Foreign Relations Law of the United States §402 (1987); *Kiobel v Royal Dutch Petroleum Co.* 133 S. Ct 1659.

⁷ Alan Hudson, *Beyond the borders: Globalisation, sovereignty and extra-territoriality* (1998) Department of Geography, University of Cambridge United Kingdom. 3 *Geopolitics* 1, 89

⁸ Katherine Florey, 'State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principles in Choice of Law and Legislation' (1999) 84 *Notre Dame Law Review* 3, 1060.

⁹ Oduntan (n 5) 136

This dissertation examines and critiques the use of the extraterritoriality principle via the provisions of the FCPA and the UKBA in corruption cases and investigations involving multinationals operating particularly within the ECOWAS region. It engages with contemporary conceptualisation of the law and practice of extraterritoriality within the context of anti-corruption law. The aim is to critically assess the effects of the emerging practice of extraterritoriality within anti-corruption legislation in light of their compatibility or otherwise with the traditional principles of sovereignty and jurisdiction.¹⁰

This dissertation discusses the injustice present in the international regulatory framework for combating corruption in IBTs. The major characteristics of the regulatory framework is the respective states' extraterritorial application of their domestic laws abroad. In order for this dissertation to engage in a nuanced discussion of this unfairness, it will discuss the concept and doctrine of extraterritoriality and how extraterritoriality has changed in form but not in function. The historical and present purpose of extraterritoriality are both entrenched in the protection of states' interests.

Although more research still needs to be done on the history, anatomy, science, economics and cost of corruption.¹¹ It is understandable that the complex malaise of corruption especially in the developing states is partly as a result of the impact of colonialism on their culture, political system and structures.¹²

¹⁰ Karl M. Meessen, *Extraterritorial jurisdiction in theory and practice* (Kluwer Law International Ltd, 1996) 75-77; Wayne Sandholtz and Mark M. Gray, 'International Integration and National Corruption' (2003) 57 *International Organisation* 4, 761-800 <http://journals.cambridge.org/abstract_S0020818303574045> accessed 3 January 2015; Philip M. Nichols, 'The Myth of Anti-Bribery Laws as Transnational Intrusion' (2000) 33 *Cornell Int'l L.J.* 627, 627-656

¹¹ Walter Rodney, *How Europe Underdeveloped Africa* (Bogle-L'Ouverture Publications 1972) 9-25; Susan Rose-Ackerman, 'The Political Economy of Corruption' in Kimberly Ann Elliott (ed), *Corruption and the Global Economy* (Institute for International Economy 1997); 31-36; Paolo Mauro, 'The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis' in Kimberly Ann Elliott (ed), *Corruption and the Global Economy* (Institute for International Economy 1997) 83-86; Vito Tanzi, 'Corruption Around the World: Causes, Consequences, Scope, and Cures' (1998) 45 *International Monetary Fund* 4, 559-561

¹² M. McMullan, 'A Theory of Corruption' (1961) 9 *The Sociological Review* 2, 181-190; Munyae M. Mulinge and Gwen N. Lesetedi, 'Interrogating Our Past: Colonialism and Corruption in Sub-Saharan Africa' (1998) 3 *Afr. J. Polit. Sci.* 2, 16-20 <<http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/political%20science/volume3n2/ajps003002003.pdf>> accessed on 28 March 2016; Munyae M. Mulinge and Gwen N. Lesetedi, 'Corruption in sub-Saharan Africa: Towards a More Holistic Approach' (2002) 7 *Afr. J. Polit. Sci.* 1, 53-57

The study, thus, considers the historical development as well as purpose of the FCPA and the UKBA in order to expose their extraterritorial effects on judicial and other competences of the select group of developing states in handling corruption cases.¹³ The hypothesis to be tested is whether the extraterritoriality principle has become just another tool in the international relations of stronger states against weaker states and whether the principle of extraterritoriality has helped in reducing a complex international problem of corruption in international business. This dissertation will seek to consider evidence of cooperation or resistance within these states to possible encroachments on their sovereignty, jurisdiction and self-governance. The study also considers the ways and means by which a wider access to the use of extraterritoriality may be to the greater advantage of the international system and perhaps reduce its current inequities.

1.2 Statement of the Problem

There is an increasing use of extraterritorial anti-bribery laws in IBTs mostly by elite states. The present regulatory framework in the enforcement of extraterritoriality on corruption tilts toward the protection of the interests of few elite states, and this in turn undermines the authority of developing states to regulate their affairs and curb corruption in the international sphere. While the purpose of combating bribery and corruption in IBTs is crucial, the regulatory framework, tone and extraterritorial practice of the law does not only portray a deep unfairness in the regulatory sphere but it also encumbers the entity of the traditional principles of sovereignty and jurisdictional competence of states.

<<http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/political%20science/volume7n1/ajps007001004.pdf>> accessed on 28 March 2016; Luis Angeles and Kyriakos C. Neanidisy, 'Colonialism, Elite Formation and Corruption' (2010) SIRE Discussion Paper, 1-5 <http://repo.sire.ac.uk/bitstream/handle/10943/188/SIRE_DP_2010_51.pdf?sequence=1&isAllowed=y> accessed on 28 March 2016

¹³ Andrew Brady Spalding, 'The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire' (2012) 59 UCLA L. Rev, 397-398 <http://heinonline.org/HOL/Page?handle=hein.journals/uclalr59&div=13&collection=journals&set_as_cursor=1&men_tab=srchresults> 5 May 2015

1.3 Methodology and Chapter Summaries

The overarching question this dissertation aims to answer is ‘what impact the extraterritorial¹⁴ application of anti-bribery legislations has on the sovereignty and jurisdictional competence of developing countries. To answer this question, this dissertation employs a critical legal approach towards international law to determine the way in which it has been employed to camouflage and maintain a bias towards the benefits of global elite (richer western states). Critical legal theory propounds that the form that law takes is ascertained by the power and authority relationships of the society. It envisions law as a ‘structure and logic that legitimises injustice of society’ by sustaining the varied interests of the members that inspired its evolution.¹⁵ Law is a mechanism for domination that is used by powerful states to retain and maintain their place at the top of the political, social and economic ladder.

The focal notion of the theory is that law is not unprejudiced or neutral in its function, form and purpose rather, it is political. This approach helps to frame the setting within which extraterritorial anti-bribery legislations operate that is, the global system of control that is preserved by international law under the auspices of extraterritoriality.

This chapter outlines the history of extraterritoriality in international law and international relations. The work of Shih Shun Liu¹⁶ will be employed to create an understanding of the history of extraterritoriality. Integral to the concept of extraterritoriality is the protection of states’ interests - political and economic. Integrating the history of extraterritoriality in this dissertation is essential to the analysis of contemporary practices of extraterritoriality.

¹⁴ The common definition of extraterritoriality, which will feature mostly in Chapter 2, 3 and 4 of this work is the notion that extraterritoriality means the application of laws across borders.

¹⁵ Ian Ward, *Introduction to Critical Legal Theory* (Routledge Cavendish 2004) 101

¹⁶ Shih Shun Liu, *Extraterritoriality: Its Rise and Decline* (Green and Co., Agents London 1925) 4-116 <http://panarchy.org/shihshunliu/Extraterritoriality_Liu.pdf > accessed 19 June 2015

Chapter Two

Although this chapter will not provide an in-depth analysis into the regulation of crime in international business, it will however set the foundation for understanding what extraterritoriality is, how it works and its usage in international business.

Chapter two sets the foundation to the whole dissertation. This chapter sets to answer the question, why is the study of extraterritoriality important in understanding the regulation of corruption? What is the history and conceptual foundation of extraterritoriality in international law and international relations? The study of extraterritoriality is crucial because not only does the history of extraterritoriality inform the present day unfair practice of extraterritoriality, the present regulation of corruption in the international sphere serves as an example of the weaknesses in the execution of the extraterritorial principle. This chapter historicises the principle of extraterritoriality, its meaning and usage in international legal practice. It discusses the foundational principles of the concept in international law and international relations. In this discussion, the chapter engages with the landmark principles of sovereignty, jurisdiction and non-interference. It discusses the sources and justifications of extraterritorial jurisdiction. This chapter centres on the argument that extraterritoriality is justifiable in this globalised world where products, people and goods and services are internationalised. However, the same chapter presents that this principle possesses a high potency to intrude upon the ancient international law concepts of sovereignty and jurisdiction which are the bedrocks of every state's capacity to organise its domestic affairs against external intrusion. The chapter will argue that the past practice of extraterritoriality dominates the present practice of extraterritoriality in international law.

Chapter Three

The question at the centre of this chapter is whether extraterritoriality in the regulation of bribery strengthens the principles of sovereignty and jurisdictional competence. The central argument of this chapter is based on the fact that the present extraterritorial regulatory framework does not show the significance of extraterritoriality principles in ascertaining the sovereignty and jurisdictional competence of developing states. This chapter presents a substantive understanding of the examples of extraterritorial instruments in international law. It discusses the

Acts and Conventions which serve to combat bribery and corruption in IBTs. This section defines the topic of foreign bribery, its impact on IBT, its effect on development and the tenets of ethical business transactions. It discusses the beneficial and deleterious effects of the presence of multiple extraterritorial domestic anti bribery laws on the international community. Additionally, it also discusses the assertion that exercising extraterritorial jurisdiction abroad helps forum states manage their affairs as well as equip host states in dealing with the perennial problem of bribery and corruption. This dissertation seeks to discuss multiple extraterritorial instruments in fighting against the bribery of foreign officials. The discussion of these instruments is essential for creating a holistic background to the understanding of the various anti-bribery instruments that there are and their purposes and impacts on the fight against bribery of foreign officials in IBTs.

Chapter Four

The question this chapter seeks to discuss is whether extraterritoriality undermines the principles of sovereignty and jurisdictional competence of ECOWAS state. This chapter will argue that the stance of the present extraterritorial regulatory framework on corruption in the international realm tilts toward favouring the elite states.

The chapter will employ the cases of James Ibori, Buruji Kashamu and Dick Cheney, amongst others to show the power play between developed and developing countries' interests on regulating the malaise of corruption in IBT. In this dissertation, the power play to be discussed is between developing states such as the US and the UK, and some countries in the ECOWAS community. The major issue to be discussed regarding these cases is that the recent extraterritorial application of national laws on corruption shows that whilst western states are swift to enforce their extraterritorial jurisdiction on developing states, they both advertently and inadvertently resist the attempts of developing states to exercise their extraterritorial jurisdiction. The FCPA and the UKBA, amongst other extraterritorial legislations are used to portray how bribery and corruption are being robustly dealt with on both national and international levels. Host states are compelled to tune their antenna to the velocity of the values of the international community which is to combat bribery and encourage economic development.

The radical application of the FCPA and the UKBA are inconsistent with the international law principles of sovereignty and jurisdiction. Making bribery a criminal act under the FCPA and the UKBA was an important step against such a noxious act. However, the jurisdiction under these acts have expanded to an extent that they without reciprocity interfere with the sovereign power and jurisdiction of developing states such as the ECOWAS thereby, intruding on their capacity to deal with their domestic affairs. This section employs the use of bribery cases and investigations to discuss the extent to which the unequal level of cooperation and assistance amongst states (developed and developing states) can undermine the sovereignty and jurisdictional competence of ECOWAS states.

Chapter Five

This chapter seeks to provide solutions to the unfairness inherent in the regulatory framework of extraterritoriality in combating the bribery of foreign officials in IBTs between the Western states and ECOWAS states. The present regulatory framework in the enforcement of extraterritoriality on corruption tilts toward the protection of the interests of few elite states, and this in turn undermines the authority of developing states to regulate their affairs and curb corruption in the international sphere. This chapter states that there should be a universal anti-bribery legislation with definite enforcement power.

1.4 Understanding the ECOWAS Community

The Economic Community of West African States (ECOWAS) was founded in 1975. Its purpose is to foster interstate economic and political cooperation. This cooperation and relationship was fostered for the betterment of the member-states which are; Benin, Burkina Faso, Gambia, the Island of Cape Verde, Ghana, Guinea, Guinea-Bissau, Liberia, Ivory Coast, Mali, Niger, Senegal, Nigeria, Sierra Leone and Togo.¹⁷ This integration was created to foster the development and sustenance of institutions which are concerned with developing strategies to empower energy, infrastructure, ICT, civil society, trade, water, agriculture, health and social affairs,

¹⁷ 'Economic Community of West African States (ECOWAS Member-States) < <http://www.ecowas.int/member-states/>> accessed on 3 April 2015.

monetary and financial questions, telecommunications and political affairs.¹⁸ These institutions were formed to harmonise the economical, industrial and agricultural policies of ECOWAS members.¹⁹

The creation of the region allows for free movement of people in the region which would help to step up the process of development in the region. The ECOWAS community on various occasions have attempted to extend their extraterritorial jurisdiction especially on cases pertaining to the impact of atrocities caused on the region.²⁰

ECOWAS fosters active relationship and travel within its member-states. There has been an increase in the economic relationships between member-states. This increase has fostered the growth and development of regional corporations.²¹ Between 2011 and 2012 there was a significant evolution in the in-flow of trade within the ECOWAS community. Products ranging from animal products to mineral products encountered significant economic exchange and purchase within the ECOWAS community. The economic activities in this region possess a combined GDP of \$734.8 billion.²² Clearly, not only does MNCs engage in business with the ECOWAS states, ECOWAS corporations are increasingly becoming interdependent.²³ West Africa remains one of the strongest growing economies amongst its African counterparts. An estimated growth as much as 6.3 percent was recorded in 2013.²⁴ In order to foster economic integration, efforts have been made to harmonise “microeconomic policies and private sector promotion towards

¹⁸ Ato Quayson and Antonela Arhin (eds), *Labour Migration, Human Trafficking and Multinational Corporations: The Commodification of Illicit Flows* (Routledge 2012) 99-100

¹⁹ Azalahu Akwara *et al*, 'The Role of Regional Economic and Political Groups in the Globalisation Process: A Case Study of the Economic Community of West African States (ECOWAS) (1982-2002)' (2013), *Canadian Social Science*, Vol.9, No.6, 67-68

²⁰ Penelope Nevill, 'Military Sanctions Enforcement in the Absence of Express Authorisation' in Marc Weller, Alexia Sololou and Jake William Rylatt (eds), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 287

²¹ See 'Basic Information: Economic Community of West African States' (ECOWAS) < <http://www.ecowas.int/doing-business-in-ecowas/import-and-export/regional-trade-statistics/> > accessed on 4 April 2016

²² *Ibid*

²³ See 'Regional Trade Statistics: Economic Community of West African States' (ECOWAS) <http://www.ecowas.int/doing-business-in-ecowas/import-and-export/regional-trade-statistics/> accessed on 4 April 2016

²⁴ See 'Basic information: ECOWAS' (n 21)

achieving economic integration”.²⁵ As a result of these efforts, initiatives on the structure and roadmap of ECOWAS single currency has been implemented. Regional institutions were created to foster the planning, monitoring, microeconomic convergence, evaluation of performance, management of the ECOWAS Macroeconomic Database and Multilateral Surveillance System (ECOMAC) were established.²⁶

The governance structure comprises of the Executive, the Judiciary and the Legislature. All these arms are involved in the prescription, enforcement and adjudication of the community’s legislations.²⁷ Matters concerning the prescription and enforcement of anti-corruption laws can be carried out by all parts of this system.

ECOWAS is moving towards an increased economic integration ²⁸ with the emergence of significant increase in business deals within member states and between non-members states like China, India and Japan amongst others.²⁹ For example, in 2010, multinational mining and steel groups in Sierra Leone, Guinea, and Liberia came to agreements on iron-ore mining projects and contracts.³⁰ These forms of agreement cut across every nook and cranny of successful state development and investment.

Due to the rich nature of the ECOWAS community for tapping raw materials, investment and business, many international influences are applicable in this region. These influences persist as a result of the legacy of colonialism in this region. The period of colonisation disrupted traditional, social, economic and political parastatals in the ECOWAS region. On the other hand, while prices of exported goods are falling, import prices are astronomically high and climbing. Unemployment is on the

²⁵ Ibid

²⁶ Ibid

²⁷ ‘Governance Structure: Economic Community of West African States’ (ECOWAS) < <http://www.ecowas.int/about-ecowas/governance-structure/> > accessed on 3 April 2016

²⁸ Akwara *et al* (n 19) 67-68. This economic integration plan is geared towards coordination in areas such as industrialisation planning, exchange rate determination and monetary policy.

²⁹ Quayson and Arhin (n 18)

³⁰ Ibid

rise causing urban population influx".³¹ The economies have never produced a manufacturing base, nor have there been any practical efforts to utilise comparative economic advantage within the ECOWAS members' states.³² The legacy of colonialism still lingers.³³ For instance, at the start of the 1970s, nearly 80 per cent of imports and exports of ECOWAS states were Europe-bound. Ever since, ECOWAS states have been an arena of major exports and imports with Asia, Europe and North America. "Added to this geographical dependence was the handicap of exporting only agricultural raw materials that were barely processed or not processed at all, hence their low value added."³⁴

³¹ Joseph Guannu, *Nation-States and the Challenge of Regional Integration in West Africa: The Case of Liberia* (Paris, Editions Karthala 2010) 105

³² Ibid

³³ In the 15th Century, Africa entered into a special relationship with Europe, which resulted to the depopulation and devastation of Africa, but contributed to the development and wealth of Europe. Some African leaders did attempt to resist the devastation of the European demand for trade and captives. In 1720, "King Agaja Trudo of Dahomey not only opposed the trade, but even went as far as to attack the forts that the European powers had constructed on the coast." See B. Davidson, *Africa in History* (Weidenfeld and Nicholson 2001); K. Shillington, *Encyclopedia of African History* (Fitzroy Dearborn, 2005); Dr Hakim Adi, 'Africa and the Atlantic Slave Trade' (*BBC History News*, 05 October 2012) http://www.bbc.co.uk/history/british/abolition/africa_article_01.shtml accessed on 15 March 2015

³⁴ OECD (Sahel and West Africa Club), 'The Socio-economic and Regional Context of West African Migrations' (November 2006) <<http://www.oecd.org/migration/38481393.pdf>> accessed on 15 April 2015

CHAPTER TWO

EXAMINATION OF THE CONCEPTUAL FOUNDATIONS OF EXTRATERRITORIALITY IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

INTRODUCTION

Historically in international relations, the word 'extraterritoriality', often used interchangeably with the word 'exterritoriality', denotes the special status of foreign ambassadors who enjoy the right of exemption from the local jurisdiction. In international law, extraterritoriality simply means the application of law across national borders. This chapter asserts that, usually, extraterritoriality is employed to protect specific state's interest.¹ Understanding the historical custom of 'extraterritoriality' is pivotal to understanding contemporary meaning and usage of extraterritoriality in international public law and international legal practice in general. In fact, ideas for grasping these processes and orders have shifted between forms. The practical pursuit and application of the concept varies in degree and intensity.²

This chapter argues that the use of extraterritoriality in international law fosters the political interest of states at the expense of the principles of equality of sovereignty and jurisdictional regulation which international law also purports to strengthen. Therefore, this chapter aims to show that the historical use of extraterritoriality has only changed in form but not in function. The use is entrenched in the protection of states' interest and immunity, and this protection is the same as the function of the present extraterritorial application in international law, especially in relation to the regulation of IBT. Undoubtedly, at the heart of international law is the protection of a state's domestic affairs, and important national affairs in turn birth state interests which international law seeks to protect. This chapter will, therefore, help build the

¹ See Encyclopaedia Britannica, 'Extraterritoriality' <<http://www.britannica.com/topic/extraterritoriality>> accessed on 2 May 2015.

² Definition wise, the term extraterritorial consists of the amalgamation of two words - 'Extra' and 'territorial'- which simply means beyond the territory or in addition to the territory. Erich Vranes stated that words such as extraterritoriality, as simple as they may seem, only "represents a condensation and simplification of more complex 'realities'". See Erich Vranes, *Trade and the Environment Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press 2009) 108

argument that the present usage of extraterritoriality in combating corruption in IBT serves both positive and negative reasons as a modern tool of the old function of political extra-territorialism. This aspect of the dissertation will compare the previous usage of extraterritoriality in history with current usages in international law to argue that even though the form of the application of extraterritoriality has changed, its function, which is to protect politically determined state interests has not changed.

To assess the understanding of this history on contemporary International Law and International Relations, the present dissertation is concerned with the varied interests preserved in some early extraterritorial application which changed in types but not in purpose. This chapter will thus, serve as a useful foundation to future chapters in this dissertation because it will demonstrate how understanding the usage of extraterritoriality in the past provides an insight into the contemporary manifestation of the principle in a very critical and important area of international law and relations today – international anticorruption law and practice. This chapter will, therefore, conclude by stating that although the structural basis of extraterritoriality is straight forward in composition, however the functionality possesses different layers which are subject to different purposes and outcomes.

2.1 A Brief History of Extraterritoriality

The more you know about the past, the better prepared you are for the future
(Theodore Roosevelt)

If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree. (Michael Crichton)

Historically, the use of extraterritoriality witnessed many a rise and decline. Its thread is traceable from religious basis of early law in Europe,³ late medieval capitulations in the Ottoman Empire, to British conferment of extraterritoriality with the far eastern countries⁴ in the late 19th century, Asia, and Africa.⁵ In this manner, the existence of

³ See Chapter One, Liu (n 16) 8-47 In Early Maritime Coast of Europe for example, one of the major cardinal principles of the "Hanseatic league was the absolute independence of its members of all foreign jurisdiction wherever they resided or traded". This, therefore, gave jurisdiction over nationals in all civil cases, and "their competence in such cases could not be transferred to any other authority".

⁴ Ibid, 40-47

extraterritoriality was rendered in different forms with diverse purposes, and currently it has reappeared as part of transnational and international regulatory tools employed to protect states' interests.⁶

In the 10th Century, the development of merchant law as a form of extraterritoriality was carried out throughout the middle ages for trade purposes. The aim of the merchant law was to provide a kind of protection to merchants and subjects living abroad from local laws and jurisdictions.⁷ Along the line, in the 19th Century, the function of extraterritoriality changed from citizens' protection from local jurisdiction to an administrative device utilised by states to "divide sovereignty and protect (mainly British) subjects abroad".⁸ Through this, the colonialists⁹ were able to "institutionalise the territorial and administrative bases of Western states and empires".¹⁰

Evidently therefore, the history of extraterritoriality provides the understanding and appraisal of a repeated tactic for the controlling of legal differences between sovereign states.¹¹ Its operation is deeply rooted in the protection of diverse states' welfares and benefits. As a result, the ardent will and concern to control legal as well as social and cultural variances has continually led to the natural progression of extraterritorial assertion in the globalised world of the 21st Century legal and political arena.

Recently, extraterritorial assertions are ever more evident in international law. More specifically, its use covers a span of functions, which can be identified in the

⁵ Ibid, 23-25

⁶ C. G. Fenwick, 'National Security and International Arbitration' (1924) Vol. 18 *The American Journal of International Law* 4, 777-781; Edith Hollan Jones, 'An Interest Analysis Approach to Extraterritoriality Application of Rule 10b-5' (1973-1974) 52 *Tex. L. Rev.* 983, 992

⁷ Raonar Numelin, *The Beginning of Diplomacy: A Sociological Study of Intertribal and International Relations* (Oxford University Press 1950) 3-10

⁸ Maia Pal, *The Politics of Extraterritoriality: A Historical Sociology of Public International Law* (PhD Thesis, University of Sussex 2012) 45 <<http://sro.sussex.ac.uk/45248/1/Pal%2C%20Maia%20C3%AFa.pdf>> accessed on 18 June 2015

⁹ See Liu (n 3) 4-5. Even foreign ambassadors enjoyed the right of exemption from the local jurisdiction they reside due to their special status. In fact, these individuals were deemed to possess the "right to exercise civil and criminal jurisdiction over their suite" as they considered themselves to be "removed from the territory in which they actually reside".

¹⁰ Pal (n 8) 46

¹¹ Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford: Oxford University Press 2009)

following. First, the Iran and Libyan Sanctions Act was fashioned to protect the US interest against terrorists' nuclear program, which resulted in the ban against US trade and investment with Iran.¹² An older but currently relevant use may also be found in the decade's long US embargo against Cuba. This embargo was created to block commercial, economic and financial relationships with Cuba after the Cuban regime nationalised oil refineries owned by America without compensation.¹³ Despite recent celebrated thawing of political relations between the United States and Cuba witnessing an epochal visit by President Obama to Cuba, the highly punitive and political sanctions against Cuba are maintained. A recent governmental guideline shows this when it stated:

Yes, the Cuba embargo remains in place. Most transactions between the United States, or persons subject to US jurisdiction, and Cuba continue to be prohibited, and OFAC continues to enforce the prohibitions of the CACR. The regulatory changes, effective in January, June, and September 2015, as well as in January and March 2016, respectively, are targeted to further engage and empower the Cuban people by facilitating authorized travel to Cuba by persons subject to US jurisdiction; certain authorized commerce and financial transactions; and the flow of information to, from, and within Cuba.¹⁴

Other uses of extraterritoriality arise in Human Rights Law, Environmental Law and Criminal Law. An area peculiar to the purpose of this dissertation is the function of a form of extraterritoriality perpetuated in international public law created to criminalise the 'bribery of foreign officials in international business.'¹⁵

¹² Sasan Fayazmanesh, 'The Politics of the U.S. Economic Sanctions Against Iran' (2003) 35 *Review of Radical Political Economics* 3, 221-225, 227-232

¹³ See brief history, interest and purpose of U.S. Embargo Against Cuba in John W. Smagula, 'Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate' (1996) 21 *N.C.J. Int'l L. and Com. Reg.* 65, 69-76; 'Timeline: US-Cuba Relations' (*BBC News*, 11 October 2012) <<http://www.bbc.co.uk/news/world-latin-america-12159943>> accessed on 18 August 2015

¹⁴ U.S., Department Of The Treasury, 'Frequently Asked Questions Related To Cuba' (*U.S. Department Of The Treasury*, 15 March 2016) <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf> accessed on 29 March 2016. See also Damien Cave, 'With Obama Visit to Cuba New York Times Old Battle Lines Fade Out' (*The New York Times*, 26 March 2016) <http://www.nytimes.com/2016/03/27/world/americas/with-obama-visit-to-cuba-old-battle-lines-fade.html?_r=0> accessed on 29 March 2015.

¹⁵ See Chapter 3 and 4 for a detailed discussion on the criminalisation of the bribery of foreign officials in IBT.

2.2 What is Extraterritoriality?

The multitude of divergent views on extraterritoriality, thriving on the dearth of clear rules, has led to the development of the dynamics of the concept in practice.¹⁶ Extraterritoriality in international law is famously defined as the application of national laws across its borders.¹⁷ *Black's Law Dictionary* defined extraterritoriality as that which "concerns the operation of laws outside the boundary of a state or country".¹⁸ As simple as these definitions may seem, Vranes asserted that they simply represent "...a condensation and simplification of more complex realities".¹⁹ He stated that for there to be a nuanced understanding of the concept, a de-construction of notions of jurisdiction, sovereignty, non-interference, balancing of interests and proportionality is pivotal; against these notions is the understanding, although not a total understanding, of the concept of extraterritoriality.²⁰

From a legislative angle, the Westphalia Treaty²¹ and UN Charter Articles 2(1) paras. 1, 4 and 78²² have established the concept of sovereignty as an international legal norm. Essentially they established the principle that a state possesses jurisdiction to employ its legislative power and authority to enforce laws within its territorial boundaries. In the same vein, Alan Hudson stated that, for state sovereignty, bounded territory possesses the bundling rule-making authority over its regulatory sphere, which serves as the hallmark of modern international system and comity.²³ In Bodin's perspective, comprehensively, the sole function of a modern state is to

¹⁶ Usually, in international law, simple notions such as extraterritoriality, sovereignty, jurisdiction and non-interference tend to "develop a dynamic of their own". Vranes (n 2) 108

¹⁷ See *Kiobel* (Chapter 1, n 5); *Restatement (Third)* (Chapter 1, n 5); Parrish (Chapter 1, n 5); Buxbaum (Chapter 1, n 5); Putman (Chapter 1, n 3) 462-465; Colangelo (Chapter 1, n 5) Colangelo (Chapter 1, n 5)

¹⁸ The Black's Law Online Dictionary, 'What is extraterritoriality?' <<http://thelawdictionary.org/extraterritoriality/>> accessed on 2 May 2015

¹⁹ See Vranes (n 2) 123-125

²⁰ *Ibid*, 96

²¹ Ronald Asch, *The Thirty Years War: The Holy Roman Empire and Europe, 1718 - 48* (New York: Palgrave 1997) 133-134

²² United Nations, 'Charter of the United Nations' (United Nations 24 October 1945) 1 UNTS XVI <<http://www.refworld.org/docid/3ae6b3930.html>> accessed on 25 July 2015. Under the UN Charter, "the Organisation is based on the principle of the sovereign equality of all its Members. ... All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

²³ See Chapter One, Hudson (n 7) 89

organise domestic affairs through created legislations.²⁴ The UN Charter Article 78 provided that for a state to be sovereign, it must possess 'sovereign equality', which is also seen as referring to the horizontal 'distribution of competences and jurisdictions'.²⁵ This gives each state the power (jurisdiction) to manage its territory without any intrusion.²⁶ Therefore, both developing states and developed states possess equal jurisdiction to manage their territorial affairs without external interference.

On the other hand, a state does not possess absolute sovereignty in that it can be intruded if it violates principles of *jus cogens*.²⁷ With the increase in global flow of capital across borders, immigration, internationalisation of production and multinational corporations, international law has emerged over the years to extend the state's jurisdiction over an activity or a person outside of its territorial jurisdiction. In this line, Walker stated that spatial relations are too complex to be compared to simple legalistic maps of state sovereignty.²⁸

At a time of increasing confusion about the actual meaning and content of the rule of state's sovereignty in contemporary international law, the technical debate on the customary law of jurisdiction and extraterritoriality has gained momentum. The complexity of economic relations, financial transactions and anti-corruption regulations in the world system made it difficult to determine which jurisdiction controls what activities.²⁹ It is noted in Meessen's work that in times of open economical, transportation and communicational systems, sovereignty cannot be conceived of as a 'right to territorial integrity'.³⁰ According to him, sovereignty constitutes the 'right to safeguarding the functioning of the state understood as an autonomous centre of governance' which is protected by the establishment of non-

²⁴ Julian H. Franklin (ed), *Bodin On Sovereignty* (Cambridge University Press 1992) 3-5

²⁵ United Nations (n 22) Article 78; Vranes (n 2) 112

²⁶ *Island of Palmer's case* (1928), R.I.A.A., 2, 829-838

²⁷ Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 *Aust. YBIL* 82, 82-84

²⁸ R.B.J. Walker, *Inside/outside: International Relations as Political Theory* (Cambridge University Press 1992) 46

²⁹ Karl M. Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996) 75

³⁰ Vranes (n 2) 119, citing Karl M. Meessen, *Völkerrechtliche Grundsätze des internationalen Kartellrechts* (Nomos 1975) 201-202

interference.³¹ In this perception, both the power to assert extraterritorial jurisdiction and the right to be protected against extraterritorial regulations of the other states are emanations of the modern concept of sovereignty.

2.2.1 Extraterritorial Jurisdiction in International Law

Extraterritorial jurisdiction is derived from the jurisdictional basis of international law.³² In international law, jurisdiction refers to a state's legal competence to regulate the conduct of its persons, be it natural or juridical persons.³³ The meaning of the term jurisdiction presents a workable framework for the understanding of extraterritorial jurisdiction. In this vein, extraterritorial jurisdiction refers to a state's legal competence under international law to regulate the conduct of persons - natural and juridical - outside its borders.³⁴ Jurisdiction is also the means for a state to organise its domestic order. Jurisdiction is further defined as the means by which a state "makes use of its '*prima facie right*' to comprehensively determine its domestic affairs".³⁵ Peculiar to these definitions is the assertion that a state has the power to regulate and organise its affairs in all ramifications. Therefore, any measure that disrupts this competence causes interference, which in turn impedes the entity of a 'sovereign state';³⁶ extraterritorial assertion is part of state's jurisdiction to organise its domestic order.

Whilst the history of international law is contested, its source is contested as well. Some commentators³⁷ argue that there is no international law, whereas others argued that international law exists. Whether or not international law exists or

³¹ Vranes (n 2) 125-128

³² Basis of jurisdiction are; Nationality principle, universality principle, the passive personality principle, the protective or security principle and the effects principle (discussed below)

³³ Ian Brownlie, *Principles of Public International Law* (James Crawford (ed), 8th edn OUP 2012) 456

³⁴ Katherine Florey, 'State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principles in Choice of Law and Legislation' (1999) 84 *Notre Dame Law Review* 3, 1060.

³⁵ Vranes (n 3) 159

³⁶ *Ibid*, 157-158

³⁷ Anthony D'Amato, 'Is International Law Really "Law"' (1984-1985) 79 *Northwestern University Law Review* in Martti Koskenniemi (ed), *International Law* (Dartmouth Publishing Company 1992) 25-40; Ingrid Detter, *The International Legal Order* (Dartmouth Publishing Company 1994) 212-220; Wilhelm G.Grewe. *The Epochs of international Law* (Walter de Gruyter 2000) 187-196

whether states should usurp the lack of clarity of the basis, history and existence of international law has been a subject of intense debate.³⁸

International law is argued not to exist as a result of the fact that it does not fulfil the characteristics of law.³⁹ Most of the rules of international law are either prohibitive or permissive.⁴⁰ In other words the state is normally not obliged or compelled by international law to exercise its criminal jurisdiction.⁴¹ Whilst the history of international law is contested,⁴² one of the main purposes accrued to its existence is a framework set up to ensure stable and organised transnational/international relations. These purposes entail resolving complex jurisdictional disputes and the strengthening of states sovereignty. However, various scholars have postulated that international law is deliberately stultified to protect the interests of a few elite's states (or in the past colonialists).⁴³ On one hand international law seeks to ensure equal sovereignty while on the other hand, the present structure of international law seeks to protect developed states' interests. A justification that can be accrued to this assertion under critical legal theory is that law is used as a tool of control for the benefit of the creators of the law.⁴⁴ As Freedman persuasively maintains: "One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal world view."⁴⁵ It is pertinent that

³⁸ Ibid

³⁹ Thomas M. Franck, 'Power of Legitimacy and the Legitimacy of Power: International Law in the Age of Power Disequilibrium' (2006) 100 Am. J. Int'l L. 88, 89-93

⁴⁰ Ibid

⁴¹ Gerhard Von Glahn and James Larry Taublee, *Law Among Nations: An Introduction to Public International Law* (9th edn Longman 2010) 4-6

⁴² Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' (1958) *Symbolae Verzijl*; Michael Akehurst, 'Custom as a Source of International Law' (1974-75) 47 *British Yearbook of International Law* 53; Martin Dixon et al, *International Law* (OUP 2011) 18-30

⁴³ George M. Abi-Saab, 'The Newly Independent States and the Scope of Domestic Jurisdiction' (1960) 54 *American Society of International Law Proceedings* 84, 84-90 <<http://heinonline.org.chain.kent.ac.uk/HOL/Page?public=false&handle=hein.journals/asilp54&page=84&collection=journals>> accessed on 29 March 2015; Sinha S. Prakash, 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *International and Comparative Quarterly* 1, 121-131; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 193-205; Gbenga Oduntan, 'How International Courts Underdeveloped International Law: Economic, Political and Structural Failings of International Adjudication in Relation to Developing States' (2005) 13 *African Journal of International and Comparative Law* 2, 262-313

⁴⁴ See Chapter One, Ward (n 15)

⁴⁵ Alan D. Freeman, 'Truth and Mystification in Legal Scholarship' (1981) 90 *Yale Law Journal* 1229,1231

<http://heinonline.org/HOL/Page?handle=hein.journals/ylr90&div=60&g_sent=1&collection=journals> accessed on 29 March 2016

this critical instinct must be maintained in relation to international law and that the workings of international anticorruption law must not be exempt from scrutiny.

Nearly all aspects of international regulation are carried out by a group of 'privileged states'. For instance, international public law and international commercial law are contemporary examples of who regulates the international legal order. Similarly, the contemporary use of extraterritorial application of laws in the international sphere still appears to be rooted in the preservation of interests of globally-strong players. However, it is important to note that economically or politically weaker (developing) countries also suffer from the lack of will, required enforcement capacity and jurisdiction to support the extraterritorial application of own local or international laws.⁴⁶ This obvious lack of capacity, arguably, far undermines its own territorial jurisdiction as it relates to, for instance, trans-national corruption and perhaps, may encourage its exposure to illegal business conducts.

As rightly stated by Charlesworth, a "concern with crisis skews the discipline of international law".⁴⁷ He says that by regarding 'crisis' as its bread and butter and the instrument of progressive growth and development of international law, international law becomes just a source for the status quo.⁴⁸ A way forward is to refocus international law on matters of structural justice that underpin everyday life. An international law of everyday life would necessitate a methodology to consider the views of non-elite groups.⁴⁹ The critical legal theory opined that law is created to maintain hierarchy, international law is not exempt from this postulation. It is obvious that the major construct of international is designed to propel the agenda of strong states without any consideration of the circumstances and stand points of non-elite groups.

⁴⁶ Ariel Ezrachi, 'Setting the Scene: The Scope and Limits of 'International Competition Law'' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar 2012) 7

⁴⁷ Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377, 391

⁴⁸ *Ibid*

⁴⁹ *Ibid*

2.2.2 Basis of Jurisdiction for Extraterritorial Jurisdiction

Under public international law, there are norms and principles that form the foundational basis of jurisdiction. These principles represent the notion of autonomy and the right to exercise jurisdiction.⁵⁰ They include the territorial, nationality, protective, passive personality and universality principles. The most common and accepted principles include the territorial and nationality principles.⁵¹ Other principles of jurisdiction emanate from customary international law which results from state practice and *opinion juris*. The exercise of jurisdiction in an international as well as trans-national context arose due to international and trans-national troublesome problems that have to be dealt with.⁵²

In *Lotus case*,⁵³ it was stated that the primary constraint imposed by international law upon a state is that it may not exercise its power in any form in the territory of another state. In other words, jurisdiction is certainly territorial; a state cannot exercise its jurisdiction outside its territory "except by virtue of a permissive rule derived from international custom or a convention".⁵⁴

The territorial principle has been deemed as the least contestable principle and basis of jurisdiction as it is the main purpose of the function of statehood and state sovereignty.⁵⁵ This principle refers to the international law doctrine that entrusts the state with the jurisdiction over persons and activities within its own territorial boundaries.⁵⁶ In that sense, the state cannot exercise jurisdiction beyond its territory.

⁵⁰ *Extraterritorial Criminal Jurisdiction* (Council of Europe Strasbourg 1990) 16-17

⁵¹ Alina Kaczorowska, *Public International Law* (4th edn, Routledge 2010) 314-315; *Re Woodpulp Cartel: A. Aslstrom Oy and Others v EC Commission* [1998] 4 CMLR 901, at 920. "The two undisputed basis on which state jurisdiction is founded under international law are territoriality and nationality"

⁵² Kaczorowska (n 51) 314

⁵³ *The Case of S.S. Lotus (France v Turkey)* (1927) PCIJ Ser A No 10, 18

⁵⁴ The first principle which arose in *Lotus case* is that a state cannot exercise its authority in any form in the territory of another state; unless an international treaty or customary law permits it to do so. *Ibid*

⁵⁵ As Oppenheim stated, "a state without a territory is not possible". In other words, statehood is inconceivable in the absence of a reasonably defined geographical base. Malcolm N. Shaw, 'Territory in International Law' (1982) 13 *Netherlands Yearbook International Law* 61, 62-65; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997), 75-77; Torres Bernardez, 'Territorial Sovereignty' (1987) *EPIL* 10, 487-494; Hudson (n 23) 98

⁵⁶ Kaczorowska (n 51) 309; It was stated in *Equal Employment Opportunity Commission v. Arabian American Oil Company (Aramco)* (1991) 499 U.S. 244 that congress possess the power to enforce its laws beyond the territorial boundaries of the United States.

However, wrongful activities can sometimes be perpetuated and transferred across a state's territorial border. A corrupt activity, for instance, may involve actors and transactions in different territories thereby, causing the spill over of the consequences of a wrongful act from a state's territory to another.⁵⁷

Subjective territorial principle gives state A the authority over conducts that commenced within state A but was completed in State B.⁵⁸ Objective territorial principle gives state A the jurisdictional right over a conduct which commenced in State B but was completed within State A.⁵⁹ In a situation where the act and its consequences have spilled between states, these states may consider themselves empowered, on the basis of territoriality or even nationality principle to take cognisance of the same offence.⁶⁰ While subjective territoriality is rarely controversial, objective territoriality is more contentious due to complications that may arise as a result.⁶¹ Traditionally, in the UK like in some other member states, the place of commission of the offence is determined on the premise of the doctrine of ubiquity: some state may categorise the act while another may categorise the effect.⁶² In Akehurst's *Modern International Law*, a man in state A may shoot across a frontier and kill someone in state B; in such circumstances both states have jurisdiction.⁶³ Likewise, this principle literally applies to a man who bribes across the border of state A to another person in state B.

Oftentimes problems arise when states want to claim concurrent jurisdiction on a matter. The issue is now how can there be judgement on concurrent jurisdiction and who should regulate when both the interests of the states are at stake? The country to whom the offence was committed in its territory has its jurisdiction over the affairs, also the country of the offender might as well have jurisdiction upon the offence depending on the effect or impact of the offence on the state. A simple example of a

⁵⁷ Gbenga Oduntan, 'Tracing Noxious Funds' (2011)XIV International Trade and Business Law Review, 125

⁵⁸ Kaczorowska (n 51) 309

⁵⁹ David Chaikin, Extra-territoriality and the Criminalisation of Foreign Bribes in Barry Rider (ed), *Corruption: The enemy within* (Kluwer Law International, 1997) 294

⁶⁰ *Extraterritorial Criminal Jurisdiction* (n 50) 8-9

⁶¹ Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long arm of the law undermine the rule of law?' (2012) 13(1) Melbourne Journal of International Law 122, 128 <<http://www.austlii.edu.au/au/journals/MelbJIL/2012/5.html#Heading186>> accessed on 4 October 2014

⁶² *Extraterritorial Criminal Jurisdiction* (n 50)

⁶³ Malanczuk (n 53) 110-111

concurrent jurisdiction on a case is the case of *Ibori*,⁶⁴ where the UK and Nigeria had concurrent jurisdiction over the matter.

States involved in such cases may have concurrent jurisdictional claims over the wrongful acts under the international law principles of subjective and objective territoriality. For example, in the *Halliburton case*,⁶⁵ a group of corporations on a joint venture from America, Japan, and UK amongst other paid bribes to foreign officials in a business venture to win a liquefied gas contract. Here, the offence was committed by different corporations from different parts of the world and the victims of the offence were high level officials in Nigeria.

The present circumstances surrounding the exercise of subjective and objective jurisdiction has become murkier as a result of the arrival and existence of the internet. Money and trade transactions are carried out online; the Halliburton case showed that a bribery scheme can be perpetuated through the use of internet and murky online transfers. The arrival of internet present two problems. One, the internet means through which the money was transferred, two, complication regarding the regulation of the corrupt money transferred (in *Halliburton*, the bribe was transferred through different streams of online transfers). Another example is the *Statoil case*.⁶⁶ In this case two bribe payments were made by wire transfer through a New York bank account. Statoil, a company headquartered in Norway but registered as part of US Stock Exchange was subjected to the FCPA for violations on the basis that the company was listed on the US Stock exchange and bribe payments were made through a New York bank account.⁶⁷ The solution to the problem of concurrent jurisdiction can be difficult to attain especially when it concerns matters of significant state interests.

⁶⁴ See Chapter Four

⁶⁵ See Chapter Three and Four

⁶⁶ U.S., Department of Justice, 'US Resolves Probe Against Oil Company that Bribed Iranian Official' (13 October 2006) http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/press_release/Statoil.pdf accessed on 5 January 2015. In this case, Statoil bribed Iranian high officials to secure lucrative oil contracts.

⁶⁷ *Ibid*

Furthermore, nationality which serves as a mark of loyalty and respect is also recognised as a basis of extraterritorial jurisdiction.⁶⁸ The nationality principle is an international law jurisdiction principle that gives every state the jurisdiction over their nationals, home and abroad.⁶⁹ By virtue of this principle, a person possesses certain rights and duties; domestic laws and regulations control the acquirement and loss of these rights and duties. Assertions on this principle generally revolve around the issues of bigamy or offences that threaten national securities.⁷⁰ However, the rise of trans-national crime like bribery of foreign officials and other forms of grand corruption have triggered the rate with which extra-territorial jurisdiction is asserted on the basis of nationality.⁷¹ For example, UK's Bribery Act 2010 makes it an offence for a UK national or resident to engage in bribery conduct abroad. This is why Brownlie stated that a person, whom the state decides to exercise its prescriptive jurisdiction, must have been a national at the time he committed the offence.⁷² Thus, in a sense, the UK law stays within the realms of preceding legal thinking whilst at the same time indirectly expanding the effects of its laws on persons and companies outside its jurisdiction. Under the nationality principle the active and passive nationality principles apply.

1. Active Nationality

This refers to the state's jurisdiction over conduct of its nationals abroad. For example, a genuine link is required to ensue between the state enforcing the law, and the person who is the subject of the law. Zerk in his report for the *Harvard Corporate Social Responsibility Initiative* noted that states regard this principle as one of the strongest basis for direct extraterritorial jurisdiction.⁷³ Chehtman expressed his concerns as to the underlying philosophical justifications for the principle. He claims that "as a basis for criminal jurisdiction the nationality principle is

⁶⁸ Crawford (n 33) 459

⁶⁹ David Gerber, 'Beyond Balancing: International Law Constraints on the Reach of National Laws' (1984) 10 Yale Journal of International Law 185, 190 <http://heinonline.org/HOL/Page?handle=hein.journals/yjil10&div=15&g_sent=1&collection=journals> accessed on 4 October 2014

⁷⁰ Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths 2006) 351

⁷¹ Ireland-Piper (n 61) 122-136

⁷² Crawford (n 33) 460

⁷³ Jennifer A Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas (2010) Working Paper No 59, Harvard Corporate Social Responsibility Initiative, 13 <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> accessed 1 May 2015

altogether unjustified as the bar of justice".⁷⁴ Chehtman also argued that "individuals in any given state lack an interest in having that state's criminal laws enforced against them or their co-nationals (or co-residents) abroad."⁷⁵

2. Passive Nationality

This limb of nationality principle refers to the power of a state to punish an offender extraterritorially on the ground that the victim - rather than the perpetrator - is its national. The use and existence of this principle is mainly controversial, possibly because of the particular challenge it poses to territorial-based systems of regulation. As a ground of criminal jurisdiction, this principle has been expressed as among the "most contested in contemporary international law".⁷⁶

The nationality principles provide a more complex basis for establishing jurisdiction in a case. This principle is complex because a state can assert jurisdiction over the performance of a corrupt activity committed by its nationals abroad, and over the victim of a corrupt activity committed abroad. Complexity arises where a corporation or person abroad may be subject to two jurisdictions, the state of nationality of the corporation where the impact of such offence was felt and where the conduct or offence took place. Potential contentions and conflicts arise between the nationality principles and territorial principles; it raises the question of whose jurisdiction should be asserted and why.

Most corruption cases are potentially subject to multiple jurisdictions - the jurisdiction of the giver of bribes and the jurisdiction of the receiver. When subsidiaries of Multinational Corporations (MNCs) are located in countries other than where the headquarters are established, jurisdictions of the home state can be asserted based on the standing practice of nationality principles in international trade and regulation.⁷⁷ Castel warned that self-restraint should be exercised when using the

⁷⁴ Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 66

⁷⁵ *Ibid*

⁷⁶ *Ibid*

⁷⁷ *Barcelona Traction I.C.J. Light and Power Co. Ltd* (1970), I.C.J. Reports 3, 42; Christian J. Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law*, 781-783 - this case provides a universally acceptable test for asserting the nationality of a corporation in international law.

nationality principle.⁷⁸ He asserted that the enforcement of the nationality principle should be based on the seriousness of the effect of the conduct on the "international trade of the regulating state, the significance of the activity and the extent to which there is a conflict with the foreign territorial law."⁷⁹ Concurrent jurisdictional assertions present complications when two or more camps, either based on nationality or territoriality principles, are affected.

Under the protective principle, the state has the jurisdiction over actors and course of conducts outside the state that affect its crucial interests - interests in respect to integrity, sovereignty or governmental functions of a state.⁸⁰ The principles used to prosecute offences which relate to "counterfeiting currency, forgery of official documents (such as passports and visas)"⁸¹ are gradually invoked on serious corruption cases. An extreme example is a situation where the corruption of foreign Head of State may damage state's national policy interests. In this regard, Chaikin asserted that the protective principle is, perhaps, not the most appropriate jurisdictional premise to justify the law surrounding foreign bribery.⁸²

The passive personality principle is a jurisdictional principle that gives a state the authority over actors, and course over conduct abroad where a national of the state has sustained an injury. The existence of this principle as a separate basis of jurisdiction has been doubted.⁸³

However, under a universality principle, states are given the right to assert jurisdiction over extremely serious international crimes wherever they had taken place.⁸⁴ Crimes treated under this jurisdiction are deemed as so offensive and a threat to international security and peace. As a result, all states are deemed to have a legitimate interest in the prescription and enforcement of this principle. Crimes like money laundering, hijacking, slave trade, terrorism, and pirates fall under this

⁷⁸ J. G. Castel, *Extraterritoriality in International Trade: Canada and United States of America Practices Compared* (Butterworths: Toronto and Vancouver 1988) 19-20

⁷⁹ *Ibid*

⁸⁰ Ireland-Piper (n 61)

⁸¹ Stephen Hall, *Principles of International Law* (3rd edn, LexisNexis 2011) 315

⁸² Rider (n 59) 293

⁸³ Geoffrey R. Watson, 'The Passive Personality Principle' (1993) 28 *Tex. Int'L. J.* 1, 4-14

⁸⁴ Ireland-Piper (n 61)

principle as they are seen as serious threats to international security and peace. The crime of bribery and grand corruption which also greatly distorts security and peace are not classified under the universality principle. Rather, enforcements of laws related to these crimes are established usually under the nationality and territoriality principles.

In a globalised economy, corrupt crimes are often carried out through various physical and cyber networks creating a murky chain of links. These links can be established in various multiple forms for example, through states internet and technological services, and multinational corporations' direct dealings with highly placed officials. In summary, a bribery operation can attract multiple legitimate jurisdictions as a result of the links attached to the activities.

2.2.3 Prescriptive, Enforcement and Adjudicative Jurisdictional Assertion

Jurisdiction is said to be one of the most overburdened terms in law as it has a large number of meanings, all of which depend on context and many of which are overlapping. Extraterritorial jurisdiction is not exempted from this chaos. In fact, extra-territorial jurisdiction presents more jurisdictional challenges compared to territorial jurisdictional problems. These extraterritorial national laws, according to the *Harvard Law Review*, can come across as direct extraterritorial jurisdiction and/or domestic measures which possess extraterritorial implication.⁸⁵

The notion of state's conduct regulation is based on jurisdictional assertions centred on the three branches of government: legislative, executive and judicial.⁸⁶ Enforcement jurisdiction means the capacity of a state to enforce compliance with laws, or penalty for breach.⁸⁷ Prescriptive extraterritorial jurisdiction refers to the

⁸⁵ Zerk (n 73). For example, imposing requirements on parent companies regarding the management of foreign subsidiaries, or placing responsibility on them for any false statements or conducts can be termed as a domestic measure with an extraterritorial implication. He further explains that a state can assert jurisdiction over its own nationals in relation to the steps taken within the State to pay bribe to another State's official whether directly or through a means.

⁸⁶ Michael Akehurst, 'Jurisdiction in International Law' (1974) 46 *British Year Book of International Law* 145, 145-147

⁸⁷ Ireland-Piper (n 61)

capacity of a state to legislate in respect of persons - natural or juridical - within the territory.⁸⁸ Finally, adjudicative jurisdiction simply refers to the capacity of courts to resolve disputes.⁸⁹ In a practical extraterritorial context, Akehurst, in his classic essay succinctly distinguished between:

"the power of one state to perform acts in the territory of another state (executive jurisdiction), the power of a state's courts to try cases involving a foreign element (judicial jurisdiction) and the power of a state to apply its laws to cases involving foreign element (legislative jurisdiction)."⁹⁰

The extent to which these arms of government act in extraterritorial claims cannot be compared with territorial claims. In fact, the present usage of jurisdiction cannot be compared to its past usage likewise extraterritorial jurisdiction. Florey expanded on this by stating that "extraterritorial principle constrains the reach of the laws state legislatures may enact."⁹¹ In the light of this statement, these constraints automatically extend to the enforcement or prescription of laws respectively by the executive or legislature. Due to this complexity, according to Karl Meessen, an attempt was made by the Restatement (Third) of the Foreign Relations Law of the United States to split the concept of jurisdiction into several distinct categories in order to form a systemic classification. However, he argued, a rigid classification, as a 'matter of pure logic' could be acceptable but this does not precisely reveal the state of international practise on the subject matter.⁹²

The Restatement (Third) of Foreign Relations Law of the US⁹³ serves as a representation of the output of various American Jurists on the topic of jurisdiction. Although this authoritative source reflects the law from the perspective of the US courts however, it presents a dynamic approach to the understanding of jurisdiction. It outlines a more restrictive criteria for the jurisdiction to prescribe. It presents that state can prescribe laws to conduct which are substantially or wholly within its

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Akehurst (n 86) 145

⁹¹ Florey (n 34) 1060

⁹² Meessen (n 29) 77

⁹³ (The American Law Institute Publishers, Washington 1987) Vol 1 s402

territory,⁹⁴ individuals within their territory,⁹⁵ or "conduct outside that is intended to have substantial effects within its territory".⁹⁶

The Restatement (Third) also includes the power of the state to prescribe jurisdiction if one of its nationals is outside the state's territory,⁹⁷ and certain activities by non-nationals outside the territory if the conduct somehow or somehow causes impact on the security or national interests of the state.⁹⁸ In addition to the above-mentioned criteria are the limits that the Restatement (Third) places on prescriptive jurisdiction. This law limits prescriptive jurisdiction if it is unreasonable and presents several factors in ascertaining its reasonableness. It is essential to note for the purposes of this dissertation and the upcoming discussion of the FCPA the degree to which an extra-territorial prescriptive jurisdiction can be deemed as reasonable.

According to Troy Lavers, the reasonableness requirement is a preferable limitation compared with the "blanket condonement" emphasized in *Lotus*.⁹⁹ Lavers stated that in instances where "prescriptive jurisdiction is not consented to by other states; reasonableness and international comity should play some part in order to maintain the sovereign equality of states and reduce jurisdictional conflicts."¹⁰⁰ Although the Restatement (Third) originates from the US, one of the major active states prescribing anti-corruption legislation, it is an invaluable reference where the factors of reasonableness can re-engage the limits of international customary principles on extraterritorial assertions.

Each state's jurisdiction is characterised by various legal orders, which vary in intensity and makeup. The state's authority to subject things, conducts and persons to its legal order also varies alike. Likewise, extraterritorial jurisdiction varies in intensity and usage. This is why strict and precise systemic categorisations cannot

⁹⁴ Ibid, s402 1(a)

⁹⁵ Ibid, s402 1(b)

⁹⁶ Ibid, s402 1(c)

⁹⁷ Ibid, s402 2

⁹⁸ Ibid, s402 3

⁹⁹ Jacqueline Troy Lavers, 'An Appraisal of the Legitimacy of Extraterritorial Criminal Law and Economic Sanctions' (PhD Thesis, University of Kent 2005) 27

¹⁰⁰ Ibid

be achieved.¹⁰¹ Each state is different from others, in terms of the usage and intensity of its authoritative power. This reiterates the fact that extraterritoriality is also a matter of degree. Crawford calls the degree of extraterritoriality as a matter of appreciation¹⁰² where different cases cannot be treated alike. Different cases will be tested under different elementary notions of fairness and justice common to all jurisdictions. Most especially in this world where globalisation is straining to keep pace with the traditional notions and principles of jurisdiction, the aspects of fairness and justice is pivotal in ascertaining reasonable extraterritorial jurisdiction.¹⁰³ This fairness has to be balanced between developed and developing states in their effort to establish their extraterritorial jurisdiction.

2.3 Justifying Extraterritorial Jurisdiction

Several arguments have been made as regards the impact extraterritoriality has on the sovereignty and jurisdictional competence of states to decide their matters. This section of the dissertation seeks to discuss those conditions under which extraterritoriality is justifiable on the basis of its structure and function in international law. This section will discuss the justification of extraterritoriality on the basis of the principles of jurisdiction and maintaining sanctity in the international realm.

The interdependence and relationship between communities in the international sphere serves as a justifiable basis for extraterritorial jurisdiction. The various basis of jurisdiction show the possibility of the transfer of conducts and activities from one state to another. The transnational nature of business transactions in the international sphere, for instance, creates a realm filled with a mixture of different legal practices, legal orders, and policies spectacular to individual countries hence the need to control affairs across borders. This regulation cannot be actualised through a strict adherence to physical territoriality. Meessen significantly identifies that the advent of globalisation, transnational trade and establishment of Multi-national Companies (MNC) undoubtedly created the need for extra-territorial jurisdiction because there is a huge imbalance and difference in states' disposition to

¹⁰¹ For this reason, "jurisdiction ought to be regarded as a unitary phenomenon characterised by different states of exercise of authoritative power", Ibid

¹⁰² Crawford (n 33)

¹⁰³ Ireland-Piper (n 61) 128

regulating affairs pertaining to its territory. Glahn and Taublee puts it simply that with nearly 200 states in the world today, there is bound to be confusion and problems in dealing with potentially 200 different sets of standards and procedures even on simple matters such as "necessary travel documents or establishing diplomatic relations."¹⁰⁴ Therefore, extraterritoriality is justifiable due to the reality of the - transnational features - of the 21st Century globalised and interconnected world. States, especially the powerful states, monitor their citizens, actors and affairs both within and without their territories. However, whether specific features of such monitoring is to be regarded as legitimate would always be subject of intense debate.

International law provides for the justification of extraterritoriality based on the basis of jurisdiction. As Harold Maier observes: the assertion of national jurisdiction across the boundaries of the acting state has been a "source of continuing debate since the development of the territorial state as the principal political unit in the world community during the sixteenth and seventeenth centuries."¹⁰⁵ Territoriality, nationality, and passive personality basis of jurisdiction all show the need to protect state affairs which arise in form of states' peculiar interests in regulating their sphere. Protection of interests and assertion of sovereignty and jurisdiction are inseparable, and the principles of jurisdiction helps states to enforce their laws in an extraterritorial manner.

The constitutional doctrine of the law of nations is entrenched in the sovereignty and equality of states.¹⁰⁶ State sovereignty represents states jurisdiction on its affairs while equality of states, arguably, represents the equal assertion of states jurisdiction in international law. The constitutional doctrine of international law is problematic in itself, and its quest to protect the sovereignty of state as well as equality of states poses a significant chaos. Ascertaining equality of states is deeply rooted in affirming states jurisdiction, but the problem is that states' possess different legal orders,

¹⁰⁴ Glahn and Taublee (n 41)

¹⁰⁵ Harold G. Maier, 'Resolving Extraterritorial Conflicts, or "There and Back Again"' (1984) 25 Virginia Journal of International Law 7, 7

¹⁰⁶ Crawford (n 33)

structures, ethics and cultural dispositions.¹⁰⁷ Enforcing a state's legal order or objectives cannot be separated from the state's assertion of its sovereignty. The dichotomy of upholding states sovereignty and maintaining equality of states is a difficult puzzle with no perfect solution.¹⁰⁸ In fact, "the history of the international system is a history of inequality *per excellence*".¹⁰⁹ Koskenniemi in his work, 'international lawyers', rightly alludes that in most periods, mainstream views and assumptions have been juxtaposed by typical challenges such as "right of sovereignty vs. the interests of an 'international community', international security vs. cosmopolitan justice, self-determination and national autonomy vs. international rules on human rights, development and environment".¹¹⁰ However, international law tilts towards the protection of states' interests rather than the interests of the international community given that these interests are specifically the interests of a few elite states who have created international law. This is why Simpson argues that equality of states in international law is a farce because it is an interplay of unequal sovereign powers (great powers and outlaw states) in the international legal order.¹¹¹ The justification of extraterritoriality is not based on the peculiar interests of the 'international community' but on particular states interest.

Although the historical and philosophical roots of equal sovereignty as discussed above is founded on Westphalian principles which symbolises a shift from strict hierarchy to equality and which entails a horizontal (rather than a vertical) order composed of "independent freely negotiating states."¹¹² It is evident that this horizontal relationship and equality is between great powers while vertical and hierarchy relationship exists between great powers and 'outlaw' states. Hence the assertion that international law is a dialogue of power, and fundamental to this dialogue is an uneven application of power to different states. Perhaps nowhere is

¹⁰⁷ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 8-10

¹⁰⁸ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002) 15-17

¹⁰⁹ H. W. Brands, *What America Owes the World: The Struggle for the Soul of Foreign Policy* (Cambridge University Press 1998) 271

¹¹⁰ Martti Koskenniemi, 'International Lawyers' (Erik Castren Institute of International Law and Human Rights, University of Helsinki 2007) <
<http://www.helsinki.fi/eci/Publications/Koskenniemi/MKINTERNATIONAL%20LAWYERS-07b.pdf>>
accessed on 24 February 2016

¹¹¹ Simpson (n 107) 31-40

¹¹² Simpson (n 107) 30

this better delayed than in the relations of powerful states like the United States, the UK and the ECOWAS states discussed in this dissertation.

Integral to the history of international law is the protection of state interests and a fostering of assumed legal, material and cultural superiority which is evident in the history and recent multiplicity of extraterritorial applications. Examples include the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996¹¹³ and the (Iran-Libya Sanctions Act). The Helms-Burton Act provides that persons who owned property seized by the Cuban government may sue individuals or companies who carry out any movement in this confiscated property.¹¹⁴ The Iran-Libyan Sanctions Act requires the president to force sanctions on overseas organisations and corporations that invest in either Libya's or Iran's oil sector. The Helms-Burton Act¹¹⁵ and the Iran-Libya Sanctions Act¹¹⁶ effectively subject foreign individuals and companies to Congress' will, raising serious international concerns concerning the legitimacy of third-party sanctions and America's role in international affairs. The international community has criticised these acts because they in fact violate other states' sovereignty to the extent that both acts prohibit conduct, recognised as legal under other sovereign nations' laws, which occur outside of the US Territory.¹¹⁷ The United States threatens the use of sanctions against third-parties - individuals and companies - to effectuate the state's larger policy objectives.

Close to these examples is the OTC derivatives. European Union (EU) legislators and policy makers justify the principles and application of extraterritoriality on the need to shield EU derivatives from regulatory arbitrage and systemic risk¹¹⁸ rather than provide a balanced and proportional approach so as to ensure equal financial

¹¹³ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996

¹¹⁴ Ibid

¹¹⁵ Pieter H. E Bekker et al, *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010) 257

¹¹⁶ Derek W. Bowett, 'Economic Coercion and Reprisals By States' (1972) 13 Va. J. Int'l L. 1; Busby J. Brett, 'Jurisdiction to Limit Third-County Interaction with Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts [notes]' (1998) 36 Colum. J. Transnat'l L. 621

¹¹⁷ Jacob S. Ziegel, *New Developments in International Commercial and Consumer Law* (Hart Publishing Oxford 1998) 239-241

¹¹⁸ European Commission, 'Commission Staff Working Paper Accompanying the Commission Communication - Ensuring Efficient, Safe and Sound Derivatives Markets' COM (2009) 332 final; European Commission, 'Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties, and Trade Repositories' COM (2010) 483-484

stability and growth. It is obvious that often times, for better or for worse most extraterritorial application of national legislations are mainly for the preservation of national interests. International law has not provided any consistent framework for dealing with the assertion of extraterritorial jurisdiction partly because of the difficulty peculiar to the principle and practice of jurisdiction in international law. As stated early in this dissertation, sovereignty has been postulated as a regulation of a state's domestic affairs. Therefore, international law possesses the obligation to protect states' order which could come in form of policies.

The decision of a state to strengthen its regulatory framework due to its legal order and practise is justifiable even if it means the assertion of extraterritoriality doctrines. The complication which arises is the legitimacy of specific extraterritorial application. It is important to argue however, that the justification of extraterritoriality should not be based solely on states' interests but should entail the interest of the international community. The interest the international community seeks to accomplish is nearly always inconsistent with the principle and practice of equality of states. This is not to say that international law should not protect the legitimacy of a state's legal act in the international sphere even if the state is the only state to harness its powers to exhibit its legal order across borders. The crux here is extraterritorial jurisdiction should be 'justifiable'¹¹⁹ beyond just an establishment of the basis of jurisdiction, the purpose, process, reciprocity and proportionality must be established in other to ensure fairness as argued by Danielle Ireland-Piper.¹²⁰

Another justification for extraterritorial jurisdiction is the maintenance of sanctity in the international realm. To move on, justification of extraterritoriality is a demonstration of the turmoil underpinning the oversight regulation and monitoring of the efficacy of transnational business relations, amongst others. The issues relating to extraterritorial jurisdiction are linked with issues relating to transnational law. Transnational law, consists of elements of both international law and national law. The interplay of these laws dissolves traditional dichotomies between the two. These fundamental changes the way in which the international arena functions. As a result,

¹¹⁹ Thomas M. Franck, *The Power of Legitimacy Amongst Nations* (OUP 1990); Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law*, 46-92

¹²⁰ Ireland-Piper (n 61)

our interconnectedness have diminished the divide between domestic and international law. Assertions of extraterritoriality sit at the crossroads of this divide. However, the notion of extraterritorial jurisdiction is not a novel concept in international law. The various basis of jurisdiction discussed earlier show the importance of extraterritoriality. Whether these claims are legitimate claims are subject of intense debate as a result of stark controversy and layers of the principles of jurisdiction which is deemed as nebulous concept comprising many facets. The justification for extending extraterritoriality in combating the bribery of foreign officials in international business is an example of a recent area where the basis of extraterritoriality is used. Legitimately, it is justifiable as bribery and corruption has been established to distort market competition, good governance etc.¹²¹

In addition, the fact that the purpose is justifiable does not make the act or the enforcement of it justifiable. A justifiable extraterritoriality principle is that which possess clear structure and fair framework to the betterment of the international community. Combating the bribery of foreign officials and grand corruption in IBTs is justifiable however, the legitimacy of the acts and conventions surrounding the enforcement of these instruments remains a subject of intense debate in the international sphere. Chapter three and four purposes to delve into the legitimacy of the present structure of laws regarding combating the bribery of foreign officials in international business. The extraterritoriality principle is entrenched in the protection of states power and interests and not in the equal exercise of extraterritorial jurisdiction. The essence of the application of extraterritoriality has not changed in international law. As historical extraterritorial application seek to focus on the protection of interests like diplomatic immunity and old medieval trade interests, newer extraterritorial application in international law also protect states' interests. Therefore, extraterritorial jurisdiction is justified on the basis that it allows states to regulate the transfer of its domestic affairs abroad.

It is arguable that corruption in IBTs is a primary feature of conducts which disrupt the sanctity of the international realm. International business relationships in

¹²¹ See Chapter Three of this work for a nuanced discussion

contemporary times tend towards corruption acts.¹²² In fact, corruption was deemed as a core part of 'business' transaction until, over the last two decades, when it was seen as a significant limitation to fairness in trade relations and inhibition to economic growth and development.¹²³ The nature of corruption on national level makes it impossible to exempt corruption on international or trans-national level. These corrupt acts can only be curbed through transnational or international law. Some states have employed their regulatory and extraterritorial power to combat this transnational disease, and it is impossible to maintain a monolithic theory of jurisdiction that all extraterritorial jurisdiction is bad as this will mean the maintenance of a charter of freedom for international criminals.¹²⁴ Undoubtedly, assertions of extra-territorial criminal jurisdiction can also provide an important response to developing countries faced with underdevelopment, economic instability and grand corruption due to omission or act on the part of foreign nations.¹²⁵

There is the belief that government comply with international law only if convenient to do so and feel free to ignore it otherwise.¹²⁶ In the case of combating bribery and grand corruption in international business, many states have reasonably applied national laws extraterritorially, some have aggressively applied their laws across borders and others are indifferent about combating bribery of foreign officials for various reasons.¹²⁷ There is the huge debate whether international law is really law because there is no strict and structured enforcement framework. The lack of structure and consistency in the way extraterritoriality is applied is significantly due to the fluid posture of states towards international and transnational regulation. This is why the former Israeli Ambassador to the United States, Abba Eban, lamented that "International law is the law which the wicked do not obey and the righteous do not enforce."¹²⁸ International law is plagued with infirmities of overregulation by some states and under-regulation by other states. May suggests that such infirmities can

¹²² Oduntan (n 57) 111-113

¹²³ Ireland-Piper (n 61)

¹²⁴ Stephen Snell 'Controlling Restricted Business Practices in Global Markets: Reflections on the Concept of Sovereignty, Fairness and Comity.' (1997) 33 Stan. J. Int'l L. 215, 298

¹²⁵ Ireland-Piper (n 61)

¹²⁶ Jack L. Goldsmith and Eric A. Posner, 'The Limits of International Law' (2005) American Enterprise Institute for Public Policy Research, 2 < <http://www.angelfire.com/jazz/sugimoto/law.pdf> > accessed on 2 February 2015

¹²⁷ Chapter three and four discusses the various instruments of extraterritoriality in anti-corruption law

¹²⁸ Charles Kegley and Gregory Raymond, *The Global Future: A Brief Introduction to World Politics* (5th edn, Wadsworth Cengage Learning 2014) 260

only be cured by focusing more on the principles of procedural fairness and the rule of law than is commonly done.¹²⁹ He describes procedural issues in international law as a 'vastly underdeveloped field'¹³⁰ with 'proportionally little attention'¹³¹ given to 'global procedural justice'.¹³²

2.4 Power and Interdependence

Sovereignty in the age of globalisation and capitalism has been a widely contested doctrine. Equality of states was a major bedrock characteristic feature of the "incident of sovereignty in traditional international legal doctrine"¹³³ and international relations. On this doctrine have been built the contemporary mainstream developments for a running system of international law. These developments have been centred on the enjoyment of reciprocal entitlements. As Oppenheim stated, a state comes as an equal to equals in ensuring the Family of Nations. In other words, a state demands a certain consideration to be paid its dignity, the retention of its independence, and its personal and its territorial supremacy.¹³⁴ The equality of all member-states of all the family of nations is an unchanging equality obtained from their international personality.¹³⁵ The basis for jurisdiction perfectly creates an understanding for the justification of extraterritorial jurisdiction. Under these various basis, states possess the power to claim extraterritorial jurisdiction on any subject concerning its matters which international law seeks to strengthen to the extent that these jurisdictional assertions does not violate international law principles. As discussed earlier in this chapter, the governance of a state's affairs is married with a state's disposition to assert its sovereignty and jurisdiction over any matters concerning its territory which could be physically or otherwise linked to its territory.¹³⁶ These justifications are correct to the extent that they are balanced in the sense that, they ensure reciprocity between states. The consistent argument presented in this

¹²⁹ Larry May, *Global Justice and Due Process* (Cambridge University Press 2011) 11

¹³⁰ *Ibid*, 2

¹³¹ *Ibid*

¹³² *Ibid*

¹³³ Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 EJIL 4, 603

¹³⁴ Arnold D. McNair, 'Equality in International Law' (1927) XXVI Michigan Law Review 2, 131

¹³⁵ *Ibid*

¹³⁶ As discussed above under the basis of jurisdiction, there are conducts which solely emanate within the territory of a state, also there are conducts which emanates from another state but significantly impacts other states.

chapter has been that although extraterritoriality may be based on customary international law and international relations, the use of extraterritoriality over the last few decades has been one-sided with little critical eye on the impact these may have globally. Balance is crucial in the current world of increased interdependence.

The present application of extraterritoriality takes its root in the sole preservation of states interests making extraterritoriality to change in form but not in function. The overall analysis of the basis of extraterritoriality represents the potential and actual tensions between the jurisdictional prerequisites.

2.5 Conclusion

In conclusion, this chapter has argued that for a state to be able to assert its extraterritorial jurisdiction, it must possess justifiable and reasonable grounds. Part of these ground is the establishment of the bases for extraterritoriality, which form the elements of what will/should constitute an extraterritorial jurisdiction. The usage of extraterritoriality as discussed in chapter two show that extraterritoriality can be used for the protection of public policy, economic integration, economic interest, reduction of poverty in the developed world, and upholding rule of law and governance. This chapter is important as it sets the scene to the rest of the chapters. It sets as the foundation for understanding subsequent chapters. This is because to be able to understand the effects the practice of extraterritoriality has on the principles of sovereignty and jurisdictional competence of countries, it is pertinent to start by explaining and unravel what extraterritoriality is, what it entails and the issues with regards to present practice of the doctrine.

Although the basis of extraterritoriality are established in international law and international public law, their origin, usage and enforcement solely rests on national governments. The international field has become global and interconnected in every form and size especially with the advent of technology, therefore the issues that plague one state, most likely will plague others. Powerful states want to regulate their territory home and abroad which international law seeks to foster. The problems of ascertaining extraterritorial jurisdiction is vast, part of which concern how international law can regulate sovereign interests, and many of which concern the

variety, vast and nebulous difference in the diverse and sensitive affairs which may concern the environment, human rights, health safety, business, economies and politics. Corruption in the international system is a very sensitive issue and calls for serious scrutiny. Attempts to redress the problem through legislations such as the Helms-Burton Act however may have led to the creation of very intrusive provisions.

Critical legal theory generally argues that the structure and logic of law is as a result of power relationships. The structure and logic of extraterritorial anti-bribery laws is designed in such a way that countries just release their extraterritorial laws into the sphere but unfortunately only powerful states possess the regulatory acumen and political vitality to dictate the direction of regulation of corruption.

A possible conclusion may be reached that extraterritoriality is created to protect the interests of states and not the interest of the international community. The interconnectedness of the international society conflicts somewhat with the basic principle of protection of national interest. Indeed it is difficult to identify where the balance between the two situations should be placed. The question of when and where to permit extraterritoriality in the protection of corruption crimes is certainly one of such cases. The intension underlining the creation of the principles of extraterritoriality lies in the need to shield a state's interest. In fact, international relations exists primarily to balance the protection of the interests of states. The principle of state equality may be undermined if in the application of sovereignty and jurisdictional competences certain states are given more latitude in terms of extraterritorial jurisdictional powers. When countries does not apply laws equally in international situations this would negatively affect the principle of equality of states. The interests of a state in extraterritorial application of its powers must not be allowed to destroy the necessary and carefully maintained system of equality of states. The two interests can indeed be easily achieved if careful thought is given to international regulation.

It is important to avoid the creation of conflict of interest of states in coping with problems of an international nature as that will defeat the purpose of international regulation. More so the George Orwellelian picture of 'all animals are equal, but

some are more equal than others' is unacceptable in today's world and attempts can be made to reduce the inequality.

However, the present practice of extraterritoriality in international law concerns the protection of interests of certain states rather than the equal protection and preservation of the international sphere. One of the hallmark features of a state is its sovereignty and jurisdictional competence which international law primarily seek to preserve. In other words, to ensure sanctity in international business for example, states had to enforce laws across national borders. The problem in the international sphere is inseparable from the domestic sphere. Different domestic affairs make up the international sphere.

Ensuring sanctity in the international sphere also means ensuring the balance of power between states. As stated in this dissertation, the protection of states' interests is very crucial in international law. In fact, this protection is justifiable under the basis of jurisdiction. However, it is asserted in this dissertation that the fact that an interest is politically justifiable does not mean it is validly justifiable in international law. International law and international public law only contains certain basis of legal principles which in themselves are not enforceable except states adopt these principles. The purposes, procedures, proportionality and fairness must as well be justifiable. Therefore, this chapter has argued that the present application of extraterritoriality in international law only seeks to protect the interests of a few elite states without much emphasis on the procedural fairness of the justified national interests. Extraterritorial jurisdiction, therefore, sits at the fences of domestic (law and politics) and international law. Those fences should be an apex of due process and best practice, not a no-man's land bereft of proper adherence to proportionality and the rule of law.

CHAPTER THREE

EXTRATERRITORIALITY IN THE REGULATION OF BRIBERY: EFFECTS ON SOVEREIGNTY AND FOREIGN STATES' JURISDICTIONAL COMPETENCE

INTRODUCTION

Bribery of foreign officials in IBTs has been identified as one of the problems that distorts the international business environment. Corruption has been found to violate the sanctity of business transactions. On the one hand, it justifies the need to combat corruption as it is an endemic malaise which distorts the efficacy of business. On the other hand, the very methods and rules used to combat the problem from the perspective of international law must be continually reassessed for efficacy, equity and fairness. The usage of extraterritoriality as discussed in chapter two shows that extraterritoriality can be used in a positive manner for the protection of public policy, economic integration, economic interest, reduction of poverty in the developing world, and for upholding rule of law and governance. In essence, the crux of international jurisdiction can be of general value to the international community as a whole. It appears nonetheless, after critical analysis that the main reason for some states to subscribe to combating the bribery of foreign officials is really to protect their own economic interests and public policy rather than seek true integration in the regulation of bribery and corruption in the international sphere.

This chapter argues that although the present regulatory framework encourages every state to fight against the bribery of foreign officials in IBTs, international practice of extraterritorial practice appears to be skewed in favour of a few states. The chapter argues that the foundations upon which the extraterritorial application of regulation of corruption in international business is predicated may need to be reformulated to rebalance the existing inequities which would be highlighted. This dissertation aims to show that the extraterritorial application of anti-corruption regulations seems to have its history in the US protection of its state's interest. Though every state should exert its extraterritorial jurisdiction against bribery in IBTs, the regulatory system is uneven and stacked with various conventions which are inconsistent with one another and different in their applicability to different states in the international system. In essence extraterritoriality in this important field is

indulged in by only a few state-actors. This is not only troubling to the workings of the principle of equality among nations but is ultimately bad for the international effort to combat bribery and corruption on a world-wide scale since selective application will not rid the international community of this significant problem.

The use of extraterritoriality in combating bribery and corruption in IBTs theoretically presents states with the power to be able to regulate their domestic affairs abroad. Ideally this would work on the basis of equal competence to regulate and on the basis of equality and sovereignty. It also gives a state the authority to oversee its dealings abroad thereby strengthening the state's sovereignty and jurisdictional competence in its own domestic affairs.

Whilst states' application of their extraterritorial law is important to combat bribery in IBTs, developing states still fall far short in their extraterritorial application of bribery laws. It was the United States of America that first significantly championed the extraterritorial application of its laws against bribery of foreign officials, with the obvious need to protect its own self-interest. Subsequently, the US introduced this concept to The OECD member states and thereafter, it was introduced to the rest of world to exert extraterritorial application on bribery of foreign officials. An important question to consider is: Could the sudden use of extraterritoriality in IBTs be used as a tool for powerful states to regulate their businesses abroad since their business, driven by globalization and technology, need to compete against many others in order to gain business abroad? The United States for example, embarked upon the formation of the FCPA and its extraterritorial clauses in response to a national scandal with serious repercussions on its own economy.¹ A Washington Post

¹It is perhaps necessary to quote the story of the inception of the FCPA "In 1973, as a result of the work of the Office of the [Watergate] Special Prosecutor, several corporations and executive officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws. . . .The Commission's inquiry into the circumstances surrounding alleged illegal political campaign contributions revealed that violations of the federal securities laws had indeed occurred. The staff discovered falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret "slush funds" disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments. These practices cast doubt on the integrity and reliability of the corporate books and records which are the very foundation of the disclosure system established by the federal securities laws". U.S. Sec. & Exch. Comm'n, Report Of The Securities And Exchange Commission On Questionable And Illegal Corporate Payments and

editorial correctly addressed the self-interest the United States had in cleaning up its business space and the practice of its leading multinationals. It stated:

“It would have been unfortunate enough to have any American corporation involved in this kind of transaction. But Lockheed is not considered, in other countries, to be just another American company. It is the largest US defence contractor, and it owes its existence to federally guaranteed loans. It is seen abroad as almost an arm of the US government. Its misdeeds, thus, have done proportionately great damage to this country and its reputation.”²

After addressing the shortcomings leading to the Lockheed scandal and sanitising the business space, the US continued to increase its dominance and extraterritorial applications of laws outside its territories.

3.1 Bribery in International Business Transactions

"Corruption is 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"³

Although there is no commonly accepted definition of bribery and corruption, various definitions provide a workable framework for the understanding of the concept.⁴ Black's Law Dictionary defines bribery as the receipt or giving any undue reward to any individual whose profession relates to the administration of public justice in order to influence his behaviour and to cause him to act contrary his duty.⁵ Denis Osborne picks up on this and defines bribe as a reward to pervert judgement or corrupt

Practices (1976), reprinted in Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353 (19 May, 1976) at 2 [hereinafter SEC REPORT]. See also Mike Koehler, 'The Story of the FCPA' (2012) 73 Ohio State Law Journal 5, 932.

² 122 Cong. Rec. 30, 336 (daily ed. 14 Sept., 1976) citing 'Mr. Tanaka and Lockheed' (*Wash. Post*, 21 Aug., 1976) A10, See also Koehler (n 1) 935.

³ Statement presented by Kofi Annan (the Secretary-General), speaking to the U.N. General Assembly on the 31 October 2003. See 'Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption' (*UN* 31 October 2003) <<https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>> accessed on 14 February 2015

⁴ Johann Graf Lambsdorff, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy* (Cambridge University Press, 2007) 236-237. Also it has been argued that it has been argued that a precise universal boundary between suitable and unsuitable corrupt behaviour does not exist, there is ample evidence showing that all cultures recognise and understand corrupt behaviours and its impacts See Glenn T Ware and Gregory P. Noone, 'The Anatomy of Transnational Corruption' (2005) 14 *International Affairs Review* 2, 30-31

⁵ The Black's Law Online Dictionary, 'Definition of Bribery' <<http://thelawdictionary.org/bribery/>> accessed on 11 July 2015; "What is a bribe depends on the cultural treatment of the constituent elements" See Barry Rider (edr) *Corruption: The enemy within* (Kluwer Law International 1997) 288

conduct.⁶ Religious perspectives, like Islam and Christianity,⁷ substantiate Osborne's point that bribery is a conduct contrary to justice and good conscience because its results are "unjust and unfair".⁸ In addition to these definitions, Article 1 OECD defines foreign bribery as "to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties so as to obtain or retain business or other improper advantage in the conduct of international business."⁹ Also, the Hong Kong Independent Commission against Corruption defines it to be a person's abuse of power and authority for personal gain at the expense of other people.¹⁰ Peculiar to all these definitions is the acknowledgment of the subversive nature of bribery to international business. Its rapid permeation and increase in IBT is huge and it greatly cripples growth and development on national and international levels.

Bribery has become a global phenomenon recognised for its destructiveness.¹¹ Bribery does not stand in isolation but rather creates a race to the bottom, in which ethical standards must continually be depreciated to maintain a false competitiveness. The bribery conduct is not only relegated to the 'little' administrative payments that surround requests for governmental services to be carried out.¹² Most importantly, it is carried out between multinational corporations and foreign officials to obtain huge percentage payments in exchange for high level financial connections, ministerial actions, contracts and other senior level benefits.¹³ Due to the high profile deals entailed between multinational corporations and foreign officials, bribery is not easy to detect as it usually involves a secretive relationship

⁶ Denis Osborne, 'The Nature of the Problem' in Barry Rider (edr) *Corruption: The enemy within* (Kluwer Law International 1997) 10

⁷ Ibid 11

⁸ Ibid

⁹ Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions, Article 1

¹⁰ Adefolake Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge University Press 2012) 42-44

¹¹ Glenn Ware and Gregory Noone, 'The Anatomy of Transnational Corruption' (2005) 14 *International Affairs Review* 2, 33

¹² Christopher Baughn, Nancy L. Bodie, Mark A Buchanan and Michael B. Bixby, 'Bribery in International Business Transactions' (2010) 92 *Journal of Business Ethics* 1, 15-16

¹³ Maria McFarland, Sanchez-Moreno and Tracy Higgins, 'No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia' (2003) 27 *Fordham International Law Journal* 5

between two or more people entering into an inappropriate conduct.¹⁴ It is much more complex to detect as the agreement is often masked through a chain of offshore transactions, numerous intermediaries and complex financial arrangements.¹⁵

In IBT, bribery, which was once perceived as a normal part of business relations has now received a great deal of legislative and official attention; bribery has been correctly identified as distortive of market competition, violating the rule of law, undermining democracy and human rights, eroding the quality of human life and fostering organised crime and other corrupt activities such as terrorism and money laundering respectively.¹⁶ Even though the conduct of bribery has accompanied the significant growth in international trade and investment,¹⁷ its adverse effects have short-changed holistic and sustainable development for mere economic growth.

Bribery in IBTs contradicts the principle of competition. The payment of a bribe which results in the securing of an international commercial contract on an unfair basis is offensive to the tenets of fair trade practices under GATT and World Trade Organisation.¹⁸ International bribery enables a multinational corporation to obtain illicit and undue business or competitive advantage. The business is secured not on the basis of quality, price, or other commercial deliberations or terms but through the bribery of an agent and the breach of fiduciary duties to secure the business transaction(s). For example, the case *U.S. v Weatherford Services, Ltd* (WSL) shows the unfairness that companies which do not partake in bribe face.¹⁹ In this case, from

¹⁴ Fahad Khalil, Jacques Lawarree and Sungho Yun, 'Bribery Versus Extortion: Allowing the Lesser of Two Evils' (2010) 41 RAND Journal of Economics 1, 179-180; Report: OECD Bribery of foreign officials report p 5

<http://www.oecdilibrary.org/docserver/download/2814011e.pdf?expires=1437131251&id=id&accname=guest&checksum=3F263BF600C321E4C05B923B0A337729> accessed on 17 July 2015

¹⁵ The complexity of this crime is often masked through a chain of offshore transactions, numerous intermediaries and complex corporate finance arrangements. See Chapter Two, Oduntan (n 55) 104 - 105; Michael Bristow, 'Murky World of Corruption in China' *BBC News* (Beijing, 29 March 2010) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/8593069.stm>> accessed on 30 October 2014

¹⁶ Jakob Svensson, 'Eight Questions About Corruption' (2005) 19 *The Journal of Economic Perspectives* 3, 25-32

¹⁷ Johann Graf Lambsdorff, *The institutional Economics of Corruption and Reform: Theory, Evidence and Policy* (Cambridge University Press 2007) 238-239

¹⁸ Mark J. Murphy, 'International Bribery: An Example of an Unfair Trade Practice [notes] (1995) 21 *Brooklyn Journal of International Law* 2, 385-424

¹⁹ *U.S. v Weatherford Services, Ltd* (2013) 4:13-cv-3500, 4-6, 6-9; *U.S. v Weatherford International Ltd* (S.D. Tex. 2013) No. 13-cr-733

2004-2008, officials at Sociedade Nacional de Combustiveis de Angola, E.P. ("Sonangol") were bribed by WSL so as to be awarded lucrative contracts as well as have insider information about competitors' pricing in order to be able to acquire the contracts from their competitors.²⁰ Clearly, this conduct is unfair to the other companies and parties which do not partake in the act of giving bribe.²¹

Lack of developed institutions and good governance creates the condition for corruption within a state. This is because lack of good governance exists, partly as a result of corrupt leadership and where there is corrupt leadership, there is violation of the rule of law. This also would often lead to disorderliness and corruption. Indeed, the practice of bribery of foreign officials in its nature, shape and form raises legal, political, economic, moral and social challenges. On the contrary transparency in business transactions would increase effectiveness of operations and would usually determine the wealth and investment fate of a nation..²² The growing number of cross-border business transactions increases the vulnerability of all states to corruption as a result of the connectedness of societies with different practices and customs concerning bribery.²³ Hence, Slaughter's²⁴ assertion of the present reality of the international legal order, which is that economic globalisation and liberal governance have resulted in a transnational regulatory convergence of social, political, economic and legal practices.

The problem is generally more hard-hitting on African states. Indeed in many African nations as confirmed in the annual Transparency International Index for Corruption, corruption is rampant and carried out at an alarming rate. Kenya, for instance, has

²⁰ Ibid

²¹ See Chapter Two, Rider (n 56) 287

²² For example, a successful road engineering and machinery contract can procure national revenue in respect to improved road facility, faster transportation of goods and services which in turn may yield income. In short, on one hand, the giving state benefits from the proceeds of its investments - financial proceeds or further business opportunities while on another hand, the receiving state benefits from the fruits of the investment.

²³ Christopher Baughn, Nancy L. Bodie, Mark A Buchanan and Michael B. Bixby (n 12) 15-16; An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Foreign Bribery Report (2014), 5 <<http://www.oecd-ilibrary.org/docserver/download/2814011e.pdf?expires=1437131251&id=id&accname=guest&checksum=3F263BF600C321E4C05B923B0A337729>> accessed on 17 July 2015

²⁴ Anne-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) *The American Journal of International Law* 2, 205-239

been reported as experiencing the worse state of corruption ever.²⁵ Veteran campaigner John Githongo stated that Kenya is sliding out of control; the publication of an official audit found out only one percent of Kenyan government spending and only about 25% of a \$16 billion government budget could be properly accounted for.²⁶ In addition, according to GIABA Report 2010, the percentage of bribery of government officials by foreign officials as a corruption technique is significantly high across ECOWAS members' states. For example, Nigeria (87.3%), Sierra-Leone (85.3%), Cote d'Ivoire (55%), Ghana (56.7%), and Benin (40.0%).²⁷

3.2 The OECD Leadership and Competition Laws

In 1967, The OECD became the key actor in efforts to globalise competition policy when its Council adopted a Recommendation concerning Cooperation between Member Countries on Restrictive Business Practices (RBP) Affecting International Trade.²⁸ Corruption and bribery in particular can be aspects of restrictive business practices. The Recommendation's request was for the following: first, notification of investigation if another country's important interests were at risk.²⁹ Second, cooperation when two or more countries proceed against the same RBP in international trade.³⁰ Thirdly, transmission of information and lastly, use of mutually beneficial methods of dealing with an RBP.³¹

3.2.1 The FCPA: Initiator of the OECD Convention of Bribery of Foreign Officials

The FCPA arguably ensured that the OECD Convention on anti-bribery gained recognition. Andy Spalding emphasized that the FCPA was designed not only to

²⁵ Africa Global News, Kenya: Corruption in Kenya 'worse than ever' says veteran campaigner John Githongo (4 August, 2015) <<http://ethixbase.com/kenya-corruption-in-kenya-worse-than-ever-says-veteran-campaigner-john-githongo/>> accessed on 05 August 2015.

²⁶ Ibid. The comment also came from US President Barack Obama's visit to Kenya when he spoke of "the cancer of corruption".

²⁷ GIABA Report, 'Corruption-Money Laundering Nexus: An Analysis of Risks and Control Measures in West Africa' (2010) 34 <http://www.giaba.org/media/f/114_corruption-and-money-laundering-nexus--english-rev051810-1-.pdf> accessed on 21 July 2015

²⁸ OECD, Recommendation of the Council Concerning Co-operation between Member Countries on restrictive Business Practices Affecting International Trade, adopted 5 October 1967

²⁹ Ibid, I.1.(a)

³⁰ Ibid, I.1.(b)

³¹ A. Zisler, 'The Word of the OECD Committee of Experts on Restrictive Business Practices' (1974) 19 Antitrust Bull. 289, 289-291; Junji Nakagawa, *International Harmonization of Economic Regulation* (OUP 2011) 195

promote business ethics through healthy competition, but to serve as a tool of foreign policy.³² As a result, congress sought to attain comparable prohibitions in other developed nations, which ended in the passage of the (OECD) Organization for Economic Co-operation and Development Convention (H.R. 4353).³³

The intended purpose of the FCPA was to restore public confidence in the reliability of the American Corporation.³⁴ The Act was passed in 1977 as a result of endemic increase in international corruption between US multinational corporations and foreign officials.³⁵ A report published by the SEC showed that over 400 US companies were involved in over \$300 million questionable payments made to foreign government officials in their business relations.³⁶ These findings troubled the United States' government who was concerned not only about the immoral relationship between US multinational companies and foreign officials, but was also concerned about the effect on US reputation and self-interest.³⁷ Ever since the U.S. has embarked on the journey of prosecuting corruption and bribery of foreign officials, there has been an immense increase in the enforcement of the act.³⁸ Tougher enforcement and application of the FCPA emerged shortly after the FCPA was amended in 1998 in order to help make U.S. businesses more competitive

³² Andy Spalding, 'The FCPA's Thwarted Intent' (*FCPA Blog*, 1 November 2009) <<http://www.fcpablog.com/blog/2009/11/1/the-fcpas-thwarted-intent.html>> accessed on 29 April 2015

³³ House Report No. 105-802 (House Commerce Committee) &NBSP (To Accompany H.R. 4353), *International Anti-Bribery and Fair Competition Act of 1998* (House Report No. 105-802) <<http://www.justice.gov/criminal/fraud/fcpa/docs/houserpt.pdf>> accessed on 15 November 2014. This report stated that, starting from 1989, the U.S. government began an effort to convince its fellow trading partners at the OECD to criminalise the bribery of foreign public officials in international business transactions. The purpose was to achieve "comparable prohibitions in other developed countries and combating corruption generally has been a major priority of the U.S. business community, the U.S. Congress, and successive Administrations since the late 1970s"

³⁴ 'Developments in the Law: Extraterritoriality' (2011) 124 *Harvard Law Review* 1226, 1239

³⁵ Richard C. Rosalez, Weston C. Loegering and Harriet Territt, 'The UK's Bribery Act and the FCPA Compared' (2010) 25 *In-House Litigator The journal of the committee on corporate counsel* 25 1

³⁶ Eugene R Erbstoesser, John H Sturc and John W.F. Chesley, 'The FCPA and Analogous Foreign Anti-Bribery Laws – Overview, Recent Developments, and Acquisition Due Diligence' (2007) 2 *Capital Markets Law Journal* 4, 381-382; 'Testimony of Paul Gerlach' <https://www.sec.gov/news/testimony/testarchive/1998/tsty1198.txt> accessed on 29/04/2015. In his testimony, Gerlach stated that "in 1973, several corporations and executives were charged with using corporate funds for illegal domestic political contributions by the office of the Special Prosecutor of the Department of Justice"; Richard C. Rosalez, Weston C. Loegering and Harriet Territt (n 35)

³⁷ Stephen J Choi and Kevin E. Davis, 'Foreign Affairs and Enforcement of the FCPA' (2014) 11 *Journal of Empirical Legal Studies* 3, 409-410; George Barbara Crutchfield and Lacey Kathleen, 'Investigation of Jalliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment' (2006)96 *J.Crim.L.& Cri*, 524

³⁸ Julie DiMauro, 'As FCPA Enforcement Tougher, Compliance Demands Bold Measures' (*FCPA Blog*, 10 February 2015) <<http://www.fcpablog.com/blog/2015/2/10/as-fcpa-enforcement-gets-tougher-compliance-demands-bold-meas.html>> accessed on 22 February 2015

globally.³⁹ U.S persons and businesses are prohibited from undertaking corrupt conduct which clearly violates the FCPA anywhere in the world.⁴⁰ These persons - natural and corporate - encompasses US citizens, resident aliens and businesses created under the US law or with a primary sit of business in the United States.⁴¹

3.2.2 Contributions of the OECD Anti-Bribery Convention

Given IBT's particular susceptibility to the problem of bribery of foreign officials, it is imperative to mention the Organisation for Economic Co-operation and Development on Combating the Bribery of Foreign Officials in IBTs.⁴² The instrument focuses on the 'supply side' of the bribery transaction⁴³ which is also described as active bribery.⁴⁴ The value of such a convention to IBTs is easily demonstrable. Specific provisions lend themselves too much support, such as those that require signatory states to criminalise the bribery of "foreign officials"⁴⁵ carried out by member's multinational corporations while doing business abroad.⁴⁶ Article 1 of the Convention provides that states should take necessary measures to criminalise bribery of foreign officials under its laws. These measures should be taken to criminalise any person

³⁹ Jack Boorman, 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (International Monetary Fund 2001) Policy Development and Review Department, 3-6 <<https://www.imf.org/external/np/gov/2001/eng/091801.pdf>> accessed on 25 May 2015

⁴⁰ FCPA 1977, s 78dd-2

⁴¹ Ibid

⁴² The OECD Anti-Bribery Convention was signed in Paris in December 1997. Over forty major economic powers have ratified the Convention. See Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), 105-43, 37.I.L.M. 1, <<http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconventions/38028044.pdf>> accessed on 03 August 2015; Mark Pieth, 'Making Sure that Bribes Don't Pay' (*OECD Blog*, 17 December 2012) <<http://www.oecd.org/daf/anti-bribery/makingsurethatbribesdontpay.htm>> accessed on 24 May 2015. The participating states cut across over five continents with over 70 percent of world exports and over 90 percent of foreign direct investment. This has made the Convention more global in its scope and reach. However, in as much as the Convention is global in its reach, major exporting countries like China and India are not signed up under the Convention

⁴³ OECD Home, 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm> accessed on 12 March 2015

⁴⁴ Elizabeth Spahn, 'Implementing Global Anti-Bribery Norms from the FCPA to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption' (2013) 23 *Indiana International and Comparative Law Review* 1, 3

⁴⁵ OECD Convention 1997 Art 1 (a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

⁴⁶ Spahn (n 44) 3-5

with the intention to offer, promise or give undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the particular official acts or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.⁴⁷ Particular provisions also offer themselves to criticism. The instrument employs the device of certain safeguard clauses, which makes the adoption of the standards of the Convention dependent upon members' willingness.⁴⁸ The difficulty with this, for example, is that the adoptive disposition of many members to the Convention is imbalanced.⁴⁹ Some members have exceeded the tenets and standards of the Convention, while other members may be aggressive in their adoption and application of the Convention.

Thus, the usefulness of the Convention to ensure that member states criminalise the bribery of foreign officials in IBTs is evidently limited at best. It is ironic that while a few of the members states, such as, the United States of America and the United Kingdom are aggressive in their response to actualising the tenets of the Convention, other members, are greatly inconsistent in their adoption, application and enforcement of the Convention. In fact, other members such as, Japan reveal a weaker and less effective effort in meeting the tenets and standards of the Convention.⁵⁰ It is unclear what the drafter's aim to achieve with this provision considering that most member states already have their set of values, legal orders and a different spirit in responding to the combat against bribery of foreign officials.

⁴⁷ OECD Convention (n 45)

⁴⁸ Germany, Spain, France, and Japan openly attacked this action. See David L. Heifetz, 'Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective Than the U.S. FCPA' (2002) 11 Pac. Rim L. & Pol'y J. 1, 213

⁴⁹ Ibid, 209-210

⁵⁰ The weakness of the Japanese implementation of the OECD Anti-Bribery Convention was ascertained through the result of the competitive relationship between the U.S. and Japan in their business pursuit in developing countries. It was established, that American companies suffer a potential disadvantage when competing with Japanese companies in international business, as Japanese companies still heavily pay bribes and are not effectively combated through the Japanese anti-bribery legislation. See Heifetz (n 44) 209-210, 229-230. To buttress this assertion, Tarullo's comment is very essential to the understanding of the haphazard members enforcement of the OECD Anti-Bribery Convention. He stated that, the U.S. pressure to ensure that other members of the OECD fight the bribery of foreign officials succeeded, however, "it only succeeded in getting other countries to sign the Convention, not in changing the underlying game being played by other countries" See Daniel K. Tarullo, 'Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention, the article' (2004) 44 Va. J. Int'l L. 665, 667

In other words, the implementation provision arguably does not neatly fit into an anti-bribery treaty which can ensure uniform and effective treatment amongst member states. For the reasons identified above, the apparently acceptable purpose that commends states to provide support and scope for economic and community integration, especially in matters of combating the bribery of foreign officials is in fact thrown into jeopardy.⁵¹

3.3 United Nations Convention against Corruption (UN CAC) 2003

The examination of regulation and the application of corruption laws across borders is the central theme of this dissertation. The UNCAC is now one of the most essential anti-corruption mechanism with global scope of application, which takes an approach that deals with both the supply side and demand side of bribery unlike the OECD which only deals with the supply side of bribery. Chapter 3 of the Convention provides for the criminalisation of the bribery of foreign officials, amongst others.⁵² As of 1 December 2015, there were 140 signatories to the UNCAC and 178 state parties.⁵³ The UN Convention addresses the following topics; prevention of corruption, criminalisation and law enforcement measures against corruption, international cooperation and asset recovery, technical assistance and information exchange.⁵⁴ The Convention also addresses various forms of corruption such as abuse of power, trading in influence, and other acts of corruption in the private sphere.⁵⁵ The major values of the UNCAC articulated in the preamble to the

⁵¹ Russia just ratified the Convention in 2012. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of April 2012 (2012) <<http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/40272933.pdf>> accessed on 03 August 2015. The Convention purposes to encourage economic integration, but major export countries like China and India have not ratified the Convention. See Richard L Cassin, 'China's clean up continues' (*FCPA Blog*, 10 September 2010) <http://www.fcpablog.com/blog/2010/9/10/shinas-clean-up-continues.html> accessed on 3 August 2015; 'In china, Death Row Billionaire Names Accomplices', *The (FCPA Blog*, 29 February 2012) <<http://www.fcpablog.com/blog/2012/2/29/in-china-death-row-billionaire-names-accomplices.html>> accessed on 3 August 2015. Chinese domestic law has been noted for its renowned egregious enforcement which includes using the penalty by death for bribery convictions (for Chinese nationals only)

⁵² United Nations Convention Against Corruption, Art 16, Chapter iii

⁵³ UNCAC (2005) Signature and Ratification Status as of 1 December 2015 <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>> accessed on 30 March 2016

⁵⁴ *Ibid*, Art 1

⁵⁵ United Nations Convention Against Corruption: 'UNCAC Signature and Ratification Status, United Nations Off. on Drugs and Crime', available at

convention are, to ensure economic development, combat transnational organized crime and uphold commitment to the rule of law.⁵⁶

Various Convention treaties are established to ensure combating foreign bribery in international business. The OECD Convention and UNCAC are tools to combat this endemic problems in international business. Both the background history and development of practice demonstrate a number of pressing problems and issues related to the application of corruption law across borders. A number of these problems are discussed further in Chapter Four; however, it is imperative to introduce them here. Combating foreign bribery is justifiable on the basis of jurisdiction as discussed in Chapter two; bribery is detrimental to business efficacy, good governance, poverty reduction, rule of law and international interests to protect the sanctity of states business. There are three pressing issues that needs to be discussed. One of these issues is that the present regulation on bribery focuses more on national states regulation which is driven by states' interests (as discussed in Chapter Two) rather than international regulation driven by the protection of the international community against the perennial problem of corruption. The provisions of the Conventions provided in international law are established in such a manner that the onus of regulation is based on individual states and their claims of jurisdiction on any particular case.

3.4 The Dynamics of Power and Interdependence in the Regulation of Corruption in International Business

Power politics is a real influence in the regulation of corruption in international business. Although there is a interdependence in the society of nations, the level and nature of this interdependence is starkly unequal as the majority of the powerful states are home states for the major corporations and majority of the less powerful states are consumers of their products and services. Majority of the powerful states were also colonisers of the less powerful states, and in the modern world they also possess regulatory competence on a wider scale in comparison to the weaker

<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> accessed on 03 August 2015; Spahn (n 44) 10

⁵⁶ 'On TRACK Against Corruption', <<http://www.track.unodc.org/Pages/home.aspx>> accessed on 03 August 2015

counterparts. Extraterritoriality is beneficial to all states as they will be able to combat foreign bribery in international sphere. However, the setup and framework is created in such a manner, advertently or inadvertently, to be regulated by elite states. This meant that the sovereignty and jurisdiction of developing states will be interfered with. Powerful states also tend to display considerable regulatory acumen. Alejandro Chehtman observes: 'extraterritoriality is deeply entrenched in the modern practice of legal punishment'.⁵⁷ In essence it is true that the extent to which states can assert extraterritorial criminal jurisdiction is a pivotal issue which sits at the 'very heart of public international law'.⁵⁸

Different scholars have argued that the normative principles of sovereignty might be outmoded in a new age of democratization and globalisation. This argument was sustained by what was seen as an emergent global structure and policy "animated by commitments to markets, civil society, liberal peace and rule of law, untrammelled communication, and transnationalism."⁵⁹ This world-wide public policy takes modest account and description of equality as a procedural component of the rule of law and democracy and a style of politics, but it is not clearly faithful to the practical and functional reduction of inequality in the global sphere. The operation of the doctrine of sovereignty has hitherto emphasised the reduction of inequality, and if sovereignty is to be displaced as a foundational normative theory of international law, an alternative would be needed to manage the resultant inequality among nations.⁶⁰ In the field of the regulation of the bribery of foreign officials in IBTs, like some other fields in international law, no such alternative is present yet. The serious problem of inequality has been seriously neglected by international law.⁶¹

⁵⁷ See Chapter Two, Chehtman (n 74) 1

⁵⁸ Rick Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of States' in Gerard Kreijen et al (eds), *State, Sovereignty and International Governance* (Oxford University Press, 2002) 281

⁵⁹ See Chapter Two, Kingsbury (n 133) 600

⁶⁰ Ibid, 600, 602-603; Gbenga Oduntan, 'International Laws and the Discontented: Westernization, the Development and the Underdevelopment of International Law' in Amita Dhanda and Archana Parashar (eds), *Decolonisation of Legal Knowledge* (Routledge India 2009) 96-100, 115-116

⁶¹ See Chapter Two, Kingsbury (n 133)

3.5 Beneficial v Deleterious Effect of Multiple National Anti-Bribery Instruments on the International Community

“Ceteris paribus, international anarchy as to jurisdiction allocation reduces welfare: strict territoriality leads to under-regulation; universal resort to extraterritorial regulation through the application of the ALCOA effects test will lead to overregulation. Each of these claims is unassailably correct, as long as one lets the ceteris proviso do the heavy lifting.”⁶²

The Conventions relating to combating the conduct of bribery of foreign officials encourage states to criminalize bribery. The criminalization of this conduct means creating and enforcing national laws that possess extraterritorial jurisdiction.⁶³ These national anti-bribery laws converge in international space to create multiple extraterritorial national anti-bribery instruments. Many states such as China, France, Australia, the U.K. and the US are beginning to enforce their extraterritorial laws. In this regard, the advent of multiple extraterritorial jurisdiction in the combat against the bribery of foreign officials is crucial for a united effort in the world combat against bribery and corruption. The US FCPA is the leading national anticorruption legislation with other countries joining the bandwagon over the next years and decades.

Number one benefit of extraterritoriality is all nations can extend their extraterritorial laws to combat the malaise of corruption in the international sphere. So states will deal with corruption thereby significantly clearing up a significant problem of IBT. States already can adequately monitor the affairs of their nation but the international plane can be further secured and would then become a less tolerable space for bribe givers and their cohorts.

Different nations have different corruption levels and the impact of corruption on the growth and development of nations do vary. The extraterritorial tool can thus, be used to coordinate in the fight against corruption wherever the problem strikes. For instance, many developing states have a kleptomaniac class running the governance

⁶² Paul Stephan, *The Political Economy of Choice of Law* (2002) 90 Geo L.J.957, 959. (Professor Paul Stephan, a jurisprudential head in matters regarding assessing choice-of-law challenges, especially where there is multiple regulators)

⁶³ Here, it is pertinent to reiterate that extraterritoriality or extraterritorial jurisdiction is the application of national laws across borders (Chapter 2).

of their states. Any significant contact they have with any state can cause them to be extradited or punished under the law of the lands. Anti-corruption laws can however be innovatively tailored to mitigate this problem.

The absence of international regulation of bribery impedes good governance thereby hurting the most vulnerable⁶⁴ as well as leaving the international terrain with a perpetual decay. Therefore, in order to curb and mitigate the decay, extraterritorial application of national anti-corruption laws remain an attractive option to combat foreign bribery and corruption.⁶⁵ Transnational crime demands transnational governance and the strict application of territoriality principle can lead to under-regulation of crime; whereas a resort to multijurisdictional assertions of extraterritorial regulation may in turn lead to overregulation. Nevertheless, a regulation geared towards balance can 'adequately' address the multijurisdictional nature of extraterritorial assertions. It is pertinent to allude to Professor Paul Stephan's assertion stated above, which conceives a backdrop understanding of the essence of this chapter. Indeed - to what extent can extra-territorial anti-corruption regulation be tolerated by weaker states? Particularly how does this relate to developing countries like ECOWAS states?

3.5.1 Example 1:

The Enforcement of the OECD Convention: The US FCPA (1977) and its Extraterritorial Elements

The FCPA enforcement has been useful ever since its creation. The FCPA possesses three key extraterritorial elements which are established in 15 U.S.C. §§ 78dd-1 to 3 of the Act. First and foremost, section 78dd-1 of the Act made it illegal to

⁶⁴ Pieth (n 42)

⁶⁵ Elizabeth Spahn, 'Implementing Global Anti-Bribery Norms from the FCPA to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption' (2013) 23 *Indiana International & Comparative Law Review* 1, 1-5; Barbara Crutchfield George and Kathleen A. Lacey, 'Investigation of Halliburton Co./TSKL's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on the FCPA Enforcement' (2006) *the Journal of Criminal Law and Criminology*, Vol 96, No. 2; Elizabeth K. Spahn, 'Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention' (2013) *Virginia Journal of International Law*, Vol 53: 1. With no gain saying, all these articles emphasise the importance of an international/global regulation of bribery of foreign officials and other forms of corruption. There is consensus as to the need for an extra-territorial anti-corruption legislation carried out by various states. However, recent research (these articles) shows that there is a need for more holistic and common standards in international regulation of anti-corruption law.

bribe foreign officials directly or indirectly in order to retain or obtain business.⁶⁶ Secondly, any issuer of securities on a US stock exchange, notwithstanding the country of the company, or any officer, director, employee, or third-party agent of such issuer or even any stockholder acting on behalf of such issuer, is prohibited under section 78dd-2 from using the US mails or any instrumentality of US interstate commerce for corrupt act anywhere in the world.⁶⁷ For example, a Nigerian or Ghanaian company listed on the New York Stock Exchange will find itself subject to the FCPA despite the fact that their headquarters and primary origin of business are located outside the US. Third, section 78dd-3 provided that non-US persons or companies are prohibited from using US mails or any means or instrumentality of interstate commerce or engaging in any other act in furtherance of an offer, promise to pay, payment, or any authorization of the giving of anything valuable corruptly to a foreign official.⁶⁸ In order to ensure good record keeping, companies subject to SEC reporting requirements to institute and maintain an internal accounting system to assure management's control over the company's assets (the internal controls provision).⁶⁹

The usefulness of this act cannot be underestimated. The bribery of foreign officials in order to retain or obtain business was made illegal under the FCPA. Paul Gerlach, in his testimony, alluded that American scholars and statesmen are often happy to state that the passing of the act made the US as the first government to criminalise the bribery of foreign officials.⁷⁰ However, it is important to note that the FCPA (1977) is not exactly the prosecutorial champion it is often made out to be. It appears that 'grease payments', i.e., payments made to enable or speed up 'routine governmental action' are basically exempted from the realm of the anti-bribery provisions.⁷¹ Exempting this form of payment weakens the purpose of the FCPA as the act does not address the "very real damage caused by low-level corruption."⁷² Also it cannot be said that the Act meaningfully resolves the problem of the American jurisdiction

⁶⁶ FCPA 1977, s 78dd-1(a)

⁶⁷ 78dd-2(a)(b)

⁶⁸ Ibid, s 78dd-3(a)(b)(c)

⁶⁹ Securities and Exchange Act (1934), 15 USC § 78m (b)(2)(B), s 13(b)(2)(B)

⁷⁰ Gerlach (n 32)

⁷¹ FCPA 1977, 78dd, Part B; Alexandros Zervos, 'Amending the FCPA: Repealing the Exemption for "Routine Government Action" Payments' (2007) 25 Penn St. Int'l L. Rev. 251, 251-253

⁷² Ibid, 251

attracting profits of bribery even where it is found to have been given by an American interest to foreign nationals. Clearly heavy fines have been imposed in many current notable cases but the fines arguably are to the advantage of the US treasury and not to the advantage of the developing states which have become preys of such corruption.⁷³

After 17 years of the passage of the Convention, not only has there been a remarkable progress in its enforcement, there has also been a shift in the level of enforcement.⁷⁴ Initially, only one country - the US FCPA - made bribery of foreign officials a crime; but, other member states have joined the bandwagon.⁷⁵ Arguably, there cannot be receipt of bribes without the giving; the enforcement of the Convention by world's leading exporting states serves as a major breakthrough in turning off "the spigot on the supply side of global corruption".⁷⁶ As of 2011, almost 300 companies and individuals have been sanctioned under criminal proceedings for foreign bribery with sixty-six individuals sentenced to prison.⁷⁷ In addition, many companies have been subjected to huge fines; one company faced EUR1.24 billion. Another 300 investigations are ongoing.⁷⁸

Nevertheless, enforcement of the Convention is still uneven thereby leading to ineffectiveness. Professor Elizabeth Spahn pointed that enacting multi-lateral laws

⁷³ ABB Vetco Gray Inc (US Subsidiary) and ABB Vetco Gray (UK) Ltd Subsidiaries of ABB Ltd, a Swiss company, made payments of \$1.1 million to government officials in Angola, Nigeria and Kazakhstan (entertainment, cash, bogus consulting fees). In Nigeria, both subsidiaries admitted to paying more than \$1million to officials of the National Petroleum Investment Management Service ('NAPIMS'), which was responsible for awarding gas rights to one of the subsidiaries in the Bonga Oil Field project. The bribes were uncovered during due diligence activities by a consortium of private equity investors. ABB Ltd thereafter, voluntarily disclosed the violations to the authorities. \$16.4 million fines were paid to the American government. ABB disgorged \$5.9 million and fined \$10.5 million by SEC; subsidiaries pled guilty and agreed to pay \$5.25 each to the government. See Alexandra Addison Wrage, *Bribery and Extortion: Undermining Business, Governments and Security* (Praeger Security International 2007) 76; Hector Igbikiowubo, 'Nigeria: Bribery - Vecto to Pay \$26m fine' (*Vanguard*, 19 February 2007) <<http://allafrica.com/stories/200702190141.html>> accessed on 15 March 2015

⁷⁴ OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials (2014), 11-13 <<http://www.oecd-ilibrary.org/docserver/download/2814011e.pdf?expires=1438024924&id=id&accname=guest&checksum=90E00785BB7D4CC6AC86197540FFA00C>> accessed on 24 May 2015

⁷⁵ Pieth (n 42)

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

on combating foreign bribery are not the same as effective enforcement.⁷⁹ After the passing of the Convention, not until 2005-2006, there was tiny concrete enforcement from OECD parties apart from the United States.⁸⁰ As at then, most parties were reluctant to toughen their enforcements and other parties' governments still perceived foreign bribery as legitimate business involvement.⁸¹

Coupled with this unevenness is an ever evolving nature of bribery. Sophisticated modes of bribery payments have resulted in increased difficulty in investigating and prosecuting bribery of foreign officials.⁸² As a result, some states have been unable to withstand the investigative and expensive nature of some covert foreign bribes due to inability to muster required adequate resources.⁸³ Nevertheless, the OECD and Transparency International quite correctly call on signatories to radically step up enforcement of their anti-bribery legislations.⁸⁴

3.5.2 Example 2:

UKBA (2010) and its Extraterritorial Elements

The initial statutory criminal law regulating bribery was "'functional', but 'old and anachronistic' with 'inconsistencies of language and concepts'"⁸⁵ leading to a bribery law, which was "difficult to understand for the public and difficult to apply for prosecutors and the courts".⁸⁶

Three sections of the Act possess the following extraterritorial elements. Section 1 concerns general bribery offences. It prohibits the bribery of another person by offering, promising or giving of a bribe (active bribery) for financial other advantage.⁸⁷ Section 2 concerns the agreeing to receive or accepting of a bribe and requesting a bribe (passive bribery) for financial or other advantage.⁸⁸ Section 6 creates an

⁷⁹ Spahn (n 44)

⁸⁰ Ibid

⁸¹ Pieth (n 42)

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Richard Rosalez, Weston Loegering and Harriet Territt (n 35)

⁸⁶ Ibid

⁸⁷ UK Bribery Act 2010, s 1

⁸⁸ Ibid, s 2

offence relating to bribery of foreign public officials in order to obtain or retain business or an advantage in the conduct of business.⁸⁹ Lastly, section 7 of the act creates a new form of corporate liability for failure of commercial organisation to prevent bribery.⁹⁰ It is crucial to note that the act employs 'residence' in the UK in addition to 'nationality' as a basis for the extension of jurisdiction of the law. The Serious Fraud Office (SFO) investigates and prosecutes serious and complex bribery, corruption and fraud.⁹¹

The UKBA and the FCPA are part of the major solid anti-corruption legislations with high level activities in carrying out the OECD objectives.⁹² These two acts have set up a firm foundation for combating bribery of foreign officials through intense investigation processes, strict compliance mechanisms and tough enforcement measures. However, the differences in both acts, based on their language, practices and enforcement dynamics create a division that debilitates jurisdictional competence.

The discrepancies between the Acts potentially lead to undefined ambiguity and duplicative enforcement. The differences range from definition and language disparities, to affirmative defences, to penalties, to exceptions, and to compliance.⁹³ The business, political, financial, policy and regulatory interests of individual countries differ in range and in scope;⁹⁴ therefore, other OECD member states are being compelled to create and toughen their anti-corruption laws and enforcement measures. The rigorous campaign to toughen measures or create anti-corruption legislations does not equate to consistency in the delivery and application of the legislations. In fact, it has been argued that the present model of combating bribery

⁸⁹ Ibid, s 6

⁹⁰ Ibid, s 7

⁹¹ 'The SFO Investigates and Prosecutes Serious and Complex Fraud, Bribery and Corruption' (SFO, 2011) <<https://www.sfo.gov.uk/about-us/>> accessed on 14 December 2015)

⁹² Lindsey Hills, 'Universal Anti-Bribery Legislation can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to create Universal Legislation to Combat Bribery Around the Globe' (2015) 13 Richmond Journal of Global Law and Business 3, 470-471

⁹³ Ibid, 474-478

⁹⁴ See Ireland-Piper Danielle, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law' (2012) 13(1) Melbourne Journal of International Law, 122. Danielle, in her work, significantly discussed the categories of extraterritorial criminal jurisdiction. They include; Treaty-Based Assertions, Ad Hoc Assertions, Reactive Assertions, Generic Assertions, Uncontentious Prosecutions, Politically Motivated Prosecutions and Alternative or Reactive Prosecutions. These categories show various motivations for extraterritorial assertions in criminal jurisdiction.

and corruption in IBTs produces procedural unfairness, injustice and a competitive spirit to 'lead' in the regulatory sphere. Danielle-Ireland Piper opined that "assertions of extraterritoriality are useful in the response to transnational crime, but such assertions are often highly politicised and are used by states to further 'unilateral' foreign policy objectives."⁹⁵ From the look of the enforcement of the US anti-bribery laws and the advent of the U.K. FCPA, these Acts clearly are different in the way they specifically target the malaise of foreign bribery. They are geared for unilateral foreign policy objectives. A law which is able to regulate is able to protect, a law which is able to protect will seek further protection as the international terrain changes.

The argument made here is that the US government's expansive interpretation of the FCPA's jurisdictional reach has yielded inconsistency in the understanding of jurisdiction and jurisdictional competence as a result of inadequate questioning of the discretion of the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) with little deliberation of the law's foreign policy consequences.

3.6 Inconsistency of the various purposes, levels of application and degree of enforcement of parties

Under the OECD Convention, there is inconsistency in the purpose, level of application and degree of enforcement of parties.⁹⁶ For example, the US FCPA combats the 'supply side' of foreign bribery whereas the UKBA combats both the 'supply' and 'demand' sides of bribery of foreign officials.⁹⁷ In addition, the reach of these national acts varies with the UKBA possessing more far reaching effect and the US FCPA possessing more expertise and experience in the investigation and prosecution of foreign bribery. Finally, the presence and active working of these laws in the developing world like the ECOWAS states is a recipe for multijurisdictional

⁹⁵ Ibid

⁹⁶ Hills (n 92) 474-489; Sharifa G. Hunter, 'A Comparative Analysis of the FCPA and the U.K. Bribery Act and the Practical Implications of Both on International Business' (2011) 18 ILSA J. Int'l and Comp. L. 89, 90-95

⁹⁷ *U.K. Bribery Act and Its Effect on U.S. Companies* (Murphy & King, May 2011) http://www.murphyking.com/news-events/uUK_Bribery_Act_and_its_Effect_on_US_Companiesu/> accessed on 2 March 2016

disaster hence, a common global anti-corruption standards with adequate global integration is urgently required.⁹⁸

If a state's purpose is to clear international business off incessant acts of corruption, both the giver and receiver of bribes do need to be punished. Having a law that only combats a side of a criminal act is almost not useful especially in fulfilling the purpose of ridding the international society of bribery. This of course is because bribery affects the territory of the giver and receiver. Multinational corporations benefit from giving bribes (contracts) while foreign officials benefit from receiving bribes (personal gain) to the detriment of the community. The UKBA on the other hand criminalises the giver and receiver of bribes. The issue this poses is an unusually long arm used in regulating the activities of the persons and corporations in the international sphere. The downside of the situation however, is that this approach presents a worrisome attitude towards the recent usage and extension of extraterritorial act which the international community may need to confront.

3.6.1 Multijurisdictional Manifestations of Bribery Law Enforcement

The likely deleterious effect of having multiple extraterritorial laws in the international society of nations is the problem of possible multi-jurisdictional conflict. When there is a concurrent jurisdiction on a case, who gets to decide the case and what threat does this pose to the system of shared sovereignty and jurisdictional competences? On the up side of things a web of extra jurisdictional competences carefully arranged between states to cover a particular international problem reduces the space for the mischief that is being removed.

Traditionally, a state can only exercise prescriptive jurisdiction over three types of activities: activity which occurs within its territory, activities of its nationals, and foreign activity fashioned to have an effect within its territory or security.⁹⁹ Any state's application of domestic law abroad is deemed as a violation of international law; member states are expected to esteem each other's exclusive authority to regulate

⁹⁸ Hills (n 92) 490-492; Hunter (n 96) 90-110

⁹⁹ Restatement (Third) of the Foreign Relations Law of the United States (1987) & 402. Basis of Extra-territorial jurisdiction discussed in chapter two of this theses - Nationality, Universality, territoriality, passive personality principles, effects doctrine

conduct within their territorial limits.¹⁰⁰ The United States, in the case of the FCPA, has increasingly flouted this prohibition while the UKBA possess a great potential to perform same as well. Relaxing these extraterritorial prohibitions has been the subject of intense debate which has proven to curb corruption however, their breach of and inconsistency with the international law norm against extraterritoriality remain, and both academics and foreign governments have criticised the tremendous increase of the global reach of these anti-corruption laws.¹⁰¹

Enforcement against bribery of foreign officials entails multiple jurisdictions with overlapping effects. Multinational Corporations by their nature operate across the borders of many states.¹⁰² As a result, many jurisdictions might collide in the event of asserting or complying with their anti-corruption laws. This collision can result in the disruption of the jurisdictional system of the host states where the bribery was carried out.¹⁰³

The *Halliburton* (TSKJ) case¹⁰⁴ portray the multi-jurisdictional nature of extra-territorial anti-corruption laws. This case involved nearly a total of twelve jurisdictions, with the Department of Justice (DOJ) playing a leading role. Although France was the first to investigate the case, there was cooperation from various OECD Convention states such as Switzerland, Italy, and the United Kingdom.¹⁰⁵ Other Convention states with possible jurisdictional assertions, like Japan and Netherlands, were absent from the list. This case serves as an example to the understanding of the possible jurisdictional clash which can ensue in the assertion of

¹⁰⁰ Hannah Buxbaum, 'Transnational Regulatory Litigation' (2006) 46 Va. J. Intl L. 251, 268

¹⁰¹ Nico Krisch 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law' in Michael Byers & Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2003) 135-36

¹⁰² Stuart Deming, 'Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the FCPA' (2006) *Journal of Criminal Law and Criminology* 96, 468-470

¹⁰³ Claudius O. Sokenu, 'Commentary: SEC Expands Foreign Corruption Law Beyond Congressional Intent' (2002) 17 *Washington Legal Foundation* 28; Daniel Patrick Ashe, 'The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. FCPA' (2005) 73 *Fordham L. Rev.* 2897, 2898-2899

¹⁰⁴ TSKJ is a private limited liability company registered in Madeira, Portugal whose members include Technip SA of France, Snamprogetti Netherlands B.V., an affiliate of ENI SpA of Italy, M.W. Kellogg (which became Kellogg, Brown and Root [KBR] after Halliburton acquired M. Kellogg) of the US, and JGC Corporation of Japan. Each of this corporations own 25 per cent of the venture. Halliburton Co., Annual Report (Form 10-K), at 22 (1 Mar, 2005) www.sec.gov/Archives/edgar/data/45012/000004501205000055/0000045012-05-000055-index.htm, accessed on 04 August 2015

¹⁰⁵ Spahn (n 62) 27-28

jurisdiction between multiple states.¹⁰⁶ On the one hand, the collision of jurisdictions greatly show the gravity and importance accrued to combating the bribery of foreign officials in international trade and business.¹⁰⁷ In fact, this development threatens the potential increase of corruption in the ECOWAS region as it awakens the problems of corruption and extortion on the part of high profile officials in Nigeria.¹⁰⁸ On the other hand, the case exposes the potential power tussle between developed and developing countries in their pursuit of jurisdictional assertions.

The US lead role in this case is significant to understanding prosecutorial or regulatory competition given the fact that only 25 per cent of the proceeds of the joint venture accrues to Halliburton. George and Lacey, and Spahn¹⁰⁹ in their works have argued that the US leading role is partly as a result of the fact that the US possess greater expertise, experience and first class personnel skill in corruption investigation, which significantly aids the discovery and investigatory process of the scandal.¹¹⁰ In addition, the notification of the US by the French of the bribery conduct shows the level of cooperation which exists between powerful OECD member states in investigatory and regulatory matters.¹¹¹ In addition, the UK cooperated with the U.S for the extradition of Tesler.¹¹² Even though the US is the leader in this prosecution, various concerned jurisdictions cooperated with the US to actualise the purpose of the OECD Convention which is to combat the bribery of foreign officials.

However, the danger of having a country lead in a case can be damaging to sovereignty and jurisdictional competence. For instance, the *Statoil*¹¹³ case shows

¹⁰⁶ Spahn (n 62)

¹⁰⁷ Jay Holtmeier, 'Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities' (2015) 84 *Fordham L. Rev.* 493, 497-500; Elizabeth Spahn, 'International Bribery: The Moral Imperialism Critiques' (2009) 18 *Minnesota Journal of International Law* 1, 223-224

¹⁰⁸ Kimberly Anne Elliott (ed), *Corruption and the Global Economy* (Institute of International Economics 1996) 148-149; Brian C. Harms, 'Holding Public Officials Accountable in the International Realm: A new Multi-Layered Strategy to Combat Corruption' (2000) 33 *Cornell Int'l L.J.* 159, 171

¹⁰⁹ George and Lacey (n 23); Spahn (n 62)

¹¹⁰ *Ibid*

¹¹¹ Spahn (n 62)

¹¹² Jeffrey Tesler was hired by the Joint Venture to serve as an intermediary between the multinational corporations and the Nigerian foreign officials in terms of delivering the bribes. See *Wrage* (n 65) 77-78

¹¹³ Statoil paid Horton Investment a sum of \$12.2 million to influence important political officials in Iran to grant oil contracts to Statoil. See *Deferred Prosecution Agreement* at 6, *United States v. Statoil*, ASA (S.D.N.Y. 16 October 2006)

that a jurisdiction with an upper hand can negate the decision of another jurisdiction. In this case, the Norwegian authorities issued Statoil a \$3 million fine for trading-influence violations which was a lesser and milder penalty under the Norwegian law compared to the FCPA's foreign bribery.¹¹⁴ The US decided that the case was not decided properly and that penalties were not adequate, so the US re decided the case. Apart from the fines paid by Statoil to the Norwegian authorities, the SEC and DOJ immediately opened investigations into the Statoil scandal for breaches of the FCPA.¹¹⁵ The DOJ reduced Statoil's penalty of \$10.5 million by \$3 million due to prior fines paid to the Norwegian government. Also, SEC required Statoil to pay disgorgement of \$10.5 million dollars.¹¹⁶

3.7 Conclusion

As national economies have become increasingly interdependent, and enterprises have become increasingly multinational, and as technological advances have permitted more rapid and accurate international communications,¹¹⁷ nations have been seeking to control their domestic affairs across territorial boundaries. This chapter has argued that bribery and corruption has pervaded transnational and IBTs on a high level and extraterritoriality is a legitimate legal strategy and one of the important means of combating bribery in IBTs. It is however, very unclear whether there is any coherent strategy to internationalise the practice of extraterritoriality to all states so that genuine progress may be made in combating the international malaise of bribery and corruption in business.

While the framework in the major treaties discussed above purports to ensure economic integration, combating bribery by alleviating poverty, and promoting 'good'

¹¹⁴ Cease and Desist Order, *re Statoil* (SEC 13 October 2006) ASA, No. 54599

¹¹⁵ *Statoil* (n 113)

¹¹⁶ Harms (n 108) 171-175

¹¹⁷ Azalahu Akwara *et al*, 'The Role of Regional Economic and Political Groups in the Globalisation Process: A Case Study of the Economic Community of West African States (ECOWAS) (1982-2002)' (2013) 9 Canadian Social Science 6, 67-68. The central theme of the theory of integration, (which was first used by Mitrany (1943) and refined and popularised by Haas and a significant number of other scholars in the study of regional integration), the modern state due to technological developments and swift increase in industrialisation is "incapable of maintaining economic growth and existing economic structures through its own efforts". This theory also premises on the fact that modern states cannot solely provide for the needs and aspirations of their citizens and territory because these needs cut across national boundaries.

business in IBTs, the fact remains that extraterritoriality is currently patchy in practice. Practice also shows that the protection of states selfish economic interests remain the salient objective for action. Protection of states interests and policy in itself is not a bad thing, but it appears that the FCPA and UKBA camouflage national interests under the language of anticorruption law. Economic integration and poverty reduction of the developing world would require a wider promotion of extraterritorial powers by the developing states and the strengthening of the rule of law therein. The international framework for development of extraterritorial application of anticorruption rules deserves dedicated attention to conform to the true 'international' and common interests. As a result, this present regulatory framework is arguably inherently unfair and international law in itself is messy on this point.

CHAPTER FOUR

DOES EXTRATERRITORIALITY UNDERMINE THE PRINCIPLES OF SOVEREIGNTY AND JURISDICTIONAL COMPETENCE OF ECOWAS STATES?

INTRODUCTION

This chapter critically examines the effects of the practice of the doctrine of extraterritoriality on states within the Economic Community of West African States (ECOWAS) region. The issue this dissertation will examine is how/why the stance of the present extraterritorial regulatory framework of corruption in the international realm tilts toward the interests of certain elite states. Through the interpretation of cases against certain high profile politically exposed persons like James Ibori, Buruji Kashamu and Dick Cheney, this dissertation will attempt to show the power play between developed and developing countries regarding the regulation of the malaise of corruption in IBT. The major issue to be discussed regarding these cases is that the recent extraterritorial application of national laws on corruption shows that whilst western states are swift to enforce their extraterritorial jurisdiction on developing states, they both advertently and inadvertently resist the attempts of developing states to exercise their extraterritorial jurisdiction.

In order to fulfil this purpose, this chapter will briefly define the meaning of the word extraterritoriality. Thereafter, the problems and prospects of one of the leading anti-corruption regulatory frameworks in IBTs - the Organisation for Economic Co-operation and Development on bribery of foreign officials in international business (the OECD Convention) will be identified. This dissertation will then explain the purpose, nature, and role that the ECOWAS community plays in curbing the bribery of foreign officials and other forms of corruption globally. Finally, the dissertation will discuss the practice of extraterritoriality and its impact on the sovereignty and jurisdiction of weaker states. The dissertation work will conclude that the present framework is unfair and that it includes engraved regulatory inequities which can be circumvented through establishing a universal jurisdiction framework where the equal exercise of states' sovereignty and jurisdiction over matters concerning its territory is plausible and strengthened.

The interconnectedness of economic and business transactions in the face of diversity has been a major feature of the 21st century global village. Globalisation dictates closer relations and interconnectedness of regulations. This is probably why it has been stated that an important goal of the US-Africa Leaders' Summit was to strengthen and expand US-Africa economic relations and engagements.¹ In order for economic relations to be strengthened, good governance has to be put in place by the ECOWAS community. Developed states of the West appear to be settled on the policy of assisting in shoring up the regulatory framework of developing states. On the other hand, for there to be good governance, the international principles of sovereignty and jurisdictional competence needs to be strengthened. The type of strengthening described here includes and entails guarding the territory from external intrusion. Good governance and sovereignty must work in tandem with globalisation. In this sense, although globalisation is inevitable, an inquiry into the fairness of its operation in a unidirectional manner and against the sovereign interests of developing states needs to be carried out. Indeed as countries engage in close interrelationship on matters of goods, services, trades, business, man power, technology and communication, closer attention needs to be paid to the influx of various extraterritorial laws. The excessive reaches of these legislations may have to be nipped in the bud.

Developed countries are usually engaged in providing technological, energy and infrastructural services to developing countries. At the same time, developing countries allow investments by these various multinational corporations.² As a result

¹ Wilson Center, 'The U.S.-Africa Leaders' Summit One Year On: Progress, Challenges, and the Way Forward for Economic Relations' (10 September 2015) < <https://www.wilsoncenter.org/event/the-us-africa-leaders-summit-one-year-progress-challenges-and-the-way-forward-for-economic>> accessed 10 September 2015

² On 23rd May 2014, Ms. Penny Pritzker (The United States Secretary of Commerce) stated that Nigeria now tops the list of the investment for American investors. Recently, over \$480m power deal was signed. See Crusoe Osagie, 'Nigeria Now US' Top Investment Destination, Says Commerce Secretary' (*This Day Live*, 23rd May 2014) <<http://www.thisdaylive.com/articles/nigeria-now-us-top-investment-destination-says-commerce-secretary/179209/>> accessed on 14 August 2015; Also, five European Union Member Countries-France (38 per cent), Germany (8 percent), Belgium (8 per cent) and the U.K.(31 per cent) accounted for over 80 per cent of the EU's share of FDI stock in the Sub Saharan region of Africa. See Amy Copley, Fenohasina Maret-Rakotondrazaka and Amadou Sy, 'The U.S. – Africa Leaders' Summit: A Focus on Foreign Direct Investment' (*Brookings*, 11 July 2014) <<http://www.brookings.edu/blogs/africa-in-focus/posts/2014/07/11-foreign-direct-investment-us-africa-leaders-summit>> accessed on 11 July 2015

of this symbiotic relationship, legislation has become fluid across borders but it appears to come from abroad into Africa and not vice versa. The purpose of foreign legislation is to ensure optimum protection of national and political interests of certain countries. The aggressive pursuit of these interests can cause powerful governments to freely create legislations that are intrusive. It is argued here that recent anti-bribery legislations are an example of this intrusion. Foreign anticorruption legislations have been criticised for their intrusive nature. Therefore, as the territory of ECOWAS states are fertile for construction, development and exploration, especially in the sectors of oil, gas, gold, diamonds and energy, the ECOWAS community needs to pay significant attention to the creeping effects of those laws that have the potential of diluting the sovereignty and jurisdictional competence of the member states. The West has paid rapt attention to the effects of foreign bribery on their business by creating their own respective extraterritorial laws. ECOWAS community states may need to strengthen their own community laws not only to adequately protect their territories from corruption as well but to also protect against excessive external intrusion in their legislative spaces under the guise of extraterritorial legislation from outside the region. It is significant to note that the West has experienced little or no attempt at extraterritorial application of laws from the ECOWAS region. They have indeed experienced little problems in this direction from anywhere else because they pay close attention to the principles of jurisdiction and sovereignty that are the bedrock of democratic states.

It is pertinent to assert that this dissertation is not about denying the significance of extraterritorial application of national anti-bribery laws. The study also is not about underrating the importance of anti-corruption laws. However, it is important to point out that some of the emerging legislation from a few western states in the anti-corruption field deeply challenge other states' jurisdiction and sovereignty due to their utter intrusive nature. The FCPA and the UKBA are significantly relevant to highlighting this issue and this chapter will strive to critique the issue.

4.1 Involvement of the ECOWAS Community in the Global Fight against Bribery and Corruption

According to the *Business Dictionary*, “globalisation is simply defined as the worldwide movement toward economic, financial, trade and communications integration.”³ It implies the opening of nationalist and local views to a broader outlook of an interconnected and interdependent world with free transfer of goods, capital and services across national frontiers.⁴ Harrell and Woods provide a significant assertion to the understanding of globalisation. This is that globalisation is a “process of increasing interdependence and global enmeshment which occurs as money, people, images, values and ideas flow ever more swiftly and smoothly across national boundaries”.⁵ For instance, the dealings of multinational corporations in the global village represent an example of the forces of globalisation. Also, the operations of these corporations contribute to the increasing process of globalisation. Although these definitions happen to paint globalisation as a process which fosters development through interdependence,⁶ however the process of globalisation has been criticised as a process, which accommodates and fosters the “surrender of power to the corporations”⁷ and keep “poorer nations in their place.”⁸ The global fight against foreign bribery is the global regulation of actors – the giver and receiver of bribes. Most giver of bribes are MNCs while most receivers are officials of developing states. It is pertinent to state that the US can mobilise coercion mechanisms that are not available to weaker actors like community groups. Actors with large markets can impose trade sanctions.⁹

³ The Business Online Dictionary, ‘What is Globalisation?’ <http://www.businessdictionary.com/definition/globalization.html> accessed on 18 July 2015

⁴ Ibid

⁵ Samuel M. Makinde and F. Wafula Okumu, *The African Union: Challenges of Globalisation, Security, and Governance* (Routledge, 2008) 3

⁶ Simon Jeffery, ‘What is Globalisation? Simon Jeffery Explains the Origins and Meaning of the Now Ubiquitous Term’ (*The Guardian*, 31 October 2002) http://horarioscentros.uned.es/archivos_publicos/qdocente_planes/306130/globalisation.pdf accessed on 20 April 2015

⁷ Ibid

⁸ Ibid

⁹ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000) 4-6

The globalisation of business cannot function without global business regulation.¹⁰ Hence, the clamour to regulate the bribery of foreign officials in IBT is understandable as it impedes fair competition as well as distorts economic growth and development.¹¹ The US in particular takes the lead in the global fight against bribery and corruption so as to mitigate its impact on IBTs.¹² Previous laws on global business regulation provide a history of the relegation of least developed and developing countries on the regulation ladder.¹³ This attitude has crept into the global regulation of foreign bribery in IBTs. For the process of globalisation to function, regulation is essential, hence global business regulation is integral to the preservation of business globalisation.¹⁴ Globalisation has been considered as a tool for ordering the states and people's lives.¹⁵ For the purpose of this dissertation, this ordering can be defined as the regulation of global business through the creation of laws. An example of this regulation is that of the bribery of foreign officials in IBTs.

Developing countries see a precarious uncertainty in regulation of business. For now, the OECD Convention on Combating Bribery of Foreign Public Officials in IBT, as explained in chapter 3 of this dissertation, is a guiding framework to various legislations on the bribery of foreign officials in IBTs. The negotiating power and influence of developed countries and economies on OECD operations dwarfs the influence of many developing countries. This brings about continual opposition to vigorous investment as a WTO agenda item. However, developing countries prefer to have their say within WTO rather than OECD where they are less represented.¹⁶

¹⁰ Philipp Pattberg, 'The Transformation of Global Business Regulation' (2006) Global Governance Working Paper No 18, 2 <<http://www.glogov.org/images/doc/WP18.pdf>> accessed on 4 April 2016

¹¹ Patrick Glynn, Stephen J. Kobrin and Moises Naim, The Globalisation of Corruption in Kimberly Ann Elliott (ed) *Corruption and the Global Economy* (Institute for International Economics 1997) 6-9

¹² Frits F. Heimann, 'Combating International Corruption: The Role of the Business Community' in Kimberly Ann Elliott (ed) *Corruption and the Global Economy* (Institute for International Economics 1997) 147-200

¹³ Eswar Prasad *et al*, 'Effects of Financial Globalization on Developing Countries: Some Empirical Evidence' (2005) *Procyclicality of Financial Systems in Asia*, 201-228

¹⁴ Heimann (n 12)

¹⁵ Wendy Larner and William Walters, 'Globalisation as Governmentality' (2004) 29 *Governing Society Today* 5, 495-500; Cristina Rojas, 'Governing Through the Social: Representations of Poverty and Global Governmentality' in Wendy Larner and William Walters, *Global Governance: Governing International Spaces* (Routledge 2004) 97-100

¹⁶ Braithwaite and Drahos (n 9) 183-184

Corruption is one of the major debilitating issues facing the ECOWAS community. Corruption is not only facilitated within the community but multinational entities (corporations and organisations) also foster grand corruption in the region.

4.1.1 ECOWAS Organisation's Anticorruption Framework and Institution

The Inter-Governmental Action Group against Money Laundering in West Africa (GIABA) was established by the Economic Community of West African States (ECOWAS) Authority of Heads of State and Government in the year 2000.¹⁷ GIABA was created in response to the fight against money laundering. This institution is responsible for facilitating the adoption and implementation of Anti-Money Laundering (AML) and Counter-Financing of Terrorism (CFT) policies. Although there is no institution specifically created to govern the aspect of bribery of foreign officials, all the institutions under the domain of GIABA seek to deal with foreign bribery in one way or the other. This is because the act of foreign bribery, more often than not, has a direct relationship with other forms of corruption, especially money laundering, terrorism, and drug trafficking, amongst others.

Essentially, GIABA is responsible for "strengthening the capacity of member states towards the prevention and control of money laundering and terrorist financing"¹⁸ within the ECOWAS states. In addition, apart from member states, GIABA grants Observer Status to African and non-African States, as well as Inter-Governmental Organisations, which supports its aims, actions and objectives. These include, various organisations such as the Central Banks of Signatory States, UEMOA, regional Securities and Exchange Commissions, Banque Ouest Africaine pour le Développement (BOAD), the French Zone Anti-Money Laundering Liaison Committee, the African Development Bank (ADB), the United Nations Office on Drugs and Crime (UNODC), the World Bank, the International Monetary Fund (IMF), Interpol, WCO, the Commonwealth Secretariat, and the European Union.¹⁹

¹⁷ See Chapter Three, GIABA Report (n 27)

¹⁸ Ibid

¹⁹ Ibid

Recently, GIABA's Action Group conducted a research on the nexus between corruption and money laundering in West Africa.²⁰ The purpose of this dissertation was to better understand the connection between corruption and money laundering so as to enhance the implementation of international and regional AML standards in the region.

It is, therefore, clear to see that ECOWAS displays an appreciation of the problem of corruption within the region. The institutional provisions designed for AML also indicate an independent assessment of the legislative deficiencies and concerns of the region. It is argued here that it is in this manner that every region and country should first be allowed to deal with the problem of bribery and corruption. However, this can be problematic because some countries are reluctant to enforce their bribery laws, whilst other countries are indifferent about tackling the crime.²¹

4.2 US Extraterritorial Anti-Bribery Jurisdiction in Relation to Nigeria

Nigeria is one of the ECOWAS members plagued with corruption and its serious efforts to tackle corruption have been hampered by various challenges such as lack of political will, inadequate infrastructure and corrupt government persons. If the U.S and UK were not rigorous in their pursuit of curbing corruption in international business, the international business community would have been greatly infested with corrupt activities. However, the rigorous enforcement of these laws may be said to intrude upon the sovereignty and jurisdiction of developing countries. The intrusive rate is so high that even the slightest link with the UK or the US is capable of bringing ECOWAS citizens under these jurisdictions. This dissertation intends to show through the cases below the exercise of extraterritorial jurisdiction and the interaction between differing jurisdictions.

²⁰ Ibid

²¹ See Chapter Three, Murphy (n 18)

4.2.1 The Ibori and Buruji Affairs: Proceeds of Cooperation and Confrontation in Exercise of Transnational Jurisdiction

Extraterritorial jurisdiction is permissible under international public law when a conduct affects the citizens, nation, or interests of the nation irrespective of who commits the criminal conduct or where it was committed. These jurisdictional basis are nationality, universality, territoriality and protective principles.²²

The Nigerian state is a federation consisting of 36 states and a Federal Capital Territory.²³ Nigeria's tussle with bribery and grand corruption in its entire axis and its recent attempts to strengthen its extraterritorial jurisdiction are some of the more infamous facts of current discourse on bribery and corruption.²⁴ The suspected scale of the applications of extraterritorial laws on foreign bribery cases which occur in Nigeria is startling. There have been little or no improvements in Nigeria's capacity to tackle its bribery cases in the sense that cases which entail the performance of bribery conduct between multinational corporations and the Nigerian government officials are nearly exclusively decided by the US SEC and DOJ, or the UK's Serious Fraud Office.

Two cases of extraterritorial investigation and exercise of judicial jurisdiction typify the uneasy state of cooperation between Nigeria and her closest developed state partners in political and economic terms. These are the *Ibori*²⁵ and *Buruji*²⁶ cases.

²² See Chapter Two, Raustiala (n 11); *Lotus* (n 53); Kaczorowska (n 51); Shaw (n 55)

²³ The Constitution of the Federal Republic of Nigeria 1999 provides in s3(1) that there shall be 36 states in Nigeria, which are, Abia, Adamawa, Akwa Ibom, Anambra, Nauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe, and Zamfara

²⁴ Nigeria demanded Halliburton to pay fines due to bribes given to his officials. The recent meeting with the President of Nigeria on the issue of combating corruption in the Nigerian Justice System assented the fact that the extraterritorial application of the Nigerian anti-corruption laws should be strengthened see Marcus Cohen, David Elesinmogun and Obumneme Egwuatu, 'Will Nigeria Take Another Bite?' (*FCPA Blog*, 4 August 2011) < <http://www.fcpablog.com/blog/2011/8/4/will-nigeria-take-another-bite.html> > accessed 17 May 2015. FCPA applications and "settlements based on bribery of Nigerian government officials have been commonplace in recent years" See Daniel Agbibo, 'One Step Forward, Two Steps Back: The Political Culture of Corruption and Cleanups in Nigeria' (2014) 8 *Central European University Political Science Journal* 3

²⁵ Estelle Shirbon, 'Corrupt Nigeria Governor Gets 13-year UK Jail Term' (*Reuters*, 17 April 2012) <<http://www.reuters.com/article/britain-nigeria-ibori-idUSL6E8FH3J820120417>> accessed on 19 July 2015; 'U.S. Restraints More Than \$3 Million in Corruption Proceeds Related to Former Governor of Nigeria' (*Department of Justice*, 23 July 2012) <<http://star.worldbank.org/corruption->

This dissertation will discuss these before it delves into some other leading convictions which were based on facts that occurred in Nigeria but employed criminal jurisdiction being exercised abroad, principally in the US.

With the way America has summoned the extradition of various Nigerian officials like Buruji Kashamu,²⁷ and the UK summoned the extradition of James Ibori, and eventually getting him into Britain via an arrest in the United Arab Emirates (UAE), there is clearly a political will to increasingly exercise US and UK jurisdiction over Nigerians in high office. The pertinent question then whether such exercise of jurisdiction can happen the other way round.

The call for the extradition of the Nigerian Senator Buruji Kashamu²⁸ was one of the most controversial extradition calls made in recent history. For over 20 years, Senator Kashamu has allegedly committed various grand offences, including drug dealing and other corrupt activities. Consequently, he was labeled as a drug king-pin in the US. As a matter of fact, his role as a drug baron was scripted into a popular TV series 'Orange is the New Black'.²⁹ The request for his arrest and extradition led to much controversy within the Nigerian legal, political, and social arenas. The crucial

cases/sites/corruption-cases/files/Ibori_US_Asset_Restraint_DOJ_PR_Jul_23_2012_2.pdf> accessed on 23 February 2017; 'Ibori Gets 13 years in Jail' (*Premium Times*, 4 April 2016) <<http://www.premiumtimesng.com/news/4682-ibori-gets-13-years-in-jail.html>> accessed on 4 April 2016

²⁶ *United States v Buruji Kashamu* (2011) No. 10-2782 <<https://lettersblogatory.com/wp-content/uploads/2011/10/Kashamu.pdf>> accessed on 3 June 2015

²⁷ 'Why The US Government Is After Buruji Kashamu' (*Sahara Reporters* New York, 11 January 2014) <http://saharareporters.com/2014/01/11/why-us-government-after-buruji-kashamu> accessed on 7 July 2014

²⁸ Senator Kashamu was said to be a notorious drug baron who made his fortune in distributing heroin and narcotics in the U.S. during the 1990s. See Micheal Abimboye, 'Fugitive Senator-Elect, Kashamu, Hid in Toilet For 6 Days During NDLEA Raid – Lawyer' (*Premium Times*, 05 June 2015) <http://www.premiumtimesng.com/news/top-news/184397-fugitive-senator-elect-kashamu-hid-in-toilet-for-6-days-during-ndlea-raid-lawyer.html> accessed on 2 July 2015; 'Senator Buruji Kashamu's Extradition Terminated By Nigerian Court' (*Sahara Reporters* New York, 01 July 2015) <http://saharareporters.com/2015/07/01/senator-buruji-kashamu%E2%80%99s-extradition-terminated-nigerian-court> accessed on 02 July 2015. Also, Kashamu was named by the U.S as a drug Kingpin who smuggled drugs through Chicago's O'Hare International Airport. Several segments of the country have been arguing for an outright extradition of the drug Kingpin to the U.S. The court,²⁸ for instance, restrained the Nigerian Drug Law Enforcement Agency (NDLEA) in their attempt to abduct him for extradition to the United States. See 'Court to Rule on Kashamu's Extradition Proceedings Against July 1' (*This Day Live*, 25 Jun 2015) <http://www.thisdaylive.com/articles/court-to-rule-on-kashamu-s-extradition-proceedings-against-july-1/213098/> accessed on 02 July 2015; 'NDLEA Battles Buruji Kashamu Again' (*The News*, 22 September 2015) <http://thenewsnigeria.com.ng/2015/09/ndlea-battles-buruji-kashamu-again/> accessed on 23 September 2015

²⁹ Ibid

question here was whether the US possessed the extraterritorial jurisdiction to request extradition of an 'elected' Nigerian senator to the US

It is however clear given the gravity of the allegations against Buruji Kashamu, that the US possessed extraterritorial jurisdiction over him, even though he was in Nigeria.³⁰ The offender was in essence a fugitive from justice who escaped the United States for the comfort of his own country. The basis of this jurisdictional power can be classified under the territoriality principle which provides for a state to have jurisdiction on any offence the facts of which ensued within the territory of the state.³¹

The greatest short coming in the conduct of affairs by the United States, however was its refusal to present adequate evidence of the crimes he was accused of and that were linked to him. Indeed, ascertaining the existence of extraterritorial jurisdiction is very much based on following due process. The process through which the US is ascertaining her jurisdiction in this case is questionable, because the process does not only show a bias to benefit the interest of the US, it shows the stark unfairness in the regulation of corruption. For there to be an extradition, the requesting state must provide documents which include a request for extradition. In this case however, the documents provided did not include a request from the American government. The US officials also had perpetuated prosecutorial wrongdoing as stated by the U.K. When this fact came to the attention of a British court, they criticised the US government for choosing to suppress the report, and punished US by annulling an order that had earlier been made against Kashamu.³²

The Ibori case is another example of the principle of extraterritorial jurisdiction applied to criminal conduct. The jurisdiction in this case is concurrent. Ibori had

³⁰ *Buruji Kashamu v U.S Department of Justice et-al* No. 16 - 1004

³¹ See Chapter Two

³² David Heinzmann, 'Orange is New Black' Drug Case Still Open in Chicago Federal Court' (*Chicago Tribune*, 14 November 2013) <http://articles.chicagotribune.com/2013-11-14/news/ct-met-orange-new-black-20131114_1_piper-kerman-piper-chapman-drug-case> accessed on 18 July 2015; Kingsley Omonobi-Abuja, 'Kashamu was arrested, tried in UK court – Police' (*Vanguard*, 18 June 2015) <<http://www.vanguardngr.com/2015/06/kashamu-was-arrested-tried-in-uk-court-police/>> accessed on 20 July 2015; Abiodun Oluwarotimi, 'UK Writes IGP Arase Over Kashamu's Extradition' (*Leadership*, 18 June 2015)

laundered Nigeria's money but was acquitted in the Nigerian criminal system.³³ However, when he fled to the UAE, the UK extradited him for the same offence and he was prosecuted. James Ibori was both a Nigerian citizen and a UK citizen, therefore, the UK had jurisdiction over him. The UK exercised its extraterritorial jurisdiction on the basis of nationality. Scotland Yard had been investigating Ibori's case since 2007 over suspicions that he systematically funnelled Nigerian state funds into his bank accounts and laundered tens of millions of pounds in London via offshore firms. Recently, it was stated that Bernard Hogan-Howe (head of the London Metropolitan Police) will face examination from the UK parliamentarians over assertions that Scotland Yard officers investigating James Ibori were engaged in a deliberate attempt to cover-up.³⁴ There have been claims by Stephen Kamlish QC of 'compelling' facts of a corrupt activity which ensued between police and private investigators employed by Ibori, who is serving a jail sentence in London.³⁵ These investigators allegedly rewarded the officers up to £20,000 in order to possess access to inside information about their investigation.³⁶

In addition, charges against Bhadrash Gohil, the lawyer who made the allegations of bribery against the Met Police officers, were immediately cleared after the Crown Prosecution Service (CPS) was forced to release papers it originally held did not exist.³⁷ The CPS will be forced to face serious questions and scrutiny over the cover-up. Perhaps, more disturbing is the allegation that the UK's Department for International Development (DFID) financed the Met investigation of Ibori, even though the department had invested huge sums in Ibori's businesses.³⁸ The DFID would be able to receive £25 million from James "Ibori's asset when processes of

³³ Estelle Shirbon, 'Corrupt Nigeria Governor Gets 13-year UK Jail Term' (*Reuters*, 17 April 2012) <<http://www.reuters.com/article/britain-nigeria-ibori-idUSL6E8FH3J820120417>> accessed on 19 July 2015;

³⁴ Charles Okogene, 'Ibori: Growing Calls for Independent Investigation of Bribery Allegation Against Met Police' (*Independent*, 24 January 2016) <<http://independentnig.com/2016/01/iboris-conviction-maybe-quashed-call-independent-investigation-bribery-allegation-met-police-mounts/>> accessed on 20 February 2016

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ Okogene (n 34); Mark Easton, 'Met Police 'Corruption' Claims lead to Calls for Investigation' (23 January 2016) <<http://www.bbc.co.uk/news/uk-35394085>> accessed on 20 February 2016

³⁸ Mark Tran, 'Former Nigeria State Governor James Ibori Receives 13-Year Sentence' (*Guardian*, 17 April 2012) <<http://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced>> accessed on 4 April 2016

seizing them were complete.”³⁹ The DFID denied the accusation of conflict of interest in the issue. Even though the DFID admitted funding the enquiry into Ibori’s case and earlier on funding some business contracts and transactions with him. However, DFID claimed all these do not sum up to a conflict of interest.⁴⁰ It is pertinent to state that this evident conflict of interest cannot be so simply dismissed or minimised by a sector which had at least on another incident wrongly exposed whistle blowers about grand corruption in Nigeria relating to its ventures and activities in Nigeria. Mr Gohil lamented: “I was a whistle-blower and instead of investigating what I had uncovered and put forward, I was persecuted.”⁴¹

Extradition treaties are of course meant to be beneficial to the parties but often times, they are usually beneficial to the stronger states. An example of this may even be seen in the criticism of the extradition of four NatWest bankers from the United Kingdom to the United States.⁴²

The rigorous pursuit and request of Kashamu (even after he had been tried twice) shows the tenacity with which a stronger state pursues a high official in a 'weaker' state whereas, on the other side of the coin it is rare and difficult for a 'weaker' state to summon an extradition of a high-ranking official in a 'stronger' state.

Examples of trivial responses given by stronger states in their quest for extraterritorial application of weaker states’ national law undermines the sovereignty and jurisdictional competence of weaker states like Nigeria in the regulation of corruption in the international sphere. This is evident in the Halliburton case discussed below.

In the case of Halliburton, the Nigerian government requested the extradition of Dick Cheney due to his involvement in the popular bribery scandal operated by the TSKJ joint venture with Nigerian public officials. Clearly, the Nigerian government

³⁹ ‘Ibori: British Lawmakers to Question Met Chief Over Bribery Allegation’ (*Vanguard*, 15 February 2015) <<http://www.vanguardngr.com/2016/02/ibori-british-lawmakers-to-question-met-chief-over-bribery-allegation/>> accessed on 4 April 2016

⁴⁰ Ibid

⁴¹ Okogene (n 34)

⁴² ‘Natwest Three Face Jail Sentence’ (*BBC News*, 29 November 2007) <<http://news.bbc.co.uk/1/hi/business/7118305.stm>> accessed on 2 April 2016

possessed the basis to employ her extraterritorial jurisdiction on the case based on territoriality principle. The territoriality principle provides for the authority of a state to enforce its laws on corrupt conduct performed in its territory. In this case, the TSKJ bribed Nigerian officials with billions of dollars in order to procure a massive oil and gas contract. Needless to say, it has been agreed by scholars that corruption erodes trust in governance and is both detrimental to the social, economic and political well-being of the country.

It is in conformity with the arguments of this dissertation that when the Nigerian government requested the extradition of Dick Cheney, Cheney's lawyer, Terrence O'Donnell, stated that an investigation was conducted by United States federal prosecutors and "found no suggestion of any impropriety by Dick Cheney in his role as the CEO of Halliburton".⁴³ The US did not cooperate with the nation's quest to further investigate one of the biggest bribery scandals of the 21st Century. Clearly, the suggestion is that once the US government agencies take a contrary view about an allegation, there will be a lack of cooperation even in a case of concurrent jurisdiction over a particular investigation. Unfortunately, this kind of luxury eludes weaker states in high profile cases and they are often bullied into cooperation by the diplomatic might of the United States. This situation undoubtedly undermines the sovereignty and jurisdictional competence of requesting states from the ECOWAS region.

Consequently, challenges to the traditional notion of international law systems of sovereignty and nationality principles of jurisdiction can be seen in increasingly varied degrees, depth and density of rules propagated by international governmental organisations. These organisations are becoming more insistent in relation to individual sovereign states both in rule creation and in execution. Administrative agencies such as the SEC, DOJ, SFO, national courts, and possibly even legislative bodies are increasingly functioning as parts of enforcement and cooperative

⁴³ 'Dick Cheney to be Charged in Nigeria Corruption Case' (*The Guardian* 2 December 2010) <http://www.theguardian.com/world/2010/dec/02/dick-cheney-halliburton-nigeria-corruption-charges> accessed on 20 June 2015

regulatory systems, and no longer solely as province based national institutions.⁴⁴ What this means is that the Nigerian Justice system, on the basis of territoriality principle, has the right to summon Dick Cheney for investigatory purposes on their engagement with the bribery of the Nigerian officials. The chances of this request being granted are slim, as it is in the history of the American justice system to decide cases relating to its territory or persons. The present regulatory framework in the enforcement of extraterritoriality on corruption tilts toward the protection of the interests of few elite states, and this in turn undermines the authority of the states to regulate its affairs and contribute to curbing corruption in the international sphere.

Furthermore it may be said that the present framework gives more powerful states the exclusive power to decide the intensity, degree and extent of the application of extraterritoriality in corruption cases. In other words, the effect of this on the international system is biased towards the protection of a few elite states' interests. This skewed protection of the interests of specific elite states does not encourage regulatory co-operation and integration between developed and developing countries. This dissertation asserts that a universal jurisdictional approach to tackling transnational corruption would ensure the equal exercise of state's jurisdiction over bribery and corruption whilst upholding the landmark principles of sovereignty and jurisdiction based on equal statehood in international law.

4.2.2 The case of Halliburton/TSKJ

It is important to highlight some other leading investigations and cases which have yielded much fruit in terms of fines and convictions in favour of the United States. The particular cases discussed here cover a decade-long scheme to bribe Nigerian government officials to obtain Engineering, Procurement and Construction (EPC) contracts to build Liquefied Natural Gas (LNG)⁴⁵ facilities on Bonny Island. TSKJ⁴⁶

⁴⁴ Philip Alston, 'The Myopic of the Handmaidens: International Lawyers and Globalisation' (1997) 3 European Journal of international Law 435. Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9(4) European Journal of International Law 599, 611

⁴⁵ Nigerian LNG Limited is owned by the Nigerian National Petroleum Corporation (NNPC), Cleag Limited (an affiliate of Total, formerly Elf Aquitaine), Shell Gas B.V. and Agip International B.V. (an affiliate of ENI SpA of Italy) See 'Nigeria NLG Limited' <http://www.nlng.com/nignlng/home.aspx> accessed on 05 July 2015

⁴⁶ TSKJ is a private limited liability company registered in Madeira, Portugal whose members include Technip SA of France, Snamprogetti Netherlands B.V., an affiliate of ENI SpA of Italy, M.W. Kellogg

was a four-company joint venture (JV) that was awarded four EPC contracts by NLNG between 1995 and 2004. NNPC was the largest shareholder of NLNG (49%). There was conspiracy amongst the partners and others to violate the FCPA by bribing a range of Nigerian officials; a sum of \$180 million was given in exchange for lucrative contracts.⁴⁷ In related proceedings, U.K. Citizens, Wojciech Chodan and Jeffrey Tesler were charged with participation in the bribery scheme in an indictment unsealed on 5 March 2009. According to the indictment, Chodan was a former salesperson and consultant to KBR's U.K. subsidiary while Tesler was hired in 1995 as an agent of the JV. According to the indictment, Tesler⁴⁸ was the agent hired to bribe high-level Nigerian government officials; he was paid \$132 million to use to bribe these officials. Allegedly, Tesler wire transferred bribe payments to or for the benefit of various Nigerian government officials, NNPC, NLNG, including officials of the executive branch, and for the benefit of a political party in Nigeria.

A penalty of \$579 million fine was declared, with KBR to pay a \$402 million criminal fine and parent, KBR Inc. and former parent, Halliburton, jointly agreed to pay \$177 million in disgorgement of profits in a related SEC proceeding (not to Nigeria). An independent compliance system was assigned to monitor and review the design and implementation of KBR's compliance program for three years, with adequate report to KBR and DoJ.

4.2.3 SEC v ABB⁴⁹

An enforcement action was filed against ABB Ltd, a company headquartered in Switzerland. This company known for its provision of power and automation technologies was said to have violated the anti-bribery provisions of the FCPA. It happened that ABB's US and foreign subsidiaries offered bribes of \$1.1 million to

(which became Kellogg, Brown and Root [KBR] after Halliburton acquired M. Kellogg) of the US, and JGC Corporation of Japan. Each of this corporations own 25 per cent of the venture. Halliburton Co., Annual Report (Form 10-K), at 22 (1 Mar, 2005) www.sec.gov/Archives/edgar/data/45012/000004501205000055/0000045012-05-000055-index.htm, accessed on 04 August 2015

⁴⁷ Press Release, Halliburton Co., Halliburton Announces SEC Investigation Regarding Nigerian Joint Venture (11 June, 2014) <https://www.sec.gov/news/press/2009/2009-23.htm>, accessed on 05 May 2015

⁴⁸ Allegedly, Tessler controlled JV's series of consulting contracts with a Gibraltar corporation

⁴⁹ *Sec v ABB Ltd.*, 1:04-cv-01141 (D.D.C. 2004)

Nigerian government officials, in order to assist ABB to obtain and retain business in Nigeria. Although no precise activity on the part of ABB or its subsidiary is alleged to have ensued in the United States, ABB was charged for violating the FCPA's anti-bribery provisions of Section 30A of the (Securities Exchange Act of 1934). This case reiterates the concern that the U.S law enforcement bring "such legal action to bear against foreign nationals and foreign corporations for conduct taking place abroad".⁵⁰ Indeed the main justification why President Jimmy Carter signed the FCPA into law was to curtail the capacity of US business interests to bribe foreign officials to retain and secure business.⁵¹ Originally, the Act was only applied to the US domestic concerns; Congress was wary of applying the FCPA even over "subsidiaries of American Corporations",⁵² much less completely foreign-owned corporations, their subsidiaries, and even their agents simply because of the "inherent jurisdictional, enforcement and diplomatic difficulties".⁵³ The ABB's case only had a minute contact with the FCPA, and the FCPA decided to fine the company a sum of \$5.9 million dollars in disgorgement and prejudgement interest, including a \$10.5 million penalty for the offence of bribery.⁵⁴ The FCPA's jurisdiction on ABB case greatly interferes with the sovereignty of the Nigerian jurisdiction. Nigeria should have decided this case. Clearly, recent enforcement action indicates the SEC's dedication to aggressively use all viable legal premises to resolutely enforce the FCPA.⁵⁵

4.3 The US Extraterritorial Anti-bribery Jurisdiction in Relation to Benin

The Republic of Benin is one of the Francophone, ECOWAS states. It is considered one of the most stable democracies in Africa. Benin has undergone immense

⁵⁰ Daniel Patrick Ashe, 'The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. FCPA' (2005) 73 Fordham L. Rev. 2897, 2898

⁵¹ Richard L. Cassin, 'The 'band of brothers' who created the FCPA' (*FCPA Blog*, 15 December 2014) < <http://www.fcpablog.com/blog/tag/jimmy-carter>> accessed on 02 September 2015

⁵² See Chapter Three, Sokenu (n 103); Ashe (n 103) 2899

⁵³ House of Representatives, Conference Report, 'Foreign Corrupt Practices' (6 December 1977)

⁵⁴ *SEC v Abb Ltd.*, Accounting and Auditing Enforcement Act Release (2004) < <http://www.sec.gov/litigation/litreleases/lr18775.htm>> accessed 2 June 2015

⁵⁵ Sokenu commented that the case of *SEC v KPMG Siddaharta Siddaharta and Harsono and Sonny Harsono*, S.D. Texas, No. H-01-3105 (11 September 2001) marked the first case where SEC would file "charges against a foreign company for aiding and abetting a U.S. company" to violate the anti-bribery provisions of the FCPA. He stated, this is a staunch rigorous application of the FCPA with a devastating effect. See Chapter Three, Sokenu (n 103)

economic and political changes in recent times.⁵⁶ However, economic transformation has occurred more unequally than political transformation. Although the basic institutional structure for a market economy has been progressively strengthened, the economy remains dominated by the informal sector.⁵⁷ The government's dedication to fighting corruption and attracting investment has resulted in a number of regulations, laws and measures to develop the business climate, although several obstacles to attracting foreign investors remain. The most important obstacle, according to many observers, is the existence of widespread corruption in the country - both petty corruption (in form of facilitation payments and small bribes), and grand corruption (government, profitable contracts). Despite this, there have been encouraging developments in relation to inward investment and some progress in tackling corruption in Benin. Institutional platform setup to fight corruption is very well established and the nation's strategy to curb corruption has been praised by various international observers.⁵⁸

Business executives rated the diversion of public funds to companies, individuals, or groups due to corruption a score of 2.5 on a 7-point scale (1 being 'very common' and 7 'never occurs').⁵⁹ They also rated favouritism of government officials when deciding companies and contract a score of 2.8 on a 7-point scale (1 being 'always show favouritism' and 7 'never show favouritism').⁶⁰ The World Bank's Enterprise Surveys of 2009 accounted that 59% of the surveyed businesses testified that they expect to give 'gifts' in order to secure a government contract.⁶¹ The average price of a gift estimated to secure a government contract is a "little less than 5 percent of the value of the contract."⁶² The World Bank and African Development Bank reported that 81 percent of business managers identify bribery and corruption to occur very regularly in the public procurement process⁶³ without following due diligence.

⁵⁶ 'Democracy in Benin: Achievements and Challenges' (*Research and Communication on Foreign Aid*, August 2012) <http://recom.wider.unu.edu/article/democracy-benin-achievements-and-challenges> accessed on 6 July 2015

⁵⁷ Benin Country Profile, 'Business Corruption In Benin' (*Business Anti-Corruption Portal*) <<http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/benin/snapshot.aspx>> accessed on 6 July 2015

⁵⁸ *Ibid*

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² *Ibid*

⁶³ *Ibid*

4.3.1 United States v. Titan Corp.⁶⁴

To illustrate the impact of international anti-corruption legislation on Benin the *Titan* case may be considered. A US defence contractor, Titan Corp, obtained the right to create and operate a wireless telephone system in Benin.⁶⁵ Titan employed Steven Lynwood Head as program manager of business activities in Benin, and later he was appointed as CEO of Titan Africa, Inc. Titan made payments to the government for the support of Benin's incumbent president re-election and campaign processes. More than \$3.5 million was paid as bribes to the President⁶⁶ so as to enable Titan Company to develop a telecommunications project in Benin.⁶⁷ Titan was guilty of "three felony counts of violating the FCPA."⁶⁸ In addition, a criminal fine of \$13 million and a civil penalty of \$2.5 million was paid to DOJ and SEC respectively.⁶⁹

One of the major arguments against the practise of extraterritoriality in combating the bribery of foreign officials is the possible interference which arises in respect to the sovereignty and jurisdictional competences of other states.⁷⁰ The present regulatory framework, arguably, has been seen as one which is imperialistic in nature. As this dissertation has reiterated severally, the basis of jurisdiction clearly gives a state the power to ascertain its sovereignty whether or not the criminal activity occurred in its territory. Evidently, the US and Benin had concurrent jurisdiction on this case.⁷¹

In *Titan*, there was no record that the government or the national institutions of Benin engaged in any investigatory processes or prosecution of Titan Corp MNC or the President of Benin. Clearly, the argument that extraterritoriality interferes with the sovereignty and jurisdictional competence of states is not out rightly logical and as identified in Chapter Two of this dissertation, the fact that extraterritoriality is only carried out by a few states does not necessarily mean that the practise is not legitimate, given the process or procedure is fair. In this regard, Elizabeth Spahn argued that it is ethically appropriate and required that states should employ their legal regimes to combat the devastating impact of global corruption in international

⁶⁴ *United States v. Titan Corp.*No.05-cr-314 (S.D. Cal. 2005)

⁶⁵ *Ibid*

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ See Chapter Two

⁷¹ See Chapter Two on the basis of jurisdiction

business.⁷² Both the bribe givers and bribe takers should be subject to rigorous investigation and penalties. In *Titan*, only the supply side of bribery was dealt with.

We should be reminded that at the centre of critical legal theory is the argument that law is used as a tool to oppress and maintain hierarchy. When law will work for the interest of developed states legal principles will be strictly applied. However, when it will be expected to work vice versa it is often the case that influence, power and other political considerations will be brought in to negate the expectations of the ordinary workings of the law. An example of this in the area of jurisdictional powers over criminal conduct is the curious case of Mark Thatcher and the coup plot he sponsored in the small African state of Equatorial Guinea.⁷³ Extradition processes to investigate how he got involved with the arrested coup plotters and all indications that he had sponsored the coup d'état (here in after, coup) in Equatorial Guinea. The prosecutors of Equatorial Guinea requested international arrest of Margaret Thatcher's son.⁷⁴ The request was apparently refused. The precise motive for the coup attempt was to corruptly seize the benefit of the 350,000 barrels a day pumped into the international market by the small nation which actually is the number three oil producer. The coup was therefore, to be for the purpose of taking control of Equatorial Guinea, one of Africa's largest oil producer.

It emerged that Mark was one of the key players that facilitated the coup. The extradition was perhaps not successful because he was bailed out by high political connections in the British establishment. It is necessary to reiterate our position therefore, that the logic and structure of law often comes about as a result of power relationships. Extradition in international law was created so that states would freely have access to regulating affairs they would not normally have access to especially if there is no extradition treaty between the states and a grave crime which impacts the host state had been committed. The presence and subjective nature of extradition

⁷² See Chapter Three, Spahn (n 107) 199-200

⁷³ Jonathan Brown, 'Equatorial Guinea Demands Interview with Mark Thatcher' (*Independent*, 27 August 2004) <<http://www.independent.co.uk/news/world/africa/equatorial-guinea-demands-interview-with-mark-thatcher-558040.htm>>I accessed on 20 February 2017; *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C)

⁷⁴ Max Du Plessis, 'The Thatcher Case and the Supposed Delicacies of Foreign Affairs: A Plea for a Principled (and Realistic) Approach to the Duty of Government to Ensure that South African Abroad are not Exposed to the Death Penalty' (2007) 20 South African Journal of Criminal Justice 2, 143-148

treaty makes it difficult to properly carry out justice where there has been an injustice.

The cases discussed above are examples of cases related to the ECOWAS community. These particular cases are treated so as to engage in a nuanced discussion of the effects of extraterritorial anti-bribery laws on the principles of sovereignty and jurisdictional competence of ECOWAS states.

4.4 Critique of the Increasing Phenomena of Exercise of Developed States' Jurisdiction on Multinationals and their Subsidiaries Operating in Developing Countries

The cases analyzed above provide a background understanding to the workings of multinational corporations in developing countries. Multinational corporations, in their nature, operate in several countries.⁷⁵ They operate by establishing their subsidiaries in countries of interest.⁷⁶ However, when bribery occurs between officials of the corporations and local officials of a country (foreign officials), the anti-bribery legislations of the home country of the multinational corporations are usually effected on the multinational corporations.⁷⁷ For example, Titan Africa Ltd is a subsidiary of Titan Corp (US) which operates in Benin and ABB Ltd has a subsidiary which operates in Nigeria. All these subsidiaries provide services in relation to oil industry equipment, operate wireless and network services, and provide power and automobile technologies respectively.⁷⁸ The services provided by these subsidiaries are important to the economic interests of many developing states.⁷⁹ However, bribery and corruption have served as cankerworms, which destroy the benefits that ought to have accrued to the developing states. Indeed in many cases apart from lost revenues to the host states multinational enterprises' corruption indeed has been noted to encourage abuse of office and breaches of human rights of local citizens.⁸⁰

⁷⁵ Sanjaya Lall, *The Multinational Corporation* (The Macmillan Press 1980) 3-11; Peter T. Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 121-124

⁷⁶ Grahame F. Thompson, *The Constitutionalisation of the Global Corporate Sphere* (OUP 2012) 35-39

⁷⁷ *Ibid*, 139, 55, 388-398

⁷⁸ Lall (n 75) 10-11

⁷⁹ Magnus Blomstrom and Ari Kokko, 'Multinational Corporations and Spillovers' (1998) 12 *Journal of Economic Surveys* 3, 247-253

⁸⁰ *Ken Saro Wiwa v. Royal Dutch Petroleum Company* 96 Civ. 8386 (KMW)(HBP); Ed Pikington, 'Shell Pays Out \$15.5m over Saro-Wiwa Killing' (*The Guardian* Nigeria, 9 June 2009) <<http://www.theguardian.com/world/2009/jun/08/nigeria-usa>> accessed 2 April 2016. The Saro Wiwa's

It has indeed become a notable feature of the United States under the exercise of its FCPA jurisdiction to impose heavy punishment against multinational corporations from around the world.⁸¹ It has unfortunately also become clear that states like the U.K. and the US have imposed these fines and punishments solely to the advantage of their economies. This is in the sense that despite the fact that the harm is often done against weaker states, the huge fines have nearly always accrued only to the investigating more powerful state. Whether this mode of decision is consistent to the principles of sovereignty and jurisdictional competence is the subject of discussion in this section of dissertation.

The argument put forward here is that, the application of national legislation to bribery incidents that ensue between multinational corporations' subsidiaries and government officials in ECOWAS states intrudes on the sovereignty and jurisdictional competence of ECOWAS members to decide cases within their states. First and foremost, it is crucial to reiterate the jurisdictional basis for territoriality and extraterritoriality as this will significantly aid the understanding of the imminent problem with the present anti-bribery legislations. To begin, one of the basis of jurisdiction is the territoriality principle.⁸² ABB subsidiary bribed the Nigerian top-level officials so as to be able to acquire contract deals. This bribery conduct happened within the Nigerian territory; the Nigerian territory possesses working bribery and corruption laws put into place to curb bribery and ordinarily, it is in their control to decide this case and apportion appropriate fines for the corporation. However, the territoriality principle is expanded to deal with instances whereby, corrupt conduct happened in America but was completed in Nigeria.⁸³ The rule states that the US can have the authority over such a case, likewise Nigeria can possess the jurisdiction over the case.

The principles of subjective territoriality and objective territoriality traditionally emanate from the landmark principles of territorial jurisdiction. In other words, any

case concerned a serious egregious human rights abuses which were committed by Royal Dutch Shell against the Ogoni people in Nigeria. The abuses included environmental degradation (indiscriminate petroleum waste dumping and exploitation). Also, this case was related to Shell's complicity with Saro Wiwa's death in Nigeria; See also John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton and Company 2013) 81-100

⁸¹ Alien Tort Statute (ATS) 28 U.D.C.s 1350. Like the rigorous enforcement of the ATS, the FCPA carries heavy punishment in form of penalties (and fines)

⁸² See Chapter Two

⁸³ See Chapter Two (The Territoriality Principle of Jurisdiction)

case that ensues within a country should be exclusively decided by the country; the country possess the authority to decide the 'activity' and persons within its territorial borders. The exception to this would be if the performance of the crime commenced in another state and the conduct is also an offence in that state. This dissertation posits that the primacy of jurisdiction is embedded in the efficacy of a country's physical territory. Unfortunately, the increasing fluidity globalisation has created has diluted the principles of jurisdiction. In order to advance this main argument, these principles should not be usurped for state's national interests hence, a further dilution.

It is repugnant to the principles of 'sovereign equality' and jurisdiction for a state to exert its jurisdiction to conduct investigations into events which completely ensued within another territory. This may also go against the principle of domestic jurisdiction by which all states have primary jurisdiction over matters occurring within their territory.⁸⁴ The norm in IBT has been that the forum state whose corporations or persons have supplied bribes to foreign officials can stretch their extraterritorial jurisdiction (subjective territorial jurisdiction) to regulate the corrupt act. However, it is argued that this practice may serve to intrude upon the sovereignty and jurisdiction of developing states to decide their domestic matters. Where clearly, in the case of businesses bribing abroad the criminal activity and most of the negative effects would have occurred within the host state by the subsidiary of a multinational corporation, it would be reasonable that the case should be decided by the host state. For this to happen, there ought to be a closer cooperation between states like the US and the UK and the developing states they have detected the activity in. The investigation ought to be cooperative and certainly the fines if any that result at the end of trials and or investigations ought to be shared between the home state of the multinational cooperation and the host state.

On the other hand developed states like the US also have their own complaints which must be taken into account. Popular assertion advocated against the US application of its extraterritorial jurisdiction after the Watergate scandal was the fact that the bribery of foreign officials places the US firms at a competitive

⁸⁴ Article 2(7) the domestic jurisdiction clause was inserted in the United Nations Charter (UN Charter) to limit even the authority of the UN in respect of disputes which are essentially within the domestic jurisdiction of the member states.

disadvantage.⁸⁵ There is also the argument that the FCPA has put American firms at a disadvantage level in international trade is questionable. Geo-Jala and Mangum argue that, "even though the enforcement has waxed and waned, there is no evidence that this enforcement has impeded US trade growth. He asserted that trade with countries formerly considered "bribe prone" has exceeded the growth of trade with non-bribe-prone countries."⁸⁶

The truth, however, is that the current approach of the United States in dealing with foreign bribery needs to be curtailed. "In most of the questionable payments investigated, American corporations had indulged in bribery to gain a competitive edge over the US firms rather than foreign ones".⁸⁷ Furthermore, this argument is faulted on the ground that 80 percent of the world's true multinationals are American corporations. A cynical but plausible argument may then be that reducing unfair competition in international business arguably simply reduces unfair competition among American firms. Better still, the US amendment of the FCPA is simply to gain hegemony over international business. Going back to history as discussed in chapter three, the FCPA initiated the OECD Convention on bribery of foreign officials. As it can be seen in recent enforcement, the FCPA is at the forefront of enforcing its anti-bribery laws in a very zealous manner. Its best investigatory expertise and experience in prosecuting bribery cases have been harnessed to gain jurisdiction over any case with a significant or even minimal contact with the US jurisdiction. To show that the US FCPA serves as a tool for creating a form of control, various other premature countries (with different legal systems, different legal orders and values and judicial histories) that are exerting their anti-bribery laws now release their jurisdictional power to the U.S to 'decide' their cases. In Innospec's case,⁸⁸ the U.K.

⁸⁵ Jennifer Dawn Taylor, 'Ambiguities in the FCPA: Unnecessary Costs of Fighting Corruption' (2001) 61 Louisiana Law Review, 267-261

⁸⁶ Macleans A. Geo-Jala and Garth L. Mangum, 'The FCPA's Consequences for U.S. Trade: The Nigerian Example' (2000) 24 Journal of Business Ethics 3, 245-246 (245-255); Some other commentators have substantiated the argument that the FCPA rigorous application does not in any way cause any business disadvantage to the U.S. corporations. See Comm. on Banking, House., and Urban Affairs, 'The International Anti-Bribery Act of 1998' (1998) S. Rep. No. 105-277; Mark Romaneski, 'The FCPA of 1977: An Analysis of its Impact and Future' (1982) 5 B.C. Int'l and Comp. L. Rev. 405, 429-430

⁸⁷ Macleans, Geo-Jala and Mangum (n 86)

⁸⁸ This case entails the bribery of foreign officials in Iraq and Indonesia by Innospec. The essence of the bribery was for Innospec to supply Tetraethyl lead. Paul Jennings and David Turner pleaded guilty to bribing these high officials. Innospec was fined \$12.7. See 'Innospec Ltd' (SFO) <<https://beta.sfo.gov.uk/cases/innospec-ltd/>> accessed on 7 March 2015; Richard L. Cassin, 'Innospec

appreciated the US agencies for their cooperation in assisting them with their first settlement; the case also had an undertone of enforcement competition between the US and U.K. with the US winning the UK on the quest for a 'split share' in the penalties.⁸⁹ The UK made a 50:50 'split share' quest based on the fact that the criminal act was orchestrated from the UK. In addition, the U.K., French, Netherlands all gave the US primacy to decide the Halliburton/TSKJ cases. The level with which states allow their cases to be decided by the US is very interesting and may be generally representative of the imperialistic practice of contemporary international relations. The *Statoil* case is equally representative of the very wide remit US jurisdiction has assumed all over the world; In this case the United States prosecuted a Norwegian corporation that had been earlier sanctioned by Norway for lesser crimes, surprisingly on the premise that the Norwegian sanctions were 'inadequate'.⁹⁰

A more complicated scenario which illustrates the specifics of subjective or objective territoriality, is the Halliburton/TSKJ. In relation to the TSKJ cases, the bribery conduct commenced in various states but was completed in Nigeria. The Halliburton/TSKJ scenario will pass the test of the territoriality principle. This asserts that, a state can claim jurisdiction over a situation which began in the territory of the forum states but was completed in another territory. The TSKJ cases began in various states including the US but were carried out through some UK agents named Chonda and Tesler; the case was completed in Nigeria, as the Nigerian officials were given millions of dollars. This case clearly passed the subjective territoriality test. However, the discussion still remains that the act occurred within the Nigerian territory so Nigeria possessed the jurisdiction to decide upon the case. The argument being advanced here is purely that even where the worst bribery scenario possible is within jurisdictional contemplation and the recipient state may not be able to decide or investigate foreign bribery cases, nothing affects the forum state to allow the

Charged in UK' (*FCPA Blog*, 26 February 2010) < <http://www.fcpablog.com/blog/2010/2/26/innospec-charged-in-uk.html>> accessed on 4 January 2015

⁸⁹ Richard L. Cassin, 'Innospec Expects Settlement' (*FCPA Blog*, 19 February 2010) < <http://www.fcpablog.com/blog/2010/2/19/innospec-expects-settlement.html>> accessed on 14 February 2015

⁹⁰ Press Release, Department of Justice, 'U.S. Resolves Probe Against Oil Company That Bribed Iranian Official' (13 October 2006), http://www.justice.gov/archive/opa/pr/2006/October/06_crm_700.html accessed on 8 July 2015; Elizabeth Spahn, 'Multijurisdictional Anti-Bribery Enforcement' (2012) 53 *Virginia Journal of International Law* 1, 22

recipient state decide, on the basis of its sovereignty and jurisdictional competence, cases relating to bribes given to the Nigerian officials. It is crucial to note that the pace with which the DOJ and SEC claim jurisdiction on a matter, that recipient state lacks the absolute capacity to head its matter in such a gesture. This step can also help tackle both the demand side and supply side of bribery.

Even US courts are beginning to assent to the fact that the congress did not intend to include non-subsidiary foreign companies under FCPA jurisdiction.⁹¹ This was evident in the court's decision on the case of *Dooley v. United Technologies Corp.*,⁹² after it examined whether it had jurisdiction to enforce the FCPA against foreign companies. After the court reviewed the legislative history of the FCPA, it concluded that the bribery that these foreign companies carried out cannot be dealt with under the FCPA jurisdiction.⁹³

Recently, it was recorded that only 4 per cent of foreign bribery fines were shared with the Nigerian government ⁹⁴ and only “3.3 percent of \$6 billion in fines were shared with developing countries whose officials accepted bribes.”⁹⁵ Questions may be asked as to whether this is proof that states ought to compensate victim states in these circumstances.

It is significant to note that other jurisdictions like France, Japan and China, amongst others have joined the bandwagon of exerting their anti-bribery laws across borders paying little or no rapt attention to the unparalleled international law concepts of sovereignty and jurisdiction of the recipient states. These barriers are indeed alarming for developing states many of which hold major problems of internal and cultural cohesion, and history of colonial as well as dictatorial military rule which makes it difficult to cope with rigorous and multiple exertion of extraterritorial jurisdiction. Now, the influx of external anti-bribery laws will result in a milieu of jurisdictional chaos and a further dilution of the principles of sovereignty. These countries will start to apply their extraterritorial jurisdiction on their subsidiaries on

⁹¹ *Dooley v. United Technologies Corp.*, 803 F. Supp. 428 (DDC 1992) 439

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ Marcus Cohen, David Elesinmogun and Obumneme Egwuatu (n 24)

⁹⁵ Julie DiMauro, 'World Bank: Developing Nations Denied Bribery Settlement Money' (*FCPA Blog*, 29 November 2013) <<http://www.fcpablog.com/blog/2013/11/29/world-bank-developing-nations-denied-bribery-settlement-mone.html>> accessed on 4 April 2015

bribery which ensued in another territory and this will be a recipe for disaster in the multi-cultured characteristics of all ECOWAS states. Not only that, compliance problems will be faced by many corporations which in turn will lead to the flight of investors thereby, causing impeded economic investment and development.

Conclusively, one of the lessons to be learnt from these experiences of the improper intrusive nature of extraterritorial laws on developing countries and the war against bribery of foreign officials is that sustained and empowered democratic governance is one of the major tools required to fight against international bribery. There will not be any successful progress in adequately fighting international bribery if ECOWAS members only have a slim door of independent democratic governance on activities which solely occurred within their states.

4.4.1 Minimal v Substantial Effects

One of the recent trends in the application of extraterritorial anti-bribery legislations is the assertion of jurisdiction over foreign bribery scenarios which possess only a minimum contact with the US territory. This kind of assertion, without the presence of any effect on the forum state, is highly intrusive to the domestic affairs of the recipient state. This assertion basically entrusts policing power to the forum states to decide on foreign affairs in a manner that is not substantiated by a real, clear cut connection with the forum state's territory. ⁹⁶

Another instance where there was the assertion of jurisdiction involving a minute connection with the US territory can be seen in the case of ABB. Commentators have argued that this case presents a minimal connection with the US territory, as the bribery was perpetuated by a foreign corporation with two of its subsidiaries to some Nigerian officials (foreign officials), although one of the subsidiaries was based in the US. In other words, this foreign bribery was not carried out by any US owned corporation. The only connection the US had with the case is the fact that ABB subsidiary in the US happened to be a channel through which the bribe was paid to

⁹⁶ Steven R Salbu, 'Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village' (1999) 24 Yale Journal of International Law 1, 254

the Nigerian officials. A minimal contact can occur in instances where a bribery occur between a foreign corporation (from country A) and foreign officials (country C) but the foreign corporation had subsidiary in (country B) through which the bribery was also paid to the foreign officials in Country C. Application of the FCPA on cases with minimal contact provides an inconsistent basis for jurisdictional application.

On the other hand, although there is no recent assertion of the UKBA on any ECOWAS cases, however, the Act provides for an assertion of jurisdiction in a 'close connection' scenario. Succinctly, countries possess the capacity to exert their jurisdiction across national borders, however, this assertion must be reliable with the principles of jurisdiction. The broad anti-bribery efforts of the U.K. and the US are crucial ingredients needed for combating an alarming global problem that will only get worse if exporting countries fail to control the supply-side of international bribery.⁹⁷ However, these acts are critiqued for "moral imperialism and jurisdictional overreaching" because they hold foreign businesses to be subject-able on a minimal contact, thereby causing a possible subjection of other corporations to western practices of ethical standards.⁹⁸

What commentators have termed minimal contacts for the purpose of this dissertation includes a situation whereby a Swiss company bribes with its US and other subsidiary bribes Nigerian oil officials. Passive personality principle should be taken into account in deciding anti-bribery case. The ABB case has been argued to be one that only had a minimum contact with the US. This is very inconsistent with the basis of jurisdiction, the basis of jurisdiction provides for territoriality but it gave exception which are subjective territoriality and objective territoriality. Following from Akehurst illustration stated in chapter two, that when a person from state A shoots another person across state B, both states have concurrent jurisdiction over the action. The argument stated by the DOJ was not that Vetco U.K. employees undertook any activities within the US. Rather, the DOJ action seemed to be based on a claim that some Vetco US employees were performing as agents for Vetco U.K.

⁹⁷ Daniel Patrick Ashe, 'The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. FCPA' (2005) 73 Fordham L. Rev. 2897,

⁹⁸ Stephen R. Salbu, 'Bribery in the Global Market: A Critical Analysis of the FCPA' (1997) 54 Wash. and Lee L. Rev. 229, 275

The doctrine derived from this basis of jurisdiction is the effects principle. As discussed, the effects principle is a very controversial principle derivative of extraterritorial jurisdiction. This principle has been greatly employed in antitrust cases, which measure the economic effects that a case causes. The premising question here is whether the minimal contact the UK and US agencies have on foreign bribery can be categorised under this principle. The US authorities have aggressively expanded the FCPA' jurisdictional reach to include a range of foreign individuals and entities, as well as US domestic concerns. Yet, there is little or no progress as regards how the US courts will reconcile this expansive approach with the presumption against extraterritoriality. Commentators have agreed that foreign bribery is detrimental to both the forum state and the recipient states. However, there is not enough work on how this effect can be measured. In a clear instance between a developed country and a developing country, the effects of foreign bribery on these countries are different. Arguably, the effect of foreign bribery on a developed nation like the US or the U.K. may be that their multinational corporations may be subjected to a competitive disadvantage thereby, leading to the loss of lucrative business contracts on a fair platform - every corporation doing business should follow business ethics and procedural fairness in business dealings. In addition, foreign bribery does not only disrupt the international market but it also hampers the test of good products without favouritism or fear. On the other hand, the effect of foreign bribery on developing countries is that it disrupts good governance. Many of the cases of foreign bribery are mainly involved with the major sectors of the society. The sectors of oil and gas, energy, transportation and communication are the bedrock of amenities, which sustain society. If one is to measure the effect of foreign bribery on developing countries, this measurement goes to the root of human sustainability. Studies published in the late 1990s found empirical evidence that corruption severely affected GDP and foreign investment, diverting monies destined for socially valuable products of infrastructure into the pockets of officials.

One of the aspects of extraterritoriality reach is the question of territorial principle. In broad respects, the anti-corruption provision, which applies to US domestic concerns, that is, US persons and businesses, foreign issuers on the US stock exchange, and foreign individuals or entities in respect of acts undertaken in the US (traditional territorial jurisdiction). There is narrow clarity as to how the US courts

would approach the extraterritorial application of the FCPA because cases are usually settled. A recent judicial decision suggests that the US courts might be more conservative than US enforcement agencies in asserting jurisdiction over foreign defendants - a US court recently declined to exert personal jurisdiction over a German national on the basis that he did not have the required minimum contact with the US as required under the Constitution.⁹⁹ In reaching this conclusion, the court took the view that neither receiving a phone call from the US nor depositing bribe payments in a New York bank provided sufficient evidence of conduct directed towards the US. Another recent case suggests, however, that the US courts may exercise jurisdiction over a person who authorises a bribe, directs the concealment of a bribe or plays a role in falsifying or manipulating financial statements relied upon by US investors, because such actions are viewed as "directed to deceiving US shareholders"¹⁰⁰

4.4.2 Mutual Legal Assistance

One of the emerging characteristics in the international response to multi-jurisdictional bribery scandal is the mechanism of bilateral Mutual Legal Assistance Treaties (MLAT). Mutual legal assistance is the formal means employed to obtain a criminal evidence in one country to assist in criminal proceeding or investigation in another country.¹⁰¹ This mechanism is usually used in solving multi-jurisdictional criminal dispute.¹⁰² In the context of foreign bribery, for example, the decision of a corrupt act performed by various multinational corporations from different jurisdictions can be subjected to the mechanism of mutual legal assistance where various jurisdictions involved provide relevant information needed for the investigatory process.¹⁰³ For instance, the MLAT between the UK and the Nigeria has been employed on various occasions by both states. In 2007, the UK demanded its officials to question top ranking Nigerian officials and business tycoons. These include: the former governor of Delta State, James Ibori, and the request for whom

⁹⁹ *SEC v Saref*, 11 Civ. 9073 (Dkt. Entry No. 33, February 19 2013)

¹⁰⁰ *SEC v Straub*, 11 Civ. 9645 (Dkt. Entry No. 48, February 8 2013)

¹⁰¹ 'Mutual Legal Assistance Requests' (*Gov.uk*, 24 December 2014) <<https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests>> accessed on 5 April 2015

¹⁰² Mark Pieth, *Recovering Stolen Assets* (Germany: Peter Lang, 2008) 100

¹⁰³ Philippa Webb, 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity' (2005) 8 *Journal of International Economics Law* 1, 198-199, 206-210

was called off for procedural purposes, and the Chairman of Globacom, Chief Mike Adenuga, with regards to his business operations.¹⁰⁴

The Nigerian-UK Mutual Legal Assistance Treaty has undeniably become the standard for mutual cooperation between other Western states and Nigeria. In the display of a major bribery scandal involving significant amounts given by Siemens¹⁰⁵ to many Nigerian government officials the Nigerian former President, Yar' adua sought the cooperation of his German counterpart that, '[w]e need a Mutual Legal Assistance treaty, similar to the one we have with the United Kingdom because it serves as a deterrent to underhand dealings and corruption'.¹⁰⁶

While it is apparent that this particular variety of treaties has demonstrated that it is quite valuable and will continue to serve as a pivotal tool in the armoury of anti-bribery and anti-corruption agencies, a few faults are evident. These faults arguably re-trigger the concerns that state governments are overprotective of alleged national interests even to the point of "rendering meaningless the obligations they have undertaken in mutual assistance treaties."¹⁰⁷ Nigeria's proactive request for major investigations and convictions in the US concerning the bribery of its officials by the US multinational corporation Halliburton was rejected. Nigeria needed and requested for Mutual Legal Assistance over the huge \$180 million Halliburton/TSKJ bribery issue; Nigeria was rejected on the ground that, Article 111(3) of the *MLAT*¹⁰⁸ provides for refusal of effecting *MLAT* request by the central authority of the requested state for enumerated reasons. This provision was utilized by the United States. Indeed many foreign bribery cases show that the prosecutions and resulting fines charged after conviction of multinational corporations and their executives are

¹⁰⁴ Funsho Muraina, 'Nigeria: UK Wants to Quiz Adenuga, Says AG' (*This Day*, 4 December 2007) <<http://allafrica.com/stories/200712040005.html>> accessed on 14 June 2015

¹⁰⁵ Simon Romero, 'Halliburton Severs Link With 2 Over Nigeria Inquiry' (*The New York Times*, 19 June 2004) http://www.nytimes.com/2004/06/19/business/halliburton-severs-link-with-2-over-nigeria-inquiry.html?_r=0 accessed on 4 June 2015; 'Nigeria Probes Siemens Bribe Case' (*BBC News*, 21 November 2007) <http://news.bbc.co.uk/1/hi/world/africa/7105582.stm> accessed 18 August 2015; Estelle Shirbon, 'Update I-Nigeria to Investigate Siemens Bribes Scandal', (*Reuters*, 19 November 2007) <http://www.rcuters.com/article/companvNewsAndPR/idUSL931303520071119> accessed 10 September 2015

¹⁰⁶ Official Website of the Office of Public Communications, 'President Yar'Adua Re assures of his Commitment to Combat Corruption' (21 January 2008) <<http://www.nigeriafirststore/article/7997.shtml>> in Gbenga Oduntan, 'Tracing Noxious Funds' (2011) *XIV International Trade and Business Law Review*, 132

¹⁰⁷ Ibid

¹⁰⁸ Mutual Legal Assistance Art 111(3)

solely directed for the benefit of the forum states. This was definitely the case in *SEC v ABB* (Nigeria), *Halliburton/TSKJ* (Nigeria) and *United States v. Titan Corp* (Benin).

4.4.3 Foreign Nationals Subjected to the FCPA Jurisdiction

The significant issue raised is the US assertion of jurisdiction over both juristic and physical persons irrespective of the state of origin. The expansion of the Act in the 1998 amendment provides to include any issuer or domestic concern or an officer, employee, or any agent who is a 'United States person'. A 'United States person' is simply defined as any "national of the United States... or any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship organised under the laws of the United States".¹⁰⁹ However, critics of the 1998 amendments assert that the FCPA's claim of subject matter jurisdiction over a foreign national should only be applied if: "(1) the action was more than mere preparation; (2) the action was material to the perpetration of the violation; and (3) it could fairly be said that the action directly caused the violation."¹¹⁰ This test presents a fair assessment of the conduct at hand and the extent of the participation of the subject matter in the conduct.

The case of *ABB* is a sample case to show the US assertion of its jurisdiction on foreign nationals. Certainly, definite bribery conduct within the US was not established in the legal action, let alone substantial conduct that could partially be said to have caused the violation. This case did not possess sufficient facts to meet the criteria. On the other hand, even if there was sufficient facts to meet the criteria discussed, in a general parlance, the interest of the United States in foreign bribery is worthy of adequate questioning. The immediate fashion of exertion of the US personal jurisdiction on the *ABB* case is unwarranted as sufficient minimum contacts should not have triggered an FCPA jurisdiction.

Although the foreign nationals in the case of *ABB* are not Nigerian officials, and may not have a dual nationality with Nigeria, however, such cases show that the FCPA

¹⁰⁹ 15 U.S.C. s 78dd-1 (g)(2) (2006).

¹¹⁰ H. Lowell Brown, 'Extraterritorial Jurisdiction Under the 1998 Amendments to the FCPA: Does the Government's Reach Now Exceed Its Grasp?' (2001) 26 N.C. J. Int'l L. and Com. Reg. 239, 328

can easily possess jurisdiction over ECOWAS members' nationals in situations of minimal contact with the FCPA. Jurisdiction with respect to nationality is assumed by the state of which the accused is a national. FCPA categorisation of every issuer, association, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship under the umbrella of a 'United State person' creates myriad confusion on the political and legal concept of who a national is. This dissertation is not ascertaining that foreign nationals should not be subjected under the FCPA action if there is a significant violation of the Act but there has to be a clear cut understanding of who a United States person is, because any juristic and physical persons attached to the United States could automatically be covered by this blanket and subjective classification which only the US courts or agencies would have the ability to provide a meaning to. It is to be remembered that, it is the US norm to employ every theoretical, legal, historical tool to ascertain its jurisdiction over a given case, also given the peculiar nature of cases in that depending on the interest at hand, similar cases may not likely be treated alike. The jurisdictional competence of the state's courts or regulatory agencies is based on the loyalty owed by the accused to his state of origin. This accused may be juristic or physical person. In cases of double nationality, both states possess equal jurisdiction over the matter. Thus, in the *James Ibori case*, the UK sentenced the accused for grand corruption even though he was a national of both the U.K. and Nigeria, and even though the particular facts of the offense largely took place in Nigeria.

On the other hand, David Elesinmogun and Obumneme Egwutatu argued that the penalty for "paying bribes in Nigeria may increase following demands from a Nigerian NGO that the Nigerian government seek its share of the recent anti-graft bounty"¹¹¹. The assertion of nationality jurisdiction on cases whereby the Nigerian officials have been bribed by foreign persons can lead to a tussle of jurisdictional assertion. What needs to be ascertained is the intensity of the effects of the bribery on the states involved.

¹¹¹ Cohen, Elesinmogun and Egwuatu (n 24).

4.4.4 Level Playing Field

A dominant theme in the FCPA anti-corruption strategy is the emphasis on 'levelling the playing field'. If corruption is prevented by extraterritorial laws and foreign actors with some connection to the US are prevented from bribery then business of the United States and its corporations are protected. This is not a surprising discovery from the perspective of critical legal theory because it is realised that ultimately the direction of law in most societies and the international society is to maintain the benefit of states. More so, it is increasingly accepted that much of international law is created to sustain the rulership of the West. The initial drive of the existence of the FCPA was to instil trust in the American corporation, this purpose has exceeded instilling the trust to making other individuals or corporation succumb to the US jurisdictional pull even as a result of a minimum link to the US such as under the rules of the FCPA. The case of *United States v. JGC Corp* betrays¹¹² some of the aspects of this truth. It portrays the oppressive side of the application of the FCPA. The alleged bribery in this case was between a Japanese Corporation and Nigerian public officials. The only ties the JGC Corp had with the U.S was the fact that JGC had connived with an American joint-venture partner, and that wire transfers – originating in and arriving at wholly foreign bank accounts – passed through New York bank accounts. The question that may be asked is how does transferring money through the New York bank be deemed as violation of the FCPA when the transfer does not in any way pose a risk of any particular direct Impact on the US markets.

4.4.5 The Protective Principle

The principle of protective or security principle is one which will constantly have a significant relevance given the extraordinary emergence and presence of the involvement of foreign nationals (both physical and juristic persons) in the crime of bribery of foreign officials. Here, a state assumes jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the

¹¹² *United States v JGC Corporation Docket No 11-CR-260*

conduct is generally recognised as a crime under the law of states that have reasonably developed legal systems. This is essentially true in emergence of the developing moral legalism and international public strategy which inform the attitude and content of both national and international legislation against the bribery of foreign officials.¹¹³

4.4.6 Conformity and Inconformity with the Passive Personality Principle

The passive personality principle bestows on a state the power to adopt laws that apply to conduct of foreign nationals who commit crimes against the sovereign's nationals while the sovereign's nationals are outside of the sovereign's territory. The passive personality principle bestows on a state the power to adopt laws that apply to conduct of foreign nationals who commit crimes against the sovereign's nationals while the sovereign's nationals are outside of the sovereign's territory.¹¹⁴ Conforming to the passive personality principle is complex. In fact, all dissenting Judges in the case of *Lotus*¹¹⁵ rejected this principle. Judge Moore in his dissenting opinion stated that accepting the passive personality principle as a basis of jurisdiction meant that a state's national, while travelling to another state carries with him the law of his own state for his protection.¹¹⁶ Clearly, this assertion is deemed contrary to the principle that such a person ought to put himself under the sovereignty and protection of the receiving state "except that his government may intervene in case of denial of justice".¹¹⁷ A case which will be dealt with in this respect is the case of Suleiman A. Nassar.

This case serves as an example of cooperation between in extradition processes. Mr Nassar who was the regional vice president of Lockheed International bribed a member of the Egyptian parliament with \$1 million so as to sell three C-130 military cargo planes worth \$79 million.¹¹⁸ This case is yet another case which has been

¹¹³ Gbenga Oduntan, 'International Moral Legalism and the Competence over Prosecution of Corruption Crimes' (2011) 1 African Journal of Law and Criminology 1 pp. 78-99.

¹¹⁴ See Chapter Two, Watson (n 83)

¹¹⁵ See Chapter Two, *Lotus* (n 53)

¹¹⁶ *Ibid*

¹¹⁷ See, Chapter Two, Oduntan (n 55) 141

¹¹⁸ Richard L. Cassin, 'The Fugitive Flies, Part III' (*FCPA Blog*, 22 September 2009) <<http://www.fcpablog.com/blog/2009/9/23/the-fugitive-files-part-iii.html>> accessed on 4 April 2016

noted as a good example of international cooperation in anti-corruption issues.¹¹⁹ However, close attention needs to be paid to the entirety of the case. After various attempts to extradite Mr Nassar failed, the Libyan government cooperated with the US. An interesting fact in this case is that Syria became very interested in the case as it generated global headlines. Based on the doctrine of extraterritoriality, the Syrian government wanted to try Nassar for violating the FCPA however, the US prosecutors partially denied that it was not exactly the trial of Mr Nassar they were after. Mr Nassar's properties and assets were frozen.¹²⁰ This caused a huge strain on Mr Nassar and family. Due to this Mr Nassar was extradited to the US Mr Nassar almost became the first individual to be tried outside the US for FCPA violation. It is evident that the US capacity to reach any individual anywhere in the world is alarming. The US possess the capacity to ensure a corrupt conduct pertaining to its territory is decided by its organisations. So as to get to Mr Nassar, the US froze all his assets worldwide including his \$750,000 pension. This case restates the argument that powerful states possess enormous strength and capacity to ensure that cases related to its territory are tried.

4.5 Conclusion

In conclusion, the hegemonic nature of regional integration usually results in regional groups hedging against other regional groups or non-members of the group. To achieve global anti-bribery legislation, regional groups have to examine their roles, especially the ECOWAS, in the globalisation process. They have to examine whether their integration serves as a vehicle or obstacle in the globalisation process. It is crucial to remember that just as all the bases of jurisdiction may empower a state to carry out intrusive investigations, so also can these bases stand for the ample non cooperative approach by another state in ensuring that the recipient state have jurisdiction over its domestic affairs.

The essence of the present anti-bribery regulatory regime is to deter bribery, however, this deterrence through rigorous pattern of enforcement has resulted in

¹¹⁹ *U.S. v. Suleiman A. Nassar* No. 1:94-CR-226-MHS, (N.D. Ga. 1995) <<http://fcpa.shearman.com/?s=matter&mode=form&id=53>> accessed on 4 April 2016

¹²⁰ Cassin (n 118)

detering investment in emerging economies. This effect conflicts with the purpose of the FCPA. This essentially signifies a wakeup call to the ECOWAS community to not only effectively curb the demand-side of bribery but to hold multinational corporations into account for damages caused.

Ascertaining jurisdiction on matters detrimental to the growth and the development of the ECOWAS community can present a challenge to weak states hampered through world powers with sophisticated legal theories and entrenched legal history, circumventing the demand of developing countries to exert their jurisdictional powers without intrusion, rather than responding to a simple request to cooperate and supply information for investigatory purposes. An example of this circumvention is Nigeria's recent demand for the repatriation of her stolen funds. It is clear that these funds are stolen, and various developed nations serve as safe havens for this funds. However, Switzerland, for example asked Nigeria to explain what she would do to the repatriated fund. This is really egregious to the principles of sovereignty and jurisdictional competence of a nation's zeal to repatriate her stolen funds. The assertion of developing countries' jurisdiction on foreign bribery can be frustrated through various cumbersome and dynamic regulatory strongholds.

Curbing international bribery is essential for many significant reasons, however, the hypocrisy behind the use and so-called purpose of current anti-bribery legislations and regulatory system is far from effectively curbing foreign bribery. The resultant effect is a hampering of sovereign equality and jurisdictional competence on matters which are solely to be decided by a territory. Therefore an international regime which will empower ECOWAS community is essential. Essentially, a universal legislation on combating of foreign bribery needs to be created.

Developing countries are looking to regulate their own system - to regulate their domestic affairs. Many of the crimes discussed above were committed within the ECOWAS territory. ECOWAS states themselves ought to have been proactive and retain jurisdiction over the investigation. The perceived imperialistic tendencies (reminiscent of colonialism) appear however, to have hindered the majority of developing countries' jurisdictional competence in matters regarding their states and matters which solely, directly and negatively affect them. And that is why the critical

legal theory asserts that law is a tool used for the preservation of elite states' interests who have created these laws. International regulation of crime is orchestrated in such a manner that arguably favours the developed states. The OECD creation of a convention for combating of bribery of foreign officials in IBTs was created by the US to protect its states interest; the movement into the international regulation of corruption was pioneered by the U.S and its OECD member states for the protection of their economic policies. However, the protection of states sovereignty and jurisdictional competence should be at the forefront of customary international law. The ECOWAS needs to formulate a regulatory response of their own on the issue of foreign investigations into economic and financial crimes that occur within their jurisdiction from abroad and to demand that fines should be shared with the particular countries where the offences took effect.

CHAPTER FIVE

THE EFFECTS OF EXTRATERRITORIALITY ON THE SOVEREIGNTY AND JURISDICTIONAL COMPETENCES OF ECOWAS STATES: STRATEGIES TO ENSURE MORE EQUITABLE REGULATION OF CORRUPTION IN INTERNATIONAL BUSINESS TRANSACTIONS

5.1 The Effects of Extraterritoriality on the Sovereignty and Jurisdictional Competences of ECOWAS States

States' assertion of their extraterritorial jurisdiction is inevitable. In fact, this dissertation concluded that the assertion of extraterritoriality cannot be removed from this period of great interdependence and market capitalism. Chapter three argued that the principles of jurisdiction (discussed in chapter two) show that the exercise of extraterritorial jurisdiction is beneficial to the strengthening of states jurisdiction as states would possess the platform to adequately govern their fluid domestic affairs across borders. However, chapter three argued that although all states possess the power and authority to use their extraterritorial jurisdiction, the present international regulatory system is stacked with huge inequity causing some states to have more power in their extraterritorial assertions than others like ECOWAS states. Gerry Simpson called this inequity the power imbalance between 'Great Powers and Outlaw States'.¹ The regulation of commerce and trade even in the specialist area of anticorruption laws cannot be carried out exclusively on elite states' terms and laws.² Such a position will hamper the true interests of all nations in combating the international malaise of corruption which has negatively affected international business and even international relations in the 20th and 21st Centuries.

It is imperative to note that the law and practice of extraterritorial jurisdiction is still in its infancy. The regulatory rigorousness of countries like the US and UK amongst others has significantly propelled the international community's awareness on the seriousness of the impact of foreign bribery and corruption on IBTs and national transactions. Sections 15 U.S.C. §§ 78dd-1, 2 and 3 of the FCPA and Sections 2, 6

¹ See Chapter Two, Simpson (n 107)

² *M/S Bremen v. Zapata Offshore Co.* (1972) 407 U.S. 1, 9. Chief Justice Burger stated that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

and 7 of the Bribery Act are particular examples of aggressive legislation that signal the possibility of the development of universalisation of jurisdiction over corruption crimes. These provisions can become a blue print for most other states to adopt but on their own for now only represent proof of the diplomatic power of the two states discussed particularly. Therefore, the present practice of extraterritoriality principles in international law in respect to the application of anti-corruption laws need to be significantly shored up legally across the world for the legislation of the US and UK not to be an aberration and a disturbance of the settled principles of international laws on jurisdiction.

It is apparent that at present, ECOWAS states' quest for cooperation and assistance from their western counterparts has not been reciprocal. This lack of reciprocity significantly undermines the sovereignty and jurisdictional competence of the requesting states. For example, in the Wilbros scam,³ the Nigerian authorities were expressly informed by US authorities that evidence in form of facts and data against the senior officials of Shell Petroleum Development Company who partook in the scam were undisclosed, and thus, the high officials of Shell Company were to remain anonymous. Chief Michael Aondoakaa, the Nigerian Attorney General who led the investigatory process on the scam stated that:

"Why is it that only the names of the Nigerians officials that were on display? Why are they shielding the Shell's officials? These are relevant questions we should be asking as Nigerians. We are pressuring the US authorities to release the names of the Shell's officials."⁴

The absence of reciprocity defeats the purpose of ascertaining state's jurisdiction in an investigation which in turn defeats the claim of sovereignty equality which international law seems to uphold. Furthermore, the *Halliburton* investigation also showed the reluctance of the US to release Dick Cheney to answer to the Halliburton scandal. Like the Wilbros scam, when the Nigerian government requested the

³ The Wilbros scam is a bribery contract scam of \$6 million which was allegedly paid to some Nigerian high officials. See Chika Amanze-Nwachuku, 'Nigeria: I'm not Involved in Wilbros Contract Scam, Says Kupolokun' (*This Day*, 12 September 2016) <<http://allafrica.com/stories/200712120544.html>> accessed on 3 April 2016

⁴ The Attorney General and Minister of Justice, Chief Michael Aondoakaa, quoted in Funso Muraina, 'Nigeria: UK Wants to Quiz Adenuga, Says AG' (*This Day*, 4 December 2007) <<http://allafrica.com/stories/200712040005.html>> accessed on 14 June 2015

extradition of Dick Cheney, Cheney's lawyer, Terrence O'Donnell, stated that an investigation was conducted by United States federal prosecutors and "found no suggestion of any impropriety by Dick Cheney in his role as the CEO of Halliburton".⁵ The US did not cooperate with the Nigeria's quest to further investigate one of the biggest bribery scandals in the 21st Century.

Indeed it appears that in many cases where the allegation of impropriety, bribery and corruption emanates from an ECOWAS State, the determination by developed State will be that the allegations are baseless. This often lets executives from Western corporations off the hook leading to the further plundering of ECOWAS. Another instance of this is the allegations by an incoming Ghanaian government which detected evidence of bribery and corruption with respect to Ghana's first oil discovery field which was awarded to an American company Kosmos. The investigation and request for cooperation came to a swift end as soon as the Department of Justice came to the conclusion that there was no proof of the allegations.⁶ This is despite the fact that the facts were best investigated in Ghana where the allegations emanated from and most of the bribe recipients may be found. There is also the strong inference that can be drawn from the very one sided and favourable contract to Kosmos. Eventually, Kosmos negotiated a settlement with the Ghanaian government after serious threats to destroy the nascent Ghanaian oil industry through negative press in the small oil and gas investor community.⁷

The present application of extraterritorial laws concerning the foreign bribery is arguably manifestly unfair and stacked in favour of the protection of elite states' interests. It is crucial to reiterate that the principles and rules of international law on jurisdiction of the state works in such a way that a state is not generally compelled by

⁵ See Chapter Four, Shirbon (n 32)

⁶ William Wallis, Martin Arnold and Brooke Masters, 'Corruption probe into sale of Ghana oil block' (*Financial Times*, 7 January 2010) <<http://www.ft.com/cms/s/0/28ed19fc-fbca-11de-9c29-00144feab49a.html#axzz44j83tNeo>> accessed on 02 April 2016; David Wethe and Jason McLure, 'U.S. Closes Inquiry as Ghana Probes Alleged Bribery at Jubilee' (*Bloomberg*, 2 September 2010) <<http://www.bloomberg.com/news/articles/2016-04-01/model-3-gives-musk-an-iphone-moment-and-big-test-for-factories>> accessed on 03 April 2016.

⁷ 'Civil Society Platform on Oil and Gas' (*Ghana's Oil Boom A Readiness Report Card*, 11 April 2011) <<http://www.oxfamamerica.org/static/media/files/ghana-oil-readiness-report-card.pdf>> accessed on 3 April 2016

international law to enforce its criminal jurisdiction.⁸ Navigating the regulatory space between national and international spheres poses huge complexities. The solution to the present regulatory framework is not farfetched. There should be an express universal jurisdiction where any state could investigate and prosecute the act of the bribery of foreign officials in the international sphere. However, the pressing questions that would need to be answered are whether there would be sophisticated and robust procedures by which states would come to their decisions and whether these procedures can be made more transparent and equally accessible by both developed and developing states like ECOWAS states.

5.2 Summary and Recommendations

This chapter has argued that the current basis for extraterritorial jurisdiction in combating the bribery of foreign officials in IBTs should be reformulated. Rather than base it solely on the state through their application of territorial and nationality principles, it should be based on a universal jurisdiction where every state possesses equal sovereignty to prosecute the offence of the bribery of foreign officials in IBTs.

Clearly, the problem of bribery of foreign officials is very detrimental to international business. As discussed in chapter three and four, this problem does not only distort the efficacy of good business and trade, it also weakens good governance and the rule of law. In addition, it leads to acute poverty in the developing world.

Corruption in IBT is a complex area to regulate. It is difficult because while some states possess the drive and determination to eradicate corruption in international business, some other states are reluctant to do so. The sudden and rapid increase in the application of extra territorialism by western states like the US and the UK also triggers controversy regarding the basis of such jurisdiction on combating bribery in international business.

The cases discussed in Chapters 3 and 4 showed the wide spread nature of foreign bribery on both national and international levels especially in the emerging

⁸See Chapter Two, Franck (n 39)

economies of the ECOWAS community. The present regulatory environment in form of soft laws, treaties, radical national laws as well as regulatory enforcement agencies are usually categorised in international law literature as 'international' tools for combating the bribery of foreign officials. These international tools are characterised by inconsistencies in meanings, enforcements and purposes. Additionally, although some national laws and institutions pursue the purpose of curbing foreign bribery in international business, their role and regulatory strength are not encompassing enough to oversee the complexities of bribery. For a holistic approach, it remains plausible to consider the application of the 'universality principle'.

A famous aspect of criminal acts covered under the international universal jurisdiction is that of piracy. A universal jurisdiction is established over an act of piracy committed anywhere in the world, irrespective of the nationality of the criminal.⁹ Customary and conventional international law notably recognises jurisdiction over this act. It works in a way that a piratical conduct against a ship falls under the ambit of any state where the pirate has been detained. In addition, anyone who takes part in a piratical act is also a pirate.¹⁰ Therefore, extending the universality jurisdiction to move beyond aerial hijacking and such acts as slave trading and genocide to areas like terrorism, money laundering as well as the central topic of discussion in this dissertation (bribery of foreign officials) presents a possibility of a unique dealing with bribery and corruption.

Corruption in international business consist of the amalgamation of three deadly perennial problems which is somewhat difficult to be regulated by a handful of developed nations. These three includes; terrorism, money laundering and bribery (grand corruption). Seeing as there is a synergetic relationship between these ills, a similar strategy needs to be put in place to curb their adverse effects. Money laundering and bribery are closely intertwined. Most of the monies earned by foreign

⁹ M. Cherif Bassiouni, 'The History of Universal Jurisdiction and its Place in International Law' in Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004) 47-49

¹⁰ Madeline H. Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks' (2001) 35 *New Eng. L. Rev.* 337, 337-338, 339-340

officials through bribery are usually laundered to developed states.¹¹ As rapid attention was given to the ill-fated September 11 2001 attack which caused a rigorous swing in the assertion of universal jurisdiction, well calculated and rigorous attention needs to be carried out universally over the facilitators and perpetrators of foreign bribery. In that respect, multinationals nationals that engage in bribery abroad would be adequately dealt with. In the same vein, foreign government officials of ECOWAS states who have assumed the irresponsible position of accepting bribes and amassing significant wealth for personal interests would be subject to international jurisdiction. This significant step will not only accentuate the assertion that bribery and corruption can be efficiently combated as multinational corporations who pay bribes are carved from under the sole jurisdiction of their interest seeking states, but it will also ensure that the pattern of pardoning and recycling corrupt leaders¹² in the developing world is consequently dealt with.

Clearly, there is huge reluctance to formally confront the inequalities embedded in contemporary international law.¹³ Castel identified in his work that extraterritoriality is no longer a low noticeable difficulty. It is crucial for procedures and standards to be created to adequately resolve legal and political issues in a proportional manner.

International regulation of grand corruption in business like any other international issues is a complex and murky terrain to regulate. Due to the global interconnectedness and interdependence, the present problems and issues countries face do not only affect the respective countries, but these problems spread to other countries. This is why the solution to any transnational issue always seek a form of international intervention or regulation which possesses the framework to foster solution. Although international law has been resorted to solve international problems, it has been argued that international law is stuck and underdeveloped. International law is very late to the awareness of complex international issues and

¹¹ A perfect example is the case of James Ibori (Former Governor of Delta State, Nigeria). With Nigeria's money, "James Ibori bought a house in Hampstead, north London, for £2.2m. A £3.2m mansion in Sadnton, South Africa, a property in Shaftesbury, Dorset, for over £311,000, A fleet of armoured Range Rovers valued at £600,000, a £120,000 Bentley, and a Mercedes Maybach for 407,000 euors." See 'Former Nigeria Governor James Ibori Jailed for 13 years' (*BBC News, Africa*, 17 April 2012) accessed on 3 April 2016

¹² Daniel Agbibo, 'One Step Forward, Two Steps Back: The Political Culture of Corruption and Cleanups in Nigeria' (2013) 8 *Central European University Political Science Journal* 3, 273-295

¹³ See Chapter Two, Kingsbury (n 122) 609-615.

problems like the equal assertion of jurisdiction on matters which affects the sovereignty and jurisdiction of states.

Even though the problem of underdevelopment of international law persists, the regulation of many issues ranging from terrorism to climate change still look up to international law for some solutions. For example, the present regulation of bribery and corruption in IBTs, as discussed in this dissertation, possess inequities which must be readdressed through incremental developments to international law itself.

The present regional anti-corruption regulations and general anti-corruption treaties stipulate that there should be cooperation and assistance between countries when needed. This clause can be problematic because it gives states the discretion to decide whether or not to give cooperation or assistance especially in multijurisdictional matters. As mentioned above on many occasions, developing countries with a serious stake in corrupt transactions have been denied cooperation and assistance in the investigatory processes of bribery and financial scandals deeply related to their territories.

The present treaties on extraterritorial application of laws in relation to corruption should be reformulated and amended. The fluidity of how international law can be used presents the problem of whether international law is really law. Especially in relation to cooperation and assistance, it should be stated that states must give their assistance and full cooperation in the investigatory and prosecutorial processes of grand corruption situations. This is already dictated in the provisions of Article 16 of the UNCAC:

Bribery of foreign public officials and officials of public international organizations.

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the

official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

Furthermore, countries party to this treaty have agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Clearly state parties are already bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court.¹⁴

It is in fact the case that the drafters of the UNCAC must have envisaged a future where universal jurisdiction on piracy¹⁵ may one day apply to corruption.

ECOWAS states should be the first to stamp the problems out by universalising their jurisdiction on combating bribery. States within the ECOWAS community need to create laws like the FCPA and UKBA. In conjunction with this, a regional convention based on combating foreign bribery needs to be created. The jurisdictional competences of ECOWAS states needs to be shored up; the enforcement mechanisms, regulatory systems need to undergo thorough developments in regulating foreign bribery within the community.

There should exist an international body which is concerned with balancing the conflicts of jurisdiction in foreign bribery cases and investigations. The UNCAC serves as an example of the most widely signed up to treaty in the regulation of corruption, but it is weak as a result of the fact that agreements signed are not concrete. These agreements are permissible agreements which are not concrete. Cooperation and assistance between states in the processes of ascertaining jurisdiction on the regulation of corruption must be obligatory.

Foreign bribery and grand corruption are heinous crimes which are repugnant to equity, justice and good conscience. A universal jurisdiction is a key way in which

¹⁴ See UN.CAC 2005, Article 37. Cooperation with law enforcement authorities.

¹⁵ Yana Shy Kraytman, 'Universal Jurisdiction - Historical Roots and Modern Implications' (2005) 2 Brussels Journal of International Studies, 94-96

states can enforce their duties under international law and a pivotal condition pattern to the curbing or eradicating of the impunity of the serious crime of corruption.

Another major reason for creating a holistic international law on combating corruption is not to leave the demand side of bribery untouched. Leaving the demand side of bribery creates a false representation of the intention of international law to successfully combat the bribery of foreign officials. It basically shows that international law is mainly used as a tool to guide the trade interests of some specific states. Critical legal theory's assertion on the hierarchical nature of law creation shows that international law is used as a mechanism to keep fostering the power of certain states over the other. From the inception of extraterritoriality to its practice in contemporary international law, one thing is common, the protection of state's national policy rather than the holistic punishments of perpetrators of corruption in international commerce. The language used and emphasis cast on the creation and actualisation of anti-corruption laws is fixed on the protection of *domestic markets* and prevention of adverse effects on the domestic fortunes.

In a globalised world, interdependence is commonplace and perpetrators of corruption in IBT are bound to increase. Foreign bribery has been correctly framed as part of international crimes. They are so egregious that they offend the sensibilities and authenticity of good businessmen and women in the international sphere. The creation, emergence and purposeful enforcement of the FCPA ensures that the bribery of foreign officials in IBTs is a good start to the eradication of corruption in the international systems. However, the international community must bear in mind that the present extraterritorial application of jurisdiction is one-sided. This one-sidedness does not only cause an undermining of the sovereignty and jurisdictional competences of developing states, but it also causes a loop hole in the in the true regulation of corruption in international law. Therefore, the international community must be vigorous in seeing that justice is done in the combating of bribery of foreign officials as well the upholding of landmark principles of international public law and international law of sovereignty and jurisdiction.

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