Is There a Right to Be Free from Corruption?

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Scholars and policymakers have, for some time, focused on the link between corruption and human rights. This has been to illustrate that corruption is not a victimless crime. While this has publicized the impact of corruption on individuals and on society, it has not changed the lack of political will to prosecute many instances of corruption. Thus citizens often stand by as their leaders plunder national treasuries. Rather than focusing solely on human rights, or trying to create a new "human right" to be free from corruption, this article explores the right to a legal remedy for victims of corruption as set forth in Article 35 of the United Nations Convention against Corruption.

This treaty-based right provides a foundation from which civil society can build an enforceable right to be free from corruption. This article also examines recent challenges brought by civil society groups trying to reclaim assets that were obtained through grand corruption and otherwise hold accountable their political leaders. These groups have used novel theories of legal standing in attempts to recover stolen assets or seek a remedy for public harm caused by systemic corruption. Based on Article 35 and emerging case law, the author argues that the emerging treaty right is one that can be broadly construed, and which forms the basis for further policy and legislative reforms.

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INTRODUCTION

High-level corruption undermines economic development and renders important issues, such as the fight against poverty, ineffective. In many parts of the world, kleptocrats have filled their own pockets rather than utilize funds for development projects, such as new roads, schools, and hospitals.[1] The United Nations reports, for example, that more than $400 billion has been stolen from Africa and moved outside the continent.[2] In response to this phenomenon, governments and civil society have started to focus on corruption and rights — looking at the impact of kleptocracy on the lives and well-being of people impacted by predatory leaders.

In October 2014, a Judge in the high court of Tamil Nadu refused to grant bail to Jayalalithaa Jayaram, the longtime chief minister of the State of Tamil Nadu, noting in his ruling that India's Supreme Court was taking a tougher view of corruption, interpreting it as "a violation of human rights."[3]

Ms. Jayaram, a popular leader, was sentenced to four years imprisonment on charges that she illegally enriched herself in the first of her three consecutive terms as chief minister. Her lawyers requested a suspended sentence pending her appeal. Though the trial was moved to the neighboring State of Karnataka, a crowd of supporters from her home State of Tamil Nadu camped outside of her prison.[4] The crowd celebrated, when the prosecutor told the Karnataka High Court that he did not object to her bail request. The celebration switched to mourning when the judge refused to do so: "The honorable Supreme Court has held that corruption violates human rights," the judge, A. V. Chandrashekara, wrote in his ruling. "It is further held that systematic corruption is violation of human rights as it leads to economic crisis."[5]

The High Court in Tamil Nadu echoed words of the Indian Supreme Court which, in 2012, held that "[c]orruption is not only a punishable offence but also undermines human rights . . . ."[6] Justice Chauhan wrote: "[S]ystematic corruption, is a human rights' violation in itself,

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[1] *Combating Kleptocracy*, IIP DIGITAL (Dec. 6, 2006), http://iipdigital.usembassy.gov/st/english/publication/2008/06/20080601225742srenod6.734866e-02.html#axzz3o2pgJNfW.

[2] *Id.*

[3] Ellen Barry, *Indian Official Appealing Corruption Case Is Denied Bail*, N.Y. TIMES, Oct. 8, 2014, at A5, *available at* http://www.nytimes.com/2014/10/08/world/asia/jayalalithaa-jayaram-corruption-case-india.html?_r=1.

[4] *Id.*

[5] *Id.*

[6] State of Maharashtra Tr. CBI v. Balakrishna Dattatrya Kumbhar, (2012) 9 S.C.R. 601 (India).

as it leads to systematic economic crimes,"[7] in a case involving corrupt acts by the then Superintendent of Excise in Mumbai.

This shift in terms of articulating corruption as a human rights violation in adjudication is a relatively new phenomenon. To date, the international rhetoric focused on corruption has described corruption as linked to or contributing to human rights violations — but not seeing systematic corruption, kleptocracy or "grand" corruption itself as one that is itself a rights violation.

It has been an important move to link corruption to human rights because it may prompt courts, over time, to take corruption seriously and to ensure that leaders are accountable — but that move by itself has not led to greater advantage for citizens in countries plagued by corruption. It has simply changed the discourse. What is needed, instead are legal tools that empower citizens to challenge corrupt actions and to recover stolen assets to national treasuries as a corollary to state investigations and prosecutions.

And what difference does that make? Grand corruption — is something that is at times perceived as victimless.[8] Since everyone might be a victim (i.e. society) no one is perceived a victim in cases of grand corruption and large-scale bribery. If corruption is seen only as a financial crime, then the state has the duty to prosecute wrongdoers rather than to provide victims with rights to a remedy. In practice, states are often reluctant to prosecute, or may lack resources or will to do so. At times, states are predatory and government officials will not prosecute their own because they are part of the corrupt system. In other situations, it is too politically contentious to prosecute a head of state or high-ranking official.

If stolen wealth is recovered, it usually occurs after a leader is toppled and dies, or is jailed and/or killed. The search for assets of the leaders deposed in the Arab Spring, for example, did not begin until the governments were out of power.[9] Civil society must wait for

[7] *Id.*

[8] U.N. OFFICE OF DRUGS & CRIME, ANTI-CORRUPTION TOOL KIT 183 (2002), *available at* http://www.unodc.org/pdf/crime/toolkit/f5.pdf ("Corruption is not a 'victimless' crime, but the only victim in many cases is the general public interest, which is not aware of the crime or in a position to report or complain about it. For this reason, any anti-corruption strategy should include elements intended to bring to light the presence of corruption."); *see also Spotlight: The Victims of Corruption* (PBS television broadcast Feb. 24, 2009), *available at* http://www.pbs.org/frontlineworld/stories/bribe/2009/02/spotlight-the-victims-of-corruption.html (explaining that when corruption is on the a country-wide scale there is no specific victim to point to since every citizen of the country is effected).

[9] *See, e.g.*, Stephanie Nebehay, *Swiss Hold $1 Billion in Blocked "Arab Spring"*

multilateral action before investigations begin, and by this time, leaders have secreted their wealth offshore.

Can we begin to see entire nations and their public as victims of corruption? If nations, as the Indian judiciary did, start to speak of grand corruption as a violation of human rights — then who has the right to a remedy when the state fails to act? Corruption, and the payment of bribes can cause direct harm to an individual victim. A company that loses a contract to a competitor, who paid an official a bribe, for example, is harmed directly by corruption. And when the harm is clear and the connection more direct, victims have acted to seek recovery, if their legal system recognizes a civil cause of action.[10]

But what about when a corrupt act, of demanding and receiving a bribe, harms an entire country, or city or industry? When many small businesses are shut out of competition, how can they properly seek redress? When the victims are many, how do they assert a claim to gain redress? The redress would ideally be the recovery and repatriation of the proceeds of corruption — if they can be located, and if there is a prosecutor willing to bring a case.[11]

This article examines the issue of what rights victims have — in the broader context of grand corruption. It does so and examines both the way in which courts have interpreted standing broadly to allow for a right to a civil remedy for collective harm. The United Nations Convention against Corruption, ("UNCAC") also provides an individual or legal person with a freestanding right to be free from corruption if one is a victim. To the extent that some courts have

Assets, REUTERS (Oct. 16, 2012, 7:43 AM), http://www.reuters.com/article/2012/10/16/us-swiss-mideast-funds-idUSBRE89F0J620121016 ("Switzerland has blocked nearly one billion Swiss francs ($1.07 billion) in stolen assets linked to dictators in four countries at the center of the Arab spring — Egypt, Libya, Syria and Tunisia — the Swiss foreign ministry said on Tuesday. Swiss authorities are cooperating with judicial authorities in Tunisia and Egypt to speed restoration of the funds, but it is expected to take years, said Valentin Zellweger, head of the international law department at the Swiss foreign ministry.").

[10] *See generally* Emile van der Does de Willebois & Jean-Pierre Brun, *Using Civil Remedies in Corruption and Asset Recovery Cases*, 45 CASE W. RES. J. INT'L L. 615 (2013) (focusing on individual private rights of action in common law when business is harmed by corrupt acts of competitor).

[11] Some commentators will make a distinction between asset recovery and civil damages. When an entire group of persons seeks a collective remedy, however, it may be that they seek return of funds as a way of restoring the public treasury and making them whole. For an interesting discussion of these issues, see Matthew Stephenson, *UNCAC, Asset Recovery and the Perils of Careless Legal Analysis*, GLOBAL ANTICORRUPTION BLOG (May 8, 2014), http://globalanticorruptionblog.com/2014/05/08/uncac-asset-recovery-and-the-perils-of-careless-legal-analysis/.

begun to see civil society itself as the "victim" in cases of grand corruption, Article 35, when interpreted in light of other parts of the treaty, may provide an adequate basis for a collective right and a remedy.

Some scholars and policymakers have called for new legal tools or instruments as a means of giving people an enforceable right to be free from corruption. This article argues that there is no need for a new right — and in fact, the right does not need to be couched in terms of human rights. Instead, UNCAC and existing legal mechanisms provides a mechanism for civil society to challenge corrupt acts through civil litigation or by initiating a civil party petition, which triggers a mandatory criminal investigation in some civil law jurisdictions, such as France.

As the article discusses below, while Article 35 might initially be construed narrowly, to allow for civil suits only by direct victims of corruption (i.e. the mother who had to bribe the doctor, or the company who lost a bid to a bribe paying competitor), recent legal actions in India, France and Nigeria, show us that collective litigation can be used as a tool for broader public interest claims in the name of citizens impacted by grand corruption. Thus, Article 35, and the concept of a right to a remedy through civil litigation may provide a powerful tool. To this end, civil society should be lobbying for broader legislative reforms as states implement Article 35 and continue to use the courts and other tribunals to develop new customary norms and interpretations of the right to seek a remedy for corruption.

I. THE PROBLEM: GRAND CORRUPTION: HOW CAN CITIZENS RECOVER STOLEN ASSETS OR CHALLENGE ONGOING CORRUPT ACTS BY PUBLIC OFFICIALS?

Corruption is defined in UNCAC by reference to a series of prohibited acts.[12] It refers to acts such as bribery, embezzlement, fraud, abuse of discretion, nepotism, and even extortion. In the case of

[12] Article III of UNCAC lists the series of corruption offenses that states are meant to criminalize in their national laws. *See* U4 ANTI-CORRUPTION RESOURCE CENTRE, UNCAC IN A NUTSHELL (September 2010), *available at* http://www.u4.no/publications/uncac-in-a-nutshell-a-quick-guide-to-the-united-nations-convention-against-corruption-for-embassy-and-donor-agency-staff/ ("Interestingly, UNCAC does not define corruption as such. It rather defines specific acts of corruption that should be considered in every jurisdiction covered by UNCAC. These include bribery and embezzlement, but also money laundering, concealment and obstruction of justice.").

public corruption, this relates to a public officials abuse of his or her own position, exploiting conflicts of interest, to seek private gain.[13]

Grand corruption refers to situations where corruption exists at the highest levels of government, where leaders, including heads of state, can subvert their political office to secure benefits for themselves, eroding public trust and also draining national treasuries.[14] Kleptocracy is a related term, which refers to a government that uses its political power to steal resources from its country and people.[15]

The extent of grand corruption is significant. While difficult to measure, it is estimated that between $20 to $40 billion is stolen each year from developing countries.[16] The United Nations Office on Drugs and Crime ("UNODC") estimates that multinational criminality moved $2.1 trillion across borders in 2009 alone, which was equivalent to 3.6% of Global GDP.[17] According to Global Financial Integrity, "between 2003 and 2012, developing countries lost an estimated US$6.6 trillion in illicit outflows."[18] The study also

[13] *See, e.g.*, U.N. Convention Against Corruption, G.A. Res. 58/4 (XV), U.N. Doc. A/RES/58/4 (Oct. 31, 2003). The treaty makes reference to public officials seeking undue advantage by virtue of accepting a bribe:

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> *(a)* The promise, offering or giving, to a public official, 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;
>
> *(b)* The solicitation or acceptance by a public official, 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.

See also U.N. OFFICE OF DRUGS & CRIME, THE GLOBAL PROGRAMME AGAINST CORRUPTION: UN ANTI CORRUPTION TOOLKIT 1-5 (3d ed. September 2004), *available at* http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf.

[14] *See* Susan Rose-Ackerman, *Democracy and "Grand" Corruption*, 48 INT'L SOC. SCI. J. 365, 365-66 (1996) (discussing high level corruption).

[15] *Kleptocrat*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/kleptocrat (last visited Nov. 7, 2015).

[16] *Stolen Assets & Development*, WORLD BANK, http://www1.worldbank.org/finance/star_site/stolen-assets.html (last visited Nov. 7, 2015).

[17] U.N. OFFICE ON DRUGS & CRIME, ESTIMATING ILLICIT FINANCIAL FLOWS RESULTING FROM DRUG TRAFFICKING AND OTHER TRANSNATIONAL ORGANIZED CRIMES 127 (2011), *available at* http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf.

[18] DEV KAR & JOSEPH SPAJERS, GLOBAL FINANCIAL INTEGRITY, ILLICIT FINANCIAL

identified the top five "exporters" of illicit flows over the past decade (on average) as China, Russia, Mexico, India, and Malaysia.[19] The public wealth lost to corruption would be enough to reduce severe poverty and hunger across the globe.

While most countries have established a legal framework to fight corruption, they often struggle to enforce their laws. Far too frequently, perpetrators are able to evade their national judicial system often in direct proportion to the magnitude of their illicit wealth and power. As a result, kleptocrats as the worst perpetrators of corruption, may be the least likely to face national prosecutions.[20] Jurisdictions that safeguard their ill-gotten gains, including major financial centers of the world, may also be content to retain the status quo of inertia, as their banks and citizens benefit.

Grand corruption is difficult to address, because of the politically sensitive nature of such cases. It is difficult to attack a sitting head of state and his or her family. At times, the assets of such leaders are often moved offshore, to foreign bank accounts and foreign jurisdictions. When this occurs, civil society may not have the resources to fund litigation in local court systems and investigations. Despite OECD member countries making increasing efforts countries to track and return such assets, there is still a vast gap between assets recovered and those reported stolen from developing countries.[21] Between 2006 and mid-2012, OECD members returned $423.5 million, compared to the estimated $20–$40 billion stolen each year.[22]

The World Bank has created a database of grand corruption — documenting 150 cases of such theft/corruption by high-ranking officials and heads of state in the years between 1980 and 2011. The World Bank notes that these cases of grand corruption have a common factor — the reliance on corporate vehicles, such as companies, foundations and trusts, as a means of concealing the true ownership of illegal assets.[23]

FLOWS FROM DEVELOPING COUNTRIES: 2003–2012, at vii, 18 (2014), *available at* http://www.gfintegrity.org/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf.

[19] *Id.* at 17.

[20] For an interesting discussion on the behavior behind embezzlement, see DAVID O. FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 203-05 (3d ed. 2007).

[21] LARISSA GRAY ET AL., FEW AND FAR: THE HARD FACTS ON STOLEN ASSET RECOVERY 2 (2014).

[22] *Id.* at 21 (analyzing fresh data from OECD countries for the period 2010–2012).

[23] EMILE VAN DER DOES DE WILLEBOIS ET AL., THE PUPPET MASTERS: HOW THE CORRUPT USE

The Arab Spring called renewed attention to the issue of grand corruption. Despite a new impetus for asset recovery, the quest for the assets of toppled Middle Eastern and North African dictators did not bear much fruit.[24] And in 2014, Attorney General Eric Holder launched a new asset recovery initiative, after the Yanukovych government was toppled in the Ukraine.[25] But these funds are often found in Western financial centers — including in banks in the U.S. and Europe. Governments are often reluctant to begin the search until leaders are toppled, which begs the question, should citizens not try to prevent the illicit flow of assets rather than trying to recover assets once a leader is toppled?

The former leader of Egypt, Hosni Mubarak, allegedly stole millions during his 30 years in office, much of it still missing.[26] Muammar Qadafi, the former Libyan leader, is thought to have taken billions out of the country.[27] The billions of missing cash and valuables would have provided a much-needed boost for post-Arab Spring states desperately needing economic recovery.[28] Masood Ahmed, the IMF

LEGAL STRUCTURES TO HIDE STOLEN ASSETS AND WHAT TO DO ABOUT IT (2011), *available at* https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf (quoting the back cover of the report).

[24] *Hidden Billions of Fallen Arab Spring Dictators Remain Elusive*, NATIONAL (June 12, 2013), http://www.thenational.ae/business/industry-insights/finance/hidden-billions-of-fallen-arab-spring-dictators-remain-elusive.

[25] *See* Eric Holder, Att'y Gen., U.S. Dep't of Justice, Address at the Ukraine Forum on Asset Recovery (Oct. 23, 2014), *available at* http://www.humanrights.gov/dyn/attorney-general-holder-at-the-ukraine-forum-on-asset-recovery/ ("Last week — at President Obama's direction, and in order to build on the work that's already ongoing — Vice President Biden announced that the United States is committing an additional $1 million in technical assistance to aid the Ukrainian investigation for equipment and other developing needs. Among other things, these funds will place a Justice Department attorney on the ground in Kyiv to work exclusively with Ukraine and its partners on asset recovery and mutual legal assistance issues. . . . As we've learned from providing similar assistance and support to Arab Spring countries, this move will be critical to augmenting vital information-gathering and communications capabilities in order to enhance asset recovery in both the short and long term.").

[26] *See* Jackson Oldfield, *Three Steps to (Start) Recovering Stolen Assets*, TRANSPARENCY INT'L (June 12, 2014), https://blog.transparency.org/2014/06/12/three-steps-to-start-recovering-stolen-assets/; *Swiss Continue Freeze on Mubarak Money*, AL JAZEERA (Dec. 18, 2013, 8:00 PM), http://www.aljazeera.com/news/middleeast/2013/12/swiss-continue-freeze-mubarak-money-20131218175513487976.html.

[27] *See* Tom Bawden & John Hooper, *Gaddafis' Hidden Billions: Dubai Banks, Plush London Pads and Italian Water*, GUARDIAN (Feb. 22, 2011, 4:28 PM EST), http://www.theguardian.com/world/2011/feb/22/gaddafi-libya-oil-wealth-portfolio.

[28] *See* Abdelmalek Alaoui, *Three Years Later: The Arab Spring and the Hunt for Former Dictators' Assets*, FORBES (Jan. 9, 2014, 8:00 AM), http://www.forbes.com/sites/kerryadolan/2014/01/09/three-years-later-the-arab-spring-and-the-hunt-for-former-

director for the Middle East and North Africa, said that after the Arab Spring, countries including "Morocco, Tunisia, Egypt and Jordan faced the double shocks of high energy and food import bills and the impact of a global economic downturn."[29] As a result, he called the recovery of assets stolen by the former dictators of Libya, Tunisia and Egypt "a moral and legal imperative" for the European Union ("EU").[30] In 2013, members of the European Parliament voted to press the EU and member states to accelerate the return of riches already frozen.[31]

The international press reports that "[t]he total amount of wealth to be recovered, mostly from foreign banks and tax heavens, was close to $300 billion . . . ."[32] This number falls just a tad short of the combined GDP of Egypt, Libya, and Tunisia in 2011, which amounted to $355 billion. If these estimates are credible, it would mean that the three dictators allegedly stole about one year's worth of their former countries' GDP.[33]

Has the money been found? Three years later, the hunt for the stolen wealth has stalled.[34] According to *The Economist*, the amount of wealth belonging to former dictators identified and frozen abroad is small, worth a little over $1 billion.[35] The publication adds that what has been repatriated is nothing for Egypt, a London house for Libya and $29 million from a Lebanese bank account to Tunisia.[36]

The reasons behind those poor results are multiple, ranging from very high and inaccurate estimates, and the existence of overly complex mechanisms to identify the assets and their owners. Some even argue that Western countries hide behind banking secrecy rules to prevent the capital from being repatriated. "Politicians of the world's most corrupt countries are putting their money in the world's

dictators-assets/.

[29] Suleiman al-Khalidi, *Arab Spring Nations Face Delayed Economic Recovery: IMF*, REUTERS (May 25, 2013, 8:17 PM), http://www.reuters.com/article/2013/05/26/us-imf-middleast-economy-idUSBRE94P00720130526.

[30] *Hidden Billions of Fallen Arab Spring Dictators Remain Elusive*, *supra* note 24.

[31] *See* Resolution of 23 May 2013 on Asset Recovery by Arab Spring Countries in Transition, EUR. PARL. DOC. RC-B7-0188 (2013), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0224+0+DOC+XML+V0//EN.

[32] Alaoui, *supra* note 28.

[33] *Id.*

[34] *See Making a Hash of Finding the Cash*, ECONOMIST (May 11, 2013), *available at* http://www.economist.com/news/international/21577368-why-have-arab-countries-recovered-so-little-money-thought-have-been-nabbed.

[35] *Id.*

[36] *Id.*

cleanest countries . . . what does that say about who's really clean?" argued one skeptical Arab analyst.[37]

II. THE RESPONSE TO GRAND CORRUPTION — THREE PIVOTS

Kleptocracy and grand corruption are challenges, because it is difficult to hold leaders accountable when they have captured the state. As a result, scholars, policymakers, and law enforcement, have focused on new means of holding kleptocrats accountable. I refer to these as three different "pivots" — attempts to find new legal tools for addressing systemic and large-scale corruption.

A. Pivot One: Grand Corruption as an International Crime

Scholars, and now other policymakers have focused on elevating grand corruption to the level of an international crime. Ndiva Kofele-Kale, one of the earliest scholars to advocate for the recognition of a new international crime of patrimonicide or indigenous spoliation, focused on situations where leaders squander precious natural resources for their own personal gain.[38] In addition, other commentators have tried to establish that corruption on a grand and systematic scale (e.g. state-sponsored plunder of natural resources) constitutes a crime against humanity.[39] As such, corrupt acts would be actionable as international crimes — subject either to the jurisdiction of international tribunals or national courts exercising some sort of universal jurisdiction.[40]

One scholar, Ilias Bantekas, notes, for example, that in order for corruption to be considered a prosecutable offense in a foreign

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[37] Alaoui, *supra* note 28; *see also Making a Hash of Finding the Cash*, *supra* note 34.

[38] Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 48, 56 & n.27 (1995).

[39] Several scholars have indeed argued that "graft" should constitute a crime against humanity. *See, e.g.*, Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT'L CRIM. JUST. 474-76 (2006); Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1258-59 (2007); *Should 'Grand Corruption' Be a Crime Against Humanity?*, FCPA BLOG (Aug. 22, 2012, 2:28 AM), http://www.fcpablog.com/blog/2012/8/22/should-grand-corruption-be-a-crime-against-humanity.html#sthash.pEoCjvub.dpuf.

[40] *See* Bantekas, *supra* note 39; Kofele-Kale, *supra* note 38, at 55; Starr, *supra* note 39, at 1297 (discussing the possibility of prosecuting grand corruption as a crime against humanity under Article 7(1)(k) of the Rome Statute of the International Criminal Court).

jurisdiction it must take the form of a crime against humanity.[41] Another human rights scholar, James Gathii points out that the Kenyan National Human Rights Commission "have even gone so far as to consider corruption a 'crime against humanity.' This is due to the undermining effect corruption has on the ability of a state to comply with its human rights obligations — it erodes both the state's capacity to and the public's confidence that the state will deliver services to the public."[42]

The International Criminal Court ("ICC") in The Hague, has jurisdiction over crimes against humanity. Article 7 of The Rome Statute of the ICC enumerates a series of offenses that include murder, enslavement, and extermination that are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[43] The Rome Statute also refers to "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[44] Treating grand corruption as another serious inhumane act would highlight the grave nature of the underlying actions — theft leading to the mass deprivation of rights. It would also allow for prosecution of leaders before international tribunals, such as the ICC, as well as potentially in national jurisdictions that have amended their own legislation to allow for the prosecution of international crimes.[45]

In 2008 the Socio-Economic Rights and Accountability Project ("SERAP"), a Nigerian non-governmental organization ("NGO"), petitioned the ICC to "examine and investigate whether the systemic/ grand corruption in Nigeria amounts to a crime against humanity within the jurisdiction of the ICC."[46] The ICC has taken no action on

[41] Bantekas, *supra* note 39.

[42] James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 147 (2009) (citing Julio Bacio Terracino, *Corruption as a Violation of Human Rights* (Int'l Council on Human Rights Policy, working paper, 2008)) (discussing the growing social implications of corruption and its connection to human rights violations).

[43] Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 38544, *available at* http://www.refworld.org/docid/3ae6b3a84.html.

[44] *Id.*

[45] *See* GLOBAL ORG. OF PARLIAMENTARIANS AGAINST CORRUPTION, PROSECUTING GRAND CORRUPTION AS AN INTERNATIONAL CRIME 6-7 (2013) [hereinafter INTERNATIONAL CRIME], *available at* http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf.

[46] *See ICC Petitioned over Systemic Corruption in Nigeria*, SOCIO-ECONOMIC RTS. & ACCOUNTABILITY PROJECT, http://serap-nigeria.org/icc-petitioned-over-systemic-corruption-

this petition, or a second petition reportedly filed in 2012 in connection with an alleged $6.8 billion dollar looting of Nigeria's fuel subsidy program.[47]

In November 2013, the Global Organization of Parliamentarians Against Corruption ("GOPAC") issued a policy paper focused on grand corruption as an international crime that should be subject to universal jurisdiction.[48] GOPAC's call to arms echoes prior recommendations of scholars.[49] GOPAC notes that existing tribunals could already prosecute the worst forms of corruption as a prosecutable crime against humanity, since such acts would meet the requirements established in the International Criminal Court's Elements of Crimes. GOPAC reaffirmed its position with a declaration at the fifth conference of State Parties to the UNCAC.[50] This is still, controversial, however, as this might allow for prosecution outside of armed conflicts or crisis situations.

The alternative would be to amend the Rome Statute to include grand corruption as a new offense. This requires approval of at least two-thirds of all States Parties to the treaty. Corrupt governments may

in-nigeria/ (last visited Sept. 26, 2015).

[47] Letter from Adetokunbo Mumuni, Exec. Dir., SERAP, to Luis Moreno Ocampo, Prosecutor, Int'l Criminal Court (Apr. 20, 2012), *available at* http://serap-nigeria.org/request-to-icc-on-6bn-fuel-subsidy-loot/ (discussing the second petition).

[48] Universal jurisdiction is a complex concept. For a discussion, which lists crimes against humanity as an international crime but not one giving rise to universal jurisdiction, see M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 118-19 (2001).

[49] GLOBAL ORG. OF PARLIAMENTARIANS AGAINST CORRUPTION, INTERNATIONAL CRIME, *supra* note 45, at 4; *see also* Ben Bloom, *Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption*, 29 *AM. U. INT'L L. REV.* 627, 648-59 (2014); Robin Palmer, *Combating Grand Corruption in Africa: Should It Be an International Crime?,* OPEN SOCIETY INITIATIVE FOR S. AFR. 33-34 (March 6, 2012), *available at* http://www.osisa.org/sites/default/files/combating_grand_coruption_in_africa_-_robin_palmer.pdf; *cf.* David M. Fuhr, *Of Thieves and Repressors: The Interplay Between Corruption and Human Rights Violations*, 5 Elon L. 271, 291-97 (2013) (discussing how anti bribery laws and international conventions can address cases of grand corruption); Starr, *supra* note 39, at 1281. *See generally* MARTINE BOERSMA, CORRUPTION: A VIOLATION OF HUMAN RIGHTS AND A CRIME UNDER INTERNATIONAL LAW? (Intersentia 2012) (arguing for embezzlement as a crime against humanity).

[50] GLOBAL ORG. OF PARLIAMENTARIANS AGAINST CORRUPTION, DECLARATION FOR THE FIFTH FORUM OF PARLIAMENTARIANS (Nov. 27, 2013), *available at* http://www.gopacnetwork.org/Docs/Declaration%20for%20Fifth%20Forum%20of%20Parliamentarians_EN.pdf ("And we further resolve to encourage states, the United Nations, and international institutions to deem crimes of *grand corruption* as crimes against the common community of humanity in violation of peremptory norms and international law; and we further resolve to encourage states, the United Nations, and international institutions to recognise crimes of *grand corruption* as being crimes against humanity.").

not support the proposal since that would be agreeing, in theory to their own prosecutions.[51] Even if it is adopted, as an amendment to Article 7 of the Rome Statute that identifies crimes against humanity, it would apply only to the states that accept the amendment.[52] In other words, amending the Rome Statute is itself unlikely and, even if such an amendment were adopted, would be circumscribed to the extent that states choose not to accept it as part of their treaty obligations.

GOPAC acknowledges some of the weaknesses in its own proposal and alludes to inherent organizational limits to using the ICC to prosecute grand corruption:

> [T]he ICC can only prosecute crimes that fall under one of four categories: (1) if the accused is a citizen of a State Party to the Rome Statute; (2) if the offence has taken place in a State Party to the Rome Statute; (3) if the UN Security Council has referred the offence to the prosecutor of the ICC; (4) if a non-party state voluntarily accepts the Court's jurisdiction.[53]

Currently, more than 50 UN member states are not parties to the ICC, including UN Security Council members China, Russia, and the United States.[54] The ICC is also not authorized to prosecute crimes committed before 2002 and has only secured a single conviction to date. Expanding the ICC's jurisdiction would stretch its already limited capacity and resources.[55] Furthermore, corruption is already a crime under domestic law in most countries. The problem might be better characterized as one of under enforcement of existing laws, not a lack of legislation.

Some experts believe that the antidote to grand corruption is not using the ICC as a venue for prosecutions, but rather a new venue tailored to address the unique nature of corruption cases.[56] Senior U.S. District Judge Mark L. Wolf recently made this case in a July 2014

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[51] *See* Brett D. Schaefer, Steven Groves & James M. Roberts, *Why the U.S. Should Oppose the Creation of an International Anti-Corruption Court*, HERITAGE FOUND. (Oct. 1, 2014), http://www.heritage.org/research/reports/2014/10/why-the-us-should-oppose-the-creation-of-an-international-anti-corruption-court.

[52] *Id.*

[53] GLOBAL ORG. OF PARLIAMENTARIANS AGAINST CORRUPTION, INTERNATIONAL CRIME, *supra* note 45, at 7.

[54] *See State Parties to the Rome Statute*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Nov. 3, 2015).

[55] GLOBAL ORG. OF PARLIAMENTARIANS AGAINST CORRUPTION, INTERNATIONAL CRIME, *supra* note 45, at 7.

[56] Schaefer et al., *supra* note 51.

Brookings Institution paper.[57] Judge Wolf compares the prospective relationship between an International Anti-Corruption Court ("IACC") and sovereign nations to that between the U.S. federal government and the 50 U.S. states, observing:

> In the United States, we do not rely on elected state prosecutors to do this because they are often part of the political establishment that must be challenged and, in any event, lack the necessary legal authority and resources. Rather, we rely primarily on federal investigators, prosecutors, and courts to pursue and punish corrupt state and local officials.[58]

Judge Wolf suggests assigning a similar authority to an IACC, although he specifically notes that the IACC, like the ICC, should have complementary jurisdiction — that is, its jurisdiction would only be triggered if national authorities proved unwilling or unable to prosecute corruption.[59] Wolf envisions this as creating an incentive for nations to "strengthen their capacity to prosecute grand corruption."[60]

This is a highly ambitious agenda — creating another international tribunal. The theoretical application of such an authority would be universal, that is, not restricted to failed states or developing countries with weak or fledgling judicial systems, but including the world's most powerful countries and possibly targeting the world's most powerful politicians. Judge Wolf acknowledges that political authorities in China, Russia, and the United Kingdom have either failed to prosecute corruption or interfered in corruption investigations.[61] In order to gather broad participation and compel reluctant states to join, Wolf urges "submission to the jurisdiction of the International Anti-Corruption Court should be incorporated in the United Nations Convention Against Corruption. It should also be made a condition of membership in international organizations such as the OECD and WTO [World Trade Organization], and for obtaining loans from international lenders such as the World Bank."[62]

This type of compulsory membership would significantly alter current geopolitical architecture. Both developing and developed

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[57] Mark L. Wolf, *The Case for an International Anti-Corruption Court*, GOVERNANCE STUD. BROOKINGS, July, 2014, at 1, *available at* http://www.brookings.edu/research/papers/2014/07/international-anti-corruption-court-wolf.

[58] *Id.* at 2.

[59] *Id.* at 12-13.

[60] *Id.* at 12.

[61] Schaefer et al., *supra* note 51.

[62] Wolf, *supra* note 57, at 11.

nations have reasons to boycott the ICC or the IACC as possible venues for the prosecution of grand corruption. Thus, this pivot seems unlikely — or at best something that will take years to achieve.[63] This first pivot — to couch grand corruption as an international crime, does little to empower victims directly. It emphasizes the substantial nature of the harm caused by large-scale theft, but it does little to empower society as a whole. It still leaves the decision to prosecute or pursue claims in the hands of states.

B. Pivot Two: A New Human Right to Be Free from Corruption

Rather than focusing on criminal law — which requires the state to prosecute wrongdoers, other scholars and policymakers are turning to international human rights law as a second path for addressing both petty and grand corruption. Over the past decade, corruption has often been linked to human rights both directly and indirectly. The act of paying a bribe may result in human rights impacts. The key report that outlines this argument was published in 2009 by Transparency International ("TI") and the International Council for Human Rights Policy ("ICHRP"), *Transparency and Human Rights, Making the Connection*. The TI/ICHRP report's focus however, was not on giving

[63] *See* Matthew Stephenson, *The Case Against an International Anti-Corruption Court*, GLOBAL ANTICORRUPTION BLOG (July 31, 2014), http://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/ ("Now, all these problems might not matter so much if an IACC, once established, would make significant headway in combating grand corruption and suppressing the culture of impunity, and if this goal could not be achieved as effectively any other way. But I don't think either claim is accurate. As I said, those countries that are really ruled by out-and-out kleptocrats will never join onto a court like this, no matter what you threaten them with. Even if some countries joined, this court would never be able to address more than a sliver of the corruption problem — "grand" and otherwise. The ICC, Judge Wolf's principal model, has, after all, done relatively little in its decade-plus in existence. Moreover, as I've noted, there are a number of ways Judge Wolf's proposed IACC could actually prove counterproductive — eroding the international norm against anticorruption, emboldening some leaders to resist other forms of pressure to clean up their acts, possibly triggering a backlash among citizens in certain countries who resent the intrusiveness of the IACC, and — for those countries that remain outside the IACC despite Judge Wolf's proposed sanctions — cutting them off from the economic opportunities and international engagement that might, in the long term, do more to reduce corruption than the punishment of a handful of officials from a few, likely very poor, countries.").

victims stronger tools to challenge corruption directly, but rather to raise awareness and to motivate calls for change and reform.[64]

The report provided a systematic account of how corruption — be it bribery or the use of undue influence, impacts the lives of the poor and vulnerable globally. The report identified women, children and minority groups, for example, as those who suffer the greatest in terms of the consequences of corruption.[65] For example, the report noted that in Mexico, it is estimated that approximately 25% of the income earned by poor households is lost to petty corruption. In Bangladesh, surveys show that nearly one-third of girls trying to enroll in a government stipend scheme for extremely poor students had to pay a bribe, while half had to make a "payment" before collecting their awarded scholarship.[66] In Madagascar, as of 2009, one-quarter of all

[64] The Report states:

> If corruption is shown to violate human rights, this will influence public attitudes. When people become more aware of the damage corruption does to public and individual interests, and the harm that even minor corruption can cause, they are more likely to support campaigns and [programs] to prevent it. This is important because, despite strong rhetoric, the political impact of most anticorruption [programs] has been low. Identifying the specific links between corruption and human rights may persuade key actors — public officials, parliamentarians, judges, prosecutors, lawyers, business people, bankers, accountants, the media and the public in general — to take a stronger stand against corruption. This may be so even in countries where reference to human rights is sensitive.

INT'L COUNCIL ON HUMAN RIGHTS POLICY & TRANSPARENCY INT'L, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 5 (Robert Archer ed., 2009) [hereinafter ICHRP].

The ICHRP report builds on the work of one its main researchers, whose own work identifies how corruption may indirectly lead to human right violations, but in other cases can constitute a direct violation. While this represents a more direct linkage it still fails to discuss situations where large bribes have been paid, resources stolen and where citizens cannot directly point to a concrete injury to them — yet their entire economy has been damaged by the corrupt acts. *See* JULIO TERRACINO, INT'L COUNCIL ON HUMAN RIGHTS POLICY, HARD LAW CONNECTIONS BETWEEN CORRUPTION AND HUMAN RIGHTS 3-5 (2007).

[65] ICHRP, *supra* note 64, at 7.

[66] *Id.* at v. *See generally* TRANSPARENCY INT'L, AFRICA EDUCATION WATCH: GOOD GOVERNANCE LESSONS FOR PRIMARY EDUCATION (2010), *available at* http://archive.transparency.org/news_room/in_focus/2010/african_education_watch#6 (this report presents a regional overview of accountability and transparency in primary education management in seven African countries including Madagascar. The report includes a discussion of corruption and school fees).

households are forced to cover school 'enrollment' fees although all primary education is free under the law.[67]

The TI/ICHRP policy report and other academic literature[68] focus on the fact that when officials demand and take bribes, engage in nepotism, embezzle or act fraudulently, all of these actions have consequences that often link to human rights. The report highlights the multiple impacts of corrupt governance and thus touches on all human rights — civil, political, economic, social and cultural, as well as the right to development. Corruption leads to violation of the government's human rights obligation "to take steps to the maximum of [its] available resources to progressively achieve the full realisation of economic, social and cultural rights." recognized in the International Covenant.[69]

The report highlights that "corrupt management of public resources compromises the government's ability to deliver an array of services, including health, educational and welfare services, which are essential for the realization of economic, social and cultural rights."[70] In addition to economic and social rights, the report also underscores that corruption may also affect the enjoyment of civil and political rights. It can, for example, weaken democratic institutions both in new and in long-established democracies. When corruption is prevalent, those in public positions fail to take decisions with the interests of society in mind and people become discouraged from exercising their civil and political rights and from demanding that these rights be respected.[71] As the Office of the High Commissioner for Human Rights has noted:

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[67] ICHRP, *supra* note 64, at v.

[68] Gathii, *supra* note 42, at 24 (quoting U.N. Conference on Anti-Corruption Measures, Good Governance and Human Rights, Nov. 8–9, 2006, *Background Note*, ¶ 6, U.N. Doc. HR/POL/GG/SEM/2006/2 (Nov. 8–9, 2006)). *See generally* CORRUPTION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES 2 (Martine Boersma & Hans Nelen eds., Intersentia 2010); C. RAJ KUMAR, CORRUPTION AND HUMAN RIGHTS IN INDIA: COMPARATIVE PERSPECTIVES ON TRANSPARENCY AND GOOD GOVERNANCE 54 (Oxford Univ. Press, 2011); Berihun Adugna Gebeye, *Corruption and Human Rights: Exploring the Relationships* (Denver Univ. Korbel Ctr., Working Paper No. 70, 2012), *available at* http://www.du.edu/korbel/hrhw/workingpapers/2012/70-gebeye-2012.pdf.

[69] *See* ICHRP, *supra* note 64, at 46.

[70] *Human Rights and Anti-Corruption*, U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RTS., http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx (last visited Sept. 10, 2015).

[71] *See id.* at 27-28 (discussing how corruption violates right to a fair trial and rights of political participation).

> In countries where corruption is pervasive in the rule-of-law system, both the implementation of existing legal frameworks and efforts to reform them are impeded by corrupt judges, lawyers, prosecutors, police officers, investigators and auditors. Such practices compromise the right to equality before the law and the right to a fair trial, and especially undermine the access of the disadvantaged groups to justice, as they cannot afford to offer bribes. Importantly, corruption in the rule-of-law system weakens the very accountability structures which are responsible for protecting human rights and contributes to a culture of impunity, since illegal actions are not punished and laws are not consistently upheld.[72]

The United Nations and other international organizations have also focused on the linkages between corruption and human rights. The former U.N. High Commissioner for Human Rights, Navi Pillay has stated:

> Corruption kills. The money stolen through corruption every year is enough to feed the world's hungry 80 times over. Nearly 870 million people go to bed hungry every night, many of them children; corruption denies them their right to food, and, in some cases, their right to life . . . A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promises of 'freedom from fear and want.'[73]

Moreover, U.N. human rights treaty bodies and special mandates also point to the corruption as a reason why states are unable to comply with their human rights obligations under international law.[74]

The U.N. has done more than just mention corruption in its proceedings and reports. The Human Rights Council, U.N. Special Rapporteurs and the Human Rights Treaty-monitoring bodies (notably the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child) have addressed issues of corruption and human rights in their work and investigations.[75] In 2003, the former Sub-Commission on the Promotion and Protection of

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[72] *Human Rights and Anti-Corruption*, *supra* note 70.

[73] Navi Pillay, U.N. High Comm'r for Human Rights, Opening Statement at Panel on "The Negative Impact of Corruption on Human Rights" (March 13, 2013), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13131&LangID=E#sthash.rrkYgatL.dpuf).

[74] *Human Rights and Anti-Corruption*, *supra* note 70.

[75] *Id.*

Human Rights appointed a Special Rapporteur with the task of preparing a comprehensive study on corruption and its impact on the full enjoyment of human rights, in particular economic, social and cultural rights.[76] The mandate ended in 2006 and the Sub-Commission was replaced by an Advisory Committee.

The Human Rights Council has continued to promote work on human rights and anti-corruption. In 2011, the Council stressed that states should promote supportive and enabling environments for the prevention of human rights violations by fighting corruption.[77] Furthermore, the Council considered the issue of the impact of the non-return of illicit/stolen funds to the countries of origin on the enjoyment of human rights, including a study by the High Commissioner for Human Rights on the subject matter.[78]

In 2013, the Human Rights Council requested its expert Advisory Committee to submit a research report to the Council at its twenty-sixth session in 2014 on the issue of the negative impact of corruption on the enjoyment of human rights, and to make recommendations on how the Council and its subsidiary bodies should consider this issue.[79] The report has not yet been presented.

While the linkages have been explored, much of the discussions have focused around policy coherence — governments ensuring that they implement anti-corruption measures as part of a larger human rights agenda. At the same time, citizens are still waiting for assets that have been looted, and treasuries that have been drained, to actually recover ill-gotten gains — often these assets (the proceeds of corruption) are in a third country — an offshore financial jurisdiction, for example.

Scholars have also focused on trying to establish new norms relating to human rights and corruption. David Kinley, a prominent human

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[76] *Former Sub-Commission Special Rapporteur on Corruption and Its Impact on the Full Enjoyment of Human Rights*, U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RTS., http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/FormerSRCorruption.aspx (last visited Oct 1, 2015).

[77] Human Rights Council Res. 18/13, Rep. of the Human Rights Council, 36th Mtg., Oct. 22, 2012, Human Rights Council, 18th Sess., A/18/13, at 39 (Oct. 14, 2011).

[78] Human Rights Council Res. 17/23, Rep. of the Human Rights Council, 17th Sess., A/HRC/RES/17/23, at 2 (July 19, 2011); Human Rights Council Res.19/38, Rep. of the Human Rights Council, 19th Sess., A/HRC/RES/19/38, at 2 (Apr. 19, 2012); Human Rights Council Res. 22/12, Rep. of the Human Rights Council, 22nd Sess., A/HRC/RES/22/12, at 2 (Apr. 10, 2013).

[79] *See* Human Rights Council Res 23/9, Rep. of the Human Rights Council, 23rd Sess., A/HRC/RES/23/9 (June 7, 2013).

rights scholar, has advocated for a new human rights treaty-based right to be free from corruption. He notes that "the most effective and practicable option would be to incorporate the right in a pair of Optional Protocols — one to be appended each of the two Covenants."[80] Kinley states that "[n]ot the least attractive aspect of this option would be the unequivocal statement it would make about its capacity to bridge the two sets of rights. Being framed in [Optional Protocols] to existing Covenants would also emphasize the systemic nature of the [Right to be Free from Corruption] — that is, something integral to the realization of full breadth of civil and political rights, and economic, social and cultural rights that States are bound to [protect]."[81]

Kinley's proposal focuses on creating a new right — which requires states to negotiate a new protocol to existing treaties — as such, it is a prospective proposal — and one that would require states to agree on new binding mechanisms. Like the international crimes proposal, the challenges are immense and require civil society to engage in a resource intensive campaign to realize their rights. While the process of further linking corruption and human rights continues, the question remains open as to how civil society should address the impunity problem with respect to grand corruption. This is where a turn to existing law and treaty provisions may be the most sensible option.

C. Pivot Three: Build on an Existing Treaty-Based Right to Be Free from Corruption

The first two proposals for addressing grand corruption require an investment in further international law making, requiring the amendment of existing treaties, the negotiation of new ones, and potentially the creation of new tribunals. Hence, while campaigns may be underway, there are many challenges to realizing either goal of making grand corruption an international crime or creating a new human right to be free from corruption that would link in to the existing international human rights frameworks and machinery. In both instances the focus is on linking corruption to human rights as the way to prompt government to take action.

These projects detract from the existing major anti-corruption treaty that is currently in force, and around which there is large consensus

[80] David Kinley, *A New Human Right to Freedom from Corruption* 12 (Sydney Law Sch. Research Paper No. 14/12, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393205).

[81] *Id.*

— UNCAC, which came into force in 2005 and currently has 140 signatories.[82] The Convention includes Article 35: Compensation for Damages, which requires states to "take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."[83] Article 35 thus requires states to establish private rights of action in civil proceedings for damages. However, the travaux préparatoires to the Convention state as follows:

> [T]his article is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State Party where the proceedings are to be brought). While article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.[84]

This article is written in non-self-executing terms, meaning that, domestic legislation is required to implement the provision.[85] The U.S. Government, for example, interprets this article as not requiring it to adopt new federal legislation establishing a cause of action for damages suffered from corruption.[86] However, other countries may adopt measures that permit injured parties to sue for compensation for

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[82] *United Nations Convention Against Corruption Signature and Ratification Status as of 1 April 2015*, U.N. OFFICE OF DRUGS & CRIME (Apr. 1, 2015) https://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

[83] *See* U.N. Convention Against Corruption, G.A. Res. 58/4 (XXXVII), U.N. Doc. A/58/422 (Oct. 7, 2003), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/886/56/PDF/V0388656.pdf.

[84] Rep. of the Ad Hoc Comm. for the Negotiation of a Convention Against Corruption on the Work of Its First to Seventh Sessions, ¶ 38, U.N. Doc A/58/422/Add.1; GAOR, 58th Sess., (Oct. 10 2003), *available at* https://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf.

[85] *See* RICHARD LUGAR, UNITED NATIONS CONVENTION AGAINST CORRUPTION, S. EXEC. REPT. NO. 109-18, at 10 (2d Sess. 2006).

[86] *Id.* at 10 (noting that "[t]he current laws and practices of the United States are in compliance with Article 35 . . . ."). The government's analysis also negates any intention that this provision creates private rights of action under the U.S. Foreign Corrupt Practices Act. *Id.*

acts of corruption. It provides a shared commitment — but gives states wide latitude as to how to provide for civil remedies within their legal system. As I will discuss below, rather than treating this as a detriment, civil society should view this as an opportunity to build and innovate in different national jurisdictions to create a more robust right to a remedy.

The U.N. treaty is not the first to focus on civil remedies, the European Civil Law Convention Against Corruption is the first.[87] As one corruption expert notes, the "broader reach of the UN Convention will accelerate the trend in recent years for parties who claim injury from another's corrupt practices to bring civil suits."[88]

1. The Right to a Civil Remedy — Narrowly Construed at Present and Seldom Used

Our current understanding of the use of civil actions to address grand corruption, focuses mainly on the role of individual litigants (e.g. businesses or employers) who have suffered more discrete injury as a result of another person's corrupt acts.[89] More recent analyses have also examined the role of states as private enforcers, often in the role of victim states, intervening to recover assets located in another jurisdiction.[90] States, in some circumstances, may have the right to act as private litigants to bring lawsuits to recover proceeds lost through corruption.[91]

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[87] *See* Civil Law Convention on Corruption art. 1, Nov. 4, 1999, E.T.S. No. 174. The Council of Europe ("COE") treaty states in Article 1 that "Each Party shall provide in in its internal law for elective remedies for persons who have suffered damage as a result of acts of corruption, to enable to defend their rights and interests, including the possibility of obtaining compensation for damage." Article 2 of the same convention also allows parties to a contract whose consent has been undermined by an act of corruption to apply to a court to have a contract be declared void. This would be separate from any claim for damages.

[88] LUCINDA A. LOW, THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: THE GLOBALIZATION OF ANTICORRUPTION STANDARDS 17 (2006), *available at* http://www.steptoe.com/assets/attachments/2599.pdf.

[89] *See generally* ABIOLA MAKINWA, PRIVATE REMEDIES FOR CORRUPTION: TOWARDS AN INTERNATIONAL FRAMEWORK (2013) (discussing the role of private actors in fighting against corruption and the remedies); *see also* William T. Loris, *Private Civil Actions: A Tool for a Citizen-Led Battle Against Corruption*, 5 WORLD BANK LEGAL REV. 437, 451 (2013) (discussing corruption in the civil law context).

[90] *See* JEAN-PIERRE BRUN ET AL., PUBLIC WRONGS, PRIVATE ACTIONS: CIVIL LAW SUITS TO RECOVER STOLEN ASSETS 99-104 (2015), *available at* https://star.worldbank.org/star/publication/public-wrongs-private-actions.

[91] *Id.* at 6.

To date, there has been sparse civil litigation.[92] That being said, here are various causes of action that could or have been utilized in civil corruption cases, including use of the doctrine of constructive trusts.[93] Other claims may arise from traditional common law causes of action such as breach of contract or tort, or a theory of unjust enrichment for which a plaintiff might seek restitution.[94]

There are many supposed advantages of civil actions — from a lower standard of proof such as preponderance of the evidence. There is also a wide range of remedies available to all claimants.[95] Civil actions can have strong symbolic significance and also strengthen the rule of law by shaming those in power. Some of the key advantages of civil actions relate to the right to make everyone a potential prosecutor in places where resources are scarce and the opportunity for civil society empowerment.[96]

Research indicates that one can infer or find a private right of action from existing civil law rules. The basic provisions for civil responsibility, for example may be found in the civil codes of jurisdictions such as Italy, France and Germany.[97] A recent survey of eight European jurisdictions found an ample basis for civil actions in each.[98] In South Africa a person who can make the elements of a tort (delict) may bring a civil claim for "restoration" if he or she incurred damage or loss as a result of corruption.[99] At least one commentator

[92] Heine, Huber and Rose point out that there are many hurdles to initiating civil proceedings including the cost of protracted civil litigation, the difficulty of compelling product and evidence and witnesses in international cases. *See* Gunter Heine, *Part III: Comparative Analysis*, *in* PRIVATE COMMERCIAL BRIBERY: A COMPARISON OF NATIONAL AND SUPRANATIONAL LEGAL STRUCTURES 603, 654-55 (Gunter Heine, Barbara Huber & Thomas O. Rose eds., 2003).

[93] *See* Arthur Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 COLUM. L. REV. 214, 214-17 (1954); *see also* van der Does de Willebois, *supra* note 10, at 626.

[94] For a general discussion, see van der Does de Willebois, *supra* note 10, at 629-39.

[95] *See* Loris, *supra* note 89, at 440.

[96] *See* Simon N.M. Young, *Why Civil Actions Against Corruption?*, 16 J. FIN. CRIME 144, 145 (2009); Abiola O. Makinwa, *Motivating Civil Remedies for International Corruption: Nigeria as an Illustrative Case Study*, 2 CALS REV. NIGERIAN L. & PRAC. 97, 103 (2008).

[97] Paola Mariani, How Damages Recovery Actions Can Improve the Right Against Corruption 3-4 (Feb. 17, 2012) (unpublished manuscript) (on file with Bocconi University Department of Law), *available at* http://ssrn.com/abstract=2007241.

[98] *See generally* THE CIVIL LAW CONSEQUENCES OF CORRUPTION (Olaf Meyer ed., 2009).

[99] Abigail J. Marcus, Broadening the Range of Incentives to Combat Corruption in South Africa 8 (Oct. 2014) (unpublished manuscript) (on file with the New York Law School Law Review), *available at* http://www.nylslawreview.com/wp-content/

has inferred that this would allow business competitors who lost tenders to sue a company who paid a bribe.[100] In South Africa, however, these civil suits have been infrequent.[101]

Implementation of Article 35 of UNCAC, however, appears patchy, according to existing peer review reports.[102] "A considerable number of state parties have not created a private right of action for victims of corruption."[103] For example, Chile, Fiji, Finland, Mongolia, Bolivia, Costa Rica, Cuba, Haiti, Mexico, Peru and Uruguay did not report on how they complied with Article 35 of UNCAC in implementation reports submitted to the UNCAC Implementation Review Group.[104] Even when countries have implemented Article 35, relevant remedies are not corruption-specific.[105] Based on the implementation reports, many State Parties rely on existing tort laws focused on intentional and economic torts, negligence, and deceit, or laws allowing the commencement of civil proceedings for victim compensation upon conviction, to satisfy their obligation to provide a right to a remedy

uploads/sites/16/2014/11/Marcus-Abigail.pdf.

100 *Id.*

101 *Id.* The author notes that "[a] cursory review of reported court cases from 1947 and 2014 revealed only five civil cases alleging corruption and claims for civil damages in delict." *Id.* at 8 n.39.

102 Delphia Lim et al., *Access to Remedies for Transnational Public Bribery: A Governance Gap*, *in* 1 LIDS GLOBAL: ISSUES IN COMBATING TRANSNATIONAL CORRUPTION 3, 8 (Harvard Law & Int'l Dev. Soc'y ed., 2013), *available at* http://orgs.law.harvard.edu/lids/files/dlm_uploads/2014/09/LIDS-Global-Initiative-Volume-I.pdf.

103 *Id.*

104 *Id.* The authors also point to other regions: According to research by Transparency International, Nigeria and Burundi were not compliant with Article 35 of the UNCAC. *Id.*; *see also* LILIAN EKEANYANWU, TRANSPARENCY INT'L, REVIEW OF LEGAL AND POLITICAL CHALLENGES TO THE DOMESTICATION OF THE ANTI-CORRUPTION CONVENTIONS IN NIGERIA 24 (2006); MICHEL MASABO, TRANSPARENCY INT'L, COUNTRY REVIEW OF LEGAL AND PRACTICAL CHALLENGES TO THE DOMESTICATION OF THE ANTI-CORRUPTION CONVENTIONS IN BURUNDI 18 (2006), *available at* http://tinyurl.com/kypkvjs.

105 Lim et al., *supra* note 102, at 8.

under Article 35 of UNCAC.[106] These laws, however, may not address all of the actions defined as corruption within UNCAC.[107]

The larger gap relates to what gives rise to a civil action. There are a limited set of causes of action that would be theoretically used for civil actions because civil remedies for corruption rely on narrow conceptions of victimhood, 'harm,' and 'causation' focused on damage to individual persons or companies.[108] These causes of action do not sufficiently recognize the significant negative impacts of transnational public bribery on the public, especially in a kleptocracy.[109]

For example, the Council of Europe explained, in relation to instituting a right to compensation for corruption, that "the damage . . . must be sufficiently characterised, particularly as regards the connection with the victim himself . . . an adequate causal link must exist between the act and the damage, in order for the latter to be compensated. The damage should be an ordinary and not an extraordinary consequence of corruption."[110] The public harm caused by transnational public bribery may not have a direct connection to any particular individual and thus would not meet these threshold requirements, despite broad effects on the community at large.

Recent discussions show that implementation of civil remedies and Article 35 is still quite nascent. As a result, civil society and the business community might seek to further explore how to campaign. William Loris has suggested that in some circumstances, regional organizations and their member states might implement Article 35 through regional conventions or frameworks like the Council of Europe Convention, as a way of ensuring a common baseline among countries that are regionally-integrated.[111]

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[106] *Id.*; *see also* Conference of State Parties to the United Nations Convention Against Corruption, Nov. 25–29, 2013, Implementation of Chapter III of the United Nations Convention Against Corruption, 14, U.N. Doc. CAC/COSP/2013/7 (Sept. 17, 2013) [hereinafter Conference of State Parties] ("The implementing legislation was either criminal or procedural, and in one case the matter was addressed in the anti-corruption law, which covered only part of the cases foreseen in the article. In one case, there appeared to be no specific provisions that guaranteed eligible persons the right to initiate legal proceedings in the absence of a prior criminal case and a recommendation was issued accordingly.").

[107] Lim et al., *supra* note 102, at 8.

[108] *Id.*

[109] *See id.*

[110] Civil Law Convention on Corruption, *supra* note 87.

[111] *See* Loris, *supra* note 89, at 445.

2. Moving Beyond a Narrow View of Civil Remedy to Collective Views of Remedy and Standing

The recent examination of civil law as a tool for prevention of corruption gives us a model as to what types of claims civil society or private actors might bring in the event of corruption. First, just as victim states might do, citizens might stand in the shoes of their government, if the government itself is the one engaged actively in kleptocratic behavior. Second, companies as with civil society, might also bring such actions challenging the behavior of a government or of a business that was engaged in corrupt behavior with a government.

Article 35 signals the promise of UNCAC to unleash the power of civil damages and administrative sanctions on persons that commit corrupt practices. The former can be seen as a further step in the privatization of law enforcement. As anti-corruption expert Lucinda Low notes, national law enforcement may see benefits in private enforcement given the difficulties in commencing criminal prosecutions for bribery of public officials.[112]

Article 35 may also provide the basis for civil society to take action. While governments wait for regime change, civil society can collect and provide evidence, identify witnesses, and document corruption as it occurs. And, as will be discussed below, they can try to mount private civil litigation or force/join a criminal prosecution in civil law countries as a *partie civile* or seek to mount a private prosecution.[113] At this juncture, several courts in different jurisdictions have recognized that individual citizens may be the victims of public corruption, even when they are indirectly harmed by the corrupt acts.[114] Furthermore, in some jurisdictions, courts have also permitted non-governmental organizations to have legal standing as representatives of collective victims of corruption, even when such victims are not identified individually.[115]

While Article 35 provides the specific right — one to which governments have already committed, the issue of how to construe this treaty right is still unanswered. Governments and civil society

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[112] LOW, *supra* note 88.

[113] Muhyieddeen Touq, Ambassador, Report at the Arab Forum Special Session Three: The Role of Civil Society in Asset Recovery ¶ 33 (Sept. 3–4, 2013), *available at* http://star.worldbank.org/star/sites/star/files/afar_special_session_iii_report_english.pdf.

[114] *Id.*

[115] *Id.* ¶ 30; *see also* INT'L CENTRE FOR ASSET RECOVERY, GUIDE TO THE ROLE OF CIVIL SOCIETY ORGANIZATIONS IN ASSET RECOVERY 15 (2013), *available at* http://star.worldbank.org/star/sites/star/files/afar_guide_to_the_role_of_csos_in_asset_recovery_english.pdf.

have paid scant attention to Article 35, and what it represents — the realization that victims do have a right to a remedy. The examples below show how emerging norms are developing, around the right to be free from corruption.

a. The Case of Les Biens Mal Aquis *(Ill Gotten Gains) and NGO Standing*

In 2008, Ngbwa Mintsa, a Gabonese citizen and taxpayer, joined forces with Transparency International France and the French legal NGO Sherpa to file a legal complaint against three current and former presidents suspected of large-scale embezzlement of public funds: Republic of Congo's Denis Sassou-Nguesso, Equatorial Guinea's Teodoro Obiang, and Gabon's Omar Bongo.[116] Mr. Mintsa dared to question the legality of the luxury purchases made by the former president of his country while a third of the population of Gabon live in poverty.[117]

The landmark case became known as *Biens Mal Acquis* ("ill-gotten gains") and has led to the seizure of luxury properties, sports cars and a private jet, with the investigation still ongoing.[118] As Transparency International reports "[a]s a Gabonese taxpayer, Ngbwa Mintsa sought redress for the damages caused not only to himself but to the Gabonese nation as a whole."[119] The cases were mounted by two closely linked organizations: the French arm of Transparency International, a group that campaigns internationally against corruption, and Sherpa, an anti-corruption association of French lawyers.[120] A 2010 legal ruling by the French Supreme Court allowed non-governmental organizations such as Transparency International to bring anti-corruption cases and to have standing to file a complaint

[116] Rosie Slater, *Anti-Corruption Heroes: An Interview with Gregory Ngbwa Mintsa*, TRANSPARENCY INT'L (May 15, 2013), http://blog.transparency.org/2013/05/15/anti-corruption-heroes-an-interview-with-gregory-ngbwa-mintsa. For general information on the complaint, see *Ill-Gotten Gains: Gabon*, SHERPA (Mar. 7, 2013), http://www.asso-sherpa.org/ill-gotten-gains-gabon#.VfG4Uk3n85g.

[117] *See* Slater, *supra* note 116.

[118] *See, e.g.*, Angelique Chrisafis, *France Impounds African Autocrats' 'Ill-Gotten Gains*,' GUARDIAN (Feb. 6, 2012) [hereinafter *Ill-Gotten Gains*], http://www.theguardian.com/world/2012/feb/06/france-africa-autocrats-corruption-inquiry (describing legal action against African politicians).

[119] *A Tribute to Gregory Ngbwa Mintsa*, TRANSPARENCY INT'L (Apr. 14, 2014), http://www.transparency.org/news/feature/a_tribute_to_gregory_ngbwa_mintsa.

[120] *Biens Mal Aquis Case: French Supreme Court Overrules Court of Appeal's Decision*, TRANSPARENCY INT'L (Nov. 9, 2010), http://www.transparency.org/news/pressrelease/20101109_biens_mal_acquis_case_french_supreme_court_overrules_court_of_appe.

and to force an investigating magistrate to commence a criminal investigation.[121] This was the first time that the complaint of an anti-corruption NGO was deemed admissible, in the name of the public interests the organization has sworn to defend.[122]

This decision, which was widely reported by French and international media, has opened the way for investigations into claims of corporate corruption as well as actions against alleged individual corruption. William Bourdon, the founder and president of Sherpa, one of the litigants, told the press that the "ruling meant that France was no longer 'a paradise' for nations or banks hiding ill-gotten gains."[123]

In June 2012, French police seized 11 luxury cars owned by the son of President Teodoro Obiang of Equatorial Guinea.[124] The seizure included two Bugattis, two Ferraris, one Maserati, and a convertible Rolls-Royce coupé.[125] The inquiries have identified 39 properties in Paris and the south of France belonging to the late president Omar Bongo of Gabon and his cronies, and 24 properties and 112 bank accounts linked to President Denis Sassou N'Guesso of Congo-Brazzaville and his circle.[126]

Sherpa has continued to bring actions using its standing as a civil society organization, to force investigations into other kleptocrats. More recently, Paris prosecutors opened a preliminary investigation into allegations that Rifaat al-Assad — the exiled uncle of Bashar al-Assad, the Syrian president — had illegally funded millions of dollars in property assets in France.[127] According to the Financial Times, the investigations "followed similar investigations into a long list of French assets held by the rulers, and their entourages, of Gabon,

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121 *Id.*

122 *Id.* Although the NGO was not viewed as having standing, it is novel that such a claim was brought before the French court.

123 Hugh Carnegy, *Campaigners Target Suspicious Assets of Foreign Leaders in France*, FT.COM (Oct. 6, 2013), http://www.ft.com/cms/s/0/78467c94-2cd3-11e3-8281-00144feab7de.html#axzz3mtTXef00.

124 *Id.*

125 *Id.*

126 Chrisafis, *Ill-Gotten Gains*, *supra* note 118.

127 Angelique Chrisafis, *France Investigates Bashar al-Assad's Uncle's £134m Paris Properties*, GUARDIAN (Oct. 1, 2013) [hereinafter *France Investigates*], http://www.theguardian.com/world/2013/oct/01/bashar-al-assad-france; *see also CP Complaint Against Bashar al-Assad*, TRANSPARENCY INT'L FR. (July 26, 2011) http://www.transparency-france.org/ewb_pages/div/CP_Plainte_Bachar_El-Assad.php (stating Transparency International and SHERPA plan on pursuing civil action against Bashar al-Assad and his family).

Equatorial Guinea and Congo-Brazzaville, as well as probes into potential alleged '*biens mal acquis*,' wrongfully acquired assets, held by the former rulers of Egypt, Tunisia and Libya."[128]

An international arrest warrant was issued last year for Teodorin Obiang, president Obiang's son.[129] French authorities seized his house on Avenue Foch, near the Arc de Triomphe in Paris.[130] In a recent development, Teodorin was placed under formal investigation for alleged money laundering and agreed to relinquish more than $30 million of looted assets located in the United States.[131]

Avenue Foch is also the location of a house belonging to Rifaat al-Assad, the uncle of Syrian President Bashar al-Assad, one of a number of French properties he owns — said by French media to be worth €160 million.[132] Bourdon has also stated that European leaders missed the opportunity to recover funds illegally accumulated by Arab leaders toppled during the Arab uprising, which should have been returned to the relevant country: "Time is the great ally of the kleptocrats. Every minute lost equals millions of dollars."[133]

While some may characterize the case solely as one involving asset recovery as opposed to a claim for compensation for harm, others view it as an example of Article 35 in action. The U.N. Office of Drugs and Crime, custodians of UNCAC and its implementation, took note of the case in its summary of State Parties' implementation of Article 35. It noted in a November 2013 report: "In one State party, a court decision had authorized a non-governmental organization active in the area of corruption prevention to bring a civil action in criminal proceedings relating to corruption offences."[134]

b. SERAP Challenges Nigerian Government in Regional Court

The Socio-Economic Rights and Accountability Project ("SERAP"), is a Nigerian civil society organization.[135] In 2007, SERAP received

[128] Carnegy, *supra* note 123.

[129] *Equatorial Guinea Leader's Son Obiang Faces French Probe*, BBC NEWS (Mar. 20, 2014), http://www.bbc.com/news/world-africa-26666871.

[130] *Id.*

[131] Press Release, U.S. Dep't of Justice, Second Vice President of Equatorial Guinea Agrees to Relinquish More than $30 Million of Assets Purchased with Corruption Proceeds (Oct. 10, 2014), *available at* http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased.

[132] Chrisafis, *France Investigates*, *supra* note 127.

[133] Carnegy, *supra* note 123.

[134] Conference of State Parties, *supra* note 106, at 14.

[135] *Who We Are*, SOCIO-ECONOMIC RTS. & ACCOUNTABILITY PROJECT, http://serap-

tipoffs from whistleblowers about allegations of corruption in the Nigerian Universal Basic Education Commission ("UBEC").[136] SERAP then investigated and obtained vital information, which confirmed widespread corruption in the UBEC boards including in nine Nigerian states.[137] SERAP then petitioned the Independent Corrupt Practices and Other Related Offences Commission ("ICPC"), which conducted further investigations and produced a report.[138] This complaint led to the recovery by the ICPC of 3.4 billion naira (calculated at 158 naira to a dollar) meant for the education of disadvantaged and disabled children but misappropriated by top officials of the UBEC.[139]

nigeria.org/ who-we-are/ (last visited Nov. 3, 2015).

136 For a background of these events, see Adetokunbo Mumuni, *Mismanaged Public Funds Recovered in Nigeria Thanks to SERAP*, UNCAC COALITION (June 30, 2011), http://uncaccoalition.org/en_US/mismanaged-public-funds-recovered-in-nigeria-thanks-to-serap/.

137 Adetokunbo Mumuni, *Statement by SERAP, Nigeria to the UNCAC Implementation Review Group Briefing for NGOs*, UNCAC COALITION (May 30, 2013) [hereinafter *Statement by SERAP*], http://uncaccoalition.org/en_US/statement-by-serap-nigeria-to-the-uncac-implementation-review-group-briefing-for-ngos/.

138 *See* Adetokunbo Mumuni, *Legal Redress for Victims of Corruption: Enhancing the Role of Civil Society to Bring and to Represent Victims in Legal Proceedings*, SOCIO-ECONOMIC RTS. & ACCOUNTABILITY PROJECT (Nov. 2010), http://serap-nigeria.org/seraps-paper-the-international-anti-corruption-conference-bangkok-thailand/. SERAP reports that

> The Commission's investigation of the UBEC finances followed SERAP's petition dated 15 January 2007 to the Commission, asking it to undertake a thorough investigation into allegations of corruption at the UBEC and bring suspected perpetrators to justice. SERAP also contends that the above is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria. 'Looting and mismanagement of UBE funds have led to ineffectiveness and near total collapse of the program. Thus, today more than 5 million Nigerian children have no access to primary education; 115 million adults are illiterate.' SERAP contends further that 'allegations of high level corruption such as the one described above has contributed to series of serious and massive violations of the right to education, including lack of access to quality primary education in Nigeria. In effect, Nigeria's international legal obligations to achieve the minimum core contents this right has been honored more in the breach than in the observance. The result has been: failure of the government of Nigeria to train the required number of teachers; gross under-funding of the nation's educational institutions; lack of motivation of teachers; non-available class rooms seats and pupils sitting on bare floor; non-availability of books and other teaching materials; poor curricula; poor and uninviting learning environments; and overcrowding, among others.

139 Mumuni, *Statement by SERAP*, *supra* note 137.

In 2007, SERAP filed a case before the Economics Community of West African States ("ECOWAS") Court of Justice in Abuja, arguing that massive corruption in a government education body amounted to a denial of the right to a free, quality and compulsory education for Nigerian children.[140] In November 2010, the ECOWAS Court upheld SERAP's petition and stated that the Nigerian government has a legal duty to provide free and quality compulsory basic education to every Nigerian child.[141] A judgment on the merits would not have been possible had the Nigerian government prevailed on its preliminary objections, which challenged the Court's jurisdiction, the justiciability of the right to education, and SERAP's standing as an NGO to bring cases before the Court.[142]

In October 2009, the ECOWAS court rejected the Nigerian government's objections. The ruling has been noted for affirming the ability of an NGO to have standing and bring cases in a representative capacity on behalf of the public.[143] Both procedural holdings are positive developments in the ongoing evolution of the sub-regional human rights system and, as the Court observed, reflect the trend among other regional and international legal settings to lower procedural impediments when substantive human rights principles are at stake.[144]

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[140] *See* Socio-Economic Rts. & Accountability Project v. Federal Republic of Nigeria, [2009] 0808 ECOWAS 1, 2 (Nigeria), *available at* https://www.escr-net.org/sites/default/files/SERAP_v_Nigeria.pdf).

[141] Mumuni, *Statement by SERAP*, *supra* note 137.

[142] *See Socio-Economic Right and Accountability Project*, 0808 ECOWAS at 7.

[143] Christopher Tansey, *ECOWAS Community Court of Justice Ruling Holds the Government of Nigeria Accountable for Fulfilling the Right to Education despite Corruption*, HUM. RTS. BRIEF (Mar. 11, 2011), http://hrbrief.org/2011/03/ecowas-community-court-of-justice-ruling-holds-the-government-of-nigeria-accountable-for-fulfilling-the-right-to-education-despite-corruption/.

[144] The Court stated:

> A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this Court must lend its weight to it, in order to satisfy the aspirations of the citizens of the sub-region in their request for a pervasive human rights regime.

Socio-Economic Right and Accountability Project, 0808 ECOWAS at 16.

The ECOWAS Court in a subsequent November 2010 judgment stated that there was prima facie evidence of embezzlement of funds on the basis of the reports of the ICPC.[145] The Court also stated that while steps should be taken to recover funds and/or prosecute the suspects, the Nigerian government should provide the funds necessary to cover the shortfall in order to avoid denying any of its people the right to education.[146] The Court also asked the government to ensure that the right to education is not undermined by corruption. The court held that the UBEC has the responsibility to ensure that funds disbursed for basic education are properly used for this purpose.

To date, the Nigerian government has not complied with the ECOWAS Court's decision despite efforts by SERAP and others urging government to act.[147] As SERAP notes: "As a member state, Nigeria is bound to comply with the Court's judgment, considered by human rights lawyers to have permanently redefined human rights-related jurisprudence on the continent."[148] As of November 2013, SERAP and Transparency International have applied to ECOWAS to seek the imposition of sanctions for Nigeria's current non-compliance with the judgment.[149]

SERAP notes that Article 35 of UNCAC was "written exactly for regions like Africa (including my country Nigeria) where large scale corruption has had huge consequences in terms of undermining the well-being of the citizens and denying them the chance for personal development and prosperity. These victims of corruption hardly receive any compensation presumably because the modalities for doing this have not yet been established."[150]

c. India and 2G Telecommunications Spectrum Scandal: Revoking Licenses

The 2G Scandal was a political scandal in which politicians and government officials under the Congress government undercharged

[145] Socio-Economic Rights and Accountability Project v. Fed. Republic of Nigeria, [2010] 1207 ECOWAS ¶¶ 19, 27, *available at* http://www.worldcourts.com/ecowasccj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm.

[146] *Id.* ¶ 28.

[147] Mumuni, *Statement by SERAP*, *supra* note 137.

[148] Tansey, *supra* note 143.

[149] Press Release, Adetokunbo Mumuni, SERAP Exec. Dir., Socio-Economic Rights & Accountability Project, Transparency Int'l, SERAP Want FG to Account for Money Spent on Education (Nov. 21, 2013), *available at* https://www.premiumtimesng.com/news/150078-transparency-international-serap-want-fg-account-money-spent-education.html.

[150] Adetokunbo Mumuni, *Statement by SERAP*, *supra* note 137.

mobile telephone companies for frequency allocation licenses, which they then used to create 2G spectrum subscriptions for cell phones.[151] The difference between the money collected, and that mandated to be collected was estimated by the Comptroller and Auditor General of India at $39 billion.[152]

In India, civil society organizations may petition the court through a process of public interest litigation. The Supreme Court allowed the Centre for Public Interest litigation to file a writ petition along with the president of the Janata Party, Subramanian Swamy, seeking the cancellation of the licenses.[153] The petitioners included: Lok Satta, a registered Society dedicated to political governance, reforms and fighting against corruption; and Telecom Watchdog and Common Cause, both Non-Governmental Organizations registered as societies for taking up issues of public importance and national interest.

On February 2, 2012, the Supreme Court of India ruled on the public interest litigation ("PIL") case related to the 2G spectrum scam.[154] The Indian Supreme Court declared the allocation of the mobile phone 2G spectrum by the United Progressive Alliance ("UPA") an illegal act and an arbitrary exercise of the government's power. The Supreme Court cancelled the 122 telecom licences allocated to 11 companies by the former telecom minister A. Raja on or after January 10, 2008.[155] According to the court the regulator "wanted to favour some companies at the cost of the Public Exchequer" and "virtually gifted away important national asset[s] . . . ."[156] Holding that the spectrum was a natural resource, the court said natural resources "are vested with the Government as a matter of trust in the name of the people of India and it is the solemn duty of the state to protect the national interest and natural resources must always be used in the interests of the country and not private interests."[157]

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151 J. Kuncheria & Devidutta Tripathy, *What Is the 2G Scandal All About?*, REUTERS (Apr. 25, 2011), http://in.reuters.com/article/2011/04/25/idINIndia-56552020110425.

152 *Id.*

153 *See* Centre for Public Interest Litig. & Others v. Union of India & Others, [2012] 3 S.C.R. 147 (India).

154 J. Venkatesan, *Supreme Court Scraps UPA's 'Illegal' 2G Sale*, HINDU (Feb. 3, 2012, 5:23 IST), http://www.thehindu.com/news/national/supreme-court-scraps-upas-illegal-2g-sale/article2853159.ece.

155 *Id.*

156 *Centre for Public Interest Litig. & Others,* 3 S.C.R. at 168.

157 *Id.* at 245.

The Court further stated:

> To say the least, the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers and its recommendations became a handle for the then the Minister of C&IT and the officers of the DoT who virtually gifted away the important national asset at throw away prices. This becomes clear from the fact that soon after obtaining the licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits. We have no doubt that if the method of auction had been adopted for grant of licence which could be the only rational transparent method for distribution of national wealth, the nation would have been enriched by many thousand crores.[158]

Although the policy for awarding licenses was first-come, first-served, Raja changed the rules so it applied to compliance with conditions (such as bidders securing guarantees) instead of the application itself.[159] On January 10, 2007, companies were given only a few hours to supply letters of intent and license payments; some executives were allegedly tipped off by Raja and could therefore act quickly ahead of other prospective bidders.[160] In 2011, *Time* ranked the scam second on their "Top 10 Abuses of Power" list, behind the Watergate scandal.[161]

CONCLUSION: THE FUTURE OF CIVIL ACTIONS TO ADDRESS GRAND CORRUPTION

The three examples discussed above reflect innovative means by which civil society groups are challenging government actions and seeking remedies for what they view as the collective harm caused by grand corruption. Some will argue that Article 35 is *solely* a commitment to provide victims with compensation only — not for other types of remedies such as license revocation, or asset recovery,

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158 *Id.* at 249.

159 Javed Ansari & Ashish Khetan, *AG Nails Raja: 2G Rules Were Changed Abruptly*, INDIA TODAY (June 2, 2010), http://indiatoday.intoday.in/story/cag-nails-raja-2g-rules-were-changed-abruptly-/1/99964.html.

160 *See Centre for Public Interest Litig. & Others*, 3 S.C.R. at 152, 214.

161 Ishaan Tharoor, *Top 10 Abuses of Power: India's Telecoms Scandal*, TIME (May 17, 2011), http://content.time.com/time/specials/packages/article/0,28804,2071839_2071844_2071866,00.html.

for example. As noted above, UNODC has described the *Biens Mal Acquis* case as illustrative of Article 35 actions. One can view asset recovery when done by the public, as an attempt to seek damages for the society as a whole, or a class of victims, rather than for individual claimants. The key point is that there is a powerful treaty currently in force that already recognizes right to a remedy in the event of corruption. NGOs and civil society, in some circumstances, have realized that they do have such a right, and have attempted to use court systems nationally and regionally, to secure their rights and in essence "to be free from corruption." What the cases do point out is that there are ways that existing practices can provide a template for further advocacy, and help develop architecture for a more robust vision of Article 35, and the types of actions that may be possible in different jurisdictions.

The issues that will need to be addressed include the key issue of standing. As seen in *Biens Mal Acquis*, Nigeria/ECOWAS, and India, each case involved courts granting standing to NGOs, who represent the public interest and anti-corruption. Hence, a key issue that must be addressed is one of standing. Further comparative research on this question will help us determine where might such standing be possible, and where it is not, what room there may be for further advocacy.

The environmental law field could provide an example in terms of the absence, in many cases, of direct personal injury. In this regard, Countries like France, Germany and Italy have adopted provisions that allow civil society organizations to initiate private lawsuits against alleged violators of environmental laws. Given the increased attention to private enforcement of anti-corruption law, there may be opportunities in many countries to revisit traditional doctrines of standing, and to reform those doctrines so as to empower private parties to sue corrupt actors.

Second, as some commentators note, one of the reasons why there have been fewer civil actions (especially of the kind outlined above) is due to the weak legal systems in certain countries. Some jurisdictions, especially states where stolen assets are located — typically major western financial centers may be better venues both for civil cases and for further legal reform.

A third issue will be what types of remedies should be available to civil society and against whom might they seek such remedies in the event of grand corruption by the state and its high-ranking officials. In two cases, civil society groups sought remedies focused on the state and funds it had misappropriated. In the case of India, petitioners

sought to have private sector contracts revoked and thus the private sector was implicated. It is possible that business entities (and their civil society trade and professional organizations) will also be able to benefit from Article 35, and to mount cases when they are harmed by corrupt acts. But it also is possible that they may find themselves subject to civil suit. Hence, states and policy makers will need to consider what limits there should be to private rights of action. In Costa Rica, the Attorney General was able to use a right to secure a remedy for "social damage" to the public interest, to seek enhanced damages from Alcatel Lucent in a transnational bribery case. While the Attorney General rather than civil society brought the action, the concept of social damage is one that is instructive for understanding how to calculate damage in the event of collective harm to the public interest.[162]

Perhaps, the way forward is to encourage state parties in their implementation of the UNCAC to enact national laws on civil remedies against corruption. We should also consistently encourage victims of corruption to use the human rights framework to file cases for compensation against corrupt public officials. Training of lawyers and other members of the civil society is important for them to be able to engage with the issues. Non-governmental human rights and anti-corruption organizations should be supported to provide legal advice and assistance to victims of corruption and associated human rights violations. Collaborative work between anti-corruption and human rights defenders is crucial if any success is to be made in this endeavor.

[162] *See* Juanita Olaya, Kodjo Attisso & Anja Roth, Repairing Social Damage out of Corruption Cases: Opportunities and Challenges As Illustrated in the Alcatel Case in Costa Rica 20-21 (2010) (draft version), *available at* http://dx.doi.org/10.2139/ssrn.1779834.