The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law

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“When the state is in healthy condition, all things prosper; when it is corrupt, all things go to ruin.”

—Democritus

I. Introduction

The financial crises that swept through much of Asia between 1998 and 19991 have renewed calls for a new global financial and economic system.2 If this momentum holds...

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1. Actually the Asian crises were part of a series of financial crises that have rocked the very foundations of the world economy, beginning first with the European currency crisis of 1992, followed by the Mexican crisis of 1994–95, and most recently, the Asian crisis. In a piece that appeared in the Dec. 29, 1997 New York Times, Robert A. Johnson distinguishes the Asian crisis from the preceding two in terms of the degree to which the latter upheavals were anticipated by sophisticated investors and also by their differential impacts on investors. The Asian turbulence, he argues, is “a more potent psychological disturbance than the Mexican crisis of 1994–95 or the European currency crisis of 1992 and was perceived as an isolated event.” The European crisis, on the other hand, “was a price adjustment to rebalance Europe in response to German unification.” Neither the Mexican nor the European financial difficulties markedly changed investors’ views of the health of the world economy since they were both “anticipated well in advance by sophisticated thinkers in both investment and government circles.” See Robert A. Johnson, What Asia’s Financial Crisis Portends, N.Y. Times, Dec. 29, 1997, at A19.

2. The 1998 Joint Sessions of the Annual Meetings of the International Monetary Fund and the International Bank for Reconstruction and Development were devoted almost exclusively to talk about the architecture of a new international monetary system. See Michel Camdessus, Address to the Board of Governors of
then those fortunate architects who have been recruited to design and supervise the construction of this new global edifice can make their task so much simpler by borrowing some valuable construction principles from the crises.

Of the many lessons that the Asian financial crises may have left us with, I will focus on five. The first is that it exposed some major structural weaknesses in the Asian development model and put to rest the myth of the invincibility of the Asian economy, a myth that had


3. While one may quibble over where the reconstruction is taking place, whether it is in the “infra” or the “supra” structure, is it still appropriate to ask what exactly is being redesigned? What does a new global financial architecture mean? Is it supposed to mean a strengthened Bretton Woods system that will be more responsive to future financial crises? If so, would this shored-up structure mean the same thing as a restructured system of global capitalism? Or, is the reference to a new international financial system just another way of saying that the role of international financial and economic institutions, in helping to promote in member states the kinds of social, institutional and policy reform that would make financial crises less frequent and less severe, needs to be redefined? But even more important than the architecture of a house (system) is “how people inside behave towards each other and how they resolve conflicts. Here, we have good principles that have served us well over the past decades: cooperation, democratic principles, predictability, and accountability towards each other. We therefore need to build on this foundation to strengthen the architecture of the international financial system, adapting it to new challenges.” Concluding Remarks, supra note 2, at 2. A clear understanding of what is meant by a “New Global Financial Architecture” is critical in order to situate the problem of corruption and the fight against it in its proper context. And here I want to raise the question, impertinent though it may sound, whether the New Global House has any room for those who are the real victims of corruption? Will this redesigned global superstructure provide for how the people inside behave towards each other and how they resolve conflicts? Some of the architects working so diligently to rebuild a battered global financial system have approached their task with a sort of evangelical fervor. One is given the unmistakable impression that this unusual concerted international response to the Asian crisis has as its principal aim promoting the interests of the peoples of the Third World (be they from Indonesia or Vanuatu or Burkina Faso) and of addressing the fundamental issues of equity and social justice that set them apart from the rest of the world. It may very well be the case that the intended beneficiaries of all this multinational restlessness are the peoples of the Third World. That may very well be the case though there is much more that explains this heightened burst of activity. It would seem that Euro-American economic self-interests are behind this unrelenting push for financial stabilization: adequate protection for foreign investments; good returns on investment; secure means for repatriating profits for shareholder dividends; and so on. This push for reform is not altogether spurred by altruistic motives, and there is nothing wrong with that. The rest of the world will and should simply hop on board this train and ride it till they reach their destination. See e.g., The Other Crisis, supra note 2. This case will be embellished in subsequent pages where the international legal regime to combat corruption is critically examined. In this context, the restrictive definition given to corruption as well as the limited geographic scope of several of the anti-bribery conventions would suggest a concern for protecting the financial interests of their Euro-American signatories and a reform approach geared toward the edifice itself with little regard for some of its occupants. See infra notes 43-45 and accompanying text.

4. These economies were once held up as models of prudent and sustainable economic policies. Yet, in the twinkling of an eye, they went from being shining examples of the most successful development experience in modern history to models of economic stagnation and decline. Growth rates that had averaged eight to ten percent per annum over many years have turned negative, economies that had enjoyed continuous high employment and experienced labor shortages now suffer from extensive and rapidly rising unemployment. And it took much less time than it took the 1929 stock market crash to turn into the Great Depression to transform
taken on the trappings of Euro-American folklore. The devastating impact of the crises on the very foundations of the Asian economy may have driven some governments anxious to repair the damage to accept the painful and humiliating experience of submitting to the tutelage of the International Monetary Fund (IMF). Secondly, the crises underscored how the economies of Asia, Africa, the Americas and Europe coexist in an integrated global economy such that the contagion effects of problems in one region quickly spread to the other regions. So, although the epicenter of the 1997 financial earthquake was in Southeast Asia, the eddies were and continue to be felt around the globe. But even more, this is not simply a crisis involving a few countries. Rather, in the assessment of Michel Camdessus, Managing Director of the IMF, it is the entire global system that is in crisis precisely because the system has "not yet sufficiently adapted to the opportunities and risks of globalization." Albert Fishlow, a Senior Fellow with the New York Foreign Relations Council, is even more pointed in attributing the crises to "a systematic failure of global capitalism . . . [because the] old rules did not work, and the new ones haven't been invented." Implicit in Fishlow’s observation is the view that the disturbances in the Asian financial markets were not random or fortuitous occurrences. And he may not be that far off the mark. Several commentators have suggested that these financial difficulties reflect factors that are intrinsic in the global financial system itself and germane to the workings of the international capital markets—that is, international capital markets and financial panics are opposite sides of a Janus-faced global system.  

The crises also demonstrated that corruption of public officials is a practice that is not confined to any one region of the world but occurs everywhere. More especially, corruption flourishes in countries where the culture of transparency and accountability is lacking;
where republican institutions have been compromised; where the rule of law has broken down and, as a consequence, legal rules no longer exist or where they do, are simply not enforced; and where market participants do not operate under an internationally accepted set of principles or standards. It is in environments such as this that the abuse of public office for private gain is frequently encountered.

Finally, this turbulence makes clear that any concerted multilateral efforts aimed at a fundamental reformation of the world financial system must resolve to place corruption under some form of international discipline. And like any other facet of the crisis, the war against corruption cannot be waged exclusively at the national level through domestic legislation that criminalizes the conduct. Rather, the most effective way to combat corruption is by elevating it to the status of a crime of universal interest, i.e., a crime under international law that (a) entails individual responsibility and punishment, and (b) is subject to universal jurisdiction.

This article will argue that there is sufficient state practice to support a claim for an emerging international customary law prohibiting corruption in all societies. That is, a case can be made for the right to a corruption-free society as a fundamental human right; a right that should be recognized as a component part of the right to economic self-determination and the right to development. Alternatively, the right to a corruption-free environment can be viewed as a freestanding, autonomous right, if you will, a right in its own right. Against this backdrop, the article will proceed first with a discussion of the international regime against corruption, followed by a critique of that regime. Next, the case will be made for considering the right to a corruption-free society as a fundamental human right and, as a corollary, treating a breach of this right as a crime under international law. The article will then conclude by drawing attention to some of the obstacles that may delay the emergence of an anti-corruption norm in international law.

II. The International Legal Regime to Combat Corruption

The last five years have witnessed a burst of law making at both the national and international levels on the subject of corruption. So many leading international organizations—such as the United Nations, the World Bank, the IMF, the Council of Europe, the European Union, the Organization of American States (OAS), the Organization for Economic Co-operation and Development (OECD), the Global Coalition for Africa (GCA),

11. According to Robert A. Johnson the Asian crisis exposed the hidden side of the Janus-faced Asian economy, where once everyone saw efficiency and vitality, now the image is one of widespread corruption and waste. See Johnson, supra note 1, at A19.
12. The OECD was established in 1961 to promote economic growth and freer trade and to expand and improve development aid to the developing countries. It is made up of fifteen EU countries, Japan, Canada, Australia, the United States and a number of Central European countries.
13. The Washington-based Global Coalition for Africa (GCA) describes itself as a North-South forum dedicated to forging policy consensus on development priorities among African governments, their northern partners, and non-governmental groups working in and on Africa. African governments, donor agencies and Africa-oriented international NGOs took part in setting up the GCA, which went operational in 1991. It was

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and the International Chamber of Commerce—have articulated anti-corruption policies and strategies. The concerted drive at the multilateral level to confront the problem of corruption has given birth to a number of anti-corruption instruments, which together make up the current international legal regime to combat corruption. The burst of law making energy began with the 1995 European Union Convention on the Protection of the European Communities' Financial Interests and its two additional Protocols, followed by the 1996 Inter-American Convention Against Corruption (Inter-American Convention) and the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ending with the 1999 Council of Europe Criminal Law Convention on Corruption. Valiant though these developments have been, these instruments do not go far enough in dealing with the global problem of corruption.

A. THE EUROPEAN UNION ANTI-CORRUPTION CONVENTION

Specific provisions in the three European Community treaties had earlier anticipated the need to combat acts of fraud: the treaty establishing the European Community (EC Treaty), the treaty establishing the European Atomic Energy Community (Euratom Treaty) and the treaty establishing the European Coal and Steel Community (Eurocoal Treaty) within the so-called first pillar of the institutional structure of the European Union (articles 209a EC Treaty, 183a Euratom Treaty and 78i Eurocoal Treaty). These provisions articulate the member states' obligation to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. To fulfill this mission member states are required to coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organize, with the help of the commission, close and regular cooperation between the competent departments of their administrations. To reduce the inconsistencies between laws on fraud in several member states that make it possible for international fraud to flourish, it became necessary to draft a convention with a common definition of fraud to protect the Community's financial interests on the basis of article K.3.2. Under Title VI of the Treaty of the European Union, article K.3 authorizes the council to draw up conventions that it recommends to the member states for adoption in accordance with their respective constitutional arrangements. On June 13, 1995, the President of the European Parliament authorized the Committee on Civil Liberties and Internal Affairs (Committee) to draw up a report on combating corruption in Europe, with Mrs. Heinke Salish as the rapporteur.


16. In a 1995 Resolution on combating corruption in Europe, the European Parliament called for stronger measures to be taken by member states of the European Union to combat corruption. The resolution raised concern about the current anti-corruption measures, noting that the agreements concluded between the member states on this subject are inadequate. See European Parliament, Report of the Committee on Civil Liberties and Internal Affairs on Combating Corruption in Europe, DOC. ENV/RR\287\287701 (Dec. 1, 1995) [hereinafter European Parliament Resolution].

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The Committee's report on Combating Corruption in Europe was considered by the European Parliament on December 1995, and it became the basis of a resolution.

The Resolution on Combating Corruption in Europe states, *inter alia*, that "corruption, particularly in conjunction with organized crime, poses a threat to the functioning of the democratic system and thus destroys public confidence in the integrity of the democratic State" as well as that "combating corruption nationally and internationally concerns all Member States and that the agreements concluded between the Member States on this subject are inadequate [and] that legal provisions and stiffer penalties for crimes of corruption are not enough on their own and that success will be achieved primarily through society's resolute condemnation of corruption and the determination of the responsible authorities to combat it."17 The 1995 Convention on the Protection of European Communities' Financial Interests builds on this earlier effort. It was drawn up under the terms of article 209a of the Maastricht Treaty, which requires every Member State of the European Union to take the same measures to counter fraud on the Community budget as they do on their own financial interests. The convention tries to harmonize the various national legal instruments for the criminal prosecution of fraudulent conduct endangering the Communities' financial interests. In addition to adopting a common definition of fraud,18 the convention also contains provisions requiring the Member States to incorporate the definition of fraud into their own body of criminal law. The 1995 Convention also includes the usual provisions for jurisdiction,19 extradition and prosecution,20 as well as mutual cooperation in the investigation, prosecution and punishment of individuals accused of committing fraud affecting the Communities' financial interests.21

The following year the First Protocol to the Convention on the Protection of the Communities’ Financial Interests was signed. The Protocol deals with corruption of public officials that endangers the Communities' financial interests. It fills in the gaps in existing criminal law on corruption having a link with protection of the Communities' financial interests that involve Community and/or national officials. As a consequence, the Protocol

17. Id.
18. Article 1(1) of the Convention defines the type of fraud that affects the European Communities' financial interests as consisting of: (a) in respect of expenditure, any intentional act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of the European Communities, nondisclosure of information in violation of a specific obligation, with the same purposes other than those for which they were originally granted; (b) in respect of revenue, any intentional act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of the European Communities, nondisclosure of information in violation of a specific obligation, with the same effect, misapplication of a legally obtained benefit, with the same effect. Until this broad definition of fraud was formulated in the convention, considerable differences could be observed in the substantive law of member states as to the type of offenses covered under fraud. Most of the criminal offenses of fraud in the member states covered either only expenditure fraud (subsidy fraud) or revenue fraud. The convention definition of fraud applies equally to revenue and expenditure. See Lothar Kuhl, *The Criminal Law Protection of the Communities’ Financial Interests Against Fraud-Part 1*, 1998 CRIM. L. REV. 259, 264-65 (1998) [hereinafter Kuhl Part 1]; Lothar Kuhl, *The Criminal Law Protection of the Communities’ Financial Interests Against Fraud-Part 2*, 1998 CRIM. L. REV. 323, 324-25 (1998) [hereinafter Kuhl Part 2].
19. See Convention, supra note 15, art. 4.
20. Id. art. 5.
21. Id. art. 6.
extends to offenses committed not just by national officials within each Member State but by members of the Commission, Parliament, the Court of Justice, and the Court of Auditors in the exercise of their functions. The Second Protocol followed on the heels of the first and incorporates certain areas that were left out of the Convention itself. In this sense, it complements the provisions of the 1995 Convention. The main purpose of the Second Protocol is the criminalization of money laundering and the confiscation of the fruits of fraud, and for cooperation between the Commission and the national prosecuting authorities in the Member States with respect to fraud, corruption and money laundering.22

B. THE OECD CONVENTION ON COMBATING BRIBERY OF PUBLIC OFFICIALS

In 1997, the European countries were able to secure a comprehensive anti-corruption instrument that went beyond the limited goal of protecting only the Communities' financial interests when they adopted the OECD Convention on Combating Bribery of Public Officials in International Business Transactions (OECD Convention).23 Like the new generation of anti-corruption conventions, the OECD Convention differentiates between demand-side and supply-side bribery. That is, the side that took the initiative that led to bribery and then ascribes sanctions accordingly. The OECD Convention is a supply-side-oriented, anti-bribery instrument and, as such, it only proscribes what, in the law of some countries, is called active corruption or active bribery, meaning the offense committed by the person who promises or gives the bribe, as contrasted with passive bribery, the offense committed by the public official who receives the bribe. Bribery is defined in the OECD Convention as the direct or indirect intentional offer or provision of "any undue pecuniary or other advantage . . . to [or for] a foreign public official" in violation of the official's legal duties "in order to obtain or retain business or other improper advantage."24 Bribery is the offer of payments to induce a breach of the official's duty. Thus, by limiting its scope to active bribery, the OECD Convention only targets the bribe giver and not the receiver.

C. THE COUNCIL OF EUROPE'S 1999 CRIMINAL LAW CONVENTION

The Council of Europe's 1999 Criminal Law Convention on Corruption (Criminal Law Convention) is different from the OECD Convention in that it attacks corruption from both the supply and demand sides. The instrument was actually designed as a framework convention that: (i) enumerates the principles that States Parties would undertake to respect in their national legislation and practice against corruption; and (ii) provides a basic structure that stands to be completed by various additional instruments. Although the Criminal Law Convention has corruption as part of its title, that is the only place the word is mentioned in the instrument; throughout the document the reference is to bribery. The crime of bribery is defined under two separate provisions to reflect the duality of the offense, i.e., its passive and active attributes. For instance, under article 2, which deals only with passive bribery, this offense is defined as the intentional "promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself

22. See Kuhl Part 1, supra note 18, at 259; see also Kuhl Part 2, supra note 18, at 323.
24. Id. art. 1, para. 1.
or for herself or for anyone else, for him to act or refrain from acting in the exercise of his or her functions.” Article 3, the active bribery provision, on the other hand, concerns itself with the intentional act of requesting or receiving, or accepting an offer or a promise by a public official, either directly or indirectly, of any undue advantage aimed at compromising him in the exercise of his functions.

With articles 2 and 3 as predicate provisions, the convention then enumerates an exhaustive list of acts that it directs the States Parties to criminalize in their domestic legislation. These are: active and passive bribery of foreign officials; active and passive bribery in the business sector; trading in influence involving national and foreign public officials; bribery of international officials and other persons who carry out functions in international organizations; bribery of high officials of international organizations; bribery in money laundering; and bribery in accounting. Within each of these enumerated acts, reference is then made to either article 2 or 3 for the definition of the criminal offense of bribery that is appropriate.

D. The Inter-American Convention Against Corruption

Of all the multilateral instruments that make up the international anti-corruption regime, only the Inter-American Convention attempts to give a broader meaning to the term corruption or bribery. The Inter-American Convention was the first anti-corruption treaty in the world resulting from the December 1994 Summit of the Americas Declaration of Principles and Plan of Action. Like the Criminal Law Convention, the OAS anti-corruption treaty attacks the problem from both the supply and demand sides. But then it goes one step farther than the other instruments examined thus far; it expressly proscribes “illicit enrichment”—defined as “a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.” The focus on illicit enrichment as an integral part of the definition of corruption in the Inter-American Convention is not shared by the other multilateral anti-bribery conventions. They, on the other hand, are focused exclusively on two varieties of corruption: either active or passive or both.

25. Id. art. 2.
26. Id. arts. 4, 6.
27. Id. arts. 7, 8.
28. Id. art. 12.
29. Id. arts. 9–11.
30. Id.
31. Id. art. 13.
32. Id. art. 14.
34. An unprecedented 21 countries signed the convention immediately upon the conclusion of negotiations. They were later joined by the United States and Guatemala. To date, 26 states have signed and 17 have deposited instruments of ratification. Inter-American Convention, at B-58 (visited Feb. 29, 2000) <http://www.oas.org/En/prog/juridico/english/Sigs/B-58.html>.
35. Inter-American Convention, supra note 33, art. VI.
36. Id. art. IX.
III. A Critique of the International Anticorruption Regime

The current international anti-corruption regime does not go far enough in dealing with the global problem of state-sanctioned or state-protected corruption. I see four major weaknesses with this regime. First, in all the conventions corruption is defined solely in terms of the side that took the initiative that ultimately led to bribery or the one that received it. As a result, the main focus is on two varieties of corruption: supply-side or active bribery, on the one hand, meaning the offense was committed by the person who promised/offered the bribes, and on the other hand, demand-side or passive bribery, meaning the offense was committed by the public official who asked for/received the bribe. There are two problems with restricting the definition of corruption to either supply or demand-side bribery or both. In the first place, it gives the impression that corruption exists only between an active bribe giver and a passive bribe taker. This Manichaean world excludes a whole class of individuals who engage in outrageous acts of corruption outside the supply/demand-side framework.

Let us take, for instance, the case of the unemployed wife of the president of an African country who is given to an epicurean lifestyle that she indulges through frequent shopping trips to the major fashion capitals of Europe. Before each trip, she either telephones the head of the country’s central bank or sends him a note demanding large sums of spending money in foreign travelers checks. Each time the request comes in, the managing director dutifully complies not because this first lady maintains an account in that bank against which the withdrawals are posted or because she has any intentions of ever repaying the loan, but because she is the wife of the President of the Republic and he stands to lose his job if he does otherwise. Or, in another case that happened in another African country that will go unnamed, the president commandeered all the available planes operated by the national airlines to ferry guests to his daughter’s wedding. To be sure, the bribe offered to a customs official at a border town and the actions of the first lady and president just described constitute corrupt practices. However, among them, there is a difference both in scale and gravity.

Unfortunately, current international conventions offer no help in determining whom the briber and the bribed are in the examples of the first lady or the doting father-cum-president. Clearly their actions do not fit neatly into either category and herein lies one of the major flaws in the orthodox definitions of corrupt practices. They tend to exclude corrupt acts that do not fit comfortably in either categories of active or passive bribery.

A second weakness with the conventional definition of corruption is its treatment of this phenomenon as essentially a binary relationship based on the principle of reciprocity. That is, for every case of bribery or corruption there is both a corruptor and a corrupted; a quid

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37. The Explanatory Statement to the European Parliament’s 1995 Resolution on Combating Corruption in Europe states that corruption is based on the principle of reciprocity on which all societies are founded. See European Parliament Resolution, supra note 16, at 8.

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in return for a *quo*. This view of corruption as involving a bribe giver and a bribe taker may have symmetrical appeal but it does not account for the entire range of corrupt behavior. It does not, for example, include acts of indigenous spoliation where there is only a taker, a corrupted individual but no givers or corruptors.\(^{38}\)

A third observed weakness in the international regime is the preoccupation with active bribery in some of these conventions such as the OECD Anti-Bribery Convention and the European Community Protection of Financial Interests Convention. In both of these instruments it is the offense of offering a bribe that is proscribed and not the receipt of a bribe. The approach by the OECD Convention, which focuses only on the supply side, is much too restrictive.\(^{39}\) Apologists for this approach have tried to justify it as a deferential nod to the realities of international relations and, in particular, as a recognition of the principle of respect for the sovereignty of other states. As one writer puts it: "the OECD takes care not to intrude into other countries' (sic) sovereignty, so the behaviour of foreign officials itself is not a topic for the OECD."\(^{40}\)

This solicitous attitude toward sovereign sensibilities is misplaced and misdirected for a couple of reasons. Viewed in the context of the fairly widespread agreement that state-sanctioned corruption is both a development problem and a moral issue with clear international implications, this obsequious genuflection to the doctrine of sovereignty makes little sense. Second, the determined efforts, evidenced by several international instruments, all point to a multilateral approach\(^{41}\) as the best way to attack the problem of corruption. Employing such a strategy will necessarily require states to waive some of their historical sovereign rights. Even when these rights are not expressly waived, states must always be prepared for the possibility that the international community might choose, in the higher interest of waging an effective war on corruption, to "pierce the veil of sovereignty" if and when the need arises.

But there is yet another problem with the preoccupation with regulating the supply end of the corruption chain. It opens these instruments up to the criticism that they are primarily concerned with protecting Euro-American economic interests while paying lip service to the idea of global efforts to combat corruption. A European commentator on the global

\(^{38}\) Because the current international regime does not address this particular genre of corruption, domestic bribery in these countries will continue unabated. See Michael Hershman, *The OECD Convention Against Corruption is a Major Step Against Bribery, But a Totally Fair Market is Still Far Off*, 17 INT'L FIN. L. REV. 11 (May 1, 1998).

\(^{39}\) This approach, as explained by the Secretary-General of the OECD, is to leave each country responsible for the conduct of its companies. "[T]he OECD Members, who are the major trading countries, are taking responsibility for upholding the trading system. They are the major competitors in most international markets. Their companies supply much of the large-scale bribery that undermines fair competition in the trading system." See Donald J. Johnston, *Building Integrity in Government: The OECD as Part of a Multiple Response, A GLOBAL FORUM ON FIGHTING CORRUPTION*, Conference Paper, Washington, D.C., Feb. 24, 1999, at 2 (visited Feb. 29, 2000) <http://www.usia.gov/topical/econ/integrity/document/johns.htm>.


\(^{41}\) All the anti-bribery conventions expressly incorporate provisions for mutual legal assistance in the fight against corruption. Art. 9 of the OECD Convention, for example, directs each state party to provide prompt and effective legal assistance to another party for the purpose of criminal investigations and proceedings brought by a party concerning offenses within the scope of this convention. OECD Convention, *supra* note 23, art. 9. *See also* Inter-American Convention, *supra* note 33, art. XIV.
anti-corruption war observes that when the United States enacted the Foreign Corrupt Practices Act in 1977,\textsuperscript{42} many Europeans considered it "either as an act of moralism or a kind of short term self mutilation in order to gain a long term advantage in competitiveness, by forcing companies to win contracts without bribes."\textsuperscript{43} However, new awareness of the extent of the globalization of the world economy forced the European nations to the realization "that they themselves also were the actors and the theatre in the world of bribery."\textsuperscript{44} This has brought about a change in how Europeans view corruption abroad, which they now see as negatively influencing their own trade opportunities. Suddenly corrupt dictators like Suharto, the former President of Indonesia, are being recognized for what they truly are: "irrational trade barriers blocking the access to interesting markets."\textsuperscript{45} The gradual realization that European businesses were being left behind in international markets may very well have spurred Europe to action as policy makers saw the need to take measures to address the problem of supply-side corruption. As a consequence, the legal regime the Europeans put in place has as its mission creating a level playing field so that European commercial interests can compete on equal terms with other major trading groups.\textsuperscript{46}

Two recent European Union instruments lend some support to this view—the 1995 Treaty on the Protection of Financial Interests of the Community and the First Protocol of 1996. The 1995 Treaty is the basis for the Protocol, which deals with criminalization of transnational bribery endangering the Community's financial and economic interests. Like all the other European-sponsored anti-bribery instruments, the principal objective of the European Union contribution is the creation of a corruption-free global marketplace. For it is only in such an environment that European commercial interests can compete fairly

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\item \textsuperscript{42} Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 et seq. (1998) [hereinafter FCPA].
\item The push for legislation to deal with corrupt payments by U.S. businesses operating in foreign markets was prompted by "[i]nvestigations by the Securities and Exchange Commission (SEC) in the mid-1970s that revealed that over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians and political parties . . . in order to secure some type of favorable action" from these recipients. "[T]he FCPA was enacted to bring a halt to the bribery of foreign public officials and to restore confidence in the integrity of the American business system." Arthur Aronoff, Anti-Bribery Provisions of the Foreign Corrupt Practices Act, United States Department of Commerce, Office of the Chief Counsel for International Commerce, <http://www.ita.doc.gov/legal/fcpa1.html>. Undoubtedly, the FCPA has as one of its principle objectives to level the playing field in the international marketplace by forbidding U.S. business enterprises and individuals from offering money, gifts, promises, or anything of value, to any foreign official who assists in obtaining or retaining business in a corrupt fashion.
\item \textsuperscript{43} Pieth, supra note 40, at 1.
\item It is true that the United States was quite concerned that its unilateral action to outlaw bribery (the FCPA) put American businesses at a disadvantage in their international operations. See A. Timothy Martin, Corruption and Improper Payments: Global Trends and Applicable Laws, 36 Alberta L. Rev. 416, 428 (1998).
\item \textsuperscript{44} Pieth, supra note 40, at 1.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} When New Zealand signed the OECD Corruption Convention, the country's Trade Minister, Lockwood Smith, stated that the convention will level the playing field for New Zealand companies. See Press Release: New Zealand Government, Dec. 18, 1997 (visited Mar. 8, 2000) <http://www.newsroom.co.nz>. When, in October 1997, the U.S. Congress gave final approval to legislation that implements the OECD Convention, U.S. Secretary of State Madeleine K. Albright issued a press statement praising the Congress for passing the anti-bribery pact. The secretary has long felt enlisting other countries in the fight against commercial bribery not only will level the playing field for U.S. business, but will also foster stronger democratic institutions in transition and developing companies, the statement read. See Statement by James P. Rubin, Spokesman: Congress Approves Anti-Bribery Treaty Legislation (visited Mar. 8, 2000) <http://www.usis-israel.org.il/publish/press/state/archive>.
\end{itemize}
with companies from other regions.\textsuperscript{47} Thus, it is to the economic interests of the United States, the OECD, and the European Union that their national companies are allowed to do business abroad without having to bribe their way.\textsuperscript{48} If in fact that is the case, then the success of these conventions will be measured in terms of how far they go in eliminating the competitive disadvantage these companies may be experiencing in those regions of the world where corruption is endemic. In this respect, it can be assumed that the present international regime against corruption is not all that concerned about what happens once economic distortions and inefficiencies have been removed. Alternatively, in defense of the approach taken by these conventions, it is arguable that everybody benefits from the creation of a level playing field not just Euro-American business interests. Be that as it may, the perception that the major industrial countries are cutting treaty deals with one another with the aim of eliminating any competitive disadvantages their companies may be experiencing in the global marketplace will likely undermine any serious multilateral efforts at combating corruption.

Finally, because of their narrow scope, i.e., the restrictive definition of corruption to mean either supply or demand-side bribery, these conventions may end up discouraging rather than encouraging adhesion by a large number of states that have a strong interest in joining forces to combat the problem of corruption.\textsuperscript{49} This will be especially true for states that have been the victims of outrageous acts of corruption, committed by high-ranking officials who then fled abroad to avoid prosecution in their national courts. For these states, the present anti-corruption regime offers them no incentives. They will have to think twice

\textsuperscript{47} 1994 OECD Council Recommendation on Bribery in International Transactions leaves no room for doubt when it states "that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions." \textit{Organisation for Economic Co-operation and Development: Council Recommendation on Bribery in International Business Transactions, OECD Press Release SG/PRESS (94) 36; reprinted in 33 I.L.M. 1389 (Sept. 1994).}

\textsuperscript{48} In welcoming the adoption of the OECD Anti-Bribery Convention, an American business consultant admitted that the U.S. stood to gain from its passage: "The OECD convention is intended to smooth out some of the inequities faced by the U.S. since the Foreign Corrupt Practices Act (FCPA) in 1977. For the past two decades, because of the FCPA, the U.S. has been hobbled by laws prohibiting bribes to foreign officials and restrained by compliance and reporting requirements absent from the laws of its trading partners. [As a consequence] U.S. companies have lost more than 100 international contracts valued at US$45 billion in 1994 and 1995 as a result of bribery." Herschman, \textit{supra} note 38, at 1. These views were echoed on the floor of the United States Senate by Senator Feingold: "[T]here has been a price for taking the ethical high road. U.S. companies that are trying to pursue opportunities in the global marketplace are forced to compete with firms from countries whose national laws take a more—shall we say—laissez-faire approach to this issue, and turn a blind eye to the corruption and graft evident in many business transactions." Transcript: Feingold On Senate Okay of OECD Accord on Bribery (visited Mar. 8, 2000) <http://rs9.loc.gov/cgi-bin/query/R?r105:FLD001:SS9669>. It would appear that the United States' desire to have other countries' multinational companies play by the rules applicable to American companies was a critical factor in the U.S. push for international support for criminalizing bribery of foreign public officials in both the OECD and Inter-American conventions against corruption. Having failed at the United Nations in the 1970s, the U.S. switched attention to the OECD and the OAS. See Martin, \textit{supra} note 43, at 428.

\textsuperscript{49} Nigeria is a case in point. There is every indication that the newly elected president, Olusegun Obasanjo, building on the foundation laid down by Abacha's successor, General Abubakar, is determined to move aggressively against corruption. On a recent visit to the United States, President-elect Obasanjo publicly described Nigeria as "one of the leading, if not the leading, corrupt nations in the world" while acknowledging that, "[a]s a nation we cannot move in the area that I believe we should move—to have investment and to have a better economy—without dealing with this issue." \textit{Obasanjo and Clinton Discuss Democracy}, BBC \textsc{Online Network}, Mar. 31, 1999 (visited Feb. 29, 2000) <http://news2.tms.bbc.co.uk/m/english/world/africa/newsid%SF308000/308011.stm>.

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before rushing to ratify an anti-corruption treaty that restricts the definition of corruption to simply the offering or demanding of bribes. Such victim states would be looking for treaties that also take a stand against those public officials who plunder their nation's wealth, which they then transfer to offshore safe havens.

In sum, the conventional definitions of corruption can be likened to fishing nets that bring in smelts and minnows but are not sturdy enough to trap the bigger catch. Their target appears to be the rent-seeking traffic cop or the custom official or the office messenger but not the unemployed wife of the president of the Republic who habitually directs the managing director of her country's Central Bank to withdraw hundreds of thousands of dollars that she has no intention of repaying to cover her shopping expenses in Paris and Rome. It would be a quantum leap in logic to treat the depredations of this first lady with the petty corruption of underpaid low-ranking civil servants. While both sets of acts fall within the general meaning of corruption, they clearly are not the same in their gravity or scale. In any event, the position taken here is that in order to wage an effective international war on corruption both the rent-seeking conduct of the customs official and the brazen acts of pillaging by high-ranking public officials and members of their families must be addressed. In other words, the war must proceed on three fronts: on the supply side, by taking action against bribe givers and on the demand side, by sanctioning the recipients of the fruits of bribery. Finally, it must also rein in those in positions of power who use their positions of trust to plunder their nation's wealth, even though their activities do not quite fall under the supply side or the demand side of the corruption ledger.

IV. The New Face of Corruption

Corruption is not a new phenomenon and "it is unlikely that there has ever been a ruling class which did not exploit its political power to further its private financial interests." But there is something extraordinary about the corruption I have in mind, for the last three decades have revealed theft of national wealth on a scale that simply defies the imagination. To place this new venality on the same moral plane as bribery is to trivialize and reduce to banality the impact of this practice on victim societies. Perhaps a few examples will suffice to drive home this point.

There can be no better example to begin with than with the case of Field Marshall Mobutu Sese Seko, whose years as head of state remain the example par excellence of this novel form of kleptocracy. In the thirty-two years that he was the incontestable ruler of the former Republic of Zaire (now the Democratic Republic of the Congo), Mobutu succeeded in embezzling some four billion dollars of his nation's wealth. If Mobutu's conduct was outrageous, consider that of the late General Sani Abacha of Nigeria who seized power in a coup d'état in 1993 and ruled Nigeria with an iron fist until his sudden death in 1998.

51. Many political leaders in countries with serious poverty have amassed extraordinary fortunes. Foreign exchange reserves have been transferred to foreign bank accounts. World Bank, supra note 8, at 16.
52. For an excellent account of how Mobutu systematically and methodically pillaged from his nation's resources, see Colette Braeckman, Le Dinosaure: Le Zaire De Mobutu (1990). Mobutu was ousted from power by Laurent Kabila and his band of loyal guerilla fighters in May 1997, and in September of the same year he died in exile in Morocco.

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His tenure as head of a modern state is perhaps one of the most egregious cases of corruption by a public official in this century. The depredations of Abacha expose the weakness in the restrictive definition of corruption promoted in the present international legal regime. Based on credible estimates by the respectable Times of London, Abacha is believed to have stashed in European banks more than 3.6 billion pounds sterling (approximately $5.4 billion) during his five-year tenure as head of state. Yet, he was not done. Over a two-year period and acting under the instructions of General Abacha, his national security adviser withdrew close to $2.45 billion from the Central Bank ostensibly to pay back debts owed to Russian contractors for the construction of the giant Ajaokuta Steel plant. The debts owed the Russians were grossly overvalued allowing the Abacha family to pocket the difference. The fraud was uncovered by the successor government, which eventually recovered some of the stolen money. But the outrage continues. According to a Government White Paper, the Nigerian government earned $12.225 billion from sales of surplus petroleum during the 1990-1991 Gulf War. Of this amount the military generals made away with $12 billion and only $225 million trickled back into the national treasury.

As is typical of stolen national wealth, much of it is banked in offshore safe havens and hardly ever invested in economically productive enterprises at home. To this extent, the victim country loses twice as the exported national wealth contributes to the problem of flight capital. Additionally, it is also typical in these cases that individuals involved usually skip town to avoid prosecution in their national courts. Again, the victim state loses a third time as its citizens are denied the opportunity to bring these individuals to justice. Conventional definitions of "corruption" as the "abuse of public power for private benefit" or the "intentional noncompliance with arm's length relationship aimed at deriving some advantage from this behavior for oneself or related individuals" or "the behavior of persons

54. Id.

55. Several months after his death, General Abacha's widow was intercepted at the Kano International Airport with 38 suitcases stuffed with foreign currency. One of her sons who was accompanying her also had with him about $100 million in cash, while between $2 to $3 billion is believed in the safe-keeping of the late general's foreign front men. His security adviser returned $250 million to the Nigerian government, funds that had been set aside for distribution to African heads of state attending the 1998 summit of the Organization of African Unity holding at Ouagadougou, Burkina Faso. Ironically, General Abacha, who was expected at that summit, suffered a heart attack literally on the eve of the first plenary session. See Cameron Duodu, How the Grand Lootocracy Beggared Nigeria's People, The Observer (U.K.), Nov. 22, 1998, at 25. But General Abacha was not alone among Nigeria's former military rulers to raid the national coffers. His predecessor, General Ibrahim Babangida, who was head of state from 1985-1993, is reputed to have placed in overseas accounts about 30 billion French Francs or roughly $5 billion. He too was in very good company. A Government White Paper from the Pius Okigbo Commission reports that of $12.225 billion Nigeria earned from selling surplus oil during the August 1990-March 1991 Gulf War, only $225 million found its way into the Central Bank. The bulk of these earnings, a cool $12 billion, the generals made off with. See Mulero, supra note 53.


57. The government of General Abdulsalami Abubakar has recovered about $750 million of this money in various currency denominations from General Abacha's family. Apparently, the Abachas had no confidence in the Nigerian banks. The amount recovered included $625 million in dollar notes and another $125 million in pounds sterling. See Nigeria Alleges Huge Abacha Fraud, supra note 56, at 2.
with public or private responsibilities who fail to fulfil their duties because a financial or other advantage has been granted or directly or indirectly offered to them."58 do not quite capture the acts of fraudulent enrichment committed by public officials nor do they convey in graphic terms the devastating effects of this conduct on many developing countries. The price these countries pay for the venality of high-ranking officials is treacherously high. The diversion of scarce national resources into the accounts of a few well-placed officials and members of their family affects all segments of the society. Casualties include the process of democratization and economic development.

Thus, the acts of spoliation referenced above fall within the category of offenses of exceptional gravity and magnitude. They take on additional gravity because they are committed by persons in positions of power and influence who can hide behind the shield of sovereign immunity to avoid prosecution in their countries. The individuals involved are, arguably, more culpable than the rent-seeking traffic cop or customs official, in part because rent-seeking behavior "on the part of public officials in many African countries is a consequence of extremely low salaries . . . [compounded by] compressed wage scales and limited opportunities for advancement."59 The Global Coalition for Africa found out in its study of corruption and development in Africa: "low salaries which may partly explain the existence of petty corruption and theft at lower levels . . . [but] it cannot be an excuse for higher-level and large scale bureaucratic corruption. Unless high-level bureaucratic corruption is addressed, it will be difficult to reduce corruption at lower-levels.60 While rent-seeking is, arguably, tolerable and economically defensible, the acts of spoliation typified by the examples just cited exceed any society's threshold of tolerance. They qualify as acts of corruption carried out in a systematic manner or on a large scale.

A. THE RIGHT TO A CORRUPTION-FREE SOCIETY AS A FUNDAMENTAL HUMAN RIGHT

The notion of human rights is derived from the belief that all human beings are born equal in dignity and rights, and that these moral claims are inalienable and inherent in all human individuals by virtue of their humanity. Having been transformed into justiciable legal rights through the international law-creating process, these erstwhile moral claims now constitute the corpus of fundamental human rights protected under international law. Consistent with the Lockean vision of rights,61 the owners of these evidently basic rights of humankind—life, liberty and property—have never surrendered them to the state. Rather, all that the individual surrenders to the state upon entering civil society is the right to have these rights enforced by the state.

The right to a society free of corruption is inherently a basic human right because life, dignity, and other important human values depend on this right. That is, it is a right without which these essential values lose their meaning. As a fundamental right, the right to a corruption-free society cannot be easily discarded "even for the good of the greatest number, even for the greatest good of all."62 The right to a corruption-free society flows from

60. Id.
the right of a people to exercise permanent sovereignty over their natural resources and wealth, that is, their right to economic self-determination, recognized in common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The antecedents of the principle of permanent sovereignty can be traced to the demarche by Third World nations in the early formative years of the United Nations for a reappraisal with a view toward altering the "inequitable" legal arrangements, in the form of concessions, inherited from the colonial period, under which foreign investors (mostly transnational corporations with their headquarters in the metropolitan country) were exploiting their natural resources. The global debate that ensued between capital-importing Third World countries, the owners of the natural resources, and the capital-exporting developed countries where the majority of the foreign investors concessionnaires are based, finally led to the adoption in 1962 in the General Assembly of Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources. This resolution together with subsequent U.N. resolutions and declarations has expanded the meaning of the people's patrimony over which permanent sovereignty is to be exercised to include not just wealth derived from natural resources but all the wealth-generating activities in the society. With respect to this expanded definition of the people's patrimony, the right to the exercise of sovereignty over

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67. See, e.g., Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973) (strongly reaffirms the inalienable rights of states to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters); Declaration on the Establishment of a New Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974) ("art. 4: The new international economic order should be founded on full respect for the following principles: (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer or ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."); Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) ("art. 2(1): Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.").

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a nation's natural wealth and resources means two things. First, the right of states to exercise control over their natural wealth and resources, and secondly, the right of all peoples within the state to freely use, exploit and dispose of their natural wealth and resources in the supreme interest of their national development. In both instances, economic self-determination is the ultimate objective. In this sense, a state can violate the right to economic self-determination in one of two ways. A violation occurs when the state alienates the people's patrimony in its resources by corrupt or unwise concessions to foreign companies. The state is also in violation of the right to economic self-determination when it engages in the corrupt transfer of ownership of national wealth to those select nationals who occupy positions of power or influence in the society. The violation by the state also operates to deny the people, individually and collectively, their right to freely use, exploit and dispose of their national wealth in a manner that advances their development.

The right to a corruption-free society also implicates the collective right to development. Henkin has defined this right as the "sum, or the aim, of all the rights in the [Universal] Declaration, especially the right to an education and of other economic and social rights, but also civil and political rights." As Henkin sees it, the importance of development in the human rights context rests on the predicate that without development it would not be possible to respect and insure individual rights.

Political development is essential to assure the human right to participate in self-government in one's own country. Economic development will better enable a country to guarantee the economic and social rights of its inhabitants, will increase the resources available for that purpose and help achieve it more expeditiously. Societal development is essential for individual development which is necessary to enable individuals to know their rights, to claim them, to realize and to enjoy them and the human dignity they promise.

In 1986, the United Nations General Assembly took a major step in the direction of elevating this right to the level of a principle of customary law when it adopted the Declaration to the Right to Development. The declaration proclaims the right to development as an inalienable human right of every human being and all people to participate in, contribute to, and enjoy economic, social, cultural and political development. Corruption by public servants undermines all of these laudable goals. Democritus was right after all: "when the state is in a healthy condition, all things prosper; when it is corrupt, all things go to ruin." In the sections that follow, we shall argue that those who by their acts of corruption contribute toward the ruination of a society commit a universal crime that engages their individual responsibility.


69. Such was the contention by Nauru in a 1992 claim brought before the International Court of Justice against Australia. Nauru claimed that Australia, as an Administering Authority for Nauru under the United Nations Trusteeship System provided for by Chapter XII of the U.N. Charter, breached its obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources by exploiting certain phosphate lands before Nauru's independence. See Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 I.C.J. 240, 243 (June 26); see also Antony Anghie, The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case, 34 Harv. Int'l L.J. 445 (1993).


B. Corruption as a Crime of Universal Interest

When the Berlin-based anti-corruption organization, Transparency International, issued its 1998 Corruptions Perceptions Index (CPI), its Vice Chairman Frank Vogl made the following observation:

The CPI scores, with their shocking portrayal of so many countries perceived to be home to rampant corruption, will spur Transparency International to be even more aggressive in mobilising initiatives to counter corruption world-wide. Securing democracy, alleviating poverty and human suffering, and sustaining investment and commerce, are inextricably dependent upon curbing corruption in most of the developing nations and across Central and Eastern Europe.

These are the reasons why official corruption deserves to be treated as a crime of universal concern because of its potential for destroying the essential foundations of a society.

C. Attributes of a Universal Crime

An essential characteristic of universal crimes is that a "state may participate in their repression even though they were not committed in its territory, were not committed by one of its nationals, or were not otherwise within its jurisdiction to prescribe and enforce." A crime of universal interest, that is, a crime under international law, can be characterized as such irrespective of its designation under domestic law. This is what is meant by the principle of the supremacy of international law over national law; reaffirmed in the Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code of Crimes) in


75. See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle 1, Aug. 21, 1950. This principle recognizes the supremacy of international criminal law over national law in the context of the obligations of individuals. Principle II goes on to state that: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. Both principles are reflected in the judgment of the Nuremberg Tribunal: the essence of the Charter is that individuals have international duties that transcend the national obligations of obedience imposed by the individual State. See id.

76. The code had as its objective the adoption of norms to prevent and punish international crimes, against the conscience and survival of mankind. Its genesis lies in the horrors of the Second World War and the international tribunals set up by the Allied Powers at Nuremberg and Tokyo to try the leaders and organizers of the worst of these barbarities. In 1947, two years after the United Nations was established, the General Assembly created the International Law Commission (ILC) and charged it with the task of identifying and formulating the principles of international law embodied in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and to prepare, based on those principles, a Draft Code of Offenses Against the Peace and Security of Mankind. The ILC interpreted this mandate to mean elaborating a code of crimes to which individual criminal responsibility would attach. The ILC submitted a first draft code to the General Assembly in 1951, a second draft in 1954. Thereafter, work on the commission was suspended. After a 27 year hiatus, the General Assembly invited the ILC to resume its work on the Draft Code. By 1991, the ILC was ready with another draft and, in 1996, it submitted a final version to the General Assembly. See Rosemary Rayfuse, The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the ILC, 8 CRIM. L. REV. 43 (1997).
Additionally, crimes of universal interest must come with adequate safeguards to protect the rights of the accused, for instance, the prohibition against double jeopardy (non bis in idem) and non-retroactivity. The former protects an individual accused of committing an international crime from being prosecuted or punished more than once for the same act or the same crime. It guards against multiple trials conducted in different national courts for the same offense. Where the principle of non bis in idem seeks to safeguard the accused from capricious judicial treatment in the criminal justice process, the doctrine of retroactivity seeks to uphold the fundamental objective of criminal law which is to prohibit, to punish and to deter conduct considered sufficiently serious in nature to justify characterizing it a crime. Satisfying this principle requires that the standard of conduct that differentiates between permissible and prohibited conduct be defined a priori. For as the Commentary to the Draft Code of Crimes points out "[t]he prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust." This provision is without prejudice to the prosecution and punishment of an accused for a crime under pre-existing national law, provided the national law in question is applied in conformity with international law.

Finally, an international crime must satisfy the principle of aut dedere aut judicare, which places any state in whose territory the alleged accused is present under an obligation to extradite or prosecute. The fundamental purpose of this principle, which is found in all the anti-bribery conventions, is "to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction." The obligation imposed on the custodial state is to ensure that the accused is prosecuted either by the national courts of that state or by another state ready and willing to prosecute as evidenced in a formal extradition request. Finally, as with all crimes under international law, responsibility for their commission remains with the individual. The individual's official position whether as head

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77. The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization. It should be noted that the Draft Code applies this principle to a much broader set of crimes whereas the Nuremberg Charter's express reference to this relation between international and national responsibility was only with respect to crimes against humanity.

78. See e.g., Draft Code of Crimes, art. 12 and common art. 12 (Yugoslavia), (Rwanda).

79. The Draft Code of Crimes recognizes two exceptions to the principle of non bis in idem. Article (2) permits an international criminal court to try an accused for breach of an international crime arising out of the same act that was the subject of a previous national court proceeding if the accused was tried by the latter court for an ordinary crime rather than a more serious crime. The second exception to the double jeopardy rule provides for an accused to be tried by an international criminal court for a crime under international law arising out of the same act or even for the same crime that was the subject of a prior national court judgment provided the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted. The idea here is to prevent sham trials for violations of serious crimes.

80. See id. cmt. 1.

81. Id.

82. See id. art. 13, cmt. 6.

83. See Inter-American Convention, supra note 33, art. XIII; OECD Convention, supra note 23, art. 10; Criminal Law Convention, art. 27.

84. Draft Code of Crimes, supra note 78, art. 9, commentary 2.

85. See id.

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of state or government does not operate as a bar to the application of the principle of individual responsibility.\textsuperscript{86}

D. Responsibility and Punishment

Under what circumstances will an individual incur responsibility for participating in or otherwise contributing significantly in the commission of acts that qualify as a crime under international law? This question arises when the person who issues the instructions to commit such an offense is beyond the reach of national courts for purposes of in personam jurisdiction. For instance, shortly after General Abacha's death, the successor regime came full face with this dilemma. As discussed earlier, a scheme to defraud the Nigerian government by members of the late General Abacha's family was uncovered by General Abubakar, Abacha's successor as head of state. The late general's national security adviser who was at the center of the fraud scheme was arrested and he implicated the late general. The aide claimed that the billions of dollars traced to him were withdrawn from the Central Bank on the instructions of the Head of State, General Sani Abacha. When questioned by the press whether the former national security adviser under his predecessor would be criminally prosecuted, General Abubakar responded that such an exercise would be futile because the main actor is dead and gone. The main problem as General Abubakar saw it was one of corroborating the testimony of Abacha's surviving aides: "[t]here is nobody to counteract (sic) what the security adviser is saying. So this is the dilemma we are having."\textsuperscript{87} It is not an insurmountable dilemma, however. Under the Draft Code of Crimes, responsibility and punishment attach to the author of an international crime, if he was directly involved in its commission, or for complicity in its commission or attempt to commit the crime.\textsuperscript{88} The activities of the late General Abacha's national security adviser are covered under the Draft Code of Crimes: either he was directly involved or was an accomplice in or attempted to defraud Nigerian taxpayers of hundreds of millions of their hard earned money. The death of Abacha does not relieve his surviving national security adviser of responsibility and, ultimately, punishment for his involvement in the fleecing of the Nigerian patrimony.

The Nuremberg Tribunal acknowledged that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."\textsuperscript{89} Article 1 of the Draft Code of Crimes which sets out the scope and application of the code provides that the code applies to those crimes set out in Part II and that those crimes are punishable under international law whether or not they are punishable under domestic law. The commentary to article 2 of the Draft Code of Crimes that establishes the principle of individual criminal responsibility for the commission of crimes against the peace and security of mankind notes that this principle is the enduring legacy of the Nuremberg Charter and Judgment: "It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals. . . ."\textsuperscript{90} In the opinion of the tribunal [this submis-
sion] must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. The principle of individual responsibility and punishment for international crimes is widely acknowledged as the cornerstone of international criminal law. It was most recently reaffirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1 and article 23, paragraph 1) and Rwanda (article 6, paragraph 1 and article 22, paragraph 1).

Punishment is the other half of the doctrine of individual responsibility for crimes under international law. Punishment is essential as a deterrent against violations of the law. Article 3 of the Draft Code of Crimes codifies this double-edged principle by providing that "an individual who is responsible for a [crime under international law] shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime." As a universal crime, the penalty for acts of indigenous spoliation will depend on the jurisdiction which in turn will determine the appropriate penalty and the severity. So, for instance, if a state were exercising jurisdictional competence over the accused, national courts may decide on the applicable penalty and "may or may not admit extenuating or aggravating circumstances." On the other hand, if jurisdiction is exercised by an international court, the applicable punishment will be fixed by "an international convention, either in the statute of the international court or in another instrument if the statute of the international court does not so provide."

E. Satisfying an Exacting Standard

But does corruption as used in this article meet the Nuremberg Charter and the Draft Code of Crimes' exacting standard of an international crime which entails individual responsibility? As a preliminary matter, a prohibited conduct qualifies as a crime under the Draft Code of Crimes' standard, if it is of such a character as to threaten international peace and security. That is, it must be seen as a crime of exceptional gravity or extraordinary magnitude and of sufficient seriousness to justify the concern of the entire international community. Several features distinguish economic spoliation from the specie of corruption dealt with in the various anti-bribery conventions to justify its elevation to a crime of universal concern.

91. Id. art. 3.
92. For instance, the OECD Convention provides, in art. 3, paragraphs 1-3, that the crime of active bribery is punishable by effective, proportionate and dissuasive criminal penalties. These include monetary sanctions as well as the seizure and confiscation of the bribe and the proceeds of the bribery, i.e., the profits or other benefits derived by the bribe-giver from the transaction or other improper advantage obtained or retained through bribery. An individual found guilty of acts of bribery is also open to a variety of noncriminal fines in addition to civil or administrative sanctions such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities, placing under judicial supervision, and judicial winding-up order. See OECD, Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions. Adopted on Nov. 21, 1997, Commentary to art. 3; see also Criminal Law Convention, art. 19 (the offense of bribery in all its forms shall be subject to effective, proportionate and dissuasive sanctions and measures, including . . . penalties involving deprivation of liberty which can give rise to extradition.).
93. See Draft Code of Crimes, supra note 78, art. 3, Commentary (5).
94. Id. art. 3, Commentary (7).

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F. The Evidence

1. State Practice

Corruption has long been prohibited by the laws and the constitutions of most states in the old democracies of Western Europe and North America, the new democracies of Central and Eastern Europe and the proto-democracies of Asia and Africa. It is expressly prohibited in the constitutions of Haiti, Nigeria, Paraguay, Peru, the Philippines and Sierra Leone, to mention but a few. Because of the gravity of the problem, special tribunals and commissions of inquiry have been set up in various countries to probe into and try cases of corruption by public officials. These developments evidence expressions of de lege feranda for treating corruption as a crime punishable under international law.

2. Expressions of International Concern

Pronouncements by states in recent years also evidence a universal condemnation of corrupt practices by public officials and a general interest in cooperating to suppress them. This widespread condemnation of acts of corruption is reflected in the preambles of a number of multilateral anti-corruption conventions and resolutions of international orga-

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99. CONSTITUTION OF PARAGUAY, Chapter IV, General Provisions, art. 41.

100. POLITICAL CONSTITUTION OF PERU, art. 62.

101. CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, art. XI, Sec. 1.

102. THE CONSTITUTION OF SIERRA LEONE, Sec. 97(b) (1991).

103. See e.g., CONSTITUTION OF THE REPUBLIC OF PANAMA, Title V, Legislative Organ. Chapter II, art. 142 (creating a permanent judicial commission to try constitutional officers under art. 171 for economic crimes (corruption, embezzlement and misappropriation) among other crimes); CONSTITUTION OF THE REPUBLIC OF PANAMA, art. XI, Sec. 4 (establishing Anti-Graft Courts and the Independent Office of the Ombudsman).
Reading through them leaves one in no doubt as to the seriousness with which the international community as a whole attaches to the problem of corruption.

The Criminal Law Convention sets out in its preamble a concise outline of the serious and varied forms of damage caused by corruption and the urgent need to combat it through a multi-disciplinary national and international approach. The Parties to the Criminal Law Convention expressly acknowledge that "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society." In the 1994 Summit of the Americas Declaration of Principles and Plan of Action, the Heads of State of thirty-four nations of the southern hemisphere pointedly linked the survival of democracy to the eradication of corruption. "Effective democracy," they declared, "requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions."

In the preamble to the Inter-American Convention that followed the 1994 summit, again the leaders of the OAS came back to the theme of corruption as a phenomenon that undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as the comprehensive development of peoples. Acknowledging that corruption has international dimensions, the signatories of the convention agreed on the need for prompt adoption of an international instrument to promote and facilitate international cooperation in fighting corruption and the responsibility of states to hold corrupt persons accountable.

On December 16, 1996, the United Nations General Assembly, acting on an earlier recommendation of the Economic and Social Commission, adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions. The declaration highlights the economic costs of corruption and bribery, and points out that a stable and transparent environment for international commercial transactions in all countries is essential for the mobilization of investment, finance, technology, skills and other resources across national borders. Member states pledge in the declaration to criminalize bribery of foreign public officials in an effective and coordinated manner and to deny the tax deductibility of bribes paid by any private or public corporation or individual of a member state to any public official or elected representative of another country. Corruption was also the subject of a 1997 United Nations General Assembly Resolution entitled Action Against Corruption. The resolution underscored the General Assembly's concern about the serious problems posed by corrupt practices to the stability and security of societies, the values of democracy and morality, and to social, economic and political development.


107. Available empirical evidence suggests a correlation between corruption and economic growth and investment. Statistically, the relationship is negative: a one standard deviation improvement in the corruption index is associated with a four percentage point increase in investment and over a half percentage point increase in the annual growth rate of per capita GDP. See Corruption in Africa, supra note 56, at 12.
The resolution also drew a link between corruption and organized crime, including money laundering. Interestingly enough, the preamble of the Inter-American Convention called attention to the “steadily increasing links between corruption and the proceeds generated by illicit narcotics trafficking...which undermine and threaten legitimate commercial and financial activities, and society, at all levels.”

Acknowledging that corruption now has trans-border effects, the General Assembly’s anti-corruption resolution recommends a multilateral approach to combat it.

G. The Perspective of Publicists

Bribery of foreign public officials is listed as one of twenty-two international crimes by a leading publicist. This crime meets Professor Bassiouni’s ten penal characteristics of an international crime: (1) explicit recognition of proscribed conduct as constituting an international crime, a crime under international law, or a crime; (2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute and punish; (3) criminalization of the proscribed conduct; (4) duty or right to prosecute; (5) duty or right to punish the proscribed conduct; (6) duty or right to extradite; (7) duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings); (8) establishment of a criminal jurisdictional basis (or theory of criminal jurisdiction or priority in criminal jurisdiction); (9) reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives); and (10) elimination of the defense of superior orders.

One can safely conclude that an emerging customary law norm that treats corruption as a crime under international law draws strong support from the following: (a) consistent, widespread and representative State practice proscribing and criminalizing the practice; (b) the widespread condemnation of acts of corruption reflected in the preambles of these multilateral anti-corruption treaties and in declarations and resolutions of international organizations; (c) pronouncements by states in recent years that evidence a universal condemnation of corrupt practices by public officials (in these pronouncements corruption is described in weighty language: a phenomenon that threatens the rule of law, democracy

108. In the same vein, a 1995 Resolution on Combating Corruption in Europe adopted by the European Parliament also stressed the ties between corruption and organized crime while expressing the view that combating the latter can help to curb the former. European Parliament Resolution, supra note 16.


110. Bassiouni, supra note 109, at 27.
and human rights; hinders economic development; and endangers the stability of democratic institutions and the moral foundations of society; (d) a general interest in cooperating to suppress acts of corruption; and (e) the writings of noted publicists recognizing corruption as a component of international economic crimes. From the foregoing, a strong argument can be made for treating corruption as a crime under international law for which individual responsibility and punishment attach.

H. Conformity with the Draft Code and Nuremberg Principles Standard

The Draft Code of Crimes defines a crime against humanity in its article 18 to mean certain acts "committed in a systematic manner or on a large scale." This standard incorporates two alternative requirements both of which are satisfied in cases involving acts of economic spoliation. Under the first requirement, for an act to rise to the level of a crime of economic spoliation, it must occur pursuant to a preconceived plan or policy, the execution of which could result in the repeated or continuous commission of acts of spoliation. As the commentary to article 18 explains, the thrust of this requirement is to exclude a random act that was not committed as part of a broader plan. Clear examples of a preconceived plan or policy within the meaning of article 18 of the Draft Code would be, for instance, the scheme by the late General Abacha, with the assistance of his key lieutenants, to defraud the Nigerian Government by overvaluing the debt owed to the Russians who contracted to construct a giant steel plant and then pocketing the bulk of the funds withdrawn from the Central Bank; or, his involvement in other acts of theft that made it possible for him to amass more wealth in a period of five years than Mobutu could in thirty-two years in power.

The second requirement is that acts of spoliation must occur on a large scale for them to qualify as a crime. This has been interpreted to mean that the acts that form the basis of the crime must take place multiple times. The commission of one isolated act would not suffice because the test focuses on the result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. Qualifying as an act of extraordinary magnitude would be the sale by the Nigerian government of surplus


112. The Draft Code of Crimes takes a restrictive approach to the definition of a crime against the peace and security of mankind. It limits its list of crimes under this category to a hard core of crimes that are of such gravity that they have victimized mankind as a whole. This approach was dictated by the need to strike a balance between legal idealism and political realism. But before settling for this restrictive description, the International Law Commission went through six other possible approaches to defining crimes under international law: (1) crimes defined in terms of their gravity and significance; (2) crimes that correspond to the legal rules accepted by states and considered serious enough to be defined as crimes against the peace and security of mankind, and translated into acts sufficiently identifiable to appear in a criminal text; (3) crimes that shock the conscience of mankind; (4) crimes that were directed against the fundamental interests of the international community and the conscience of mankind and consequently threatened peace and security, and sufficiently serious to justify the concern of the entire international community; (5) definition that should hinge on seriousness, massive nature, and violation of the international legal order, and (6) definition based on a basket of several principles, including, nullum crimen sine lege, gravity of the conduct that offends universal sensibilities and constitutes a serious threat to the peace and security of mankind, etc. Topical Summary: Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR Int'l Law Comm'n, 6th Comm., 47th Sess., ¶¶ 21-27, at 8-10, U.N. Doc. A/CN.4/472 (1992).
oil during the Gulf War for $12.225 billion, only $225 million of which went into the Central Bank while the rest, a cool $12 billion, was diverted into the private bank accounts of the country's military rulers.

There is something fundamentally different between the acts of corruption just described and the practice of offering a bribe to a local council clerk to expedite the birth registration of a child. A plot to swindle $2.45 billion from the national treasury with the knowledge and connivance of the head of state should not even be called corruption, at least as the term is used in treaty law. Such a brazen act deserves another name. I have called it patrimonicide elsewhere.\footnote{The word "patrimonicide" comes from combining the Latin words \textit{patrimonium}, (meaning [t]he estate or property belonging by ancient right to an institution, corporation, or class; especially the ancient estate or endowment of a church or religious body) and \textit{cide}, meaning killing. See Ndiva Kofele-Kale, \textit{Patrimonicide: The International Economic Crime of Indigenous Spoliation}, 28 \textit{VAND. J. TRANSNAT'L L.} 48, 58 (1995).} In formulating the concept of genocide shortly after World War II, Ralph Lemkin acknowledged that there have been mass killings before in history and that they will continue to occur in the future.\footnote{See Raphael Lemkin, \textit{Genocide: A Modern Crime}, 9 FREE WORLD, Apr. 1945, at 39.} But what the Nazis did tops the scale of mass killings and could not be dismissed as another unplanned spree of senseless killings of innocent people. What they did was planned well in advance, organized and systematically carried out with the single-minded objective of exterminating a whole race of people. Lemkin argued that this form of wholesale organized slaughter of innocent and defenseless people deserved another name. \textit{Genocide} was this new name he coined by stringing two Latin words together to describe the unspeakable horrors that were committed by the Nazis.\footnote{See Raphael Lemkin, \textit{Axis Rule in Occupied Europe} 79 (1944).}

This is the view I hold of indigenous spoliation, it is corruption to be sure but corruption of a higher degree. The activities associated with this conduct satisfy the exacting standard of the Nuremberg Principles and the International Law Commission's (ILC) Draft Code of Crimes Against the Peace and Security of Mankind. As such, they should be treated as a crime of universal concern.

In sum, the foregoing public statements convey normative rules that have been widely accepted as law \textit{(opinio juris)} by a representative majority of states.

\section*{V. Conclusion: Obstacles to the Emergence of an Anticorruption Customary Law Norm}

Several obstacles stand in the way of the crystallization of an international legal norm against corruption. We call attention here to two of them.

\subsection*{A. The Problem of Enforcement at the Level of National Courts}

The problems associated with criminalizing domestic behavior at the international level might lead some to question why the fight against corruption is not being handled at the national level. This concern goes to the question of enforcement. If in fact corruption is given the status of an international crime will there be an effective enforcement of the law against violators or potential violators? Two methods have been employed in enforcing violations of crimes under international law: the direct method through an international
criminal tribunal or the indirect method through a national court and national laws. There are, however, several problems in relying on the domestic legal regime in the fight against corruption. As Professor Bassiouni observed:

the indirect method is flawed as courts in many parts of the world will not be able or will refuse to prosecute nationals who, acting pursuant to executive policy, violate international norms. Moreover, the prosecution of the officials of one state by courts of another state could create political conflict or encounter jurisdictional difficulty.\textsuperscript{16}

This problem is avoided when enforcement is placed in the hands of an international tribunal.

Prosecutions of corruption cases in domestic courts, even when the accused are nationals of the custodial state, tend to be sporadic and highly dependent on the political mood of the day. They generate much enthusiasm particularly in the euphoria following the successful overthrow of the previous regime. The successor government then promises to clean up the Augean stables as it promises greater transparency and accountability in governance. But as time goes on these promises are quickly forgotten as the new rulers begin to behave no differently from their predecessors. Nonetheless, every now and then the commitment to eradicate corruption in society is revived and a burst of prosecutions commence when international financial lending institutions make transparency and accountability prerequisites in loan agreements. But as one would expect from reforms driven by reasons of expediency, once the emergency recedes the enthusiasm to prosecute violations of corruption laws also wanes.

Secondly, even when prosecutions of violators are pursued in earnest, more often than not the targets have usually been the low level, underpaid rent seeking officials. And the explanation is simple: the major violators, high ranking members of government, almost always flee to safe havens, out of reach of the forum’s jurisdiction. Besides, before they leave office many of these high profile violators of anti-corruption laws usually take the usual precaution of enacting legislation immunizing them from judicial prosecution for acts taken while in office. It has not been that long since Senator Pinochet of Chile advanced this defense against a request from the Spanish government to the United Kingdom government for his extradition to Spain to answer to charges for crimes against humanity.\textsuperscript{17} Chile demanded the return of Senator Pinochet claiming that the crimes alleged against him were the subject of a general amnesty in 1978, and a subsequent scrutiny by the Chilean Commission of Truth and Reconciliation in 1990.\textsuperscript{18} While such amnesty laws may succeed in shielding heads of state against corruption charges in the national courts, they may not work that well in foreign jurisdictions, as Pinochet found out in England.


\textsuperscript{17} See Regina v. Bow Street Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte 4 All E.R. 897, 3 W.L.R. 1456, (House of Lords, 1998).

\textsuperscript{18} On April 19, 1978, while Pinochet was still head of state, the Chilean Senate passed a decree granting amnesty to all persons involved in the crimes for which Pinochet is alleged to have committed (torture, genocide, and so on) between September 11, 1973 and March 10, 1978. After Pinochet fell from power, the successor democratic government appointed a Commission for Truth and Reconciliation. The commission’s terms of reference were to investigate all violations of human rights between 1973 and 1990, and to make recommendations. The commission reported on February 9, 1991.
But even when the defense of sovereign immunity is unavailable for an accused in the national courts and he eventually is convicted and ordered to forfeit his ill-gotten wealth, the victory for the nation is a pyrrhic one at best. With the stolen funds in safe keeping abroad, seizure and repatriation present some formidable legal and practical challenges: whether the hidden assets be found, whether foreign courts will enforce judgments from the courts of victim states, and so on.

B. SOVEREIGN DENIALS AND RESISTANCE

The internal resistance likely to be put up by states that have been branded corrupt by external observers is a factor that must be reckoned with in the formation of this new international regime against corruption. A case in point is the Cameroon Government’s angry reaction to Transparency International’s (TI) 1998 CPI, which ranked Cameroon as the country perceived to be the most corrupt in the world. Soon after CPI was made public, the Cameroon Government went into a full court press to destroy the bona fides of Transparency International. TI was attacked for mischaracterization, for the motives behind the exercise, and for the methodology it employed in drawing up the perceptions index. The campaign to denigrate TI and its work was orchestrated from the highest level of government, the presidency no less. In a statement issued from the presidency, the deputy Secretary General of the Presidency dismissed the report as a “nasty political manoeuver . . . a callous manoeuver of intoxication” intended to “tarnish the image of Cameroon and discourage investors.” The report was a gross misrepresentation of Cameroonian realities as it ignored giant strides taken by the government in the past decade to institutionalize a culture of accountability, transparency, and probity in public governance. The CPI, the government claimed, cannot be taken seriously because of its flawed methodology: the

119. African leaders are not even willing to take responsibility for not doing anything to curb corruption in their countries. It will come as no surprise that when the problem of corruption was raised during a Global Forum for Africa Plenary in Maastricht in November 1995, many African leaders blamed the industrialized countries and their multinationals for worsening corruption in their countries! See GCA, Corruption and Development in Africa: Policy Forum (visited Feb. 29, 2000) <http://www.gca-cma.org/epfdtoc97.htm>.

120. TI is a global anti-corruption organization founded in 1993 with over 60 national chapters around the globe and an International Secretariat based in Berlin. Working through its vast network of national chapters, TI strives to mobilize civil society, business, academia and government in its relentless fight against corruption both nationally and internationally.

121. According to Transparency International, the 1998 Corruption Perceptions Index is the most comprehensive index of perceptions of corruption ever published. The CPI is described as a poll of polls reflecting the results of several different surveys of expert and public views of the extent of corruption in many countries around the world. Eighty-five countries were ranked on the 1998 CPI and assigned a score ranging between 10 (highly clean) and zero (highly corrupt). The index only captures perceptions of the degree of corruption as seen by business people, risk analysts and the general public. Denmark with a perfect score of 10 was ranked the most highly clean country while Cameroon’s score was 1.4. About two-thirds of the countries on the index received scores well below 5. See Transparency International, 1998 Corruptions Perceptions Index Press Release (visited Feb. 28, 2000) <http://www.gwdg.de/~uwww/ier.htm>.

122. Ironically, a few months later, Cameroon’s President Biya in a New Year Address to the Nation admitted that corruption had become a serious national problem that was gnawing at the moral and economic foundations of the society! In the televised end-of-year message, the president accused his compatriots for accumulating illicit wealth . . . and for being well versed in cheating, fraud and even swindling. See Cameroon-Politics: Biya Calls for Justice, Security, Morality and a Fight Against Corruption (visited Feb. 28, 2000) <www.boh.org/english/cm/1999/0101354/n4.html>.
surveys on which the CPI was constructed were described as phantom "multinational company heads who claim to be working in Cameroon," concluding that there are no infallible instruments that have yet been found that can accurately measure corruption in any country, let alone rank countries on a scale. Worsely, TI, the brain behind this survey, was accused of being "on the pay of neocolonialists" and "clusters of people at work" to undermine Cameroon's efforts to develop.

From the point of view of positive international law, sovereign resistance to the corruption label carries a couple of consequences. In the first place, if Cameroon's response is any indication of how other like-minded states on the CPI will react, such noisy and bellicose response will likely affect the number of ratifications and accessions to multilateral anti-corruption treaties as fewer countries will be interested in becoming signatories. Such non-adherence potentially denies these instruments the widespread and representative participation of states, this being one of the crucial elements in transforming an anti-corruption treaty norm into a rule of customary international law binding even to states that are not signatories to the instrument. But sovereign resistance to the corruption label may also, in another sense, operate as a bar to the formation of a new rule of customary law that proscribes corruption. Such resistance may signal a state's intention to be treated as a persistent objector in the face of this emerging rule of customary law. As a general rule, a state that registers its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures. A dissenting state could further


125. For example, the OECD Anti-Bribery Convention is open to the signature of nonmember states. Five non-OECD states, Argentina, Brazil, Bulgaria, Chile and the Slovak Republic, have signed on and Israel has also requested to join.

126. The World Court, in its 1969 Judgment on the North Sea Continental Shelf, spelled out the conditions by which norm-creating provisions from a convention pass into the general corpus of international law so as to have binding effect on third states: (1) that it would be necessary in the first place that the provision concerned should be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; (2) these rules, by their very nature, must have equal force for all members of the international community, and cannot therefore be subject to any right of unilateral exclusion (that is to say, these rules cannot be subject to unilateral denunciation and reservations by parties to a codification convention); (3) widespread and representative participation in the convention might suffice, provided it included states whose interests were specially affected; (4) state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved; and (5) the passage of only a short period of time is not necessarily a bar to the formation of a new rule of customary international law. See Report of the International Law Commission on the Work of its Twenty-First Session, U.N. GAOR, 21st Sess., 963, 72-74, U.N. Doc. A/7610/Rev. 1 (1969).


128. See Restatement (Third) of Foreign Relations § 102, comment d (American Law Institute, 1987).
down the road invoke as a defense against the binding force of such a norm, should it eventually attain the status of a rule of positive international law, its open and notorious objection. States that are on record as having challenged *ab initio* the fundamental basis of these new rules can always claim that they had earlier opted out of, and therefore are not bound by, the new anticorruption law.129 Such a defense is all the more compelling especially when applied to a norm that does not yet carry the weight of an expression of *jus cogens*.130

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129. It bears repeating, if only for emphasis, that international law is no more than the corpus of legal rules by which states freely agree to be bound, either in terms expressed in a treaty or by implied agreement (*tacitus consensus*) through custom. That a rule of customary law is not binding on any state indicating its dissent during the development of the rule is an accepted application of the traditional principle that international law essentially depends on the participant state's consent. *See id.*, Reporters Note 3.

130. On the international normative scale, a *jus cogens* norm enjoys the status of a super norm that trumps all lesser norms, so to speak, and states cannot contract out of their *jus cogens* obligations. According to the Vienna Convention on the Law of Treaties: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *See Vienna Convention, supra* note 104, art. 53. As a general rule, a treaty norm that conflicts with a peremptory norm (*jus cogens*) of international law is not enforceable.