

# BACKGROUND

No. 2958 | OCTOBER 1, 2014

## Why the U.S. Should Oppose the Creation of an International Anti-Corruption Court

*Brett D. Schaefer, Steven Groves, and James M. Roberts*

### Abstract

Advocates believe that “grand corruption” (extensive, large-scale corruption by high-level government officials) should be classified as a crime against humanity, subject to jurisdiction under the International Criminal Court or a new International Anti-Corruption Court (IACC). Corruption is a real problem, but classifying it as a crime against humanity subject to international criminal courts would be impractical, ineffective, and, where it could be pursued, often unnecessary. Among other problems, it would not address widespread and deeply entrenched petty corruption, would prove ineffective in cases of true impunity, and arguably would trivialize genocide and war crimes by equating them with theft and abuse of power. Long-term, sustainable anti-corruption measures cannot be instilled from above via international treaties and courts—they must be cultivated domestically from the ground up. The U.S. should oppose proposals to create an IACC.

The idea that “grand corruption” by world leaders and powerful individuals able to shield themselves from domestic accountability should be considered a crime against humanity has percolated for years among anti-corruption advocates and international law experts. As these advocates argue, the destructive impact of grand corruption, which they argue contributes to extreme poverty and consequent negative outcomes by diverting stolen resources that could otherwise support education and health programs or improve infrastructure that would improve economic growth and general welfare, is so severe that it should be considered a crime against humanity subject to the jurisdiction of the International Criminal Court (ICC) or an independent international anti-corruption court (IACC).

### KEY POINTS

- Corruption costs billions in stolen resources, lost productivity, erosion of the rule of law, and serves as a regressive tax on the poor.
- The appeal of punishing those who commit grand corruption and abuse their power is understandable—but the U.S. should oppose classifying grand corruption as a crime against humanity and placing it under the jurisdiction of the International Criminal Court (ICC) or a new International Anti-Corruption Court (IACC).
- ICC and IACC jurisdiction over grand corruption would necessarily undermine national sovereignty. Even so, they would be (1) restricted by time and resources to the most notorious instances of corruption; (2) unlikely to overcome true impunity; (3) unnecessary in the absence of impunity; and (4) would do little to address the damaging widespread low-level corruption that similarly harms the broader population.
- Sustainable anti-corruption measures cannot be instilled from above via international treaties and courts—they must be cultivated domestically from the ground up.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2958>

**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

The advocates are correct to highlight the serious problem of grand corruption. But the proposed solution is an unnecessary, impractical approach to the issue since it is unlikely to be used in cases of true impunity, would often be unnecessary in cases where it could be applied, and would not address the widespread low-level corruption that is more common and similarly damaging to gross domestic product (GDP) growth and the living standards of ordinary people around the world. The U.S. should reject the notion of an IACC and pursue a “broken windows” approach to corruption by encouraging countries to implement and enforce anti-corruption efforts and support good governance and judicial capacity and objectivity in countries where corruption is most prevalent. The U.S. should also continue to apply U.S. law in U.S. courts to prosecute corruption and facilitate foreign governments’ efforts to reclaim funds or assets acquired through illicit or corrupt means.

### Corruption Is a Serious Problem

Transparency International, a pioneer in measuring and highlighting the pernicious impact of corruption, has published its *Corruption Perceptions Index* (CPI) annually since 1995. The CPI is the primary measure used for one of the 10 indicators in the *Index of Economic Freedom*<sup>1</sup> published annually by The Heritage Foundation and *The Wall Street Journal*.

The 2013 CPI measures corruption in 177 countries on a scale from 0 (highly corrupt) to 100 (very clean). As summarized by Transparency International, “No country has a perfect score, and two-thirds of countries score below 50. This indicates a serious, worldwide corruption problem.”<sup>2</sup>

Transparency International defines corruption as “the abuse of entrusted power for private gain.”<sup>3</sup> This definition includes illicit actions for monetary

gain and for non-monetary political gain. Corruption researchers also frequently differentiate between grand corruption and everyday or petty corruption, which is dishonest or illegal abuse of public power by relatively low-level public officials through solicitation of bribes or advantage from ordinary citizens seeking to access basic goods or services. Transparency International defines grand corruption as “acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.”<sup>4</sup>

Although most corruption occurs at lower levels, such as bribing police and minor government officials to avoid harassment or navigate bureaucratic requirements, and is not enormously costly on an individual basis, that does not mean that its impact is minor. Indeed, a 2012 analysis concluded that “poor people are indeed much more prone to pay bribes to government officials. This suggests that the people who are worst off materially are also more likely to be victims of corruption.”<sup>5</sup> The cumulative cost of low-level corruption across a population is large. It harms entrepreneurship, erodes living standards, the rule of law, and retards economic growth. Furthermore, it functions as a de facto regressive tax on the poor, who consume many of the goods and services affected by corruption.

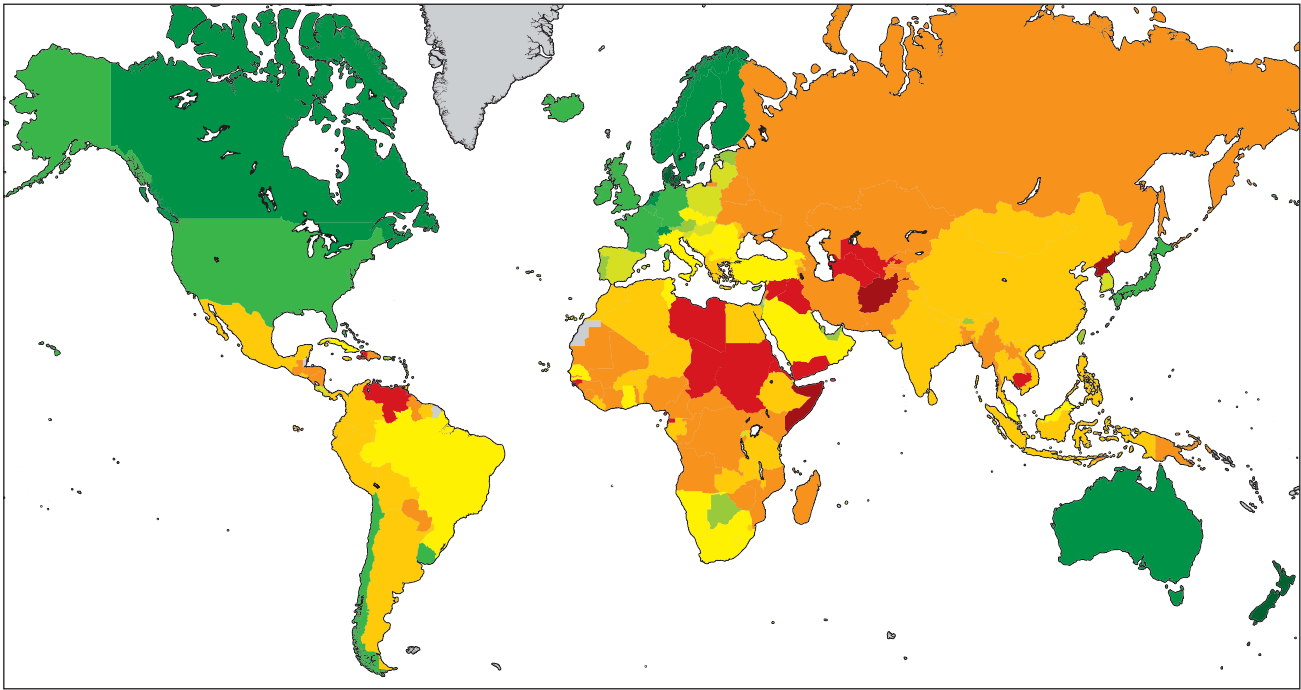
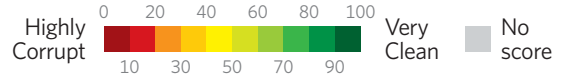
But how much does corruption cost overall? Numerous sources and news stories quote a 2002 study by the African Union that estimated the cost to the continent at \$148 billion per year (25 percent of GDP), but the World Bank notes that “neither a precise source nor an underlying methodology for this number could be pinned down. It appears to have become a ‘fact’ as a result of being repeatedly cited.”<sup>6</sup> Other studies, however, illustrate the significant cost of corruption:

1. Terry Miller, Anthony B. Kim, and Kim R. Holmes, *2014 Index of Economic Freedom* (Washington, DC: The Heritage Foundation and Dow Jones & Company, Inc., 2014).
2. Transparency International, *Corruption Perceptions Index 2013*, <http://www.transparency.org/cpi2013/results> (accessed September 8, 2014).
3. Transparency International, “FAQs on Corruption: How Do You Define Corruption?” [http://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption/2/](http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/) (accessed September 8, 2014).
4. *Ibid.*
5. Mogens K. Justesen and Christian Bjørnskov, “Exploiting the Poor: Bureaucratic Corruption and Poverty in Africa,” *Afrobarometer Working Paper* No. 139, October 29, 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2168119](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168119) (accessed September 8, 2014).
6. U.N. Office on Drugs and Crime and the World Bank, “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan,” June 2007, p. 9, footnote 9, <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf> (accessed September 8, 2014).

MAP 1

## Measuring Corruption

Transparency International measures corruption by country in its annual *Corruption Perceptions Index*. No country had a perfect score in 2013, and two-thirds scored below 50, suggesting a global problem with corruption.



Source: Transparency International, *Corruption Perceptions Index 2013*, <http://www.transparency.org/cpi2013/results> (accessed September 19, 2014).

BG 2958 heritage.org

- A 2002 study by Sanjeev Gupta, Hamid Davoodi, and Rosa Alonso-Terme “provides evidence that high and rising corruption increases inequality and poverty. An increase of one standard deviation in corruption increases the Gini coefficient of income inequality by about 11 points and income growth of the poor by about 5 percentage points per year.... An important implication of these findings is that policies that reduce corruption will most likely reduce income inequality and poverty as well.”<sup>7</sup>
- Raymond Baker estimated “Cross-Border Flows of Global Dirty Money” to be between \$1.06 trillion and \$1.6 trillion annually, of which approximately half (\$539 billion to \$778 billion) involves developing and transitional economies. Baker estimates that \$20 billion to \$50 billion of this total stems from “corrupt” activities.<sup>8</sup> However, much corrupt activity, especially petty corruption, likely does not cross borders, and some of the “criminal” or illicit “commercial” activity could also be considered corruption by some accounts.

7. Sanjeev Gupta, Hamid Davoodi, and Rosa Alonso-Terme, “Does Corruption Affect Income Inequality and Poverty,” *Economics of Governance*, Vol. 3, No. 1 (2002), pp. 23–45, [http://econpapers.repec.org/article/sprecogov/v\\_3a3\\_3ay\\_3a2002\\_3ai\\_3a1\\_3ap\\_3a23-45.htm](http://econpapers.repec.org/article/sprecogov/v_3a3_3ay_3a2002_3ai_3a1_3ap_3a23-45.htm) (accessed September 8, 2014).

8. Raymond Baker, *Capitalism’s Achilles Heel: Dirty Money and How to Renew the Free-Market System* (Hoboken, NJ: John Wiley & Sons, Inc., 2005), p. 172, Table 4.4, [http://www.e-reading.ws/bookreader.php/135381/Capitalism%252560s\\_Achilles\\_heel.pdf](http://www.e-reading.ws/bookreader.php/135381/Capitalism%252560s_Achilles_heel.pdf) (accessed September 8, 2014).

- Daniel Kaufman finds that “an estimate of the extent of annual worldwide transactions that are tainted by corruption puts it close to US\$1 trillion. The margin of error of this estimate being obviously large, it may well be as low as US\$600 billion; or, at the other extreme of the spectrum, it could well exceed US\$1.5 trillion.”<sup>9</sup>
- According to the World Bank and the U.N. Office on Drugs and Crime, “Corrupt money associated with bribes received by public officials from developing and transition countries is estimated at \$20 billion to \$40 billion per year—a figure equivalent to 20 to 40 percent of flows of official development assistance (ODA).”<sup>10</sup>
- According to Dev Kar and Brian LeBlanc, “[F]rom 2002 to 2011, developing countries lost US\$5.9 trillion to illicit outflows. The outflows increased at an average inflation-adjusted rate of 10.2% per year over the decade—significantly outpacing GDP growth. As a percentage of GDP, Sub-Saharan Africa suffered the biggest loss of illicit capital. Illicit outflows from the region averaged 5.7% of GDP annually. Globally, illicit financial outflows averaged 4% of GDP.”<sup>11</sup> This figure, while encompassing some corruption, should not be taken as an estimate of corrupt financial flows. Illicit flows as defined by the study also include financial flows resulting from criminal activity and tax evasion.

Moreover, there is a strong correlation between CPI scores and low scores in the World Economic Forum’s *Global Competitiveness Index*, Freedom House’s “civil liberties” rankings, and the U.N.

*Human Development Index*, suggesting that higher levels of corruption discourage foreign investment, undermine competitiveness, weaken human rights, and contribute to poverty, illiteracy, and poor health.<sup>12</sup> In sum, as concluded in a meta-analysis of 41 different empirical studies on the effect of corruption on growth, the preponderance of economic analysis indicates that corruption, though difficult to measure, “sands the wheels of growth” and “undermines the positive effect of institutions and trade openness on growth.”<sup>13</sup>

### Combatting Grand Corruption with Human Rights Laws?

Corruption writ large is condemned by proponents of good governance, and a number of efforts are currently being pursued to combat corruption nationally, regionally, and multilaterally. Efforts to criminalize corruption, both petty and grand, have gained momentum and have already been implemented into domestic law in most nations. Media and nongovernmental organizations (NGOs), such as Transparency International, that pay close attention to corruption are proliferating and increasingly prominent. Many bilateral aid agencies have made anti-corruption and good governance a priority in their work, including the U.S. Agency for International Development and the Millennium Challenge Corporation, where corruption is a key criterion for compact eligibility. Some countries have also enacted broad domestic laws providing significant means for prosecuting corrupt practices, such as the Foreign Corrupt Practices Act (FCPA) in the U.S., under which individuals and businesses with a physical presence in the U.S. can be prosecuted for engaging in foreign corrupt

9. Daniel Kaufman, “Myths and Realities of Governance and Corruption,” *Global Competitiveness Report 2005–2006*, Chapter 2.1, [http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/2-1\\_Governance\\_and\\_Corruption\\_Kaufmann.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/2-1_Governance_and_Corruption_Kaufmann.pdf) (accessed September 8, 2014).

10. U.N. Office on Drugs and Crime and the World Bank, “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan.”

11. Dev Kar and Brian LeBlanc, “Illicit Financial Flows from Developing Countries: 2002–2011,” December 11, 2013, <http://www.gfintegrity.org/report/2013-global-report-illicit-financial-flows-from-developing-countries-2002-2011/> (accessed September 8, 2014).

12. Roger P. Alford, “A Broken Windows Theory of International Corruption,” *Scholarly Works*, Paper 572, 2012, [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/572](http://scholarship.law.nd.edu/law_faculty_scholarship/572) (accessed September 12, 2014).

13. Nauro F. Campos, Ralitzia Dimova, and Ahmad Saleh, “Whither Corruption? A Quantitative Survey of the Literature on Corruption and Growth,” Institute for the Study of Labor (IZA, Germany), *Discussion Paper* No. 5334, November 2010, <http://ftp.iza.org/dp5334.pdf> (accessed September 8, 2014).

practices regardless of whether they are present in the United States.<sup>14</sup>

Multilateral aid institutions, such as the World Bank and the International Monetary Fund, also emphasize the need to combat corruption and often incorporate anti-corruption efforts in their assistance programs. The Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions, ratified by all 34 OECD member states and Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa, “establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.”<sup>15</sup> The U.N. Convention Against Corruption was adopted by the U.N. General Assembly in October 2003, and entered into force in December 2005.<sup>16</sup> The 171 parties to the convention commit to implement policies to prevent and criminalize corruption, cooperate in fighting corruption (including transferring evidence for use in court and tracing and securing funds and assets tied to corruption), and agree to participate in asset recovery.

There is some evidence that domestic anti-corruption laws and treaties have influenced behavior. According to Notre Dame law professor Roger Alford, “Empirical studies of the impact of the OECD Anti-Bribery Convention find that investors from countries that have laws against paying bribes to foreign officials are likely to limit their foreign direct investment in countries with high levels of corruption. By contrast, investors from countries with high levels of corruption do not limit their foreign direct investment in other countries that also have high levels of corruption.”<sup>17</sup> Alford also noted that an analysis of the U.N. Oil-for-Food Program bribery scandal concluded that firms located in non-signatory countries to the OECD Anti-Bribery Convention were 13 percent more likely to bribe U.N. officials than were firms from OECD countries.

There have also been notable cases in recent years where political leaders have been tried for corruption and even convicted. For instance, Teodoro Obiang, son of Equatorial Guinea’s dictatorial president, was charged with embezzlement of funds in the U.S. and France; a British High Court ruled that former President Frederick Chiluba of Zambia stole and laundered \$46 million in state funds through British accounts;

- 
14. As summarized by the U.S. Securities and Exchange Commission (SEC), which, along with the Department of Justice, enforces the FCPA, “The Foreign Corrupt Practices Act (FCPA), enacted in 1977, generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business. The FCPA can apply to prohibited conduct anywhere in the world and extends to publicly traded companies and their officers, directors, employees, stockholders, and agents. Agents can include third party agents, consultants, distributors, joint-venture partners, and others.” The FCPA does carve out an exception for “facilitating or expediting payments” made to realize routine government approvals, licenses or other actions of a non-discretionary nature. According to the SEC, “Examples of ‘routine governmental action’ include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official’s discretion or that would constitute misuse of an official’s office. Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.” U.S. Securities and Exchange Commission, “Spotlight on Foreign Corrupt Practices Act,” April 9, 2014, <https://www.sec.gov/spotlight/fcpa.shtml> (accessed September 8, 2014), and Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, “FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act,” November 14, 2012, p. 25, <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (accessed September 8, 2014).
  15. Organization for Economic Co-operation and Development, “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,” undated, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (accessed September 8, 2014).
  16. U.N. Office on Drugs and Crime, “United Nations Convention Against Corruption,” 2014, <https://www.unodc.org/unodc/en/treaties/CAC/> (accessed September 8, 2014).
  17. Alford, “A Broken Windows Theory of International Corruption.”
-



and former Egyptian President Hosni Mubarak was convicted of corruption and embezzlement in 2014.<sup>18</sup>

Nonetheless, grand corruption remains too common and, increasingly, human rights activists,<sup>19</sup> international lawyers,<sup>20</sup> and politicians<sup>21</sup> have argued that grand corruption should be categorized as a crime against humanity and included in the jurisdiction of the ICC. The ICC is a treaty-based international court with jurisdiction (limited temporally and in scope, and also restricted to a complementary role when “the State is unwilling or unable genuinely to carry out the investigation or prosecution”<sup>22</sup>) over war crimes, crimes against humanity, genocide, and the crime of aggression.

The justification for considering grand corruption a crime against humanity and placing it under the jurisdiction of the ICC is that—because grand corruption continues to be a serious problem and convictions are rare—there is a need to address the issue through a supranational judicial authority of which the ICC is the most practical option:

Article 7 of the Rome Statute [of the International Criminal Court] expanded the limited scope of the Nuremberg definition, classifying crimes against humanity as an attack against a civilian population, which is widespread or systematic, and setting out eleven possible underlying acts—any one of which could support a conviction. Of particular relevance to Grand Corruption is the underlying act contained in Article 7(k), which includes “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

... [I]t seems arguable that the systematic high-level theft of government revenue could, in many cases, result in “great suffering” and “serious injury to mental or physical health” (for example, famine directly linked to the diversion of funds or the failure to purchase food supplies due to corruption). Although each element of the definition is bound to be severely contested, the inclusion of the underlying act of Apartheid (Article

- 
18. Bate Felix, “U.S. Prosecutors Add Charges in Equatorial Guinea Graft Case,” Reuters, June 15, 2012, <http://www.reuters.com/article/2012/06/15/us-equatorial-guinea-teodorin-idUSBRE85E18J20120615> (accessed September 8, 2014); RFI, “Equatorial Guinea: Govt Takes France to ICC Over Obaing Corruption Raids,” All Africa, September 26, 2012, <http://allafrica.com/stories/201209261026.html> (accessed September 8, 2014); Samuel Rubinfeld, “U.S. Court Deals Blow to Forfeiture Case Against Obiang,” *The Wall Street Journal*, May 9, 2014, <http://blogs.wsj.com/riskandcompliance/2014/05/09/u-s-court-deals-blow-to-forfeiture-case-against-obiang-assets/> (accessed September 8, 2014); “Zambia’s Former President Chiluba Dies: Final Years Spent in Political Obscurity After a Chequered Career that Ended with a Lengthy Corruption Trial,” Al Jazeera, June 18, 2011, <http://www.aljazeera.com/news/africa/2011/06/201161844151518878.html> (accessed September 8, 2014); and “Hosni Mubarak to Be Jailed for Corruption: Deposed Egyptian President Hosni Mubarak Gets Three-Year Term While Sons Get Four-Year Jail Terms,” *The Guardian*, May 21, 2014, <http://www.theguardian.com/world/2014/may/21/hosni-mubarak-jailed-corruption> (accessed September 8, 2014).
  19. Ephraim Kasozi, “Activists Want an International Anti-Corruption Court Opened,” *Daily Monitor*, August 10, 2014, <http://www.monitor.co.ug/News/National/Activists-want-an-international-Anti-Corruption-Court-opened/-/688334/2413690/-/w1c4j7z/-/index.html> (accessed September 8, 2014).
  20. Sonja B. Starr, “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations,” *Northwestern University Law Review*, Vol. 101 (2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=934470](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=934470) (accessed September 8, 2014); David M. Fuhr, “Of Thieves and Repressors: The Interplay Between Corruption and Human Rights Violators,” *Elon Law Review*, Vol. 5 (2013), pp. 271–299, [http://www.elon.edu/docs/e-web/law/law\\_review/Issues/Elon\\_Law\\_Review\\_V5\\_No2\\_Fuhr.pdf](http://www.elon.edu/docs/e-web/law/law_review/Issues/Elon_Law_Review_V5_No2_Fuhr.pdf) (accessed September 8, 2014); Ben Bloom, “Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption,” *American University International Law Review*, Vol. 29, No. 3, (2014), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1817&context=auilr> (accessed September 8, 2014); and Robin Palmer, “Combating Grand Corruption in Africa: Should It Be an International Crime?” Open Society Initiative for Southern Africa, March 6, 2012, [http://www.osisa.org/sites/default/files/combating\\_grand\\_corruption\\_in\\_africa\\_-\\_robin\\_palmer.pdf](http://www.osisa.org/sites/default/files/combating_grand_corruption_in_africa_-_robin_palmer.pdf) (accessed September 8, 2014).
  21. Luke Balleny, “Grand Corruption Is ‘Crime Against Humanity’—Lawmakers,” Thomas Reuters Foundation, November 29, 2013, <http://www.trust.org/item/20131129173618-0jev1/> (accessed September 8, 2014).
  22. The ICC can only prosecute crimes: (1) if the accused is a citizen of a State Party; (2) if the alleged crime occurs in the territory of a State Party; (3) if the U.N. Security Council has referred the situation to the Court; or (4) if a non-State Party country accepts the Court’s jurisdiction. Moreover, the ICC “has jurisdiction only with respect to crimes committed after the entry into force of this Statute,” which was July 1, 2002. Rome Statute of the International Criminal Court, Articles 11, 12, 13, and 17.

7(j)) has opened the door for the acceptance of other policy-based underlying acts under subsection (k), such as systemic corruption.<sup>23</sup>

The practice of using international tribunals to prosecute war crimes, crimes against humanity, and genocide when national authorities are unwilling or unable has a long history, including the International Military Tribunal at Nuremberg, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, and the International Criminal Court. The 122 States Parties to the Rome Statute of the International Criminal Court illustrate substantial modern acceptance of this concept, although many large and powerful nations have decided against ratifying the Rome Statute, including China, India, Russia, and the United States.

However, the proposal that international tribunals should expand their jurisdiction beyond their historically narrow focus to include non-violent, serious crimes, such as corruption, is relatively novel. Even vocal supporters, like the Global Organization of Parliamentarians Against Corruption (GOPAC), admit that there are problems with classifying grand corruption as a crime against humanity:

There may be sufficient justification to prosecute grand corruption as a crime against humanity under Article 7(1)(k) of the Rome Statute, if grand corruption is defined in a manner that makes it explicit that it is restricted to inhumane acts that cause “great suffering, or serious injury to body or to mental or physical health.”

However, there are concerns that equating corruption with crimes against humanity may be unreasonable, since the devastation caused by corruption is not as obvious as in, for example, genocide or slavery. Expanding the scope

of “other inhumane acts” to include corruption may encourage political actors to try to further stretch the definition and pursue political vendettas through the ICC.

Moreover, grand corruption crimes are not necessarily “committed as part of a widespread or systematic attack directed against a civilian population.” While grand corruption may meet the *actus reus* test of crimes against humanity, the *mens rea*, the clear intent to eventually destroy part of a population, is typically missing.<sup>24</sup>

Nonetheless, these concerns did not stop GOPAC from voting unanimously in support of establishing grand corruption as a crime against humanity, concluding that

the most severe forms of corruption, grand corruption, have such dire effects on the material and mental well-being of populations and on the integrity of international systems, as to constitute serious attacks against human dignity and universal human rights—attacks that shock the conscience of the community of nations and that perpetrators of these attacks cannot be allowed to evade justice.<sup>25</sup>

The next steps in this process are uncertain. Even those who argue that Article 7(1)(k) of the Rome Statute is broad enough to allow inclusion of grand corruption as a prosecutable crime against humanity, and that the “the worst cases of grand corruption” would meet the requirements established in the court’s Elements of Crimes, caution that

ICC prosecution of grand corruption outside crisis contexts would probably be controversial. Nobody defends grand corruption, and, indeed, the new international treaties reflect considerable momentum toward addressing the problem

23. Palmer, “Combating Grand Corruption in Africa: Should It Be an International Crime?”  
24. GOPAC, “Prosecuting Grand Corruption as an International Crime,” Discussion Paper, November 18, 2013, [http://gopacnetwork.org/Docs/DiscussionPaper\\_ProsecutingGrandCorruption\\_EN.pdf](http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf) (accessed September 8, 2014).  
25. GOPAC, “Declaration for the Fifth Forum of Parliamentarians,” November 27, 2013, [http://www.gopacnetwork.org/Docs/Declaration%20for%20Fifth%20Forum%20of%20Parliamentarians\\_EN.pdf](http://www.gopacnetwork.org/Docs/Declaration%20for%20Fifth%20Forum%20of%20Parliamentarians_EN.pdf) (accessed September 8, 2014), and GOPAC, “Grand Corruption,” 2014, [http://gopacnetwork.org/programs/grand\\_corruption/?doing\\_wp\\_cron=1407785083.3056879043579101562500](http://gopacnetwork.org/programs/grand_corruption/?doing_wp_cron=1407785083.3056879043579101562500) (accessed September 8, 2014).

more seriously. However, the enforcement and ratification gaps in those treaties exist because of real political obstacles. Likewise, the fact that specific inclusion of corruption was never on the table in Rome, while proposals to include other systemic crimes like drug trafficking were shelved, suggests that ICC prosecutions of peacetime grand corruption might well take delegates by surprise. This is not to say the Court has no authority to try such cases. The “other inhumane acts” category was deliberately included in order to give the ICC the flexibility to reach crimes the delegates did not mention specifically. But it does warrant caution as a matter of political strategy.<sup>26</sup>

Indeed, as a practical matter, including grand corruption under the jurisdiction of the ICC could require amending the Rome Statute, which requires approval of at least two-thirds of all States Parties. Since grand corruption necessarily involves senior government officials, it is reasonable to expect that corrupt governments—which could be a substantial number as two-thirds of the world falls below the median CPI score according to Transparency International—may not support the effort. Even if it is adopted, as an amendment to Article 7 of the Rome Statute that identifies crimes against humanity, it would apply only to the states that accept the amendment.<sup>27</sup> In other words, amending the Rome Statute is politically unlikely and, even if such an amendment were adopted, would be circumscribed to the extent that states choose not to accept it.

Alternatively, an attempt to amend the Elements of Crimes, which serve to “assist the Court in the

interpretation and application of articles 6, 7 and 8,” to facilitate interpretation of grand corruption as a crime against humanity in Article 7(k) under ICC jurisdiction would likely be challenged in the Assembly of States Parties, which under Article 9 must adopt changes to the Elements of Crimes by a two-thirds majority.<sup>28</sup> Similarly, encouraging the Office of the Prosecutor to utilize prosecutorial discretion to interpret in Article 7(k) to include grand corruption, as some have advocated,<sup>29</sup> would doubtless face resistance and challenge in ICC judicial chambers from some ICC States Parties—a situation that most international bureaucracies would prefer to avoid.

### **An Even More Controversial Proposal**

Some see the challenges of incorporating grand corruption into the jurisdiction of the ICC as too difficult either procedurally or politically and suggest that a new international anti-corruption court (IACC) could be a more effective remedy. Senior U.S. District Judge Mark L. Wolf recently made this case in a July 2014 Brookings Institution paper.<sup>30</sup> Wolf compares the prospective relationship between the IACC and sovereign nations to that between the U.S. federal government and the 50 states, observing:

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

26. Starr, “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations.”

27. Article 121(5) states: “Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.” Rome Statute of the International Criminal Court, 1998 (corrected 2002), Articles 7 and 121, [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (accessed September 8, 2014).

28. Article 9(1) states: “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.” Article 9(2) states: “Amendments to the Elements of Crimes may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; (c) The Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.” Rome Statute of the International Criminal Court, Article 9.

29. Ben Bloom, “Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption,” *American University International Law Review*, Vol. 29, No. 3 (2014), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1817&context=auilr> (accessed September 8, 2014).

30. Mark L. Wolf, “The Case for an International Anti-Corruption Court,” The Brookings Institution, July 23, 2014, <http://www.brookings.edu/research/papers/2014/07/international-anti-corruption-court-wolf> (accessed September 2014).



In the United States, sometimes acting on information provided by private parties who want to remain anonymous, independent media often expose corruption. Federal investigators are authorized to conduct undercover operations and secretly record conversations, and are adept at unraveling complicated financial transactions. Federal prosecutors are capable of trying complex cases successfully before impartial judges and juries. As a result, public officials convicted of corruption often receive serious sentences, which have the potential to deter others and to create a political climate in which good government is also good politics.

Judge Wolf suggests assigning a similar authority to the IACC, although he specifically notes that the IACC, like the ICC, should have complementary jurisdiction—that is, its jurisdiction would only be triggered if national authorities proved unwilling or unable to prosecute corruption. Although this has not been evinced in the case of the ICC, Wolf envisions this as creating an incentive for nations to “strengthen their capacity to prosecute grand corruption.”<sup>31</sup>

The ambitions of such a project are enormous. The theoretical application of such an authority would be universal, that is, not restricted to failed states or developing countries with immature judicial systems, but including the world’s most powerful countries. Indeed, in his discussion, Judge Wolf notes the failure to prosecute corruption, or interference in corruption investigations by political authorities, in China, Russia, and the United Kingdom. To encourage broad participation and compel reluctant countries to cooperate, Wolf urges that

submission to the jurisdiction of the International Anti-Corruption Court should be incorporated in the United Nations Convention Against Corruption. It should also be made a

condition of membership in international organizations such as the OECD and WTO [World Trade Organization], and for obtaining loans from international lenders such as the World Bank. Similarly, among other new measures to combat corruption being discussed in the current negotiations of the fifth round of the Transatlantic Trade and Investment Partnership, participation in an International Anti-Corruption Court should be included, which would then serve as a model for other trade treaties.<sup>32</sup>

Needless to say, this proposal runs roughshod over the sovereign rights of states, many of which would be compelled into participation, since it would allow the IACC to unilaterally declare a state noncompliant and drag its leaders before an international court.

The practical challenges are also significant. Details of the IACC structure in the article are scant, but Judge Wolf compares the theoretical IACC to the ICC. Like the ICC, the IACC would be “staffed by elite investigators and prosecutors as well as impartial judges” who could theoretically “erode the widespread culture of impunity” and create “conditions conducive to the democratic election of honest officials.” The ICC can receive complaints from governments and also from individuals, NGOs, and other nongovernmental sources for consideration by the Office of the Prosecutor.

For illustrative purposes, in addition to the Prosecutor’s office, the ICC has 18 judges for three divisional courts (Pre-Trial Division, Trial Division, and Appeals Division), a Presidency and Registry for administration and support, and several semi-autonomous offices, such as the Office of Public Counsel for Defense.<sup>33</sup> The 2014 budget for the ICC totaled €121,656,200, approximately \$163 million, including expenses for 768 staff members.<sup>34</sup> Considering the extent of corruption, even if restricted to

31. *Ibid.*

32. *Ibid.*

33. International Criminal Court, “Structure of the Court,” undated, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx) (accessed September 8, 2014).

34. ICC Assembly of States Parties, “Programme Budget for 2014, the Working Capital Fund for 2014, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2014 and the Contingency Fund,” Resolution ICC-ASP/12/Res.1, November 27, 2013, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP12/ICC-ASP-12-Res1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res1-ENG.pdf) (accessed September 8, 2014).

grand corruption, the demands on an IACC could easily outstrip those on the ICC with commensurately higher resource requirements.

### **Impractical, Ineffective, and Unnecessary**

Exactly how much genuine support there is among nations and elected leaders for prosecuting grand corruption as a crime against humanity through the ICC or an IACC is uncertain. Coalitions such as GOPAC indicate some interest, but express commitments by governments are lacking. Some advocates have interpreted Obama Administration anti-corruption statements in official documents as evidence of oblique U.S. support for prosecuting grand corruption as a crime against humanity. In particular, advocates point to the 2010 U.S. National Security Strategy that expressed support for “strengthening international norms against corruption” and promoting “the recognition that pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.”<sup>35</sup> However, no substantive action, either in proposing an IACC or supporting prosecution of grand corruption through the ICC, has been taken by the U.S.

There is much greater interest among NGOs and international lawyers, whose advocacy often inspires international conventions and encourages germination of treaties. Indeed, there are nascent signs that such a process is subtly advancing. For instance, United Nations High Commissioner for

Human Rights Navi Pillay opined in 2013 that corruption was a violation of human rights:

There is no doubt that, in practical terms, corruption is an enormous obstacle to the realization of all human rights—civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of life of the community....

As we continue to clarify the links between corruption and human rights, groups working to combat corruption locally and internationally will see more clearly the value of working with agencies in the field of human rights.<sup>36</sup>

Nevertheless, even among those international lawyers who are generally positively disposed to international courts and treaties, there is considerable skepticism.<sup>37</sup> Before proceeding down this path, nations should question the practicality and necessity of such a venture. Key problems with the internationalist approach include:

- **Grand corruption lacks clarity.** While various experts offer definitions of grand corruption, the boundaries of grand corruption are not clear. As stated by the Anti-Corruption Resource Centre, “There is not a clear division between where petty corruption ends and grand corruption begins.”<sup>38</sup>

35. U.S. Administrations periodically prepare the National Security Strategy for Congress to detail America’s national security concerns and the Administration’s strategy for dealing with those threats. Anti-corruption advocates point to the inclusion of “Strengthening International Norms Against Corruption” among the goals listed in the 2010 National Security Strategy, which states: “We are working within the broader international system, including the U.N., G-20, Organization for Economic Cooperation and Development (OECD), and the international financial institutions, to promote the recognition that pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.” Richard L. Cassin, “The Obama Doctrine,” *The FCPA Blog*, June 2, 2010, <http://www.fcpablog.com/blog/2010/6/2/the-obama-doctrine.html> (accessed September 8, 2014).

36. Officer of the High Commissioner for Human Rights, “Opening Statement by Navi Pillay, High Commissioner for Human Rights: Panel on ‘the Negative Impact of Corruption on Human Rights,’” March 13, 2013, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13131&LangID=e> (accessed September 8, 2014).

37. Karen Alter and Juliet Sorensen, “Let Nations, Not the World, Prosecute Corruption,” *U.S. News & World Report*, April 30, 2014, <http://www.usnews.com/opinion/articles/2014/04/30/dont-add-corruption-to-the-international-criminal-courts-mandate> (accessed September 8, 2014); Matthew Stephenson, “The Case Against an International Anti-Corruption Court,” *The Global Anticorruption Blog*, July 31, 2014, <http://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/> (accessed September 8, 2014); and “Should ‘Grand Corruption’ Be a Crime Against Humanity?” *The FCPA Blog*, August 22, 2012, <http://www.fcpablog.com/blog/2012/8/22/should-grand-corruption-be-a-crime-against-humanity.html#> (accessed September 8, 2014).

38. U4 Anti-Corruption Resource Centre, “The Basics of Anti-Corruption,” undated, <http://www.u4.no/articles/the-basics-of-anti-corruption> (accessed September 8, 2014).

Subjectivity on issues of international crime is a recipe for strife and controversy. Moreover, it is unclear if jurisdiction would be restricted to the act or also extend to the failure to take action to punish corruption. As noted by Harvard Law School professor Matthew Stephenson, “[I]f the understanding of ‘grand corruption’ includes not just theft or bribe-taking by high-level government officials, but also failure by those officials to take action to punish corruption by friends or political allies ... then just about every U.S. President, or any other national leader, could feel potentially vulnerable to IACC liability.”<sup>39</sup> Aside from the obvious political complications, such an expanded scope of jurisdiction would require more resources and greater infringement on sovereignty.

- **Expanding the definition of serious crime erodes the gravity of genocide, crimes against humanity, and violent aggression.** Corruption can be committed on a staggering scale and be damaging to development, justice, and living standards. However, corruption still consists of theft, intimidation, and abuse of authority. Equating grand corruption or other crimes with genocide, crimes against humanity, and war crimes, arguably trivializes those crimes.
- **Corruption is difficult to prosecute.** As observed by international law professors Karen Alter and Juliet Sorensen, “[C]orruption is a particularly difficult crime to prosecute: the perpetrators are public officials wielding power, victims are often reluctant to report a shakedown, so that most effective investigations are covert and ongoing, involving cooperating witness [*sic*] (‘flippers’) or long-term undercover investigators.”<sup>40</sup> The ICC lacks the capacity and the relationships with domestic law enforcement to conduct such investigations. Granting the ICC or an IACC such capacity would involve a prohibitive provision of resources and authority. Conversely, if the ICC or IACC remains reliant on domestic

law enforcement cooperation, the impunity problem would remain in many cases.

- **International jurisdiction over grand corruption is duplicative.** Corruption is already a crime under domestic law in virtually every nation and there are several international initiatives that are trying to address the issue. The problem is enforcement, not a lack of laws or judicial options. If these existing laws and commitments are insufficient to address the issue, it is doubtful that another treaty will tip the balance even if it includes the possibility of punishment.
- **International jurisdiction over corruption would infringe on national sovereignty.** Judge Wolf acknowledges that some may perceive the IACC as a violation of national sovereignty, but dismisses this concern because he believes that the FCPA and comparable foreign statutes already create a form of universal jurisdiction. Further, he argues that multilateral courts “should be a less offensive incursion on national sovereignty than an FCPA prosecution in the United States based on the decision of a single country.”<sup>41</sup> This statement is wrong on two counts. As noted by Stephenson,

[T]he FCPA does not create “universal jurisdiction.” FCPA jurisdiction is based either on presence in the United States (via the voluntary decision to list on a U.S. exchange, or physical presence), or else on nationality (the law applies to U.S. citizens and domestic concerns, even when acting abroad). And the FCPA applies to bribe-payers, not to the bribe-taking government officials in other countries. The affront to national sovereignty comes when an international body asserts jurisdiction to try a government official for a crime, over the objections of the official’s own government, when the international body would not have any of the traditional bases (nationality, territoriality, etc.) for asserting jurisdiction. That’s clearly

39. Stephenson, “The Case Against an International Anti-Corruption Court.”

40. Alter and Sorensen, “Let Nations, Not the World, Prosecute Corruption.”

41. Wolf, “The Case for an International Anti-Corruption Court.”

an infringement on traditional notions of sovereignty. Not an unprecedented one, of course—the ICC operates on the same model. But still, much more intrusive than the FCPA.<sup>42</sup>

True, some governments have asserted universal jurisdiction over some crimes. However, other governments are similarly free to reject such claims. Ultimately, governments must recognize the potential ramifications in their dealings with other sovereign governments. This is a reflection of sovereignty, not a violation. Wolf is proposing something fundamentally different—he is urging governments to submit to the superior authority of a supranational judicial authority and plainly compares the IACC to the U.S. federal government, and the world’s nations to the 50 states.

- **Like the ICC, an IACC would likely lack independent means of enforcement.** The ICC has no ability to deploy officers to execute its warrants and arrest suspects. It relies entirely on the cooperation and support of national authorities to enforce its warrants and rulings. Unsurprisingly, the ICC is struggling to fulfill its current responsibilities—proceedings have moved slowly, cases have at times been plagued by problems and irregularities, and many individuals sought by the court remain at large.<sup>43</sup> The ICC has also faced lack of cooperation in a number of cases, including Darfur, Libya, and Kenya. This has led to charges of ineffectiveness, as individuals such as Sudanese President Omar Bashir remain free despite outstanding ICC warrants issued in 2009 and 2010 and periodic travel to ICC States Parties. Enforcement is a necessary element for the U.S. federal government in exercising its authority, and essential if the IACC is to perform as a supranational federal prosecutorial authority as envisioned by Judge Wolf. However, as with the ICC, it is very unlikely that governments would grant, or

submit willingly to, such authority—especially if a government is populated with corrupt individuals at levels high enough to enjoy impunity.

- **Diplomatic immunity and diplomatic relations complicate matters.** In cases of non-cooperation, the ICC and, likely, the IACC would have to rely on other governments to arrest and surrender corrupt officials. Officials, if their government chooses not to cooperate with the ICC or IACC, could avoid this possibility by not travelling or travelling only to nations where they have assurances that they will not be arrested. More generally, heads of state, heads of government, and government officials travelling on government business enjoy significant protections and immunities established over centuries and expressed in the Vienna Convention on Diplomatic Relations.<sup>44</sup> Most countries have incorporated these immunities and protections into their domestic laws and observe them, if only to ensure that their own leaders and diplomats receive the same treatment from foreign governments. Few, if any, governments would be willing to suffer the diplomatic complications that would arise from arresting these individuals. This is particularly true for powerful nations. To highlight examples mentioned by Judge Wolf in his article, it is unrealistic to expect Russian President Vladimir Putin, Chinese Premier Li Keqiang, or King Abdullah of Saudi Arabia to submit to the ICC or the IACC if charged with corruption, and nearly as unlikely for other nations to execute warrants and surrender them to the ICC or the IACC.
- **International jurisdiction over grand corruption would be redundant when impunity is not present.** Former presidents, senior officials, and judges have been successfully charged, tried, and convicted after they lost power or influence. Such instances may be too rare, but

42. Stephenson, “The Case Against an International Anti-Corruption Court.”

43. Brett D. Schaefer and Steven Groves, “The U.S. Should Not Join the International Criminal Court,” Heritage Foundation *Backgrounder* No. 2307, August 18, 2009, <http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court>, and ICC, “Situations and Cases,” undated, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (accessed September 8, 2014).

44. Vienna Convention on Diplomatic Relations, April 18, 1961, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7F83006DA90AAE7FC1256F260034B806/\\$file/Vienna%20Convention%20\(1961\)%20-%20E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7F83006DA90AAE7FC1256F260034B806/$file/Vienna%20Convention%20(1961)%20-%20E.pdf) (accessed September 8, 2014).

the fact that they are possible undermines the argument for establishing corruption as a crime against humanity under the jurisdiction of the ICC or an IACC.

- **The less notorious, but damaging and wide-spread, problem of low-level corruption would remain unaddressed.** Including grand corruption as a crime against humanity under the jurisdiction of an international court would not prevent or deter corruption that affects the vast majority of people. Specifically, countering corruption must address the problem at all levels, including low-level corruption. If a population is inured to the practice of providing small bribes to police, courts, and government officials, it likely will be more resigned to corruption at higher levels of government. Ending this tolerance for low-level corruption is a foundational concept in the “broken windows”<sup>45</sup> anti-crime theory applied so successfully in New York City and elsewhere.
- **Political challenges would be immense.** Even though few governments envision themselves likely to commit genocide, war crimes, and crimes against humanity, the number of states ratifying the Rome Statute has slowed dramatically and currently stands at 122 nations. China, India, Russia, and the U.S. have refused to ratify the Rome Statute and have demonstrated only limited support for the ICC and its investigations. African governments have expressed increasing dissatisfaction with the ICC, criticizing the court for bias.<sup>46</sup> The political challenges faced by the ICC would be exacerbated if government officials thought the court could open cases on corruption, and the chances that an amendment to the Rome Statute would be adopted are low. Since corruption is far more common than genocide, war crimes, and crimes against humanity, wary government officials who may be engaged in corrupt activities would be even more reluctant to join a new IACC than the ICC.

These concerns are not trivial. They are fundamental and raise serious doubts about the practicality of addressing grand corruption through an international court, and even graver doubts about its prospects.

### What the U.S. Should Do

Advocates for international jurisdiction over grand corruption are justifiably dismayed by the extent of the problem and angered by the impact on economies and populations, but their proposed remedies are replete with problems and complications. Indeed, their proposals are an illustration of the “blank slate” trap described by William Easterly, economics professor at New York University.<sup>47</sup> That is the naïve hope—usually flying in the face of evidence to the contrary—that Western experts can impose changes to a corrupt system from the outside that history teaches can only come from within.

Instead, the U.S. should focus on encouraging anti-corruption efforts at all levels. As observed by Roger Alford,

[G]overnment corruption is a source of fear and distrust in society. The maintenance of order is undermined when citizens do not trust government officials to pursue the public interest.... This lack of confidence makes it less likely that citizens will rely on the police, the courts, or other public institutions to resolve their problems. If the government is on the take, the public’s perception will be that it has little to offer....

A broken windows theory of international corruption draws from the strategy of community policing in the domestic context and applies it to the global struggle against corruption. That strategy recognizes that petty crimes, like bribery, are far more serious than traditionally understood, for they send signals about the state of society and the commitment of government to maintain order and pursue the general welfare. The bonds of social trust are severed when gov-

45. George L. Kelling and James Q. Wilson, “Broken Windows,” *The Atlantic*, March 1, 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (accessed September 8, 2014).

46. Michael Birnbaum, “African Leaders Complain of Bias at ICC as Kenya Trials Get Underway,” *The Washington Post*, December 5, 2013, [http://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b\\_story.html](http://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html) (accessed September 8, 2014).

47. William S. Easterly, *The Tyranny of Experts* (New York: Basic Books, 2014).



ernment officials pursue private gain at the public's expense, and the economic, political, and moral consequences of such conduct are grave.<sup>48</sup>

In short, while grand corruption is destructive and rightly condemned, the predominant focus on grand corruption inadvertently downplays the damage done by petty corruption. A more effective and far-reaching strategy, albeit less dramatic, would have the U.S.:

- **Focus on bolstering good governance and judicial capacity and objectivity in developing countries.** Judge Wolf's case for optimism that an IACC could actually be effective in removing corrupt leaders rests mostly on the positive experience of so-called *qui tam* (whistleblower) lawsuits in the United States. Most of the countries that Judge Wolf cites as potentially benefiting from an IACC do not have a tradition comparable to the U.S. rule of law, and are not likely to establish one in the near future. Indeed, the global average score for "Freedom from Corruption" in the *Index of Economic Freedom* continues to lag behind scores for other components of economic freedom.<sup>49</sup> An international court addressing grand corruption would not resolve this key problem. The U.S. should promote a "broken windows" approach to changing the culture of corruption from the bottom up by promoting a free media, good governance, and transparency policies, such as disclosure of assets of government officials; enhancing law enforcement and judicial capacity; and tightening or eliminating the exception for "facilitating or expediting payments" in the FCPA.

- **Reduce direct assistance to governments.** Providing development aid directly to governments enhances the power of corrupt regimes

through provision of resources, increases opportunities for grand corruption, undermines the government's reliance on local taxpayers for funding—thereby weakening a key check on government authority—and undercuts the political and economic power of a nation's indigenous business community.<sup>50</sup>

- **Comply with legitimate extradition requests involving corruption.** As a nation that prohibits corrupt practices, the U.S. has an interest in discouraging such activities and should assist and cooperate with efforts to hold public and private individuals to account for their corrupt actions. However, such requests deserve scrutiny, as accusations of financial crimes and disbursement through Interpol are a frequently used tool of autocratic regimes to harass dissidents and opposition figures.<sup>51</sup>

- **Express opposition to proposals that include grand corruption as a crime against humanity subject to ICC jurisdiction.** Aside from the complications and difficulties stated above, the inclusion of grand corruption among the crimes subject to ICC jurisdiction, considering the scope of corruption around the world, would dramatically increase the authority of the ICC at the expense of national sovereignty.

- **Refuse to support or participate in negotiations for an IACC or similar initiative.** To be effective, an IACC would necessarily undermine national sovereignty. Even so, such a court would be restricted by time and resources to the most notorious instances of corruption, would be unlikely to overcome true impunity, be unnecessary if impunity is not present, and do little to address the types of low-level corruption that inure a population to corruption.

48. Alford, "A Broken Windows Theory of International Corruption."

49. Miller, Kim, and Holmes, 2014 *Index of Economic Freedom*.

50. Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (New York: Farrar, Straus and Giroux, 2009), and James M. Roberts, "Not All Foreign Aid Is Equal," Heritage Foundation *Backgrounder* No. 2523, March 1, 2011, <http://www.heritage.org/research/reports/2011/03/not-all-foreign-aid-is-equal?ac=1>.

51. Ted R. Bromund and David B. Kopel, "Necessary Reforms Can Keep Interpol Working in the U.S. Interest," Heritage Foundation *Backgrounder* No. 2861, December 11, 2013, <http://www.heritage.org/research/reports/2013/12/necessary-reforms-can-keep-interpol-working-in-the-us-interest>.

## The U.S. Should Reject an IACC

The appeal of punishing those who commit grand corruption is understandable. The ultimate victims, those who are denied the uses of stolen resources, are many and generally are the most vulnerable among populations. Domestic judicial and law enforcement officials are often unable to hold the powerful to account. However, the U.S. should resist efforts to include grand corruption among crimes against humanity or to establish an IACC. As stated by University of Richmond law professor Andy Spalding,

[I]nternational organizations—the ICC, ICJ, the various UN bodies—could only ever reach the most egregious and high-profile forms of corruption. The more pedestrian, systemic, and pervasive corruption, of the sort that the FCPA and other statutes are designed to address, is well beyond the capacity of international organizations. The solution to systemic corruption lies in the national enforcement of laws enacted pursuant to international conventions.<sup>52</sup>

Long-term, sustainable anti-corruption measures cannot be instilled from above via international treaties and courts—they must be cultivated domestically from the ground up.

—**Brett D. Schaefer** is Jay Kingham Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation, and editor of *ConUNdrum: The Limits of the United Nations and the Search for Alternatives* (Rowman and Littlefield, 2009). **Steven Groves** is Bernard and Barbara Lomas Senior Research Fellow in the Thatcher Center. **James M. Roberts** is Research Fellow for Economic Freedom and Growth in the Center for Trade and Economics, of the Institute for Economic Freedom and Opportunity, at The Heritage Foundation.

---

52. “Should ‘Grand Corruption’ Be a Crime Against Humanity?”