International Remedies for Corruption: Correlating Impacts with Human Rights Violations

Corruption in widespread cultural venues has recently been making the headlines.\(^1\) The public recognition of corruption as an exposed problem, and as a body of law shows people around the world are accepting its presence as a norm. Corruption law is almost as well established as other substantive bodies of law, such as human rights. However, it is not yet to the point where international courts are taking cases involving corruption disputes. This is because the conventions and treaties which make binding international law do not define causes of action that provide for that level of enforceability.

Watching corruption law gather inertia, it seems inevitable that one day there will be a legally binding convention that specifies corruption as an internationally criminal cause of action. For the time being, however, it may be most useful for jurists to consider using a cause of action which already is accepted and codified. The most logical would be to use a human rights cause of action.

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\(^1\) See eg. E. Perez & S. Prokupecz, U.S. Charges 16 FIFA Officials in Widening Probe, CNN, (accessed on December 4, 2015 2:00 PM) http://edition.cnn.com/2015/12/03/sport/fifa-corruption-charges-justice-department/. (This is only one incident, but it concerns the world’s most popular sport. Millions of people around the world follow the sport with a ferocity that edges on the religious. Knowing that a corruption case is legitimately able to interrupt that flow of support gives incredible weight to the anti-corruption legal practice.) For a slew of different contemporary instances of where popular culture meets legal practice in the realm of anti-corruption, see Jose Ugaz, Grand Corruption – the New Challenge, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/news/speech/grand_corruption_the_new_challenge [accessed Dec. 17, 2015].
Scholars have begun to outline the intersections between human rights and corruption law practices. The most specific treatment is the paper published by the International Council on Human Rights Policy (CHRP) called *Corruption and Human Rights: Making the Connection*. The ICHRP illustrates the links between human rights and corrupt acts by state officials which may constitute violations. Further, ICHRP’s paper provides a rudimentary framework for how to recognize when this intersection may occur. Using this framework, acts of corruption are equated to violations of human rights. Courts that accept human rights cases are numerous in the international realm. The remedies available are not only numerous, but flexible and tailorable to the particular individual or group of individuals whose rights were violated.

This paper will look at the current options scholars and jurists consider to take this next step towards accepting grand corruption as a cause of action for international courts. In doing so, it weighs the current debated options and proposes which may be most feasible on a pragmatic scale of efficiency, timeliness, and a wise use of resources.

Current Corruption Law and Grand Corruption Specifically

The global price of corruption-related crime is well documented and is often on the scale of states’ GDPs. IMF research shows that investment in corrupt countries is 5% less in relatively

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2 See eg. Sadika Hameed, Costs of Corruption, A REPORT OF THE CSIS PROJECT ON PROSPERITY AND DEVELOPMENT. (Center for Strategic & International Studies), Feb 2014 at 3. “It was found that tax evasion in Namibia was equal to 9 percent of its GDP and larger than the resources allocated for education.” See generally Axel Dreher and Thomas Herzfeld, The Economic Costs of Corruption: A Survey and New Evidence SOCIAL SCIENCE RESEARCH NETWORK. June 2005. [accessed 4 December 2015]
corruption-free states. Interestingly, there is even data describing how citizens in states perceive corruption. Some data is hard and concrete, and some may serve as the canary in the coalmine for states which have not yet been investigated or tried for corruption. At least some of this data points to engrained systemic or “grand” corruption. The quantity and quality of data shows that investigators are able to move so far enough into cultures of corruption that the legal practice of discovery may be viable.

International corruption law is most clearly stated in the United Nations Convention against Corruption (UNCAC). The UNCAC is adhered to by a super majority of states, each of which has consented to its binding, “shall”-heavy language. This language obligates officials to act in honest fashions and refrain from acting in corrupt fashions. It empowers citizens to seek legal recourse and remedies are available for corrupt acts.

The UNCAC describes corruption in discrete forms of action. A corrupt action can be interpreted as any of five specific actions: 1) bribery, 2) embezzlement, 3) trading in influence, 4) abuse of functions of position, 5) illicit enrichment. These five discrete actions can be generally classified into either “active” corruption, describing the initiation: such as the intention of, and following through on, procuring a public good or service for private gain through the enumerated act of bribing a state official. Passive corruption, on the other hand, describes the

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5 See especially @IPaidABribe, Twitter (Dec. 7 2015), [https://twitter.com/IPaidABribe](https://twitter.com/IPaidABribe).


7 Id.
receiver: anticipated ex-ante that a given proposition will promote private gain at the potential expense of the public, by way of that state official accepting the proffered bribe.

This convention also employs a “Dual Criminality” or “legal reciprocity.” If each of the states adopt these enumerated acts then the states become obligated to comply with the international convention. Even if the domestic law integrated from the UNCAC language is not verbatim, the laws may be deemed fulfilled under similar enough wording.

The UNCAC is considered the standard in international law for corruption mostly because of the aforementioned super majority of states whom have adopted it. Its downfalls are in the way of enforcement. Although it suggests an effective remedy for victims of corruption, asset recovery, that remedy is not enough to make many victims whole. Further, the UNCAC is not frequently used as the enforcing mechanism in international corruption cases.

Grand corruption has fewer definitions in use than corruption; it has no helpful documents like the UNCAC to define it, or point jurists and potential claimants in the direction of how to pursue it. Generally, grand corruption occurs “when ‘politicians and state agents entitled to make and enforce the law in the name of the people, are misusing this authority to sustain their power, status and wealth.’”\(^8\) Usually, this application results in “kleptocracy,” the term given to a regime which partakes in, and perpetuates grand corruption. The leader of such a society is dubbed a “kleptocrat.”

To that end, it is essential to know who may qualify under international law to be prosecuted for such actions. The UNCAC defines a state official as “any person holding a

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\(^8\) *Prosecuting Grand Corruption as an International Crime*, GLOBAL ORG. OF PARLIAMENTARIANS AGAINST CORRUPTION (GOPAC) at 3 (2013).
legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of seniority.”

But “kleptocrat” is not legally defined, so trying against them will not be possible using corruption law alone. Thus, jurists who wish to bring action against such a figure may consider a different avenue – potentially like a human rights court.

**Courts and Remedies**

Human rights courts are the most numerous type of single-function courts in the international arena. The largest of them is the International Criminal Court (ICC). This is created under The Rome Statute which has 123 states parties. Like the UNCAC, it commands a majority of states in the world. Unlike the UNCAC, it can be effectively used as an enforcement mechanism against states. Smaller courts also exist – four regional courts currently operate, and four temporary tribunals have historically operated. None of these courts take corruption charges, grand or otherwise, as causes of action.

For several reasons, it is conceivable that they will eventually take corruption cases, and for several reasons, it is clear why they do not yet. The largest reason it is conceivable for the future is how clearly it can be shown that corruption, especially of the “grand” variety, violates human rights. The largest reason why they do not yet is that there is no cause of action under

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9 For further uses of this definition, see also Federal Corrupt Practices Act, Article 2, Section (a)(i); Legislative Guide for the Implementation of the United Nations Convention against Corruption Article 2, Section (a). See also even Trans Pacific Partnership Chapter 26, Section A, Article 26.1.

10 “Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.” https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [accessed Dec. 7 2015].
which jurists might bring a corruption case. Instead, courts large and small continue to prosecute human rights while scholars start pointing and where their focus might be shifted.

Far more current in enforceability for corruption is domestic statute. States who opt to reach foreign investors with their domestic law, like by the USA and Germany did in 2008 for the Siemens case are able to reach far into the international realm with only their national statutes to arm them.

In US v. Siemens, US federal prosecutors worked with German public prosecutors to investigate the engineering firm for active bribery and personal enrichment actions which started being noticed and recorded in the mid-1990s for various international projects throughout the world. It was settled in 2008 by both US Department of Justice and the Munich Public Prosecutor’s Office. 11 It used two domestic law enforcement agencies which settled in their separate sovereign states. The Siemens case exemplifies two things, 1) domestic law in a globalized world has a far reach, and 2) action against legal persons by states is possible.

The Siemens case, and the many others like it, 12 reveal that most international corruption cases are brought by domestic courts against foreign investment corporations which touch their domestic concerns in multiple ways.

Remedies possible in current corruption cases brought in domestic courts grant remedies like disgorgement. Siemens paid a $450K fine, and a $350K disgorgement of profits. The next is in restrictive action: Siemens was barred from World Bank projects. This is no case going

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11 U.S. v. Siemens Aktiengesellschaft; Court Docket Number: 08-CR-367-RJL
after grand corruption, but it is a good example of the spread of available remedies for international corruption cases.

Unfortunately, that spread is only available in such domestic-led cases investigating corruption. Truly international agreements, like the UNCAC, only enumerates one remedy: asset recovery. However, it makes a blanket statement in Article 9, Section 1 (d) that:

an effective system of domestic review [for public procurement and management of public finances], including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed.\(^\text{13}\)

Chapter V of the UNCAC goes to some length to explicitly describe its one defined reparation. The “prevention of transfer of proceeds of crimes,” and measures and mechanisms that should be followed and enacted through domestic law concerning “asset recovery.” For the UNCAC, the standard for human rights must take measures to effectively give legal authorities to reclaim assets on their behalf.\(^\text{14}\) Despite the “shall” heavy language, the UNCAC is not used to enforce much more than the preventative side of anti-corruption.

States specifically experiencing grand corruption, on the other hand, have little domestic recourse.\(^\text{15}\) Often, the individuals trying to expose corruption are punished for doing so. Without support or infrastructure, the whistleblowers, ombudsmen, and journalists are unable to gain the support, let alone the evidence, necessary to bring legal cases against the kleptocrats and

\(^{13}\) UNCAC, supra note 6, Article 9, section 1(d).
\(^{14}\) UNCAC, supra note 6, Article 54.
\(^{15}\) GOPAC Discussion Paper: supra note 8, p1.
other state officials involved. Thus, attempts at recourse are rarely taken, and even more rarely brought to fruition.

Human Rights Law Currently

Unlike corruption law, human rights law is a healthy, thriving body of laws both international and domestic with half a dozen courts to its name, and cultural norms accepted the world over. It is so well-established, in fact, that describing it here is not actually worth it. This alone makes it a tempting vehicle for any fledgling body of law, like corruption, to attempt to piggy back into legitimacy.

A state is responsible for a human rights violation when it can be shown that the state’s actions (or failure to act) do not conform with the requirements of international or domestic human rights norms. Often the threshold of the human rights violation can be perceived by the world, and news-reading public, as one of scale. Individual human rights are violated every day, but are only dealt with in domestic law, as they are of singular instances – murder of one person instead of genocide of this entire group of persecuted religious followers. It is this scale in number of people which makes both the legal and political fields in the international realm so crucial.16

Human rights is a more effective legal concept than corruption in international criminal law for several reasons. It empowers easily identifiable groups, which may not otherwise find an

identity since the law itself gives avenue for social consolidation. 17 Human rights law also benefits from the doctrine of universal jurisdiction as it concerns such serious crimes that most, if not all, states recognize as wrongful. 18 There are even soft advantages, which are more difficult to quantify, like how adhering to and respecting human rights makes that state more “trustworthy” which makes other states more willing to trade with the adherent state. An aspect of pride is also revealed through the fact that some dedicated human rights courts make a point of publicizing states’ refusal to adopt human rights into legislation as a shaming mechanism. Lastly, most individuals can tell when they are being denied something that is rightfully theirs. Human rights law, once it is known about, empowers individuals to stand up for themselves.

COURTS AND REMEDIES

Courts available to hear human rights conflicts are numerous. They span the scale of fully international, with 170+ adherent parties, to smaller regional courts, and very specific courts which focus only on one conflict within a single country. The specific courts are ad hoc or hybrid tribunals which exist only for the duration of the conflict, and may either consist of

Remedies possible for human rights violations are not only numerous, but also effectively collected upon. 19 The United Nations Human Rights Office of the High Commissioner drew up a collection of principles and guidelines regarding the right to remedy for human rights violations. They are not part of a binding international treaty or convention, but were adopted and

17 R. Rorty, Contingency, Irony, Solidarity. [accessed 4 December 2015].
18 Slye & Van Schaack, supra note 16, 71-73
19 See eg. T. M. Antikowiak, A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous People, 5 (2014).
proclaimed by General Assembly (GA) Resolution 60/147 in December, 2005. The United Nations (UN) did not explicitly decide whether or not this document would be binding on the GA states. This is neither referred to as a “recommendation” nor a “decision,” thus it is not clear how strictly states should adhere to these guidelines.

However, the preamble of this document goes to some length to enumerate all the binding treaties, conventions, covenants, and statutes which do explicitly demand action from the adherent GA states. The preamble goes on to clarify that the principles therein stated do not make new international or domestic legal obligations – but only identify the mechanisms by which states may enact the obligations already taken on. Lastly, the dominant language used in the suggestions is not “shall” heavy, insinuating that the measures are not expected to be legally enforced. It is a help to states, and insurance for the UN.

The document is not legally binding, but could be used to prove whether or not violators were over or under the thresholds of culpability necessary to prove violations. For the purposes of this paper, adherence or non-adherence to these guidelines would prove how directly linked the corrupt action is with the violation outcome.

The recommendations cover the gamut from purely monetary in nature to purely emotional in nature. Restitution and compensation are described in articles 19 and 20, respectively. They go on to describe less concrete remedies such as “rehabilitation”\(^{20}\) and “satisfaction,”\(^{21}\) which cover the far emotional end of the spectrum with actions like public

\(^{20}\) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Section 5 article 8. Also Section IX, Article 21.

\(^{21}\) Id. Section IX, Article 22.
apologies and commemorations for victims. Then in the domestic legal prevention arena, the guidelines enumerate “guarantees of non-repetition”\textsuperscript{22} including adoption and implementation of liberalization and democratization of government and promoting monitoring and accountability measures.

One umbrella statement also reflects the UNCAC sentiments of states adhering to human rights conventions, make such remedies available, adequate, effective, prompt and appropriate and to include reparation.\textsuperscript{23}

The Correlation between Human Rights and Corruption Law

A corrupt act “is often the handmaiden of human rights abuses.”\textsuperscript{24} In its forward, the UNCAC even points out that corruption “leads to the violations of human rights.”\textsuperscript{25} Considering them separately is not as powerful as considering them in partnership—for each benefits from the consideration of the other. Therefore, defining where an intersection between these two bodies of law is not merely an exercise in creating new regulation to lash on individuals, but instead giving voice to a human intuition. When you follow the impacts of corruption, especially grand corruption, you find human rights violations.

Perhaps the largest similarity between the two is how both types of action create and necessitate a culture of impunity. For either wrong, citizens must turn a blind eye, otherwise be

\textsuperscript{22} Id. Section IX, Article 23.
\textsuperscript{23} Id. Section I, Article 1(c).
\textsuperscript{25} UNCAC, supra note 6, Forward, piii.
wholly unaware of the situation in which they find themselves. Such a culture is encouraged and cultivated by kleptocrats who are trying to keep what they’ve created. This sort of culture is what pressured the creation of the International Criminal Court for human rights. 26

International criminal law, itself, developed partially because the state as perpetrator will not adequately or uniformly prosecute or punish crimes committed by the state.27 The preamble of the Rome Statute lays out that the court it creates is “determined to put an end to impunity for perpetrators of these crimes.”28 This shared need for a culture of impunity is creating the same pressure that helped criminalize human rights violations on an international scale, likewise will help criminalize actions of grand corruption.

Both types of action specifically threaten groups of people who are already vulnerable. People who gain places of power through corrupt action will need to retain that place, usually by oppressing those who would protest. Usually, those people desireous of protest are those already disadvantaged, thus they become the first parties oppressed. Further, due to a vulnerability, certain groups of people (like migrant workers) may be more easily pressured into being unwitting active bribers (on pain of deportation).29

For neither can the scale be of only one person, or even a discriminated several people. In order for an international level wrongful act to occur, and to pass into the realm of “human rights

27 Slye & Van Schaack, supra note 16, 111.
violation,” an entire definable group within the population, or even the general populace must be affected.\textsuperscript{30} This is why the focus on specifically grand corruption is crucial to the intersection. Both grand corruption and human rights violations harm the same magnitudes of people in the states where they exist.

The analytic framework laid out by the International Council on Human Rights Policy (ICHRP) is currently only conceptual. This practical, step-by-step process which reveals the intersection between corrupt acts and human rights violations as the impact thereof.\textsuperscript{31} It is practical because it starts with defining the wrongful action and works through the applicable legal proof of whether or not that action embodies a simple corrupt practice, or actually violates the human rights of an individual or group of individuals.

The first step is to identify the corrupt practice. Facialy, for grand corruption, this is systematically siphoning the state’s assets outside of its borders. However, that is far too general to constitute a justiciable cause of action. Thus, we must look to actions such as systematically bribing the judges of the governmentally funded judges of the judicial branch of that state’s government.


\textsuperscript{31} Generally ICHRP, \textit{supra} at note 29.
Second, the ICHRP recommends identification of a state’s legal HR obligations. Doing this requires two aspects of their general obligations: that of their international treaties consented to, and those of their own creation domestically. As we have seen while looking at human rights law it is clear that if a state is party to the UNCAC, it should have a semblance of its agreed-to restrictions and recommendations in place in its domestic law.

Third, the jurist is suggested to identify the victims of the corrupt act. The Office of the High Commissioner for Human Rights (OHCHR) defines such victims as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law…may also include family or dependents.32

This is clear in some situations, such as in the International Criminal Tribunal for Yugoslavia (ICTY), where the term “ethnic cleansing” was well defined and popularized,33 to see whom the victims are. For grand corruption, that class may literally be the general populace. However, if the systemic corruption is bent on a specific branch of the government, for example, the judicial branch of the concerned state, then the class of people may be defined as those who sought and were denied justice. Any investigating body would be embroiled for some time defining where all those individuals are and collecting their testimonies.

Crucially, the analyst must evaluate the causal link between the two types of action. This step may be the true determinant of whether or not a human right has been violated by a corrupt

There are three levels in the causal connection scale: direct, indirect, and remote. Direct causes are those where the corrupt act may be linked to a violation where the action is deliberately used to violate a human right. Indirect causes are those where the action derives from a corruption act, and that act is a necessary condition for the violation. Remote causes simply may be pinpointed as the root of the violation, but many other factors also contribute to the violation.

Lastly, the analyst must evaluate state responsibility. This final step is where analysis pins the action upon a specific party. State responsibility consists of two parts. First, states are obligated to refrain from actions which may deprive citizens of their rights. Second, states are obligated to protect their citizens from third parties which may violate the citizens’ human rights.

This third party could include other states, state officials, or even private entities. UNCAC, in fact, mandates several private sector-specific actions and systems to be in place. These include justice systems with independence, accounting and auditing standards, corporate legal liability, and the disclosure of “suspicious transactions.”

Further onus is put on the potential state official by choice of language in the UNCAC. The operative word chosen is not “will” or “shall” deprive citizens of their rights, but rather “may.” This choice puts substantial responsibility upon the state official to foresee the consequences of their actions.

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34 Making the Connection, supra note 29, at 27.
35 Id. p25.
36 UNCAC, supra note 6, Article 11.
37 Id. Article 9, section 3.
38 Id. Article 26.
39 Id. Article 14, section 1(a).
These obligations will start to be fulfilled with the adoption and ratification of multilateral treaties like The Rome Statute and the UNCAC, which will ostensibly be solidified by creating equally compelling domestic law. Then, state officials must allow themselves to be held accountable to these standards. When the state is both perceived as not violating rights by its citizens (for example if it goes significantly down in the TI ranks of the Perception Index referred to earlier), it will be very close to corruption free. When it is quantifiably, under continuing investigation and audits of systems recommended by the UNCAC, corruption and human rights violation-free.

Applying such an intersectional framework, as that from the ICHR P, will be useful to any jurist in either field. It is adaptable enough to be case-by-case specific, yet general to those actions which occur in all such situations.

Hypothetically applied to UDHR’s rights, the framework reveals how tightly linked acts of corruption by state officials are to the violations of human rights. Take, for example, the first simple article in the UDHR is Article 6 – everyone has the right to recognition everywhere as a person before the law. A state is party to the UDHR and UNCAC, and some soft domestic law reflecting the UNCAC should recognize this. That overlap includes the majority of states. A citizen of a nation attempts to pursue a case in his state. The person he wants to sue is a state official. The state official bribes the judiciary to deny the case. The citizen is not recognized before the law, and his right granted by the UDHR is violated. Run it through the framework:

1. The corrupt act is bribery.

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2. State has some legal HR obligations.
   a. Under Rome Statute the state may not be liable for too much. Under UNCAC the state is liable to show they took actions to prevent such action.
   b. Under the mimicked UNCAC domestic law the state is liable to show they took actions to prevent such action.

3. The victims are those citizens denied justice by the governmental institution for the time period for which that institution was in power and acting corruptly.

4. The causal link is directly related to a corrupt action. It is not Indirect, it is not a consequence down the way after the action.

5. The state is responsible because the violator is a State official.

This application of the framework shows, in this hypothetical the exact and tight correlation between a corrupt act and its corresponding human rights violation. It is so clear, in fact, that it should be considered the reason for the violation. Making the case for this to be considered its own stand-alone violation is the leap which will strengthen international law at large, and empower those hoping to bring such a case, and allow employees in the justice field to proceed with bringing justice to such situations.

It is important to note that the ICHRP is now defunct. Its research and recommendations, however, are still applicable.\textsuperscript{41}

\textsuperscript{41} The ICHRP ran out of grant funding, thus is no longer creating new reports. However, this report has had success enough, since is February 2009 publication, that it has been translated into four languages: Spanish, Armenian, Thai, and Serbian.
The largest question to ask immediately after proving the link, is “so what?” If there is nowhere to try these cases and no one to try them, it hardly matters that the link exists. The debate about how to pinpoint where to try cases of grand corruption ranges across the array of existent legal structures. One argument is for the specific use of the Rome Statute, Article 7 to allow for the prosecution of government officials who perpetrate “grand corruption,” in the ICC. Under Article 7 the legality of such an action is available under existent international criminal jurisprudence. 42 This argument is very specific on the legal analysis, where much of the current debate focuses on which forum is best to try charges of corruption.

The scholars debating forums to take this next step towards accepting grand corruption as a cause of action for international courts fall into three distinct camps: 1) those desirous to allow individual states to continue following actions of anti-corruption from their own vantages, 2) those who would incorporate grand corruption as a cause of action for existent courts, and 3) those who would create a full and new international court dedicated to trying corruption charges.

Each of these prospective approaches to the future of international anti-corruption law holds its own strengths and weaknesses. At this early stage in criminalizing grand corruption, however, the best criteria for judging which course of action to take lies in pragmatism. Each of the proposed legal approaches fall somewhere on a scale of most pragmatic to least. The most pragmatic solution would be effective but use very few resources of time and money. The least

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pragmatic solution has a high risk of being ineffective and is simultaneously expensive in time and money.

**DOMESTIC LAW**

The scholars\textsuperscript{43} who argue for allowing individual states to follow their own investigations, and let that be the end of prosecuting grand corruption have a distinct advantage over the scholars of the other options – this option is already happening. However, they are short sighted. They point out the effectiveness of the Foreign Corrupt Practices Act (FCPA), and misattribute the lack of another Watergate scandal since 1977 to the FCPA’s existence, then myopically project this upon the rest of the world. Such skewed thought does not lend credence to use of domestic law as the sole tool in the fight against grand corruption.

Successful cases do use the FCPA, and the FIFA scandal of bribes for the privilege of hosting the next FIFA World Cup, and the Siemens case, do prove the usefulness of domestic law approach.\textsuperscript{44} It is true that it is the most effective method of both criminalizing corrupt acts and then finding and trying them. Since it is already in action, however, it has little need to be advocated.

The largest disadvantage for using domestic laws to prosecute corrupt acts is in its scope of jurisdiction. These cases are only brought by prosecutors on behalf of one state against the representative of a private organization or legal person. The international rules of diplomatic protection and state responsibility are clearly laid out and adhered to. The targets of this


\textsuperscript{44} See also US v. Castle, 925 F.2d 831 (5th Cir. 1991); and OECD Annual Report 2013 http://www.oecd.org/daf/antibribery/antibriberyannrep2012.pdf [accessed 4 December 2015].
prosecution will never be a kleptocrat. Ceding such a high degree of jurisdictional sovereignty may even result in the withdrawal of support for international criminal law.45

Individual state prosecution of private entities with the use of domestic laws may be able to pierce a corporate veil, but it will not be able to pierce the kleptocrat’s veil. If the world only relies on this course of action for corruption, it will always be weakened by the dependence. Just as the US’s own domestic law is based on a system of checks and balances, so too should be the international arena. What would if the lead corruption-prosecuting states, themselves became systematically corrupt? Because of this weakness, reliance upon domestic law only makes for a good paving stone in the path towards criminalizing and prosecuting grand corruption.

Indeed, this worry is very real with the realization that only the US, Germany and a few other states are currently able to prosecute corrupt actions.46

Remedies are almost entirely based on disgorgement. This only tells half of the reparation story, however. In attempts to make victims of corruption whole, simple sums of money will not be sufficient. Further, it is arguably difficult to obtain that money from kleptocrats, who have made their lives around wrongfully taking and hiding money. The remedy of disgorgement, though powerful against private companies, will not be as useful against a kleptocrat. Thus, the single avenue of domestic law will not be sufficient as corruption law continues to gain legitimacy in the world, and the scholars who argue as such are only seeing a part of the picture.

46 Wolf, supra at 26, at 9.
EXISTENT COURT USAGE

The advocates of using existent courts have a similar advantage to that of domestic law advocates. International courts for human rights already exist. If prosecutors in these courts find human rights violations, and those violations happen to be the result of grand corruption, the prosecutor may be able to indirectly bring justice to the victims of grand corruption. Such an argument will not ever be as effective at dismantling kleptocracies as outwardly using grand corruption as its own cause of action would be. Instead of piggy-backing on the causes of action for human rights some scholars have argued for recognition of a right to live in a corruption-free world on the grounds that endemic corruption destroys the fundamental values of human dignity, and many specific rights.\(^47\) Either action would facilitate use of existing courts to prosecute acts of corruption.

Using existent courts factors high for pragmatism. Few resources will have to be expended in the implementation phase of this theory. The effort is all up-front: jurists will have to draft amendments to the ruling statute of the particular court. Such action is likely to take years, so for the pragmatic factor of timeliness, this is not as desirable as using only domestic law.

There is a private right of action provision in UNCAC for individuals to take on actions against them, much like the right of individuals in certain domestic legal frameworks.\(^48\) UNCAC’s private right of action provision, however, will not be useful in grand corruption

\(^{47}\) Making the Connection, supra note 29, at 3.
\(^{48}\) UNCAC, supra note 6, Article 32 (It is also one of the provisions that the USA has declined. Though not necessary here, this makes a strong statement to warrant further research in the future).
scenarios. By its very nature, grand corruption is systemic, pulling large chunks of the state’s populace with it, not affecting a single individual, but a whole class of the population.  

Using an existing court would help with the concept of legitimacy. There is already an established sense of legality because the law is typically created through fair procedures and its contents often conform to broad notions of justice, transparency participation and deliberation.

Determining the best courts for this intersection of law depends on several factors: 1) effectiveness, 2) legitimacy, and 3) scope of Jurisdiction. Without the first, it will be futile to add a new task to the court’s roster. Yuval Shany’s definition considers not just the “intuitive” definitions of how an international court may be effective, but also how those things (like compliance with court judgments, usage rates and/or impact on state conduct) that exist in flexible and situation-dependent inflations. For example: “a low-aiming court, issuing minimalist remedies, may generate high levels of compliance, but have little impact on the state of the world.” Without the second, the justice sought will not be reliably found. Without the third, the court would not legally be able to carry out this new mission.

Dedicated International Human Rights Courts (IHRCs) currently taking human rights violations are numerous, comparatively to courts or tribunals dedicated to other types of substantive law. There is a regional IHRC for Africa, the Americas, Europe, and for the Middle

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51 Id. at 4. See also eg. Kal Raustiala, Compliance & Effectiveness in International Regulatory Cooperation, 32 CASE W. RES. J. INT’L L. 387, 394 (2000).
52 Assessing the Effectiveness, supra note 50, at 227.
East. And of course there is the ICC, defined by the Rome Statute. Compared to numbers of international courts currently dedicated to other substantive forms of international law, like the single maritime court, ITLOS.

THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) was established by the ICC statute as a part of the Rome Statute in 1998. It has jurisdiction over those crimes enumerated in the Rome Statute: 1) genocide, 2) crimes against humanity, 3) war crimes. As these crimes are considered by most states, and by customary international law, to fall under universal jurisdiction, any state with standing for a claim may bring a case against any other state – regardless of whether allegedly wrongful state is party to the Rome Statute. After this blanket determination, it becomes a political question for each state as to whether or not they want to try that.

The ICC is generally regarded as both legitimate and effective, and its continuous flow of cases is testament to this perception. The only place where that perception may be weakened is because of the disparity in numbers between cases brought against African states versus the number of cases brought against states anywhere else in the world.

54 For a full list of these cases see All Cases, INTERNATIONAL CRIMINAL COURT at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx [Accessed Dec. 7, 2015] (which names and dates each case, and provides a link to the arbitral award for the case. The cases span the life of the ICC but definitely show the prejudice of the court to only try African cases.)
The difference between the ICC and the dedicated courts to human rights is that the ICC prosecutes crimes committed by individuals. The IHRCts regard either a disagreement between states concerning the convention which mutually binds them, or a disagreement about how the states are executing justice domestically. This difference is as easily argued by the point of view of active prosecutors as may be human rights violations caused by grand corruption.

The ICC is able to prosecute the crimes enumerated in the Rome Statute. These crimes are broad in scope, as is seen with the current argument around the crime of aggression. Crimes against Humanity, in particular is so extremely broad that the definition is not actually agreed upon. Another possible cause of action against kleptocrats is the war crime “pillage.” The elements necessary to prove for the war crime of pillaging is remarkably similar to the definitions of grand corruption:

1) the perpetrator appropriated certain property, 2) the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use, 3) The appropriation was without the consent of the owner, 4) the conduct took place in the context of and was associated with an international armored conflict, 5) the perpetrator was aware of factual circumstance that established the existence of an armed conflict.  

The only problem seen here is the 4th element concerning armed conflict. Grand corruption does not necessitate armed conflict, in fact such a thing is contrary to the kleptocrat’s end game of private gain. This is further narrowed by exempting appropriations justified by

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56 Article 8 section 2(b)(xvi) ICC Statute; Article 8 section 2(e)(v) ICC Statute; Article 4 International Criminal Tribunal for Rwanda Statute. See Argument: A. Tejan-Cole, Don’t Bank on Prosecuting Grand Corruption as an International Crime. http://www.osisa.org/sites/default/files/dont_bank_on_prosecuting_grand_corruption_as_an_international_crime__abdul_tejan-co [Accessed Dec. 7 2015] (The argument Tejan-Cole makes is that while possible, the definitions of such crimes are still diaphanous to really be argued in their current state.)

military necessity. However, in those narrow circumstances where grand corruption does link up with an armed conflict this cause of action will be available to the observant prosecutor.

DEDICATED INTERNATIONAL HUMAN RIGHTS COURTS

There are three current dedicated IHRCs currently making reliable legal decision, with a fourth on the way to legitimacy.

The African Court on Human and People’s Rights (ACtHPR) was established by the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the Court Protocol) in 2004. The ACtHPR holds contentious and advisory jurisdictions. The contentious part includes jurisdiction for cases brought by other states, and recommended by the African Commission. The advisory part takes cases from the African Union, member states, and AU-recognized organizations.

While this appears open and forthright based upon its own publicity and appearance in text books, the people under ACtHPR’s jurisdiction do not perceive it as legitimate. Its lack of enforcement power, “invisibility” to people, lack of independence, lack of resources, and lack of cultural buy-in make the court one of the less seriously-taken courts of the dedicated human

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58 ICC Statute, supra, at 58, at footnote 62.
60 Assessing the Effectiveness, supra note 50, at 227-8.
rights variety. As such, it is likewise not very effective as a negligible number of cases are ever brought to it.

Philosophically, it is important for cases to continue to be brought in this court. Only with continued effort will justice start soaking into the culture of the people surrounding a court. Eventually, if paired with the international legal community, this will start to show, and the legitimacy and effectiveness of this court may increase.

In the eyes of the international legal community, the ACtHRP is legitimate enough to bring a case of human rights violations caused by the impact of grand corruption, though, realistically, it may not be effectively heard there.

The Inter-American Court of Human Rights (IACtHR) was created as “a supervisory organ” for the American Convention of Human Rights. It is the principal organ of the Organization of the American States (OAS), and exercises contentious and advisory jurisdictions, but is strictly administered only to the state parties and commission itself. No longer may NGOs, individuals (recommended by the commission, or not), or approved organizations bring cases, as is allowed by the ACHPR or ECtHR. This simply means that it would take the kinds of human rights violations cases we are considering here, but only if by the state parties against state parties.

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62 Assessing the Effectiveness, supra note 50, at 229.
63 Id.
To ensure the IACtHR is perceived as effective and legitimate it started to make human rights house calls on the states parties to investigate specific situations.64 This does show the relief that if the court itself, perhaps, could be effective, or at least perceived as more effective than in the individual domestic courts which make up the region.65 Such ineffectiveness may be because the court is full only of politically appointed judges.66 A more likely culprit is that the IACtHR has a meagre budget of only USD $10M per annum.67

The European Court of Human Rights (ECtHR) was formed in 1950. It was adopted in a climate of post-World War Two by states who had just seen the Nuremberg Trials successfully execute newly-officiated human rights. This is a ripe environment for a court which is both hyper-legitimate in the eyes of its adjoining states, and hyper-effective in meting out justice for violations.

As it has the same contentious jurisdiction as other courts, but has the added value of individual right to make claims (added in 1994), the cultural history accepting human rights, and the buy-in of national judges, the ECtHR is perceived more legitimately than any of its counterparts. Further, it has delivered, in the 50 years of its existence, more than 10,000 judgements.68 This is absolutely a court which could take the cases of human rights violations caused by the impacts of grand corruption.

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67 Id.
Any of these courts are already capable of hearing contentious cases of human rights. Using the ICHRPs’s framework we see that any right enumerated under the UDHR will be possible to show in the lens of grand corruption, thus whenever a prosecutor sees a group of victims or individual victim of grand corruption, they will be able to show it as a human right and bring the cause to one of these regional courts.

NEW COURT FORMATION

The option which will be lowest on the scale of resource efficiency will be the argument for a new and independent court in which to try international instances of corruption. The most outspoken scholar on this topic is Judge Wolf of the US District Court of Massachusetts. His proposal for an International Anti-Corruption Court would have a new organization legislated, funded, organized, staffed, and opened for taking possible cases of corruption. He proposes the cases will be easier, because the evidence is not reliant of witness testimony, that prosecutors and judges will be unelected, investigators unbiased, and sanctions cast upon those parties convicted of corruption.

More than Wolf’s own optimism, it is not difficult to see several legal advantages to establishing an empowered corruption court. Such an institution may strengthen international other judicial institutions, spreading the presence and influence of international law, generally. Specifically, the IACC may be “complementary to the activities undertaken by the ICC” by providing a contingency plan for governments unable to prosecute their own corrupt state.

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69 See generally Wolf, supra at note 26.
officials.\textsuperscript{70} This is especially important since international law has a distinct lack of legislative and executive branches.\textsuperscript{71} States would be incentivized to strengthen their own capacity of prosecuting grand corruption because of the principle of complementarity that such a court would entail.\textsuperscript{72}

Thoughts against the creation of an IACC come down to the fear of the unknown and potential undermining of legal institutions in general. During the last twenty years, as the number of international courts and tribunals has spread, so too has the reach of law and court jurisdictions.\textsuperscript{73} Doubts arise about the viability of court-based governance of international relations – IE. the “hollow hope” idea that it is nearly impossible for court decisions to enact social change.\textsuperscript{74} As with all large actions, there is also a fear of externalities from establishing a court.\textsuperscript{75} The cost/benefit analysis of economically minded jurists voice how high the costs would be, while speculating a negligible number of brought cases.\textsuperscript{76} These opinions skew toward inaction, but again, such worries would apply to any large change in a system.

It is just as feasible that litigating grand corruption as a cause of action in an existent court would cause similar jurisdiction tangles, externalities, and resource costs. A libertarian fear


\textsuperscript{71} Assessing the Effectiveness of International Courts, supra note 50, at 1.

\textsuperscript{72} Wolf, supra at note 26, at 12.

\textsuperscript{73} Assessing the Effectiveness of International Courts, supra note 50, at 1.


\textsuperscript{75} Assessing the Effectiveness of International Courts, supra note 50, at 3. Also Y. Shany “No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary” 20 European Journal of International Law (EJIL) 73, 80 (2009).

\textsuperscript{76} Thordis Ingadottir, “Financing International Adjudication,” in CPR Romano, K. J. Alter, and Y. Shany (eds), Handbook of International Adjudication (Oxford University Press 2013) 594.
of entangling jurisdictions, or watering down the potency of international justice, expressed by opponents to a new court, should not be directed solely at Wolf’s IACC proposal.

More worrisome are the fragile cultural concepts attendant upon states’ attention paid to human rights violations. If corruption becomes a well-established cause of action on its own, then attention paid to crimes like genocide may be diffused. This worry would, itself, be best diffused by recognizing the intersection of the two types of crime. If human rights violations were caused by grand corruption, and a framework like that of the ICHRPs can show it as a direct and indisputable link, then the jurists who wish to bring a grand corruption case could bring the human rights violation in an existent court.

Overall, it seems Wolf’s IACC idea is one for the future. It’s a future anti-corruption advocates should look forward to.

AD HOC TRIBUNALS

An idea not yet presented is that of ad hoc tribunals, and probably this is because it is more distant than even Wolf’s IACC. A half dozen ad hoc tribunals in place that each focus on a human rights disaster which is confined to a specific geographic location. They each tried many smaller cases within that single disaster. The result was highly effective for the concerned region.

The ad hoc tribunal option would require up-front legislation like the options which would require making grand corruption a cause of action. They would also require the same sort of infrastructure which makes the IACC inefficient on the pragmatic scale, except for the risk

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77 Wolf, supra note 26, at 12.
factor. Because the tribunals would each be temporary in nature, they would also pose a temporary risk of failure and loss of resources. Expending much time and money to create a permanent court, when that permanent court has a high risk of not attracting many cases, is much lower on the pragmatism scale.

Since the ad hoc tribunals would be dependent, first on the causes of action being recognized, and then having a court in place to adhere to, this is further down the road. If possible to put into place, however, would carry the same advantages of the IACC, legitimacy and impartial justice, and the regional courts since the justice meted out would be tailored to the regions where the wrongs were committed.

What has made human rights law so effective in the past 75 years is not the strict adherence to only one avenue for recourse. Instead, human rights law has followed every possible avenue which presents itself. So too, must corruption law.

Conclusion

There is a tight correlation between human rights and corruption law, as stated by several scholars. If the correlation is as tight as the ICCHRP framework shows, then jurists may one day be able to bring their corruption cases to these venues. In the meantime, it is more likely to prevail if brought as simply a human rights violation.

Corruption law currently is expanding and gaining legitimacy. Grand corruption, specifically, is not yet either a crime to be pursued in international criminal courts, nor is it
voiced as a thing humans have a right to live without. In fact, the only courts which prominently take corruption cases currently are domestic courts who have expanded their reach of legal legitimacy and jurisdiction through the fact of globalization between systems and business partnerships.

Human Rights law currently is solid and culturally accepted as a body of legitimate causes of action. There are several dedicated courts to that end, and remedies which attempt to fulfill the psychic, physical, and monetary losses due to their violation.

There is a tight correlation between human rights and corruption law, as analyzed throughout the above paper. Various abstract reason lead to the intuitive grasp of the fact. Scholars who entertain the idea of an intersection agree to its existence. One legitimate think tank has outlined an effective and adaptable framework to analyze a given situation and prove the intersection between a corrupt act and the violation of individuals’ human rights.

As there are no current remedies enforced for corruption in courts, it would behoove corruption jurists to look to human rights violations as an argument in order to seek legal remedies for their corruption cases. This is not where scholars should end their argument, however. If cases of grand corruption are spotted, the human rights violations that may come about are mirrored by the enumerated rights in the UDHR. These violations, then, could be argued in the courts where they are likely to prevail. Arguments for remedies for victims of grand corruption will be more effectively argued in this frame of reference – as human rights violations.
Both the ICC and dedicated human rights courts are, therefore, already able to remedy victims of grand corruption. If the story ended with that, if that piggy-backing was satisfactory, there would not be a slew of scholars debating the merits of creating a cause of action for grand corruption, and the creation of an International Anti-Corruption Court. The debate would not have brought up more creative solutions, like using crimes against humanity or sections of war crimes as causes of action. In pursuing this argument, farther-reaching solutions come to mind – not just to create a permanent trial court, but to employ the existence of ad hoc tribunals in the campaign against corruption. Thus, it is clear that this argument is only just beginning.

Regardless, the problem of grand corruption is a problem that must be faced. Norms come about through the will of citizens, and the norm is starting to recognize corruption, and grand corruption specifically, as a legal violation of rights – basic human ones or otherwise.