An Accountability Deficit: The Case for an International Anti-Corruption Court

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Modern democracies face a crisis. The influence of private wealth on the political process has been such that public policy serves only those able to purchase the government's responsiveness. This article describes the widespread and deeply ingrained corruption at the highest levels of government across the globe, which has led to the destruction of popular sovereignty. More concerning yet is the claim this article makes that there is currently no effective mechanism for holding the corrupt and powerful to account. This article proposes the establishment of an International Anti-Corruption Court to remedy the accountability deficit. The stated aims of the Court would include holding the corrupt criminally responsible, disgorging them of their illicit profits and critically challenging the way legal frameworks facilitate the corrupting influence of private wealth on the political process. Change is desperately needed to restore the true meaning of democracy: government accountable to the people. An International Anti-Corruption Court presents one possible solution.

I INTRODUCTION

Sed quis custodiet ipsos custodes?

— Juvenal[1]

Corruption takes many forms. All have the effect of delegitimising democratic institutions. This effect is especially marked when corruption is perpetrated by those in whom the most trust is placed. Democratic legitimacy can only be preserved by holding the corrupt accountable. This, however, is no easy task. Consider the following two examples.

The Democratic Republic of Congo (DRC) is one of the world's largest stores of copper and cobalt. This mineral wealth has brought the DRC steady economic growth, yet its per capita income remains among the lowest

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1 "Who will guard the guardians themselves?"

worldwide.[2] Of the $10 billion annual revenue generated through copper and cobalt extraction between 2013 and 2015, an estimated six per cent reached the country's national treasury.[3] According to a *Global Witness* investigation, at least some of the funds unaccounted for were distributed among then-President Joseph Kabila and his allies.[4] For their parts in the "pervasive bribery scheme", Israeli businessman Dan Gertler was sanctioned by the United States government,[5] New York-based hedge fund Och-Ziff Capital Management was penalised $412 million, and its CEO was fined a further $2.17 million.[6] President Kabila, however, enjoyed impunity. All the while Congolese miners, who played a foundational role in building both the country's and Kabila's vast personal wealth, suffered human rights abuses at the hands of DRC authorities.[7]

A culture of impunity for high-level officials extends beyond the borders of the African continent. In West Virginia, the United States, 1,500 tonnes of explosives are used in mountaintop mining every day.[8] Mountaintop-removal coal mining has a direct link to increased rates of cancer, birth defects, cardiovascular disease, respiratory diseases and overall mortality.[9] In comparison with conventional coal mining, mountaintop-removal is cost-efficient because explosives replace the expensive machinery and manual labour otherwise required to dig through mountains.[10] During the 2018 financial year, West Virginia's elected representative, Joe Manchin III, also a member of the Senate Committee on Energy and Natural Resources,[11] earned between $570,000 and $1,470,000 from his share in a coal-brokerage company.[12] The impact of this money has — according to the Senator himself — "absolutely not" affected his policymaking judgement in regulating the coal industry.[13] His West Virginia constituency, contending with the catastrophic health impact of mountaintop-removal coal mining, may disagree.[14]

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2 Michael J Kavanagh "This Is Our Land" *The New York Times* (online ed, New York, 26 January 2019).

3 Global Witness *Regime Cash Machine: How the Democratic Republic of Congo's booming mining exports are failing to benefit its people* (21 July 2017) at 7.

4 At 7.

5 The United States Department of Justice "Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine" (press release, 29 September 2016); and US Department of the Treasury "United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe" (press release, 21 December 2017).

6 Nate Raymond "Och-Ziff to pay $412 million to settle US foreign bribery charges" (30 September 2016) Reuters <www.reuters.com>.

7 Amnesty International *Profits and Loss: Mining and Human Rights in Katanga, Democratic Republic of the Congo* (Index AFR/62/001/2013, 19 June 2013) at 7.

8 Matt Combs "Coal River Mountain Watch director discusses mountain top removal" *The Register-Herald* (online ed, Beckley (United States), 17 June 2019).

9 Appalachian Voices "Human Health Impacts" (14 August 2014) <www.appvoices.org>.

10 Sophia Yan "In West Virginia, a Battle Over Mountaintop Mining" *Time* (online ed, United States, 12 March 2010).

11 US Senate Committee on Energy & Natural Resources "Members" <www.energy.senate.gov>.

12 Joseph Manchin III "Financial Disclosures: Annual Report for Calendar 2018" (filed to United States Senate, 13 August 2019).

13 Manuel Quinones and Elana Schor "Sen Manchin Maintains Lucrative Ties to Family-Owned Coal Company" *The New York Times* (online ed, New York, 26 July 2011).

14 Quinones and Schor, above n 13.

The cases described above are instances of grand corruption. Perpetrators in each case enjoy impunity in either a factual or legal sense. There is currently no effective mechanism to hold such State actors accountable. The proposal of an International Anti-Corruption Court (IACC) seeks to change this state of affairs by ending the culture of impunity and holding high-level officials accountable for their corrupt actions.

This article will evaluate the proposal of an IACC. Part I contextualises and defines grand corruption. Part II describes the need for an international solution to what is conventionally considered a domestic problem. It argues that the violation of human rights and the inadequacy of the current anti-corruption framework have led to an intolerable status quo, which must be changed through the international community's intervention. Part III provides an overview of the functioning of the IACC. It describes a criminal and civil jurisdiction and proposes a further declaratory function to challenge the more subtle or advanced forms of corruption that plague established democracies. Part IV describes the challenges an IACC must overcome to be effective in combatting grand corruption and reinforcing popular sovereignty. These include the practical challenges of operating in a framework of sovereign states and more fundamental challenges of legitimacy. Part V concludes the evaluation.

Grand Corruption

Before an IACC can be instituted, the concept of "grand corruption" must be defined. Transparency International provides a useful starting point by defining grand corruption as "[a]cts 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."[15] Esther Hava further narrows the scope of cases serious enough to warrant international attention by identifying the following elements:[16]

1. Involving huge sums of money (economic factor);

2. Committed, facilitated, managed or tolerated by persons in high levels of power or government (political factor);

3. Not representing isolated acts, but rather a set of planned actions that are part of the very functioning of the country or region affected (systemic factor);

4. The damage caused is not only economic, but also affects fundamental rights and public freedoms of all citizens (social factor);

5. The relationship between corrupt individuals and high levels of power, and the planned nature of their actions enables them to avoid the

15 Transparency International *The Anti-Corruption Plain Language Guide* (28 July 2009) at 23.

16 Esther Hava "Grand Corruption: Strategies for Preventing International Impunity" (2015) 2 IJICL 481 at 485–486.

> workings of [the] justice system, either by actively preventing its application or by forcing it into a position of inaction (impunity factor).

The approach taken by the United Nations Convention against Corruption allows for more certainty, describing corruption as including bribery, embezzlement, trading in influence, abuse of functions and money laundering.[17] Hava examines in depth the issues related to defining an international crime of grand corruption. Broadly, the issues represent the tension between the principle of certainty in criminal law and the need for a definition wide enough to avoid loopholes.[18] This tension is so pronounced in anti-corruption law because of the diversity of forms corruption can take. Wrestling with important questions in defining precise boundaries in the field of anti-corruption criminal law is best left to expert drafters.[19]

What is of particular interest to this article, rather, is the delegitimising *effect* of grand corruption on democracy, through its ability to distort policies or the central functioning of the state in contravention of democratic principles.[20] Such an effect can result from abject forms of corruption (for example, President Kabila's involvement in outright bribery), and can equally result from legal forms of corruption (for example, Senator Manchin's overlapping financial and political interests). Transforming one form of corruption to another will achieve little because reducing corruption is not an end in itself. Instead, reducing corruption is a way to strengthen democratic institutions and improve governance with an ultimate focus on human well-being.[21] Furthering the aim of good governance necessitates widening grand corruption's definitional scope to include the more textured practices that may presently be legal, but that have a corrupting influence on democracy nonetheless.

Good governance, or the opposite of corruption, can be seen as the impartial exercise of public power in the pursuit of the collective good.[22] This notion connects with the idea that the opposite of justice is not unequal treatment, but favouritism.[23] The influence of private wealth on the political process can provide opportunities aplenty for favouritism. Activities such as campaign financing, lobbying and conflicts of interest may not violate any legal rules but — similar to overt forms of corruption such as bribery and embezzlement — can affect public policy. A landmark study involving

17 United Nations Convention Against Corruption 2349 UNTS 41 (opened for signature 9 December 2003, entered into force 14 December 2005) [UNCAC], arts 15–23.

18 Hava, above n 16, at 497.

19 See, for example, the legal definition of grand corruption developed by Transparency International: Transparency International "What is Grand Corruption and how can we stop it?" (21 September 2016) <www.transparency.org>.

20 Transparency International, above n 15, at 23.

21 Susan Rose-Ackerman "International Actors and the Promises and Pitfalls of Anti-Corruption Reform" (2013) 34 U Pa J Intl L 447 at 486.

22 Robert Gregory "Assessing 'Good Governance': 'scientific' measurement and political discourse" (2014) 10(1) Policy Quarterly 15 at 16.

23 Sushma Raman and Mathias Risse *Corruption and Human Rights: The Linkages, the Challenges and Paths for Progress* (Carr Center for Human Rights Policy, 25 April 2018) at 10. See also John Rawls *A Theory of Justice* (Oxford University Press, Oxford, 1999).

statistical analysis of policy outcomes demonstrates a legally-facilitated destruction of popular sovereignty: Martin Gilens and Benjamin Page found that "economic elites and organised groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have *little or no independent influence*".[24]

Lawrence Lessig takes a consequentialist view in defining corruption:[25]

> Institutional corruption is manifest when there is a systemic and strategic influence … that undermines the institution's effectiveness by diverting it from its purpose … weakening either the public's trust in that institution or the institution's inherent trustworthiness.

When the institution of democracy, with its purpose of giving effect to the popular will,[26] and the influence of private wealth on the political process[27] are inserted into Lessig's definition, the litmus test of legality starts to appear artificial. Therefore, this article includes in its conception of grand corruption those acts that have the effect of subverting the popular will through the undue influence of money, notwithstanding their legality.

With a clearer picture of grand corruption and its effect on democracy, the inquiry can now move on to the question of what it is about the destruction of popular sovereignty that demands an international approach. Part II argues that the most important purposes of the proposed IACC would be to remedy the human rights violation that is grand corruption and to introduce accountability at the highest levels of government.

II NEED FOR AN INTERNATIONAL APPROACH

Human Rights

The destruction of popular sovereignty demands an international approach because international law guarantees popular sovereignty. Through international human rights law, States have committed to providing citizens with a democratic form of governance.[28] If States are not fulfilling their side of the bargain of protecting and promoting human rights, international law ought to call up its debt. Grand corruption's potential negative impact on the realisation of all other human rights makes the call for action even louder.

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24 Martin Gilens and Benjamin I Page "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" (2014) 12 Perspectives on Politics 564 at 565 (emphasis added).

25 Lawrence Lessig "'Institutional Corruption' Defined" (2013) 41 JLME 553 at 553.

26 John Locke *Second Treatise of Government* (1690) as cited in James A Gardner and Guy-Uriel E Charles "Democracy: Theoretical Frameworks" in *Election Law in the American Political System* (Wolters Kluwer, New York, 2012) at 10.

27 As documented by Gilens and Page, above n 24.

28 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR], arts 1 and 25.

1 Grand Corruption as a Violation of the Democratic Entitlement

(a) The Democratic Entitlement

In recognising the "inherent dignity and … equal and inalienable rights of all", the Universal Declaration of Human Rights proclaims that:[29]

> The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage … .

The International Covenant on Civil and Political Rights, which 173 States have ratified, creates an obligation to respect, protect and fulfil the "right of self-determination … without distinction of any kind, such as … property … or [any] other status".[30] Citizens are entitled to "take part in the conduct of public affairs"[31] and "[t]o have access, on general terms of equality, to public service in [one's] country".[32] Finally, it is recognised that the full realisation of "one of international law's earliest promises"[33] — a right to democratic governance — cannot be complete without "transparent and accountable government institutions".[34]

Thomas Franck, in 1992, described this demanding set of rights (the "democratic entitlement") as "a global entitlement, one that increasingly will be promoted and protected by collective international processes".[35] Twenty-eight years on, how well have State parties performed their obligations?

(b) Pay-to-Play: A Different Sense of Equality

As shown earlier, the effect of grand corruption on the political process, by design, is to replace considerations of the public good with the influence of private wealth. If public policy decisions are susceptible to the influence of money, financial power implies political power. Unrestricted, this equivalence means that government decisions are no longer based on what the "good of the society shall require", but instead are a way for the wealthy to set the terms based on their willingness to pay.[36] The political process becomes an auction where "legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation".[37]

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29 *Universal Declaration of Human Rights* GA Res 217A (1948) [*UDHR*], art 21(3).
30 ICCPR, arts 1–2.
31 Article 25(a).
32 Article 25(c).
33 Timothy K Kuhner "The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics" (2013) 26 Harv Hum Rts J 39 at 40.
34 *Report of the Economic and Social Council for the Fifty-Fifth Session of the Commission on Human Rights* UN Doc E/CN.4/1999/167 (1999) at 195.
35 Thomas M Franck "The Emerging Right to Democratic Governance" (1992) 86 AJIL 46 at 46.
36 Locke, above n 26, at 10.
37 William Landes and Richard Posner "The Independent Judiciary in an Interest-Group Perspective" (1975) 18 JLE 875 at 877 as cited in Kuhner, above n 33, at 86.

Payments may either take the form of outright bribes or political finance, depending on the "democracy" in question. For example, mining corporations in the DRC were able to buy favourable business conditions from President Kabila in exchange for a bribe. In the United States, meanwhile, economic elites and organised groups representing business interests — while acting in accordance with the law — have been able to buy influence over legislators to such an extent that policy outcomes correlate not with the general public's preferences, but with what moneyed interests desire.[38] Their weapons of choice include campaign finance, lobbying and political advertising, among many others.[39]

When state actors are willing to take money, and individuals or corporations are willing to give money for the perceived accompanying benefits (increased influence over public policy), those with the ability and willingness to pay have greater political power than those without. Democracy's promise of "one person, one vote" no longer holds, and is replaced with its plutocratic counterpart: "one dollar, one vote".

(c) A Failure to Respect, Protect and Fulfil

States have an obligation to respect, protect and fulfil the democratic entitlement for persons under their jurisdiction.[40] This obligation involves refraining from measures that may deprive enjoyment, preventing violations by third parties and taking active steps to ensure the realisation of the democratic entitlement.[41] A violation, therefore, occurs where a State's actions do not conform with this obligation in relation to a recognised human right.[42]

The "pay-to-play" system of governance described above, where political power must be bought, discriminates on the basis of wealth or "property".[43] The influence of money in politics drowns out the inherent right of *all* individuals to participate in the process of self-determination on an equal footing. That is, the poor are priced out of democracy because of grand corruption's presence in polities. A state may not intend to discriminate, and it may apply apparently neutral rules, de facto or de jure,[44] to achieve political equality — for example, allowing anyone to bribe a state official or to incur political expenditure. However, as only the rich can take advantage of such a rule, its "consequence or effect" would be to enhance the political power of the rich, while diminishing the political power of the poor.[45]

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38 Gilens and Page, above n 24, at 572 and 575. The impact of average citizens on policy has been described as "minuscule, near-zero, statistically non-significant" while economic elites have "a quite substantial, highly significant, independent impact on policy".

39 At 567; and Kuhner, above n 33, at 43–44.

40 International Council on Human Rights Policy *Corruption and Human Rights: Making the Connection* (2009) at 25.

41 At 25–26.

42 At 26.

43 For a thorough articulation of the equivalence of "property" and "wealth", see Kuhner, above n 33, at 60–61.

44 Kuhner, above n 33, at 61.

45 International Council on Human Rights Policy, above n 40, at 34.

Such a state of affairs imposes an obligation on States to take corrective measures to limit the ability of the economically powerful to monopolise political power. By failing to adequately enforce anti-corruption laws, enact limits on political spending, effectively regulate conflicts of interest and restrict the undue influence of career lobbyists over lawmakers, States have failed to meet their obligations in relation to the democratic entitlement. The disconnect between State obligations to provide a social order where the right to political equality is realised,[46] and the reality of a legal or factual framework which perpetuates political inequality on the basis of wealth, is a violation of human rights.

2 Grand Corruption as a Precursor to Other Human Rights Violations

Grand corruption often entails human rights abuses apart from those identified above. Resources directed away from the public and towards corrupt actors undermine the State's efforts to fulfil to the "maximum of its available resources" individuals' rights to healthcare, education and clean water.[47] Grand corruption may also distort public expenditure in favour of large-scale infrastructure projects, which present more opportunities for generating illicit funds, to the detriment of investment in health and education.[48]

When government institutions are affected by corruption, the realisation of all human rights is threatened.[49] It is now incumbent on the international community to take greater steps to enforce its promise of "accountable and transparent institutions".[50]

Inadequacy of Current Accountability Mechanisms

1 Domestic Controls

Impunity of powerful individuals results not because of a lack of laws. Rather, the problem an IACC would seek to solve is the enforcement of laws against the political elite.[51] Susan Rose-Ackerman, while advocating for "vigorous outside checks", writes that a "democratic electoral system, standing alone, is an insufficient deterrent to corruption".[52] However, the susceptibility to corruption of the judicial and enforcement bodies of a State, and the fear of reprisals from those exercising corrupt power, may render oversight bodies —

46 *UDHR*, art 28.

47 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976), art 2; and Angela Barkhouse, Hugo Hoyland and Marc Limon *Corruption: A Human Rights Impact Assessment* (Universal Rights Group and Kroll, 2018) at 4.

48 Zoe Pearson "An international human rights approach to corruption" in Peter Larmour and Nick Wolanin (eds) *Corruption and Anti-Corruption* (ANU E Press, Canberra, 2013) 30 at 35.

49 Anita Ramasastry "Is There a Right to Be Free from Corruption?" (2015) 49 UC Davis L Rev 703 at 720.

50 *Report of the Economic and Social Council*, above n 34, at 195.

51 Mark L Wolf "The World Needs an International Anti-Corruption Court" (2018) 147(3) Daedalus 144 at 147.

52 Susan Rose-Ackerman "Corruption and Democracy" (1996) 90 ASIL PROC 83 at 90.

which ultimately fall under the control of high-level officials — ineffectual.[53] The result is a factual incapacity to hold corrupt officials to account.[54]

An added challenge in fighting corruption solely within the boundaries of a State is the increasingly global nature of the problem. Prosecutions require evidence. Gathering cross-border evidence of corruption, with an ultimate view to recovering stolen assets, can be "a slog".[55] Home countries face issues of criminal, civil and administrative law, as well as slow, and at times uncooperative, international cooperation.[56] Tax havens, bank secrecy laws and complex corporate structures offer a mask of legality to the plain unwillingness of institutions complicit in money laundering to part with profits.[57] Such processes facilitate grand corruption by making ill-gotten assets "easy to steal, easier to keep".[58]

The difficulty cross-border corruption poses has been recognised, and the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organisation have attempted to make gains.[59] Their success, however, has been restricted by both systems being voluntary, neither having robust legal mechanisms for controlling cross-border corruption and results depending on domestic prosecutorial and enforcement priorities. Also, and most damagingly, the measures only apply to the supply side of corruption.[60] State actors, who are just as culpable as those offering bribes, if not more, are left immune.[61] An IACC would fill this implementation gap by investigating what domestic institutions do not currently investigate, and by carrying out this mandate effectively in the complex global system.

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53 Hava, above n 16, at 488. See, for example, President Donald Trump's attack on the independent oversight of his administration: David E Sanger and Charlie Savage "Trump Takes Aim at a Watergate Reform: The Independent Inspector General" *The New York Times* (online ed, New York, 22 May 2020). After several allies and two of his sons came under criminal investigation, President Jair Bolsonaro fired the Federal Police Chief: Ernesto Londoño, Letícia Casado and Manuela Andreoni "Turmoil in Brazil: Bolsonaro Fires Police Chief and Justice Minister Quits" *The New York Times* (online ed, New York, 24 April 2020). Prime Minister Benjamin Netanyahu will have a say on the key appointments of the state prosecutor and attorney general while he awaits his own trial on corruption charges: David M Halbfinger and Isabel Kershner "Netanyahu's Power Is Extended as Rival Accepts Israel Unity Government" *The New York Times* (online ed, New York, 20 April 2020).

54 Simeon Aisabor Igbinedion "A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders under the United Nations Convention Against Corruption 2003" (2009) 6 Manchester Journal of International Economic Law 56 at 59.

55 "Making a hash of finding the cash" *The Economist* (online ed, London, 11 May 2013).

56 David A Chaikin "Controlling corruption by heads of government and political élites" in Peter Larmour and Nick Wolanin (eds) *Corruption and Anti-Corruption* (ANU E Press, Canberra, 2013) 97 at 109.

57 Michael Johnston "Cross-Border Corruption: Points of Vulnerability and Challenges for Reform" in Sahr J Kpundeh and Irène Hors (eds) *Corruption & Integrity Improvement Initiatives in Developing Countries* (UNDP, New York, 1998) 13 at 15 and 17; and Ramasastry, above n 49, at 710–712.

58 "Making a hash of finding the cash", above n 55.

59 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed 17 December 1997, entered into force 15 February 1999); and Agreement on Government Procurement (signed April 1994, entered into force January 1996).

60 Rose-Ackerman, above n 21, at 474; and Sonja Starr "Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations" (2007) 101 NWU L Rev 1257 at 1291–1292.

61 Starr, above n 60, at 1292.

2 International Anti-Corruption Framework

International anti-corruption norms have undeniably elevated the urgency and importance of tackling corruption. While the topic was considered taboo before the end of the Cold War, there is now a global treaty recognising that the "prevention and eradication of corruption is a responsibility of all States".[62] International anti-corruption norms have allowed for the foundational steps to be taken in strengthening democratic institutions in the face of widespread corruption.[63] They represent a global "normative consensus" on corruption and its ability to "undermine the institutions and values of democracy".[64]

However, the creation of such norms is only a start. Whether these norms are effective in holding corrupt actors accountable is a different matter. The real test of anti-corruption instruments lies in their implementation, monitoring and enforcement.[65] It is here where the most comprehensive global anti-corruption treaty, the United Nations Convention Against Corruption (UNCAC), shows its weakness. UNCAC's failure to facilitate the creation of robust mechanisms[66] that encourage accountability has earned it the label of "*lex simulata*",[67] defined as:[68]

> A legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied.

This critique was made before the Convention's review mechanism was put in place. It may, nonetheless, still apply. UNCAC's review mechanism is "substantially less transparent" than that of the OECD Working Group, upon which it was modelled.[69] UNCAC's review mechanism emphasises ensuring State parties' "equality and sovereignty".[70] This is practically demonstrated

62 UNCAC, preamble.

63 UNCAC, preamble. Other major multilateral initiatives against corruption include: African Union Convention on Preventing and Combating Corruption 2860 UNTS 113 (opened for signature 11 July 2003, entered into force 5 August 2006); *United Nations Convention Against Transnational Organized Crime* GA Res 55/25 (2001); Criminal Law Convention on Corruption 2216 UNTS 225 (opened for signature 27 January 1999, entered into force 1 July 2002); Civil Law Convention on Corruption 2246 UNTS 3 (opened for signature 4 November 1999, entered into force 1 November 2003); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 2802 UNTS 225 (signed 17 December 1997, entered into force 15 February 1999); and Inter-American Convention Against Corruption (opened for signature 29 March 1996).

64 UNCAC, art 2; and Philippa Webb "The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?" (2005) 8 J Intl Econ L 191 at 228.

65 Webb, above n 64, at 219.

66 Cecily Rose *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, Oxford, 2015) at 105.

67 Webb, above n 64, at 221.

68 W Michael Reisman *Folded Lies: Bribery, Crusades and Reforms* (Free Press, New York, 1979) at 31 as cited in Webb, above n 64, at 221.

69 Rose, above n 66, at 105.

70 United Nations Office on Drugs and Crime *Mechanism for the Review of Implementation of the United Nations Convention against Corruption — Basic Documents* (2011) [UNODC] at 5.

by the fact that country visits, a defining part of the OECD model's success,[71] are dependent on the consent of the State party under review.[72] Moreover, the reports produced remain confidential until and unless the State party exercises its "sovereign right" to make them publicly available.[73] The resulting lack of transparency about current compliance with UNCAC constrains efforts by those not in-the-know to improve anti-corruption action.

Through its form, too, the Convention largely avoids obligating States to advance anti-corruption efforts. Out of 11 articles on the criminalisation of corrupt acts, only five are mandatory: bribery of national public officials, bribery of foreign and international organisations' public officials, embezzlement, laundering of proceeds of crime and obstruction of justice.[74] Of these mandatory obligations, only one (embezzlement) is a new obligation, as the United Nations Convention against Transnational Organized Crime previously incorporated the other four.[75] The remaining six criminalisation provisions provide only that State parties "shall consider" criminalising certain behaviours: trading in influence, abuse of functions, illicit enrichment, bribery and embezzlement in the private sector and concealment.[76] As Timothy Kuhner argues, "[a]n obligation to 'endeavour' to promote a certain aim or to consider criminalising certain behaviour is no obligation at all".[77] In a treaty containing 71 articles, Kuhner further notes that such qualifiers were used over 80 times.[78]

UNCAC again betrays its aim to "promote integrity [and] accountability" by excluding matters of money in politics from the scope of corruption from the only global treaty on the subject.[79] Democratic integrity and accountability cannot be realised if international instruments only target obvious cash-in-a-bag forms of corruption. To achieve the aim of good governance, the undue influence of private wealth on public policy through advanced forms of corruption must simultaneously be limited. Otherwise, there is a real risk of an illegal bribe merely changing its form to a legal campaign donation, without any change to the disastrous implication for democracy. This was the position of at least some States negotiating UNCAC when the following article, entitled "Funding of political parties", was proposed:[80]

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71 Fabrizio Pagani *Peer Review: A Tool For Co-Operation and Change* (OECD, SG/LEG(2002)1, 11 September 2002) at 33.

72 UNODC, above n 70, at 9.

73 At 10. After completion of the first review cycle, 83 out of 186 State parties had chosen to make their country reports publicly available and 16 allowed publication of self-assessment reports: UNODC "Country Profiles" <www.unodc.org>.

74 UNCAC, arts 15–17, 23 and 25. These articles provide that State parties "shall adopt" certain measures.

75 United Nations Convention against Transnational Organized Crime 2225 UNTS 209 (signed 15 November 2000, entered into force 29 September 2003), arts 5, 6, 8 and 23.

76 UNCAC, arts 18–22 and 24.

77 Kuhner, above n 33, at 54.

78 At 54.

79 UNCAC, art 1(c).

80 United Nations Office on Drugs and Crime *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (November 2010) at 86.

> 1. Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
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> (a) To prevent conflicts of interest and the exercise of improper influence;
>
> (b) To preserve the integrity of democratic political structures and processes;
>
> (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
>
> (d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.
>
> 2. Each State Party shall regulate the simultaneous holding of elective office and responsibilities in the private sector so as to prevent conflicts of interest.

This mandatory, albeit vague and undemanding, provision[81] proved unpalatable for some.[82] After tense negotiations, the final version was hollowed out to a mere obligation for States to:[83]

> … *consider* taking appropriate … measures … in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties …[and] *endeavour* to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

Ultimately, this means State parties looking to UNCAC for a model of robust regulation of advanced forms of corruption, such as political financing, lobbying and conflicts of interest are better to search elsewhere.

UNCAC's influence on domestic law thus relies on the political will of each successive government in its efforts to combat corruption. Instead of being able to use UNCAC to justify criminalising a broad range of corrupt conduct, the Convention requires lawmakers to justify taking those steps by reference to consistency with domestic law, appropriateness or necessity.[84] Rather than empowering governments with the legal capacity to combat corruption, the Convention provides a mere and incomplete guide on how to go about it, if they so wish. Cecily Rose sums up how the liberal use of non-mandatory criminalisation provisions and vague, qualified and hortatory language diminishes UNCAC's strength as a binding legal instrument:[85]

> The Convention indicates what steps States Parties could take in order to combat corruption in a comprehensive manner, but it does not actually

81 Kuhner, above n 33, at 51.
82 At 51; and Webb, above n 64, at 217.
83 UNCAC, art 7(3)–(4) (emphasis added).
84 For example, UNCAC, arts 5(4), 20, and 48; and Rose, above n 66, at 114.
85 Rose, above n 66, at 114.

> require them to undertake such measures. The Convention outlines the path forward for States Parties, but it does not obligate them to proceed.

UNCAC has resolved the inherent tension, present in every international instrument, between national sovereignty and international obligations in favour of the former. The "opportunity to codify innovative approaches to common problems, to which national laws [can] aspire" appears to have given way to a model that is closer to "a mere reflection of national laws".[86] The landmark global treaty on corruption, therefore, is not an effective tool in holding corrupt State actors accountable.

Despite its shortcomings, the Convention is a major step in the advancement of anti-corruption action. This is because it represents a global normative consensus. It provides a framework of anti-corruption norms much broader than any previous treaty and addresses prevention, international cooperation and asset recovery.[87] The range of behaviours identified and agreed upon as corruption in the Convention should not be taken lightly. They can, and must, be built upon, but even in their present form provide a sound foundation for the proposed IACC's jurisdiction. When enforced in an international court against high-level officials who presently enjoy impunity, the provisions of UNCAC can effect real change.

Parts I and II have established the problem of grand corruption and the ineffectiveness of existing accountability mechanisms. Part III describes a possible solution for making the shift from a culture of impunity towards one of accountability.

III OVERVIEW OF THE PROPOSED IACC

In 2014, Senior United States District Judge Mark Wolf, writing extrajudicially, proposed the concept of an IACC.[88] According to Wolf, grand corruption exists because of a culture of impunity whereby "corrupt leaders control the police, the prosecutors, and the courts".[89] Wolf posits that an international forum similar to the International Criminal Court (ICC), with the ability to enforce anti-corruption laws and punish offenders will deter, and thus diminish grand corruption.[90] The proposal also includes a civil right of action available to private citizen whistle-blowers to bring a claim on behalf of the government.[91]

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86 This was the concern of the Chairman of the Ad Hoc Committee in relation to repeated references to the Convention's conformity with domestic law: *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its third session, held in Vienna from 30 September to 11 October 2002* UN Doc A/AC.261/9 (26 November 2002) at 7.

87 Rose, above n 66, at 97 and 104.

88 Mark L Wolf *The Case for an International Anti-Corruption Court* (Brookings Institute, Washington DC, 23 July 2014).

89 Wolf, above n 51, at 144.

90 At 145.

91 Wolf, above n 88, at 10.

This Part elaborates on the criminal jurisdiction and civil right of action. It proposes a third, declaratory function of the IACC with which advanced forms of corruption in established democracies could be challenged.

Criminal Jurisdiction

An IACC would be an independent, apolitical and disinterested forum for the enforcement of anti-corruption law against high-level government officials.[92] Its legal basis for imposing criminal liability, according to Wolf, should be derived from existing domestic law.[93] Such an approach has the distinct advantage of not requiring additional consensus-building negotiations. This article, however, proposes an alternative: creating a new body of law criminalising corruption in the international realm, using the Rome Statute of the International Criminal Court (Rome Statute) as a model.[94] The creation of an anti-corruption criminal statute specifically for the purpose of an IACC would allow greater consistency in the application of the law across all States.[95]

Moreover, the Court's effectiveness would not be diminished when confronted with a defective domestic anti-corruption legal framework. Equatorial Guinea, for example, does not have specific legislation against corruption.[96] An IACC would, therefore, be powerless to hold a corrupt actor accountable if its jurisdiction were derived solely from existing but inadequate domestic law. A deficient domestic legal framework could also be the making of legislators seeking to hollow out law which might be enforced against them. It would be most unsatisfactory if an IACC had the effect of encouraging States to dismantle anti-corruption laws.

Accordingly, it would be better to generate a new body of anti-corruption law to be applied by the IACC. Here, UNCAC will prove useful. As discussed in Part II, the Convention represents a global normative consensus on what constitutes corrupt behaviour. Its criminalisation provisions include a broad range of conduct which ought to guide the process of creating the new statute. It has already been recognised that UNCAC omits certain practices that should be regarded as corruption. However, that should not detract from the gains the Convention's enforcement, even in its present form, could make for democratic accountability. President Kabila, for example, would not enjoy impunity for his brazen acts of embezzlement and bribery. Others in similar positions could also be stripped of their impunity

92 That is, those who exercise a significant level of power. For example, heads of state, lawmakers and judges of superior courts. See Hava, above n 16, at 487.

93 Wolf, above n 88, at 10.

94 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute].

95 Michael R Darling "'I Can Resist Everything Except Temptation.' An International Solution to African Resource Corruption" (2017) 52 Tex Intl L J 421 at 436.

96 At 436.

under the operation of an IACC, which is why several civil society groups have lent the proposal their support.[97]

Civil Jurisdiction

Corruption cases are notoriously difficult to prosecute.[98] The practical difficulties of proving a case in an international court, usually years after the fact, mean not every true allegation will reach the requisite standard of beyond a reasonable doubt.[99] To ameliorate an all-or-nothing approach to justice and accountability, the proposed IACC should also have civil jurisdiction. The civil jurisdiction would derive from an international civil statute empowering private plaintiffs to bring a claim against high-level officials on behalf of the government.[100] As an incentive, the whistle-blowers would be entitled to a share of the funds retrieved.[101] This subpart describes the benefits of tackling corruption using civil measures.

First, a civil right of action, with its lower standard of proof, allows a form of redress where criminal liability may not be possible — for example, because of evidentiary hurdles[102] or where the defendant has evaded arrest and trial.[103] Secondly, repatriating stolen wealth is not only an essential part of holding corrupt actors accountable and creating a deterrent effect,[104] but also ensures the funds are returned to the home country and are not used for ill ends.[105] Thirdly, having the IACC exercise criminal and civil jurisdiction allows for justice to be administered efficiently. An IACC will have the ability to hear evidence from different jurisdictions together, and then to trace, freeze and seize funds as appropriate.[106] Contrast this with the Mutual Legal Assistance (MLA) system of the present day. The World Bank found 29 barriers to asset recovery in UNCAC's MLA system.[107] This is especially concerning considering UNCAC's system was itself designed to be a solution

97 Nick Donovan "The 1MBD Scandal Should be Addressed by an International Criminal Tribunal" (19 December 2016) Global Witness <www.globalwitness.org>; Arvind Ganesan, Business and Human Rights Director of the Human Rights Watch "Tom Lantos Human Rights Commission Briefing: An International Anti-Corruption Court (IACC) to Mitigate Grand Corruption and Human Rights Abuses" (oral testimony to the Tom Lantos Human Rights Commission, Washington, 13 November 2014); and Global Organization of Parliamentarians Against Corruption "The Yogyakarta Declaration" (8 October 2015).

98 Susan Rose-Ackerman "Corruption: Greed, Culture, and the State" (2010) 120 Yale LJ Online 125 at 125.

99 A standard of beyond a reasonable doubt is recommended because of the gravity of sentences to be imposed: Wolf, above n 88, at 11. See also Darling, above n 95, at 441.

100 This would be modelled on the United States False Claims Act 31 USC § 3729. For an overview of a *qui tam*, or a false claim action, see Paul D Carrington "Law and Transnational Corruption: The Need for Lincoln's Law Abroad" (2007) 70(4) LCP 109 at 122.

101 Worthwhile claims would be screened by allowing lawyers a contingency fee. See Darling, above n 95, at 442.

102 At 441.

103 Starr, above n 60, at 1288.

104 Darling, above n 95, at 441.

105 Such as illicitly funding political parties, purchasing arms and so on. See Starr, above n 60, at 1288.

106 At 1259.

107 Kevin M Stephenson and others *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (World Bank, Washington DC, 2011).

to ineffective international cooperation.[108] The barriers include onerous legal requirements, unreasonable delays and a lack of effective coordination.[109] An IACC, acting as a centralised authority, would mitigate these barriers and ensure a more efficient system of asset recovery, thereby making grand corruption a less attractive enterprise.

In addition to practical benefits, civil jurisdiction also empowers citizens to challenge corruption in a more direct way than elections.[110] Quite apart from the possible material gains for national treasuries, the benefit of a favourable judgment from the IACC would have immense symbolic significance in authoritatively declaring that a wrong has been committed.[111] The value of such transparency cannot be overstated. Sonja Starr makes the point that even brazen and powerful kleptocrats go to great lengths to hide their illicit profits and the manner in which they were derived, rather than simply declaring entitlement to the wealth they steal.[112] Starr concludes this is because even "strongmen … could not get away with open looting".[113] An IACC would amplify the presence of corruption and make it easier to rally around efforts aimed toward its elimination.

Declaratory Function

This article is the first to propose a third, declaratory function of an IACC by which the Court would evaluate the legal framework of a State party against the standards of democracy provided for in human rights law.[114] The Court would have the ability to make declarations of inconsistency and non-binding recommendations about how the inconsistency may be remedied. This function would be similar to the European Court of Human Rights' (ECtHR) model, but with a more limited scope of matters related only to corruption. In comparison, the ECtHR deals with a much broader range of rights found in the European Convention on Human Rights.[115] Such a function is desirable because it provides an avenue for critically analysing practices that do not

108 At 1.

109 See, for example, at 81–84 "Barrier 22: Onerous Legal Requirements to MLA and Overly Broad MLA Refusal"; at 90–92 "Barrier 26: Unreasonable Delays in MLA Responses"; and at 37–40 "Barrier 5: Too Many Cooks in the Kitchen—Lack of Effective Coordination".

110 See Brad Roth "Evaluating democratic progress" in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000) 493 at 502: "The universal franchise may allow all sectors of the society to select once every four years from among pre-packaged candidates of parties controlled by social elites, but this scarcely implies the rudiments of accountability …". The point is that such "elections" do not allow for proper accountability because voters who may want to challenge corruption through elections are not given adequate choice by the "true powers-that-be". See also Michael Johnston "More than Necessary, Less than Sufficient: Democratization and the Control of Corruption" (2013) 80 Soc Res 1237 at 1245–1248 and 1238: "expecting citizens to check the abuse of power with their votes is likely to be a futile hope".

111 Ramasastry, above n 49, at 726.

112 Starr, above n 60, at 1288.

113 At 1288.

114 As discussed in Part IIA(1)(a) of this article (the democratic entitlement). See generally Franck, above n 35.

115 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

violate domestic legal rules, but contravene human rights law and have a corrupting influence on democracy nonetheless.

Non-binding recommendations, which the Court will issue on a case-by-case basis, can be tailored to the economic, social, cultural and political landscape of each State party. When the subject matter involves more textured practices that do not easily conform to the binary choice between corruption or good governance, the one-size-fits-all model of anti-corruption reform is an illusory concept.[116] Instead, an IACC will be in a position to recommend changes a particular State party may make to ensure the progression of its process of "deep democratisation".[117] This approach will also allow motivated States to advance anti-corruption action further than the international community's consensus position by seeking valuable guidance for possible next steps.[118] Indeed, the criminal and civil functions may cast the Court as a punitive actor, constantly pitted against governments. Its recommendatory function, on the other hand, will allow it to be perceived more as an ally, helping State parties meet their obligation of governance according to the "will of the people".[119]

The primary benefit of the proposed IACC's declaratory function would be enhanced transparency. An authoritative declaration, from a neutral court, that a State party's legal framework impedes political equality cannot go unnoticed.[120] Such a powerful statement will galvanise support for reform, with high political costs for inaction.[121] Further, it would both provide a form of redress[122] for the violation of the democratic entitlement and foster important conversations.[123]

Having discussed the function and benefits of the proposed IACC, the next step is to probe the challenges the Court will have to contend with if it is to be successful in reducing grand corruption. Part IV will also offer possible solutions for overcoming those challenges.

116 Johnston, above n 110, at 1254: "there is no master plan".
117 At 1238 and 1254.
118 Similar to the European Court of Human Rights' advisory jurisdiction.
119 *UDHR*, art 21(3).
120 Dinah Shelton *Remedies in International Human Rights Law* (3rd ed, Oxford University Press, Oxford, 2015) at 286.
121 See Helen Keller and Cedric Marti "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26 EJIL 829 at 840 for the European Court of Human Rights' experience. See also Neil Duxbury "Judicial disapproval as a constitutional technique" (2017) 15 ICON 649 at 651 for discussion of the effect of domestic courts issuing declarations of inconsistency.
122 *Varnava v Turkey* [2009] 5 ECHR 13 (Grand Chamber) at [224]: "public vindication of the wrong suffered … is a powerful form of redress in itself".
123 See Kuhner, above n 33, at 89, discussing the potential impact of the Human Rights Committee publicising the failure of States to meet human rights obligations in the context of the democratic entitlement. This article has taken the approach that the publicity generated from, and the normative impact of, an IACC judgment would be even greater.

IV OBSTACLES TO ENDING GRAND CORRUPTION

The successful operation of an international court faces the practical challenge of enforcement in a framework of equal and independent sovereign nations.[124] Additionally, in establishing an IACC, there are broader challenges of generating the requisite political will and assuring States that the Court represents a legitimate and justifiable restraint on national sovereignty.

Enforcement

This subpart will first describe the anarchical framework that governs international relations. Next, it will discuss the shortcomings of the ICC as a manifestation of the voluntary nature of international law. Finally, this subpart will propose how the IACC can better encourage compliance among State parties.

1 The Anarchical Framework

International law is based on a system of cooperation, as opposed to coercion.[125] The absence of a central authority and the voluntary nature of international law have earned the system the label of "anarchy".[126] Boutros Boutros-Ghali, former Secretary-General of the United Nations, sums up the essence of international relations:[127]

> I can do nothing. I have no army. I have no money. I have no experts. I am borrowing everything. If the member states don't want [to do something], what can I do?

Any imposition of obligations on States, therefore, can generally only arise through their consent.[128]

2 The ICC's Experience

The ICC relies on State cooperation for enforcement of its arrest warrants and any other assistance.[129] A failure to cooperate, however, does not trigger any penalties.[130] Instead, art 87(7) of the Rome Statute makes provision for the act of non-cooperation to be referred to the Assembly of State Parties. The referral

124 Charter of the United Nations, art 2(1).
125 Jan Klabbers *International Law* (2nd ed, Cambridge University Press, Cambridge, 2017) at 24.
126 See generally Kenneth Waltz *Theory of International Politics* (Addison-Wesley, Reading, 1979) at 102–128 and specifically at 102–104.
127 Webb, above n 64, at 222.
128 *SS Lotus (France v Turkey)* (1927) PCIJ (series A) No 10 at 44 per Weiss VP dissenting.
129 Rome Statute, pt 9.
130 Sigall Horovitz, Gilad Noam and Yuval Shany "The International Criminal Court" in Yuval Shany *Assessing the Effectiveness of International Courts* (Oxford University Press, Oxford, 2014) 223 at 245–252; and Henry Lovat and Yuval Shany "The European Court of Human Rights" in Yuval Shany *Assessing the Effectiveness of International Courts* (Oxford University Press, Oxford, 2014) 253 at 253–256.

procedure is one of the Court's primary shortcomings.[131] Such a weak enforcement structure detracts from the legitimacy of the Court and its ability to dispense justice.[132] At the time of writing, the ICC has 15 outstanding arrest warrants.[133] By comparison, the number of defendants currently serving their sentences is four.[134] The aims of ending impunity and encouraging accountability are greatly diminished if real abuses of power result only in theoretical punishments. If the IACC is to have a better chance of achieving the above aims in relation to grand corruption, it must have stronger enforcement mechanisms.

3 A Solution

To encourage IACC participation and compliance, Wolf recommends making it a condition of OECD or World Trade Organization membership.[135] Further, he writes, submitting to the jurisdiction of the IACC should be incorporated into UNCAC.[136] Other incentives that Wolf proposes include conditioning World Bank loans on membership of the IACC and including membership as a term in free trade agreements.[137] A broad range of positive and negative incentives is likely to encourage uptake. However, conditioning membership of these international organisations on IACC participation is not a perfect solution.

First, States that enjoy disproportionate influence on these international organisations could exert that power on the design of the IACC. Even more damaging to the rule of law, they could carve out exemptions based on their own vulnerabilities.[138] Secondly, in the case of kleptocracies ruled by the most corrupt, expulsion from international organisations would hurt ordinary citizens more than the high-level officials intended to be the subject of punishment. Such organisations provide vital assistance and monitoring and maintain a degree of pressure on governments.[139] These concerns ought to influence the enforcement-structure of the IACC.

A more potent alternative to a generalised sanctions regime would be to target the individual perpetrators of grand corruption using economic and political sanctions.[140] Here, the tendency of the corrupt to store illicit funds

131 Darling, above n 95, at 437–441; Gwen P Barnes "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir" (2011) 34 Fordham Intl LJ 1584 at 1616–1619; and Jack Goldsmith "The Self-Defeating International Criminal Court" (2003) 70 U Chi L Rev 89 at 92.

132 Barnes, above n 131, at 1588.

133 International Criminal Court "Situations and Cases" (12 October 2019) <www.icc-cpi.int>.

134 International Criminal Court, above n 133.

135 Wolf, above n 88, at 11.

136 Wolf, above n 51, at 152.

137 At 152.

138 See, for example, Goldsmith, above n 131, at 90–94 for the role of the United States in weakening the International Criminal Court.

139 W Michael Reisman "Sovereignty and human rights in contemporary international law" Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000) 239 at 256.

140 These could include travel bans, limiting their use of banking services and confiscating property in the jurisdiction of member States: Igbinedion, above n 54, at 77.

outside their home countries would assist. A greater problem underlying the practical challenges of creating an international accountability mechanism, however, is generating enough political will to implement these ideas.

Political Will

Implementing the IACC as proposed in this article requires the generation of political will by the bucketful. In practical terms, it entails governments voluntarily agreeing to have their actions scrutinised by an independent international court. This subpart suggests that the challenges modern democracies face will lead to decision-makers reassessing their calculations of self-interest in favour of reducing democratic corruption. This ideological shift will help build momentum for an enduring international solution to the accountability deficit identified in this article.

1 Challenging Times for Democracy

Democracy's posterchild, the United States, has become synonymous with political gridlock.[141] The United Kingdom, meanwhile, is faring no better.[142] Dissatisfaction with how democracy is working is widespread across Europe,[143] while authoritarian China is heading in the right direction, according to its population.[144] In democracies, there is a pervasive concern that politicians lie and take little account of the interests of those they represent.[145] This concern is more than theoretical. The real and tangible consequences of inaction on climate change, increasing income inequality, inequitable distribution of the gains from artificial intelligence and the mass displacement of people from conflict zones are some of the major problems that threaten an unravelling of the global oligarchy of the political and economic elite. To prevent a complete collapse of the system, those who have so far benefitted from it must make some concessions.

2 Why Join an IACC?

International relations are governed by self-interest calculations. So far, these calculations have not favoured establishing an independent international monitoring device to ensure minimum standards of democracy are maintained, regardless of the composition of the government of the day. However, dissatisfaction with establishment politics is rife.[146] Provided the IACC presents as a legitimate way of achieving accountability, pressure to

141 "What's gone wrong with democracy" *The Economist* (online ed, London, 27 February 2014).
142 Richard Wike, Laura Silver and Alexandra Castillo *Many Across the Globe Are Dissatisfied With How Democracy Is Working* (Pew Research Centre, April 2019) at 15.
143 At 15.
144 Ipsos Public Affairs *What Worries the World: May 2018* (10 June 2018) at 3.
145 Wike, Silver and Castillo, above n 142, at 27–29.
146 At 5 and 36.

join will be felt in the polls and on the streets.[147] To maintain their positions of power, the elite will have to submit to the IACC's jurisdiction.

The motivation to join, however, need not be so pessimistic and self-serving. Leaders who want to change a culture of corruption often struggle with changing the ingrained expectations of society.[148] Joining the IACC would be an emphatic signal of a commitment to democracy and anti-corruption reform. It would also ensure successive governments are bound to international standards and that progress is not eroded. Moreover, support for an IACC will allow voters to differentiate between those who truly intend to lead with integrity and those who decry corruption solely to harness public frustration for personal political gain.[149]

Corruption is also a serious impediment to ambitious economic agendas.[150] While democratic integrity may not be a high priority for all, concern over economic growth often is. This is why Xi Jinping and Vladimir Putin, two heads of state least concerned with being accountable to the people, are vigorous advocates of anti-corruption reform.[151] If eradicating corruption is a concern as grave as they claim it to be, China and Russia ought to be the first to push for the establishment of an IACC.

Such a scenario may well be political fiction. Nevertheless, the underlying logic holds: high-level officials cannot claim to be serious about anti-corruption reform if they are not willing to hold themselves to the standards they expect to apply to others. The relevance of this logic to China and Russia is humorous at best. However, its relevance to established democracies, such as the United States, France and Australia, which regularly proclaim their commitment to democratic principles of accountability, transparency and integrity, is high. An IACC would represent a credible way to test the commitment of those in power to these fundamental principles.

Sovereignty

The final obstacle standing in the way of an IACC is concern over State sovereignty. This subpart will first describe the role of consent and the principle of complementarity in allowing an IACC to exist alongside sovereign States. It will also argue that sovereignty is an evolving concept that no longer possesses an absolute quality. This subpart further proposes some fundamental changes that, in a normative sense, should be made to the conceptual underpinnings of international law.

147 Declan Walsh and Max Fisher "From Chile to Lebanon, Protests Flare Over Wallet Issues" *The New York Times* (online ed, New York, 23 October 2019).

148 Anna Persson, Bo Rothstein and Jan Teorell *The failure of Anti-Corruption Policies: A Theoretical Mischaracterization of the Problem* (The Quality of Government Institute, June 2010) at 19–20.

149 For example, Donald Trump's election rested in large part on his promise to eradicate corruption. While in office, he has presided over a dramatic downturn in democratic norms and has himself been implicated in a number of corruption scandals. See Mark Schmitt "Why Has Trump's Exceptional Corruption Gone Unchecked?" *The New York Times* (online ed, New York, 2 September 2019).

150 Susan Rose-Ackerman *Corruption and Government: Causes, Consequences, and Reform* (2nd ed, Cambridge University Press, New York, 1999) at 49.

151 Ivan Krastev "Why Putin Tolerates Corruption" *The New York Times* (online ed, New York, 15 May 2016).

1 An IACC Would Not Represent a Radical Departure from State Sovereignty

First and foremost, a country would only be subject to the IACC's jurisdiction if it consented. The above analysis has described ways of encouraging consent but has stopped well short of advocating for coercion. Without consent and the requisite political will, even the successful operation of an IACC would easily be dismissed as illegitimate outside meddling.[152] Such a result would not effect change and may instead be counterproductive.

Secondly, the IACC would operate under the principle of complementarity.[153] This means the IACC would neither seek to replace domestic courts nor act as a court of final appeal. Rather, it would investigate cases that domestic authorities are unable or unwilling to address.[154] The ultimate aim of an IACC would be to make itself redundant by incentivising States to themselves prosecute grand corruption to prevent the spectacle of being hauled into an international court.[155]

Thirdly, the establishment of an IACC is an intrusion on the principle of sovereignty no more significant, or only incrementally so, than that of the ICC, the European Union,[156] international law generally,[157] or even the conditions attached to World Bank loans.[158] Therefore, the argument that an IACC would unacceptably infringe upon national sovereignty can be practically defeated. A normative argument in favour of an IACC involves reconceptualising the role of international law and its relationship with individuals.

2 Rethinking the Role of International Law

Since the establishment of the United Nations, the goal of the international community has been peace among nations.[159] As long as peace is not threatened, the use of sovereignty as a "protective shield" to abuse power without consequence has largely been allowed.[160] This dynamic supposes a conception of sovereignty as something that can be transferred and alienated to the government of the day. This is incorrect. Sovereignty belongs to the people.[161] Wielding "the authority of government against the wishes of the

152 Rose-Ackerman, above n 21, at 482.
153 Wolf, above n 88, at 10.
154 Darling, above n 95, at 437.
155 Wolf, above n 88, at 12.
156 Joshua Rozenberg "Does the EU impact on UK sovereignty?" (23 February 2016) BBC <www.bbc.com>. For example, regulations made by the European Parliament are binding on member states without the need for individual legislatures to implement them.
157 Stanford Encyclopedia of Philosophy *Sovereignty* <www.plato.stanford.edu>.
158 See generally Ngaire Woods *The Globalizers: The IMF, the World Bank, and Their Borrowers* (Cornell University Press, New York, 2006).
159 Charter of the United Nations, preamble.
160 Ndiva Kofele-Kale *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (2nd ed, Ashgate Publishing, Farnham, 2006) at 219–221.
161 Reisman, above n 139, at 240 and 252.

people" is as much a violation of sovereignty as an invasion by an outside force.[162] By ensuring the primacy of the wishes of the people, an IACC would reinforce popular sovereignty, rather than infringe upon it.

Further support for this view of the IACC's function is found in Starr's interpretation of the United Nation's stated aim of maintenance of "security".[163] Starr argues that security has traditionally been confined to needing protection only in "crisis" situations.[164] Instead, security would be better understood as encompassing systemic causes of human suffering, such as grand corruption. The *way* a State is run is the domain of international law because the democratic entitlement is not a passive set of theoretical ideals, but a standard of "quality control".[165]

Support for reinforcing domestic popular sovereignty through the channels of international law already exists in the textual underpinnings of human rights law and the foundational documents of the United Nations. But in practice, it has proved elusive. The international community's inertia in taking decisive steps to truly ensure that "the will of the people [is] the basis of the authority of government" is intolerable.[166] What is required now is a purposive interpretation of the role of international law.

V CONCLUSION

The ancient concern of guarding the guardians is pertinent to modern democracies. There are myriad ways private wealth can influence the political process. This article has shown that existing international anti-corruption norms have been ineffective in safeguarding democracy against that influence. Domestic counterparts have fared similarly. An effective solution is desperately needed, and an IACC is one robust and potent possibility. The Court would hold corrupt actors criminally responsible, make the entire enterprise of corruption unattractive by disgorging these actors of their illicit profits and critically challenge the way legal frameworks facilitate the influence of private wealth on the political process. These are worthy aims.

Unfortunately, the worthiness of these pursuits is not the only consideration that will be taken into account should this proposal be heeded. Personal interests of influential decision-makers, the self-interest of nations as conceived of by the same decision-makers, relations between States and the power dynamics that follow are all bound to play a role as influential as that of consideration of the public good. At the time of writing, these considerations seem insurmountable. The nations expected to lead on issues

162 At 243.
163 Starr, above n 60, at 1262.
164 At 1263.
165 James Crawford "Democracy and the body of international law" in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000) 91 at 98.
166 *UDHR*, art 21(3).

of democracy and legitimacy of government are occupied by isolationist conquests, while the influence of authoritarian governments, and in turn of the ideology they espouse, grows. Democracy's public image is not the best it has been.

A change is needed to give meaning to what democracy actually is: government accountable to the people. While there are concerns to be cognisant of, on balance, the IACC will act as a real check on the virtually unlimited power accorded to those who, at least in name, represent us. Political realities may seem overwhelming, in which case regional alternatives should be explored, which could gradually, and by invitation, extend their scope. Potential misuse of the IACC should also be considered and guarded against.

The quest to get decision-makers to establish a check on themselves will not be easy. Nevertheless, this author believes that exploring new ways of safeguarding a fundamental and consequential human right is a worthwhile exercise, if only to imagine the possibilities. The proposal of an IACC, it is hoped, encourages critical questioning of long-established practices. Why are these practices accepted? What are the alternatives? And most importantly, are they achieving what they should be? Progress depends on further research and discussion with wider audiences. Concerns about how well democracy is functioning at a level deeper than day-to-day politics should not just be the domain of academia. Everyone must engage in this conversation because, in the words of Professor Franck, "[t]he natural right of all people to liberty and democracy is too precious, and too vulnerable, to be entrusted entirely to those who govern."[167] We must all play a role in ensuring our voice is given the weight it ought to be given.

167 Franck, above n 35, at 82.