ARTICLES

Refocusing International Law on the Quest for Accountability in Africa: The Case Against the "Other" Impunity

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Abstract. This article argues that the harrowing consequences of official corruption for African societies elevate corruption to the level of a breach of the social and economic rights recognized in international human rights law. Yet, unlike in the case of violation of civil and political rights, the principle of non-intervention in the internal affairs of sovereign states seems to provide a convenient excuse for the inaction of the international community in the face of egregious violation of social and economic rights. This inaction, the article argues, is part of the reason why corrupt public officials in Africa perpetrate graft and openly accumulate illicit gains at home and abroad without fear of punishment. The article, therefore, suggests two things: elevation of corruption to the status of a crime in positive international law, and expansion of the jurisdiction of the International Criminal Court to include official corruption and looting of public funds.

1. INTRODUCTION

A few decades ago, at the Tokyo and Nuremberg trials of war criminals, the international community established its unequivocal stand against impunity.[1] In the aftermath of two of the world's greatest human tragedies, World War II and the Holocaust, perpetrators of genocide and other horrendous crimes against humanity were prohibited by the collective force of civilization from roaming the face of the earth as free persons. This development was rightly hailed as "a manifestation of an intellectual and moral revolution which will have a profound and far-reaching influence

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1. *See* G.A. Finch, *The Nuremberg Trial in International Law*, 41 AJIL 20 (1947); and G. Schwarzenberger, *The Judgment of Nuremberg*, 21 Tul. L. Rev. 329 (1947).

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upon the future of world society […].”[2] More recently, the international community achieved significant successes in the bid to keep the spirit of that revolution alive. First was the establishment of the International Criminal Tribunals for former Yugoslavia and for Rwanda respectively. These Tribunals have since begun to drive home the point that no atrocity against humanity would go unpunished. Then the establishment of the International Criminal Court (‘ICC’) followed, the Court’s enabling statute having come into force on 1 July 2002.[3] This is, indeed, the golden age of human rights. Not only have institutions sprung up at the international level to punish egregious breaches of civil and political rights, but it is obvious that violators of these rights are running out of sanctuaries. Clearly, a new understanding of sovereignty has emerged, in which the protection of the rights of human beings takes precedence over respect for the rights of states.[4]

Regrettably, however, this progress is uneven and fundamentally inadequate. Whereas the disapproval of breach of civil and political rights is virtually universal, breach of social and economic rights is yet to receive the unanimous condemnation of humankind. This unequal treatment of human rights has created the unfortunate impression that violators of social and economic rights can do so with impunity. There are many examples of international interventions to dislodge regimes that have been adjudged guilty of oppression and repression, but, although expressions of sympathy for the plight of the poor is not in short supply in the international community, no single instance of such intervention to liberate a country from poverty or economic despoliation comes to mind. Poor people seem to have been left to their own devices in these matters, even though it is clear that, in a great number of cases, poverty is a function, not entirely of scarcity of resources, but of mismanagement and looting of resources by public officials. There is, for example, a consensus among development experts that, granted proper management, some countries in Africa, such as Nigeria and Zaire, given the abundance of their human and natural resources, ought not to be counted among the poor. Yet these countries are today some of the poorest in the world; they are heavily indebted and riddled with every imaginable social problem.

Billions of dollars have been looted by African leaders from public coffers and stashed away in offshore banks, while several billions more in natural resources have been mismanaged, resulting in massive poverty, hunger, disease, illiteracy, and social turmoil on the continent. The colossal theft of public funds in Africa is unique in the way that the thieves get

2. J.B. Keenan & B.F. Brown, Crimes Against International Law v (1950), quoted *in* M.C. Bassiouni, Crimes Against Humanity in International Law 117 (Boston: Kluwer Law International, 1999).
3. *See* Human Rights Watch, *International Criminal Court*, http://www.hrw.org/campaigns/icc/.
4. *See*, *e.g.*, W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866 (1990); and L.B. Sohn, *The New International Law: Protection of the Rights of Individuals rather than States*, 32 Am. U. L. R. 1 (1982).

away without punishment. Indeed, most of the people known to have looted public treasuries in Africa have remained, and are enjoying their loot, in the countries which they have so ruthlessly stripped bare. In many cases, these same people who, while holding public office have shown such a lack of integrity, are now playing clandestine, but effective, roles in the politics of their countries, corrupting the political process with the funds which they have illegally amassed.[5] Ibrahim Babangida of Nigeria, Mathieu Kerekou of Benin, Hastings Kamuzu Banda of Malawi, and Gnassingbe Eyadema of Togo are examples of this outright challenge to the concept of accountability in governance. By contrast, Ferdinand Marcos of the Philippines, Fernando Collor de Mello of Brazil, and Alberto Fujimori of Peru, all fled their countries and took refuge abroad after their governments collapsed under the weight of corruption in which they were leading perpetrators.[6] Corrupt African leaders and public officials are, thus, turning Africa into impunity's last stand.

If the ultimate goal of the modern idea of sovereignty is to deepen human freedom and security, then it ought to be understood that poverty is as much a threat to human freedom and security as the menace of politically oppressive regimes. That goal would remain elusive as long as corrupt leaders are allowed the freedom to loot national treasuries and impoverish entire nations comprising hundreds of millions, indeed billions, of people without the slightest fear of punishment.

This article argues for an international system of justice that would make looters of public funds in Africa accountable for their crimes. It investigates the following questions: Why does political corruption in Africa amount to breach of social and economic rights? Why do the looters of public treasuries in Africa enjoy so much impunity for violating the social and economic rights of their citizens? Is this impunity justifiable in international law? How may the resources of international law be marshaled to put an end to this form of impunity? Illustrations will be drawn mostly from Africa, but also from other parts of the Third World, to explicate the issues. The argument is developed in four sections. Section 2 describes the nature and consequences of the problem of political corruption in Africa today. Section 3 discusses the legal and political roots of impunity, the current state of domestic and international law relating to corruption, and the inadequacy of the regimes. Section 4 discusses international strategies and possibilities for combating and ultimately stopping the looting of public treasuries in Africa. Section 5 summarizes the main arguments

5. *See*, *e.g.*, the declaration by the former Nigerian dictator, Ibrahim Babangida, that he might consider participating in partisan politics: 2003: *I'm Waiting for Allah's Directive, says IBB*, ThisDay News (Nigeria), 19 August 2002. *See also Drop Atiku or Else … IBB*, 36(3) Newswatch (Nigeria), 22 July 2002.
6. *See*, *e.g.*, *The Collor Charm*, at http://www.brazzil.com/cvrmar97.htm; and *Fujimori 'Linked to Corruption'*, BBC News, 25 April 2001, at http://news.bbc.co.uk/hi/english/world/americas/newsid_1297000/1297222.stm.

of the article and concludes by drawing attention to the need for international law to become solicitous, not only of the needs of its founding fathers, but also of those of other members of the international community.

2. Political Corruption in Africa: Its Nature and Consequences

Political corruption is a global phenomenon: no country – developed, developing or Third World – is immune from it.[7] But the nature, extent and effects of political corruption vary from country to country. Studies have shown that political corruption is relatively more virulent in countries which lack transparent governance structures or which are governed by authoritarian regimes.[8] In such a context, the institutional checks on abuse or misuse of power by persons who occupy public offices are necessarily weak. Until recently, many countries in Africa were ruled by authoritarian one-party governments or military dictatorships. In spite of the political liberalization of the past decade which has seen many of these countries hold multi-party elections and establish the formal institutional structures of representative democracy,[9] the legacies of authoritarianism die hard; in most of these countries, democracy exists still in a paradoxical relationship with lack of transparency and accountability in the conduct of public affairs.[10] This in itself is no surprise, given the nature of the African state. Lacking internal sources of authority, the African state

7. *See*, *e.g.*, M. Woollacott, *Corruption As A Way of Life: The Rot of Scandal Has Become so Pervasive, All Political Systems are Weakened*, The Toronto Star, 17 March 1993; *see also* 2(13) Corruption List (25 March 2002), at http://www.corruptionlist.com/archive; and *The End of Swag?*, Newsweek International (Atlantic Edition), 1 July 2002; M. Clarke, (Ed.), Corruption – Causes, Consequences and Control (New York: St. Martin's Press, 1983); R. Wraith & E. Simpkins, Corruption in Developing Countries (London: Allen and Unwin, 1963); and R.J. Williams, *Political Corruption in the United States*, XXIX(1) Political Studies 17 (1981).
8. *See* United Nations Development Programme, Reconceptualising Governance, Discussion Paper 2 (New York: Management Development and Governance Division, UNDP, 1997); United Nations Development Programme, Governance for Sustainable Human Development (New York: Management Development and Governance Division, 1997); S. Rose-Ackerman, Corruption and Government – Causes, Consequences, and Reform (New York: Cambridge University Press, 1999); R. Williams, Political Corruption in Africa (Aldershot: Gower Publishing Co. Ltd., 1991); and S.J. Kpundeh, Politics and Corruption in Africa – A Case Study of Sierra Leone (Lanham, MD: University Press of America, 1995).
9. *See* S.P. Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman: University of Oklahoma Press, 1991); and L. Diamond & M.F. Plattner (Eds.), The Global Resurgence of Democracy (Baltimore: The Johns Hopkins University Press, 1993).
10. *See*, *e.g.*, J.O. Ihonvbere, *Where is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy*, 43 Africa Today 343 (1996).

for the most part exists only in the juridical sense.[11] As such, it might be too early to expect that the paraphernalia of democracy would function in these states in the same way that they do in the much older and established democracies. Nevertheless, even by the most primitive standards, the nature and extent of political corruption in Africa defy easy comprehension or comparison.

2.1. The character of the "new" corruption: some recent examples

In a very important work published not long ago, Ndiva Kofele-Kale[12] identified the distinguishing features of the new form of political corruption in the Third World. One characteristic of the phenomenon is that it involves huge amounts of money. Sani Abacha,[13] the dictator who ruled Nigeria for only five years (1993–1998), stole an estimated five billion dollars of public funds. General Babangida, who ruled the country before Abacha, is suspected to have stolen even more; under Babangida, who was virtually forced out of government in 1993 after he cancelled the results of democratic elections, $3 billion of the $5 billion realized from the sale of crude oil during the Gulf War disappeared without trace. Although the special accounts which Babangida set up in the Central Bank ostensibly for special projects held over $12 billion, only slightly over $200 million remained in the accounts in 1991. The disappearance of this colossal amount of public funds has till date not been explained to Nigerians.[14] Similarly, in 1999, $10 billion was reported missing from state coffers in Kenya under Daniel Arap Moi, ruler of Kenya since 1978.[15] Before then, Moi was estimated to be worth over $3 billion in illegally accumulated wealth.[16] Mobutu Sese Seko, erstwhile maximum ruler of Zaire, is estimated to have amassed about $8 billion in foreign banks and substantial

11. *See*, *e.g.*, R.H. Jackson & C. Rosberg, *Why Africa's Weak States Persist: The Empirical and Juridical in Statehood*, 35(1) World Politics 1 (1982). Writers use a variety of epithets to describe the various manifestations of the African state's weakness: "weak," "soft," "shadow," "leviathan," "vampire," etc. *See*, *e.g.*, R. Sandbrook, *Taming the African Leviathan*, 7(4) World Policy Journal 673 (Fall, 1990); and J. Frimpong-Ansah, The Vampire State in Africa (Trenton, NJ: Africa World Press, 1991).
12. N. Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 Vand. J. Transnat'l L. 45 (1995).
13. *See* C. Duodu, *How the Grand Lootocracy Beggared Nigeria's People*, The Observer (UK), 22 November 1998; *Nigeria Alleges Huge Abacha Fraud*, BBC, 3 December 1998; *$4 Billion Missing: Abacha Aide Held*, Reuters, 8 June 1998.
14. *See*, *e.g.*, Report of the Panel on the Reorganisation of the Central Bank, the Okigbo Report, named after the chairman of the panel, the late Dr. Pius Okigbo, (Lagos: Federal Government Press, 1995); Financial Times (London, UK), 25 and 27 June 1991; and Newswatch magazine (Lagos, Nigeria), 16 January 1995, at 9–14.
15. *Kenya Loses $10 bn Public Money*, BBC News, Wednesday, 6 October 1999, http://news.bbc.co.uk/hi/english/world/africa/newsid_466000/466859.stm.
16. *See* G.B.N. Ayittey, Africa Betrayed 244 (New York: St. Martin's Press, 1992).

real estate in Europe.[17] Other examples of looters of public funds include the following: Moussa Traore, former president of Mali,[18] who has a personal fortune of $2 billion; the late Felix Houphouet-Boigny of Côte d'Ivoire,[19] who held about 6 billion pounds sterling, Gnassingbe Eyadema of Togo,[20] who stashed away over $2.8 billion, and Nicholas Biwott, Kenya's erstwhile energy minister, who is reported to be "worth hundreds of millions of dollars, chiefly in offshore holdings."[21] In other parts of the Third World, poor comparisons to Africa's kleptocrats can only perhaps be found in General Marcos of the Philippines, the Duvaliers of Haiti, and General Suharto of Indonesia.

A second characteristic is that the theft of public funds and pillage of the economy are a carefully planned and meticulously executed enterprise. The Zairean economy was turned virtually into Mobutu's personal fiefdom.[22] He is said to have established an elaborate network of rent-seeking and extraction with himself occupying the apex of the system. Mobutu drew no distinction whatsoever between public funds and his personal property. The situation was no different in Nigeria. The Nigerian army generals perfected a system of graft and direct theft of public funds to support not only an extremely ostentatious lifestyle within the country, but fat accounts in offshore banks. For example, General Babangida set up special accounts in the Central Bank of Nigeria during the Gulf War, into which the vast surpluses from the sale of crude oil were deposited. He is believed to have eventually diverted a large part of the contents of these accounts into his and the private accounts of his cronies abroad. In a similar vein, General Abacha was able to divert billions of dollars due to Nigeria from a phony debt equity swap which he arranged with certain overseas discount houses.

Finally, a "great mobility of wealth and the capacity to hide and disguise it"[23] characterizes the new form of corruption. The proceeds of corruption are extracted from the indigenous economy and laundered through offshore banks. In the transfer of these funds from the continent, many

17. *Id.*, at 254; *see also* H. Kriz, *When He was King: On the Trail of Marshal Mobutu Sese Seko, Zaire's Former Kleptocrat-in-Chief*, http://www.metroactive.com/papers/metro/05.22.97/cover/mobutu-9721.htm.
18. Ayittey, *supra* note 16, at 236.
19. *See* Guardian Weekly (London, UK), 17 June 1990; and La Croix (Paris, France), 13 March 1990.
20. New African (London, UK), October 1991.
21. The New York Times, 21 October 1991, at A9. *See also* Financial Times, 27 November 1991, at 4.
22. *See* Ayittey, *supra* note 16, at 253–262. *See also* West Africa, 30 November 1981, at 2881; West Africa, 7–13 May 1990; The Washington Post, 3 October 1991; World Development Forum, No. 9, 3 (1988); W. Reno, Warlord Politics and African States (Boulder, Colorado: Lynne Rienner Publishers, 1998); K.N.F. Emizet, Zaire after Mobutu: A Case of a Humanitarian Emergency (Helsinki, Finland: UNU World Institute for Development Economics Research, 1997).
23. Proceedings of the 81st Annual Meeting of the American Society of International Law, at 395 (1987).

legitimate agencies of government, such as central banks and ministries of finance, have been used to camouflage illicit dealings. This, in turn, made it easier for conniving offshore banks to break bank due diligence rules where such existed. In other cases, legitimate processes were deliberately corrupted. In Nigeria, both Sani Abacha and Ibrahim Babangida interfered with the running of the Central Bank during their rule. In Zaire, Mobutu regularly used the Central Bank to transfer public funds directly into his personal bank accounts abroad.

Given the extent to which African leaders employed the resources of state to perpetrate theft of public funds, it is accurate to speak of abuse of their powers. It is this element of abuse of state power[24] that distinguishes the form of theft under consideration from other varieties, which may be committed by stealth, sleight of hand or use of naked force, by persons who act under no colour of state power or authority.

Many countries have gone to great expense in an effort to repatriate funds stolen and banked abroad by fallen dictators, but so far with only limited success.[25] The location of the stupendous wealth which Mobutu amassed during almost three decades of plundering Zaire is still largely a mystery.[26] The mansions, palaces, beach resorts and vineyards in

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24. All commentators on the issue of political corruption in Africa agree that the looting of public treasuries in the Third World is not garden-variety or run-of-the-mill theft. N. Kofele-Kale refers to it as "patrimonicide," coined from joining two latin words – "patrimonium" (estate or property belonging to an institution, corporation, or class, by ancient right) and "cide" (killing). He argues that such concepts as "embezzlement," "misappropriation," "corruption," and "graft" are inadequate to convey the seriousness of an organized and systematic theft of resources that literally bankrupts states, arrest their development, and condemn their people to a life of poverty and misery: *see* Kofele-Kale, *supra* note 12, at 57–58. Michael Reisman calls it "indigenous spoliation": *see* W.M. Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AJIL 56 (1989). Usually, the acts of plunder and pillage, such as are being currently perpetrated by leaders and public officials in the Third World, are committed by the occupying forces of an enemy. But the type of spoliation under review is different because it is carried out, not by invading aliens, but by people indigenous to the victim states. It is instructive, in this connection, that Mobutu Sese Seko's official title was "Marshal Mobutu Sese Seko Kuku Mgbedu Waza Banga", which, roughly translated reads: "The all-powerful warrior who, because of his endurance and inflexible will to win, will go from conquest to conquest leaving fire in his wake": *see* Kriz, *supra* note 17, at p. 7. In trying to understand the rapacious despoliation of the Nigerian economy by the military dictators of Nigeria, Nigerians came to the painful realization that the soldiers actually regarded the country as conquered territory, which they proceeded to loot without compunction.
25. *See Dictators/Politicians & Scoundrels*, at http://marcosbillions.com/marcos/dictators.htm.
26. *Id.*, at 1:

> One of the most horrific cases of looting is the former dictator of Zaire, Mobutu Sese Seko, who created a 'kleptocracy' during his 32 year old [*sic*] rule. The Swiss authorities froze Mobutu's assets after his fall from power. […] [B]ut the Swiss banks found a mere $3.4 million in assets, far short of the billions of dollars various independent observers claim he had. It is estimated that the Mobutu regime collected $8.5 billion from 1970 to 1990 and that the Mobutu fortune was at its height $4–7 billion. Why the discrepancy?

Switzerland, Belgium, Spain, Portugal, and France, are common knowledge, but all accounts indicate that the Swiss accounts were emptied soon after Mobutu's death. Nigeria, under the leadership of Olusegun Obasanjo, managed to locate in foreign banks only a minute part of the money stolen by the Abacha family;[27] but even then, the exigencies and unpredictability of legal vindication, as well as economic considerations in the context of escalating lawyers' bills, have compelled a compromise arrangement under which the Nigerian Government has agreed to forfeit about $100 million of located loot to Abacha's family in exchange for repatriation of about a billion dollars.[28]

To these three characteristics one might add one other phenomenon: family members of African leaders are now commonly involved in the looting of public treasuries. Wives and children of these leaders do not only sometimes directly access public treasuries, but their epicurean lifestyles have cost African countries millions of dollars of unbudgetted expenses. Some "First Ladies" in Africa are known to have landed properties and businesses worth millions of dollars, as well as fat accounts in foreign banks. In Nigeria, Sani Abacha's son, Mohammed, has been implicated in some of his father's looting schemes.[29] Mohammed personally utilized a great deal of state power for private gain, even though he held

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This website also contains a gruelling account of the fight to recover the assets of the Marcoses by the Philippines Government. So far, nothing has been recovered. Both Mobutu and Marcos died in exile in 1997 and 1989 respectively: *see Mobutu Dies in Exile in Morocco*, 7 September 1997, at http:/www.cnn.com/world/9709/07/mobutu.wrap; and *Ferdinand Marcos, Ousted Leader of Philippines, Dies at 72 in Exile*, The New York Times, 29 September 1989, at http://www. nytimes.comlearning/general/onthisday/bday/0911/htm.

27. *See Switzerland to Give Nigeria Dlrs 535 Million Linked to Late Dictator*, Associated Press, Wednesday, 17 April 2002. Earlier on Switzerland had returned $70 million to Nigeria. The funds in British banks are still mired in legal tussle between the Nigerian Government and the Abacha family; *see British Govt Gets Go-Ahead to Probe Abacha Loot*, Vanguard (Lagos, Nigeria), 19 October 2001; and *British Court Orders Freezing of Abacha Accounts*, Vanguard (Lagos, Nigeria), 4 October 2001.

28. *See Abachas to Return $1 bn in Funds to Nigeria*, Financial Times, 17 April 2002; *Nigeria to Get $1 Billion in Out-of-Court Deal*, Reuters, 17 April 2002; and *Nigeria to Recover $1 Billion from the Family of a Late Dictator*, The New York Times, 18 April 2002. *See also Obasanjo: "My Deal with the Abachas"*, Tell magazine (Lagos, Nigeria), 17 May 2002. Explaining his decision to make a deal with the Abachas, President Obasanjo said:

> Our lawyers have been on this job (of trying to recover the money stolen by the Abachas) for well over two years. […] [T]hat case in London (UK), for instance, cost us to maintain our lawyer a little bit over $1 million. The Abacha family lawyer was paid over $12 million. They were able to pay that because it is not their money. It's your money and my money. But what the lawyer wanted on their side was to go on endlessly and they can do that almost for ever.

He referred to the deal as "the hardest decision of my life."

29. *See Son of Late Nigerian Ruler Charged with Corruption*, Agence France-Presse, 26 September 2000. A close parallel to this was the conviction of Suharto's son, "Tommy" Putra Suharto, for graft and an 18-month jail sentence. Putra is currently standing trial for masterminding the assassination of the judge, Syafiuddin Kartasasmita, who convicted and imposed the jail sentence on him: *see Ex-President Suharto's Son on Trial*, United Press International, 20 March 2002.

no public position, including, evidence has shown, involvement in trading with the central bank's reserve of US dollars on the parallel foreign exchange market. He confessed to moving over $700 million through various banks in Europe and the US. Mohammed's elder brother, Ibrahim, was reportedly on his way from Lagos to attend a party in Kano in the company of his friends, in an aircraft belonging to the Nigerian Government when he lost his life in a plane crash in 1996. Similarly, Mobutu's son, Niwa,[30] was implicated in the network of corruption over which his father presided.

2.2. Effects of political corruption on African economies and societies

Corruption exacts a heavy toll on the economies of African states, and the evidence abounds. In the decades since 1960 when most African countries won their political independence, it has been estimated that over $140 billion has been lost to this form of corruption.[31] This is probably a very conservative estimate; Nigerian nationals alone are reported to have over $98 billion in overseas bank accounts.[32] Obviously, some of this amount may have been legitimately earned, but it gives an indication of the size of funds which Nigerians have taken out of the economy. To put this in perspective, consider that Nigeria's international debt is about $30 billion;[33] that the amount of foreign investment needed annually for the next couple of years to put all African countries on the path of economic growth and prosperity under the New Partnership for African Development ('NEPAD') is $64 billion;[34] and that the United Nations[35] estimated recently that it would cost less than $15 billion annually to achieve basic health and nutri-

30. *See* Ayittey, *supra* note 16, at 255.
31. President Olusegun Obasanjo gave this estimate recently: *Africa Looted for $140 bn, Leader says*, BBC News, Thursday, 13 June 2002, at http://www.news.bbc.co.uk/go/em/fr/-/hi/english/business/newsid_2043000/2043403.stm.
32. *See* testimony by Mobolaji E. Aluko before the US Congressional Subcommittee on Domestic and International Monetary Policy, Committee on Banking and Financial Services, 25 May 2000, entitled *Debt Relief, Loot Recovery and Constitutional Reform in Nigeria*, at http://www.africaaction.org/docs00/nig0006.htm.
33. *See* United Nations Development Programme, Nigeria-specific Human Development Report, 2000/2001 (New York: Oxford University Press, 2002). The Report puts the debt at 1.20 trillion naira, which translates roughly to about $30 billion.
34. The NEPAD document was adopted at Abuja, Nigeria, by African leaders on 23 October 2001. Under "Mobilizing Resources – The Capital Flows Initiative" (at 36), the document states:

> To achieve the estimated 7 per cent annual growth rate needed to meet the IDGs (International Development Goals) – particularly, the goal of reducing by half the proportion of Africans living in poverty by the year 2015 – Africa needs to fill an annual resource gap of 12 per cent of its GDP, or US $64 billion.

(Document is on file with author).
35. *See* United Nations Development Programme, Human Development Report 1997, 102 (New York: Oxford University Press, 1997).

tion for all worldwide; that the annual cost of achieving universal access to safe water and sanitation in all developing countries was about $8 billion; and that the annual amount required to assure basic education worldwide was about $5.5 billion.

In the sixties and early seventies, African economies grew at a healthy rate, and the fight against poverty seemed to engage the attention of governments. But for the past two decades, as a direct consequence of a heightened crisis of legitimacy,[36] governments in Africa have been largely engaged, not with the sundry social and economic issues which trouble and torment their citizens, but with the struggle to maintain a mere presence in the territories over which they claim authority; that struggle has hardly left them the latitude to fulfil even the most basic needs of their citizens.[37] One dimension of the crisis is the pervasiveness of corruption. Until recently, political corruption enjoyed free rein in virtually every corner of the continent, while public treasuries were plundered at will by leaders whose preoccupation in government was anything but the public good.[38] In consequence, Africans today wallow in the most abject forms of poverty and human insecurity.

Of the 48 countries identified by the United Nations as the Least Developed Countries, 34 are in Africa. To put the extent of poverty on the continent in clearer perspective, let us look at some figures about Nigeria, Africa's potentially richest country. Official statistics produced by the Nigerian Government indicate that standard of living among a majority of this country of over 120 million people, is probably the lowest in Africa. In the sixteen-year period beginning from 1980, the number of Nigerians living in poverty, *i.e.* on less than US$1.40 a day, rose from 28% to 66%. Numerically, while 17.7 million people lived in poverty in 1980, the number rose to 67.1 million in 1996. A Situation Assessment Analysis published by Nigeria's National Planning Commission and the UN Children's Fund ('UNICEF') confirmed the obvious:

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36. *See* D. Rothchild & N. Chazan (Eds.), The Precarious Balance: State and Society in Africa (Boulder: Westview Press, 1988); and J.W. Harbeson, *et al.* (Eds.), Civil Society and the State in Africa (Boulder: Lynne Rienner Publishers, 1994).
37. *See*, *generally*, C. Ake, Democracy and Development in Africa (Washington, DC: The Brookings Institution, 1996); S. Handelman, *'Let Down by Their Leaders' – Africa's Shame Exposed by One of the World's Most Influential Africans*, The Toronto Star, 22 April 1998.
38. The conclusion that the situation has abated somewhat is challenged by reports of corruption even in those states that have institutionalized anti-corruption measures and policies. On 3 March 2002, Agence France-Presse reported that Zimbabwean President, Robert Mugabe, sent more than 10 million pounds through Channel Island banks to Malaysia in the previous three months. Mugabe has not denied this report. Nevertheless, it seems that the brazen kleptomania of former dictators, such as Mobutu and Abacha, would be difficult to re-enact in the current democratizing dispensation given the freer atmosphere for criticism, investigation, interrogation, protests, and exposure by ordinary citizens and non-governmental organizations.

> Despite its oil wealth, Nigeria has performed worse, in terms of basic social indicators, than Sub-Saharan Africa as a whole and much worse than other regions of the developing world, such as Asia and Latin America.[39]

This is the state of the human condition in Nigeria, a country that earned an estimated US$320 billion from the export of crude oil between 1970 and 1999. The Assessment identified corruption as the major cause of so much poverty in the midst of plenty:

> At the heart of the problem has been a crisis of governance and public management, which has its roots in the competition among rival elites and their ethno-regional constituencies for control of the huge rents that accrue to the state from the operations of the petroleum industry.

The pervasiveness of corruption in Africa, the lack of transparency in public life, the mismanagement and privatization of public resources – all of these have negatively affected economic growth all over the continent and scared off foreign investors.[40] Social deterioration has followed closely on the heels of economic decline. As the woes multiply and most African states lose their at the best of times tenuous authority on their territories, civil wars and ethnic disharmony have become routine in many parts of the continent. Security of life and property, basic responsibility of any state worth its name, has become an insurmountable challenge for African states.

When money of the magnitude described here is siphoned from the economy of capital-poor countries, economic and social devastation is the natural consequence. Resources which could have been invested in social amenities such as hospitals, schools, housing projects, water supplies, etc. are, instead, accumulated abroad for the private use of the plunderers. Central banks, state and private enterprises and governments have turned to international lenders for loans following the draining of domestic resources by corrupt leaders and officials. External borrowing adds to the huge existing debt obligations of African countries. In some cases, even these loans and the foreign aid that flows from bilateral and multilateral relationships between Africa and the world's rich nations have ended up in the private accounts of rogue African leaders.[41]

There is no doubt that the economic and social problems described above compound the political problems of African states. After decades of suffering from the depredations of dictators and kleptocrats, most African countries are currently taking their baby steps on the road to

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39. Nigeria's President agrees: *see Corruption, Bane of Nigeria's Progress – Obasanjo*, Vanguard (Lagos, Nigeria), 16 October 2001.
40. *See Corruption, Bane of Africa's Growth – Obasanjo*, Vanguard (Lagos, Nigeria), 19 October 2001; and *Nigeria among 20 poorest nations – IFAD*, Vanguard (Lagos, Nigeria), 17 December 2001.
41. *See*, *e.g.*, A. Colgan, *Africa's Debt – Africa Action Position Paper*, July 2001, at http://www.africaaction.org/action/debtpos.htm.

democracy. But the new crop of African leaders have discovered, for example, that the burden of huge debts incurred by their predecessors is threatening to derail the task of nation-building. Looking around the states of Africa, it is difficult to see any successful industrial or social projects in which these borrowed sums were invested. The more reasonable conclusion is that most of these funds ended up in private accounts, and now entire nations must pay back at the cost of their education, health, and other social facilities and amenities. Nigeria services her external debt with over 2.5% of its annual budget as compared to 0.8% for health, 0.7% for education, and 0.9% for national security. Ghana, Côte d'Ivoire, Mauritania, Mauritius, Cameroon, Zimbabwe, Angola, Zambia, Senegal, Gabon, Lesotho, and Sierra Leone all spend in excess of 5%, with a few of the countries spending over 10%, of their GDP on debt servicing, while their spending on health is less than 3%.[42] Olusegun Obasanjo routinely laments the implications of the debt overhang for the delivery of what he often refers to as "democracy dividend,"[43] that is, reinvestment of the savings from good governance in the social and economic development of the citizens. But foreign creditors have so far resisted Nigeria's call for debt cancellation or some other appreciable form of relief and insisted that a putatively rich country such as Nigeria does not deserve any such relief.[44] If these nascent experiments in democracy among African states fail to deliver what they promise, there will probably be many cases of political recidivism among the states and a relapse into total chaos on the continent.[45]

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42. These percentages are from United Nations Development Programme, Human Development Report 2002, Table 17 (New York: Oxford University, 2002). The Table shows that, of 50 African countries, at least 29 spent more on debt service than on health, 9 spent more on debt service than on health and education combined, 13 spent more on the military than on health, and 5 spent more on the military than on health and education combined. The Report states that, in comparison, each of the top 22 ranked countries on the Human Development Index, from Sweden to Israel, spend more than 5% of their GDP on health.
43. Nigeria admitted in August 2002, that it could no longer afford to service its foreign debts: *see Nigeria admits Debt Crisis*, BBC News, 28 August 2002; and *Debt Crisis Rocks Nigeria's Nascent Democracy*, Reuters, 28 August 2002.
44. *See Wealthy Nigerians Can Pay Nigeria's Foreign Debt – Italian Envoy*, ThisDay News (Nigeria), 5 April 2002; and *Why Nigeria Will Not Get Debt Forgiveness, by British MP*, The Guardian (Nigeria), 12 June 2002.
45. Dire predictions in this connection are not in short supply. *See*, *e.g.*, R.D. Kaplan, The Coming Anarchy (New York: Random House, 2000). In a press release on 24 July 2002, to launch the Human Development Report 2002, the UNDP warned that "democracy deficits" in many countries was putting human development and security at risk. It stated that lack of attention to economic and social rights might ultimately damage democracy: *see* http://www.africaaction.org/docs02/hdr2002.htm. Also, the Berlin-based anti-corruption group, Transparency International, while launching its annual survey for 2002, remarked that widespread and worsening corruption among the world's political elite was trapping developing nations in poverty and undermining democracy in both rich and poor nations alike. The Chairman of the group, Peter Eigen, said:

> Corrupt political elites in the developing world, working hand-in-hand with greedy business people and unscrupulous investors, are putting private gain before the welfare of citizens and the economic development of their countries. From illegal logging to

There is an international dimension to the effects of political corruption in Africa. The intensification of poverty and social insecurity in the continent is bound to instigate new waves of migration and create new refugee flows in a world that is growing increasingly intolerant of refugees and immigrants.[46] Most recipient countries are today reporting fatigue, and reports abound of social tension in some countries brought on by problems associated with absorption of refugees and immigrants into the cultural and social mainstream of their adopted countries.[47] Globally, so much human insecurity cannot mean greater peace and security for the world. Studies show that in a globalized world, the globe is as secure as its poorest country. Great despair and frustration inhabit poverty-stricken regions, and the fragility of their social fabric makes them an attractive base for planners of terrorist activities.[48] As the terrorist events of 11 September 2001 in the United States illustrate, such activities are capable of inflicting the worst human tragedies in the most secure parts of the world, with devastating consequences for the rest of humanity. One immediate consequence of the attack was that the American economy, which had slowed down considerably after an extended period of boom, went into recession.

3. The Legal and Political Roots of Impunity

The roots of the impunity which looters of state treasuries in Africa currently enjoy go deep. Legally, the existing domestic and international regimes are woefully inadequate to compel rogue African leaders to account for their misdeeds. Politically, democratic institutions are too

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blood diamonds, we are seeing the plundering of the earth and its people in an unsustainable way

see Corrupt Countries Named in Survey, The Guardian (UK), 28 August 2002.

46. *See*, *e.g.*, S. Fagen, Applying for Political Asylum in New York: Law, Policy and Administrative Practice (New York: NYU Center for Latin-American and Caribbean Studies, 1994); J.N. Saxena, *Uprooted People and Development* and S. Bari, *The Right to Development and Refugee Protection*, *in* S.R. Chowdhury, *et al.* (Eds.), The Right to Development in International Law 179 and 167, respectively (Boston: Martinus Nijhoff Publishers, 1992); J. Crisp, *The High Price of Hospitality*, 80 Refugees 21 (November 1990); M.B. Philip, *Immigrant: A Label that Sticks Forever*, The Toronto Star, 27 June 1994.
47. *See*, *e.g.*, A. Sharrif, *Culture Cops Ever Eager to Muzzle Black Leaders*, The Toronto Star, 25 October 1994; N. Worsfold, *Misleading Figures Distort National Debate on Refugees*, The Toronto Star, 2 August 1994; P. Calamai, *It's about Color, Not Numbers*, The Toronto Star, 20 July 1994; L. Goldstein, *Being Color-Blind on Crime*, The Toronto Sun, 25 October 1994; Editorial, *Immigrants Do Not Commit More Crimes*, The Toronto Star, 23 July 1994; A. Sharrif, *Thread of Common History Ties Immigrants to Canada*, The Toronto Star, 13 May 1994.
48. *See*, *e.g.*, S. Sassen, *Governance Hotspots: Challenges We Must Confront in the Post-September 11 World*, *in* C. Calhoun, P. Price & A. Timmer (Eds.), Understanding September 11, 106 (New York: The Free Press, 2002). *See also*, *generally*, E. Hershberg & K.W. Moore (Eds.), Critical Views of September 11 (New York: The Free Press, 2002).

young and the political culture too weak to tackle unethical or deviant political conduct with any degree of success. This combination of legal and political impediments to the enforcement of accountability at the national and international levels give Africa the dubious distinction of being impunity's last stand.

3.1. Legal roots of impunity

The legal roots of impunity lie in the domestic African as well as the international legal regimes. These will be discussed in turn.

3.1.1. Domestic legal regimes

The legal regimes regarding political corruption in many African countries are extremely weak and incapable of curbing the current spate of corruption. Until recently, the practice was to treat political corruption as any other crime; no regard was paid to its unique insidiousness on the social, political, and economic life of a country, nor to the capacity of its perpetrators to disguise it in various ways that elude legal radar screens. In an overwhelming number of cases, the punishment prescribed for the crime was so hopelessly incommensurate with its social consequences that the compensations of corruption were worth the risk of being caught with one's hand in the till.[49] The high threshold of tolerance for corruption as symbolized by the lenient treatment at law, in turn, made it unrewarding for law enforcement officials to deploy the huge amount of resources required to investigate and prosecute cases of corruption. The situation has only now begun to change, with most countries having enacted special anti-corruption legislation in recent years. New laws do not always mean tighter control, however. There is a lot of improvement in terms of the definition of corruption and the punishment for the offence.[50] But some

49. *See*, *e.g.*, L. Diamond, *Nigeria's Perennial Struggle against Corruption: Prospects For the Third Republic*, 7 Corruption and Reform 215, at 220–221 (1993):

> The incentive structure in Nigeria offers a low-risk path to easy riches through political corruption, while opportunities to accumulate wealth through real entrepreneurship are limited and chancy […] (these underlying realities) will change […] if opportunities for corrupt gain shrink while its risk rises, and legitimate methods for accumulating wealth expand.

See also Y. Akinseye-George, Legal System, Corruption and Governance in Nigeria (Lagos: New Century Law Publishers, 2000).

50. *See*, *e.g.*, P.D. Ocheje, *Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000*, 45(2) JAL 173 (2001). *See also* Akinseye-George, *supra* note 49, at 135 and 148.

of the biggest offenders have escaped justice through deliberately created concessions[51] in the form of gaps and *lacunae* in the law.

This situation is compounded by the absence of independent judiciaries in most African countries. All over the continent, judges have been manipulated by governments in power to thwart efforts by civic-minded citizens who seek to force some accountability into governance. The judges themselves have not asserted their independence with any degree of vigour. In many cases, judges have been found to be corrupt and patently unfit to discharge the functions of their office. In at least one case,[52] the court has been used in a cynical game of symbolic politics, where an anti-corruption body was declared unconstitutional once it showed signs of a resolution to carry out its duties without fear or favour.

3.1.2. The international legal regime

Looters of public treasuries in Africa also derive support from, or are emboldened by the international legal regime. International legal practice is dominated by a number of anachronisms which frustrate any effort to mount effective international campaign against the impunity of rogue leaders. Practice is woefully out of touch with theory in, at least, three areas: the concept of sovereignty and its associated doctrines of act of state and sovereign immunity, the indefensible privileging of civil and political rights over social and economic rights, and the labyrinthine processes of international co-operation to enforce justice where an offence is alleged to have been committed by a person who has physically removed him/herself from the jurisdiction of the country where the offence is alleged to have been committed.

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51. The Nigerian law, for example, has no retroactive application, thereby leaving out of its purview the most notorious cases of corruption. This seeming concession to corrupt former dictators and public officials is grist in the mill for those who have expressed disappointment with Obasanjo's anti-corruption campaign. *See Why Anti-Graft Panel Cannot Probe Babangida, by Akanbi*, The Guardian (Nigeria), 9 August 2002. *See also* L. Akande, *How Obasanjo blocked recovery of IBB's $25bn loot*, at http://www.Nigeriaworld.com; and *Anti-Corruption Panel: The Battle so Far*, ThisDay News, 25 June 2002.
52. The saga of the Kenya Anti-Corruption Agency ('KACA'), which was established in 1997, is quite interesting. Its first director, Harun Mwau, resigned owing to pressures from powerful politicians and technocrats who felt uncomfortable with the Agency's principled interventions. He was replaced with a serving judge, Aaron Ringera. This appointment raised constitutional issues, first with the mode of his appointment, then with the exercise of his powers as a prosecutor and a serving judge. Justice Ringera, having failed to resign as a judge after first surviving these challenges, was subsequently declared unqualified to sit as the head of KACA, and the enabling Prevention of Corruption Act was also declared unconstitutional. But in response to threats by the IMF and the World bank to cut off donor funds, Kenyan parliament passed another anti-corruption law – the Corruption Control Bill – on Wednesday, 8 May 2002: *see Kenya Passes Anti-graft Bills Demanded by IMF*, Reuters, 8 May 2002. The new law creates an anti-corruption agency to replace KACA, which was declared unconstitutional on 22 December 2000. It is difficult to imagine that, at the time of his appointment, the Kenyan Government was unaware of the constitutional objections that eventually led to the disqualification of Ringera, and the death of KACA.

The term "sovereignty" has been given various meanings, from the time of Aristotle to the present. It was in the earliest times considered to be an attribute of a powerful individual whose legitimacy over territory derived from divine or historic source, but not from the consent of the people.[53] A number of postulates flowed from or were predicated on this fundamental position. First, international law excluded from legal scrutiny and competence a broad category of events which were regarded as belonging to the domestic jurisdiction of the sovereign. Domestic legal systems reinforced this conception through notions of, for example, the sovereign's immunity from legal actions before the courts of the territory, the courts themselves deriving their authority from the sovereign. In England, the maxim was that the King could do no wrong! Sovereign immunity before domestic tribunals had its international extension as well: all acts done by the sovereign on its own territory were acts of state, for which the sovereign was immune from prosecution in the courts of other states. The Act of State doctrine means that every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. The effect of this is that a plea of act of state precludes legal action against a foreign state regardless of the merits of the action.

Today, sovereignty connotes popular will; the consent of the governed is the source of political legitimacy and the authority of any government.[54] Profound changes have equally accompanied this new understanding of the concept of sovereignty. The term "sovereignty" still continues to be used in international legal practice, but it refers now to the people's, rather than the sovereign's, authority and power. Whereas under the old concept of sovereignty, it would be an invasion of sovereignty to investigate violation of human rights in a state without the permission of the sovereign, it is no longer acceptable in modern international law to argue that human rights within a state are an internal domestic matter in which the international community cannot intervene.[55] As a corollary, the Act of State doctrine is also subject to scrutiny in modern international law. It is elementary that, generally, the action for which immunity from prosecution or litigation is claimed must be a public, as opposed to a private or commercial, action. But even this clear principle has no applicability in the case of international crimes. In the instruments adopted since the Nuremberg Charter, including the Tokyo Tribunal Charter, and more recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the official position of an individual who

53. *See*, *e.g.*, A. Cassese, International Law, Chapter 5, 80–113 (New York: Oxford University Press, 2001).
54. *See* Reisman, *supra* note 4; and Sohn, *supra* note 4. *See also* T. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).
55. *See*, *e.g.*, A. D'Amato, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AJIL 516 (1990).

commits a crime against the peace and security of mankind, even if he/she acted as head of state or government, neither relieves the individual of criminal responsibility nor mitigates punishment.[56]

Does the theft of public funds amount to a discharge of public duty for which immunity from prosecution or litigation or individual responsibility can be claimed, or is it private action, to which individual responsibility attaches? The courts in the United States have had the opportunity to consider this question in a number of cases, but their judgments have done very little by way of a definitive answer to that question. For example, in *Republic of Philippines* v. *Marcos*,[57] the Ninth Circuit Court of Appeals ruled that the purchase of assets with money allegedly stolen from the Philippine Government was a public action which was precluded from judicial review by the Act of State doctrine. The court was of the view that governmental action, whether illegal or carried out by a ruling power that was recognized or not, was an act of state.[58] On the one hand, in *Jiménez* v. *Aristeguieta*,[59] the Fifth Circuit had held, more than two decades earlier, that the crimes alleged to have been committed by former Venezuelan president, Jiménez, were acts done for his private financial benefit; as these acts were not public acts, they were not shielded or immunized by the doctrine of Act of State. The latter case clearly represents the correct modern view of the Act of State doctrine, but the confusion which the former case introduced into the law has yet to be cleared.

A second area of inconsistency between theory and practice of modern international law is the difference which the international community continues to draw between civil and political rights on the one hand, and social and economic rights on the other. The complementarity of these rights seems self-evident, and the same has been affirmed times without number in international documents and the writings of countless human rights experts.[60] Yet, in practice, civil and political rights enjoy a primacy over social and economic rights. The international community militarily intervenes in countries on a regular basis in order to stop massive breaches

56. *See* International Law Commission Report 1996, Chapter II, Draft Code of Crimes Against the Peace and Security of Mankind, 14, Article 7 – Official Position and Responsibility – and Commentary, at http://www.un.org/law/ilc/reports/1996/chap02.htm.
57. Republic of Philippines *v.* Marcos, 818 F.2d 1473 (9th Cir. 1987).
58. This position adopted by the court attracted a firestorm of controversy: *see*, *e.g.*, T.A. Sundack, Note, *Republic of Philippines v. Marcos: The Ninth Circuit Court Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 Am. U. L. Rev. 225 (1988); W.J. Ritter, Case Comment, *International Relations – Act of State Doctrine – Marcos' Assets as Act of Philippine State*, 11 Suffolk Transnat'l L. J. 501 (1988); D.J. Chu, Note, *Marcos Mania: The Crusade to Return Marcos' Billions to the Philippines Through the Federal Courts*, 18 Rutgers L. J. 217 (1986); and A.C. Robitaille, Note, *The Marcos Cases: A Consideration of the Act of State Doctrine and the Pursuit of the Assets of Deposed Dictators*, 9 B.C. third World L. J. 81 (1989).
59. Jiménez *v.* Aristeguieta, 311 F.2d 547 (5th Cir. 1962).
60. *See*, *e.g.*, H.J. Steiner & P. Alston, International Human Rights in Context (Oxford: Clarendon Press, 1996); and F. Newman & D. Weissbrodt, International Human Rights: Law, Policy, and Process (Cincinnati: Anderson Publishing Co., 1996).

of human rights, including genocide, torture, rape and other forms of inhumane treatment. By contrast, examples of such intervention in any country to stop the impoverishment of populations by public officials who, acting under the colour of state power, loot state treasuries or mismanage the economic resources of states, or otherwise destroy the socio-economic mainstays of entire populations, are hard to find. Obviously, poverty and the human insecurity that it spawns are still being regarded as matters within the exclusive domestic jurisdiction of states, largely insulated from the rules of international law. This is a false and unjustifiable distinction between rights; it probably would have been discarded a long time ago if issues of debt, corruption and poverty were as critical to the survival of Western nations as they are to African states. In other words, international law continues to reflect the interests and predilections of its founding fathers, regardless of the emergence of other equally legitimate interests in the international community of states.

Finally, the complex rules on extradition do sometimes help to protect suspected criminals from, rather than expose them to, the potential consequences of their conduct. Nowhere is this more evident than in the so far unsuccessful effort on different occasions to extradite persons who have escaped the jurisdictional reach of their native countries after being accused of stealing large amounts of public funds.[61] The law of extradition is complex, and the process of extradition is rather involved. More often than not, political considerations are dispositive.[62] Mere suspicion that an offence has been committed, without substantial evidence would not suffice to engage the process. As a minimum requirement, there must be an extradition treaty between the victim-country and the asylum-country. Effort to extradite persons accused of corruption in the past have not enjoyed any great amount of success for at least two reasons: corruption cases, because of their highly surreptitious character, yield very little information from initial investigations; usually, most of the facts that lead

61. An example is Umaru Dikko, erstwhile Nigerian Minister of Transport, who escaped to England after the government of Shehu Shagari was toppled in a *coup d'état* amid allegations of corruption. England refused to extradite Dikko. Another recent example is Alberto Fujimori, former president of Peru, who fled to Japan after he was sacked from office in November 2000 by the Peruvian congress amid mounting corruption scandals. Fujimori, who was born in Peru of Japanese immigrants, holds Peruvian citizenship and is entitled to Japanese citizenship. He has since claimed Japanese citizenship, and taken advantage of Japan's policy against extradition of its nationals. Japan has also ignored the international arrest warrant issued by Peru for Fujimori, claiming that it has no extradition treaty with Peru: *see Fujimori 'Linked to Corruption'*, BBC News, 25 April 2001, at http://news.bbc.co.uk/hi/english/world/americas/newsid_1297000/1297222.stm; *Japan Refuses to Hand Over Fujimori*, BBC News, 3 August 2001, at http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1471000/1471730.stm; and *Peru Issues New Fujimori Warrant*, BBC News, 25 January 2002, at http://news.bbc.co.uk/hi/english/world/americas/newsid_1782000/1782459.stm.

62. In the Marcos case, the Ninth Circuit stated that it was necessary to allow Marcos to invoke the Act of State doctrine in order to avert embarrassment for the executive branch of the US Government, and to prevent a diplomatic row between the US and the Philippines.

to criminal convictions emerge during trial, but the facts upon which extradition requests must be made are usually required to be produced upfront; secondly, many of the poor countries who, in pursuit of stolen funds, desperately demand extradition of their erstwhile leaders or public officials, sometimes have no extradition treaty with the asylum-countries. Where there is a treaty, the judicial systems of victim-countries, often abused and misused by military regimes and dictatorships, are hardly able to offer the requisite guarantees of fair trial routinely demanded by the asylum-countries. It is these difficulties that are probably responsible for the desperate turn[63] that effort to extradite by victim-countries sometimes takes.

3.2. Political roots of impunity

Some of the venality and abuse of power that characterize governance of the African state would be difficult to replicate in more politically advanced polities. In the latter, the maturity of political institutions necessarily implies the internalization of checks and balances through all facets of the political system. The judiciary is relatively independent, and the courts retain their integrity for the most part as bastions of justice and accountability. The absence of effective checks and balances in the political system, and the corresponding authoritarianism of the structures of governance, is part of the reason why African leaders are able to plunder their respective states with abandon. African states have some of the most elaborate constitutions in the world, but constitutional habits do not come easily to African leaders.

In spite of pretensions and appearances, it is obvious that politics in Africa is not yet a participatory project.[64] Owing to an array of factors, the poor, whom Africa has in over-abundance, rarely participate autonomously in politics – a fact which is responsible in part for their condition.[65] It is difficult to achieve appreciable political participation of the masses under conditions of illiteracy and ignorance. But without participation, politicians are virtually free of the constraints which evaluative judgments of the governed imposes upon the use of political power. African politicians know this, and they seem to invest heavily in the perpetuation of poverty, illiteracy and ignorance. The pay-off is the impunity

63. An example was the unsuccessful kidnap attempt on Umaru Dikko in 1984 by persons who claimed to have been hired by the Nigerian government of Major-General Muhammadu Buhari: *see Nigeria's Fresh Start*, Times (London, UK), 9 May 1989; and *Nigerian Kidnap Man Seeks Asylum*, Times (London, UK), 21 December 1984. This event ignited a diplomatic ruckus in Anglo-Nigerian relations.
64. *See*, *e.g.*, *Democracy Begins To Take Hold Across Africa*, New York Times News Service, 2 June 2002.
65. *See*, *e.g.*, K. Weyland, Democracy Without Equity: Failures of Reform in Brazil 4–5 (Pittsburgh: University of Pittsburgh Press, 1996).

that they enjoy for the great suffering which their corruption of politics helps to inflict on the populace.

The inability of political structures to enforce accountability on African leaders is evident in the way that these leaders successfully negotiate their places in the public affairs of their countries at the end of their tenure, or when they decide to voluntarily quit.[66] Some of them, like Babangida of Nigeria, seem to have secured immunity from prosecution for themselves, their families and their cronies, in exchange for generous campaign contributions and other support for the government in power.[67] Some of them enter into immunity pacts with their successors as condition for voluntarily relinquishing power and allowing multi-party elections. The huge war chest which some of these leaders have assembled in terms of funds and political support networks (bought of more funds) ensure that they maintain a Medusa-like presence in the politics of African states for a long time to come. One notable exception to this trend is Zambia, where the former president, Frederick Chiluba, is currently being investigated on an allegation that he corruptly enriched himself with $50 million of state funds. Chiluba's successor, Levy Mwanawasa, successfully asked the legislature to lift the former president's immunity, in order to clear the way for Chiluba to stand trial on charges of corruption.[68]

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66. Daniel Arap Moi, who must retire from the presidency of Kenya at the end of 2002, is reported to have anointed Uhuru Kenyatta as his successor by making him the ruling party's (Kenya African National Union's ('KANU's')) only candidate for the presidency in the 2003 elections. Veteran politician, Raila Odinga, who was considered the odds-on favourite by political pundits, was bypassed for Uhuru, who is considered politically inexperienced, because Moi is said to distrust both Odinga, and the Vice-President, George Saitoti. Moi is said to favour a candidate who would protect him and his family from political or legal harm either to themselves or to the huge fortune they have salted away from the public treasury. The controversy over Moi's choice of a successor reached a head on 30 August 2002, when he dismissed his vice-president: *see Kenyan President Sacks His Deputy*, BBC News, 30 August 2002. Moi is reported to have put together the following package for himself: a retirement home at his Eldoret Farm; a gleaming ultra-modern airport near the Farm; a monthly pension, which is 80% of his current salary; six top-of-the-line Mercedes Benz cars, seven chauffeurs paid out of public funds, three cooks, two housekeepers, a swimming pool, sauna, tennis court and gymnasium: *see From Kenyatta to Kenyatta: 'Prof' Arap Moi's Last Hurrah*, The Monitor (Kampala), 11 August 2002; and *Moi's Golden Parachute*, BBC News, 30 July 2002.
67. The President of Nigeria, Olusegun Obasanjo, has vehemently denied the truth of this public perception in Nigeria, but his government's demonstrated unwillingness to probe Babangida for his unabashed opulence tends to support this perception. Recently, the head of the anti-corruption commission ruled out such an investigation, claiming that his commission had no retroactive powers: *see*, *supra* note 51. Augusto Pinochet of Chile extracted immunity from his successors, in addition to a place in the government as a senator.
68. *See Removal of Chiluba's Immunity Has Sent a Clear Message, Says Kavindele*, The Post (Lusaka), 9 August 2002; *President Levy Seeks Regional Help to Prosecute Chiluba*, The Post (Lusaka), 8 August 2002; *We are Not Surprised by Chiluba's Corruption – IMF*, The Post (Lusaka), 10 August 2002.

4. Assailing Impunity: Using International Law to Impose Accountability

The difficulties of bringing corrupt leaders to justice described in the foregoing ensure that persons who loot public funds in Africa put themselves beyond the reach of justice simply by escaping out of the jurisdiction of the victim states. Even where there is no such escape, there are insurmountable difficulties, as the Nigerian Government recently discovered, in tracing the looted funds, and in getting foreign jurisdictions to enforce judgments of national courts, and so on.

There is some evidence of a basis for regarding corruption as a crime punishable under international law. First, state practice seems to treat corruption as a crime. Over the years, the collective disapproval of the international community for corruption has been manifested in the myriad of regional, bilateral and multilateral frameworks making corruption unlawful or illegal. Leading international organizations, such as the United Nations,[69] the International Monetary Fund, the World Bank, the European Union,[70] the Organization of American States,[71] the African Union,[72] the International Chamber of Commerce,[73] have all denounced corruption and put in place anti-corruption policies. In addition to express prohibition of corruption in the constitutions of most states, these past few years have also witnessed a flurry of anti-corruption legislation across the world, instigated in part by the "openness" requirements of the global market.

Secondly, there is an abundance of expressions of concern across the globe over the dangers of corruption. Corruption has been identified as a threat to the rule of law, democracy and human rights. The Preamble to the Criminal Law Convention, for example, has warned that corruption "undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society."[74] The Preamble to the Draft OAU Convention on Combating Corruption[75] similarly expresses concern about "the negative effects of corruption on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of African

69. *See*, *e.g.*, the 1996 UN Declaration Against Corruption and Bribery in International Commercial Transactions. *See also* the 1990 UN Crime Prevention and Criminal Justice in the Context of Development.
70. *See* global and regional initiatives to combat corruption on http://www.oecd.org/daf/nocorruption/initiatives.htm.
71. *See* the 1996 Inter-American Convention Against Corruption, reprinted *in* 35 ILM 724 (1996).
72. *See infra* note 75.
73. *See supra* note 69.
74. *See* Council of Europe, *Preamble to the Criminal Law Convention on Corruption*, reprinted *in* 38 ILM 505 (1999).
75. The Draft Convention was unfolded at Addis Ababa on 29 November 2001, *see* http://www.oau-oua.org/corruption/draft%20convention.htm.

people." This is a recurring theme in many international fori.[76] Aid agencies show fatigue, and stress the need to route aid, no longer through the greedy hands of governments in the Third World, but through non-governmental organizations.

Finally, leading international scholars[77] are beginning to identify corruption as an economic crime. There is a growing assembly of materials which arguably support this conclusion. Some of them are resolutions of regional organizations and declarations, codes and instruments of the United Nations and its specialized agencies. As these materials achieve critical mass, it will be appropriate to speak of an emerging customary law norm which treats corruption as a crime under international law. From the perspective of the countries victimized by the corruption of their leaders, this is significant advancement from a position of global indifference a decade or so ago.[78] But to translate this advancement to practical advantages for these countries, three more steps are necessary: domestication of international law on political corruption, elevation of political corruption to the status of a crime in positive international law, and expansion of the jurisdiction of the ICC. To these we now turn.

4.1. Domestication of international law

The effectiveness of international law depends almost entirely on the consent of states to be bound. A critical step in translating international law into rules that are backed by the executive authority of states is the reception of those rules into national jurisdictions or their enactment as domestic law by national jurisdictions. Much of the emerging international customary law criminalizing corruption is general in nature. It recognizes the need to repatriate stolen funds and to punish the individuals who breach the social and economic rights of so many by looting public funds. But how to overcome the international and domestic legal obstacles to the

76. *See*, *e.g.*, Summit of the Americas, *Declaration of Principles and Plan of Action*, 11 December 1994, reprinted *in* 34 ILM 808 (1995). *See also* the Global Coalition for Africa's *Principles to Combat Corruption in African Countries*, adopted at Washington DC, 23 February 1999; Global Forum's *Declaration on Fighting Corruption*, Washington DC, 26 February 1999, at http://www.gca-cma.org/ecorrup.htm.

77. For example, M.C. Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 Case W. Res. J. Int'l L. 27 (1983).

78. The issue of indigenous spoliation by leaders of the Third World had for a long time been overshadowed by that of the exogenous spoliation by multinationals. Indigenous (or endogenous) spoliation was, perhaps, first brought up for serious consideration at the American Society of International Law at its 81st Annual Meeting in 1987. *See*, *e.g.*, A. Chayes, *Pursuing the Assets of Former Dictators*, Proceedings of the 81st Annual Meeting of the American Society of International Law 394 (1987). Since then, other scholars have sought to elevate the issue to the level of international concern: *see*, *e.g.*, Reisman, *supra* note 24; and Kofele-Kale, *supra* note 12. *See also* N. Kofele-Kale, International Law of Responsibility for Economic Crimes (The Hague: Kluwer Law International, 1995); and N. Kofele-Kale, *The Right to Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34(1) The Int'l Lawyer 149 (Spring, 2000).

realization of these objectives is often scarcely addressed. Some of these difficulties – relating to the ambiguous treatment of sovereignty and its related doctrines of sovereign immunity by some domestic courts, as well as to the complexity of extradition – have already been alluded to above, but more importantly, even where the defence of sovereign immunity or act of state is denied, it does not automatically lead to repatriation of stolen funds. Stolen assets may have been stashed away in numerous jurisdictions. These assets will need to be traced. This implicates the issue of enforcement of judgments. If a US court, for example, finds someone guilty of looting a public treasury and orders a forfeiture of the stolen assets, will the judgment be given equal legitimacy and enforcement in France? Would the US court's decision place Swiss banks under an obligation to help trace the stolen funds that they may be holding on behalf of the convicted looter? All of these issues are more effectively addressed primarily at the level of domestic jurisdictions.

A great deal of diplomacy will be necessary in this process. African countries have begun some of the diplomacy, first, by themselves enacting strong policies against corruption at national and regional levels,[79] and, second, by speaking out strongly against corruption.[80] At a meeting of the Organization of African Unity in June 2002, African leaders declared that the repatriation of stolen assets from their hiding places in different parts of the world would make up a significant amount of their diplomatic workload in the years to come. On behalf of the leaders, Nigeria's Olusegun Obasanjo declared:

> We are working to get an international convention by which money stolen by corrupt African leaders and stashed abroad is repatriated. […] [I]f there is an international convention in place, it would be easier to recover such monies. That is (the object of) the effort we are making now […].[81]

79. Almost all African states have enacted new laws or have rejuvenated old laws to combat corruption. Nigeria, Kenya, Botswana are some of the countries that have enacted new laws, while Zambia, Ghana, Tanzania, and Gambia are among those that rely on the general criminal law.
80. Speaking out against corruption is a new phenomenon in Africa. Hitherto, some of Africa's leaders openly encouraged, rather than spoke out, against it. *See*, *e.g.*, *Moi Pledges to Weed Out Corruption*, BBC News, 10 October 1999, at http://news.bbc.co.uk/hi/english/world/africa/newsid_470000/470788.stm; Arap Moi is also reported to have announced that corrupt officials in Kenya would be "hunted down like rats": BBC News, 3 November 1999, at http://newsvote.bbc.co.uk/hi/english/talking_point/newsid_503000/503599.asp; *Africans Must Benefit From Resources*, The Namibian (Windhoek), 22 August 2002, in which President Sam Nujoma of Namibia urges the Parties to NEPAD to ensure that African resources are not removed from the continent, but used instead to benefit the African people. In addition, there are strong pressures for transparency in governance from civil society: *see*, *e.g.*, *African Chapters of Transparency International to Spearhead Campaign to Recover Wealth Stolen from Continent*, Associated Press Newswires, 17 May 2002.
81. *See Africa Seeks to Recover Stolen 140 Billion Dollars*, Agence France-Presse, 13 June 2002; *Stop Harbouring Stolen Monies, Obasanjo Tells Western Nations*, The Guardian (Nigeria), 13 June 2002.

At a meeting of the Commonwealth Parliamentary Association earlier, Obasanjo had thrown a challenge to the Western world:

> It is not enough to accuse developing countries of corruption, the Western world must demonstrate practical commitment to assist us by repatriating to us monies that have been stolen from our treasuries and stashed away in their financial institutions. To do less would be to perpetuate the poverty of countries of the South, while further enriching the Western world with ill-gotten funds. This is (an) unacceptable reversal of the logic of partnership for development, based on mutual good faith and sincerity.[82]

Many Western countries have enacted strong legislation against money-laundering. These pieces of legislation, as well as regulatory structures, have even been further strengthened in the aftermath of the 11 September 2001, terrorist attack of the United States.[83] Furthermore, although there is a long list of UN conventions, regional conventions, and national laws, against terrorism,[84] the UN produced a *Suppression of Terrorism Regulations* which was quickly domesticated in Canada, the United Kingdom, Israel, France, Australia, India, Japan, and Pakistan in October 2001.[85] A number of other countries have since followed suit. The UN terrorism regulations provided a list of individuals and entities[86] whom, based on information provided by Member States of the UN, there are reasonable grounds to believe

> (a) (have) carried out, attempted to carry out, participated in or facilitated the carrying out of a terrorist activity;
> (b) (are) controlled directly or indirectly by any person conducting any of the activities (described as terrorist in the regulations).

The Government of Canada gazette[87] setting out and explaining the reasons for these regulations, states that the Governor in Council found the regu-

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82. *Id.*
83. *See*, *e.g.*, Office of the Superintendent of Financial Institutions ('OSFI') (Canada), *New OSFI Monthly Reporting Form OSFI-525 Under the United Nations Suppression of Terrorism Regulations*, which was notified to all banks and other financial institutions on 2 October 2001: http://www.osfi-bsif.gc.ca/english/publications/notices/index.asp. *See also* BIS Quarterly Review, December 2001. This publication reports, at 74: *Fight Against Money Laundering Intensifies Following 11 September Attacks*. It also gives a chronology of major global structural and regulatory developments, at 75. Among the bodies leading the charge are the Basel Committee on Banking Supervision, European Commission, US Securities and Exchange Commission, US Commodity Futures Trading Commission, and the Financial Action Task Force on Money Laundering.
84. *See* World Anti-Terrorism Laws, at http://jurist.law.pitt.edu/terrorism/terrorism3a.htm.
85. *See id.*
86. Entitled "Consolidated List", the Canadian list consisted of three parts: Part A – List established by the United Nations Security Council Committee (AFG/131, SC/7028, 8 March 2001); Part B – List included in the Schedule to the United Nations Suppression of Terrorism Regulations; and Part C – List provided by the United States Federal Bureau of Investigation (17 September 2001).
87. Canada Gazette, Part II, Extra Vol. 135, No. 2, Ottawa, Thursday, 4 October 2001.

lations to be necessary "for enabling the measures set out (in the UN Security Council Resolution 1373 of 28 September 2001) to be effectively applied." Resolution 1373 imposes an international legal obligation on all Member States of the UN to adopt broad and concrete measures to prevent and suppress the financing of terrorist acts from their territories, and to co-operate in the global fight against terrorism. Key provisions of the resolution include criminalizing the perpetration of terrorist acts, the provision of funding or other kinds of support to terrorists by their nationals or from their territory, and the freezing of the assets of terrorists.

The rapidity and ease with which the United States was able to rally other nations to the fight against terrorism obviously speaks volumes about the centrality of power in the processes that produce diplomatic triumph or failure in international affairs. Many Member States of the UN have lived with terrorism for decades; they had been able to sponsor anti-terrorist legislation and policies through the UN system. But none of these successes matches that of the US after 11 September 2001. Some of this spectacular success may have been facilitated by a particularly effective US diplomacy. US allies may have needed little persuasion to see terrorism from the perspective of a severely wounded ally. But it is also possible that the only super-power in a globalized world used a combination of threats and cajolery to elicit not only a renewed global consensus against terrorism, but concrete domestic actions against terrorism.[88]

African countries, individually or as a collective, lack the kind of influence which the US wields in international affairs. They have few reliable allies in a world demarcated into camps of rich and poor countries, and in which the overriding interest of global capital remains the extraction of profit regardless of the pains that the process inflicts on humanity. But they have a window of opportunity, granted the political will, to press a case on the conscience of the world for the universal criminalization of looting of public funds in the climate of global resentment against immoral conduct brought on by the events of 11 September 2001. In so doing, African leaders will be drawing on their past, albeit few, diplomatic successes. In spite of their obvious powerlessness, their diplomatic effort was a large part of the processes that brought apartheid to an end in South Africa, and led to the independence of Zimbabwe, Namibia, and Angola. By embarking on a serious campaign to globally criminalize looting and for the return of looted assets to Africa, these leaders will be challenging the rich nations of the world to justify the disconnect between their pronouncements and their deeds. How could these nations rail against the prevalence of corruption on the continent and then turn around to allow their financial institutions to launder stolen assets on behalf of looters of the African continent?

88. *See*, *e.g.*, E.S. Herman, *The Godfather's New World Order*, http://www.zmag.org/ZMag/articles/may99herman.htm (visited on 16 July 2002).

Whatever excuses these nations might have for allowing the free flow of, and a sanctuary for, stolen funds in their jurisdictions while social and economic conditions worsen with devastating consequences for human rights in Africa, these excuses will no longer hold in the aftermath of 11 September, given the possibilities which anti-terrorist efforts have exposed. For example, it is now clear that bank accounts are not as confidential or sacrosanct as they were often made out to be; the veil of confidentiality or secrecy can be lifted in appropriate circumstances to reveal the faces behind the accounts. It is possible, indeed very easy in the globalized economy, to trace suspicious movement of funds, to investigate the sources of funds, and to freeze or confiscate such funds where overriding interests so dictate.[89]

The crushing debt burden of African countries, the worsening poverty of the continent, the implications of these for global security – all of these are good reasons to approach the looting of Africa in the same way that the world has approached terrorism after 11 September 2001. Accordingly, looting of public treasuries in any part of the world should be criminalized in the Western nations; it should become a crime for any citizens or agencies worldwide to aid or support the looting of public assets; and looted assets, where identified, should be promptly frozen and repatriated to their source countries. Any excuses for inaction would only expose these nations to the accusation, once again, that international law is not really about the interests of the global community as a whole, but those of the few Western nations which constitute its founding fathers.

4.2. Elevating political corruption to the status of a crime in positive international law

Another step necessary to internationally criminalizing political corruption is to embody the crime in a multilateral convention. This ought to be the logical culmination of the widespread reprobation of corruption in the international community. Conventions are the primary source of positive international law. Some scholars refer to conventions as international law *par excellence*,[90] because conventions have the ability to codify, define, interpret, or abolish existing customary or other conventional rules of international law, or even create new rules for future international conduct.

89. In the wake of the discovery of Abacha's loot in Swiss bank accounts, the Swiss Government has tried very hard to shed the image of Switzerland as banker of the world's dirty money: *see*, *e.g.*, *Swiss Banking Regulator Reprimands UBS over Abacha Accounts*, Dow Jones International News, 15 July 2002. Her British counterparts also tried to manage the fallout of the Abacha saga: *see Britain Goes After Abacha Millions*, BBC News, 18 October 2001. The British Financial Services Authority had decided to "name and shame" the 23 London banks involved in handling $1.3 billion belonging to family and friends of General Abacha: *see Revealed: Questionable Transactions Routed via UK – Banks' Dubious Cash Transfers Outlined*, The Guardian (UK), 4 October 2001; *Looted Dollars 1bn Sent Through London*, The Guardian (UK), 4 October 2001.
90. *See*, *e.g.*, Bassiouni, *supra* note 2, at 253.

Multilateral conventions, when they enter into force, are declarative of what a substantial number of states think that the law is or should be on a particular matter. As a matter of hierarchy, conventions rank higher than other sources of international law, and they are viewed by leading authorities as virtually the constitutional basis, second in importance only to the UN Charter, of the international community of states. As such, effort to elevate political corruption to the level of a crime in positive international law must be directed at embodying the conduct in an international convention.

Ultimately, however, whether political corruption constitutes an international crime would depend not only on what the conduct involves, but also whether it meets recognized criteria for international criminalization. In trying to identify these criteria, the eminent jurist, Cherif Bassiouni,[91] begins by isolating the social interest sought to be protected by criminalization. They are that: (a) the prohibited conduct affects a significant international interest; (b) the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community; (c) the prohibited conduct involves more than one state in its planning, preparation or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; or the effect of the conduct bear upon an internationally protected interest that is not sufficient to fall into either (a) or (b) above, but requires international criminalization in order to ensure its prevention, control, and suppression because it is predicated on "state action or policy" without which it could not be performed. On the basis of these characteristics, Bassiouni argues, an examination of the twenty-five currently recognized categories of international crime would reveal the existence of one or a combination of the following elements: *International*: this includes conduct which is a direct or indirect threat to the peace and security of the international community or conduct which is shocking to the collective conscience of the world community on the basis of commonly shared community values; *Transnational*: this refers to conduct affecting the public safety and economic interests of more than one state and whose perpetration transcends national boundaries, or conduct involving citizens of more than one state (either as victims or perpetrators) or conduct performed across national boundaries; *State Action or Policy*: this refers to conduct containing in part any one of the first two elements above but whose prevention, control and suppression neces-

91. *Id.*, at 253–254. *See also* Reisman, *supra* note 24, at 56:

> Factually, the problem of indigenous spoliation is international in terms of means and consequences. In terms of means, the misappropriated funds cross international boundaries to find a haven. In terms of consequences, a significant part of the burden of reconstruction of the spoliated economies is perforce shifted to the international community where it is folded into development assistance.

sitates international co-operation because it is predicated on "state action or policy" without which the conduct in question could not be performed.

Looting of public treasuries satisfies all of the listed criteria. It is a violation of the internationally guaranteed rights of people to use their national wealth for their own welfare.[92] That it cannot be successfully accomplished without a collaborating financial institution abroad means that such collaboration is part of the delict. Looting of public funds impoverishes millions and sets the context for the despair and hopelessness which breed violence in societies. Poverty also provides the context for social upheavals, setting in motion waves of displacement, refugee flows, and unplanned migration. Given current knowledge about the emergence of terrorist networks, and the difficulties relating to the management of refugee flows and the patterns of migration, it is fair to conclude that political corruption is a threat to the peace and security of the international community. The magnitude of theft by African leaders and the living conditions of most Africans would undoubtedly shock the collective conscience of the world. The mode of stealing, which involves the transfer of stolen funds from Africa to offshore banks, is obviously transnational, and the use of state power to perpetrate the theft clearly implicates state action or policy. International co-operation is fundamental to effectively preventing, suppressing or controlling this phenomenon.

There are distinct advantages to making political corruption a crime in positive international law. First, codification would conclusively remove the criminal status of political corruption from the realm of debate which it arguably currently occupies and put it squarely among the family of international crimes where it appropriately belongs. Secondly, it would clarify the applicability of those doctrines and principles associated with the old version of sovereignty, such as act of state and sovereign immunity, in situations involving the abuse of state power through theft of public funds; the applicability of these doctrines in these situations is still ambiguous. Finally, codification will lay to rest the problems associated with prosecuting looters of public funds, such as extradition, tracing and

92. These rights derive from the UN Charter, 59 STAT. 1031, TS No. 993, 3 Bevans 1153 (1945), the International Covenant on Economic, Social and Cultural Rights, General Assembly Res. 2200, 21 UN GAOR Supp. (No. 16), UN Doc. A/6316 (1966), at 52, Art. 1(2) of which states:

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

the Universal Declaration of Human Rights, UN General Assembly Res. 217, UN Doc. A/810 (1948), at 71, the Resolution on Permanent Sovereignty over Natural Resources, UN Doc. A/5217 (1962); UN Doc. A/9400 (1973), and the principle of self-determination as reflected in many human rights documents, especially the Right to Development, UN GAOR, 41st Session, Resolutions and Decision, Agenda Item 101, at 3–6, 9th Plenary Meeting, Declaration on the Right to Development, UN Doc. A/Res./41/128 (4 December 1986).

repatriation of looted funds, and enforcement of foreign judgments. Successful elevation of this form of political corruption to the status of an international crime means that an obligation *erga omnis* would be created by which every member of the international community of states would be obligated to domestically criminalize and prosecute this conduct. Codification would also afford an opportunity to set out the process for recovering and repatriating looted funds to the victim countries.

4.3. Expansion of the International Criminal Court's jurisdiction

On 1 July 2002, the Treaty of Rome, otherwise known as the Statute of the International Criminal Court ('Statute'),[93] came into force, establishing the ICC. The ICC, the first standing court of its kind, has been described as "a unique and important development in the history of human rights protection and international justice."[94] According to Human Rights Watch,

> [T]he International Criminal Court will bring the most serious international criminals to justice and challenge the impunity that they have so far enjoyed in the past. Until now, those who commit atrocities have gotten [*sic*] away with it and their victims left with nothing. The ICC can provide redress and reparations for the victims and survivors of these atrocities, which is a vital step towards accountability and lasting justice.[95]

The ICC has jurisdiction to investigate and try individuals for genocide, crimes against humanity, and war crimes.[96] This jurisdiction is complementary to national criminal jurisdictions. Article 12 of the ICC Statute provides that a state that ratifies the statute automatically accepts the ICC's jurisdiction over the enumerated crimes. The ICC's jurisdiction is engaged where either the state which is the locus of the crime or the state whose national is accused of committing the crime is a state party to the Statute or has accepted the ICC's jurisdiction. The jurisdiction is prospective, and statutes of limitation have no applicability to the crimes covered by the Statute. Finally, the jurisdiction of the ICC can be invoked or triggered by a state party, or by reference from the UN Security Council, or by the prosecutor acting *proprio motu*.[97]

The ICC represents everything desirable with modern international criminal law, except that its concept of crime follows the traditional pattern

93. UN Doc. No. A/CONF.183/9 (17 July 1998), reprinted *in* 37 ILM 999 (1998). Also available online at http://www.un.org/law/icc/statute/romefra.htm. A corrected version, incorporating corrections by the procès-verbaux of November 1998 and 12 July 1999, is available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm (visited 19 August 2002). Of the 77 countries which ratified the Statute as of 1 July 2001, 17 were African states.
94. Human Rights Watch, *ICC Fact Sheet*, at http://www.hrw.org/campaigns/icc/, at 1.
95. *Id.*
96. Art. 5 of the Statute.
97. *See*, *generally*, Human Rights Watch, *Making the International Criminal Court Work: A Handbook for implementing the Rome Statute*, 13(4) Human Rights Watch (September 2001).

of according more importance to civil and political rights than social and economic rights. Articles 6, 7, and 8 define the three heads of crime over which the ICC has jurisdiction. Genocide is defined as involving a number of acts, including killing, causing serious bodily or mental harm, imposing measures intended to prevent births, and forcible transfer of children to another group, "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group." Crimes against humanity are defined as including murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence, persecution, forced disappearance, apartheid and other inhumane acts "when committed as part of a widespread or systematic attack directed against any civilian population." War crimes cover acts committed during international and non-international (internal) armed conflicts, including grave breaches of the 1949 Geneva Conventions, willful killing or torture of protected persons or extensive destruction of protected property, serious violations of the laws and customs applicable in international and internal armed conflicts, such as intentional attacks on or violence against civilians. Clearly, all of these crimes relate to serious violations of civil and political rights. The serious violation of social and economic rights which theft of public funds involves does not engage the attention of the international community in this concept of crime. This lack of regard for the complementarity of human rights casts an unseemly blight on the otherwise impressive progress of human civilization exemplified by the establishment of the ICC.

The only possible saving grace is to be found in Article 10 of the Statute, which provides that the definitions of crimes under the Statute and other provisions of Part 2 of the Statute cannot be interpreted as limiting or prejudicing in any way existing or developing rules of international law. As earlier indicated, there is growing evidence, from state practice, expressions of international concern, and the writings of publicists, that corruption is regarded as a crime in international law.

Some states, such as Germany, United Kingdom, New Zealand, Norway, Finland, Estonia, The Netherlands, Spain, Argentina, France, Belgium, and Canada, have already adopted and many more are in the process of enacting ICC implementing legislation. In different ways, these countries have incorporated or are incorporating some or all of the crimes referred to above in their domestic legislation. The domestic laws may provide for universal or partial jurisdiction over the crimes, but they all provide comprehensively for co-operation between national authorities and the ICC.[98] This is precisely what is required to discourage the ongoing pillage of Africa by its leaders, and to do justice by the hundreds of millions of

98. *See* Tables 1–3 detailing the implementation strategies of various countries, prepared by Human Rights Watch, *supra* note 94.

Africans whose benighted lives are a living testimony to the greed and inhumanity of fellow Africans. All who steal public funds must be deprived of a sanctuary either for themselves or their loot. At the very minimum, the Statute should be revisited with a view to creating a special jurisdiction over looted funds. A special commission should then be set up under the aegis of the United Nations[99] with the responsibility to take requests from member states to trace looted funds, and to return them to their sources, either by negotiation or judicial action.

The expansion of the ICC's jurisdiction to cover political corruption, especially the looting of public funds, will underscore the dangerous implication of this conduct for international peace and security, and eliminate the needless dichotomy which is currently being drawn between civil/political rights on the one hand and social/economic rights on the other.

5. Conclusion

The corruption of public offices or abuse of public power for private ends has become so pervasive, and its effects so devastating on the social and economic rights of Africans, that African leaders themselves have cried out for help. Many African countries have instituted legal and administrative mechanisms for the prevention, investigation, detection, and prosecution of corrupt practices and abuse of power. But the international nature of political corruption, in which the proceeds of corrupt enrichment are transferred from African countries to hiding places in offshore banks, means that nothing less than international co-operation would be effective to control the phenomenon. The current individual case-by-case approach of African states to the recovery of stolen funds will achieve very little. International co-operation would involve a new approach to international law which delegitimizes the false dichotomy currently drawn between civil and political rights on the one hand and social and economic rights on the other. It will involve a new international law which recognizes limits on the doctrine of sovereignty, and the need to derogate from that doctrine in appropriate circumstances in deference to the welfare of humankind.

Ultimately, international law would never be able to shed its perceived ethnocentric bias unless it begins to give equal attention to the needs of Third World countries, however imperfectly articulated by their chosen leaders, as it currently gives to the needs of its founding fathers.

99. A similar suggestion has been made by Reisman, *supra* note 24, at 58–59.