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Corruption in International Law: Illusions of a Grotian Moment

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Abstract

Has there already been a Grotian Moment for corruption? If not, what would it take for new legal rules and doctrines on corruption to crystallise? This article seeks to answer these two questions by reviewing the relevant history of international legal scholarship, the current public international law framework for anticorruption, and recent developments in international legal practice. We conclude that a Grotian Moment may have been reached for a narrow concept of corruption, focused on petty corruption and bribery, with the proliferation of international anticorruption law following the Cold War. However, a Grotian Moment for a broadened understanding of corruption, based on other forms such as institutional, political, and grand corruption, ought to emerge to comprehensively address all forms of corruption. Given the range of challenges, including resistance from political elites and the indeterminacy of criminal liability, a Grotian Moment for a broadened concept of corruption remains improbable.

Keywords

corruption – institutional corruption – UNCAC – human rights system

> "Quod monstra generantur propter corruptionem alicujus principii." (Monsters are begotten on account of the corruption of some principles.)[1]
>
> "You are the Law, and you have never been broken. But is there a free soul alive that does not long to break you, only because you have never been broken?"[2]

Around the world countless people are facing the detrimental effects of corruption, being denied fair participation in political processes or, worse, equal access to public services, as necessary resources are syphoned off elsewhere. The United Nations (UN) estimates that the global cost of corruption is as high as USD 2.6 trillion, representing five percent of global gross domestic product (GDP),[3] and every year an estimated USD 500 billion is lost to corruption in the public health sector alone.[4] Redirecting these vast resources to where they are most needed would change the lives of millions of people. Yet, while recent progress in the international and regional legalisation of anticorruption mechanism may indicate the achievement of a Grotian Moment for a narrow concept of corruption focused on issues such as bribery, the widespread manifestation of other forms of corruption, including institutional corruption and other forms with transnational reach, suggests that anticorruption law encompassing a broader concept of corruption ought to be 'ushered in by the urgency of dealing with [this] fundamental change.'[5]

This article begins with a brief overview of some historical perspectives on the concept of corruption and in some greater detail of the norm evolution towards the end of the last century concerning the need for legal anticorruption instruments, reflected in the adoption of a plethora of international and regional anticorruption legislation. To underpin the argument that anticorruption mechanisms failing to take account of various forms of corruption are insufficient in truly combatting corruption and its negative externalities in all its forms, the following section proceeds with a discussion of recently

1 Edward Coke, *Preface to Reports*, Part Ten (1614), ed. by Steve Shepherd (Indianapolis: Liberty Fund, 2003), vol. 1. p. 331.

2 Gregory, the only anarchist among detectives posing as anarchists, at the end of G.K. Chesterton, *The Man Who Was Thursday* (London: J.W. Arrowsmith, 1908).

3 United Nations, 'Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data', (10 September 2018).

4 M. Wahba, '19th International Anti-Corruption Conference', UNDP, (4 December 2020).

5 Michael P. Scharf, 'Grotian Moments: The Concept', *Grotiana* 42:2 (2021), 193–211, at p. 209.

formulated concepts of other forms of corruption, including political and grand corruption, as well as institutional corruption, which is a sub-field of legal studies of corruption that developed from behavioural economics and has seldom been applied to international law before. Demonstrating the urgency of adopting a broadened concept of corruption in the international legal system, this section also illustrates that there is an emerging demand for the adoption of a broader concept of corruption among States and scholars. Next, we offer illustrative examples of the broader concept of corruption and their detrimental effects, highlighting the prevalence of incidents of corruption not captured by 'classic' corruption. The next section will assess the probability and possible features of a Grotian Moment for a broadened concept of corruption from two perspectives: by examining potential avenues for elevating such a concept of corruption to the international legal sphere through both the international human rights system and an international criminal law approach; and by reviewing some potential challenges, such as resistance from political elites and legal procedural issues such as attribution.

The article concludes that based on (a) the rapidity of the international legalisation process of anticorruption mechanisms propelled by a global norm-shift on corruption and culminating in the adoption of a range of international and regional legal anticorruption instruments within less than a decade; and on (b) an interpretation of widespread ratification of treaty law signalling a Grotian Moment; a Grotian Moment may have been achieved for a narrow concept of 'classic' corruption. And while there is an urgency for a Grotian Moment to be ushered in for a broadened concept of corruption, realities of the global political landscape would prove such an evolution of international law illusionary.

A Grotian Moment for 'Classic' Corruption?: a Historical Perspective[6]

Historically, there is broad consensus among political and legal writers that corruption is such an ineradicable part of human nature that its only theoretically plausible cure, totalitarian autocracy, is worse than learning to live with corruption. Some theologians disagree, but only about a cure being even theoretically available in this life.[7] Since the very origins of humanity, various forms of corruption have been a central feature of legal discourse and ultimately

6 For definitions of Grotian Moments see Tom Sparks and Mark Somos, 'Grotian Moments: An Introduction', *Grotiana* 42:2 (2021), 179–192.

7 Some Manicheans and Anabaptists considered themselves uncorrupted, but they did not leave large coherent bodies of writing behind.

culminated in the proliferation of international anticorruption law at the end of the last century.

Renaissance to Enlightenment

By Machiavelli's time, the maxim that political and moral corruption are akin to the inevitable decay of the human body has become deeply entrenched; few utopian advocates of an incorruptible body politic, able to defy the structural causes of decline diagnosed by Polybius, have been taken seriously. The acceptance of corruptibility as an integral feature of humans individually and collectively is a mainstay of Western legal thought. The *topos* that laws are only needed because corruption is inescapable is the brightest thread through our discourse, memorably captured from Aristotle to Rousseau and in forensic speeches from Edward Coke to James Madison. In Christian formulations of this theme, the first Grotian Moment is therefore the Fall, when corruption set in, war and crimes began, laws became necessary and a set of customary international laws, such as legal protection for monogamy and the use of explicit oaths to signal binding agreements, were crystallised as soon as Adam and Eve tasted the forbidden fruit.[8] A specific understanding of corruption has also

8 E.g. Christian Thomasius, *Institutes of Divine Jurisprudence, with Selections from Foundations of the Law of Nature and Nations* (1688), ed., tr. and intr. by Thomas Ahnert (Indianapolis: Liberty Fund, 2011), I.ii §62, pp. 98–9. *Pacta sunt servanda* necessitated by the 'state of corruption': *Institutes*, II.vi §2, p. 205. The institution of binding oaths 'has only been introduced as a crutch for corrupt nature', as faithfulness cannot be assumed and only verbalised promises can be made enforceable: *Institutes*, II.viii §1, p. 241.

Wars start due to the corruption of human nature: *Institutes*, I.ix §104, p. 277. On the Fall and laws governing the society of nations: *Institutes*, III.i §53, p. 363. Laws governing sexual relations, including proscriptions of polygamy and adultery, also appear in customary international laws rather than divine laws, since God made exceptions to these rules, but they are followed by civilised nations. *Institutes*, III.iii. One must distinguish humanity's corrupt nature from individuals guilty of added corruption in that context: *Institutes*, III.vii §83, p. 526; §110, p. 532.

Heineccius: corruption triggered by the Fall necessitated States: *Elementa Iuris Naturae et Gentium: Methodical System of Universal Law: Or, the Laws of Nature and Nations, with Supplements and a Discourse by George Turnbull,* ed. and intr. by Thomas Ahnert and Peter Schroder (Indianapolis: Liberty Fund, 2008), II.vi.ciii, p. 408.

Machiavelli accepted the already well-established argument that serving in a militia counteracts corruption. Vattel and James Otis, Jr. inverted it and welcomed what they described as customary laws for using standing armies. E.g. Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. and intr. by Béla Kapossy and Richard Whatmore (1758) (Indianapolis: Liberty Fund, 2008), III.xv, p. 613.

emerged in the Islamic world in the eleventh century as a 'state's decay' that can only be halted through legal regulation.[9]

In his 1707 introduction to the first German edition of Grotius's *De iure belli ac pacis*, Christian Thomasius (1655–1728) gave an historical overview of the evolution of the law of nations as an academic discipline. In his account, the discipline became self-aware with the ancient Greeks at the latest, but immediately entered a spiral of corruption due to ignorance and political ambition that were greatly exacerbated by the rise of Christianity as a state religion and by the professionalisation of theology and divine and canon law.[10] Catholics and Jesuists brought both the practice and study of international law to its most corrupt nadir, while Luther and his followers helped merely to slow down the corruption of international law, until finally God sent Grotius 'to provide it with a new beginning'.[11] Thomasius, and after him Jean Barbeyrac (1674–1744), postulated a Grotian Moment, the defining characteristic of which was that it put an end to international law's corruption. Johann Gottlieb Heineccius (1681–1741) was among many who proposed a Hobbesian Moment in which Hobbes changed the law of nations forever by revealing that corrupt human nature cannot be contained without the ever-present violence of powerful sovereigns, and that the same irreparable and almost incontrollable corruption will thwart any attempt to establish a peaceful union of states.[12] By contrast, Samuel Pufendorf (1632–1694) held that cognitive bias, irrational emotions and self-deceit were such pervasive sources of corruption that no amount of domestic and international law could ever eradicate corruption from human interaction.[13]

Since Bernard Bailyn's 1967 *Ideological Origins of the American Revolution*, the recognition of corruption's pervasive impact in legal history has dominated scholarship on American independence and diplomatic relations. Judges and scholars often remind us that although Louis XIV stayed within the remit of

9 Bo Rothstein and Aiysha Varraich. *Making Sense of Corruption* (Cambridge: Cambridge University Press, 2017), p. 33.

10 Also see Thomasius' 1701 essay on the crime of sorcery, where he blames self-serving lawyers for inventing and perpetuating a fictitious crime for political gain, and to keep their practice going. Christian Thomasius, *Essays on Church, State, and Politics*, ed., tr. and intr. by Ian Hunter, Thomas Ahnert and Frank Grunert (Indianapolis: Liberty Fund, 2007), pp. 244–245.

11 Thomasius, 'On the History of Natural Law until Grotius', first published in 1707 as the foreword to the first German translation of Grotius's *De iure belli ac pacis*. In Thomasius, *Essays*, p. 45. Also see Thomasius, *Foundations*, in *Institutes*, p. 1.

12 Heineccius, *Methodical System*, I.iii.lxxiii, p. 59.

13 E.g. Pufendorf, *Of the Law of Nature and Nations*, ed. and tr. by George Carew (London: Walthoe, Wilkin, Bonwicke, Birt, Ward and Osborne, 1729), VIII.III.xiv, p. 777.

European diplomatic custom when he presented Benjamin Franklin with a portrait surrounded by 408 diamonds in a snuff box in 1785, the King unwittingly triggered a constitutional crisis with enduring consequences in the young United States, where expensive gifts were normally seen as temptations to luxury and dependency. Congress had to approve the gift under a provision that later became Article I, Section 9 of the Constitution: 'No person holding any office of profit or trust under [the United States], shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.' Pivoting around Franklin's snuff box, Zephyr Teachout and Larry Lessig traced the legal discourse of corruption from its Renaissance roots, through its seventeenth-century English and Dutch flowering, to its American fruits until the Supreme Court's 2010 campaign finance decision in *Citizens United v FEC*, described by Teachout and Lessig as an historically ignorant departure from the US anticorruption tradition, which they perceive as extending to conflicts of interest and cognitive biases, and thus far broader than the dominant notions of 'classic' corruption.[14]

A Decade of International Legal Regulation for 'Classic' Corruption

Over the span of just a couple of decades fighting corruption has evolved from a somewhat controversial issue into an international norm, advocated for by strong states and disseminated by non-state actors.[15] Between the mid-1990s and early 2000s, an acceleration has taken place in the development of international anticorruption law, as it pertains to the narrower understanding of 'classic' corruption defined 'as the abuse of entrusted power for private gain'.[16] Within a short period of seven years, from 1996 to 2003, a plethora of

14 Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* (New York: Twelve, 2011). Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Cambridge: Harvard University Press, 2014). Much of the historical analysis of the discourse on corruption comes from Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967). Not mentioned in this literature is Vattel's countervailing point that by the law of nations, sovereigns must honour the independence of foreign ambassadors by not threatening them even subtly or indirectly, because ambassadors' mental independence is vital for interstate relations. Vattel, *Law of Nations*, IV.vii, p. 706. Vattel also describes the crime of corrupting ambassadors through gifts: *Law of Nations*, IV.vii., pp. 708–709.

15 For instance, France was sceptical of early efforts to develop anticorruption mechanisms at the OECD. See Barbara C. George and Kathleen A. Lacey, 'A Coalition of Industrialized Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives,' *Cornell International Law Journal*, 33 (2000), 547–592.

16 Transparency International, 'What is Corruption?', (2021).

international and regional legal instruments aimed at tackling 'classic' corruption have emerged[17] from as many as nine international and regional organisations. This significant period in the internationalisation of anticorruption law was preceded by two inconsequential 'waves' of anticorruption initiatives. The first 'wave' of a potential norm evolution started in the 1970s with debates on corruption emerging in the UN, OECD and among European countries, and the second 'wave' commencing in the late 1980s with renewed efforts in developing anticorruption mechanisms to target corruption conducted by businesses, but neither led to any concrete outcomes in the form of international legal instruments.[18] Lohaus suggests that the third 'wave of agreements appears to reflect a new global consensus against corruption.'[19]

There are a number of explanations for why anticorruption initiatives flourished and that have provided the 'context of fundamental change (…) to serve as an accelerating agent [for international law] to form much more rapidly'[20] in the third wave. A possible explanation is the end of the Cold War, prompting states to reverse their stance on supporting kleptocratic regimes in the absence of East-West confrontations and opening space for international collaboration.[21] Another factor was the spread of democracy and economic globalisation—including the proliferation of transnational corporations and a rise in globalised corruption scandals, with emerging theories on the detriments of corruption on the open market system and on democratic institutions, especially emanating from the World Bank and the International Monetary Fund.[22] This was also accompanied by a shift in global norms viewing corruption as a major cause for poverty in developing nations[23] and for insecurity as a negative externality of conflict in failed or weak states.[24] Specifically, Alexander Cooley and Jason Sharman find that 'what was new in the 1990s was seeing corruption as an international governance problem, rather than just a domestic

17 Elitza Katzarova, 'From Global Problems to International Norms: What Does the Social Construction of a Global Corruption Problem Tell us About the Emergence of an International Anti-Corruption Norm', *Crime, Law and Social Change*, 70 (2018), 299–313.

18 Anja P. Jakobi, 'The Changing Global Norm of Anti-Corruption: From Bad Business to Bad Government,' *Zeitschrift für Vergleichende Politikwissenschaft*, 7 (2013), 243–264.

19 Mathis Lohaus, *Towards a Global Consensus Against Corruption: International Agreements as Products of Diffusion and Signals of Commitment* (London: Routledge, 2019).

20 Scharf, 'Grotian Moments', at p. 195.

21 J. C. Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cambridge: Cambridge University Press, 2017).

22 Lohaus, 'Global Consensus Against Corruption'; Abbott and Snidal, 'Values and Interests.'

23 Sharman, 'Despot's Guide to Wealth Management.'

24 Lohaus, 'Global Consensus Against Corruption.'

matter amendable to local criminal investigative and regulatory solutions.'[25] This observable shift in global norms on corruption in the 1990s 'was essential to the success of the anticorruption movement' and a critical catalyst driving what Abbott and Snidal described as the 'surprising rapidity' of the international legalisation process of anticorruption mechanisms.[26] Indeed, it was this change in normative values that allowed for the re-introduction of the debate on corruption in international fora and accounted for the success in the 'third' wave after the failures endured in the decades before.

Prompted by domestic political developments and corruption scandals during the 1970s, the US played a considerable role in the adoption of international and regional anticorruption law, including the United Nations Convention Against Corruption (UNCAC).[27] Jakobi identifies the US as a 'central norm entrepreneur,'[28] while Lohaus notes that the 'US government was the principal agenda-setter and proponent of banning transnational bribery.'[29]

Some anticorruption instruments originate in the US legal framework. Following the adoption of the *Foreign Corrupt Practices Act* of 1977, which was the first legal instrument addressing transnational corruption, the US lobbied for the establishment of an international legal system aimed at internationalising its domestic regulations for combatting corruption of foreign officials as the Act only regulated US businesses and impacted their competitiveness. Encountering significant resistance at the UN, primarily from developing countries due to the proposed narrow definition of corruption and concerns regarding potential implications for their country's sovereignty, but also from European countries hesitant to impact the competitiveness of European businesses,[30] the US pursued a similar track through the Organization of

25 Alexander Cooley and J. C. Sharman, 'Transnational Corruption and the Globalized Individual,' *Perspectives on Politics*, 15:3 (2017), 732–753, at p. 733.

26 Kenneth W. Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption,' *The Journal of Legal Studies*, 31:S1 (2002), 141-177, at pp. 158 and 144.

27 Sharman, 'Despot's Guide to Wealth Management'; Lohaus, 'Global Consensus Against Corruption'; Jakobi, 'Changing Global Norm of Anti-Corruption'; Abbott and Snidal, 'Values and Interests'; Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, 'The Fight Against Corruption in International Law', *Leuven Centre for Global Governance Studies Working Paper*, 94 (2012). For instance, the US tabled a draft agreement on anticorruption at the UN as early as 1976. See Jakobi, 'Changing Global Norms'. On treaties as potential signals of crystallisation of customary international law in the context of Grotian Moments, see e.g. Sparks and Somos, 'Grotian Moments', at pp. 184–185 and Jutta Brunnée, 'International Environmental Law: Of Sovereignty, Complexity, and Grotian Moments', in this issue.

28 Jakobi, 'Changing Global Norm of Anti-Corruption,' at p. 245.

29 Lohaus, 'Global Consensus Against Corruption,' at p. 5.

30 Abbott and Snidal, 'Values and Interests'.

American States (OAS) and the Organisation for Economic Co-operation and Development (OECD), which proved to be more successful. Despite the role of the US in spearheading these debates, there is no doubt, however, that the US was not the only critical actor in advancing the international legalisation of anticorruption mechanisms. Indeed, in the early 1990s a coalition of actors from developing nations hijacked the forum of an OECD conference to demand actions being taken against corruption.[31] Similarly, European legal instruments were to some extent the result of the publicity given to corruption scandals involving prominent European leaders, while the AU Convention was driven by civil society and donors' concerns over corruption on the continent.[32]

With the adoption of the Inter-American Convention against Corruption in 1996, the OAS adopted the first legally binding international legal instrument aimed at fighting corruption.[33] The OECD's Convention on Combating Bribery of Foreign Public Officials was adopted in 1997. Focusing primarily on a small set of corruption practices and, in particular, on the supply side of bribes rather than also on the role of the bribe taker, the OECD has adopted a fundamentally narrow approach in its anticorruption law. That same year, the EU adopted the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union. The Council of Europe was among the first regional organisations to address some form of corruption in a set of non-binding recommendations in 1981, but it was not until 1998 that it adopted the Criminal Law Convention on Corruption. In other regionalisations of anticorruption law, the adoption of the African Union Convention on Preventing and Combating Corruption followed in 2003.[34] These regional anticorruption efforts culminated in the adoption of the UNCAC in 2003. Although the UN had initiated debates on anticorruption mechanisms as early as the 1970s, such as in a report on corruption developed by the Economic and Social Council (ECOSOC) and in a corruption-related resolution adopted by the General Assembly, anticorruption only re-emerged as a key issue in the 1990s.[35]

A review of these legalised anticorruption mechanisms reveals a strong norm confluence that has influenced their respective provisions, with 'many provisions [being] copied verbatim.'[36] Both the OECD convention and the OAS convention were heavily influenced by the FCPA.[37] Yet, the nature of the

31 Abbott and Snidal, 'Values and Interests'.
32 Lohaus, 'Global Consensus Against Corruption.'
33 Jakobi, 'Changing Global Norm of Anti-Corruption.'
34 Wouters et al., 'The Fight Against Corruption in International Law.'
35 Jakobi, 'Changing Global Norm of Anti-Corruption.'
36 Lohaus, 'Global Consensus Against Corruption,' at p. 16.
37 George and Lacey, 'Coalition of Industrialized Nations.'

international and regional legal instruments discussed above varies, with some benefiting from a broader scope but weak monitoring mechanisms, while others have adopted a narrower scope with stronger enforcement measures.[38] To assess whether these developments in international law represent a Grotian Moment, we proceed with an in-depth examination of UNCAC.

UNCAC: Zenith of a Grotian Moment?

While numerous treaties embody anticorruption norms and commitments relevant to identifying a Grotian Moment in international law, UNCAC is emblematic of UN and regional anticorruption initiatives.[39] In his foreword to UNCAC, then Secretary-General Kofi Anan compared the spread of corruption to a plague ravishing the world, and welcomed UNCAC as the first global and legally binding anticorruption instrument.[40] There are a number of factors that may indicate that the adoption of UNCAC marks the culmination of a Grotian Moment.

First, UNCAC was adopted by the General Assembly, which is significant in light of Michael P. Scharf's elaboration of a Grotian Moment as counselling 'governments when to seek the path of a U.N. General Assembly resolution as a means of facilitating the formation of customary international law.'[41] Second, the remarkably high number of signatories and ratifications, counting 187 State Parties as of 6 February 2020, including the US and China,[42] with most parties having 'refrained from making reservations that would damage the integrity of the treaty.'[43] And some States that have not ratified the UNCAC, have signed on to other regional anticorruption legislation, indicating that only a very small set of countries is not party to any international or regional anticorruption instrument – clearly signalling the manifestation of an international anticorruption norm.[44] Demonstrating that a high ratification rate is central for the time element in the formation of customary international law, Omri Sender and Sir Michael Wood cite the International Court of Justice (ICJ) in determining that 'even without the passage of any considerable period

38 Lohaus, 'Global Consensus Against Corruption.'

39 For detailed contextualising UNCAC in the universe of other anticorruption agreements see Lohaus, 'Global Consensus against Corruption.'

40 UNODC, 'The Secretary-General: Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption', (31 October 2003).

41 Scharf, 'Grotian Moments', at p. 204.

42 United Nations Convention Against Corruption, Adopted on 9 December 2009.

43 C. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: Oxford University Press, 2015), p. 97.

44 Jakobi, 'Changing Global Norm of Anti-Corruption'; Lohaus, 'Global Consensus Against Corruption.'

of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'.[45] This understanding of a high ratification rate of a treaty as an indicator of a Grotian Moment was echoed by Dire Tladi.[46]

Third, the definition and norm emanation may represent a potential Grotian Moment. The hope was that improved definitions of elements and mechanisms of corruption will be imported from UNCAC into domestic criminal codes to facilitate reporting and international review of codes of conduct for public officials under UNCAC Art. 8; and that this process over time will create a profound and enduring paradigm shift in anticorruption.[47] Although UNCAC does not define corruption,[48] its Preamble specifies three characteristics: corruption threatens social stability, it is linked to other crimes, and it is transnational. UNCAC aims and is understood to aim for impacts that would turn the treaty into a marker of the crystallisation of customary international anticorruption law, partly but not only through domestic incorporations of UNCAC measures.[49] Multiple UNCAC provisions that aim to entrench meritocracy and displace nepotism or comparable undue advantage have been hailed as a panacea.[50] Yet, UNCAC is arguably too 'soft' to generate a Grotian Moment via domestic incorporation: 'due to the liberal use of semi- and non-mandatory articles, as well as qualified provisions, the Convention is for the most part not likely to pose any threat to the sovereignty of States parties in the first place.'[51]

Fourth, UNCAC may produce a Grotian Moment by mandating transparency and disclosure. Asset and private interests declarations, comparable to Teachout's anticorruption genealogy in the US context, are provided by UNCAC Art. 8(5), and have given rise to hopes that they will help to extinguish conflicts of interest.[52] In a similar reach for transparency, UNCAC Art. 10 has been described as a unique force for public reporting obligations.[53] Transparency and disclosure are powerful tools against corruption; however, they can be

45 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, at p. 42, para. 73.

46 Dire Tladi, 'Grotian Moments and Peremptory Norms of General International Law: Friendly Faciliators or Fatal Foes?', *Grotiana* 42:2 (2021), 334–352, at p. 346.

47 Eds. Cecily Rose, Michael Kubiciel and Oliver Landwehr, *The United Nations Convention Against Corruption: A Commentary* (Oxford, UK: Oxford University Press, 2019), p. 84.

48 Eds. Rose *et al*, *UNCAC Commentary*, p. 23 on debates during drafting that led to this feature.

49 On treaties marking Grotian Moments, see Sparks and Somos, 'Grotian Moments.'

50 Eds. Rose *et al*, *UNCAC Commentary*, pp. 68, 70.

51 Eds. Rose *et al*, *UNCAC Commentary*, p. 43. Also see p. 44 on the 'distinct softness' of UNCAC's Implementation Review Mechanism.

52 Eds. Rose *et al*, *UNCAC Commentary*, p. 88.

53 Eds. Rose *et al*, *UNCAC Commentary*, pp. 107–108.

counterproductive under the current UNCAC conceptualisation of corruption, as the transparency mandates can create unrealistic expectations, especially given implementation problems, and the systematic corruption of information that States signatories to UNCAC will undoubtedly generate.[54]

Fifth, and relatedly, a quantitative breakthrough or tipping point ushered in by UNCAC may mark a Grotian Moment for anticorruption. The drafters, signatories, and commentators of UNCAC hold that it will produce an anticorruption breakthrough by generating transparency and improved knowledge through data collection. Three examples of this highly optimistic formulation are the 2009 *Quantitative Approaches to Assess and Describe Corruption and the Role of UNODC in Supporting Countries in Performing Such Assessments: Background Paper Prepared by the Secretariat*; the 2019 Working Group on the Prevention of Corruption's 'The use of information and communication technologies for the implementation of UNCAC',[55] and the *Oxford Commentary* on UNCAC Art. 5(2), Art. 5(4),[56] and Art. 6(3). While it is not implausible that data collection will instil habits that in turn solidify into State-level anticorruption standards and practices, there are reasons to doubt the potential of data collection to create a Grotian Moment, including through the limitations set by national contexts in which data collection is performed and through cognitive biases, which can reinforce other forms of corruption by providing political or legal cover for unmeasured or unmeasurable sources of corruption.[57]

Heeding warnings to be cautious in identifying Grotian Moments where there are none,[58] and recognising the significant shortcomings of UNCAC, we contend that there is persuasive evidence suggesting that a Grotian Moment might potentially have been achieved for 'classic' corruption. Ultimately, this

54 On creating false expectations by adding implementation problems to the design of transparency laws, see Richard S. Saver, 'Deciphering the Sunshine Act: Transparency Regulation and Financial Conflicts in Health Care', *American Journal of Law & Medicine*, 43:3 (2017), 303–343. On the systematic corruption of knowledge by misrepresenting scientific data see, Sergio Sismondo, 'Key Opinion Leaders and the Corruption of Medical Knowledge: What the Sunshine Act Will and Won't Cast Light On', *Journal of Law, Medicine and Ethics* 14:3 (2013), 635–643; and by presenting data in ways that non-specialists cannot understand, see Meredith B. Rosenthal and Michelle M. Mello, 'Sunlight as Disinfectant – New Rules on Disclosure of Industry Payments to Physicians', *New England Journal of Medicine* 368:22 (2013), 2052–2054.

55 UN Doc. CAC/COSP/WG.4/2016/2, 3 June 2016.

56 Eds. Rose *et al*, *UNCAC Commentary*, p. 54.

57 Eds. Rose *et al*, *UNCAC Commentary*, pp. 55–56.

58 Michael P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change', *Cornell International Law Journal*, 43 (2010), 439–469, at p. 452; Omri Sender and Michael Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law', *Grotiana* 42:2 (2021), 229–251.

determination hinges on what approach is adopted in identifying a Grotian Moment; whether informed by a more conservative understanding resting on the formation of customary international law,[59] or by a broader conceptualisation of Grotian Moments as signifying a critical moment that leads to the acceleration of international law.[60] To advance our argument, we have adopted the latter approach to identifying a Grotian Moment based on a global norm shift and the rapid legalisation process of international and regional anticorruption mechanisms, as signalled by the sheer number of instruments adopted within a short period of time and the high rate of ratification of these instruments by almost all States representing the international community.

Beyond 'Classic' Corruption: a Grotian Moment for a Broadened Concept of Corruption

Despite these achievements in advancing the anticorruption agenda in the 1990s, the aforementioned international legal instruments have significant shortcomings even in combating 'classic' corruption, but especially in addressing other forms of corruption. While important work remains to be done in improving enforcement mechanisms for existing legal instruments fighting 'classic' corruption, given the prevalence and detrimental effects of other forms of corruption, international law ought to evolve to encompass mechanisms incorporating a broader concept of corruption. We argue that separately and in addition to earlier anticorruption efforts, a Grotian Moment *ought* to be achieved for a broadened concept of corruption that takes into account the complexities of the global phenomenon of corruption in all its forms.

Conscious that '[t]he search for a robust conceptual definition of corruption is a near Sisyphean task,'[61] we proceed with a review of some proposed definitions for other forms of corruption, namely institutional, political, and grand corruption, to underpin our argument.[62] The term *institutional corruption* was coined by Dennis Thompson, who defined the concept as a 'political gain or

59 Scharf, 'Grotian Moments', p. 204.

60 Tladi, 'Grotian Moments and Peremptory Norms of General International Law', p. 336; Frédéric Mégret, 'The 'Grotian Style' in International Criminal Justice', *Grotiana*, 42:2 (2021), 303–333 (p. 302).

61 Paul M. Heywood and Jonathan Rose, 'Curbing Corruption or Promoting Integrity? Probing the Hidden Conceptual Challenge', in *Debates of Corruption and Integrity*, ed. by Peter Hardi, Paul M. Heywood, and Davide Torsello (London: Palgrave MacMillan, 2015), p. 103.

62 Scholars at times use the different definitions of corruption interchangeably. For instance, for what we would label as institutional corruption, Peters uses the term grand corruption

benefit by a public official under conditions that in general tend to promote private interests.'[63] Lessig built upon and expanded the definition as follows:

> Institutional corruption is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.[64]

With regard to *political corruption*, Emanuela Ceva argues that such conduct occurs when 'an institutional role-occupant who makes use of her power of office for the pursuit of an agenda whose rationale may not be publicly vindicated as coherent with the terms of the mandate for which that power was entrusted to her role and for which she is publicly accountable.'[65] *Grand corruption* is defined by Transparency International as 'the commission of any of the offences in UNCAC Articles 15–25 as part of a scheme that (1) involves a high level public official; and (2) results in or is intended to result in a gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group.'[66] These different forms of corruption appear on a continuum of individual and institutional corruption and are for the most part interconnected and overlapping. As Thompson notes, 'many instances of corruption are appropriately described as more or less institutional, or more or less individual.'[67] Individual corruption, particularly in developing countries, often takes on a systemic nature and

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to describe "what is provocatively termed 'legal corruption': non-transparent election financing and the resulting vested interests of politics and a toleration of the smooth transition of public officials to lucrative jobs in the private sector, in which the insider knowledge gained in office can be put to use in the new company (the 'revolving door' phenomenon)." *See:* Anne Peters, p. 1280.

63 Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, DC: Brookings Institution, 1995).

64 Lawrence Lessig, '"Institutional Corruption" Defined', *Journal of Law, Medicine and Ethics*, 41:3 (2013), 553–555 at p. 554.

65 Emanuela Ceva, 'Political Corruption as a Relational Injustice', *Social Philosophy and Policy*, 35:2 (2018), 118–137 at p. 120.

66 UN Doc CAC/COSP/2019/NGO/1, 12 December 2019, Statement submitted by Transparency International, a non-governmental organization in consultative status with the Economic and Social Council.

67 Dennis Thompson, 'Theories of Institutional Corruption', *Annual Review of Political Science*, 21 (2018), 495–513 at p. 503.

turns into an institutionalised form of corruption.[68] Thus, 'as corrupt practices are iterated over time they become institutionalised and develop their own cultural logics that create a quasi-acceptance of such practices by society at large.'[69]

Not dismissing the existence of different types of corruption and the varying connections between corruption and the political systems, Bo Rothstein and Aiysha Varraich argue in search of a universal core meaning of corruption that 'the underlying current for corruption being condemned in almost all known societies (…) is the equating of corruption with some particular form of injustice.'[70] In the public sphere this is particularly related to injustices in the access to public goods, whereby the State has to practice the 'impartiality principle' of treating all those equally that deserve equality and officials entrusted with the management of public goods distribute them accordingly.[71] The State regulates both the 'input' side of engagement with citizens, whereby access to power is ideally regulated by electoral processes, and the 'output' side where those officials determine access to public goods.[72] Thus, it is crucial to combat corruption in all its forms, especially as a system based on 'fair' mechanisms to determine access to power—including with respect to campaign financing—is expected to produce justice in the access to public goods.[73] Although, Matthew Stephenson cautions that a more nuanced approach is required to analyse the complex interrelations of democracy and corruption. He argues that while, on the whole, levels of democratic governance may have a positive effect on the reduction of corruption, evidence also suggests that the competitive nature of democratic electoral processes may incentivise candidates to engage in what he terms 'instrumentalised political corruption.' An evaluation of cross-country studies reveals a mixed picture but also illustrates a non-linear relation between corruption and democracy, whereby 'long-standing, well-established democracies exhibiting notably lower levels of perceived corruption than

68 Ibid.

69 Todd Landman and Carl J. W. Schudel, 'Corruption and Human Rights: Empirical Relationships and Policy Advice,' Working Paper (2007).

70 Rothstein and Varraich, 'Making Sense of Corruption,' p. 52.

71 Bo Rothstein and Jan Teorell, 'What Is Quality of Government: A Theory of Impartial Political Institutions'. *Governance*: *An International Journal of Policy, Administration and Institutions* 21:2 (2008), 165–90.

72 Rothstein and Varraich, 'Making Sense of Corruption.'

73 Ibid, p. 140.

other polities.'[74] Similarly, different democratic political systems were found to have led to different *forms* of corruption.[75]

There are two trends that are indicative of the need for a Grotian Moment for a broadened concept of corruption in international law incorporating elements of institutional, political, and grand. First, there is increasing recognition within the international legal system of the need to address other forms of corruption both among States, particularly developing countries that advocate for the adoption of a broader definitional scope of corruption, and among international lawyers. Second, a world defined by increasing interconnectedness has given rise to incidents of different forms of corruptions that have transnational reach and span several jurisdictions or fall at least partly between the cracks.

States' Demand for a Broadened Concept of Corruption

States' recognition that a broader lens is needed for corruption was signalled by a shift in focus from corruption's market-distorting effects to a broader understanding of its effects on justice and society. States 'were bitterly divided over the definition of corruption,' but in its final text the UNCAC adopted a definition that covered a wider range of corrupt practices than earlier international legal instruments.[76] For instance, in its preamble, the UNCAC takes note of the systemic nature of corruption and its detrimental effects on public institutions and democracy. It specifically calls on States to tackle institutional corruption by enhancing 'transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.'[77] Similarly, the OAS Convention adopted a broadened concept of corruption emphasising its corrosive effects on democracy.[78] The European Civil Law Convention incorporates a concept of corruption that not only includes instances of *quid pro quo*, but also forms of corruption that distort democratic processes and norms, including the principle of equality.[79] Even so, the existing international legal framework, including UNCAC, has largely adopted a narrow focus on 'classic' corruption. For instance, a key 'weakness in the [OECD] Convention concerns

74 Matthew C. Stephenson. 'Corruption and Democratic Institutions: A Review and Synthesis', in *Greed, Corruption, and the Modern State. Essays in Political Economy* 92, ed. by Susan Rose-Ackerman and Paul Lagunes (Cheltenham: Edward Elgar Publishing, 2015), p. 126.

75 Ibid.

76 Katzarova, 'From Global Problems to International Norms,' p. 309.

77 UNCAC, Art. 7, para 3.

78 Wouters et. al., 'The Fight Against Corruption in International Law.'

79 Lys Kulamadayil, 'When International Law Distracts: Reconsidering Anti-Corruption Law', *ESIL Reflections* 7:3 (2018).

its substantive scope, [namely] the types of bribes that are prohibited,' with critics pointing out the 'exclusion of payments to foreign political parties' and other foreign public officials[80]—matters that may be encompassed by a definition incorporating political and institutional corruption. The norms emerging from the international legalisation of anticorruption efforts from the 1990s on are often also perceived by some critics as representing an overly Western-liberal understanding of corruption that is not necessarily applicable to other contexts, while what constitutes corruption varies greatly in different cultural contexts.[81]

This can be explained by pressure applied by the US, advocating for a narrow legal definition that contrasted the broader understanding preferred by many other States, particularly developing countries. States represented in the G-77 at the General Assembly promoted an understanding of corruption as corporate influence over politics and the interference of such undue influence with the public interest. Already in 1974, States proposed at the UN the regulation of such exchanges between transnational corporations and officials through a binding code, but this was strongly rejected by the US and other OECD countries.[82] During the drafting of the OECD Convention, European countries expressed fierce opposition to provisions seeking to regulate payments to political parties due to concerns over sovereign decision-making on party and campaign financing.[83] Years later during the negotiations on UNCAC, the US objected to a number of preliminary drafts that seemed to criminalise other forms of corruption.[84] Under the Biden administration, even the US may finally embrace a broadened concept of corruption. As presidential candidate, Biden pledged to tackle institutional corruption and to convene a global Summit for Democracy focused on fighting corruption, vowing that '[he] will lead efforts internationally to bring transparency to the global financial system.'[85]

Further evidence that most States see the need for a broadened concept of corruption can be found in the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law, which states that '[w]e are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes *public confidence*, *legitimacy* and *transparency* and

80 Abbott and Snidal, 'Values and Interests,' p. 169.
81 Rothstein and Varraich, 'Making Sense of Corruption.'
82 Katzarova, 'From Global Problems to International Norms'.
83 Abbott and Snidal, 'Values and Interests,'.
84 Wouters. et. al. 'The Fight Against Corruption in International Law'.
85 Joe Biden, 'Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump', *Foreign Affairs*, (March/April 2020).

hinders the *making of fair and effective laws*, (…).'[86] Even more clearly, States pledged in the General Assembly's Agenda 2030 for Sustainable Development under target 16.5 to 'substantially reduce corruption and bribery in *all their forms.'* These recent developments suggest a possible shift in the conceptualisation of corruption within the international legal system based on the original Senturia-influenced World Bank definition.[87] States have moved beyond their narrow understanding of corruption as merely *quid pro quo* transactions and promote a broadened concept of corruption.

Rise in Corruption Incidents with Transnational Reach

The need for a Grotian Moment for a broadened concept of corruption in international law is reinforced by the rise in incidents of various forms of corruption—both at the international and domestic level—that have transnational reach and fall outside the jurisdiction of any one State, or affect people in third States who cannot find redress within the jurisdictional State. A review of a number of perception-based indexes on the prevalence of corruption indicates that there has been a clear rise in corruption in the years following 2010.[88] Cooley and Sharman speak of an increasingly globalised network of corruption that is insufficiently captured by the traditionally country-based approach, arguing that 'corruption is increasingly instantiated in transnational networks of intermediaries that link actors, institutions, and processes across developing and developed States.'[89]

Prevalence of various forms of corruption in low-capacity States that are unable to address them, especially when systematic and institutionalised, cause serious negative externalities and represent a transnational challenge. Corruption at the national level may lead to an erosion of trust in public institutions and undermine the functioning of governments, which in turn may impede efforts at maintaining stability and ensuring regional security. In *Thieves of State*, Sarah Chayes draws linkages between corruption in fragile States and international security threats. Building on extensive empirical research, she finds that low public trust and dissatisfaction nurtured by systemic corruption

86 UN Doc. A/RES/67/1, 30 November 2012, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, p. 4, para. 25.

87 Senturia defined political corruption as the misuse of public power for private profit. See Joseph Senturia, 'Corruption, political', *Encyclopedia of the Social Sciences*, 4 (1931), 448–452 at p. 448.

88 Jakobi, 'Changing Global Norm of Anti-Corruption,' p. 255.

89 Cooley and Sharman, 'Transnational Corruption and the Globalized Individual,' p. 732.

and abuse of public power is the main factor driving violent extremism.[90] A survey of Afghanistan's 2010 parliamentary elections has shown a system based on patronage encouraging candidates to favour clientelist strategies during their election campaigns relative to programmatic strategies, which in turn undermined voters' rights to express their preferences through genuine participation in the political process and to hold their public officials accountable.[91] In Kenya, pervasive corruption, especially as it relates to campaign financing, has fuelled post-election violence and political instability. Efforts at regulating campaign financing such as the adoption of the *Election Campaign Financing Act* in 2013, which was nullified by Kenya's National Assembly, have faced fierce resistance from political elites.

Moreover, institutional and other forms of corruption influencing law-making in one State may affect third States. In addition to undermining democratic processes at the national level, law-making shaped by corruption bears negative implications for citizens from other States who are denied remedies for the misconduct of public officials from a third State. For example, institutional corruption in the US influences foreign policy that affects other countries, such as the decision to wage war,[92] or the 'revolving door' phenomenon in the US military-industrial complex.[93] The German arms export regime is characterised by secrecy and lack of transparency regarding corporate influence on decision-making, which renders the regime particularly vulnerable to instances of institutional corruption.[94] The transnational nature of institutional corruption has been underscored by the influence that foreign governments wield over domestic policy making through financial contributions to think tanks that serve as an important source of information and guidance for policy-makers.[95] Also, laws influenced by institutional corruption that appear to be merely of a domestic nature can have transnational reach. A recent news report found that US gun laws influenced by the National Rifle Association (NRA) as one of the main lobbying groups in the US, with support for 'legislative programs'

90 Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security*, (New York: WW Norton & Co., 2016).

91 Michael Callen and James D. Long, 'Institutional Corruption and Election Fraud: Evidence from a Field Experiment in Afghanistan', *The American Economic Review*, 105:1 (2015), 354–381.

92 Simona Ross, 'Who Governs Global Affairs? The Role of Institutional Corruption in U.S. Foreign Policy', *Edmond J. Safra Working Papers*, 49 (2014).

93 Katherine Carson, 'Tarnished Brass?', *Edmond J. Safra Center for Ethics Blog* (2014).

94 Kathrin Strobel, 'Arms, Exports, Influence: Institutional Corruption in the German Arms Export Regime,' *Edmond J. Safra Working Papers*, 47 (2014).

95 Brooke Williams, 'Influence Incognito', *Edmond J. Safra Center for Ethics Research Lab Working Papers*, 3 (2013).

amounting to USD 83 million in 2016 alone,[96] have led to a proliferation of small arms in Latin America.[97]

Thus, in line with the advocacy role sometimes prescribed to international law as proposed by Sender and Woods citing Judge Altamira's words that even when a rule of customary international law has not been established, 'but is so forcibly suggested by precedents that it would be rendering good service to the cause of justice and law to assist its appearance in a form in which it will have all the force,'[98] we argue that a Grotian Moment for a broadened concept of corruption *ought* to be achieved.

A Case of Institutional Corruption in the Legal Sphere: Double-Hatting

The pressure to broaden the conceptualisation of corruption is partly a response to a loss of public trust, including in international legal institutions, where misconduct also falls outside the jurisdiction of any State. While conflicts of interest are recognised by the drafters of UNCAC, double-hatting is a powerful illustration of the advantage that an institutional corruption perspective can bring, since it focuses on hard-to-identify cognitive biases arising from institutional design.

It has long been an open secret that judges are not allergic to hefty fees for extracurricular service as arbitrators. There is no rule against it—unless one counts Art. 16(1) of the Statute of the ICJ, stipulating that '[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.' By a November 2017 count, seven of the fifteen serving ICJ judges and thirteen former judges were engaged in investor-state dispute settlements cases, serving in at least 90 such cases during their tenure at the ICJ. Nathalie Bernasconi-Osterwalder and Martin D. Brauch noted that at the time of writing, Tomka, Greenwood and Crawford earned considerably more from their appointments as arbitrators than from the ICJ, and that they accepted their arbitration roles during their ICJ term.[99]

96 Financial Statements of the National Rifle Association of America as of 31 December 2016, (8 March 2017), p. 3.

97 *The Economist*, 'Guns from the United States are Flooding Latin America', *The Economist*, 23 March 2019.

98 Referenced by Sender and Wood, 'Between "Time Immemorial" and "Instant Custom"', p. 246.

99 Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS,' International Institute for Sustainable Development (23 November 2017).

The authors argued that the judges' ICJ duties can suffer from relative inattention, as judges have a fixed salary but arbitrators are paid by the hour, and that judges' independence and impartiality may be compromised through allegiance to their investment case paymasters, in cases such as *Certain Iranian Assets* where arbitral awards have also been rendered, and by the very real probability of encountering fellow ICJ judges on the arbitration circuit.

This is not to say that the judges at the time did anything wrong, at least technically, by 'classic' corruption standards. After all, in 1995 the Court stated that 'occasional appointments as arbitrators' fell outside the scope of Art. 16 of its Statute, and such double-hatting honoured 'a long-standing tradition of the Permanent Court of International Justice [PCIJ] founded in 1922.'[100] Challenged by the Advisory Committee on Administrative and Budgetary Questions, the court repeated in its 1995–96 Annual Report that judges 'acting as arbitrators in inter-State and private international arbitrations' were in the best traditions of the ICJ and the PCIJ, and in fact show appointing parties' 'awareness of the contribution that the Members of the Court may, by this function, make to the development of international law, and of the benefits deriving therefrom for all institutions concerned.'[101]

Judicial corruption is a delicate topic. Twenty years ago, Sands presented a paper on judges' susceptibility to what the institutional corruption literature calls 'dependence' corruption, which in this case covers both appointments and remuneration. Sands and Mackenzie developed those initial thoughts by expanding the range of judicial behaviours that merit close inspection for potentially creating misaligned incentives and opportunities for corruption.[102] Sands followed up with a sustained series of criticisms,[103] which became the rhetorical anchor for several high-profile studies on specific problems Mackenzie and Sands identified, including double-hatting and revolving

100 UN Doc A/C.5/50/18, 2 November 19965, p. 12, para. 31, cited in Marie Davoise, 'Can't Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes', *EJIL: Talk!* (5 November 2018).

101 UN Doc A/51/4, 19 September 1996, Report of the International Court of Justice: 1 August 1995 - 31 July 1996, p. 43, para. 199.

102 Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge', *Harvard International Law Journal*, 44:1 (2003), 271–285.

103 Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in *Evolution in Investment Treaty Law and Arbitration*, ed. by Chester Brown and Kate Miles (Cambridge: Cambridge University Press, 2011), 19–41; Philippe Sands, 'Developments in Geopolitics – The End(s) of Judicialization?', 2015 ESIL Conference Closing Speech, 12 September 2015.

doors.[104] Yet, none of the authors of this burgeoning literature described the deeply problematic practices they identified with the word 'corrupt.' They pointed out that judges and arbitrators technically broke no rules, and occasionally argued that the problem was not the dubious practices themselves, but rather the public perception of such practices as flagrant violations of common-sense ethics.[105] Nevertheless, the pressure within the profession seemed to have reached a new peak by the end of 2018.

On 25 October 2018, Judge Yusuf, then ICJ President announced 'in the spirit of transparency' in his speech to UNGA that members of the Court 'will not normally accept to participate in international arbitration,' 'in particular, they will not participate in investor-state arbitration or in commercial arbitration.'[106] Yusuf cited the Court's 'ever-increasing workload' as the sole reason for this decision, and left the door open to judges acting in commercial arbitration 'subject to the strict condition that their judicial activities take absolute precedence.' Some commentators interpreted these provisions as a face-saving exercise by which the ICJ was responding to mounting criticism; while others predicted that judges' moonlighting and double-hatting were on their way out.

In December 2020, the Court published decisions concerning judges' external activities that can be read as one step forward and two steps back on the path to eliminate potential biases and conflicts of interest.[107] On the one hand, 'Members of the Court may only participate in inter-State arbitration cases,' which excludes lucrative roles in investor-state dispute settlement, reversing the Court's 1995 defence of double-hatting as an honourable tradition, and preserving the ICJ judges' expertise for the inter-State arena. On the other hand, the conflict with the ICJ's mandate could not be more direct. Despite the common-sense provision that

104 E.g. Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration', *Journal of International Economic Law* 20:2 (2017), 301–32; Id., 'The Ethics and Empirics of Double Hatting,' *ESIL Reflections*, 6:7 (2017); Daniela Cardamone, 'Independence of International Courts', in *Judicial Power in a Globalized World*, ed. by Paolo Pinto de Albuquerque and Krzysztof Wojtyczek (Cham: Springer, 2019), pp. 91–104. Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law', *ICSID Review – Foreign Investment Law Journal* 21:1 (2006), 126–131.

105 Sands, 'Developments in Geopolitics.'

106 ICJ, Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, 25 October 2018.

107 ICJ, Compilation of Decisions Adopted by the Court Concerning the External Activities of Its Members, Adopted on 2 October 2018.

> Members of the Court must however decline to be appointed as arbitrators by a State that is a party in a case pending before the Court, even if there is no substantial interference between that case and the case submitted to arbitration,

the same historically phenomenal recent spike in the Court's caseload and turnaround that President Yusuf invoked in 2018, suggests that judges involved in inter-State arbitration are potentially less able to escape biases and conflicts of interest due to their participation in disputes that are more likely to overlap with pending ICJ cases.[108] Judge Tomka resigned from the ICSID arbitral tribunal in *Macro Trading v. China* in February 2021.[109]

While Tomka's resignation appears to be a straightforward application of the new ICJ norms that Yusuf announced, arbitrators who are not double-hatting between private and public international law can also fall foul of the rapid evolution of applicable standards and regulations. An illustration from commercial arbitration is useful for our thesis. *Halliburton Co. v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 is a much-discussed case on the cutting edge of the falling knife of evolving conflicts of interest standards. After the 2010 explosion on Deepwater Horizon, thousands of civil claims were brought against the rig's owner, Transocean; against BP plc, which leased the rig; and against Halliburton, which built some of the faulty equipment. BP also initiated proceedings against Transocean and Halliburton, both of which held insurance policies with Chubb. Part of the complex litigation led to three concurrent arbitrations: between Halliburton and Chubb; Transocean v Chubb; and Transocean v a third-party insurer. Kenneth Rokison QC was appointed in all three; a fact he initially failed to inform all parties of and eventually culminated in Halliburton requesting the High Court to remove him from Halliburton v Chubb under s. 24(1)(a) Arbitration Act 1996. Despite an offer to withdraw by Rokison, Chubb opposed, and the case eventually reached the Supreme Court (UKSC) after passing through the High Court and the Court of Appeals.

UKSC applied the test for apparent bias established in *Porter v Mgill* [2000] UKHL 67, reviewed applicable practices and codes of conduct at IBA, GAFTA,

108 Only slightly more tone-deaf were the ICC judges who approved Judge Ozaki's proposal to combine Japanese ambassadorship to Estonia with her continued service on the ICC. See Kevin J. Heller, 'Judge Ozaki Must Resign—Or Be Removed', *Opinio Juris* (29 March 2019).

109 Damien Charlotin, 'ICJ Judge Resigns from ICSID Case Involving China, Following Controversy Over Arbitral Appointment', *IA Reporter* (9 February 2021).

ICC, as well as LMAA, ICA, LCIA, CIArb and other fora, and concluded that while an arbitrator accepting, and not disclosing, appointments in multiple arbitrations with identical or overlapping subject matter can give rise to an appearance of bias, on balance a fair-minded and informed observer would not have inferred that a real possibility of unconscious bias existed in this case, rejecting Halliburton's appeal in November 2020.

Numerous commentators have described UKSC's reasoning as confused and lacunose, failing to fully grasp unconscious bias, the risk of contaminating the arbitrator's impartiality due to 'inside information' and informational asymmetries as the three proceedings unfold, the inevitable (even if unconscious) bias in favour of one's paymaster, the parties' and the public's perception created by Rokison's arguable breach of his duty to disclose. These are unfair criticisms. UKSC gave full attention to these issues, took note not only of law but also of scholarly literature, and sought to develop the norms and practices applicable to these arbitrations directly or by analogy, for instance by seeking to distinguish between the impartiality of judges and arbitrators in ways the aforementioned bodies do not.[110] It is a remarkable and pivotal judgment that advances anticorruption norms in commercial arbitration, which appear to be already at a more developed stage of sophistication and efficiency than in public international law, where the ICJ and ICC have barely begun to grapple with forms and risks of corruption. Yet, the institutional corruption literature demonstrates that the scope for corruption that is debated in the Halliburton case cannot be reduced without redesigning the institutional framework for arbitration to address institutional blind spots that create the appearance of corruption, and lead to a loss of trust. The other lesson from the case may be that a Grotian Moment is unlikely, and we should settle in for an open-ended and reiterative process of minor and major adjustments, with no breakthroughs.

UNCAC incorporates—even if insufficiently—some preliminary measures to address challenges related to the phenomena of double-hatting and of 'revolving doors.' UNCAC mandates standards for domestic anticorruption bodies and international experts to strengthen the guardians against corruption, such as in Art. 6 concerning preventive anticorruption bodies 'free from any undue influence' and in Art. 16(1) criminalising active bribery of officials of international organisations. UNCAC Art. 11(1) on judges, for instance, warns about the mind-bending potential of social networking.[111] UNCAC Art. 12(2)(e) defends against 'revolving doors' in ways, as we saw, that the ICJ and other

110 See e.g. [2020] UKSC 48, para. 58–60.

111 Eds. Rose *et al*, *UNCAC Commentary*, p. 123.

bodies do not yet live up to.[112] Yet, UNCAC does not address the possibility and fact of judicial corruption under undue dependence. As a commentator notes, '[t]he creation of a specific institution(s) with authority to prevent corruption will be insufficient where there is interference by the political elite.'[113] Similarly problematic is faith placed in the 'both professionalised and de-politicised' experts who work at the UNCAC Implementation Review Mechanism and the Implementation Review Group.[114]

Opportunities and Challenges for a Grotian Moment

The need for an evolution in the international legal framework to tackle all forms of corruption is evident and it is the responsibility of States to tackle global injustices. Anne Peters asserts that all 'types of corrupt conduct by public officials can and should be attributed to the State in accordance with the principles of State responsibility.'[115]

Corruption in International Criminal and Human Rights Law

Even if not yet realised in practice, scholars are increasingly drawing attention to the merits of international criminal law in combatting various forms of corruption, including institutional, political and grand corruption. International anticorruption law in its current form is based on the localisation of the conduct to be addressed through domestic law by the territorial State where corruption occurs, including through the nationalisation of international law.[116] However, in recent years calls for accountability of crimes related to corruption through international criminal law have been growing. Prominent among its advocates is Mark Wolf, who proposes that '[a]n International Anti-Corruption Court, similar to the ICC or as part of it, should now be established to provide a forum for the criminal enforcement of the laws prohibiting grand corruption that exist in virtually every country, and the undertakings that are requirements of various treaties and international organisations.'[117] Some scholars go as far as to suggest that systemic corruption has already been criminalised

112 Eds. Rose *et al*, *UNCAC Commentary*, p. 134.
113 Eds. Rose *et al*, *UNCAC Commentary*, p. 61.
114 Eds. Rose *et al*, *UNCAC Commentary*, p. 13.
115 Anne Peters, 'Corruption as a Violation of International Human Rights', *European Journal of International Law*, 29:4 (2018), 1251–1287 at p. 1273.
116 Kulamadayil, 'When International Law Distracts.'
117 Mark L. Wolf, 'The Case for an International Anti-Corruption Court', Brookings Institution (2014).

in international criminal law under Art. 7 of the Rome Statute of the ICC on crimes against humanity.[118] Nyongesa M. Wabwile argues that systemic corruption represents a systematic attack in peacetime '[b]y grabbing public funds, the corrupt political elites commit a systematic attack on the livelihood of the majority of economically vulnerable populations.'[119]

Establishing a link between various forms of corruption and international human rights law, Peters concludes that '[t]he framing of corruption not only as a human rights issue but even as a potential human rights violation can contribute to closing the implementation gap of the international anti-corruption instruments and can usefully complement the predominant criminal law-based approach.'[120] The UN treaty bodies monitoring mechanisms have adopted a normative framework for tackling corruption. The appointment of a UN Special Rapporteur on corruption demonstrates a growing acknowledgement of these linkages. State practice clearly suggests that States support the view that corruption is detrimental for the enjoyment of human rights.[121] In a 2012 judgement, the Supreme Court of India affirmed that 'systematic corruption is a human rights violation in itself.'[122] While there is extensive scholarship on the effects of 'classic' corruption on economic, social and cultural rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), scholars are drawing more and more attention to the effects of other forms of corruption on civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). With regard to civil and political rights, Mark Warren is concerned with the distorting effects of corruption on representation and the democratic principle of equality. He finds that '[c]orruption reduces the effective domain of public action, and thus the reach of democracy, by reducing public agencies of collective action to instruments of private benefit.'[123] Ceva and Maria P. Ferretti build on this theory, concluding that political and institutional corruption undermine equality

118 Ilias Bantekas, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies', *Journal of International Criminal Justice*, 4:3 (2006), 466–484.

119 Nyongesa M. Wabwile, 'Transnational Corruption, Violations of Human Rights and States' Extraterritorial Responsibility: A Case for International Action Strategies', *African Journal of Legal Studies*, 8 (2015), 87–114, at p. 110.

120 Peters, 'Corruption as a Violation of International Human Rights.'

121 M. Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Antwerp: Intersentia, 2012).

122 As referenced by Peters, 'Corruption as a Violation of International Human Rights', p. 1258.

123 Mark E. Warren, 'What Does Corruption Mean in a Democracy?', *American Journal of Political Science*, 48:2 (2004), 328–343, at p. 328.

and the impartiality of decisions-makers by putting citizens in an asymmetric position, where a small minority has undue influence and is able to determine policy outside the frame of democratic processes. In this sense, corruption 'undermines the very liberal democratic rationale for the public order and the moral acceptability of the terms and conditions of social cooperation.'[124] Thompson posits that '[t]he harm that institutional corruption causes to the legislature and the democratic process is often greater than that caused by individual corruption [as it] is also more systematic and more pervasive than individual corruption.'[125] Corruption in this sense has serious implications by inhibiting the 'role of institutions in guaranteeing citizens' rights and duties over time.'[126]

With regard to social and economic rights, bribery and grand corruption have shown to lead to misallocations of public resources. Warren argues that '[c]orruption creates inefficiencies in deliveries of public services, not only in the form of a tax on public expenditures, but by shifting public activities toward those sectors in which it is possible for those engaged in corrupt exchanges to benefit.'[127] There is a clear recognition that '[w]here corruption is systemic, it directly affects the poorest sections of the population, as a result of the diversion and siphoning off of public expenditure budgets.'[128]

Special Procedures as an IHRL Remedy to Corruption?

The UN Special Procedures system may have potential in ushering in a Grotian Moment for a broadened anticorruption concept through an international human rights law approach, even if they have an historically chequered record. Many began as fact-finding missions; almost all grew *proprio motu* into vacuums created and expanded by States' disagreements over political hot topics. The most powerful tool in the modern Special Procedures' kit is their ability to make press statements that carry the weight of the UN's authority.[129] Yet, the legal framework of Special Procedures seems to generate, rather than halt corruption.

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124 Emanuela Ceva and Maria P. Ferretti, 'Liberal Democratic Institutions and the Damages of Political Corruption', *The Ethics Forum*, 9:1 (2014), 126–145.

125 Thompson, *Ethics in Congress*.

126 Maria P. Ferretti, 'A Taxonomy of Institutional Corruption', *Social Philosophy and Policy*, 35:2 (2018), 242 – 263 , at p. 249.

127 Warren, 'What Does Corruption Mean in a Democracy?,' p. 328.

128 Angela Barkhouse, Hugo Hoyland and Marc Limon, *Corruption: A Human Rights Impact Assessment* (Universal Rights Group and Kroll, 2018) p. 2.

129 Elvira Domínguez-Redondo, *In Defense of Politicization of Human Rights: The UN Special Procedures* (Oxford: Oxford University Press, 2020).

With regard to their mandate, Special Procedures benefit from the pervasive vagueness of their mandate,[130] as 'Mandate holders have contributed to the haziness in this area, insisting at times on their absolute independence while keeping the authority that the blue stamp of the United Nations provides to their activities.'[131] Some Special Procedures set up websites, published reports, and issued statements that mimic legal opinions, thereby 'wearing a double hat as being independent from, but simultaneously representing the United Nations, is a legal impossibility that is nonetheless performed by Special Procedures on a regular basis.'[132] In 2000, the Secretary-General had to deny that Jiri Dienstbier, then Special Rapporteur for human rights in the former Yugoslavia, spoke for the UN when he condemned the indictment of Milosevic.[133]

To contain legal-authority-entrepreneurship, Special Procedures are encouraged by States, UN organs, NGOs and scholars to codify and formalise their practices, for instance by writing codes of conduct. Others argue that such codification generates self-censorship and corrupts the functioning of Special Procedures.[134] The Special Procedures system has scope for reform that would reduce institutional corruption. One area of improvement concerns their appointment. Special Procedures are expected to be wholly impartial and independent individuals, and while they are not supposed to represent their State, their appointment is a highly politicised process. States are unlikely to spend political capital in the horse trading of UN appointments for a fully independent candidate, and to refrain from vetoing other States' candidates, however independent and impartial, when that serves their interests. Another area that classical institutional corruption literature points to is risks arising from funding. Special Procedures are part-time unpaid positions within the UN hierarchy. Many Special Procedures holders must raise their own funds.[135] Due to shortfalls earmarked for Special Procedures budgets, States that are the subject of investigations by Special Procedures are often requested to fund or

130 Domínguez-Redondo, *In Defense*, pp. 135, 170, 174.

131 Domínguez-Redondo, *In Defense*, p. 179.

132 Domínguez-Redondo, *In Defense*, p. 158.

133 UN Doc. SG/SM/7574 (4 November 2000); Domínguez-Redondo, *In Defense*, p. 168.

134 Marc Limon and Ted Piccone, *Human Rights Special Procedures: Determinants of Influence* (Brookings Institutions & Universal Rights Group Policy Report, 2014).

135 Inga T. Winkler and Catarina de Albuquerque, 'Doing It All and Doing It Well? A Mandate's Challenges in Terms of Cooperation, Fundraising and Maintaining Independence', *The United Nations Special Procedures System* ed. by Aoife Nolan, Rosa Freedman, and Thérèse Murphy (Leiden: Brill, 2017).

otherwise support Special Procedures' work, including their country visits, and there is no uniform expected reporting of State contributions.[136]

Political and Legal Obstacles

While there is some potential to address other forms of corruption incorporated in a broadened concept of corruption in the international legal system through the UN human rights system or through an international criminal law approach, several political and legal challenges hinder the achievement of a Grotian Moment for an international legal framework that addresses such a broadened concept of corruption. The most critical obstacle is *resistance from political elites* to devising accountability mechanisms for misconduct they themselves are most likely to be implicated in. Officials in positions of power are unlikely to formulate legal frameworks that would tie their own hands, particularly in dictatorships,[137] but also in democracies. As Sharman notes, '[c]orruption is a difficult problem to address in the best of times, but most of all when the State apparatus used to enforce laws is controlled by people dedicated to breaking them.'[138] Thompson elaborates on this point, observing that '[t]he leaders who are in a position to lead political reform benefit from the existing system,' and highlighting that '[t]he potential agents of change are the actual agents of corruption.'[139] Opposition can be expected particularly toward an international criminal law approach, especially the kind proposed by Wolf, as 'those countries truly dominated by corruption would have great difficulty in deciding to join such a court, no matter the incentive or threat.'[140] To highlight how opposition may differ depending on the form of corruption to be addressed by international legal instruments that might lead to a Grotian Moment, it is worth considering how corruption manifests in different settings. Daniel Kaufmann and Pedro C. Vicente suggest that corruption occurs in three distinct ways in different geographical areas. First, a prevalence of illegal corruption, mainly in the form of 'classic' corruption in developing countries. Second, mostly legal corruption in the form of political and institutional corruption in some OECD countries. Third, some countries supposedly do not face the problems of corruption, such as the Nordic States.[141] These patterns are

136 Domínguez-Redondo, *In Defense*, 172–3. Analysis of 173n32.

137 P. Gowder, 'Institutional Corruption and the Rule of Law', *The Ethics Forum*, 9:1 (2014), 84–102.

138 Sharman, 'Despot's Guide to Wealth Management,' p. 22.

139 Thompson, 'Theories of Institutional Corruption,' p. 508.

140 Franco Peirone, 'Corruption as a Violation of International Human Rights: A Reply to Anne Peters', *European Journal of International Law*, 29:4 (2018), 1297–1302.

141 Daniel Kaufmann and Pedro C. Vincente, 'Legal Corruption', *Economics and Politics*, 23:2 (2011), 195–219.

indicative of the political nature of international law making. It is no coincidence that contemporary international legal systems focus primarily on 'classic' corruption and that attempts to regulate political, institutional and grand corruption at all, and even less so at the international level, are stifled.

The notion that some instances, for example, of institutional corruption are legal and part of democratic practices, such as the need for campaign financing, compels some opponents of reform to posit that alternatives ought to be found for these legitimate practices to ensure the functioning of institutions.[142] These arguments are opposed by advocates of campaign financing reform,[143] and alternative models were successfully adopted in countries such as Austria. Moreover, Ferretti highlights that some lawful practices may still fail to uphold public accountability.[144] This view is echoed by Oguzhan Dincer and Michael Johnston, who argue that 'solid majorities see campaign financing as profoundly corrupting.'[145]

Moreover, even if States expressed support for an international accountability mechanism, the complexity of identifying the responsible party for misconduct under a broadened concept of corruption will continue to be a major challenge. Assigning *individual responsibility or liability* in international criminal law and identifying *attribution* for violations of international human rights law are inescapable prerequisites. The question of individual liability and attribution arises in particular with regards to institutional corruption, the very concept of which—as proposed by Lessig—assumes that actors engaging in such conduct are merely 'good souls' operating in a bad system.[146] Thompson also proposes that '[t]he individual agents of corruption act in institutional roles and do not have the corrupt motives that characterise agents who participate in *quid pro quo* exchanges.'[147] Institutional corruption, so the argument goes, is symptomatic of institutional failure and it is often difficult to identify an individual case or to assign clear responsibility for misconduct.

This perspective has been questioned, however, by more recent scholarship. On the more moderate end of the spectrum, Seumas Miller argues with reference to campaign financing that responsibility lies with the collective, but acknowledges that from a disaggregated perspective, individuals are still

142 Thompson, 'Theories of Institutional Corruption.'
143 Lessig, '"Institutional Corruption" Defined.'
144 Ferretti, 'A Taxonomy of Institutional Corruption.'
145 Oguzhan Dincer and Michael Johnston, 'Legal Corruption?', *Public Choice*, 184 (2020), 219–233 at p. 220.
146 Lessig, '"Institutional Corruption" Defined.'
147 Thompson, 'Theories of Institutional Corruption,' p. 496.

responsible for their contributions.[148] Even Elinor Amit, Jonathan Koralnik, Ann-Christin Posten, Miriam Muethel, and Lessig acknowledge the systemic problems of institutions that are prone to acts of institutional corruption are ultimately linked to the conduct of individuals, but add that in the current legal system their acts are neither criminalised nor considered unethical.[149] Thompson affirms that individuals can still be held accountable for not seeking to reform the system and not trying to mitigate against the damaging effects of corruption.[150] Adopting a 'continuity approach,' Ferretti argues that institutional corruption can only be attributed to an institution by starting with the actions of an individual. The function of public officials and in extension of public institutions is based on 'the duty of public accountability,'[151] thus, in the case of institutional corruption, public officials fail to uphold this duty and should be held responsible even if they are operating in an environment of institutional corruption.

Conclusion

With the challenges highlighted above in mind, we are conscious of the potential pitfalls that recognition of a Grotian Moment for a broadened concept of corruption may entail. Thus, we are cautious in offering avenues that might accelerate progress toward a Grotian Moment for anticorruption law that addresses all forms of corruption.

Recent developments concerning institutional and other forms of corruption in international law prompt us to frame a new question. What is the best analytical framework for diagnosing and correcting potential problems with new rules, such as those introduced at the ICJ and commercial arbitration? We propose that

(1) corruption in international legal practice cannot be explained without a notion of corruption that includes institutional and other forms of corruption; and

(2) once the broadened applicable notion of corruption includes institutional, political, and grand corruption, corruption cannot have a Grotian

148 Seumas Miller, *Institutional Corruption: A Study in Applied Philosophy* (Cambridge: Cambridge University Press, 2017).

149 Elinor Amit, Jonathan Koralnik, Ann-Christin Posten, Miriam Muethel, and Lawrence Lessig, 'Institutional Corruption Revisited: Exploring Open Questions Within the Institutional Corruption Literature', *Southern California Interdisciplinary Law Journal*, 26:447 (2017) 447–467.

150 Thompson, 'Theories of Institutional Corruption.'

151 Ferretti, 'A Taxonomy of Institutional Corruption,' p. 246.

Moment for reasons that offer insights into both corruption and Grotian Moments.

Applying the institutional, political, and grand corruption literature to the question of a Grotian Moment for anticorruption suggests that the theologians were not wrong: human nature is corrupt, if not because of the Fall, then due to cognitive flaws that are not necessarily morally culpable. For instance, identity biases seem to be necessary for in-group formation and maintaining cohesion. Organisations and their rules, including municipal and international laws, can constrain harm from the aggregation of individual corruptibility only to a certain extent, partly because organisations and laws are made by flawed humans, and partly because they must evolve in reaction to events. These two theses, concerning individuals and rule-driven collectives, suggest that eliminating corruption writ large is a never-ending process; even ostensible breakthroughs, for instance through pervasive institutional reform, create downsides and cracks through which corruption will re-enter. Connecting Grotian Moments and institutional, political, and grand corruption is a welcome salutary tale about misplaced expectations. Pufendorf, the first professional international lawyer, might have been right: individual and institutional biases cannot be wholly eliminated through legal instruments alone, and a Grotian Moment for a broadened concept of corruption will always be illusory.