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WHY UN INSPECTIONS? CORRUPTION, ACCOUNTABILITY, AND THE RULE OF LAW

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I. INTRODUCTION

Corruption takes a variety of forms. Significantly, the United Nations Convention Against Corruption (UNCAC) specifies that corruption includes “the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions” as well as giving any person “an undue advantage” resulting from the abuse by a public official of his or her influence.¹ One hundred seventy-four nations ratified the UNCAC, signaling their support for this definition of corruption.²

The persistence of corruption is associated with a culture of impunity. Individuals who engage in corrupt behavior presumably do so because they believe that the risk of punishment is low relative to the reward. This suggests a need to identify what is missing from the environment surrounding these individuals that leads them to believe that the risk of punishment is low. If an institutional structure is missing, what is that structure? For example, one type of structure is a dedicated domestic anticorruption unit. However, while many

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¹ United Nations Convention Against Corruption, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter UNCAC].

² United Nations Office on Drugs and Crime, United Nations Convention against Corruption Signature and Ratification Status as of 12 November 2014, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited June 15, 2015).

countries have created this type of unit, results have been disappointing.

Section 2 of this article explores the reasons for this failure by drawing upon the experience of Nigeria's Economic and Financial Crimes Commission (EFCC). The analysis suggests that this type of domestic anticorruption unit can only be successful if it is insulated from interference by powerful domestic elites who benefit from the continuation of corruption. Section 3 suggests that a promising strategy involves implementing the type of bilateral treaty that established the International Commission against Impunity and Corruption in Guatemala (CICIG). This type of institution, establishing UN inspectors, might provide the type of protection that is needed by domestic anticorruption units. Section 4 proposes an international treaty establishing UN inspectors empowered to investigate allegations of corruption, analyzes prospects for ratification, examines issues raised by the proposal, and suggests that the precedent established by the Rome Statute (where 122 nations previously agreed to permit intrusive criminal investigations)³ offers reason for optimism. Section 5 concludes that the implementation of this type of international treaty could have a profound effect on the culture of impunity that prevails wherever corrupt individuals feel that the risk of punishment is low.

II. NIGERIA'S ECONOMIC AND FINANCIAL CRIMES COMMISSION

The experience of Nigeria's Economic and Financial Crimes Commission (EFCC) is instructive. The EFCC was established in 2002, after the election of President Olusegun Obasanjo, with a mandate to investigate and prosecute a range of financial crimes, including governmental corruption.⁴ In 2005, the EFCC investigated all of the country's thirty-six powerful state governors and asserted that almost all were corrupt.⁵ By November 2006, five had been charged with corruption and were impeached.⁶ By April 2008, the

³ Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

⁴ See Letitia Lawson, *The Politics of Anti-Corruption Reform in Africa*, 47 J. MOD. AFR. STUD. 73, 83-84 (2009).

⁵ See *id.* at 85.

⁶ *Id.*

EFCC had recovered \$5 billion in stolen public funds and secured 250 convictions, including a chief of police, a governor, and a minister.⁷

The EFCC's director, Mallam Nuhu Ribadu, moved aggressively to institutionalize the EFCC; he obtained a \$5 million grant from the World Bank, permitting the EFCC to target political corruption at the highest levels without fear of the financial consequences to his agency.⁸ He established international links between the EFCC and INTERPOL, the United Kingdom's Metropolitan Police, the US Federal Bureau of Investigation, the Canadian Mounted Police, and South Africa's Scorpions, extending the EFCC's capacity to investigate corruption.⁹ Through his efforts, a coalition of civic groups agreed to mobilize 500 lawyers, including twenty-five Senior Advocates, to support EFCC prosecutions of corrupt officials.¹⁰

However, even these dedicated efforts were insufficient to protect the EFCC. Powerful elites had already begun to strike back. In August 2007, "Attorney General Michael Aondoakaa announced that the independent prosecutorial powers granted to the EFCC . . . were unconstitutional, and that all future prosecutions would need to be vetted by his office."¹¹ This blocked the EFCC's prosecution of former Governors Joshua Dariye and Orji Uzor Kalu.¹² In December 2007, the EFCC arrested former Governors Ayodele Fayose and James Ibori, a well-connected, powerful supporter of President Yar'Adua.¹³ The government quickly struck back by announcing that the EFCC, the Independent Corrupt Practices Commission (ICPC), and the Code of Conduct Bureau (CCB) would merge, followed by a second announcement that Ribadu had been reassigned to attend a one-year policy and strategic studies course in central Nigeria.¹⁴

⁷ *Id.* at 91.

⁸ *Id.*

⁹ *Id.* at 90.

¹⁰ *Id.* at 91.

¹¹ *Id.* at 87.

¹² *Id.* at 88.

¹³ *Fayose, Ibori Sent to Prison*, ALLAFRICA (Dec. 18, 2007), <http://www.allafrica.com/stories/200712180033.html>.

¹⁴ Abdullahi Yahaya Bello, *Nigeria: EFCC/ICPC/CCB - One Merger, Many Questions*, ALLAFRICA (Dec. 22, 2007), <http://allafrica.com/stories/200712220006.html?page=1>; Kingsley Omonobi & Emmanuel Ulayi,

Within a year, Ribadu was demoted along with 139 other police officers, then dismissed and driven into exile.¹⁵ An EFCC official told Human Rights Watch that these moves were intended to undermine “the independence of the EFCC and halt the investigation and prosecution of former governors.”¹⁶

The case of Nigeria’s EFCC illustrates how domestic anticorruption units are neutralized by powerful elites who benefit from the continuation of corruption and seek to thwart domestic anticorruption agencies. However, this case suggests that these units can be very effective if they are insulated from interference. Is it possible for the international community to install an institution that would provide such insulation?

III. GUATEMALA’S CICIG

A promising approach involves the type of bilateral treaty between the United Nations and Guatemala that established the CICIG.¹⁷ This treaty authorized the creation of a body of international, UN-supported inspectors to lead criminal investigations in Guatemala.¹⁸ The rationale is that domestic agencies, weakened by corruption, are no match for powerful criminal organizations.¹⁹

Guatemala has experienced high levels of corruption and violence.²⁰ For example, in 2007, Vice President Eduardo Stein conceded that organized crime cartels had gained effective control of

Nigeria: EFCC - Okiro Confirms Ribadu's Exit, ALLAFRICA (Dec. 27, 2007), <http://allafrica.com/stories/200712280320.html>.

¹⁵ Misbahu Bashir, *Nigeria: Ribadu Demoted – With 139 Others – Doubts Over His NIPSS Course*, ALLAFRICA (Aug. 6, 2008), <http://www.allafrica.com/stories/200808060176.html>.

¹⁶ *Nigeria: Firing of Anti-Corruption Chief Would Boost Abusive Politicians*, HUMAN RIGHTS WATCH (Jan. 2, 2008), <http://www.hrw.org/fr/news/2008/01/01/nigeria-firing-anti-corruption-chief-would-boost-abusive-politicians>.

¹⁷ See Agreement between the United Nations and Guatemala on the Establishment of an International Commission against Corruption in Guatemala (CICIG), Dec. 12, 2006, 2472 U.N.T.S. 47 [hereinafter CICIG]; Patrick Gavigan, *Organized Crime, Illicit Power Structures and Guatemala's Threatened Peace Process*, 16 INT’L PEACEKEEPING 62, 62 (2009); *About CICIG*, INT’L COMM’N AGAINST IMPUNITY IN GUAT., <http://www.cicig.org/index.php?page=about> (last visited June 15, 2015).

¹⁸ See *About CICIG*, *supra* note 17.

¹⁹ Gavigan, *supra* note 17, at 70.

²⁰ *Id.*

six of Guatemala's twenty-two departments.²¹ According to Human Rights Watch, "Guatemala's weak and corrupt law enforcement institutions have proved incapable of containing the powerful organized crime groups and criminal gangs that contribute to one of the highest violent crime rates in the Americas [I]mpunity remains the norm"²² Illegal armed groups and criminal gangs operate death squads and employ violence and intimidation, supporting their activities through drug trafficking.²³ Guatemalan law enforcement institutions are unable to address this rampant violence due to intimidation, corruption, and infiltration of the police and judiciary by the criminal organizations.²⁴ In one notorious case, three members of the Central American Parliament were killed by senior members of Guatemala's police force, including the head of the organized crime unit.²⁵ Leadership and pressure from Guatemalan and international human rights groups, pressure exerted by the UN to monitor and verify Guatemala's commitments to the 1994 Human Rights Accord, and political calculations by Presidents Alfonso Portillo and Óscar Berger, led Guatemala and the UN to create the CICIG via a treaty-level bilateral agreement.²⁶ The CICIG seeks to address the infiltration of government institutions by criminal organizations and the operation of violent death squads operating beyond the control of the Guatemalan state.²⁷ The CICIG is the first instance of a UN investigative body whose jurisdiction

²¹ *Id.*

²² HUMAN RIGHTS WATCH, COUNTRY SUMMARY – GUATEMALA 1 (2011), available at http://www.hrw.org/sites/default/files/related_material/guatemala_0.pdf.

²³ See Andrew Hudson & Alexandra W. Taylor, *The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 J. INT'L CRIM. JUST. 53, 57 (2010).

²⁴ *Id.* at 56.

²⁵ *Id.* at 57.

²⁶ See Matthew Kennis, *The Creation of the International Commission against Impunity in Guatemala: Miscalculation by a 'Corporate Mafia State'?*, PEACE & CONFLICT MONITOR, http://www.monitor.upeace.org/archive.cfm?id_article=918 (last updated June 6, 2012).

²⁷ See generally *Mandate*, CICIG, <http://www.cicig.org/index.php?page=mandate> (last visited June 15, 2015) (describing the main objectives of CICIG's mandate).

focuses on corruption and organized crime, rather than human rights violations.²⁸

The CICIG employs international and local staff members to conduct independent investigations and produce reports that are submitted to Guatemalan prosecutors.²⁹ The agreement with the UN specifies:

The Government of Guatemala shall provide CICIG with all the assistance necessary for the discharge of its functions and activities . . . and shall ensure, in particular, that its members enjoy:

- (a) freedom of movement without restriction throughout Guatemalan territory;
- (b) freedom of access without restriction to all State locations . . . without prior notice . . . ;
- (c) freedom to meet and interview any individual . . . whose testimony is deemed necessary for the discharge of its mandate;
- (d) free access to information and documentary material that has a bearing on its investigations . . . whether civilian or military.³⁰

Furthermore, "The Government of Guatemala shall take such effective and adequate measures as may be required to ensure the security and protection of [CICIG personnel] International personnel shall enjoy . . . immunity from personal arrest or detention."³¹ CICIG investigators have extraordinarily broad freedom to conduct independent investigations into any person, official, or entity, and to present criminal charges to Guatemala's Public Prosecutor.³² However, the CICIG is not empowered to enforce cooperation or impose penalties for noncompliance.³³

The CICIG's activities during its first four years suggest that this type of international investigative body can quickly achieve success, despite having limited enforcement tools and no independent ability to prosecute. The CICIG's investigations led to the indictment of

²⁸ *Id.*

²⁹ See CICIG, *supra* note 17, at 50–51.

³⁰ *Id.* at 53.

³¹ *Id.* at 54–55.

³² See *id.* at 52–53.

³³ See generally *id.* at 50–56 (lacking specificity on potential penalties for failure to cooperate with the CICIG).

powerful individuals including ex-President Alfonso Portillo for corruption; ex-Defence Minister Eduardo Arévalo Lacs for corruption; Senior Prosecutor Álvaro Matus for obstruction of justice and destruction of evidence; General Enrique Ríos Sosa, son of former Guatemalan General Efraín Ríos Montt, and five other ex-military officials for embezzlement; the kidnappers of Gladys Monterroso, wife of the Human Rights Ombudsman; and four members of the National Civilian Police who engaged in extortion and assault.³⁴ “In all eight cases, the accused [were] directly and visibly connected to government institutions, politicians[,] or drug-trafficking organizations.”³⁵

When Judge Irma Leticia Valenzuela issued a ruling that protected ex-President Portillo, the CICIG appealed to Guatemala’s Supreme Court, forcing Judge Valenzuela to resign from the case.³⁶ The CICIG also forced multiple resignations of public prosecutors

³⁴ See Hudson & Taylor, *supra* note 23, at 66–67. Ríos Montt was found guilty and sentenced to eighty years in prison for genocide and crimes against humanity. Emi McLean, *Guatemala’s Constitutional Court Overturns Ríos Montt Conviction and Sends Trial Back to April 19*, INT’L JUSTICE MONITOR (May 21, 2013), <http://www.ijmonitor.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19/>. The Constitutional Court overturned the decision, sending the trial back to the lower courts. *Id.* Portillo was “acquitted despite damning evidence against him” but later extradited to the United States “to face charges of money laundering, fraud[,] and embezzlement of public funds.” James Bargent, *Last Rites for Guatemala’s Anti-Impunity Crusaders CICIG?*, INSIGHT CRIME (Sept. 6, 2013), <http://www.insightcrime.org/news-analysis/last-rites-for-guatemalas-anti-impunity-warriors>. An initial two-year mandate was established by the agreement between the United Nations and the government of Guatemala, and was renewed in April 2009 and January 2011. United Nations, Dept. of Political Affairs, CICIG (International Commission against Impunity in Guatemala), http://www.un.org/wcm/content/site/undpa/main/activities_by_region/america/cicig (last visited June 15, 2015). “Its current mandate runs through [September 4,] 2015.” *Id.* The current Guatemalan President, Otto Pérez Molina, has announced that he will not extend CICIG’s mandate when it expires in September 2015. Geoffrey Ramsey, *Guatemala’s Supreme Court Judges Take the Bench*, THE PAN-AM. POST (Nov. 24, 2014, 9:41 AM), <http://www.thepanamericanpost.com/2014/11/guatemalas-supreme-court-judges-take.html>.

³⁵ Hudson & Taylor, *supra* note 23, at 65.

³⁶ See *id.* at 69.

for corruption or obstruction of justice, including Attorney General Juan Luis Florido, Senior Prosecutor Álvaro Matus, and Administrative Crimes Prosecutor Patricia Lainfiesta.³⁷ The CICIG's investigations also led to a purge of 1,700 allegedly corrupt police officers.³⁸ These results suggest that the CICIG is having an impact despite its inability to discipline or prosecute individuals, and despite the risk of violence to its investigators. Accordingly, the CICIG's success suggests that this type of investigative body can be successful even under conditions where criminal gangs, death squads, and powerful individuals appear to operate with impunity—conditions that characterize many developing countries.

Lessons from the CICIG's experience include the need to dedicate significant resources to witness and staff security.³⁹ Unless witnesses and victims feel sufficiently protected, they are unlikely to provide crucial information and the necessary cooperation for a successful investigation. Consequently, the CICIG created a witness protection program by negotiating an agreement with Spain for the relocation of protected witnesses, training forty-eight police officers to create an elite group of agents responsible for protecting witnesses, and successfully pressuring Guatemala to implement legislative reforms enhancing identity protection for witnesses in organized crime cases.⁴⁰

Despite these challenges, the CICIG suggests a way forward that has not previously been explored. Had Nigeria established a comparable agreement with the UN, Ribadu potentially could have filed a complaint with UN investigators, leading to an investigation of his demotion and dismissal as acts that fall within the UN definition of corruption because they were intended to protect corrupt government officials.⁴¹ The mere threat of investigation and prosecution for corruption might have deterred Attorney General Michael Aondoakaa from acting in a way that blocked the EFCC's prosecution of former Governors Joshua Dariye and Orji Uzor Kalu,

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Witness Protection: A Necessary Tool in Justice Administration*, CICIG (Sep. 27, 2011), <http://www.cicig.org/index.php?page=0046-20110927E>.

⁴⁰ Hudson & Taylor, *supra* note 23, at 64.

⁴¹ See Stuart S. Yeh, *Why UN Inspections? The Accountability Gap in Sub-Saharan Africa*, 7 INT'L PUB. POL'Y REV. 1, 19 (2013).

and might have deterred government officials from demoting and dismissing Ribadu.⁴² Under the international treaty proposed in Section 4, below, UN investigators would have likely determined that these actions involved obstruction of justice—crimes subject to prosecution and punishment under Nigeria’s laws.⁴³ Having made that determination, and after referral of the case to domestic prosecutors, Aondoakaa and his corrupt colleagues would have faced a legitimate risk of punishment. At a minimum, public condemnation might have forced Aondoakaa’s resignation in the same way that the CICIG forced the resignations of public prosecutors in Guatemala for corruption or obstruction of justice.⁴⁴

The experiences of Guatemala suggest that it is feasible to implement an international treaty that involves intrusive criminal investigations led by UN investigators even in a country where the rule of law is extremely weak, where powerful and violent criminal cartels have gained control of several government departments, where impunity prevails, and where the prospects for implementing an international treaty are less than favorable. Guatemala’s

⁴² See Lawson, *supra* note 4, at 88.

⁴³ UN investigators would be more likely than domestic investigators to act vigorously. While Ribadu could have filed a complaint with Nigeria’s Public Complaints Commission (PCC) or the Independent Corrupt Practices Commission (ICPC), it is unlikely that these agencies would have requested charges against the Attorney General because all prosecutions are handled by the Attorney General. See *id.* at 81. In contrast, an independent UN investigation and report that referred charges to Nigeria’s public prosecutor would force the prosecutor to either prosecute or risk public outrage over a clear failure to prosecute an egregious case of corruption and risk being forced to resign in the same way that the CICIG forced the resignations of public prosecutors in Guatemala for corruption or obstruction of justice, including Attorney General Juan Luis Florido, Senior Prosecutor Álvaro Matus, and Administrative Crimes Prosecutor Patricia Lainfiesta. See, e.g., Hudson & Taylor, *supra* note 23, at 69–70. The proposed international treaty contains provisions to ensure that the tactics employed by Aondoakaa could not be used in the future without risking prosecution for obstruction of justice. The proposed treaty defines the crime of obstruction of justice, defines a procedure whereby UN inspectors may request an opinion from a domestic justice, and defines a process whereby reports of obstruction would be published online by Transparency International in a way that would publicly identify individuals accused of obstructing justice and would expose these individuals to the court of public opinion.

⁴⁴ See Hudson & Taylor, *supra* note 23, at 69.

experience also provides reason to believe that barriers to the implementation of a treaty establishing UN investigators can be overcome through the leadership of international and domestic human rights organizations, pressure exerted by the World Bank, the IMF, and other nations, as well as realist political calculations by domestic leaders that the political benefits outweigh the political costs.

IV. AN INTERNATIONAL TREATY

A promising strategy for fighting corruption involves the implementation of a multilateral treaty similar to the treaty that established the CICIG.⁴⁵ Instituting a treaty that would establish UN inspectors empowered to investigate allegations of corruption might provide the type of protection needed by domestic anticorruption units from interference by powerful elites who benefit from the continuation of corruption. The proposed treaty would require signatory parties to establish a system of courts and prosecutors dedicated to the adjudication and swift resolution of corruption charges. These dedicated courts would be funded by the UN and would include checks and balances to ensure they are only served by honest, competent justices and prosecutors. The dedicated courts would prioritize charges submitted by UN inspectors and would ensure the swift resolution of resulting cases. The appendix to this article contains a summary of the proposed treaty provisions.

However, the proposal also raises numerous issues. For example, it might be argued that Nigeria would never ratify the type of agreement that established the CICIG. This argument presumes: (a) conditions for ratifying this type of agreement were more favorable in Guatemala than in Nigeria; (b) the influence of reform-oriented elements of society is stronger in Guatemala than in Nigeria; and (c) the rule of law is stronger in Guatemala than in Nigeria. However, the violent circumstances within Guatemala suggest that conditions for ratification were not more favorable.⁴⁶ Instead, it may be argued

⁴⁵ See Stuart S. Yeh, *Ending Corruption in Africa through United Nations Inspections*, 87 INT'L AFF. 629, 639 (2011); Stuart S. Yeh, *Is an International Treaty Needed to Fight Corruption and the Narco-Insurgency in Mexico?*, 22 INT'L CRIM. JUST. REV. 233, 235, 242 (2012); Yeh, *Why UN Inspections? The Accountability Gap in Sub-Saharan Africa*, *supra* note 41, at 7.

⁴⁶ See Hudson & Taylor, *supra* note 23, at 56–57.

that the creation of the EFCC and its apparent successes in investigating all thirty-six of Nigeria's governors, indicting five governors for corruption, recovering \$5 billion in stolen public funds, and securing 250 convictions, including a chief of police and a governor, are evidence that the rule of law in Nigeria is stronger than that of Guatemala.⁴⁷ Thus, it appears that conditions in Nigeria are more, rather than less, favorable for the ratification of the same type of agreement that established the CICIG.

Significantly, Nigeria has ratified both the UNCAC⁴⁸ and the African Union Convention on Preventing and Combating Corruption (AUCPCC).⁴⁹ Both are international laws committing the parties to create and enforce domestic laws against corruption, and to extend cooperation in investigating and prosecuting corruption.⁵⁰ These ratifications suggest that Nigeria might also ratify an international agreement similar to the CICIG.⁵¹

While it might be argued that the CICIG goes far beyond the UNCAC and the AUCPCC by permitting intrusive inspections by UN inspectors, Nigeria has also ratified the Rome Statute, which established the International Criminal Court (ICC) and permits intrusive inspections similar to the CICIG.⁵² The Rome Statute

⁴⁷ See Lawson, *supra* note 4, at 91.

⁴⁸ See United Nations Office on Drugs and Crime, United Nations Convention against Corruption Signature and Ratification Status as of 12 November 2014, *supra* note 2.

⁴⁹ See Kolawole Olaniyan, *Introductory Note to African Union (AU): Convention on Combating and Preventing Corruption*, 43 I.L.M. 1, 1 (2004). See also African Union Convention on Preventing and Combating Corruption, Aug. 5, 2006, 43 I.L.M. 5 [hereinafter AUCPCC].

⁵⁰ See CICIG, *supra* note 1, at 55–57; AUCPCC, *supra* note 49, at 5–6.

⁵¹ I am not suggesting that there are not differences between Nigeria and Guatemala. However, there is a striking similarity among all states where the rule of law is weak: they are characterized by high rates of violent deaths, glaring impunity, corruption, the inability of the state to handle crime, public outrage, and demands for reform. See Hudson & Taylor, *supra* note 23, at 69; Chinedum Odenyi, *The Domestic Implementation of International Treaties in Nigeria*, NIGERIAN COALITION FOR THE INT'L CRIMINAL COURT (July 23, 2014, 12:20 PM), <http://www.ncicc.org.ng/index.php/latest/83-the-domestic-implementation-of-international-treaties-in-nigeria>. It is not unreasonable to think that independent investigators who offer a real hope for action would be welcomed in any state where these conditions exist.

⁵² See Rome Statute, *supra* note 3, at 115–26.

created an international body of criminal investigators endowed with broad powers to conduct independent investigations on domestic soil, similar to the investigations permitted by the CICIG.⁵³ The primary difference is that the Rome Statute focuses on crimes of war, aggression, genocide, and crimes against humanity,⁵⁴ whereas UN inspectors would focus on corruption. However, crimes of war, aggression, genocide, and crimes against humanity also involve abuse of functions or position by public officials, and thus constitute an extreme form of corruption.⁵⁵ The Rome Statute compels every citizen of a party to the treaty, including the president and powerful elites, to submit to independent investigators who have the powers of arrest, detention, trial, and conviction through the ICC.⁵⁶ Thus, the Rome Statute establishes a precedent of surrendering domestic sovereignty in cases where government officials place themselves above the law.

Importantly, it was not necessary to rely on voluntary acquiescence by leaders to achieve adherence to the Rome Statute: pressure from constituents and the international community forced those leaders to sign the treaty or risk removal at the next election.⁵⁷ The key to this breakthrough was that the Rome Statute created a public litmus test of a leader's willingness to sign an international treaty establishing the ICC. Leaders evidently found that the pressure to sign was greater than any concerns they had about the challenge to their power and domestic sovereignty.⁵⁸ The same process by which the Rome Statute was established provides a model for establishing a UN inspectorate, involving a similar public litmus test. The UN General Assembly established a committee that drafted the ICC Statute, which was subsequently ratified by 123 nations.⁵⁹ The same process could be pursued to establish a UN inspectorate.

⁵³ *Id.*

⁵⁴ See Rome Statute, *supra* note 3, at 91.

⁵⁵ See *supra* text accompanying note 1.

⁵⁶ See Rome Statute, *supra* note 3, at 92.

⁵⁷ See Chinedum Odenyi, *The Domestic Implementation of International Treaties in Nigeria*, *supra* note 51.

⁵⁸ See Yeh, *Is an International Treaty Needed to Fight Corruption and the Narco-Insurgency in Mexico?*, *supra* note 45, at 246.

⁵⁹ *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited June 15, 2015).

While it might be argued that international inspectors would be viewed as an unwanted intrusion into domestic affairs, international treaties are by definition voluntary agreements.⁶⁰ Only voluntary nations would accede to such a treaty. Pressure from the international community might expedite passage, but no leader would sign a treaty, and no parliament would ratify a treaty without the support of their constituents. Significantly, public opinion polls indicate that Africans have grown tired of failed promises from domestic authorities claiming they will address corruption, and are ready to embrace the type of international intervention represented by the ICC.⁶¹ For example, 61% of Kenyans prefer ICC trials while only 8% prefer to have domestic courts deal with the perpetrators of the post-2007 election-related violence.⁶² This evidence suggests that Africans may prefer international criminal inspectors for the same reasons that Kenyans prefer ICC trials: they might be persuaded that the only realistic hope to establish accountability is international inspectors who are beyond the government's influence. They want more international intervention, not less.⁶³ Thus, leaders may be forced by public opinion to sign a protocol that would expand the scope of the UNCAC to permit investigations, led by UN inspectors, of alleged acts of corruption committed by public officials.⁶⁴ The reasons that leaders would sign such a protocol are the same reasons that previous leaders signed the UNCAC: public outrage regarding corruption and pressure to create laws and

⁶⁰ United Nations Treaty Collection, Definitions of Key Terms Used in the UN Treaty Collection, https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#treaties (last visited June 15, 2015).

⁶¹ See Stephen Brown & Chandra Lekha Sriram, *The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya*, 111 AFR. AFF. 244, 245 (2012).

⁶² *Id.* at 257.

⁶³ In 2007, Nigerian President Umaru Yar'Adua invited British police experts to "re-invent" Nigeria's police force. See Abegunde Babalola, *Power of Police to Prosecute Criminal Cases: Nigeria and International Perspectives*, 2 EUR. J. BUS. & SOC. SCI. 127, 138 (2014). Nigeria's Inspector General of Police, Mike Okiro, endorsed this invitation and expressed strong support: "The British police need to repackage, retrain and give the Nigerian policemen what it takes to combat crime in the modern world." *Id.* at 138 (citations omitted).

⁶⁴ See Yeh, *Why UN Inspections? The Accountability Gap in Sub-Saharan Africa*, *supra* note 41, at 4.

institutions that restrict it.⁶⁵ There is nothing unusual about political leaders signing laws that restrict their own powers: every existing law restricting power must necessarily have been signed into law by previous leaders, albeit in response to pressure from their constituents.

The broad adoption by 123 nations of a treaty permitting intrusive inspections suggests that there is reason to believe that a similar agreement to establish UN inspectors might be ratified by many nations where levels of corruption are high and the rule of law is weak. The list of parties to the Rome Statute includes many nations that rank poorly on Transparency International's Corruption Perceptions Index (CPI).⁶⁶ Despite high levels of corruption and weak rule of law, these nations ratified a treaty permitting intrusive inspections and agreed to execute arrest warrants for all citizens charged by the ICC prosecutor.⁶⁷ Significantly, autocracies with weak rule of law were at least as likely to ratify the ICC statute as high rule of law countries.⁶⁸ Thus, governments that were arguably at the highest risk of ICC action were most likely to ratify the Rome Statute. Therefore, there is reason to think many of these nations may also agree to permit UN inspections and may agree to execute warrants for the arrest of citizens who are charged with corruption. Significantly, 174 nations are parties to the UNCAC,⁶⁹ and thirty-five

⁶⁵ See *id.*

⁶⁶ These countries include Afghanistan, Albania, Angola, Bangladesh, Bolivia, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Colombia, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Eritrea, Gabon, Gambia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Kenya, Lesotho, Liberia, Malawi, Mali, Mexico, Mozambique, Namibia, Niger, Nigeria, Panama, Pakistan, Paraguay, Senegal, Sierra Leone, Sudan, Suriname, Syrian Arab Republic, Tajikistan, Timor-Leste, Uganda, Tanzania, Yemen, and Zambia. *Corruption Perceptions Index 2013*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2013/results/> (last visited June 15, 2015). See *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, *supra* note 59.

⁶⁷ Rome Statute, *supra* note 3, at 103.

⁶⁸ Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 252 (2010) ("[T]he least accountable governments—the least democratic, with the weakest reputations for respecting the rule of law, the least politically constrained—with a recent past of civil violence were at the highest 'risk' of ratifying the Rome Statute.").

⁶⁹ See UNCAC, *supra* note 1, at 1–3.

African nations have ratified the AUCPCC,⁷⁰ evidencing broad acceptance of international laws designed to fight corruption.

The reasons why the least accountable governments were most likely to ratify the Rome Statute are worth exploring in more detail. Simmons and Danner suggest that in weak rule of law countries, internal conflicts are rife, rebel groups unleash attacks, government forces retaliate, violence abounds, and many parties suffer, including the party in power as well as opposition parties.⁷¹ Thus, there may be bipartisan support and strong motivation to ratify a treaty that binds all parties in a way that reduces the risk of genocide, war crimes, and crimes against humanity, even at the cost of giving up traditional sovereign rights regarding the prosecution of individuals accused of those crimes. In other words, the perceived benefits of ratification for both the governing and opposing parties may exceed the costs. In addition, once the treaty is ratified, the threat of prosecution for those crimes becomes very real, causing all parties to restrain themselves out of fear of prosecution. Similarly, there may be bipartisan support for an anticorruption protocol if multiple parties believe that their rivals are corrupt and need to be restrained. Once a protocol is ratified, the threat of prosecution would become real, causing all parties to restrain themselves.

While it might be argued that even if this type of agreement were ratified, domestic authorities would resist cooperation with UN inspectors and would resist the execution of arrest warrants for domestic officials; any nation that ratifies the proposed treaty would voluntarily accede to the requirement to cooperate and to execute arrest warrants.⁷² The proposed treaty specifies procedures that require the cooperation of domestic authorities, including the cooperation of local police in executing arrest warrants, and specifies penalties for instances of noncooperation (see appendix).⁷³ Once the treaty is ratified, these provisions would bind all domestic authorities.

⁷⁰ See AUCPCC, *supra* note 49, at 1–4.

⁷¹ See Simmons & Danner, *supra* note 68, at 239.

⁷² See Stuart S. Yeh, *Building a Global Institution to Fight Corruption and Address the Roots of Insurgency*, 8 INT'L PUB. POL'Y REV. 7, 20 (2014).

⁷³ The provisions of the proposed treaty are described in the author's previous publications. See Yeh, *Ending Corruption in Africa through United Nations Inspections*, *supra* note 45, at 640; Yeh, *Is an International Treaty*

The proposed treaty includes built-in provisions for monitoring domestic compliance with the terms of the treaty.⁷⁴ The treaty specifies that the UN Commission on Crime Prevention and Criminal Justice would appoint one or more entities to monitor compliance, including national human rights institutions or any other entities deemed by the Commission to be duly qualified to monitor compliance. State parties would agree to give designated monitors access to all reports and information necessary to formulate an opinion regarding the degree of compliance, including information deemed relevant by UN inspectors. Refusal by domestic authorities to provide access to requested reports and information would constitute a failure of cooperation and an obstruction of justice. Designated monitors would possess standing to bring suit in domestic courts to compel the production of relevant reports and information. Monitors would publish regular reports regarding compliance, and Transparency International would publish these reports online. The reports would be admissible as evidence in administrative or judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.

It might be argued that ratification would be purely symbolic and would not affect behavior; however, the available evidence does not support this conclusion. Ratification of the Rome Statute influenced behavior: the least democratic governments were almost eight times more likely to terminate a violent conflict if they had ratified the ICC statute, apparently because of the real threat of prosecution for war crimes.⁷⁵ Thus, “the idea that ratification is purely symbolic does not

Needed to Fight Corruption and the Narco-Insurgency in Mexico?, *supra* note 45, at 245.

⁷⁴ For more information regarding the role of national human rights institutions in monitoring compliance with international treaties, see generally Chris Sidoti, *National Human Rights Institutions and the International Human Rights System*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 93 (Ryan Goodman & Thomas Pegram eds., 2012); Richard Carver, *National Human Rights Institutions in Central and Eastern Europe*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 181 (Ryan Goodman & Thomas Pegram eds., 2012).

⁷⁵ Simmons & Danner, *supra* note 68, at 247–48.

square with the facts.”⁷⁶ Ratification was not a symbolic action by leaders who could presume they would be unaffected.⁷⁷

While it might be argued that domestic authorities lack the capacity and willingness to execute arrest warrants, domestic authorities have already demonstrated a basic level of capacity and willingness. In Nigeria, 250 individuals have been convicted of economic and financial crimes, including a chief of police and a governor.⁷⁸ In 2013, the annual conviction rate accelerated to 117 individuals per year.⁷⁹ Even in one of the most corrupt nations in the world, it is possible to obtain convictions. The issue is how to improve the rate of prosecution and conviction in every state so that corrupt individuals cannot act with impunity. In every state where the rule of law is weak, the introduction of independent investigators, with the capacity to illuminate corrupt police, prosecutors, and justices, would potentially plug leaks in the judicial system that occur when corrupt police, prosecutors, and justices believe they can engage in corruption without being discovered and tried in the court of public opinion.

With regard to the Rome Statute, the ICC has been effective in conducting successful investigations, indicting alleged criminals for committing mass atrocities, executing arrest warrants with the assistance of domestic authorities, and bringing suspects to trial. The ICC’s success demonstrates that it is not a paper tiger, and adoption and ratification are not empty gestures by politicians to placate the international community. The ICC is bringing criminals to justice in cases covering Uganda, the Democratic Republic of the Congo, Darfur/Sudan, and the Central African Republic.⁸⁰ The Court convicted Thomas Lubanga, the founder of the United Congolese Patriots, of war crimes including kidnapping and forcing children to

⁷⁶ *Id.* at 253.

⁷⁷ *See id.* at 227.

⁷⁸ Lawson, *supra* note 4, at 91.

⁷⁹ ECON. & FIN. CRIMES COMM’N, FOR THE RECORDS: 2013 CONVICTIONS, *available at* https://efccnigeria.org/efcc/images/EFCC_2013_Convictions.pdf.

⁸⁰ *Situations and Cases*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited June 15, 2015).

participate in armed conflict.⁸¹ The Court convicted Germain Katanga, former leader of the Patriotic Resistance Force in Ituri, of war crimes and crimes against humanity.⁸² The Court is currently trying Jean-Pierre Bemba Gombo, former Vice President, and one of the richest men in the Democratic Republic of the Congo, for war crimes and crimes against humanity.⁸³ The ICC is also currently trying Joseph Kony, the Ugandan head of the rebel Lord's Resistance Army, for crimes including murder, abduction, mutilation, sexual enslavement of women and children, and the conscription of child soldiers.⁸⁴ Sudanese President Omar al-Bashir, the first sitting head of state to face ICC charges, has been indicted for war crimes and crimes against humanity in Darfur.⁸⁵ Laurent Gbagbo, the former President of Côte d'Ivoire, was indicted and arrested for crimes against humanity and is currently facing trial.⁸⁶ The evidence suggests that international investigators can be effective and can obtain the cooperation and assistance of domestic authorities in executing arrest warrants, even in nations characterized by high corruption and weak rule of law.

However, it might be argued that, irrespective of treaty provisions requiring cooperation with UN inspectors and regardless of the success of the ICC, UN inspectors would not possess the legitimacy and capacity necessary to enforce the execution of domestic arrest warrants. What prevents local police from refusing to cooperate?

UN inspectors would not be completely powerless. They could obtain and present an arrest warrant to the local police and request their assistance in its execution. Under the proposed treaty, if local police attempt to delay or refuse to cooperate when presented with a valid warrant, they would be subject to investigation and arrest by UN inspectors for obstruction of justice—specifically, the failure to execute a valid arrest warrant. There would be real consequences. For example, Nigeria's criminal code makes the failure to execute a

⁸¹ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Crimes, ¶ 19 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>.

⁸² *Situations and Cases*, *supra* note 80.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

valid arrest warrant a felony: "Any person who conspires with another to obstruct, prevent, pervert, or defeat the course of justice is guilty of a felony, and is liable to imprisonment for seven years."⁸⁷ Thus, the failure to execute a valid arrest warrant would be an act of corruption, as it is an "abuse of functions" involving a "failure to perform an act" that is required of domestic police when presented with a valid arrest warrant.⁸⁸ Furthermore, the Nigerian Police Code of Conduct requires cooperation with, for example, UN inspectors in the event that Nigeria ratifies the proposed treaty: "Police officers will cooperate with all legally authorized agencies and their representatives in the pursuit of justice."⁸⁹ The Code of Conduct instructs Nigerian police to cooperate with legally authorized inspectors.⁹⁰ This Code, in combination with the requirement in the proposed treaty to cooperate with UN inspectors and to provide any assistance needed to execute warrants for arrest, would obligate local police to assist in executing valid arrest warrants. UN inspectors would obtain and present a warrant to arrest the corrupt police and would seek the assistance of honest, competent police to execute the warrant.⁹¹ Even in the most corrupt nations in the world, there are many honest, competent police officers, as demonstrated by the 250 arrests and convictions obtained by the EFCC in Nigeria.⁹² The conviction of a chief of police and a governor suggest that powerful individuals are not immune to arrest and prosecution.⁹³ The threat of arrest for obstruction of justice would be a powerful deterrent to any local police. Furthermore, the police would know that UN inspectors could not be bribed or corrupted in the same way as their corrupt

⁸⁷ Criminal Code Act (1990) Cap. (4), § 126 (Nigeria), *available at* <http://www.nigeria-law.org/Criminal%20Code%20Act-PartIII-IV.htm#Chapter>.

⁸⁸ UNCAC, *supra* note 1, at 155.

⁸⁹ *Code of Conduct and Professional Standards for Police Officers*, NIGERIA POLICE FORCE, <http://npf.gov.ng/code-of-conduct> (last visited June 15, 2015).

⁹⁰ *Id.*

⁹¹ While certain justices might be corrupt and might refuse to issue an arrest warrant, UN inspectors could consult local staff, such as EFCC staff, who are knowledgeable about local justices, have successfully obtained arrest warrants from competent justices, and can readily identify competent justices.

⁹² See Lawson, *supra* note 4, at 91.

⁹³ *Id.*

domestic counterparts. The danger of arrest and conviction would be real.

Since the UN would pay inspectors and their careers would depend on the propriety of their investigations, they could not be manipulated or pressured in the same way that police or investigators from a domestic anticorruption unit could be manipulated and pressured. Unlike domestic police and domestic members of anticorruption units, UN inspectors would be insulated from the power exerted by domestic authorities over jobs and careers. As a result, UN inspectors could not be subjected to the same pressure to tip-off suspects, tip-off local police, or give corrupt officials opportunities to make arrangements with local officials to obstruct investigations and arrests. UN inspectors would arrive unannounced, giving corrupt officials no time to react. When presented with an arrest warrant, the local police would have the choice of either cooperating with UN inspectors and executing the warrant, or obstructing the investigation in the hope that corrupt protectors would quash any attempt by UN inspectors to execute arrests for obstruction of justice. But when there is a real threat of arrest for obstructing justice, even corrupt police would likely decide that cooperation with UN inspectors is the wisest course of action.

The same logic applies across the entire system of criminal justice. It might be argued that corrupt prosecutors and judges would block investigations by UN inspectors, perhaps by releasing suspects, refusing to prosecute, refusing to hear a case, delaying judgment, or manipulating the outcome of a case. Under the proposed treaty, however, those prosecutors and judges would be subject to investigation by UN inspectors for corruption and obstruction of justice. The UNCAC defines corruption to include "the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions," as well as giving any person "an undue advantage" resulting from the abuse by a public official of his or her influence.⁹⁴ The proposed treaty defines the crime of obstruction of justice, a procedure whereby UN inspectors may request an opinion from a domestic judge, and a process whereby reports of obstruction would be published online by Transparency International in a way that would publicly identify individuals accused of obstructing justice, and would expose these individuals to the court of public opinion.

⁹⁴ UNCAC, *supra* note 1, at 155.

Under the proposed treaty, any attempt to delay or thwart the effort of a UN inspector to obtain or execute a warrant for arrest, in excess of the discretionary authority of the judge who receives the request for a warrant, would constitute an obstruction of justice. Any attempt to delay or thwart the lawful prosecution, trial, disciplinary hearing, or oversight hearing of an individual accused of corruption or obstruction of justice, in excess of the discretionary authority of the prosecutor, judge, disciplinary body, or oversight agency exercising jurisdiction over the relevant case, would constitute an obstruction of justice. A prosecution, trial, disciplinary hearing, or oversight hearing regarding an individual accused of corruption or obstruction of justice that is substantially irregular, violates accepted prosecutorial, judicial, disciplinary, or oversight norms and practices, and perverts the course of justice, would constitute an obstruction of justice.

These actions would also trigger new UN investigations. Since opinions about what falls within the discretion of a prosecutor, judge, or disciplinary body may differ, the proposed treaty specifies that UN inspectors may seek a judicial opinion from a domestic judge regarding an allegation of an obstruction of justice. Domestic judges are in the best position to formulate a judgment about whether a prosecutor or judge exceeded his or her discretionary authority. Since these judges are familiar with domestic norms and practices, they are unlikely to censure a prosecutor or fellow judge without compelling evidence that corruption or obstruction of justice has occurred. The provision for obtaining judicial opinions is intended to respect domestic norms and places judgments about criminality in the hands of individuals who are constitutionally vested with the role of deciding criminality.

The proposed treaty specifies that UN inspectors would submit reports to be published online by Transparency International. This provision is analogous to the unsealing of an indictment by a U.S. prosecutor. The intent of this provision is to illuminate corruption and obstruction of justice in a way that would be maximally embarrassing and very difficult to ignore, while still preserving the legitimate discretionary authority of honest prosecutors and judges. The treaty seeks to maintain that authority while addressing gross abuses engineered by powerful domestic elites that currently exploit countries where the rule of law is weak and impunity abounds.

It is likely that UN reports would receive attention from the media, especially if they include judicial opinions that an obstruction of justice has occurred. The adverse publicity would be difficult to ignore. UN inspectors would recommend charges to the appropriate prosecuting authorities or disciplinary agencies, and those agencies would, under the proposed treaty, enforce sanctions in accordance with agency practices and domestic law. These provisions are intended to ensure that any prosecutor or judge who attempts to obstruct justice would be forced from office in the same way that the CICIG forced the resignations of public prosecutors in Guatemala for corruption, including Attorney General Juan Luis Florido, Senior Prosecutor Álvaro Matus, and Administrative Crimes Prosecutor Patricia Lainfiesta.⁹⁵

Nigeria offers case examples illustrating how this could be accomplished. In February 2014, Nigeria's National Judicial Council (NJC) forced two high court judges to retire, reprimanded an appeals court justice and two high court justices, and issued warning letters to two high court justices for various acts of corruption, gross misconduct, and low productivity.⁹⁶ The process employed by the NJC suggests how accountability over corrupt justices may be enforced when justices attempt to manipulate outcomes. In particular, these cases suggest the process that may be employed to suppress any temptation to thwart investigations by UN inspectors.

The NJC is comprised of the following:

- (a) the Chief Justice of Nigeria . . . [;] (b) . . . [a] senior Justice of the Supreme Court . . . ; (c) the President of the Court of Appeal; (d) five retired Justices selected by the Chief Justice . . . ; (e) the Chief Judge of the Federal High Court; (f) five Chief Judges of States . . . ; (g) one Grand Kadi . . . from the Sharia Courts of Appeal . . . ; (h) [the] President of the Customary Court of Appeal . . . ; (i) five

⁹⁵ Hudson & Taylor, *supra* note 23, at 69.

⁹⁶ *Nigeria's National Judicial Council Forces 2 Judges into Compulsory Retirement, Reprimands 3 Others*, SAHARA REP. (Feb. 27, 2014), <http://saharareporters.com/2014/02/27/nigerias-national-judicial-council-forces-2-judges-compulsory-retirement-reprimands-3>. See Mohammed Shosanya & John Chuks Azu, *Lawyers Call for Prosecution of Corrupt Judges*, DAILY TRUST (March 4, 2014), <http://dailytrust.info/law/18102-lawyers-call-for-prosecution-of-corrupt-judges>.

members of the Nigerian Bar Association . . . [; and] . . .
(j) two persons [who are not] legal practitioners.⁹⁷

The Council is constitutionally vested with the responsibility of exercising disciplinary control over Nigeria's judicial officers and recommending the removal of officers for misconduct or poor performance.⁹⁸ An eight-member committee of judges evaluates the performance of judicial officers, while a five-member committee of judges formulates recommendations regarding disciplinary actions.⁹⁹ Any individual, including a UN inspector, may file a complaint against any judge, triggering a hearing and possible disciplinary sanctions.¹⁰⁰

The Council ordered Federal High Court Justice Gladys Olotu to retire after delaying judgment for eighteen months in a case that consumed a total of seven years, in violation of constitutional

⁹⁷ Constitution of the Federal Republic of Nigeria (1999), Third Schedule, Part I, § 20(a)–(j), *available at* <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#FederalExecutiveBodies>.

⁹⁸ *About the Council*, NAT'L JUDICIAL COUNCIL, <http://njc.gov.ng/about.php> (last visited June 15, 2015).

⁹⁹ *Committees*, NAT'L JUDICIAL COUNCIL, <http://njc.gov.ng/committee.php> (last visited June 15, 2015).

¹⁰⁰ R. E. Badejogbin & M. E. Onoriode, *Judicial Accountability and Discipline in Nigeria: Imperatives for the New Democratic Order* 12 (unpublished manuscript) (on file with the South Carolina Journal of International Law and Business). "Any aggrieved person may lodge a complaint against any judge either to the chairperson (who is the Chief Justice of Nigeria) or Secretary of the Council." *Id.* The Chief Justice issues a query and copy of the complaint to the subject of the complaint. *Id.* The subject "must respond within two weeks." *Id.* "The Council then sits to determine whether there is a prima facie case against the" subject. *Id.* "[I]f no prima facie case is established, the complaint is thrown out, otherwise a panel is [arranged] to hear the matter." *Id.* Subjects "are free to [obtain] legal representation." *Id.* The panel's decision "is presented to the Council for confirmation." *Id.* "If the [subject] is found guilty, the Council may" write a letter of admonishment, recommend compulsory retirement, "or recommend dismissal to the President or [State] Governor" of Nigeria. *Id.* "[T]he Council may indefinitely suspend the [subject] without salary" "pending the response of the President or Governor." *Id.*

provisions that require judgment within a period of ninety days.¹⁰¹ The NJC found that Justice Olotu “forgot” to deliver a ruling.¹⁰² In a second case, she failed to deliver a judgment twice, and in a third case, was guilty of reopening a matter in the absence of legal authority to do so.¹⁰³ Investigative reports by the EFCC revealed that she possessed assets exceeding NGN 2 billion (equivalent to \$12,388,000 USD) that were almost certainly obtained through corruption.¹⁰⁴ Similarly, the NJC ordered Federal High Court Justice U.A. Inyang to retire after finding that he had engaged in numerous deliberate, irregular, prejudicial actions.¹⁰⁵ The NJC issued letters of reprimand to Presiding Appeals Court Justice Dalhatu Adamu, High Court Justice A. A. Adeleye, and High Court Justice D. O. Amaechina for misconduct and poor performance.¹⁰⁶ The NJC previously issued a reprimand to Federal High Court Justice Okechukwu Okeke, forcing his retirement.¹⁰⁷ In 2013, they suspended Federal Justice Abubakar Talba for twelve months without pay because of an investigation into his role in a police pension case involving John Yusuf, an Assistant Director in the Police Pension Office.¹⁰⁸ Justice Talba had engineered a reduction in the charges against Yusuf and a concomitant reduction in the associated recommended sentence of fourteen years to two years of jail time; Talba then gave Yusuf the option of paying a fine of NGN 250,000 (\$1,549 USD) for each charge instead of imprisonment.¹⁰⁹ The egregious nature of the complaints against these justices led

¹⁰¹ Shosanya & Azu, *supra* note 96. See *Nigeria's National Judicial Council Forces 2 Judges into Compulsory Retirement, Reprimands 3 Others*, *supra* note 96.

¹⁰² Shosanya & Azu, *supra* note 96; *Nigeria's National Judicial Council Forces 2 Judges into Compulsory Retirement, Reprimands 3 Others*, *supra* note 96.

¹⁰³ Shosanya & Azu, *supra* note 96; *Nigeria's National Judicial Council Forces 2 Judges into Compulsory Retirement, Reprimands 3 Others*, *supra* note 96.

¹⁰⁴ See *Nigeria's National Judicial Council Forces 2 Judges into Compulsory Retirement, Reprimands 3 Others*, *supra* note 96.

¹⁰⁵ *Id.*; Shosanya & Azu, *supra* note 96.

¹⁰⁶ Shosanya & Azu, *supra* note 96; *Nigeria's National Judicial Council Forces 2 Judges into Compulsory Retirement, Reprimands 3 Others*, *supra* note 96.

¹⁰⁷ Shosanya & Azu, *supra* note 96.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

several members of the Nigerian legal profession to call for criminal prosecutions.¹¹⁰

The preceding examples from Nigeria suggest that UN investigations and referrals to disciplinary bodies such as the NJC would have real consequences for corrupt justices. Even in one of the most corrupt nations in the world, immoral justices are not immune to public opinion. A UN investigation and referral to a disciplinary body could trigger suspension, an order to retire, or forced retirement as a consequence of pressure exerted by the stain of a letter of reprimand.¹¹¹ The stain of a UN investigation and a charge of corruption—especially a charge that is sustained by a judicial opinion—would be difficult to ignore and would undermine the legitimacy of a corrupt prosecutor or judge, causing erosion of public support. Without public support, corrupt prosecutors and judges may be forced from office, even in the most corrupt nations in the world. When faced with a real threat of vigorous investigation by independent investigators who are perceived to be incorruptible, even corrupt police, prosecutors, and judges may decide that virtuous behavior is the wisest course of action.

IV. CONCLUSION

The evidence from Guatemala and Nigeria suggests that UN investigations and referrals to disciplinary bodies could trigger the removal of corrupt prosecutors, judges, and government officials. They are not immune to public condemnation, and can only survive if their crimes are hidden from public view. UN inspectors would serve to pull back the veil and expose corruption for the world to see. UN inspectors who act independently of the ethnic, tribal, and class rivalries endemic to Nigeria and other nations may possess a level of legitimacy not possessed by domestic police and domestic anticorruption units.

The proposed treaty seeks to multiply the power of public opinion by including a provision specifying that periodic updates regarding the progress of each case would be posted by Transparency International on a publicly accessible website. Thus, any individual

¹¹⁰ *Id.*

¹¹¹ See generally *id.* (showing results from investigations and referral to a disciplinary body).

with access to the Internet could check the progress of cases as they meander through the domestic court system. While Internet access is limited, as of December 2014, over 297 million Africans now have access, including most journalists in major African cities.¹¹² When printed, their stories are widely accessible to the public. In addition, citizen journalists, using mobile phones with Internet access, are “emerging as a powerful phenomenon across Africa.”¹¹³ Furthermore, significant news, including news about corrupt elites, is disseminated orally.¹¹⁴ Through these channels, and despite limited Internet access, the online publication of UN investigative reports would ensure that efforts to thwart justice would become widely known. The referral of charges regarding corruption or obstruction of justice to disciplinary bodies such as the NJC would likely trigger letters of reprimand, inflame public opinion, and create intense pressure to resign. This process may force the resignations of powerful individuals in the same way that the CICIG forced Attorney General Juan Luis Florido, Senior Prosecutor Álvaro Matus, and Administrative Crimes Prosecutor Patricia Lainfiesta,¹¹⁵ and the NJC forced Federal High Court Justice Okechukwu Okeke to resign.¹¹⁶

While it may seem unlikely that mere investigations can stop corruption, this is exactly what happened in Hong Kong. The Hong Kong Independent Commission Against Corruption (ICAC) did not have the power to convict, sentence, or imprison suspects, yet it was very successful in halting corruption.¹¹⁷ Until the advent of the

¹¹² *Internet Usage Statistics for Africa*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats1.htm> (last visited June 15, 2015).

¹¹³ Bruce Mutsvairo et al., *Reconnoitering the Role of (Citizen) Journalism Ethics in the Emerging Networked Public Sphere*, 35 AFR. JOURNALISM STUD. 4, 4 (2014).

¹¹⁴ Mary Omogor Ifukor, *Channels of Information Acquisition and Dissemination among Rural Dwellers*, 5 INT’L J. LIBR. & INFO. SCI. 306, 307 (2013).

¹¹⁵ Hudson & Taylor, *supra* note 23, at 69–70.

¹¹⁶ Shosanya & Azu, *supra* note 96.

¹¹⁷ See Bertrand E.D. De Speville, *The Experience of Hong Kong, China, in Combating Corruption*, in CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY 51, 51–58 (Rick Stapenhurst & Sahr J. Kpundeh eds., 1999); MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG 27, 27–83(2004); Tan Ah Leak, *The Experience of Singapore in Combating Corruption*, in CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY 59, 59 (Rick Stapenhurst & Sahr J. Kpundeh eds., 1999); Beatrice

ICAC, Hong Kong's police force was notoriously corrupt.¹¹⁸ However, the introduction of the ICAC ensured for the first time that no corrupt police officer could feel safe from exposure.¹¹⁹ There would be no tip-off of a raid, inspection, or investigation, and no chance to hide or destroy evidence. The calculus of the benefits and costs of corruption changed dramatically.¹²⁰

In the same way, independent UN investigators could ensure that corrupt police, prosecutors, judges, legislators, and staff of anticorruption units never feel safe from exposure. By exposing every member of the law enforcement community, prosecutor, judge, legislator, and investigator in an anticorruption unit to the threat of investigation, independent investigators deter corruption in the very institutions that normally fight it. Police are compelled to collect evidence, prosecutors are compelled to present evidence, judges are compelled to cite evidence, and legislators are compelled to investigate evidence of corruption, or risk investigation and prosecution themselves for favoritism and corruption. When faced with the prospect of incarceration or removal, it becomes much easier for potentially corrupt police, prosecutors, judges, and legislators to decline bribes and to behave ethically. At the same time, it becomes easier for honest police, prosecutors, judges, and legislators to advance themselves through competent work. By deterring corruption and crime among crime fighters, independent investigators multiply the effectiveness of their own efforts to fight crime and restore the powers of the police, judiciary, and anticorruption units.

The experience of the ICAC suggests that the presence of independent investigators has a powerful effect on corrupt officials across all branches of government.¹²¹ When officials know that their telephones may be tapped, that any meeting might be recorded, and that any colleague may provide evidence to prosecutors, the potential

Weder & Aymo Brunetti, *Another Tale of Two Cities: A Note on Institutions in Hong Kong and Singapore*, 156 J. INSTITUTIONAL & THEORETICAL ECON. 313, 314 (2000).

¹¹⁸ See Brief History, ICAC, http://www.icac.org.hk/en/about_icac/bh/ (last visited June 15, 2015); De Speville, *supra* note 117, at 51.

¹¹⁹ See De Speville, *supra* note 117, at 53.

¹²⁰ *Id.* at 52.

¹²¹ See *id.* at 56.

for corruption is drastically reduced. However, this is only the case when there is a truly independent body composed of inspectors that are perceived to be incorruptible. This is what is needed, but has yet to be established by the international community.

The proposal to create a body of UN inspectors may be distinguished from the many failed attempts to create anticorruption units modeled after the ICAC. The difference is that UN inspectors would be protected from the ability of domestic ruling elites to manipulate the jobs and careers of domestic investigators. UN inspectors could not be removed in the same way that Mallam Nuhu Ribadu, the director of Nigeria's EFCC, was removed.¹²² UN inspectors would have the authority to investigate any instances where corrupt police, prosecutors, or judges attempted to obstruct justice. This would include the authority to obtain and execute arrest warrants for corrupt police and the ability to aggressively investigate corrupt prosecutors and judges. This capacity would distinguish UN inspectors from the limited capacity of domestic anticorruption units that can be easily manipulated and thwarted by powerful ruling elites.

The proposal for an international treaty, modeled on the treaty authorizing the CICIG, was presented at the Symposium on Institutional Capacity, Corruption, and Development sponsored by the Rule of Law Collaborative on April 11, 2014, at the University of South Carolina School of Law. The spirited discussion at the symposium suggested the need to write this article. While space does not permit the author to address all of the issues posed by the treaty, numerous issues have previously been addressed in articles published in *International Affairs*,¹²³ the *International Public Policy Review*,¹²⁴ the *International Criminal Justice Review*,¹²⁵ and the *Journal of African Policy Studies*.¹²⁶ The interested reader is urged to read those articles, begin a serious examination of the proposed treaty, and consider the possibility that UN inspectors could have a

¹²² See *Nigeria: Firing of Anti-Corruption Chief Would Boost Abusive Politicians*, *supra* note 16.

¹²³ Yeh, *Ending Corruption in Africa through United Nations Inspections*, *supra* note 45.

¹²⁴ Yeh, *Why UN Inspections? The Accountability Gap in Sub-Saharan Africa*, *supra* note 41.

¹²⁵ Yeh, *Is an International Treaty Needed to Fight Corruption and the Narco-Insurgency in Mexico?*, *supra* note 45.

¹²⁶ Yeh, *Anti-Corruption Inspections: A Missing Element of the IMF/World Bank Agenda?*, *supra* note 45.

profound effect on the culture of impunity that prevails wherever corrupt individuals feel the risk of punishment is low.

APPENDIX

A draft protocol to the UNCAC, originally drafted to establish an African Commission Against Corruption (ACAC) and intended to deter corruption in African countries, could be broadly adapted for a protocol that would apply to signatories worldwide. Upon entry into force, the treaty would empower the UN to create an ICAC to investigate allegations of corruption. The preamble justifies the protocol by citing Articles 3, 10, 13, 43, 46, 48, and 62 of the UNCAC. Article 62 of the UNCAC provides the legal basis for employing the resources of the UN, and Articles 3, 10, 13, 43, 46, 48, and 62 provide the legal basis to augment the capabilities of the police, law enforcement, and anticorruption agencies in developing countries to combat corruption. Furthermore, the UNCAC provides the legal authority for law enforcement personnel of member states to act on behalf of the law enforcement personnel of a requesting state. Specifically, Article 46 of the UNCAC specifies that parties "shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions[,] and judicial proceedings" in relation to corruption-related offenses.¹²⁷ Finally, Article 62 of the UNCAC created a mechanism that could be used to fund the proposed ICAC through contributions by the World Bank, IMF, parties to the UNCAC, and the G8 countries, which have already agreed to commit substantial financial resources to fight corruption and ensure accountability and government effectiveness.

Thus, legal authority and a funding mechanism have already been established that would permit: (a) the establishment of a UN-funded ICAC; (b) the use of ICAC inspectors to augment the capabilities of the police, law enforcement, and anticorruption agencies in developing countries; and (c) the employment of inspectors and law enforcement personnel of member states, through the ICAC, to act on behalf of the law enforcement personnel of a requesting state to conduct investigations, involving all of the powers enumerated in Article 46, listed above. What is needed is not legal authority, but rather a UN protocol that spells out the details of how this would work in practice. Thus, the draft proposal is framed as a protocol that supplements the UNCAC.

¹²⁷ UNCAC, *supra* note 1, at 166.

The draft protocol specifies procedures. Any individual may submit an allegation of corruption. After receiving a request for an investigation, the ICAC, under the auspices of the UN Commission on Crime Prevention and Criminal Justice, would prioritize and review the merits of each request. The Commission would designate a UN inspector who would lead and supervise every aspect of the investigation, ensuring that the investigation is conducted in a manner that respects and abides by the laws and law enforcement procedures of the state where the investigation is conducted. Inspectors, their staff, and their surrogates would be immune from arrest or detention, and their papers, documents, and personal baggage would enjoy the inviolability accorded to diplomatic envoys in conformity with Article VI of the United Nations Convention on Privileges and Immunities. However, an operations review committee would monitor their conduct and the propriety of all investigations, with members nominated by parties to the protocol. The operations review committee would refer cases of criminal misconduct by inspectors or their surrogates for prosecution under the laws and judicial system of the state where the inspectors or surrogates maintain citizenship.

UN inspectors would exercise their powers through production of a written authorization showing their identity and position, together with documentation indicating the subject matter and purpose of the on-the-spot check, inspection, or investigation. Individuals served with these documents would be required to comply under the same terms as would be required by the police, law enforcement, and anticorruption units of the state where the investigation is conducted. Failure to comply would have the same consequences as failure to comply with investigations by the police, law enforcement, and anticorruption units of the state where the investigation is conducted.

Where witnesses or suspects resist an on-the-spot check, inspection, interview, or investigation, the police, law enforcement, and anticorruption units of the state where the investigation is conducted, acting in accordance with national rules, would give UN inspectors assistance as needed to allow them to discharge their duty in carrying out an on-the-spot check, inspection, interview, or investigation. It would be for the police, law enforcement, and anticorruption units of the state where the investigation is conducted to take any necessary measures, in conformity with national law, to

enforce cooperation. In cases where an inspector believes that adequate and timely assistance has not been provided by the requisite police, law enforcement, judicial, and anti-corruption units, the inspector may file a request for censure by the Commission on Crime Prevention and Criminal Justice. The Commission would review the request and may subpoena evidence or interview witnesses. The Commission would make a determination, by a majority vote, to approve or disapprove the motion for censure no later than twenty-one days after receiving a request for censure.

Under the draft protocol, The World Bank and the IMF would develop and implement a system of reducing aid and credits in response to the magnitude and frequency of noncooperation with UN inspectors and their surrogates. Parties to the protocol agree to abide by the judgment of the Commission on Crime Prevention and Criminal Justice with regard to the magnitude and frequency of any noncooperation, and with regard to the Commission's recommendations for implementing reforms of the police, law enforcement, judicial, and anticorruption units of the state where the investigation is conducted.

Under the draft protocol, inspectors would hand over disposition of each case to the appropriate prosecuting authority upon completion of the investigation. Each inspector would submit reports to the Commission every thirty days following assignment to an investigation until the investigation is completed and the case is handed over to the appropriate prosecuting authority. When the case is handed over to the prosecuting authority, copies of the final report would be submitted to Transparency International, in addition to the relevant prosecuting authorities, to ensure that the reports are not ignored through the machinations of corrupt officials. Transparency International would publish updates regarding the disposition of the case every thirty days, until the appropriate prosecuting authority or court dismisses the case, or the appropriate court reaches a final verdict.

The reports and all supporting documents would constitute admissible evidence in administrative or judicial proceedings of the member state in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They would be subject to the same evaluation rules as those applicable to administrative reports

drawn up by national administrative inspectors and would be of identical value to such reports.

Under the draft protocol, parties to the treaty would establish a system of courts and prosecutors dedicated to the adjudication and swift resolution of charges of corruption. The Commission on Crime Prevention and Criminal Justice would ensure that dedicated courts and prosecutors have regular and adequate funding to perform their responsibilities, would conduct periodic reviews to evaluate the performance of dedicated courts and prosecutors, and would redirect funding based upon these evaluations. Dedicated courts and prosecutors would prioritize charges submitted by UN inspectors or their surrogates, would ensure the swift resolution of resulting cases, and would not tolerate delays that pervert the course of justice.

Under the draft protocol, parties to the treaty would establish national judicial councils vested with the responsibilities of selecting justices and prosecutors of the utmost integrity to serve and ensure adequate staffing of dedicated courts, develop and implement streamlined adjudication procedures, ensure the swift resolution of corruption charges, evaluate the performance of justices and prosecutors, and censure and remove justices and prosecutors whose performance is substandard. National judicial councils would be appointed by panels of justices, and prosecutors and would be composed of justices and prosecutors of the utmost integrity who are duly qualified to perform the responsibilities enumerated within the treaty. National judicial councils would submit nominations of justices, prosecutors, and individuals nominated to serve on national judicial councils to the Commission on Crime Prevention and Criminal Justice. The Commission would retain the power, upon a majority vote, to veto the nomination of any individual to serve on a national judicial council, veto the nomination of any justice or prosecutor to serve a dedicated court, and request the censure or removal of any justice or prosecutor serving a dedicated court whose performance is alleged to be substandard. The Commission would be able to consider information provided by any individual as well as any governmental or nongovernmental body or organization in formulating its decisions.

To ensure the safety of witnesses, victims, and UN inspectors under the violent conditions that exist in many developing countries, the protocol specifies that UN inspectors would determine the

measures necessary to protect their own safety and the safety of ICAC staff, witnesses, victims, and all individuals who assist with ICAC investigations. The state where the investigation is conducted would implement measures requested by UN inspectors and their surrogates, including the use of armored vehicles, secure buildings, special plain-clothes guards, and measures to protect their identity. In addition, it may be necessary to implement witness protection measures including laws that permit closed trial sessions, the use of pseudonyms, voice distortion technology to shield the identity of witnesses while in court, and the use of confidential witness interviews. These measures have been employed to protect witnesses and victims testifying before the ICC and other international tribunals.¹²⁸ It may be necessary to negotiate agreements with G8 countries for the relocation of protected witnesses. The necessary provisions may be written into the protocol or may be established through separate agreements. While these provisions could not eliminate the threat of violence, the threat could be managed, as indicated by the success of Guatemala's CICIG, operating under similarly violent conditions.

Despite the possibility of intimidation, there is ample precedent from Guatemala that witnesses and victims are willing to provide testimony and inspectors are willing to lead investigations, even under the violent conditions that prevail in Guatemala.

Under the proposed treaty, attempts to arrest, interfere with, or harm witnesses, victims, or inspectors, contrary to the wishes of UN inspectors, would constitute obstruction of justice. Any attempt to delay or thwart the effort of a UN inspector to obtain a warrant for arrest, or the trial of an individual accused of corruption or obstruction of justice, and any prosecution or trial of an individual accused of corruption or obstruction of justice that is substantially irregular, violates accepted judicial norms and practices, and perverts the course of justice would constitute obstruction of justice. These actions would trigger new ICAC investigations. UN inspectors would submit reports to be published online by Transparency International. They would recommend charges to the appropriate prosecuting authorities or disciplinary agencies and those agencies would, under the proposed treaty, enforce sanctions in accordance

¹²⁸ See PAULINA VEGA GONZALEZ & CARLA FERSTMAN, REDRESS, ENDING THREATS AND REPRISALS AGAINST VICTIMS OF TORTURE AND RELATED INTERNATIONAL CRIMES: A CALL TO ACTION 37–38 (Dec. 2009).

with agency practices and domestic law. The protocol also specifies that a UN inspector may file a request for censure by the UN Commission on Crime Prevention and Criminal Justice if the inspector believes that obstruction of justice has occurred, or adequate and timely cooperation, assistance or protection have not been provided by the requisite police, law enforcement, judicial, anti-corruption or government units. The protocol specifies that the World Bank and IMF would develop and implement a system of reducing aid and credits in response to the magnitude and frequency of acts of noncooperation with UN inspectors and their surrogates.

