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## **International Moral Legalism and the Competence over Prosecution of Corruption Crimes**

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### **Abstract**

The paper highlights the acute nature of the problem of grand business corruption and the major legal developments in anticorruption legislation nationally, regionally and internationally. While accepting the utility of the black letter analysis of anticorruption laws the author argues that it is equally worthwhile that legal writers establish the moral abhorrence of international corruption across human cultures and forms of civilisation. It is suggested that there is ample basis for doing so by distilling the philosophical, religious and cultural jurisprudence of corruption from the corpus of indigenous African religion, Islamic thought, Christian theology and cultural values common to human societies. It is noted that the complicity of western societies in providing home for stolen and illegal wealth systematically transferred from the developing world is at odds with this shared moral vocabulary of human civilisations. It is argued that the utility of establishing the moral imperative of the global anticorruption movement is to put a stop to this phenomenon and to ensure the expansion of the jurisprudence and international criminal jurisdiction against gross abusers on the same basis as is presently done against pirates, terrorists hijackers and other persons engaging in acts regarded as *delicta jure gentium*.

**Keywords:** Bribery, Corruption, Multinationals, Tracing, Stolen funds, Money laundering

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### **1. The problem of corruption in International Business Transactions**

This article argues that the prohibition of corruption in international business transaction and the developing international law that provides for the tracing, seizure and return of the proceeds of corrupt enrichment is based upon a common language of international morality. The article also argues that there is adequate basis for the internationalisation of the jurisdiction over corrupt businesses and their executives that is fast approaching that which applies to pirates, terrorists and other international delinquents.

It has become clear since the middle of the last century that the phenomenon of stolen capital flight is one of the principal causes of underdevelopment. The stolen wealth of developing states and the proceeds of bribery and corruption in their participation in international business over the last half century has found safe haven in the banks and financial institutions of western states. Much of western business activities and investment in many developing states take place in a pervading milieu of international corruption involving bribery and corruption of key decision makers and other business players.

The unholy cycle of corruption is complete when the corrupt officials and businessmen export their ill-gotten wealth back into the coffers of offshore accounts mostly based in western countries and tax islands. Since the end of the colonial era,

after the Second World War when the outlines of this international mischief became to be noticeable no meaningful regime of prevention was created to stop the rot. Sophisticated national and international legislation to stem the practice are a very recent development. There is an argument that international practice of money laundering has been pressed to the advantage of western economies and this is why the legal regime to trace stolen wealth is left in its infancy.<sup>1</sup> Countries of the southern hemisphere have been systematically defrauded for decades by their corrupt leaders with the proceeds finding haven in western banks. States which have experienced high profile Swiss banking scandals or have tried to recoup their losses from foreign banks include Ethiopia, Honduras, Vietnam, Cambodia, Panama, Bolivia, Algeria, Nigeria, and Kenya.<sup>2</sup>

Corruption at both the petty and grand levels is a widely recognised feature of developing countries.<sup>3</sup> The incidence of grand corruption involves multinationals, politicians and elites of the civil and military class. The connection between corruption in the developing world and the active involvement and perhaps cultivation of local actors by foreign elements has been poorly examined in literature. Grand corruption requires interaction between foreign elites who give bribes, kickbacks and various forms of illegal inducement in order to gain undue advantages in business. This interaction is what we choose to refer to as grand-business corruption. This may take the form of bribes for lucrative procurement contracts, construction contracts and mining and other extractive industrial activities.<sup>4</sup>

The frequent discoveries of slush funds and bribery networks maintained by leading Western corporations are indicative of the depth of the problem.<sup>5</sup> The multinationals involved in major scandals and investigations in the last ten years include Siemens in up to 20 countries,<sup>6</sup> Hyundai and Samsung in South Korea,<sup>7</sup> BAE

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<sup>1</sup> The World bank has estimated that the amounts involved in money laundering are in the region of US \$800 Billion –US\$ 1 trillion and according to the IMF money laundering accounts for 2 to 5 percent of the world GDP. US Senator Carl Levin admits: "It is estimated that half of that money comes to the United States". James Petras, " 'Dirty Money' Foundation of US Growth and Empire - Size and Scope of Money Laundering by US Banks" *La Jornada* [Mexico], 5/19/01 also available at [http://www.fromthewilderness.com/free/economy/053101\\_banks.html](http://www.fromthewilderness.com/free/economy/053101_banks.html)

<sup>2</sup> Jean Ziegler, *Switzerland Exposed* (Allison and Busby, 1978) p. 39

<sup>3</sup> A Report on the Transparency International Global Corruption Barometer 2004 appears to single out political parties among the governmental sectors and institutions most affected by corruption. The point to be made however is that; it is the leadership elite in many of these states that participates whether it is monarchical, military or a combination of any of these. See Indira Carr, "Corruption In Africa: Is The African Union Convention On Combating Corruption The Answer" *Journal of Business Law* (2007) p. 111, 123, 124. See also In Rose-Ackerman, S, *Corruption and Government*, (Cambridge, Cambridge University Press, 1999) p. 27. Reports and materials of the Transparency International are available at [www.transparency.org](http://www.transparency.org). Release date of report: December 9, 2004; United Nations, The Global Programme Against Corruption: Anti Corruption Toolkit "What is Corruption? The Meaning of "Corruption" and a Survey of its most common forms," (Ministry of Foreign Affairs {Development Cooperation} of The Netherlands and the Ministry of Foreign Affairs of Norway) p. 13.

<sup>4</sup> Rose-Ackerman, S, *Corruption and Government*, (Cambridge, Cambridge University Press, 1999) pp 27, 91.

<sup>5</sup> Simon Romero, "Halliburton Severs Link With 2 Over Nigeria Inquiry" *The New York Times*, Saturday, June 19, 2004; BBC, "Nigeria Probes Siemens Bribe Case" available at <http://news.bbc.co.uk/1/hi/world/africa/7105582.stm>; Estelle Shirbon, Update 1-Nigeria to investigate Siemens bribes scandal Mon Nov 19, 2007 available at <http://www.reuters.com/article/companyNewsAndPR/idUSL1931303520071119>; Chudi Offodile, "Halliburton Scandal: The Nigerian Angle" *Vanguard* (Nigeria) Friday, April 24th, 2009

<sup>6</sup> David Gow, "Siemens prepares to pay \$2bn fine to clear up slush fund scandal" *The Guardian*, Friday 25 January 2008 <http://www.guardian.co.uk/technology/2008/jan/25/1> visited 25 June 2009; Chris

Systems in Saudi Arabia and a few other countries<sup>8</sup> Haliburton and Kellogg Brown & Root (KBR) in Nigeria<sup>9</sup> and Lucent Technologies in China.<sup>10</sup> A writer aptly notes:

“It is a matter of fact that major deals between a government office and a foreign supplier will on occasions involve money exchanging hands, beyond and above payments specified in the contract. Indeed, this would happen rather frequently not to say most of the time in certain countries and very few nations could claim to be totally immune from this plague”.<sup>11</sup>

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Mellor, “Siemens slush fund scandal deepens” *Techworld* 13 December 2006 <http://www.techworld.com/news/index.cfm?newsID=7571> visited 18 June 2009.

<sup>7</sup> As a result of these and similar disclosures South Korea has sent two former presidents to jail. Roh Tae Woo (1988-93) was charged with amassing at least \$650 million in political "slush funds" from the giant conglomerates that dominate Korea's economy, and Chun Doo Hwan (1980-88) for among other reasons gathering even more money (upwards of \$1 billion). Bruce Cummings, Korean Scandal, or American Scandal? Japan Policy Research Institute *JPRI* Working Paper No. 20 available at <http://www.jpri.org/publications/workingpapers/wp20.html> visited 25 June 2009

<sup>8</sup> BAE Systems, which was formerly called British Aerospace and one of the world's leading producers of advanced weaponry systems has to the admission of the Tony Blair government serious allegations to answer regarding a £20 million (\$33.4 million) slush fund to finance prostitutes, gambling trips, yachts, sports cars etc. for its most important clients the Saudi royal family and their intermediaries. Evidence has also since been discussed in various fora that members of the British government were aware of the bribe arrangement, but looked the other way. See Sasha Lilley, BAE System's Dirty Dealings, *CorpWatch* November 11th, 2003.

<sup>9</sup> Two U.K. Citizens, Wojciech Chodan and Jeffrey Tesler, were charged with participation in a bribery scheme in US Department of Justice indictment commenced March 5, 2009. According to the indictment, According to the indictment, Tesler was hired in 1995 as an agent of a four-company joint venture that was awarded four EPC contracts by Nigeria LNG Ltd., (NLNG) between 1995 and 2004 to build LNG facilities on Bonny Island. The government-owned Nigerian National Petroleum Corporation (NNPC) was the largest shareholder of NLNG, owning 49 percent of the company. Chodan was a former salesperson and consultant of a United Kingdom subsidiary of Kellogg, Brown & Root Inc. (KBR), one of the four joint venture companies. At so-called "cultural meetings," Chodan and other co-conspirators allegedly discussed the use of Tesler and other agents to pay bribes to Nigerian government officials to secure the officials' support for awarding the EPC contracts to the joint venture. According to the indictment, the joint venture hired Tesler to bribe high-level Nigerian government officials, including top-level executive branch officials, and another agent to bribe lower level Nigerian government officials, including employees of NLNG. At crucial junctures before the award of the EPC contracts, KBR's former CEO, Albert "Jack" Stanley, and others allegedly met with three successive former holders of a top-level office in the executive branch of the Nigerian government to demand they should designate a representative with whom the joint venture should negotiate the bribes. In pursuance of the scheme Tesler allegedly wire transferred bribe payments to or for the benefit of various Nigerian government officials, including officials of the executive branch, the Nigerian National Petroleum Company (NNPC), Nigeria Liquefied Natural Gas Limited (NLNG), and for the benefit of a political party in Nigeria. If convicted on all charges, each defendant faces a maximum prison sentence of 55 years. See Department of Justice, “Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme” Press Release Thursday, March 5, 2009 CRM (202) 514-2007, TDD (202) 514-1888 available at <http://www.usdoj.gov/opa/pr/2009/March/09-crm-192.html> visited 12 October 2009.

<sup>10</sup> ABA Section on International Law,” U.S. Enforcement Agencies End 2007 with Three New FCPA Settlements”, *Anti-Corruption Committee Newsletter* December 2007 p. 2; Paul French, “A bunch of dodgy bankers” *Ethical Corporation* available at <http://www.ethicalcorp.com/content.asp?ContentID=3758> visited 24 June 2009.

<sup>11</sup> Ezio Bonsignore, “Defence Trade and the Misuse of Justice”, Vol. 32 *Military Technology*, 2008, Issue 6, p. 8.

The illegality of money laundering, and corruption in international business transactions and grand corruption is confirmed in a network of national, regional and international laws. Developments in Soft Law include the G8 commitments,<sup>12</sup> the Extractive Industry Transparency Initiative' (EITI),<sup>13</sup> the UN proposals in 1977 (Code of conduct on Transnational Corporations) which contained demands for detailed financial and non financial items for disclosure, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,<sup>14</sup> and the European 'Vredeling' Directive, introduced in 1980 which mandated a level of information sharing between management and labour in transnational enterprises has been no different.<sup>15</sup>

Treaty and quasi-treaty law that are designed to prevent and prohibit international business corruption, money laundering and grand corruption include the Inter-American Convention Against Corruption adopted by the Organization of American States in 1996;<sup>16</sup> Convention on Combating Bribery of Foreign Public Official in International Business Transactions adopted by the OECD in 1997;<sup>17</sup> Criminal Law and Civil Law Conventions on Corruption adopted by the Council of Europe in 1999;<sup>18</sup> ICC Rules of Conduct on Extortion and Bribery in International Business Transactions;<sup>19</sup> the African Union Convention on Preventing and Combating Corruption;<sup>20</sup> and the United Nations Convention on Corruption adopted in December 2003.<sup>21</sup>

National laws of significance to research in this area include the US Foreign Corrupt Practices Act ("FCPA");<sup>22</sup> Public Bodies Corrupt Act 1889,<sup>23</sup> (which covered

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<sup>12</sup> Official website of the G8 Presidency of the Russian Federation in 2006, 'Fighting High Level Corruption' St. Petersburg, July 16, 2006 < <http://en.g8russia.ru/docs/14-print.html>>; Note also the *Sea Island Compacts* which were entered into with Nigeria, Nicaragua, Peru and Georgia.<sup>12</sup>

<sup>13</sup> Countries that have implemented this initiative include Nigeria, Ghana, Azerbaijan and the Kyrgyz Republic. Joseph A Schumacher, 'Introducing Transparency into the Oil Industry: The Quest for EITI' (2004) 4(3) *Global Jurist Advances*, 2.

<sup>14</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55<sup>th</sup> Sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003).

<sup>15</sup> *Proposal for a Council directive on procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings* [1980] COM (80) 423 final; [1983] OJEC No C297/3 amended in 1982; OJEC No C292/33; and [1983] OJEC No C217/3.

<sup>16</sup> *Inter-American Convention Against Corruption*, 29 March 1996, 35 ILM 724.

<sup>17</sup> *OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions*, adopted 21 November 1997. See, <<http://www.oecd.org>>.

<sup>18</sup> *Criminal Law and Civil Law Conventions on Corruption adopted by the Council of Europe in 1999*, opened for signature, CETS 174 (entered into force <<http://www.coe.int>>).

<sup>19</sup> Adopted 1996; revision of 1977 Rules of Conduct. The 1977 Rules prohibited extortion and bribery in connection with obtaining or retaining business. New rules prohibit extortion or bribery for any purpose. See, <<http://www.iccwbo.org>>.

<sup>20</sup> *African Union Convention on Preventing and Combating Corruption*, adopted on 11 July 2003 (entered into force 5 August 2006) ('*AU Convention*'). This instrument has received impressively high acceptance among African states signed by 41 out of 53 African Union Member States, of which only 24 have actually ratified it. Ratifying states as at 2009 are: Algeria, Burkina Faso, Burundi, Comoros, Congo, Ethiopia, Ghana, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Mozambique, Namibia, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Uganda, Zambia, and Zimbabwe.

<sup>21</sup> *United Nations Convention Against Corruption*, opened for signature 31 October 2003, UNTS, (entered into force 14 December 2005) ('*UNCAC*'). See, <<http://www.un.org>>.

<sup>22</sup> The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.

<sup>23</sup> Public Bodies Corrupt Practices Act 1889 1889 Chapter 69 52 and 53 Vict.

both active and passive bribery);<sup>24</sup> the Prevention of Corruption Act 1906<sup>25</sup> applied to both private and public sector bribery the Prevention of Corruption Act 1916,<sup>26</sup> The Anti-Terrorism, Crime and Security Act 2001;<sup>27</sup> UK Bribery Act (the "Bribery Act")<sup>28</sup> in force from April 2011. In the African continent notable developments include the Zambian Prohibition and Prevention of Money Laundering Act, 2001, Nigerian Economic and Financial Crimes Commission Act 2002<sup>29</sup>; Money Laundering (Prohibition) Act, 2004; Money Laundering Decree 1995; Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act 1988<sup>30</sup> the National Drug Law Enforcement Agency Decree 1989.<sup>31</sup>

## **2. Morality of Jurisdiction over Money laundering**

The general trend of our discussion so far has been to argue that the imperatives of the recent soft law and treaty law on corruption, transparency and accountability is that there is a duty upon states to cooperate in the prevention and repatriation of stolen funds. The success of this argument stands and falls upon a proper forensic analysis of the various streams of laws and legal jurisprudence referred to and the recognised principles of law that govern international jurisdiction. Furthermore, where there is wanton disregard for the law as it is and where a receiving state refuses to cooperate based upon its interpretations of the law as it stands it becomes necessary to ask the question, what apart from the law necessitates the cooperation of receiver nations to assist in the return of stolen funds. The answer ought to be that international morality does demand cooperation in the prosecution of the conspirators and facilitators of the odious crimes under discussion. The assertion of Sir Harold Nicolson that "[t]here does not exist such a thing as international morality" is inapplicable to the policing of international money laundering and corruption.<sup>32</sup>

The requirements of a strong moral content in the actions of states in their regulation and coordination of businesses and economic policies has been thrown into sharper focus in the last few years and was perhaps heralded by the epoch signifying collapse of Enron and Anderson. The so called 'credit crunch' and the near collapse of the world economic as a result of the banking practices and business lending have further placed morality on a strong pedestal along with law in the regulation of international economic and business life. This realisation has certainly produced reactions in the academia and in the accounting law and business disciplines. Corporate scandals are used as valuable teaching tools in the various disciplines. The preferred view is that held by Arnold-Wolfers who wrote; "the 'necessities' in international politics, and for that matter in all spheres of life (that states) do not push

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<sup>24</sup> The definition of public body in the 1889 Act was widened by the Prevention of Corruption Act 1916 so that local and public authorities of all descriptions could be included.

<sup>25</sup> Prevention of Corruption Act 1906 c. 34 (Regnal. 6\_Edw\_7).

<sup>26</sup> Prevention of Corruption Act 1916 c. 64 (Regnal. 6\_and\_7\_Geo\_5).

<sup>27</sup> See, Terrorism Act 2000 (UK) c 11, Part 12 on Bribery and Corruption.

<sup>28</sup> Bribery Act 2010 c. 23.

<sup>29</sup> Full text available at [http://www.nigeria-law.org/Economic%20And%20Financial%20Crimes%20Commission%20\(Establishment\)%20Act.htm](http://www.nigeria-law.org/Economic%20And%20Financial%20Crimes%20Commission%20(Establishment)%20Act.htm)

<sup>30</sup> Full text available <https://www.unodc.org/tldb/showDocument.do?documentUid=8223&country=NIR&language=ENG>

<sup>31</sup> Decree No. 48 of 1989, now an act of parliament CAP N30 laws of the federation of Nigeria 2004

<sup>32</sup> See Herve Stolowy, "Nothing Like the Enron Affair Could Happen in France!" (New Economics Papers Law and Economics 2006-01-29 <http://d.repec.org/n?u=RePEc:ebg:hecchah:0815&r=law>)

decision and action beyond the realm of moral judgment". It is acutely necessary in the battle to contain international bribery and corruption that the immorality of the activity be emphasised so as to counter the prevailing sanitised view of white collar crime. Not all commentators on this specific problem have been as forthcoming in their conclusions as Michael Buchanan who stated;

"Money laundering is often seen as a white collar crime, and as such is sometimes thought of as being almost victimless. But as I discovered on a visit to Nigeria, nothing could be further from the truth. The country has suffered desperately at the hands of corrupt politicians who have stolen the country's wealth and laundered it overseas."<sup>33</sup>

In this way the necessary causative link has been made showing that what previously was condoned simply as 'boys will be boys' and under the table activities of western businessmen, contractors and bankers and their counterparts in developing states are the very roots of much of the chronic poverty that has been afflicting the better part of Africa and other parts of the developing world.

It is persuasive to assert that much of the aid given to African states by western nations is driven by moral conviction of the governments and peoples of the richer states to help and to be seen to help poorer and developing states many of which were colonies and vassal states of the age old western empires.<sup>34</sup> However, perennial campaigns to 'save Africa' and 'make poverty history' are meaningless in the context of the damage which is allowed if not encouraged to happen to vulnerable states through a symbiotic relationship and interaction between a kleptomaniac ruling elite class and rogue multinationals as well as the banking and financial institutions of foreign receiving nations.

As a result of the largely amoral view of the phenomenon of stolen funds in academic and sociological discourse the solutions that have been devised in the past remain unconvincing and inadequate in practice. There is little point in the periodic summoning up of globally televised concerts to raise paltry sums (most of which are of a promissory nature) for what in reality amounts to 53 independent African states when up to £220 billion may have been siphoned abroad from one single African state

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<sup>33</sup> Buchanan op.cit., p. 8.

<sup>34</sup> Note the significance of the infamous events of the partition of Africa in the tail end of the 19<sup>th</sup> century. See the General Act of Feb. 26, 1885. The mid-nineteenth century marked the beginning of the renewed interest in the continent of Africa by the imperialist powers of Europe. Of particular interest to them at the time were the hitherto unexplored central African regions comprising modern-day Zaire, Zambia and Zimbabwe. This interest was based on the relentless rush for raw materials and investment that these territories provided for Europe's continuing industrialization. Competition between the European powers was severe as they coveted the opportunities that colonial subjugation assured. Much interest was concentrated on the Congo region (modern Zaire) upon which King Leopold II of Belgium had set his sights (it later turned out to be a lucrative source of rubber). However, the old colonial nation of Portugal, with African interests in Angola and Mozambique extending back over three centuries, also saw the Congo region as its historical sphere of influence. International rivalry and diplomatic conflicts between the principal European powers prompted France and Germany to suggest the notion of a European conference to resolve contending claims and provide for a more orderly 'carving up' of the continent. The Conference met at Berlin from November 1884 through February 1885 and resulted in the following agreement--The Berlin Act of 1885. The participating states that sent representatives were Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, the Netherlands, Portugal, Russia, Italy, Spain, Sweden, Turkey and the U.S.A. For further reading on the history of this period and a summary of The General Act of Feb. 26, 1885 visit <http://web.jjay.cuny.edu/~jobrien/reference/ob45.html>.

(Nigeria) in just 47 years through grand corruption. These funds inevitably end up in the same aid giving countries. As stated earlier such amounts is much more than the entire European States can give in aid even if they collectively pledge half of their GDPs to aid Africa over the next 50 years. If all that is done to aid the affected states, is to help stem the outflow of ill gotten wealth then at least two things are bound to occur. First, the lack of a safe haven for stolen wealth will remove the impetus to steal further funds at the grand scale at which it is done. Secondly even if grand corruption does continue as it is uncertain that any country in the world will ever reach the zero percent corruption among politicians and rulers then the funds will at least remain in the state region where it was derived and cannot but have an effect on the investment and banking fortunes of that state.

It is perhaps necessary to delve into the universality of the conceptualisation of corruption as an essentially immoral act. This will reveal the unsatisfactory nature of the present strategies in the fight against corruption that appear to ignore the moral dimension and arguments. It may be noted that the consensus amongst the world's major religions is that corruption in all its ramifications and particularly by the ruling elite in society is a deplorable, illegal and indeed sinful activity. The corpus of Christian biblical jurisprudence reveals many instances of bribery and corruption that attend the offence.<sup>35</sup>

In one of the earlier biblical references to the phenomenon of grand corruption by civil servants; the sons of Samuels during the prosecution of a war led by Samuel himself committed brazen acts of corruption. This created enough justification in the estimation of the citizenry (in the case of the erring sons) and in the course of divine interventions (in the case of the Samuel himself) for the affected persons to both lose legitimacy to govern and to suffer dire consequences. In addition quite significantly the biblical precedent created an obligation to give up the proceeds of the stolen wealth acquired from foreign lands. In Christian theology, therefore, it is arguable that the imperatives of involvement in grand corruption over the wealth of other nations are two fold: a loss of legitimacy to govern and the obligation to offer reparations at the very least to God.<sup>36</sup>

Yoruba philosophy and criminological theory is quite conclusive on this point in holding that the major part of the blame if not culpability in burglary if not all forms of stealing is to be borne by the facilitators of the crime particularly the receiver of the stolen property the 'gbodegba'. The '*Ole agbe wiri*' (fast handed thief) clearly

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<sup>35</sup> Balak attempted to bribe Balaam to curse Israel (Numbers 22:5-7,15-17); Haman bribed Ahasuerus to destroy the Jews (Esther 3:9); the Chief priests successfully bribed Judas leading to the crucifixion of Jesus (Matthew 26:15;27:3-9; Mark 14:11; Luke 22:5); Soldiers were bribed to declare that the disciples stole the body of Jesus (Matthew 28:12-15); Governor Felix solicited bribes from Paul (Acts 24:26).

<sup>36</sup> Instances of Samuel's sons, taking bribes (1 Samuel 8:1-5). (New International Version). In furtherance of corruption and despite divine instructions Samuel took Agag king of the Amalekites alive, and all his people he totally destroyed with the sword. But Saul and the army spared Agag and the best of the sheep and cattle, the fat calves [a] and lambs—everything that was good. These they were unwilling to destroy completely, but everything that was despised and weak they totally destroyed. 1 Samuel 15:8-35. In contrast to the case of the leader who engages in grand corruption the bible sets up the recommended profile of righteous rulers: "Now Daniel so distinguished himself among the administrators and the satraps by his exceptional qualities that the king planned to set him over the whole kingdom. 4 At this, the administrators and the satraps tried to find grounds for charges against Daniel in his conduct of government affairs, but they were unable to do so. They could find no corruption in him, because he was trustworthy and neither corrupt nor negligent. 5 Finally these men said, "We will never find any basis for charges against this man Daniel unless it has something to do with the law of his God" (Daniel 6:3-5 (New International Version)).



provides the *actus reus* (physical elements) of stealing but as in English criminal law it is appreciated that the *actus reus* is not the whole of the story and can indeed be present whereas the actor is ultimately blameless because of a lack of *mens rea* mental element of (the crime). The *mens rea* that may, however, be imputed to the receiver of stolen property in Yoruba thinking is so strong as to provide the completion of the elements of the offence by the receiver as if he went in to do the stealing itself and provide the *actus reus*. This is summed up in the maxim “*eni ji epo la ja ko jebi to eni ti o gba*”

In traditional village settings people will hide their keg of palm oil in the attic. Palm oil was and remains a highly valuable economic resource used for cooking among various other useful functions. The keg will typically be wet and very slippery and, therefore, difficult to handle and nearly impossible to steal alone. The receiver of stolen property is therefore personified in the assistance rendered by the person who stays on the ground or outside and stretches a lending hand to the thief who climbs into the attic to burgle and relieve the owner of his property. Such a criminal helping hand makes possible an act that will most certainly have failed without outside help or at least would have attracted detection by others. The maxim, therefore, expresses the conclusion that the stealer of the palm oil from the attic is not as guilty as the one who lent a helping hand to receive same. The irrefutable thinking is that without the assistance rendered by the receiver the thief would not attempt to steal the keg alone or will be unsuccessful in doing so. This reasoning is pertinent today with respect to the ferrying of national capital and noxious funds away from developing economies.

### **3. Principles of State Jurisdiction and Competence over Prosecution of Crimes**

Having argued that there is a common language of morality in human cultures and in international law and international relations, it remains to be seen whether this morality can be reconciled with classic principles of law that govern state competence to act or refuse to act in relation to persons and activities within their territory. Although sovereignty and territorial jurisdiction have for long been seen as the basic legitimising tools in the hands of a government that may not want to cooperate in repatriation of allegedly stolen wealth, it can be shown that there is nothing inherently incompatible in both these principles with the modern day demands to wipe out the safe havens for the proceeds of bribery and corruption.

The following arguments will show that there has always been a valid basis within the requisite principles upon which the moral or public policy content of states that guide individual states may be brought to bear upon their understanding of the law and practice of sovereignty and territorial and/or criminal jurisdiction. To establish this proposition it may be necessary to discuss the concepts *seriatim* and to show how various nations have interpreted their content in time.

Sovereignty in law is often considered to be the essence of the state. It explains the powers of a state over its entire territories and its inhabitants. The normal complements of state rights including the typical case of legal competence are described commonly as sovereignty.<sup>37</sup> The concept is political in conception and is popularly symbolised by the Leviathan of Hobbes. It implies the supreme authority of a state, which recognises no higher authority in the region.<sup>38</sup> Bodin developed the

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<sup>37</sup> Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon press, 1998) p. 106.

<sup>38</sup> G.S. Sachdeva “Sovereignty in the Air - A Legal Perspective”, 22 *Indian Journal of International Law* (1982), p. 398.

concept in terms of internal strength and external limitation of power.<sup>39</sup> Jowitt picks up on this theme and defines sovereignty as: “[t]he power in a state to which none other is superior”.<sup>40</sup>

As the respected jurist Max Huber wrote in his opinion in the *Island of Palmas Arbitration between the U.S.A and the Netherlands*, “[s]overeignty in the relations between states signifies independence. Independence in regards to a portion of the globe is the right to exercise therein to the exclusion of any other the functions of a state...”<sup>41</sup> This important principle can be useful for a state that insists upon embarking upon a large scale investigation into acts of corruption that may have taken place in its territory or that is directed at it from abroad. It is well within the sovereignty of a state to conduct targeted or general investigations within all legitimate means applicable under national and international laws. This may take the form of invasive investigations and extensive enquiries (e.g. the Nixon Watergate scandals). The question would, however, often arise as to whether the particular methods used go beyond the remits of its own national laws particularly the rules of human rights and the rule of law (US McCarthy trials) or if they conflict with public international laws or the sovereignty of other states for example, the Umaru Dikko affair<sup>42</sup>.

The principle of sovereignty is also embodied in various important treaties; Article 2 (1) of the UN Charter gives effect to the concept.<sup>43</sup> It is further elaborated upon in the provisions of the 1970 UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as follows: “All states enjoy sovereign equality...Each state enjoys the right inherent in full sovereignty...”<sup>44</sup> However, Schwarzenberger rightly describes this emphasis on complete independence as negative sovereignty. Negative sovereignty means non-recognition of any superior authority. On the level of legal relations, this situation may be expressed in terms of a right, or freedom not to have to recognise any superior.<sup>45</sup> It is indeed true that the limitation of sovereignty to its absolute extreme is as little justified as the attribution of a necessarily absolute character to any other notion. It must be remembered that just as absolute sovereignty may empower a state to carry out oppressive investigations so also can the principle stand for the complete non cooperative attitude

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<sup>39</sup> Imre Anthony Csaffi, , *The Concept of the State Jurisdiction in International Space Law: A Study in the Development of Space Law in the United Nations*, (Hague: Martinus Nijthoff, 1971), p. 50.

<sup>40</sup> *Jowitts Dictionary of English Law*, 2<sup>nd</sup> Edition, Vol 2 John Burke (ed.), (Sweet and Maxwell Ltd., London, 1977) p. 1678.

<sup>41</sup> *Island of Palmas Case* (1928) R.I.A.A.; 2 829.

<sup>42</sup> Four men, three Israeli nationals and one Nigerian national were arrested and charged in the UK with kidnapping—a common law offence—and with administering drugs with intent to kidnap Nigerian Ex-Minister, Mr. Umaru Dikko who had been the target of extradition requests from Nigeria. The then Nigerian military government wanted Umaru Dikko in Nigeria for the purposes of facing serious allegations of corruption. UK police inquiries also disclosed evidence which appeared to implicate members of the Nigerian High Commission. See Hansard, “Nigerian Ex-Minister, Mr. Umaru Dikko Abduction” HL Deb 12 July 1984 vol 454 cc1055-8 1055

§ 4.15 p.m.available at <http://hansard.millbanksystems.com/lords/1984/jul/12/nigerian-ex-minister-mr-umaru-dikko> visited 25 June 2009.

<sup>43</sup> It reads thus: “The Organization is based on the principle of the *sovereign* equality of all its Members”. Charter of the United Nations San Francisco, 26 June 1945. In force 24 October 1945. Documents on the UN Conference on International Organisation, vol. 15, p. 336.

<sup>44</sup> Adopted by resolution 2625 (XXV) of October 24, 1970. See UNGA Official Records: Twenty-Fifth Sess., Supp. No. 28 (A/8028).

<sup>45</sup> G. Schwarzenberger, “The Forms of Sovereignty”, Vol. 10 *Current Legal Problems*, (1957) p. 264.

by another state in tracing the path of any stolen property.

Advocates of the stringent prosecution of corruption may take solace in the fact that wherever we look the omnipotent nature of sovereignty is in recession. Whether the focus is on human rights, exchange rates, monetary policy, arms control, chemical weapons, landmines, warfare, environmental control, minority rights or the tracing of funds the policy options open to states in any real sense have become increasingly constrained. Challenges to the traditional international law system of sovereignty can be seen in increases in depth and density of rules promulgated by intergovernmental organisations. These organisations are becoming more assertive *vis-à-vis* individual sovereign states both in rule making and in implementation. National courts, administrative agencies, and perhaps even parliamentary bodies are said to increasingly function as parts of cooperative regulatory and enforcement trans-governmental networks and no longer simply as parochial national institutions.<sup>46</sup> It is in this sense that it may be concluded here that the sovereignty principle assists rather than preclude the imperative of international anti corruption activism.

It remains to see how the principle of jurisdiction may also assist the tracing of stolen Funds and the emergent international legal regime against laundering the proceeds of grand-business corruption. The doctrine of jurisdiction emerged in the seventeenth century from the concepts of sovereignty and territoriality. Its development led through the *statute theory* to the *Huber Storyan maxim* and it became established in the nineteenth century.<sup>47</sup> Jurisdiction in a strict legal sense denotes the particular rights or accumulations of rights quantitatively less than the norm, which the omnibus term of sovereignty covers. In other words, while the term 'sovereignty' covers the total legal personality of a state, jurisdiction refers to particular aspects of the substance, especially rights (or claims), liberties and powers.<sup>48</sup> Thus, jurisdiction

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<sup>46</sup> See Phillip Alston, "The Myopia of the Handmaidens: International Lawyers and Globalisation", *European Journal of International Law*, No. 3 (1997) p. 435. See also Benedict Kingsbury, "Sovereignty and Inequality", Vol. 9 *European Journal of International Law*, No. 4 (1998), p. 611. Other authors like Krasner believe that international legal sovereignty and Westphalian concepts of sovereignty have always been characterised by 'organised hypocrisy'. He agrees with the mainstream view, that with changes to the basic nature of the international system, the scope of activities over which states can effectively exercise control is declining. These include atmospheric pollution, terrorism, the drug trade, currency crisis, and the immunodeficiency syndrome (AIDS). He notes for instance, that technological changes have drastically reduced the costs of transportation and communication, which in turn, has prompted independent states to enter into conventions and contracts (a manifestation of international legal sovereignty) some of which have led to a compromise of their Westphalian sovereignty by establishing external authority structures like international institutions. He however, thinks that contemporary scholars are overstating the newness of globalisation in that "Rulers have always operated in a transnational environment; autarky has rarely been an option; regulation and monitoring of transborder flows have always been problematic.... There is no evidence that globalisation has systematically undermined state control or led to the homogenisation of policies and structures. In fact, globalisation and state activity have moved in tandem". Krasner *op. cit.*, pp. 12, 222-223.

<sup>47</sup> One of the leading Roman juriconsults, (of the early third century A.D.) J. Paulus, formulated the term *Statute theory* and it has for a long time influenced the doctrine of jurisdiction. In Italy the concept "*statutum non ligat nisi subditos*" became accepted around 1200 A.D. In effect it denied the absolute power of *lex fori* and around the 16<sup>th</sup> century writers like Bertrand d'Argentre spelt out the essence of the *statute theory* by distinguishing between *potestas* and jurisdiction. The *Huber Storyan maxim* refers to the theory developed in Ulrich Huber's work titled *De Conflictu legum diversarum in diversis imperiis*, which was written in 1733. In terms of the *Storyan maxim*, territorial jurisdiction means that each State has exclusive jurisdiction within its own territorial domain over persons, property, things and legal transactions done within it, including the extraterritorial activities of such persons. See Csbaffi *op. cit.*, pp. 49-51, notes 51-52.

<sup>48</sup> Brownlie, *op. cit.*, p. 85.

is the authority a state exercises over natural and juristic persons and property within it. It concerns mostly the exercise of this power on a state territory or quasi-territory; however, some states exercise a measure of their jurisdiction both extraterritorial and extra-territorially.<sup>49</sup> States which claim extraterritorial jurisdiction threaten punishment for certain acts either against the state itself, such as high treason, forging bank- notes, and the like or against its nationals, such as murder, arson, libel and slander.<sup>50</sup> States that claim extra-territorial jurisdiction, chiefly the United States, have taken the view that whenever activity abroad has consequences within the state which are contrary to local legislation then that state may make orders requiring such things as the disposition of patent rights and other property of foreign corporations, the reorganisation of industry in another country, or the production of documents.<sup>51</sup>

Although it is true that in the past this sort of jurisdiction (mostly in the context of economic issues) has been a source of serious controversy there is enough precedence for the view that victim states should be able to bring to account corporations and persons abroad that engage in significant corruption against the state from abroad.<sup>52</sup> Beale narrowly defined the concept of jurisdiction in the following words: "The power of a sovereign to affect the rights of persons whether by legislation, by executive decree, or by judgement of a Court".<sup>53</sup> This definition is narrow in that it restricts jurisdiction to powers over persons alone. In *McDonald v. Mabee*,<sup>54</sup> Justice Holmes said that the ultimate basis of jurisdiction is 'physical power' and in *Wedding v. Meyler*<sup>55</sup> he equated jurisdiction with 'authority'.

Territorial jurisdiction is therefore seen as the sum total of the state's powers in respect of a portion of *terra firma* under its governmental authority including all persons and things therein, and the extra-territorial activities of such persons.<sup>56</sup> It denotes the power of legislation, executive and judicial competence over a defined territory.<sup>57</sup> It is generally derived from territorial sovereignty, but it may also be

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<sup>49</sup> Bin Cheng introduced two terminologies in the 1960s, which did not seem to have received sufficient analysis in academic literature. This, however, is not for the reason of the falsity of his analysis. In this discussion however, it is appropriate to revisit these terms because they still represent a unique and important way of looking at jurisdiction. State jurisdiction as a whole suggested Cheng, may be separated into two complementary elements: (a) Jurisdiction to prescribe (prescriptive legislative jurisdiction or *jurisfaction*) and (b) Enforcement prerogative jurisdiction or *jurisdiction* (that is jurisdiction to enforce). *Jurisfaction* denotes the normative element of jurisdiction and it represents the powers a state has to adopt valid and binding legal norms and to concretise them with binding effect through its appropriate organs, whether judicial or otherwise. The spheres of validity or operative force of these norms may be realised *ratione loci* (territorial), *ratione instrumenti* (quasi territorial) or *ratione personae* (personal).<sup>49</sup> *Jurisdiction* on the other hand, is the formal element of state jurisdiction and it encompasses the powers a state possesses to, at any place or time, physically perform the acts of making, concretising or enforcing laws. That is it can hold legislative assembly, set up courts or tribunals or even arrest wanted persons. From this point of view, "the validity of jurisdiction presupposes *jurisfaction*, but it is possible to have *jurisfaction* without *jurisdiction*". B. Cheng, "The Extra-Territorial Application of International Law," *Current Legal Problems* (1965), p. 136.

<sup>50</sup> See L.F.L. Oppenheim, *International Law A Treatise*, Vol. I eighth edition (London: Longmans, 1963) p. 331. See also U.O. Umozurike, *Introduction to International Law*, (Lagos: Spectrum Publishing, 1993), p. 85.

<sup>51</sup> See for example the case *U.S. v. Aluminium Co. of America*, 148 F. 2d 416 (1945) and *U.S. v. Watchmakers of Switzerland Information Center Inc.*, 133 F. Supp. 40 (1955); 134 F.

<sup>52</sup> See Brownlie *op. cit.*, pp. 310-312; M.N. Shaw, *International Law*, Fourth Edition (Cambridge: Grotius Publication, 1997) pp. 483-484.

<sup>53</sup> Joseph Beale, "Jurisdiction of a Sovereign State", Vol. 36 *Harvard Law Review*, (1922-23) p. 24.

<sup>54</sup> 90 U.S. 230 (1916).

<sup>55</sup> 192 U.S. 573, 584 (1904).

<sup>56</sup> B. Cheng, *op.cit.*, p. 135.

<sup>57</sup> Umozurike, *op. cit.*, p. 86.

derived from treaties, as in the case of mandated, trust or leased territories. It may also derive from *occupatio pacifica* or *bellica*.<sup>58</sup> The principle of territorial supremacy arises from the view that a state has absolute and exclusive authority over people, things and events within its own territory and therefore may exercise jurisdiction over them in all cases.<sup>59</sup> But the problem of what may properly be considered state territory for purposes of jurisdiction is not always clear. This brings us to the concept of territory itself.

International law does not actually impose restrictions on the civil jurisdiction of states' courts; it is their criminal jurisdiction that international law controls by evolving rules and principles of competence. It follows from this that before considering crimes of transnational significance, especially in the area of corruption and money laundering it is necessary to concentrate briefly on the criminal jurisdiction of states under contemporary international law. It must be observed from the outset that the rules of international law on the criminal jurisdiction of the state are either permissive or prohibitive; they are not prescriptive. In other words a state is normally not compelled by international law to exercise its criminal jurisdiction;<sup>60</sup> but when it decides to do so; then it has to comply with these rules which form the bases upon which its courts will be competent to entertain criminal cases. This also applies by extension to the exercise of criminal jurisdiction over acts of bribery and international corruption committed by foreigners that affect the welfare of the state.

These bases (also called principles or grounds) of criminal jurisdiction are, broadly speaking, five in number. They are; (1) territorial (or territoriality) principle; (2) nationality principle; (3) protective (or security) principle; (4) passive personality principle; (5) universality principle. Since territory is relevant only in respect of the first basis while all the others have to do (as we shall see shortly) with the person of the offender or of the victim, or with the character of the offence, some writers classify these bases into two major groups, namely, the territorial and the extra territorial or personal grounds of jurisdiction. These principles will now be considered separately to see how they may assist or impede the work of the prosecutor in the tracing of stolen funds.

Jurisdiction here is assumed by the state of which the accused is a national. The competence of the state's courts is based on the allegiance owed by the accused who can be a physical or juristic person to his state of origin. It is generally admitted that jurisdiction may be founded on nationality at the time of commission of the offence or nationality at the time of prosecution, provided this does not violate the principle of non-retroactivity of criminal laws. In cases of double nationality, both states have equal jurisdiction. Thus, in *Tomoya Kawakita v. U.S.*<sup>61</sup> the U.S. Court of Appeal (9th Circuit) sentenced for high treason the accused who was a national of

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<sup>58</sup> Cheng, *op. cit.*, p. 135.

<sup>59</sup> Some authors like Starke choose to refer to these overwhelming powers as territorial sovereignty. The question then arises as to whether there is a possible distinction between territorial sovereignty and territorial jurisdiction. Oppenheim seems to have effectively answered this query by stating that he sees "Independence and Territorial as well as personal Supremacy (which Starke seems to have referred to as territorial sovereignty) as aspects of Sovereignty". (Brackets mine). Cf. Brownlie, *op. cit.*, pp. 105-106. See J.G. Starke, *Introduction to International Law* (London: Butterworths 1984) pp. 151-152. Oppenheim *op. cit.*, p. 286. See also DH Ott, *Public International Law in the Modern World*, (Britain: Pitman Publishing, 1987), p. 135.

<sup>60</sup> The possible exceptions to this rule exist as a result of treaty obligations voluntarily entered into by states such as in the prosecution of offenders with respect to the crime of unlawful interference with the safety of civil aviation as established in certain air treaties as discussed below.

<sup>61</sup> Reported in Vol. 46 *AJIL*, (1952) p. 147.

both the U.S. and Japan, and who was accused of having tortured U.S. soldiers in Japanese prisons. The nationality principle is, for instance, the apparent basis upon which Thailand's Supreme Court issued an arrest warrant against the erstwhile Thai Prime Minister Thaksin Shinawatra in August 2008. This principle clearly represents the basis upon which at least five separate cases relating to grand political corruption was maintained against the exiled leader even in his absence and despite his attempts to seek political asylum in England.<sup>62</sup>

Although most if not all the five main basis of criminal jurisdiction may at anytime be deployed as a tool in the investigation of financial and corruption crimes the 'protective (or security) principle' is one which will continue to have particular relevance given the high common factor of the involvement of foreign nationals (corporate and natural persons) in these crimes. Here a state assumes jurisdiction over aliens for acts done on foreign territory but which affect the security or other interest of the forum state. Thus, currency, immigration and economic offences committed by aliens abroad are punished by the state offended. *Joyce v. D.P.P.* represents also a classic application of the protective principle. The appellant (primarily a US citizen by birth and of naturalised Irish parents) having been convicted for propaganda broadcast for the enemy in war time, his nationality was considered immaterial under the protective principle during his trial under English jurisdiction.

The protective principle has served as the basis for different criminal legislation in various countries. Thus, the French Code of Criminal Procedure provides in Article 694 that a foreigner who outside the French territory renders himself guilty either as a perpetrator or as accomplice of a felony or misdemeanour against the security of the state or the counterfeiting of the seal of the state or current national monies may be prosecuted and tried according to French law if he is arrested in France or if the government obtains his extradition.<sup>63</sup> There is, therefore, sufficient basis in state practice for victims states to seek the extradition (treaty law or political expediency permitting) of foreigners who are complicit in bribery and corruption against their national interests. It is, therefore, to be concluded that there is basis for using this principle to arrest and/or prosecute those who in a systematic manner

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<sup>62</sup> BBC News, "Former Thai PM flees to the UK" BBC Website available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/7553028.stm> visited 5 June 2009. These include allegations of: abuse of power related to purchase of state land by his wife; abuse of power linked to government lottery scheme; abuse of power related to state loan to Burma alleged to have benefited family business; concealing assets; tax evasion. Members of Thaksin's family such as Pojaman Shinawatra and her brother were in fact jailed for three years.

<sup>63</sup> French Code de la Procedure Penal adopted 1975. See also *U.S. v. Archer* (1943) where a Federal District court referred to the protective principle to justify a U.S. statute which made it a crime for an alien to commit perjury before a U.S. diplomatic or consular official outside the U.S. territory, even though this act might not be a crime in any other country. Similarly, the U.S. courts relied on the protective principle to assume jurisdiction for the prosecution of aliens who outside the U.S. swear falsely before a U.S. consul for the purpose of obtaining the necessary documents to enter the U.S. territory. See *U.S. v. Rodiguez*, 182 F, Suppl. 479 (1960). Cf. *Attorney-General of Israel v. Eichmann* (1961) where the Israeli court held that Israel although it was not in existence during the Second World War could exercise jurisdiction over a Nazi war criminal on the basis of the protective principle, because of the defendant's "crime against the Jewish people" which fact is the "linking proof" between the forum state (Israel) and the accused (Eichmann). Israeli agents without the knowledge of the Argentine authorities abducted Eichmann from Argentina in 1960. He was tried, convicted, sentenced to death and executed after his appeal to the Israeli Supreme Court was dismissed. The Bustamante Code, Convention on private international law adopted in 1928 and in force between several South American states also provides in Article 305 that "those committing an offence against the internal or external security of a contracting state or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting state".

conspire to launder funds that are the receipt of the proceeds of grand-business corruption and other financial crimes. This is particularly true in light of the emerging moral legalism and international public policy that informs the content of national and international laws against money laundering.

This reasoning also directly explains the relevance of the so-called 'passive personality' or 'Passive nationality principle' by which an alien may be prosecuted for acts done abroad which are harmful to the nationals of the forum state. Although this is the most controversial basis of criminal jurisdiction it is likely to be used more frequently in this century in the fight against corruption in international business and in the prosecution of international money laundering offences. In the *Cutting Case* (1887), a Mexican Court exercised jurisdiction in respect of the publication in a Texas newspaper of material adjudged defamatory of a Mexican. Cutting, a citizen of the U.S. and the paper's editor was thus, prosecuted in Mexico when he subsequently travelled there. The United States demanded his release, but the decision on appeal by which he was discharged from custody justified his release only on grounds of public interest, as "the offended party... has withdrawn from the action".<sup>64</sup> It must be noted in this case that the U.S. protested against the court's assumption of jurisdiction until the court changed its theory to jurisdiction based on circulation of the libellous publication in Mexico.

All the dissenting judges in the *Lotus Case* rejected the passive personality principle (and the Harvard Draft Convention 1935 did not retain it either). In his dissenting opinion, Judge Moore said of the passive personality principle that it would mean that the national of one country while travelling to another takes with him for his protection the law of his own country, which is contrary to the well settled principle that such a visitor ought to put himself under the protection and dominion of the law of the receiving state, except that his government may intervene in case of denial of justice. Yet many states assert jurisdiction (through legislation) on the basis of the passive personality principle. This can be found for example in Article 4 of the Mexican Penal Code, and Article 5 of the Swiss Penal Code. O'Connell in supporting this basis of jurisdiction wrote that it is "a corollary of the rule that any state may protect its own citizens abroad".<sup>65</sup> States are tempted to adopt this principle for various reasons, not the least of which is their perceived laxity of the domestic laws of other states as compared to their own in certain matters. In the context of our discussion of the emergent international legal regime against laundering the proceeds of grand-business corruption it may be argued that a state ought to be able to exercise jurisdiction over persons or corporations that bribe or attempt to bribe its officials or business nationals such as consular or diplomatic staff in the exercise of their duties when they are abroad. This is moreso upon the onset of an era of increasing state involvement in international business abroad such as in the operation of sovereign funds or evolvment of national oil companies NOCs into international oil companies (IOCs).

The lowest common factor that would connect the desire of a state to seek the prosecution of foreigners under the protective principle and the passive personality/security principle is the active involvement of foreign nationals who by sophisticated means and designs engage in a conspiracy to harm its national interests by corrupting the business or other interests of the victim states. Example may be made of the Haliburton saga in Nigeria which involved a bribery scheme designed to

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<sup>64</sup> (1887) US For Rel., p. 751.

<sup>65</sup> D.P. O'Connell, *International Law*, 2nd Edition, Volume 2 (London: Stevens and Sons, 1970) pp. 901, 902.

secure Nigerian Liquefied National Gas (NLNG) contracts. The sophistry of the foreign architects of the plan was described by a writer thus:

It was their decision not to involve US citizens in delivery of bribes. The intent was to deceive their legal authorities by adopting the process, structures and terms of sub-contracting regimes within their home countries. It was in Nigeria that parties involved were in the know that for their decisions to award the contracts to TSKJ moneys will be offered according to their hierarchy of decision makers – the authorising officials getting the most and the technical officials getting the least... The scheme was called a “cultural committee” and it embraced the sales and senior personnel officers of the four joint venture companies as well as agents of Marubeni put together to consider how to implement, but hide the scheme to pay bribes to Nigerian officials.<sup>66</sup>

Conspiracies of this sort being more likely to succeed need to be prevented as a matter of international public policy and allowing the gradual exercise of such jurisdiction particularly between consenting states will go a long way in the building of a more robust international response against international business corruption.

It remains to consider the possible application of the ‘universality principle’ to the tracing of stolen funds and the emergent international legal regime against laundering the proceeds of grand-business corruption. According to this principle, certain crimes are of such nature and seriousness as to justify their repression by all states as a matter of international public policy. Universal jurisdiction over piracy for example is well known under both customary and conventional international law: wherever committed and whatever the nationality of the criminal, a piratical act against a ship falls under the jurisdiction of any state that detains the pirate. Anybody who contributes to the committing of a piratical act is also a pirate. The power to arrest pirate ships and watch out for them is based on the principle that there is a duty on all states to repress piracy. Piracy is defined in Article 101 of the Law of the Sea Convention (1982).<sup>67</sup> There have been efforts to extend the scope of application of the universality principle beyond piracy as it is known under customary international law to include other acts such as aerial hijacking and other acts regarded as *delicta jure gentium*. Such would include slave trading, and genocide.<sup>68</sup>

The unfortunate events of September 11 2001 caused a major shift in international jurisprudence towards the consideration of acts of international terrorism as international crimes the perpetrators of which may be subject of international jurisdiction. If the international powers are serious about the wish to make terrorism an international crime and one in which potentially any state may exercise jurisdiction over the perpetrators wherever they may be found then they ought to be amenable as well to the recognition of universal jurisdiction over money launderers that oil the wheel of terrorist funding as well as multinationals that engage in bribery and corruption abroad. The connection between terrorism and money laundering and

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<sup>66</sup> John Moyibi Amoda, ‘Halliburton Saga: Which will prevail, Moral Legalism or Real Politik?’, *Vanguard* (Nigeria), 9 June 2009, p. 19.

<sup>67</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 xxi ILM 1245 (1982). Hereinafter referred to as LOSC (1982).

<sup>68</sup> The principle surely applies to war crimes. The United Nations War Crimes Commission stated in its Digest of Laws and Cases that: “According to generally recognised doctrine... the right to punish war crimes is not confined to the state whose nationals have suffered or on whose territory the offence took place, but is possessed by any independent state whatsoever, just as is the right to punish the offence of piracy”. Vol. XV Law Reports of Trials of War Criminals (1949), p. 26.



international corruption needs hardly be reiterated. On many levels the person who perverts the business and economic interests of an independent state through orchestrated large scale corruption and facilitates the transfer of the proceeds abroad is comparable to a pirate and may indeed cause more devastation than can be achieved by the average piratical act.

The power to arrest pirate ships and watch out for them is based on the principle that there is a duty on all states to repress piracy.<sup>69</sup>

Viscount Sankey L.C. in *Re Piracy Jure Gentium* has accurately expressed the total abhorrence of the act of piracy in international law thus:

...whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any state. He is no longer a national, but *hostis humani generis* and as such ..... anywhere.<sup>70</sup>

In consequence of this it was also held in this case that “actual robbery is not an essential element in the crime of *piracy jure gentium*. A frustrated attempt to commit a piratical robbery is equally *piracy jure gentium*”.<sup>71</sup> Similarly an attempt to corrupt government officials of a foreign land ought to carry very serious gravity as an international crime. Given the abject poverty that results from systematic resort to corruption and the many documented evil effects of grand business corruption only a very powerful argument ought to be able to counter the view that the persons involved in such acts of depredation are not in fact *hostis humani generis*. It is notable that in the *Eichmann Case (1962)*, the Israeli courts relied not only on the protective principle, but also on the universality principle in trying the accused.

In view of the very poor record of receiving states in bringing culprits within their state to book for flagrant conspiracy or gross negligence in assisting in the laundering of stolen funds, it is considered necessary to consider the right of the victim state to embark on prosecution of foreign persons under the requisite principles of international criminal jurisdiction discussed above.

There are indeed convincing bases in pertinent international and comparative law and practice to sustain successful legal processes in the punishment of the perpetrators and facilitators of grand business corruption wherever they may be found. Although it is conceded that the exercise of universal jurisdiction over such crimes may at present be largely seen as speculative, it is perhaps good international public

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<sup>69</sup> Piracy is defined in Article 101 of the United Nations Convention on the Law of the Sea ((LOSC) Montego Bay, 10 December 1982 xxi ILM 1245 (1982) as consisting of: (a) any illegal acts of violence or detention, or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft, (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

<sup>70</sup> *Re Piracy Jure Gentium* [1934] A. C. 589.

<sup>71</sup> Umozurike *op. cit.*, p. 112.

policy to extend the principle *aut dedere aut punire* to persons who help in facilitating bribery abroad and/or receiving stolen funds from other lands.<sup>72</sup>

The banking officials and other persons who are involved in providing safe haven for the stolen funds from another state ought to be aware of the possibility that they may be committing a very serious offence under the criminal laws of that state and may be brought to prosecution and punished under the criminal laws of the victim state. In accordance with this view where the attitude of the receiver state towards prosecuting bankers and other officials involved in receiving stolen funds is lackadaisical it is indeed possible for the concerned victim state to begin extradition requests in accordance with international law and/or bilateral or other multilateral arrangements. It may be noted that at least among friendly developed states there is already good basis for such exercise of international jurisdiction.

There are of course many reasons for the current wave of closer cooperation in the tracing of stolen monies between receiver states and developing states. Factors that may be suggested include (a) the imperatives of control over the financing of terrorism<sup>73</sup>; (b) the imperatives of combating the illicit trade of traffic in drugs and narcotics (c) globalisation and communications revolution such as the prevalent use of the Internet which means that suspicions, allegations and incidents of corrupt activity are circulated freely and widely, thus bringing wider recognition of the problem<sup>74</sup> (d) the realisation by largely democratising developing states with increasingly educated and literate populace of the extent of the problem and effects of grand corruption; (e) Greater involvement and influence of civil society in the political affairs of nation states as well as in their influence on international affairs;<sup>75</sup> (f) Instalmental improvements to the development of ethical standards in international business transactions and investment practices both in the European Union and other leading western financial centres and International Financial Institutions. It is indeed surprising that it has taken this long for the deliberate and lapses of receiving nations to attract opprobrium. It had for long been recognised that there is a connection between receiving jurisdictions and many of the familiar problems of international life. A writer draws attention to this noting that: "When drug dealers are caught in America, their Swiss accounts figure in their dossiers. The money for the arms traffic in the Middle East and Asia goes by way of Geneva".<sup>76</sup>

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<sup>72</sup> An example of the applicability of the principle *aut dedere aut punire* is in relation to terrorists suspected of taking part or organising hijacks for whatever purpose. This is contained in Article 7 of the Montreal Convention (1971), which provides that a State in whose territory an alleged offender has been found shall either extradite him or be obliged without any exception whatsoever, and whether or not the offence was committed in its territory, prosecute him.

<sup>73</sup> As a writer put it "it wasn't until the attacks of 11 September 2001 that concerted, coordinated international efforts began to catch the launderers. Among the many lessons learned from that day was that without laundered money there would be no terrorism, so regulations were passed to try and stop the funding of militant activities" Michael Buchanan, *Dirty Money World Agenda: The BBC International Journal* Feb 2006 p. 8.

<sup>74</sup> Indira Carr, *op.cit.*,

<sup>75</sup> The work of Transparency International for instance in bringing the problem of Corruption to national and international discussion can hardly be over exaggerated. The epithet second most corrupt nation in the world shocked the normally stoic Nigerian cultural conscience and successive governments have tried to move the country away from this image as much as possible.

<sup>76</sup> Ziegler *op.cit.*, p. 53-54.

#### **4. Conclusion**

The thing that is becoming clear is that cleaning the Aegean stables of international business corruption and grand corruption is not as impossible as it once appeared. That in itself is a major victory for campaigners in this field of legal studies and anti-corruption activism. In very modest gestures that have taken place in just the last five years the financial rewards in terms of saved or repatriated funds in the selected jurisdictions we have discussed above has run into billions of dollars. If such savings are sustained this may provide the much needed funds to turn around some economies.

Moral legalism is therefore, a necessary but not sufficient condition to trace stolen and corrupt funds across the globe. The rules of law in national codes and international soft and treaty laws are crucial in the attainment of these goals. These legal rules are very formidable as at present but they need to be further developed based on a common response of both developed and developing states. The emerging moral legalism and regime of cooperation is a particularly welcome development for vulnerable economies and developing states to the extent that the emerging international regime may allow them to repatriate valuable funds from around the world. Further development of the law must proceed with a deep involvement of the shared international morality. Although legal opportunism and real politic may continue to impede progress in this area, the days when the problem was left unaddressed is perhaps gone forever.

There is enough in the shared moral civilisation of mankind and the positive rules of public and private international law to prevent the rampant exercise of international bribery, corruption and money laundering particularly where it targets vulnerable peoples and states.

The corrupt classes in the international system have been exposed to be just as vulnerable and apprehensible as are common thieves. Senators, governors and heads of states have been exposed as far from invincible.<sup>77</sup> The powerful signals this has sent around the consciousness of the world's populations should not be underestimated. On occasion, however, the drama grabs both national and international attention with disturbing vehemence.<sup>78</sup> On the whole, it is arguable that lives have been saved as result of the conservation of funds and perhaps a redirection of the energies of government to their legitimate duties rather than as it appeared the pursuit of monies as an end in itself.

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<sup>77</sup> Recent examples of high value convictions from Nigeria alone include the conviction of former Minister of Petroleum Dan Etete in France. A French court sentenced him in absentia to three years in prison and a fine of 300,000 euros (\$440,000 ) for money laundering. The Paris criminal court also issued an arrest warrant for Etete, who served as Petroleum Minister under Late General Sani Abacha from 1995 to 1998, and is currently living in Britain. Etete reportedly fled Nigeria for France in 1998 after the death of the military ruler.

Etete was convicted of using 15 million euros in funds obtained fraudulently to purchase properties in 1999 and 2000 including a Paris apartment, a chateau in northwest France, and a luxury villa in the upmarket Paris suburb of Neuilly. A French businessman Richard Granier-Defferre, was convicted of complicity and sentenced to 12 months in jail and a fine of 150,000 Euros.

<sup>78</sup> Witness the apparent suicide of the erstwhile South Korean leader Roh Moo-hyun as a result of the investigations conducted by the country's Supreme Prosecutors' Office. Ironically the late leader while in office had the image of a popular champion of clean government. Martin Fackler, "Recriminations and Regrets Follow Suicide of South Korean", *New York Times* May 25, 2009, p. A4 of f the New York edition. Also available at [http://www.nytimes.com/2009/05/25/world/asia/25iht-korea.html?\\_r=1](http://www.nytimes.com/2009/05/25/world/asia/25iht-korea.html?_r=1) visited 5 June 2009.

Most importantly it is safe to conclude that the direction of the development of international law is towards the internationalisation of jurisdiction over perpetrators of corruption in international business including the beneficiaries of grand corruption especially where their conduct is on a gross or systematic scale. The threshold that determines international involvement is still unclear but it is suggested that certain useful criteria such as the amounts involved, the egregiousness of the activities and the possibility of wide-ranging or cross boundary damaging effects may be used to predict or encourage international action.

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