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Corruption In Developing Countries: What Keeping It In The Family Means For Everyone Else

Tonita Murray

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Corruption In Developing Countries: What Keeping It In The Family Means For Everyone Else

Abstract

The United Nations estimates that 30 per cent of all international development funding is lost to corruption. Identifying and understanding the dynamics of how such corruption occurs at the ground level could help to reduce opportunities for the diversion of funds from public purposes to private uses. An analysis of two highly publicized corruption cases in Kenya and one in Afghanistan identifies some common characteristics that may also be present in other cases around the world. The characteristics fall into four categories: (1) political, social, and cultural; (2) governance; (3) people; and (4) international. Different understandings of corruption, weak government and laws, illegitimate involvement of powerful politicians or their relatives, and ineffective international mechanisms for preventing corruption all contribute to the loss of development funding. The article describes these characteristics and discusses remedies for addressing them.

Keywords

Corruption; Economic development--Corrupt practices; Kenya; Afghanistan

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Special Issue Supplement: Perspectives from Practice

CORRUPTION IN DEVELOPING COUNTRIES: WHAT KEEPING IT IN THE FAMILY MEANS FOR EVERYONE ELSE[†]

TONITA MURRAY*

The United Nations estimates that 30 per cent of all international development funding is lost to corruption. Identifying and understanding the dynamics of how such corruption occurs at the ground level could help to reduce opportunities for the diversion of funds from public purposes to private uses. An analysis of two highly publicized corruption cases in Kenya and one in Afghanistan identifies some common characteristics that may also be present in other cases around the world. The characteristics fall into four categories: (1) political, social, and cultural; (2) governance; (3) people; and (4) international. Different understandings of corruption, weak government and laws, illegitimate involvement of powerful politicians or their relatives, and ineffective international mechanisms for preventing corruption all contribute to the loss of development funding. The article describes these characteristics and discusses remedies for addressing them.

Les Nations Unies estiment que trente pour cent de toutes les subventions mondiales au développement se perdent en raison de la corruption. Mieux comprendre la dynamique qui permet à de telles pratiques de prendre racine réduirait les occasions de détourner des fonds publics vers le secteur privé. Une analyse de deux cas très médiatisés de corruption au Kenya et d'un autre en Afghanistan permet de relever des caractéristiques communes qui se retrouvent sans doute dans d'autres cas à travers le monde. Ces caractéristiques se divisent en quatre catégories : 1) des raisons politiques, sociales et culturelles, 2) la gouvernance,

[†] An earlier version of this article was presented at the Second OHLJ Symposium, Understanding and Taming Public and Private Corruption in the 21st Century, 6-7 November 2014, Osgoode Hall Law School, Toronto.

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3) les personnes mises en causes et 4) la conjoncture mondiale. Des notions divergentes de ce qu'est la corruption, la faiblesse des gouvernements et de la législation, des gestes illégaux posés par de puissants politiciens et des membres de leur famille et l'inefficacité des mécanismes internationaux de prévention de la corruption expliquent ensemble la perte de ces fonds destinés au développement. Cet article décrit ces caractéristiques et discute des moyens de les résoudre.

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CORRUPTION IN DEVELOPING COUNTRIES is not well understood by international donors or by their recipients. While both donors and recipients might accept at face value the imperfect but useful World Bank definition of corruption as “the abuse of public powers for private benefit,”¹ their understandings of the definition are, in fact, intrinsically different. Without a common understanding, solutions to what both parties see as a serious problem for development are likely to be elusive and ineffective.

With official development assistance (“ODA”)² surpassing 134 billion US dollars (“USD”) in 2013, bilateral international donors and multilateral

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1. The World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (Washington: World Bank Group, September 1997) at 8, online: <www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf> [World Bank, *Combat Corruption*].
 2. The Organisation for Economic Co-operation and Development defines ODA as flows of funding provided by official agencies to developing countries and territories designated as recipients and to multilateral institutions (for example, the United Nations) for the purposes of economic development and welfare. At least 25 per cent of the funding is in the form of a grant. Military spending and the enforcement element of peacekeeping are not included in the ODA amount.

organizations³ make funding contingent on the recipient country agreeing to certain governance standards to ensure transparency and accountability. To help the recipient governments meet the requirements, donors often provide technical assistance and capacity building intended to strengthen recipients' ability to manage resources, provide services, govern well, and avoid corrupt practices. While such requirements appear reasonable and no less than what an astute lender would expect of a responsible borrower, they are standards based on the principles and practices of advanced countries. As the cases discussed below illustrate, capacity development to improve management is frequently inadequate. Although donors understand that they are assisting countries that have low levels of development, they nevertheless frequently set terms that are difficult for inexperienced, unstable, or barely functioning governments to achieve. They make few allowances for the culture, politics, or powerful non-governmental pressures that influence how some societies act or for the difficulties that weak governments experience in fulfilling the terms of their funding agreements. In other words, the terms often tend to ignore prevailing political and social norms of the recipient country, rudimentary public administration systems, and the slow pace at which political, financial, and legal sophistication is acquired. The result is that developing countries often do not achieve the standards of governance, accountability, and transparency set out; fall short of development goals; and frequently engage in practices considered corrupt by donor standards but not necessarily by recipient countries.

Attaching anti-corruption measures to aid funding is a relatively recent donor requirement. During the Cold War era (1945–1991), both Soviet and Western Bloc countries used aid as a means of winning allies in the developing world, tolerating the most blatant corruption of recipient governments. The corrupt and repressive dictator Mobutu Sese Seko of Zaire is a notorious example. He amassed a huge fortune during his thirty-two years in power but maintained the support of Western states because of his support for their interests and his willingness to provide them with access to mineral and oil resources.⁴ Since the 1990s, however, there has been growing global intolerance to corruption. Observers attribute this to the proliferation of governments adopting democratic principles; the growth

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3. Multilateral organizations or institutions are funded by donor governments and are intermediaries in the delivery of development aid. They include such organizations as the United Nations, International Monetary Fund, and World Bank.
 4. Howard W French, "Anatomy of an Autocracy: Mobutu's 32-Year Reign," *The New York Times* (17 May 1997), online: <partners.nytimes.com/library/world/africa/051797zaire-mobutu.html>.

of a free news media; the expansion of globalization; and the opening of markets that bring countries into closer contact with one another, thereby creating a requirement for assured common business standards.⁵

As for the recipient countries, their understanding of corruption is influenced by their different experiences and culture. A significant number of recipient countries still retain many of the characteristics of traditional, collective societies. They may have factionalized owing to tribal rivalries, experienced conflict, or endured a long history of scarcity and struggle for survival. Such societies tend to focus on the present rather than the future and on what is close to them—such as the protection of their extended families and tribal groups. Reciprocal gift giving may also be part of the process of customary governance. Authority in such social organization is exercised by a few individuals: the heads of families, tribal elders, and warrior leaders. Apart from perhaps the intelligentsia, such societies normally do not have a strong adherence to or great expectations of national government. Consequently, many may have difficulty consciously appreciating such abstract notions as the rule of law or accountability or the idea that governments are expected to act for the greater good and provide services impartially.

In traditional societies, confidence that one's interests are protected derives from personal relationships based on kinship, alliances, and patronage rather than impersonal systems of government. This means there is little appreciation of the concept of the abuse of public powers for private benefit. All power is regarded as personal, family, or tribal. While those with power are expected to look after those without it, the allocation of resources between oneself and others is largely left to the power holder to decide. This cultural view is well illustrated in Wrong's account of how tribes in Kenya regard their clan members' election to political office or appointment to public office as their "turn to eat"—in other words, their turn to receive largesse from office holders.⁶ Added to this is the fact that scarcity encourages opportunism. When there is something to "eat," there is a tendency for those who have the opportunity to seize as much of it as they can while it is there.⁷ Large international donations frequently provide the opportunity for those who have access to the funds to divert them from the intended purpose to

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5. George T Abed & Sanjeev Gupta, "The Economics of Corruption: An Overview" in George T Abed & Sanjeev Gupta, eds, *Governance, Corruption, & Economic Performance* (Washington: International Monetary Fund, 2002) 1 at 2.
 6. Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (London: Fourth Estate, 2009) [Wrong, *It's Our Turn to Eat*].
 7. *Ibid.* See also Charles Hornsby, *Kenya: A History Since Independence* (New York: Tauris, 2012) ch 14 at 787ff.

the support of a fortunate few.⁸ While this might be criticized in the media and by the opposition, it often can be done with impunity because others will do the same when it is their turn to “eat.” And if the origin of the funding is international, there is frequently resentment that it has been provided to achieve donor aims rather than to satisfy the wishes of the recipient nations. Consequently, there may be some degree of tolerance towards the diversion of funds.

I. RESEARCH ON CORRUPTION IN DEVELOPING COUNTRIES

Economists were among the first researchers of corruption. They approached it both theoretically and empirically. Some economists regard corruption as a product of modernization in underdeveloped countries, while others argue that it encourages efficiency in developing societies.⁹ Bribes allow business obstacles such as time delay or rigid laws to be surmounted; the most efficient companies are the most able to afford the ‘commissions’ that win contracts and licences. The efficiency of corruption is refuted empirically by other economists who show that perceived corruption reduces economic growth¹⁰ and pushes up efficiency costs by introducing various distortions such as secrecy into government activities. They argue that eliminating the distortions introduced by corrupt activity in fact increases efficiency.¹¹ This dispute, however, may be due to different conceptions of corruption. Those researchers who consider corruption efficient might be thinking of what is referred to as “petty” or “bureaucratic” corruption, while those who consider it inefficient have “grand” corruption in mind. The two types of corruption are discussed below.

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8. Toyin Falola & Jessica Achberger, eds, *The Political Economy of Development and Underdevelopment in Africa* (New York: Routledge, 2013); Brady Yauch, “A never-ending story: More Canadian foreign aid money lost to corruption, this time in Kenya,” *Probe International* (23 December 2010), online: <journal.probeinternational.org/2010/12/23/a-never-ending-story-more-canadian-foreign-aid-money-lost-to-corruption-this-time-in-kenya>.
 9. Nathaniel H Leff, “Economic Development Through Bureaucratic Corruption” (1964) 8:3 *Am Behav Sci* 8; Samuel P Huntington, *Political Order in Changing Societies* (New Haven, Conn: Yale University Press, 1968) at 59-71; Francis T Lui, “An Equilibrium Model of Bribery” (1985) 93:4 *J Pol Econ* 760; Douglas A Houston, “Can Corruption Ever Improve An Economy?” (2007) 27:3 *Cato J* 325.
 10. Paulo Mauro, “Corruption and Growth” (1995) 110:3 *QJ Econ* 681 at 704.
 11. Benjamin A Olken & Rohini Pande, “Corruption in Developing Countries” (2012) 4:1 *Ann Rev Econ* 479 at 484.

Other researchers have examined the causes of corruption. Some postulate that it is more prevalent in developing than economically advanced countries because of ethnic factionalization, federal systems of government, the presence of mineral and metal resources, and cultures of giving “honour gifts.”¹² Others theorize that countries with a Protestant tradition, democratic and unitary governments, a history of British influence, a common-law legal system, more economic development, and greater openness to trade tend to be less corrupt.¹³ There is some empirical support for the Protestantism hypothesis,¹⁴ but evidence for the other factors inhibiting corruption is mixed.¹⁵ Kenya, a former British colony, exhibits most of the identified characteristics, but as the case studies below demonstrate, it has high levels of corruption and is thus a notable exception to the theory. The tentativeness of empirical findings on corruption research may be owing to a number of factors such as differing definitions of corruption, the fact that much corruption is hidden, and the lack of substantive as opposed to perception data. While there is an increasing amount of research based on

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12. Alberto Ades & Rafael Di Tella, “Rents, Competition, and Corruption” (1999) 89:4 *Am Econ Rev* 982; P Steidlmeier, “Gift Giving, Bribery and Corruption: Ethical Management of Business Relationships in China” (1999) 20:2 *J Bus Ethics* 121. Steidlmeier discusses the cultural and moral differences between gift giving on the one hand and bribery and corruption on the other hand in China. This distinction is important since we all appreciate how gift giving engenders a sense of obligation and can result in ambiguity over its motive. A young Kenyan police officer told the author that, in his view, corruption in Kenya is founded on the tradition of gift giving. For example, gifts are taken to tribal elders by those seeking to obtain advice. These are “honour gifts” that show respect to an elder. But they also constitute what we understand by the phrase, “the norm of reciprocity,” the concept of returning a favour. In Canada, we give gifts to our hosts who invite us to dinner. That is both an honour gift to thank them for their kindness and also a way of giving something in return for dinner. In some cultures, particularly those where personal relationships are favoured over impersonal systems of conduct, there is likely to be less distinction between a gift, a tip, or a bribe.
 13. Neil J Smelser & Seymour Martin Lipset, “Social Structure, Mobility and Development” in Neil J Smelser & Seymour Martin Lipset, eds, *Social Structure & Mobility in Economic Development* (Chicago: Aldine Publishing, 1966) ch 1 at 1ff; Rafael LaPorta, Florencio Lopez-De-Silanes & Andrei Shleifer, “Corporate Ownership Around the World” (1999) 55:2 *J Fin* 471.
 14. Daniel Treisman, “The causes of corruption: a cross-national study” (2000) 76:3 *J Pub Econ* 399.
 15. *Ibid.* See also Lorenzo Pellegrini & Reyer Gerlagh, “Causes of Corruption: A Survey of Cross-Country Analyses and Extended Results” (2008) 9:2 *Econ Gov* 245 at 258.

observed and measured characteristics of corruption, many studies still are based on general conclusions.¹⁶

Game theory provides another approach to studying corruption. Charap and Harm focus on the interactions between “rulers” and “members” within political systems that allow rulers to acquire power and economic advantage at an efficient cost and maintain internal equilibrium through “predatory hierarchies” of supporters.¹⁷ The authors hypothesize an evolution of rent-seeking behaviour. This evolution begins with anarchy, in which the ruler gains and maintains advantage through prowess in combat; it moves through a phase of warlords and gang organization, in which equilibrium is maintained through the dispensation of favours and monopolies; and it results in advanced bureaucratic systems, in which the ruler gains and maintains equilibrium through patronage. The conclusion is that the elimination of patronage and corruption can destabilize a bureaucracy or political system and lead to the failure of reform—unless there are compensatory stabilizing mechanisms introduced, such as a ruler’s benevolence. While the theory provides an explanation for the existence of patronage and corruption in developing and advanced countries (and in various organizations), its focus on the systematic and endogenous nature of corruption assumes that the behaviour of bureaucracies and political systems is more cohesive and consistent than it is really. It also ignores external influences on a system as well as the possibility of corrupt groups working independently from each other in the same system.

Comparisons of corruption in different countries are provided by a number of international surveys that draw on data collected regularly by the World Bank, international non-governmental organizations (“NGOs”), and business risk consultancies. These surveys are useful for identifying where corruption is most prevalent and for testing theories of corruption. The best known of these

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16. See *e.g.* Treisman, *supra* note 14; Pellegrini & Gerlagh, *supra* note 15; Jakob Svensson, “Eight Questions About Corruption” (2005) 19:3 J Econ Persp 19; Johann Graf Lambsdorff, “Measuring Corruption – The Validity and Precision of Subjective Indicators (CPI)” in Charles Sampford et al, eds, *Measuring Corruption* (Burlington, Vt: Ashgate, 2006) ch 5 at 81ff; Fredrik Galtung, “Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices” in Sampford et al, *supra* note 16, ch 6 at 101ff; Nick Duncan, “The Non-Perception Based Measurement of Corruption: A Review of Issues and Methods from a Policy Perspective” in Sampford et al, *supra* note 16, ch 7 at 131ff; William L Miller, “Perceptions, Experience and Lies: What Measures Corruption and What do Corruption Measures Measure?” in Sampford et al, *supra* note 16, ch 8 at 163ff.
17. Joshua Charap & Christian Harm, “Institutionalized Corruption and the Kleptocratic State” in Abed & Gupta, *supra* note 5, 135 at 137.

is the annual Transparency International Corruption Perceptions Index, which is based on a composite of twelve data sources. Other indices containing findings on corruption include the Business International Survey,¹⁸ the World Bank Enterprise Survey,¹⁹ the International Country Risk Guide,²⁰ and the Global Competitiveness Report²¹ produced by the World Economic Forum. While these indices tend to support each other's findings in a general way, they are nevertheless based on either proxies or perception data from different sources, such as businesses and entrepreneurs, rather than actual incidents of corruption. These are the data frequently used by researchers, which may therefore explain some of the tentativeness of findings on corruption.

Some research by independent organizations has focused on assessing illicit financial outflows from developing countries. According to Dev Kar and Brian LeBlanc, illicit outflows are

a major source of domestic resource leakage, which drains foreign exchange, reduces tax collections, restricts foreign investments, and worsens poverty in the poorest developing countries. Illicit flows are all unrecorded private financial outflows involving capital that is illegally earned, transferred, or utilized, generally used by residents to accumulate foreign assets in contravention of applicable capital controls and regulatory frameworks.²²

In its 2013 report, Global Financial Integrity presented its financial analysis for the decade from 2002 to 2011. It found that illicit outflows had increased in real terms by about 10.2 per cent per annum over the decade and in 2011

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18. John Bray, *International Business Attitudes to Corruption: Survey 2014/2015* (London: Control Risks Group Limited, 2014), online: <www.controlrisks.com/-/media/Public%20Site/Files/Reports/corruptionsurvey2015.pdf>.
 19. World Bank Group, "Enterprise Surveys," online: <www.enterprisesurveys.org>.
 20. The PRS Group, "International Country Risk Guide (ICRG)," online: <pub.prsgroup.com/products/international-country-risk-guide-icrg>.
 21. Klaus Schwab, ed, *The Global Competitiveness Report: 2014–2015* (Geneva: World Economic Forum, 2014), online: <www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf>.
 22. *Illicit Financial Flows from Developing Countries: 2002-2011* (Washington: Global Financial Integrity, December 2013) at 1, online: <iff.gfintegrity.org/iff2013/Illicit_Financial_Flows_from_Developing_Countries_2002-2011-HighRes.pdf>.

amounted to 946.7 billion USD.²³ Illicit outflows from sub-Saharan Africa were the highest, at 5.7 per cent of gross domestic product (“GDP”).²⁴

In addition to independent organizations, governments of some countries also produce data on corruption. For example, the US Special Inspector General for Afghanistan Reconstruction presents a quarterly report to Congress on its audits of US government spending on Afghanistan, including reports of identified corruption, misuse of funds, and failed anti-corruption strategies.²⁵ The audits have shown persistent loss and diversion of substantial amounts of both military and development aid funds, but in many cases, the audits are unable to show conclusively whether the losses can be attributed to corruption or to mismanagement.

Multilateral institutions also conduct extensive research and regularly publish findings and information on corruption in developing countries. The Organisation for Economic Co-operation and Development (“OECD”) makes a significant contribution to the literature on research and practice. For example, in December 2014, it released its *Foreign Bribery Report*,²⁶ which analyzes four hundred cases from the forty-one signatory countries to the OECD *Anti-Bribery Convention*²⁷ (“*OECD Convention*”) that were involved in bribing foreign public officials. The cases occurred between February 1999, when the *OECD Convention* came into force, and June 2014. The value of the bribes was

23. *Ibid* at 8.

24. Jacey Fortin, “Trillion Dollar Theft: In Developing Countries, Staggering Losses Due To Corruption Exceed Incoming Aid, Says Report,” *International Business Times* (27 December 2013), online: <www.ibtimes.com/trillion-dollar-theft-developing-countries-staggering-losses-due-corruption-exceed-incoming-aid-says>.

25. Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (Arlington, Va: SIGAR, 30 April 2012), online: <www.sigar.mil/pdf/quarterlyreports/2012-04-30qr.pdf> [SIGAR, *Quarterly Report 1*]; Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (Arlington, Va: SIGAR, 30 October 2013), online: <www.sigar.mil/pdf/quarterlyreports/2013-10-30qr.pdf>; Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (Arlington, Va: SIGAR, 30 April 2014), online: <www.sigar.mil/pdf/quarterlyreports/2014-04-30qr.pdf> [SIGAR, *Quarterly Report 3*]; Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (Arlington, Va: SIGAR, 30 October 2014), online: <www.sigar.mil/pdf/quarterlyreports/2014-10-30qr.pdf>.

26. Organisation for Economic Co-operation and Development, *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Paris: OECD, 2014) [OECD, *Foreign Bribery Report*].

27. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, 37 ILM 1 (entered into force 15 February 1999) [OECD *Convention*].

equivalent to almost 11 per cent of the transaction costs and 34.5 per cent of the profits.²⁸ Surprisingly, the analysis revealed that bribes are generally paid to win contracts from state-owned or -controlled companies in advanced rather than developing economies and that most of those who took and paid bribes are from wealthy countries.²⁹

Other multilateral institutions conducting corruption research are the International Monetary Fund (“IMF”), the World Bank, and the United Nations Office on Drugs and Crime (“UNODC”).³⁰ With some notable exceptions, the research tends to focus on specific corruption problems and is largely intended for practical application.³¹ Its value lies in its concentration on corruption in developing countries, which has led to a considerable body of literature ranging from research findings to anti-corruption training manuals and public awareness pamphlets.³² Investigative journalists and whistle-blowers also produce information on corruption in developing countries;³³ however, the copious

28. OECD, *Foreign Bribery Report*, *supra* note 26 at 8.

29. The UNODC *Anti-Corruption Tool Kit* is typical of research that results in practical applications. See United Nations Global Programme against Corruption, *Anti-Corruption Tool Kit*, vol 1 (Vienna: UNODC, November 2002), online: <www.unodc.org/pdf/crime/toolkit/fl1tof7.pdf> [UNODC, *Anti-Corruption Tool Kit*].

30. For example, the IMF commissions and publishes articles from recognized academics as an educational aid.

31. See *e.g.* Abed & Gupta, *supra* note 5; Paolo Mauro, *Why Worry About Corruption?* (Washington: International Monetary Fund, February 1997), online: <www.imf.org/EXTERNAL/PUBS/FT/ISSUES6/issue6.pdf>.

32. See *e.g.* Abed & Gupta, *supra* note 5; World Bank, *Combat Corruption*, *supra* note 1; UNODC, *Anti-Corruption Tool Kit*, *supra* note 29.

33. Lars Møller & Jack Jackson, *Journalistic Legwork that Tumbled a President: A Case Study and Guide for Investigative Journalists* (Washington: World Bank Institute, 2000), online: <siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/pcij_estrada.pdf>. For an exposé by investigative journalists of the connection between the Mexican drug cartels and members of successive Mexican governments including the police and prosecutor, see Anabel Hernández, *Narcoland: The Mexican Drug Lords and Their Godfathers*, translated by Iain Bruce & Lorna Scott Fox (New York: Verso, 2013). That investigative journalists can die as a result of publishing research and investigative findings on government corruption is illustrated in an article published by the World Bank Institute. See World Bank Institute, *Investigating Corruption in Ukraine: A Case Study of Internet Journalist Georgy Gongadze* (Washington: World Bank Institute, 2002), online: <siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/gongadze1.pdf>. There is also a web-based International Consortium of Investigative Journalists, which publishes information of government misdoings around the world. See The Centre for Public Integrity, “International Consortium of Investigative Journalists” (2015), online: <icij.org>. Nearer to home, investigative journalists Bob Woodward and Carl Bernstein of *The Washington Post* undertook considerable research and investigation to uncover the 1970’s Watergate scandal. In the absence of

information found in television, radio, newspaper, and internet accounts usually focuses on particular cases. While such accounts contribute to an understanding of the magnitude and mechanics of corrupt activities, they tend to be descriptive rather than analytical and contribute only indirectly to understanding the nature of corruption.

Much of the literature does not distinguish between different categories of corruption. Some of it, however, distinguishes between “grand” and “petty” or “bureaucratic” corruption.³⁴ The World Bank makes this distinction in its corruption taxonomy.³⁵ Grand corruption is often linked with political corruption because it occurs at the policy level of government where laws can be created, changed, or subverted for the benefit of powerful actors³⁶ and leaders are able to abuse their positions with impunity for personal benefit. Petty corruption occurs at the level of functionaries who use their positions and administrative authority to exact “facilitating payments” for the provision of a public service.³⁷ While

independent oversight in developing countries, the United Nations Development Programme provides support to investigative journalism. For example, it supports the Philippine Center for Investigative Journalism. It also provides training in investigative journalism to develop the research and investigative capacity of local journalists to help in investigation of irregularities in public finances and other government corruption. See UNDP & Media Institute of Southern Africa, *The MISA/UNDP Training on Investigating and Reporting Corruption for Journalists in Southern Africa: Workshop Report* (Johannesburg: UNDP, 10 December 2009), online: <www.ifex.org/africa/2009/12/21/report_undp-misa_training_on_investigative_journalism_dec2009.pdf>; United Nations Development Programme, “Trainer on Social Media and Writing for the Web” (2014), online: <procurement-notices.undp.org/view_notice.cfm?notice_id=17324>; Philippine Center for Investigative Journalism, “Philippine Centre for Investigative Journalism” (2015) online: <www.pcij.org>.

34. See e.g. Robin Palmer, “Combating Grand Corruption in Africa: Should it be an international crime?” (6 March 2012), online: Open Society Initiative for Southern Africa <www.osisa.org/sites/default/files/combating_grand_corruption_in_africa_-_robin_palmer.pdf>; Behzad Mashali, “Analyzing the Relationship between Perceived Grand Corruption and Petty Corruption in Developing Countries: Case Study of Iran” (2012) 78:4 Intl Rev Admin Sci 775; Gabrielle Poeschl & Raquel Ribeiro, “Everyday Opinions on Grand and Petty Corruption: A Portuguese Study” (2012) 013 Observatório de Economia y Gestão de Fraude Working Paper; Stephen P Riley, “Petty Corruption and Development” (1999) 9:1/2 Dev in Prac 189.
35. World Bank, *Combat Corruption*, *supra* note 1 at 8-9.
36. Palmer, *supra* note 34; Fintan O’Toole, “State of corruption: power and impunity,” Book Review of *Political Corruption in Ireland 1922–2010: A Crooked Harp?* by Elaine A Byrne, *The Irish Times* (2 June 2012), online: <www.irishtimes.com/culture/books/state-of-corruption-power-and-impunity-1.1063548>.
37. Antonio Argandoña, “Corruption and Companies: The Use of Facilitating Payments” (2005) 60:3 J Bus Ethics 251 at 256.

grand and petty corruption are mutually reinforcing,³⁸ petty corruption is more pervasive in developing than advanced countries. For example, all eight countries listed by the TI Global Corruption Barometer for 2009 as the most affected by petty bribery are developing nations.³⁹ Failure to distinguish the two categories of corruption in research appears to be reflected in practice. Yet given the differences between them—in terms of prevalence, the status of the players, and the tactics used—it would seem necessary to take different approaches to remedy each. Similarly, nepotism, cronyism, and patronage receive slight attention in the research literature, except as aspects of dysfunctional business practices. The influence of personal relationships in public life, however, is a prominent feature of developing countries.⁴⁰

While the literature reveals that there has been active and imaginative study of corruption in developing countries over the last two decades—with research results continuing to accumulate—it is nevertheless apparent that the subject still eludes total comprehension. Such factors as distance, armed conflict, culture, language, secrecy, the governmental practices of recipient countries, and the absence of recorded data present barriers to gaining insight into corruption in developing countries—even for researchers who are on the ground or embedded in international institutions. The research, consequently, tends to lack detail.

II. CASE STUDIES

The three case studies that follow were chosen for examination because they identify many of the characteristics of grand corruption in Kenya and Afghanistan. Furthermore, the author has acted as a policing advisor in both countries and is thus familiar with the political, social, and law enforcement environments in which the cases occurred. The cases have been extensively investigated and publicized within the two countries, so there is available information to examine

38. Susan Rose-Ackerman, “Democracy and ‘grand’ corruption” (1996) 48:149 *Intl Soc Sci J* 365; Behzad Mashali, “Analyzing the relationship between perceived grand corruption and petty corruption in developing countries: case study of Iran” (2012) 78:4 *Intl Rev Admin Sci* 775.

39. Transparency International, *2009 Global Corruption Barometer* (Berlin: Transparency International, 30 November 2009) at 3, 7-9, online: <issuu.com/transparencyinternational/docs/global_corruption_barometer_2009_web?e=2496456/2192681>.

40. Simon Ulrik Kragh, “Nepotism: Organizational Behaviour in Modernizing Societies” (Paper delivered at the International Association of Cross-Cultural Competence and Management, Vienna University of Economics and Business, 25 June 2009), online: <www.wu.ac.at/fileadmin/wu/o/iaccm/Abstracts/2009_25kragh.pdf> at 1-2.

and identify the characteristics, dynamics, and scale of the corruption they represent. Comparison with the literature on corruption (discussed in Part I, above) suggests that the three cases are typical of corruption in most developing countries. More detailed dissection of their characteristics and dynamics could therefore yield information on the behaviours of those implicated. The tentative typology of corrupt behaviour that emerges from the three cases could be tested against other well-documented cases in other countries and could be used in developing new anti-corruption measures.

The proceeds from petty corruption in developing countries are often of domestic origin and are generally spent domestically, so they continue to circulate among the population that exacts and pays the bribes. They continue, therefore, to contribute to the originating country's economy. The proceeds of grand corruption, on the other hand, are often obtained directly or indirectly from international development aid—thus depriving the intended beneficiaries of some, if not all, of the value of the aid. As in the cases examined here, the diverted funds may then be invested in property, enterprises, or bank accounts outside the developing country, thereby denying the country even indirect benefits from the diverted funds. Moreover, those engaging in grand corruption are usually already socio-economically privileged. Because the perpetrators are political and business leaders, their corrupt acts are a betrayal of public trust and are often criminal. The two Kenyan cases and the case from Afghanistan illustrate these points. They demonstrate the complexity of the corruption schemes, their destabilizing effect on the fiscal systems and economies of their countries, and the difficulty even for donors to obtain redress.

A. KENYA

Situated in East Africa, Kenya had in 2013 a population of 44.3 million and a GDP of 5.5 billion USD.⁴¹ In the 2013–2014 fiscal year, its revenues, including development revenues, were approximately 9.7 billion USD and its actual expenditures were 10.08 billion USD.⁴² During 2013, Kenya received ODA of

41. The World Bank, “World DataBank: World Development Indicators” (2015), online: <databank.worldbank.org/data/reports.aspx?source=World-Development-Indicators> [World Bank, “World DataBank”].

42. Edward RO Ouko, *Summary of the Report of the Auditor General on the Financial Statements of Ministries, Departments, Commissions, Funds and Other Accounts of the National Government for the Year 2013/2014* (Nairobi: Office of the Auditor-General, 2015) at 5, online: <www.kenao.go.ke/index.php/reports/doc_download/243-report-2013-2014>. The figures have been converted from Kenyan shillings to USD using a conversion factor of 100:1.

3.2 billion USD.⁴³ But with a Gross National Income (“GNI”) per capita of 1,160 USD, its status as a lower income country is moving to that of a lower middle income country. The economic outlook is reasonably bright despite a poverty rate of over 45 per cent⁴⁴ and a 2013 unemployment rate variously reported as 9.2 per cent⁴⁵ and 40 per cent.⁴⁶ The discrepancy in unemployment rates is possibly owing to the fact that the formal work sector constitutes only 19 per cent of all employment⁴⁷ and that there is a disproportionately high youth unemployment rate.⁴⁸ Over 45 per cent of the population lives below the poverty line and received almost 2 billion USD in ODA in 2013.⁴⁹ In the 2014 Transparency International Corruption Perception Index, 144 of 175 countries were considered less corrupt than Kenya.⁵⁰ Even in relation to other sub-Saharan countries, then, Kenya tends to have a high rate of corruption.

1. GOLDENBERG INTERNATIONAL LTD.

Goldenberg International Ltd. (“Goldenberg”) was created in 1990 to export gold and diamond jewellery from Kenya. The principals were a Kenyan entrepreneur of Asian descent and the Director of the Kenyan National Security Intelligence Service. The intelligence director was also a director of Firestone East Africa (1969) Ltd. and First American Bank Ltd. At the time, Kenya was a one-party state with a struggling economy. Interest rates were soaring as high as 80 per cent, exports were declining, real GDP had dropped 5 per cent in one year,⁵¹ and there was a hard currency crisis. Total external debt totalled 6.56 billion USD or 75 per cent of the GDP. Over 50 per cent of the debt was owed to multilateral agencies and a further 35 per cent to bilateral donors—so Kenyan government

43. World Bank, “World DataBank,” *supra* note 41.

44. *Ibid.*

45. *Ibid.*

46. KPMG, “Monitoring African Sovereign Risk” (2013) 1 KPMG East Africa Limited 1.

47. Kenya Institute for Public Policy Research and Analysis, *Kenya Economic Report 2013* (Nairobi: KIPPRA, 2013) at 29-34, online: <www.kippira.org/downloads/Kenya%20Economic%20Report%202013.pdf>.

48. *Ibid.*

49. Organisation for Economic Co-operation and Development, *Aid (ODA) Disbursements to Countries and Regions [DAC2a]* (Paris: OECD, 2015) [OECD, *ODA Disbursements*].

50. Transparency International, *Corruption Perceptions Index 2014* (Berlin: Transparency International, 2014), online: <issuu.com/transparencyinternational/docs/2014_cpibrochure_en/3?e=2496456/10375453>.

51. International Monetary Fund, *Kenya: Ex Post Assessment of Longer-Term Program Engagement* (Washington: IMF, October 2008), online: <www.imf.org/external/pubs/ft/scr/2008/cr08338.pdf> [IMF, *Kenya: Ex Post Assessment*].

spending was heavily dependent on international assistance. At the same time, the government had committed to multi-party elections in 1992 and therefore needed to generate substantial funds to campaign for its re-election.⁵²

Two pieces of legislation were used to help ameliorate the economic situation. One was the *Exchange Control Act*, which designated the Central Bank of Kenya (“CBK”) as the sole dealer in hard currency and required foreign currency dealers to sell their foreign currency to the CBK in return for Kenyan shillings.⁵³ The other was the *Export Compensation Act*, which provided for exporters to receive cash incentives of 20 per cent of the value of exported non-traditional goods that earned hard currency.⁵⁴

Goldenberg claimed in its letter of application to export gold that it would earn the Kenyan Treasury 50 million USD annually for five years. Consequently, it was set up as a virtual monopoly with the help of principals in the Kenyan government, and all precious metal dealers were required to sell or export their goods directly through Goldenberg. Moreover, the Minister of Finance agreed to pay Goldenberg an export incentive of 35 per cent. This constituted a premium of 15 per cent over the legislated amount, thereby overriding the *Export Compensation Act* and violating other regulatory statutes such as the *Monopolies and Price Control Act*.⁵⁵

By early 1991, through the company bank account at First American Bank, Goldenberg had presented nine claim forms to Customs, duly certified by the Minerals and Geology Branch, for payment of the 35 per cent incentive on purported sales to two false foreign companies (Servino Securities Inc. and Solitaire of Switzerland) and to an acquired company (World Duty Free). First American Bank received, however, rather than inter-bank transfers, direct deposits in USD, British pounds, Swiss francs, French francs, Italian lira, and Japanese yen. This raised the bank’s suspicions that Goldenberg was illegally dealing in hard currency. When the bank protested, the CBK issued a foreign exchange dealer’s licence to Goldenberg and paid the incentive claims. The incentive claims expanded in 1992. In addition, Goldenberg acquired 6 million USD short-term bridge financing (later extended) from the government under an existing revolving fund to help exporters manufacture or prepare goods that

52. Hornsby, *supra* note 7.

53. *Exchange Control Act* (Kenya), 1953, c 113, part 2, s 3.

54. *Local Manufactures (Export Compensation) Act* (Kenya), 1974, c 482, ss 3, 7.

55. *Restrictive Trade Practices, Monopolies, and Price Control Act* (Kenya), 1989, c 504; Peter Warutere, *The Goldenberg Conspiracy: The Game of Paper, Gold, Money and Power* (Pretoria, South Africa: Institute for Security Studies, 2005); Gladwell Oteino, *All That Glitters? An Appraisal of the Goldenberg Report* (Nairobi: Africa Centre for Open Governance, 2011).

would earn foreign income. As time passed, the government also issued a licence to allow Goldenberg to set up its own bank—the Exchange Bank. The CBK also issued foreign exchange bearer certificates with the stated aim of giving importers access to foreign currency to finance their operations. Through the Exchange Bank, Goldenberg managed to gain effective control of the foreign exchange bearer certificates and manipulate them in its favour.⁵⁶

Before mounting pressure from the banking community led to the closure of Goldenberg and the Exchange Bank, Goldenberg obtained another 900 million USD from the CBK, most of it through three large fraudulent transactions. In the first, the Exchange Bank and six other dubious banks obtained advances of 530 million USD in four days through a cheque-kiting scheme. In the second, Goldenberg obtained 210 million USD in advance payments from CBK when Exchange Bank sent documentation showing that Goldenberg had made deposits from its sale of gold and diamond jewellery into CBK accounts in London and New York. No deposits, in fact, had been made. In the third transaction, 100 million USD was transferred in three payments to a Goldenberg bank account on the instructions of the Permanent Secretary of the Treasury.⁵⁷

With the collapse of the company and its bank, it was discovered that no gold or diamonds had ever been exported, that two of the three foreign companies were dummy enterprises, and that it was likely that the foreign currency for the deposits had been bought on the black market in Mombasa. Goldenberg was in fact a money laundering and cheque-kiting operation, very likely designed to divert funds from the Kenyan Treasury to finance the upcoming elections. By 1993, the company had submitted 160 forms claiming 375 million USD for the export of non-existent gold and diamonds.⁵⁸ It had also acquired 900 million USD from the three fraudulent transactions and other proceeds from cheque-kiting, dealing in foreign bearer bonds, and other incidental transactions. All of the proceeds came from the Kenyan Treasury. While one half to two-thirds of the funds were recovered, it is estimated that between 600 million USD and 1.25 billion USD—representing more than 10 per cent of GDP—was lost to the Kenyan Treasury.⁵⁹ The scheme destabilized the Kenyan economy and caused a steep rise in inflation; there were periods between 1990 and 1993 when the Treasury was virtually emptied of all funds.⁶⁰

56. Warutere, *supra* note 55; Otieno, *supra* note 55; Hornsby, *supra* note 7 at 505-509.

57. Otieno, *supra* note 55.

58. Waurtere, *supra* note 55 at 10.

59. *Ibid.*

60. Hornsby, *supra* note 7 at 505-509.

There had been suspicion of Goldenberg from the beginning. The media began asking questions in 1992, but the government actively defended the operations of the company. A CBK clerk had queried the Goldenberg incentive payments. When ignored, the clerk passed the papers to the opposition, who subsequently dismissed the allegation.⁶¹ It was not until 1993, when the Kenya Economic Survey appeared, that the irregularities became obvious. Although the government maintained that Goldenberg had earned 145 million USD for Kenya by the end of 1992, the survey showed there had been no appreciable export of commodities and that the total value of all mineral exports had been only 40 million USD.⁶²

The officials implicated in the scheme were the Vice President (who was also the Minister of Finance); the heads of Treasury, the CBK, and Customs; and the Permanent Secretary in the President's Office. The Minister of Finance resigned before the scandal broke but remained as Vice President. The President's two sons were implicated, while the President himself was also suspected of involvement. A commission of inquiry set up in 2003 by a new President, Mwai Kibaki, singled out the former President and two of his associates for further investigation by the Attorney General,⁶³ but there is no record of the investigation having taken place. For example, the records of the World Bank Stolen Asset Recovery Initiative cite statements from an 8 May 2002 hearing of the US House of Representatives Subcommittee on Financial Institutions and Consumer Credit. These statements asserted that the Goldenberg affair had paid to the Kenyan President and his "cronies" an estimated minimum of 5 billion USD and that he and his associates had secreted illicit fund sums equivalent to the size of the Kenyan national debt of that time.⁶⁴ No other source suggests the same magnitude of sums involved in Goldenberg as those mentioned in the US House of Representatives Subcommittee statements, but most imply or hint at the implication of the President and his sons.

When the scheme became public in 1993, the head of the CBK resigned. In 1994, the Permanent Secretary of the Treasury followed suit, but no one was ever prosecuted. An audit ordered by a new Minister of Finance found that Goldenberg, the Exchange Bank, and the CBK had been involved in embezzlement and money laundering, but no action was taken on the conclusions. Even the institution of

61. Otieno, *supra* note 55.

62. Warutere, *supra* note 55.

63. Oteino, *supra* note 55.

64. Stolen Asset Recovery Initiative, "Daniel Arap Moi- Goldenberg Scandal" (2015), online: <star.worldbank.org/corruption-cases/node/18610>.

the Commission of Inquiry did not result in any prosecutions—even though the principal facilitator of the Goldenberg affair, Kamlesh Pattni, testified to the Commission that he was close to the leaders of the President’s party, and that he had agreed with the former President that he would fund the party electoral machine. Pattni also avoided prosecution and had all charges against him and his associated companies quashed by the Kenya High Court in March 2013, on the grounds that his constitutional rights had been violated because the case had dragged on for too long.⁶⁵

The judicial decision in favour of Pattni proved controversial. In 2015 the judge who cleared him faced a judicial tribunal investigating the way he handled the case,⁶⁶ and the Court of Appeal allowed the Director of Public Prosecutions to challenge the acquittal. Pattni thus still remains vulnerable to sanctions, although after twenty-five years of eluding prosecution and consolidating his wealth⁶⁷—not to mention becoming a pastor and running for Parliament in the 2013 elections—he seems invulnerable to all vicissitudes.⁶⁸ One of his incarnations, albeit fictional, may lead to immortality: Parts of his story are used imaginatively and sympathetically for the protagonist and plot of the Scotiabank Giller Prize-winning novel, *The In-Between World of Vikram Lall*, by the Kenyan-Canadian novelist, M.G. Vassanji.⁶⁹ But in the end, even the novel stops short of deciding the ultimate fate of the flawed character. It is not certain that he perished in the fiery destruction of the building in which he was staying. Pattni’s political partners, too, seem to have avoided sanction, perhaps because Anglo Leasing, another significant political corruption scandal, emerged to overshadow the Goldenberg affair.

2. ANGLO LEASING AND FINANCE CO. LTD.

The Anglo Leasing affair took its name from one of a number of existent and non-existent companies with which the Kenyan government had supply contracts.

65. Galgalo Fayo, “Judge defiant after clearing Pattni of Goldenberg scam,” *Business Daily Africa* (21 April 2013), online: <www.businessdailyafrica.com/Judge-defiant-after-clearing-Pattni-of-Goldenberg-scam/-/539546/1754552/-/mdsp8hzt/-/index.html>.

66. “Pattni case judge to face tribunal,” *Daily Nation* (8 May 2015), online: <www.nation.co.ke/news/Pattni-case-judge-to-face-tribunal/-/1056/2710798/-/ve8b15zl/-/index.html>.

67. “Kamlesh Pattni puts his cash into real estate,” *Daily Nation* (20 February 2014), online: <www.nation.co.ke/news/Kamlesh-Pattni-Real-Estate-Wealth/-/1056/2215646/-/sxcvruz/-/index.html>.

68. Michela Wrong, “Running on Amnesia,” *The New York Times* (22 February 2013), online: <latitude.blogs.nytimes.com/2013/02/22/kenya-election-campaign-run-on-amnesia/?_r=0>.

69. (Toronto: Doubleday Canada, 2004).

The affair began under the same President who was in office during the Goldenberg Affair. In 2002, the new President was elected on the promise to eliminate government corruption. He created the Kenya Anti-Corruption Commission (“KACC”), appointed a former director of Transparency International Kenya as Permanent Secretary for Ethics and Anti-Corruption, and appointed a judicial commission of inquiry to examine the Goldenberg Affair.⁷⁰ After a year in office, however, the new government, too, showed signs of engaging in corruption as a source of funding for the next election.⁷¹

Most of the contracts were for the purchase of security equipment and services. The choice of commodities and services was a suitable cover for corrupt dealings; in a post-September 11 world, the need for the contracts would likely go unquestioned and allow secrecy to be maintained. A number of the contracts were genuine, but the costs were inflated.⁷² Other companies such as Anglo Leasing were dummy corporations created for the purposes of processing funds diverted from government and depositing them in banks in the United Kingdom, France, and Switzerland. The facilitators of the scheme and the owners of Anglo Leasing were two Kenyan entrepreneurs of Asian descent. The government leaders involved in the corruption included the Minister of Finance, Minister of Security, Vice-President, Minister of Justice, the Permanent Secretary of the Public Service, and the Permanent Secretary for Security.⁷³

The case came to light in 2004 when the Permanent Secretary for Ethics and Anti-Corruption, John Githongo, obtained intelligence that Anglo Leasing was a non-existent company that had been paid a commitment fee of 3 per cent of the value of a 30.14 million USD contract by the Kenyan government for the supply of tamper-proof passports. He discovered that there were nineteen contracts of the same nature totalling between 750 million USD and 1 billion USD. Some had been created for corrupt purposes by the previous government and had been continued by the new government.

Githongo took his concerns to various ministers and reported his findings on many occasions to the President. While the response of the President was vague, the ministers were all too honest in telling him that he was being obstructionist and was preventing the government from acquiring the money it needed for the

70. The Honourable Justice SEO Bosire, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair* (Nairobi: Republic of Kenya, 2005).

71. John Githongo, *Kenya: Githongo Report* (Nairobi: Africafocus Bulletin, 2006) [*Githongo Report*]; Wrong, *It's Our Turn to Eat*, *supra* note 6 at 62.

72. IMF, *Kenya: Ex Post Assessment*, *supra* note 51.

73. *Githongo Report*, *supra* note 71; Kenya, National Assembly, *Official Report (Hansard)*, (18 April 2006) 465 at 479.

next election.⁷⁴ They also put pressure on the KACC and the Attorney General to close down investigations based on Githongo's information. Nevertheless, Anglo Leasing repaid some of the money and the government cancelled some of the promissory notes it had signed. Githongo, however, continued to gather information and started secretly recording his conversations with the ministers.⁷⁵ By 2005, he believed his life was in danger, and he fled to the United Kingdom, where he wrote a full report to the President (a nineteen-page summary that was posted online).

Again, the multilateral institutions froze aid payments in an effort to have Kenya deal with the massive diversion of public funds. The KACC undertook an investigation, and in 2005, three former permanent secretaries and three other senior public officials were charged.⁷⁶ However, apart from one conviction of the former Permanent Secretary of Home Affairs, who was fined 35,000 USD, the cases against the defendants collapsed.

The Anglo Leasing affair continues to be problematic for the Kenyan government. While seven of the contracts were stopped, three were fulfilled. Three others were partially fulfilled but were never fully paid by the government. In addition, the previous government had signed promissory notes that were legally binding. It had also entered into agreements with financial institutions to borrow money to pay the contracts, which the financial institutions had started paying. In 2014, a UK judgement found the Kenyan government liable for the payment of two of the contracts. Given that the two contracts had very favourable rates of interest that had continued to accrue over the years, the award was substantial. While public opinion in Kenya was that of general opposition to paying, the government was about to launch an international bond offering and did not want to jeopardize its success, so the President directed the Treasury to pay the required amount—which was over 16 million USD.⁷⁷

Later in 2014, the Ethics and Anti-Corruption Commission ("EACC"), the successor to the KACC, provided five Anglo Leasing files to the Swiss government for an investigation of suspected Anglo Leasing assets in Swiss banks. The UK and Swiss authorities froze assets and promised to return funds in the

74. *Githongo Report*, *supra* note 71.

75. *Ibid.*

76. Ethics and Anti-Corruption Commission, News Release, "The Kenya Anti-Corruption Commission (KACC) and the Anglo-Leasing Case" (24 October 2005), online: <www.eacc.go.ke/WHATSNEW.ASP?ID=12&day=10/24/2005>.

77. George Omondi, "Treasury paid Anglo Leasing on Uhuru spokesman's order," *Business Daily Africa* (21 May 2014), online: <www.businessdailyafrica.com/Treasury-paid-Anglo-Leasing-on-Uhuru-spokesman-s-order/-/539546/2322758/-/j2h044z/-/index.html>.

Anglo Leasing and other cases.⁷⁸ The evidence provided by the two countries also assisted the EACC to lay charges in 2015 against thirteen suspects in the case. Among those charged were a serving senator, a former finance minister, a former internal affairs secretary, a former transport minister, and a former postmaster general as well as the principal external facilitator, his brother, and his father. For a brief period, it looked as if the prosecution would be straightforward—but since the laying of charges, other political events have intervened to muddy the waters. The President published a “List of Shame,” which contained a list of 175 ministers and public officials allegedly involved in corrupt practices.⁷⁹ The EACC was given two months to investigate the named people and refer evidence for prosecution to the Director of Public Prosecutions. Shortly afterwards, four of the commissioners—including the Chair—were themselves accused of dubious practices and were pressured to resign. In the meantime, four of the five ministers named on the List of Shame were acquitted, some of the accused Anglo Leasing principals were given permission to travel, and the external facilitators in the case applied to have their prosecution stopped on various technicalities.⁸⁰ In retaliation, the Director of Public Prosecutions further charged them with submitting false documents in support of their cases.⁸¹ The political furor has brought into question the intentions of the President in declaring a campaign against corruption and having the List of Shame compiled.⁸² As a result, the Anglo Leasing case has again lost profile and sunk into even more legal confusion. So after more than thirteen years, and despite strong evidence and open discussion of the politics in the case, a successful resolution remains out of sight.

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78. Zeddy Sambu, “Experts fault Uhuru’s order to pay Anglo Leasing firms,” *Daily Nation* (17 May 2014), online: <mobile.nation.co.ke/news/Experts-fault-Uhuru-order-to-pay-Anglo-Leasing-firms/-/1950946/2318676/-/format/xhtml/-/138amg2z/-/index.html>.
79. “List of Shame: Corruption laid bare,” *Daily Nation* (31 March 2015), online: <www.nation.co.ke/news/politics/List-of-Shame-EACC-Report-Parliament/-/1064/2672264/-/vvodg7z/-/index.html>; Bernard Namunane, “Rich and powerful dominate anti-graft list,” *Daily Nation* (4 March 2015), online: <mobile.nation.co.ke/news/Anglo-Leasing-Scandal-EACC-List-Court-Case-Prosecution/-/1950946/2642944/-/format/xhtml/-/7s1gi3z/-/index.html>.
80. Fred Makana, “Court allows businessmen charged with Anglo Leasing scam to travel out of country,” *Standard Digital* (25 April 2015), online: <www.standardmedia.co.ke/?articleID=2000159644&story_title=Kenya-court-allows-businessmen-charged-with-anglo-leasing-scam-to-travel-out-of-country>.
81. Peter Leftie, “Tobiko lets Kazungu Kambi off the hook,” *Daily Nation* (28 May 2015), online: <www.nation.co.ke/news/Kambi-let-off-the-hook/-/1056/2732636/-/emtd0e/-/index.html>.
82. “Suspended EACC boss back in office,” *Daily Nation* (29 April 2015), online: <mobile.nation.co.ke/news/Suspended-EACC-boss-back-in-office/-/1950946/2701582/-/format/xhtml/-/2kdw1hz/-/index.html>.

B. AFGHANISTAN

While corruption in Afghanistan has become notorious during the last fourteen years of massive international military and development support, it tends to lack the sophistication found in Kenya. At the end of 2001, Afghanistan had no national government or state institutions, no political parties, and no banks or financial institutions. In the intervening years, government, public, and business institutions were brought into existence and the rudiments of a regulatory regime implemented. Even so, ethnic and tribal relationships still remain more important than shared political beliefs. Elections are financed largely by the international community, and Afghanistan remains a very poor and largely cash and subsistence economy. It is in effect an “aid rentier” state in that it requires external financial assistance to resource nearly all its government activities, including security, operating, and development costs. Almost all (97 per cent) of its GDP is derived from international military and aid spending. The government generates annual revenues of only 2.5 billion USD, while its security costs total 6–8 billion USD annually (over time to be reduced to 4.1 billion USD).⁸³

In 2013, the estimated population of Afghanistan was almost thirty-one million and its GNI over 20 billion USD.⁸⁴ In 2010, the United Nations High Commissioner for Human Rights reported that one-third of Afghans live in absolute poverty and another 37 per cent of poor people hover on the edge.⁸⁵ Government revenues in 2012 were 2.3 billion USD, which is roughly half the annual 4.1 billion USD that international donors have pledged to support the Afghan national security forces for the “Decade of Transition.”⁸⁶ In 2013, with 5.3 billion USD in aid, Afghanistan was the top global recipient of ODA.⁸⁷ This did not take into account military spending or the considerable bilateral

83. Sarajuddin Isar, “A Blessing or a Curse? Aid Rentierism and State-building in Afghanistan,” *E-International Relations* (23 May 2014), online: <www.e-ir.info/2014/05/23/a-blessing-or-a-curse-aid-rentierism-and-state-building-in-afghanistan>; Barnett R Rubin, “Political Elites in Afghanistan: Rentier State Building, Rentier State Wrecking” (1992) 24:1 *Int J Middle E Stud* 77; SIGAR, *Quarterly Report 1*, *supra* note 25 at 11.

84. World Bank, *World Development Indicators 2015* (Washington: World Bank, 2015), online: <data.worldbank.org/news/release-of-world-development-indicators-2015>.

85. United Nations High Commissioner for Human Rights, *Human Rights Dimension of Poverty in Afghanistan*, (Kabul: UNHCHR, 2010) at 4; United Nations General Assembly, Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights*, UNHRCOR, 13th Sess, UN Doc A/HRC/13/62 (2010).

86. Defence and Security Committee, North Atlantic Treaty Organization Parliamentary Assembly, *Afghanistan: 2014 and Beyond* (Brussels: NATO, October 2013) at 3, 8, 10, 12.

87. OECD, *ODA Disbursements*, *supra* note 49.

donations that have poured into the country since the fall of the Taliban in 2001. Given that most of the donor funding has remained under international control, however, there is little wealth in the Afghan Treasury. The opportunities for plundering government finances are therefore low, but the massive influx of not always well-managed international funding has nevertheless increased the incidence of corruption.

1. KABUL BANK

Two Afghan entrepreneurs established Kabul Bank in 2004. It was one of the first Afghan banks to be formed and became one of the most successful, with one million depositors and over 1 billion USD in funds. It handled about one-third of all Afghan banking, including the government's electronic payroll, and attracted many small depositors through such promotion schemes as lottery draws.⁸⁸

Concerns arose in 2008 that Kabul Bank lacked strong management. Much of its capital was invested in the Dubai real estate market, and when that market fell by 50 per cent in 2008, Kabul Bank lost many millions of dollars.⁸⁹ But corruption was not discovered until 2010, when, as the result of a falling out between the principals, the bank founder reported the allegedly illegal activities of the CEO. It transpired that the bank had paid 920 million USD in unsecured, interest-free loans to nineteen people and companies—including one of the President's brothers and one of the First Vice President's brothers. None of the loans had a repayment schedule nor had the borrowers begun any repayment of the loans. Most of those with the loans were either members of the government or well connected to government. The loans had been used by the borrowers for a number of purposes: to buy shares in the bank itself, to create a slush fund used to buy the support of the major ethnic factions for presidential policies, to finance the 2009 presidential election campaign, to start businesses, to buy real estate, and to purchase a rickety airline that went bankrupt when one of its airplanes crashed and killed all on board.⁹⁰

88. Jon Boone, "The financial scandal that broke Afghanistan's Kabul Bank," *The Guardian* (16 June 2011), online: <www.theguardian.com/world/2011/jun/16/kabul-bank-afghanistan-financial-scandal>.

89. *Ibid.*

90. Michael Huffman, "The Kabul Bank Scandal and the Crisis that Followed," (3 December 2011), *US Policy in a Big World* (blog), online: <www.uspolicyinabigworld.com/wordpress/wp-content/uploads/The_Kabul_Bank_Scandal_Version_2_FOOTNOTES.pdf>; Independent Joint Anti-Corruption Monitoring and Evaluation Committee, *Report of the Public Inquiry into the Kabul Bank Crisis* (Kabul: MEC, 15 November 2012), online: <mec.af/files/knpir-final.pdf> [MEC, *Kabul Bank Crisis Report*].

The bank remained solvent by constantly attracting new deposits and by putting the government payroll deposit into overnight interest bearing accounts, mainly with the Central Bank. The payroll deposits included police salaries, which were entirely paid by international donors via reimbursement of the Afghan government through the Law and Order Trust Fund for Afghanistan (“LOTFA”), managed by the UNDP.⁹¹ In other words, the bank was lending the government its own money to earn interest, and the money coming in was used to pay the demands on the bank. The bank maintained two sets of books: a dummy set in Kabul and a valid set in Dubai. It was widely reported in the media that the forensic audit following the discovery of this corruption had described the bank as a giant Ponzi scheme.⁹²

The affair was crude, and apart from the manipulation of the government payroll, it did not involve public funds. That changed, however, when there was a run on the bank after the corruption became generally known. In an effort to prop up the bank, the government gave assurances that Kabul Bank deposits would be guaranteed. The Central Bank, as lender of last resort, then transferred funds to Kabul Bank to pay out depositors. The funds were secured by a promissory note and agreement with the Ministry of Finance against government reserves, but as an aid rentier state, nearly all Afghan government funds are derived from international donations.⁹³ The President was slow to take any measures to deal with the bank until the IMF and other donors halted aid pending government action to meet certain conditions—including a forensic audit, the recovery of loan money, and a plan to repay the reserve fund.⁹⁴ The Afghan Ministry

91. Personal knowledge of the author.

92. Matthew Rosenberg, “Audit Says Kabul Bank Began as ‘Ponzi Scheme,’” *The New York Times* (26 November 2012), online: <www.nytimes.com/2012/11/27/world/asia/kabul-bank-audit-details-extent-of-fraud.html> [Rosenberg, “Ponzi Scheme”].

93. KPMG Afghanistan Limited, *Da Afghanistan Bank: Audited Financial Statements For the year ended 30 Hoot 1389* (Kabul: KPMG Afghanistan, 2011), online: <[dab.gov.af/Content/Media/Documents/FinStmt138920110320AfterAudit\[1\]662015112811597553325325.pdf](http://dab.gov.af/Content/Media/Documents/FinStmt138920110320AfterAudit[1]662015112811597553325325.pdf)>; MEC, *Kabul Bank Crisis Report*, *supra* note 90 at 46-54; Matthew Rosenberg, “Afghans Move to Bail Out Kabul Bank,” *The Wall Street Journal* (7 September 2010), online: <www.wsj.com/articles/SB10001424052748704095704575473650615414666>; Adam B Ellick & Sangar Rahimi, “Afghanistan Pledges Support for ‘Troubled Bank,’” *The New York Times* (6 September 2010), online: <www.nytimes.com/2010/09/07/world/asia/07afghan.html>; Ministry of Finance, Islamic Republic of Afghanistan, “Parliament Approves Funds for Central Bank” (16 October 2011), online: <mof.gov.af/en/news/4047>.

94. See *e.g.* Rosenberg, “Ponzi Scheme,” *supra* note 92. See MEC, *Kabul Bank Crisis Report*, *supra* note 90 at 54.

of Finance took over the part of the Bank that was still financially sound and functioning and then renamed it the New Kabul Bank.

Despite the withholding of funds by the IMF and other donors, by 2014, only 10 per cent of the money had been repaid. By this time, too, the two Kabul Bank principals—together with twenty-one other defendants, mainly bank employees and negligent regulators—who had been convicted were now free. None of the politically well-connected borrowers had been prosecuted.⁹⁵

A new president was elected in September 2014 on an anti-corruption platform. The day after his election, he ordered the Attorney General to resume the Kabul Bank investigation and produce results within six weeks. By November 2014, the jail sentences of the two former Kabul Bank principals had been tripled to fifteen years each and the assets of those who had not repaid the loans were frozen. Within nine months, however, the investigation had still not yielded results. At the date of writing, a number of the prosecutions were caught between the appellate courts and the Supreme Court, and asset recovery was encountering obstacles due to “borrowers” leaving the country with substantial amounts of the funds.⁹⁶ Only 50 of 227 identified debtors have repaid their loans in full and as of 16 February 2015, only 228 million USD of the 977 million USD in dubious loans had been recovered.⁹⁷ On a positive note, though, Afghanistan has adopted an anti-money laundering law and a Pakistani bank has made an offer to buy the New Kabul Bank. Even so, it is possible that the Kabul Bank affair will be another large-scale developing country corruption case that will drag on for years, result in large losses, and ensure virtual impunity for the perpetrators.⁹⁸

95. Azam Ahmed & Declan Walsh, “New Afghan Leader, Putting Focus on Graft, Revives Bank Fraud Inquiry,” *The New York Times* (1 October 2014), online: <www.nytimes.com/2014/10/02/world/asia/afghanistan-president-corruption-investigation.html>.

96. Samirullah Popal, “The Kabul Bank Case: Corruption, Inquiry and Impunity” *Integrity Watch Afghanistan* (2015), online: <www.iwaweb.org/tmaf/docs/advocacy_brief_kabul_bank_case_2015.pdf>.

97. *Ibid.*

98. In November 2015, there were indications that the case would assuredly linger on. Khalilullah Ferozi, the first principal in the Kabul Bank Affair, was prominent in a stone-laying ceremony for a new, ultra-modern housing development in Kabul called Smart City. Everyone thought he was in prison. He was introduced at the ceremony by the President’s Advisor on Good Governance, and the Minister of Urban Development officiated at the signing of a memorandum of understanding between Ferozi and the company building Smart City. He owns the land that Smart City will be built on. His presence was largely unremarked by local media but picked up by *The New York Times* and *The Guardian*. The government was embarrassed, particularly as the question was raised as to whether the President, with his anti-corruption stand, was aware of Ferozi’s involvement in the Smart City scheme. As a consequence of the incident, the President’s legal advisor has resigned.

III. COMMON FEATURES OF THE CORRUPTION CASES

The three cases described above exhibit a number of common features, which they may share with other grand corruption cases in other developing countries. The characteristics fall into four categories: (1) political weaknesses, (2) governance weaknesses, (3) detrimental effects of status and class, and (4) weakness of international controls.

A. POLITICAL WEAKNESSES

In all of the cases discussed, the amounts appropriated were enormous and represented a significant percentage of government financial resources. For example, the Afghan reserves devoted to propping up Kabul Bank were equivalent to about 20 per cent of the annual revenues of 2 billion USD. Flagrancy and lack of impunity were the hallmarks of corruption in developing countries during the Cold War period, but it appears that the situation has not improved—despite the greater attention now paid to the corrupt activities of developing country governments.

The pressure to find a source of funding for financing election campaigns seems to have been a motivation for all three cases of grand corruption. Election campaigns anywhere cost many millions of dollars, and in the two countries discussed, bribery and buying votes are part of the system and so add to the cost. The two countries also appear to lack either provisions for regulating election spending or established practices for political parties to raise funds for elections in a transparent manner. With thin regulatory frameworks and little practice in holding democratic elections, the act of diverting government funds to pay for the next election of the party in power can become a norm—albeit an illegal one.

While the value of the land may repay some of the Kabul Bank money Ferozi still owes (he says that he is on work-release and returns to prison after office hours), his presence at the ceremony and the tribute paid to him indicate that his malfeasance is not taken seriously by the Afghan business community and even the Afghan government. See Martine van Bijlert, “The Afghan Government and the ‘Smart City’ Debacle: Who out-smarted whom?” *Afghan Analysts Network* (21 November 2015), online: <www.afghanistan-analysts.org/the-afghan-government-and-the-smart-city-debacle-who-out-smarted-whom>; Mujib Mashal, “Afghan Businessman Convicted in Kabul Bank Fraud Is Still Free to Make Money,” *The New York Times* (4 November 2015), online: <www.nytimes.com/2015/11/05/world/asia/afghan-businessman-convicted-in-kabul-bank-fraud-is-still-free-to-make-money.html?_r=1>; Emma Graham-Harrison, “Afghan government signs huge property deal with shamed ex-banker,” *The Guardian* (5 November 2015), online: <www.theguardian.com/world/2015/nov/05/afghan-government-signs-huge-property-deal-shamed-ex-banker>.

The three cases also occurred in societies where petty or bureaucratic corruption is endemic. Though the relationship between petty and grand corruption was not examined in this article, the existence of widespread bureaucratic corruption may suggest that the public is habituated to the use of public office for private benefit and is therefore less shocked or impelled to act in cases of grand corruption. Both societies are also ethnically factionalized; faction members are perhaps disinclined either to condemn the corruption committed by members of their own ethnic groups or cooperate across ethnic groups to condemn or work against corruption. As discussed in Part II, above, in collective societies and relationship cultures where democratic traditions or central government and bureaucracies are not well entrenched, people appear to have lower expectations of such abstract notions as public trust. This may help explain why even though the corruption became public knowledge through the news media in all of the three cases, public opinion was not sufficiently aroused to bring a halt to it. This is what ultimately allowed the perpetrators to continue with impunity.

Another common feature of the cases is that new approaches are introduced with the advent of a new political regime, and the new broom sweeps clean—at least until the new regime becomes corrupt. This means, however, that corruption has the possibility of thriving for the length of an electoral mandate and that nations can become the victims of successive kleptocracies—each one displacing the previous one, only to put another in its place. This seems to have been the case in Kenya from independence until at least 2008. Kleptocracies can strip governments of their assets and disable the delivery of public services or simply appropriate large amounts of international aid so that development is undermined. As long as elections take place regularly, however, there is always the possibility of breaking the kleptocratic cycle by introducing new strategies with a new government. That is what appears to be currently happening in Afghanistan, although it is far from clear at this stage whether there will be success.⁹⁹

99. And indeed, there are already indications that the anti-corruption resolve of the new Afghan government is wavering. At the beginning of November 2015, Khalilullah Ferozi, the first principal in the Kabul Bank Affair, was prominent in a stone-laying ceremony for a new, ultra-modern housing development in Kabul, called Smart City. Everyone thought he was in prison. He was introduced at the ceremony by the President's Advisor on Good Governance, and then the Minister of Urban Development officiated at the signing of a memorandum of understanding between Ferozi and the company building Smart City. Ferozi owns the land that Smart City will be built on. His presence was largely unremarked by local media but picked up by the *New York Times* and *the Guardian*. The government was embarrassed, particularly as the question was raised as to whether the President, with his anti-corruption

B. GOVERNANCE WEAKNESSES

Despite official denial and impunity in the Kenyan cases, the need to report information regularly to Parliament and to comply with certain governance mechanisms helped in some small measure to uncover both corruption cases. This was less true in Afghanistan. While the Kabul Bank corruption did not originate in government, governance principles are as important in the private as in the public sector—since without trust and confidence, an economy is unlikely to flourish. In all three cases, it appeared that regulations were easily ignored or manipulated, and the principals behaved as if they had personal rather than delegated right and authority. There was a marked lack of attention to accountability and transparency, either in the transactions or in the aftermath and public discussion.

Despite the emphasis on good governance by multilateral agencies and international donors, it does not seem to be part of the consciousness or even the rhetoric of some developing country governments. This suggests that the multilateral agencies are not getting the message across to recipient countries that values such as accountability, transparency, efficiency, effectiveness, responsiveness, forward vision, and rule of law constitute a formula for good governance and are not just philosophical concepts.

Another weakness in governance that created the circumstances for corruption to occur was the existence of weak or culpable central banks with little independence from the political regime. While both countries have general corruption oversight mechanisms, they lack strength and effectiveness. In Kenya, judging from the recent events discussed in Part II(A)(1), above, even the EACC corruption oversight body appears to be suffering from the malaise it is mandated to cure. Neither country, moreover, appears to have independent banking oversight mechanisms apart from the central banks. It is also evident in all three cases that attorneys general were slow or reluctant to prosecute and lacked expertise to investigate and prosecute the cases. Finally, where public inquiries occurred, they uncovered valuable information but ultimately did not

stand, was aware of Ferozi's involvement in the Smart City scheme. As a consequence of the incident, the President's legal advisor has resigned. While the value of the land may repay some of the Kabul Bank money Ferozi still owes (he says that he is on work-release and returns to prison after office hours), his presence at the ceremony and the tribute paid to him indicate that his malfeasance is not taken seriously by either the Afghan business community or the Afghan government. See Graham-Harrison, *ibid.*

succeed in having the principals prosecuted. This was owed to the government's failure to act decisively on the information gathered by the inquiries.

C. DETRIMENTAL EFFECTS OF STATUS AND CLASS

In all three cases, there was an economic and social hierarchy of players. First were the politicians and those who were politically well-connected. These were the principal beneficiaries of the schemes in both countries. In the Kenyan cases, those involved were the most politically powerful people in the country, occupying positions that allowed them to facilitate the diversion of funds by the use of their authority and connections as well as legal and bureaucratic mechanisms. In Kabul, too, the principal beneficiaries were connected to the political and social elite. In both countries, however, the politicians and the politically well-connected were not able to manage the business side of the corruption, which was outside their realm. For that they required business partners.

The business partners were the second group of players. They were the "fixers," facilitators, and entrepreneurs with experience in setting up companies, investing, and moving money around. They became the principals of the corrupt companies and banks. They were not part of the privileged governing or social class, however. In Kenya, the entrepreneurs in the two cases came from the Asian business community, which is regarded with some wariness by Kenyans and in turn keeps itself somewhat aloof from African society.¹⁰⁰ In Afghanistan, the two Kabul Bank principals had worked in Russia. The founder was an international poker player and was recently discovered to have an outstanding Russian arrest warrant against him for illegal banking activities, organization of a criminal group, and money laundering.¹⁰¹ The Kabul Bank CEO was a former gem dealer who sold Afghan emeralds to print money for both the Northern Alliance and the Taliban.¹⁰² Perhaps because of their outsider status, the entrepreneurs seemed to have had more difficulty than the politicians in extricating themselves from the corrupt businesses and avoiding prosecution. There is no evidence that they have been protected or received support from the establishment with which they rubbed shoulders for joint profit. The Kenyan entrepreneurs have so far used wits and money to avoid penalty. But if these run out, as they seem to have done for the two Kabul entrepreneurs, they are likely to suffer consequences

100. Vincent Cable, "The Asians of Kenya" (1969) 68:272 *Afr Aff* 218 at 226.

101. MEC, *Kabul Bank Crisis Report*, *supra* note 90 at 22.

102. Dexter Filkins, "The Afghan Bank Heist," Letter, *The New Yorker* (14 February 2011), online: <www.newyorker.com/magazine/2011/02/14/the-afghan-bank-heist>.

more severe than those faced by the political partners whose corrupt enrichment they facilitated.

A third group of players evident in all of the cases are the minor officials, who in some cases became the scapegoats. While some were honest whistleblowers, others could have been among those engaging in petty corruption under different circumstances. In the cases of grand corruption, they were blamed for some aspects of the schemes, lost their jobs, or were convicted for minor offences. It is unlikely any of them benefitted from their involvement in the cases. Certainly, the Kenya Commercial Bank clerk who reported the irregularities of the Goldenberg claims did not benefit. He lost his job, was jailed, and died in poverty from tuberculosis.¹⁰³ In the face of power, influence, and money, their attempts to stop the corruption were futile. Instead, they became victims of the corrupt activity.

D. WEAKNESS OF INTERNATIONAL CONTROLS

A fourth group involved in the cases are the multilateral institutions and bilateral donors. On the margins, they could only observe the fate of the donated funds and were unable to do much more than freeze or withhold funding in an effort to influence events. Whether this had much effect is debatable. In Afghanistan, for example, despite the IMF and other donors freezing aid funding, the government was able to continue to fund operations from the unspent development budget it had accumulated. Because of the insurgency, the international community did not cut off the funds it supplied to support and pay the Afghan national security forces. Notably, the programs that tend to suffer when bilateral aid is cut off are social programs—such as healthcare and education—that benefit poor people the most. Cutting off international assistance stopped the flow of project funding but not large transfers and loans.

More important is the role the multilateral institutions and bilateral donors played in creating the conditions that led to the corruption in the first place. Large influxes of financial aid that are not always well managed create the conditions for corruption to occur. In Afghanistan in particular, there was so much funding available that it was impossible to use or absorb it all. As a consequence, much of it either went to waste or fuelled corruption.¹⁰⁴ It is not surprising, then, that in low income and subsistence economies, some seize the opportunity to

103. Oteino, *supra* note 55 at iii.

104. SIGAR, *Quarterly Report 3*, *supra* note 25; Jamie Tarabay, "Afghanistan and the bottom line," *Al Jazeera America* (2 April 2014), online: <america.aljazeera.com/features/2014/4/afghanistan-and-thebottomline.html>.

appropriate international funds when it is available. In fact, it is surprising that corruption is not more prevalent in such circumstances.

IV. CONCLUSIONS

Grand corruption in developing countries often involves the direct or indirect diversion of astounding amounts of international funding intended for development in disadvantaged countries. The Secretary General of the United Nations, Ban Ki-moon, has estimated that 30 per cent of all development funding is lost to corruption.¹⁰⁵ Losing nearly one-third of all development funding undermines the foreign policy and development aims of the donor governments, reduces opportunities for stability and improved living standards in disadvantaged countries, and creates cynicism and reluctance to support international development among taxpayers of the advanced countries. And as the inconclusiveness of the three corruption cases demonstrates, donor countries currently have little recourse either to prevent the loss of funds to corruption or to recover misappropriated funds, even after decades of trying to do so. If the problem is increasing, as some suggest,¹⁰⁶ then current mechanisms for curbing corruption are not working. New approaches are needed for both the prevention and the successful investigation and prosecution of grand corruption when it takes place.

Much is known about corruption in a general way, but there is much less detailed knowledge of how corruption works in practice. Without knowledge and understanding of the methods used by corrupt governments, politicians, and facilitators to misappropriate and convert development funds to their own use, countermeasures cannot be completely effective. Studying particular cases and building up a cumulative picture of methods and patterns could contribute to developing new approaches to enable multilateral agencies to combat corruption on the ground. The three cases identified culture, lack of governance, the roles of different actors, and the inconclusiveness of investigations and inquiries as common features. These are perhaps just a few of the characteristics that might emerge given a more detailed study of a wider selection of cases from around the world.

105. Jenny Lei Ravelo, "30 percent of aid lost to corruption – Ban Ki-moon" (10 July 2012), *The Development Newswire* (blog), online: <www.devex.com/news/30-percent-of-aid-lost-to-corruption-ban-ki-moon-78643>.

106. Kar & LeBlanc, *supra* note 22 at iii.

From the cultural perspective, the three cases tentatively indicate that grand corruption is more threatening than petty corruption to development goals. It therefore makes strategic sense for international agencies to concentrate efforts on reducing grand corruption. Petty corruption has socially corrosive elements but it also has positive dimensions: it is based on cultural norms of reciprocity; it benefits many rather than a few people; it is a survival mechanism in countries where governments neglect the welfare of their citizens; and it generally keeps the payments in the country, where they continue to recycle and create benefit. Grand corruption, on the other hand, largely benefits a few already privileged people and detracts from the common good. Much practical attention is devoted to prevention of petty corruption, but little is given to the contextual factors that support it. Efforts to curb grand corruption, however, seem more focused on describing the events after they take place than preventing them in the first place.

Lack of governance mechanisms in developing countries also hinders the prevention and detection of corruption. Regulatory and oversight frameworks tend to be rudimentary. Expertise tends to be low among regulatory, oversight, and law enforcement officials responsible for preventing the misuse of funds or for recovering misappropriated assets. Additionally, there is no widespread use of automated systems that reduce the opportunities for corruption and store information that disappears easily from paper records. The close relationships between those operating in the private and public sectors also escape close scrutiny, so the line between public and business sectors is not always clear. Politicians and public officials own and manage businesses while still in public office and use business associates and facilitators to carry out what should be public duties. This is particularly so in the procurement of goods and services, including large national and international contracts. At the same time, officials in the criminal justice system, including police, prosecutors, and judges, are not at arm's length from either the business sector or politics. Knowing more about how these relationships operate is important for developing systems of transparency and accountability.

The 2003 *United Nations Convention against Corruption* (“*UNCAC*”) is a strong enabling framework for developing focused mechanisms to combat corruption and the loss of international development funds.¹⁰⁷ Among other things, it covers such matters as prevention, criminalization, and law enforcement (including prosecution of those offering bribes to officials, mutual legal assistance, and asset recovery). There are 176 parties to the *UNCAC*, including

107. 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) [*UNCAC*].

Afghanistan and Kenya.¹⁰⁸ As those two countries show, however, few developing countries appear to have set up mechanisms required to give substance to their *UNCAC* undertakings. The provisions of the *UNCAC* are comprehensive and sophisticated and perhaps beyond the capacity of most developing countries to implement on their own. Some international assistance has gone towards capacity development of public administration and regulatory systems and the officials in the systems. Nonetheless, establishing the legal and regulatory frameworks and the administrative infrastructures they require for the *UNCAC* to be effective requires sustained and concentrated funding and expert attention. Such support does not seem to have been pursued with the same fervour as, say, international security assistance. Important, long-term, and less visible solutions to chronic problems can easily be neglected in international development because of urgent matters such as response to humanitarian crises or insecurity. Consequently, there is insufficient funding for and sustained attention to the practical analysis of complicated corruption cases to help the design of countermeasures, the development of mechanisms and methods to give effect to the *UNCAC*, or the training and capacity development of those operating the mechanisms. Unless this situation is remedied, corruption and the diversion of development funding to the privileged few in developing countries will persist.

108. United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: Signature and Ratification Status as of 1 December 2015" (2015), online: <www.unodc.org/unodc/en/treaties/CAC/signatories.html>.