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Hyperbole, Hypocrisy, and Hubris in the Aid Corruption Dialogue

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HYPERBOLE, HYPOCRISY, AND HUBRIS IN THE AID-CORRUPTION DIALOGUE

BRUCE WINFIELD BEAN*

In this article I examine the relationship between corruption and foreign aid – specifically, development aid intended to alleviate poverty by fostering economic growth. More than \$2.5 trillion has been expended over the past six decades on aid of all kinds. This total includes military aid, humanitarian and disaster relief assistance as well as development aid designed to enhance economic growth. Despite the proud rhetoric we hear about how generously aid is provided, there is abundant evidence from the World Bank and others that development aid has not succeeded in producing sustainable economic growth. Indeed, we have known for decades that such aid has been counter-productive, leading to reduced GDP per capita in more than half of all cases.

All serious scholars agree that corruption is a pervasive, global phenomenon. But the failure of development aid to reduce corruption has not been linked to corruption. I focus on “grand” or “political” corruption, as it is the most intractable. Following a review of the literature, which leads to the disappointing conclusion that development aid has not been successful, I consider those nations where poverty-alleviating economic growth has been recently established. A look at these successful nations leads to additional awkward truths about our proud assertions regarding the necessary conditions for creating self-sustaining economic growth. I then analyze current instrumentalities available to combat grand corruption and detail their fundamental inadequacies. The article concludes with a description of current global efforts to make development aid more effective by redesigning delivery mechanics.

Corruption is a global behavior which all agree is a major problem. While corruption can and should be suppressed and deterred, it will not be eliminated. I conclude with several policy proposals designed to make development aid more effective and less susceptible to corruption.

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I. INTRODUCTION

This article examines the relationship between corruption and foreign aid. By some estimates, more than \$2.5 trillion has been expended over the past six decades on aid of all kinds. This enormous total includes military aid, humanitarian and disaster relief aid as well as aid intended to foster economic growth. There is incontrovertible evidence that corruption is responsible for the diversion of billions of dollars of aid from its intended purposes. In Part I, I look broadly at corruption and aid. I focus on "grand" or "political" corruption because it is the most intractable kind and has an obvious impact on aid intended to foster long-term economic development. Part II analyzes

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the extensive literature on the efficacy of aid in facilitating self-sustaining, poverty-alleviating, long-term economic growth. The result of this review is most disappointing: aid is not an effective means of alleviating extreme poverty. In this section, I outline the foundational assumptions underlying foreign aid and discuss the “inconvenient truths” associated with aid.

Part III exposes some further awkward truths about where self-sustaining economic growth has been successfully established. Part IV deals with the undeniable impact of grand corruption on developmental aid. I analyze the current instrumentalities available to combat corruption and their fundamental inadequacy. Part V concludes with a summary of the overall state of affairs for current national and international aid programs and offers several policy proposals for making long-term development aid more effective and less susceptible to corruption.

Few will state that corruption is not a problem. I argue that although corruption is a problem, it is one that will not be cured or eradicated. Corruption can and should be suppressed and deterred; however, corruption will not be eliminated.

II. CORRUPTION AND AID

Institutions and experts involved in the delivery of aid have strong views on corruption and its corrosive impact:

- The World Bank has labeled corruption the “single greatest obstacle to economic and social development,” and views the anti-corruption battle as “central to its poverty alleviation mission.”¹
- The European Bank for Reconstruction and Development tells us “corruption weakens the state’s rules and institutions.”²
- The International Monetary Fund has emphasized that international aid should “ensure the rule of law, improve the efficiency and accountability of their public sectors, and tackle corruption.”³
- The United Nations Development Program links corruption to

1. Jeff Everett, Dean Neu & Abu Shiraz Rahaman, *Accounting and the global fight against corruption*, 32 ACCT., ORGS. & SOC'Y 513, 517 (2007).

2. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, TRANSITION REPORT 1998: FINANCIAL SECTOR IN TRANSITION 23–24 (1999).

3. International Monetary Fund [IMF], *The IMF's Approach to Promoting Good Governance and Combating Corruption — A Guide*, <http://www.imf.org/external/np/gov/guid/eng/index.htm> (last visited June 5, 2010).

problems involving gender, the environment and cross-border investment.⁴

- Others have contributed to the universal condemnation of corruption.
 - President Obama has declared that the United States must tackle corruption at home and abroad⁵ and should be at the forefront of “an international initiative to root out corruption.”
 - We are told that:
 - Corruption is a cause of poverty.⁶
 - Corruption caused the financial crisis of 1997–1998 in Asia.⁷
 - Corruption contributes to man-made disasters.⁸
 - “Corruption slows down and diverts investment, distorts competition, is economically inefficient, and is unfair to poor people.”⁹
 - Corruption reduces private investment.¹⁰
 - “Egregious human rights violations such as international child sex trafficking are made possible by cultures of corruption.”¹¹
 - Corruption “frustrates efforts to achieve very basic human rights,” “undermines environmental reform technology and clean up efforts,” and “directly affects the safety of ordinary consumers.”¹²
 - “There is no doubt that graft afflicts the develop-

4. UNITED NATIONS DEVELOPMENT PROGRAMME, MAINSTREAMING ANTI-CORRUPTION IN DEVELOPMENT: ANTI-CORRUPTION PRACTICE NOTE (2008), <http://www.pogar.org/publications/finances/anticor/UNDP-AC-Guidance-Note-08e.pdf> (last visited June 5, 2010).

5. THE CENTER FOR GLOBAL PROSPERITY, THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 9 (2009), available at <http://www.hudson.org> (search “Index of Global Philanthropy” and follow first hyperlink).

6. Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT’L LAW. 717 (2005).

7. *Id.* at 718.

8. *Id.* at 721.

9. *Id.* at 730.

10. Daniel Kaufmann et al., *Governance Matters* (The World Bank Development Research Group Macroeconomics and Growth & World Bank Institute Governance, Regulation and Finance, Working Paper No. 2196, 1999), <http://siteresources.worldbank.org/intwbigovantcor/resources/govmatrs.pdf> (last visited June 5, 2010).

11. Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155, 156 (2009).

12. *Id.* at 224–25.

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ing world heavily: officials defraud developing nations of up to \$40 [billion] yearly.”¹³

A. *Corruption is Not a Recent Development*

Corruption has been with us from “the Beginning,” or at least from the time of Eve’s encounter with the serpent in the Garden of Eden.¹⁴ The Bible is unambiguously explicit: “[a]nd thou shalt take no gift.”¹⁵

The Quran has many references to corruption:

Give, therefore, full measure and weight [in all your dealings], and do not deprive people of what is rightfully theirs; and do not spread corruption on earth after it has been so well ordered: [all] this is for your own good, ‘if you would but believe.’¹⁶

13. Editorial, *Dodging the Graft; Strengthen the UN Convention Against Corruption*, FIN. TIMES, Nov. 10, 2009.

14. *Genesis* 3:1–7 (King James).

1 Now the serpent was more subtil than any beast of the field which the LORD God had made. And he said unto the woman, Yea, hath God said, Ye shall not eat of every tree of the garden?

2 And the woman said unto the serpent, We may eat of the fruit of the trees of the garden:

3 But of the fruit of the tree which is in the midst of the garden, God hath said, Ye shall not eat of it, neither shall ye touch it, lest ye die.

4 And the serpent said unto the woman, Ye shall not surely die:

5 For God doth know that in the day ye eat thereof, then your eyes shall be opened, and ye shall be as gods, knowing good and evil.

6 And when the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat.

7 And the eyes of them both were opened, and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.

15. *Exodus* 23:8 (King James).

16. The full verse is as follows:

Al-A'raf (The Heights)

والى منين أخافهم شعبنا قال يا قوم اعبدوا الله ما لكم من إله غيره قد جاءكم بينة من ربكم فآمنوا الكيل والميزان ولا تخسروا الناس أنفئاهم ولا أنفسوا في الأرض بعد إصلاحها فليكن خيرا لكم إن كنتم مؤمنين (7:85)

Translation:

(Asad) AND UNTO [the people of] Madyan [We sent] their brother Shu'ayb. He said: “O my people! Worship God alone: you have no deity other than Him. Clear evidence of the truth has now come unto you from your Sustainer. Give, therefore, full measure and weight [in all your dealings], and do not deprive people of what is rightfully theirs; and do not spread

Beyond these religious traditions, we have additional ancient evidence that suggests the acceptance of corruption as an inescapable verity:

Just as it is impossible not to taste the honey
(or the poison) that finds itself at the tip of the tongue,
so it is impossible for a government servant not to eat
up, at least, a bit of the king's revenue.
Just as fish moving under water cannot possibly be
found out either as drinking or not drinking water, so
government servants employed in the government
work cannot be found out (while) taking money for themselves.¹⁷

Few would dispute the conclusion that corruption is "somewhat universal,"¹⁸ "an expression of our humanity,"¹⁹ or "an ugly problem facing every human culture throughout history."²⁰ The recognition that corruption is a universal truth suggests that corruption cannot be completely eradicated. Despite this, the international community formally condemns corruption and has taken numerous steps to suppress and deter corruption.

B. *Defining Corruption*

Can we define corruption? Supreme Court Justice Potter Stewart once declared that although he could not define pornography, he knew it when he saw it.²¹ Similarly, we lawyers and legal scholars know corruption when we see it. This knowledge, however, arises out of cultural norms, not rigorous legal analysis. One of the most prominent scholars in this field, Susan Rose-Ackerman, has noted: "Corruption' is

corruption on earth after it has been so well ordered: [all] this is for your own good, if you would but believe." (Internal citations omitted.)

17. Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1320 (1997) (citing Kautilya, *Arthashastra* (4th Century B.C.), as interpreted by R.P. Kangle (1979)).

18. CORRUPTION IN INTERNATIONAL BUSINESS: THE CHALLENGE OF CULTURAL AND LEGAL DIVERSITY, 179-80 (Sharon Eicher ed., 2008).

19. RUPERT HODDER, HOW CORRUPTION AFFECTS SOCIAL AND ECONOMIC DEVELOPMENT: THE DARK SIDE OF POLITICAL ECONOMY 165-67 (2007).

20. Spahn, *supra* note 11, at 224.

21. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

a term whose meaning shifts with the speaker.”²² For example, the Chinese have the deeply ingrained tradition of *guanxi*, whereby social relationships are created and developed by providing gifts and favors. Similarly, in East Asia and Sub-Saharan Africa there is a long tradition of gift-giving. Although U.S. policy condemns such practices, we do accept our own practices of business lunches and Skybox entertainment for potential clients. Given the different ways corruption manifests, it can be difficult to define. Nonetheless, we know it when we see it.

For this article, I focus on corruption with respect to development aid, which, if reduced, would make aid intended for sustainable economic development more efficacious. Thus, the focus here is on “grand corruption,”²³ i.e., the embezzlement, theft and diversion of funds by government officials responsible for administering aid. This paper does not discuss “grease” or “facilitating” payments.²⁴ Similarly, patronage, nepotism, commercial bribery between private parties, and kickbacks that do not involve political figures or state bureaucracies, while important, are not the focus of this article.

C. *What is Aid?*

Foreign aid has been an American national priority since 1947 with the announcement of the Marshall Plan, which aimed to revive Europe in the aftermath of World War II. Although this aid was deemed tremendously successful, it is not the type of aid we deal with today. Europe needed to rebuild a physically destroyed capital base, but the institutions, knowledge, national policies and cultural habits necessary for self-sustaining economic growth had long been in place; much of the Marshall Plan’s aid was directed—whether directly or indirectly—at businesses which had functioned well prior to their destruction during World War II.

This is not the case in the “less developed,” “underdeveloped” or “third world” nations where aid flows today. Nineteenth century colonialism rapidly disappeared after World War II. Ultimately, decoloniza-

22. Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS, 301 (Bjorn Lomborg, ed., 2004).

23. Susan Rose-Ackerman, *Corruption and Government*, 15 INT’L PEACEKEEPING 328, 331 (2008).

24. 15 U.S.C. Section 78dd-1(b) excepts from the general prohibition of foreign bribery contained in 15 U.S.C. Section 78dd-1(a) “any facilitating or expediting payment . . . which is to expedite or to secure the performance of a routine governmental action” Such payments are often referred to as “grease” payments and generally affect only the timing of a governmental action to which the party is otherwise entitled.

tion increased the number of nations in need of aid to more than a hundred. A portion of this aid was not intended to rebuild previously functioning, developed economies, but to alleviate poverty in societies, which, to a large extent, had never industrialized. For more than four decades during the Cold War, aid donated by the United States and its NATO allies was largely structured to ensure that such nations were loyal to the Free World and not to the Communist Bloc. Such aid was designed to encourage political and diplomatic reliability. The USSR and the Warsaw Pact nations provided aid to secure exactly the opposite loyalty. If this aid was diverted by national leaders to personal use, this was not seen as a reason to terminate the aid, thus risking its primary diplomatic and political objectives.

D. *What Type of Aid?*

There are many forms of aid and many institutions and organizations committed to providing aid. One way to think about aid is to categorize it as development aid, humanitarian aid or on-going charitable aid.

- *Development aid* is focused on long-term economic growth in the receiving country and is generally directed to the receiving nation's government,²⁵
- *Humanitarian - emergency aid* is provided by foreign governments and non-governmental organizations ("NGOs"), often directly to victims of natural disasters, famine relief or other crises, and
- *Charitable aid*, which may be provided through the local government or may be administered by the provider, is directed towards on-going local issues, such as health and education programs, and is not directly focused on long-term economic growth.

There is a broad consensus that economic growth increases the income of the poor: "[economic] [g]rowth . . . has dramatically improved the absolute living standards of the poor as measured by human development indicators and income levels."²⁶ This article, therefore, deals with development aid, which aims to alleviate poverty by increasing per capita gross domestic product ("GDP"). While foreign direct investment ("FDI") and the policies that encourage such investment

25. Private sector aid aimed at economic development, such as micro loans, is not included here because it is not, to my knowledge, susceptible to grand corruption. Foreign direct investment can certainly support long-term economic growth and may be a source of corrupt payments but is not the focus of this article.

26. Ian Vásquez, *Official Assistance, Economic Freedom, and Policy Change: Is Foreign Aid Like Champagne?*, 18 CATO J. 275, 278 (1998).

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are often deemed crucial for economic development, FDI and humanitarian and charitable aid are beyond the scope of this article.

E. *Assumptions Underlying Aid Programs*

Having established that the goal of development aid is to reduce poverty by fostering sustained economic growth, the question becomes how to accomplish this in the developing world.

Transparency International (“TI”) is an international NGO that has been in the vanguard of anti-corruption efforts since the end of the Cold War when the incentives to overlook corruption in receiving nations subsided. TI’s corruption perception indices²⁷ reveal that nations with the highest levels of economic development have relatively little poverty and enjoy the lowest levels of perceived corruption. Of equal importance, the nations that do not suffer high relative rates of perceived corruption are, with few exceptions, liberal democracies with competing political parties and established, honest bureaucracies. These governments have enacted and enforced laws limiting corruption. Most of these governments decry trade protectionism and publicly espouse liberal economic policies, such as free trade and the free international movement of capital. These liberal democracies are also the source of most development aid. In light of this, we find that many aid-giving nations assume that developing nations could reduce poverty and corruption if they, too, embraced a liberal democratic model of governance.

III. AID INEFFECTIVENESS

A. *Correlation, Causation and Confusion*

Before considering the impact of grand corruption on aid, it is essential to understand the extensive scholarly literature in economics, sociology, political science, anthropology and law dealing with the effectiveness of aid. These studies measure aid effectiveness by its impact on poverty, economic development and the growth of democracy in aid-receiving nations.

Studies of the results of aid over the past few decades are shocking: scholars have found a *negative relationship* between development aid and economic growth. In one recent analysis, it was found that a *one percent increase in aid as a percent of GDP decreased annual real GDP per capita*

27. Transparency International, *Global Corruption Report 2009: Corruption and the Private Sector*, at 395–404, available at http://www.transparency.org/publications/gcr/gcr_2009.

growth by 3.65 percent.²⁸ Across the globe, aid has not brought about a meaningful increase in GDP per capita in most cases. Most importantly, there is no persuasive evidence that corruption in the form of diversion or embezzlement accounts for this failure. The consequences of international aid, as indicated in the following list of conclusions from various studies, are devastating:

- “The study of the effectiveness of international aid has generated a fast-growing literature. Most of the articles provide a negative answer: international aid is ineffective in fostering economic growth.”²⁹
- “[T]he empirical evidence on the effectiveness of foreign aid is discouraging.”³⁰
- “Despite the steady flow of development aid to poor countries in the last 50 years, the results have been somewhat disappointing (citing six studies from 1986 through 2001). Even though some countries, notably in East Asia, have managed to break out of poverty, many of the poorest countries have actually seen their real per capita incomes decline since the 1970s.”³¹
- A United Nations study of 100 countries determined that fifteen years of economic development aid (1980–1995) had not been terribly successful: “[i]n 70 of these countries average incomes are less than they were in 1980 — and in 43 countries less than they were in 1970.”³²
- A separate study has demonstrated that over a twenty-five year period from 1971–1995, there was no positive correlation between aid and growth. “In fact, aid as a percentage of GDP has a slightly negative correlation with economic growth.”³³
- As an economist from Zambia has stated, Africa’s “insidious aid culture” is an “*unmitigated political, economic and humanitarian disaster*.”³⁴
- Another scholar notes that although aid increases consumption, higher consumption does not benefit the poor. Furthermore, aid has not had a significant impact on basic measures of human

28. Tomi Ovaska, *The Failure of Development Aid*, 23 CATO J. 175, 186 (2003).

29. Simeon Djankov et al., *Does Foreign Aid Help?*, 26 CATO J. 1, 11 (2006).

30. *Id.* at 1.

31. Ovaska, *supra* note 28, at 175.

32. UNITED NATIONS DEVELOPMENT PROGRAMME, UNITED NATIONS HUMAN DEVELOPMENT REPORT 1996, at 1 (New York, Oxford University Press 1996).

33. Vasquez, *supra* note 26, at 276.

34. Dambisa Moyo, *Why Foreign Aid Is Hurting Africa*, WALL ST. J., Mar. 21, 2009, at W1.

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development such as infant mortality ratios or primary school enrollment.³⁵ Thus, although aid increases the size of government, it has no significant impact on poverty indicators.³⁶

- Others have similarly concluded that “unconstrained aid may increase public consumption rather than investment.”³⁷

B. *Why Does Aid Fail? Aid Dependency and the Curse of Unnatural Resources*

One study published in 2003 describes the condition of “aid dependency,” a condition that recipients of aid may develop.³⁸ As the African Development Bank confirmed in a 2008 report, aid can create dependency and encourage poor economic policies.³⁹ Earlier research found that “[a] secure source of foreign aid is a little like a diamond mine or an oil deposit. Countries with access to such largesse have a cushion that others lack.”⁴⁰ Another study compares the well-established curse of natural resources⁴¹ with foreign aid and suggests an analogous “curse of unnatural resources.”⁴²

Empirical research reveals a negative impact of foreign aid on both democracy and growth, because aid is found to reduce investment and increase government consumption.⁴³ One study provides evidence that in Somalia, where there are no natural resources, a civil war was sparked by efforts of opposition groups to control the humanitarian food aid being received.⁴⁴ Zambian economist Dambisa Moyo, edu-

35. Peter Boone, *Politics and the Effectiveness of Foreign Aid*, 40 EUR. ECON. REV. 289, 322 (1996).

36. *Id.* at 315.

37. Jeffrey Sachs et al., *Ending Africa's Poverty Trap*, BROOKINGS PAPERS ON ECON. ACTIVITY, 1:2004, 117–240 (2004).

38. Ovaska, *supra* note 28, at 184.

39. John Loxley & Harry A. Sackey, *Aid Effectiveness in Africa*, 20 AFR. DEV. REV. 163, 173 (2008).

40. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 213–14 (Cambridge University Press 1999) (citing Mick Moore, *Death Without Taxes: Democracy, State Capacity and Aid Dependency in the Fourth World*, in THE DEMOCRATIC DEVELOPMENTAL STATE: POLITICS AND INSTITUTIONAL DESIGN (Mark Robinson & Gordon White eds., Oxford University Press 1998)).

41. This explanation posits that a sudden windfall of oil, mineral or other wealth slows economic growth. Jeffrey Sachs & Andrew Warner, *Natural Resource Abundance and Economic Growth* (Harvard Inst. of Econ. Research, Working Paper No. 517, 1995).

42. Djankov, *supra* note 29 at 2, 5–7.

43. *Id.* at 2.

44. Djankov, *supra* note 29, at 9 (citing MICHAEL MAREN, THE ROAD TO HELL: THE RAVAGING EFFECT OF FOREIGN AID AND INTERNATIONAL CHARITY (The Free Press 1997)).

cated at Harvard and Oxford and with experience at both Goldman Sachs and the World Bank, points out the perhaps obvious fact that with a “constant stream of ‘free’ money in the form of aid, a bad government can retain power. [A]s long as it pays the army, it doesn’t have to take account of disgruntled citizens All the government really needs to do is to court and cater to its foreign donors to stay in power.”⁴⁵

1. Aid and Corruption During the Cold War

Prior to 1990, the effectiveness of aid in fostering sustainable economic growth was not always the primary concern. Instead, the Cold War motivated both sides to use aid to cement their “alliances.” Former President Mobutu Sese Seko of Zaire, now the Democratic Republic of Congo, was a long-standing “ally” of the United States during the Cold War⁴⁶ and is said to have amassed between four and eight billion dollars in personal wealth.⁴⁷

2. Is All Corruption Bad?

More than thirty years ago, Nathaniel Leff studied corruption in bureaucracies and challenged the accepted wisdom that corruption is always bad: “[t]he foregoing discussion suggests that many of the negative attitudes toward corruption are based upon special view points and interests Indeed, the criticism has become something of a ritual and a symbol-laden preamble accompanying policy discussion and statements in the underdeveloped countries. As such, it is cherished for the modicum of consensus it provides to otherwise antagonistic groups.”⁴⁸

Hernando de Soto challenged the broad conclusion that all corruption is bad in 1989 with his intensive study of the “informal economy,” or the black market, in Peru.⁴⁹ As a later researcher noted, de Soto did

45. Moyo, *supra* note 34.

46. Howard W. French, *Mobutu Sese Seko, 66, Longtime Dictator of Zaire*, N.Y. TIMES, Sept. 8, 1997, available at <http://partners.nytimes.com/library/world/090897obit-mobutu.html>.

47. Arik Hesseldahl, *How Dictators Manage Their Billions*, FORBES, June 22, 2000, available at <http://www.forbes.com/2000/06/22/feat.html>.

48. Nathaniel H. Leff, *Economic Development through Bureaucratic Corruption*, in BUREAUCRATIC CORRUPTION IN SUB-SAHARAN AFRICA: TOWARD A SEARCH FOR CAUSES AND CONSEQUENCES 325, 330 (Monday U. Ekpo ed., 1979).

49. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD*, (Harper and Row 1989).

not consider the informal economy as a problem where unregistered illegal companies and industries pay no taxes and compete unfairly with companies and industries who obey the law and pay their taxes promptly.⁵⁰ Instead, he believed that legality was a privilege available only to those with political and economic power, thus leaving the poor with no alternative but to turn to illegal means.⁵¹ According to de Soto, “[t]he names of the favored individuals or consortia change with each new government, but the system is always the same: not only does it concentrate the nation’s wealth in a small minority but it also concedes to that minority the *right* to that wealth.”⁵²

While the debate regarding the possible utility of corruption is not at issue here, Michael Johnston reminds us that “we cannot assume that without corruption all would be well. A Ministry of Development, cleansed of corruption, may still pursue poorly conceived policies or suffer from a lack of critical resources.”⁵³

3. No One Claims Grand Corruption is Good

The correlation between aid and corruption has been empirically tested: “[a]n increase in aid is associated with an increase in corruption and vice versa in that corruption appears to be persistent”⁵⁴ The end of the Cold War presented the opportunity for tighter standards to be applied to foreign aid. Disappointingly, the authors of one study found that the relationship between aid and corruption has not changed significantly since the end of the Cold War.⁵⁵

When aid is disbursed to governments whose incentives are to maintain bad policies so as to continue receiving aid, we can understand how some conclude that aid discourages policy reform.⁵⁶ Where this occurs, corruption is clearly not constrained and may even be encouraged. In fact, one study directly sought evidence suggesting that countries were rewarded with additional aid for their efforts to combat

50. Mario Vargas Llosa, *Foreword* to HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD*, at xi, xi-xii (1989).

51. *Id.* at xii.

52. *Id.* at xv.

53. Michael Johnston, *Corruption and Democratic Consolidation* 31, March 12, 1999 (revised June 2000), <http://people.colgate.edu/mjohnston/MJ%20papers%2001/Princeton.pdf>.

54. Alberto Alesina & Beatrice Weder, *Do Corrupt Governments Receive Less Foreign Aid?*, 92 AM. ECON. REV. 1126, 1135 (2002).

55. *Id.* at 1136.

56. Jac Heckelman & Stephen Knack, *Foreign Aid and Market-Liberalizing Reform* 11 (World Bank Policy Research Working Paper No. 3557, 2005).

corruption. Their findings disappoint: “[t]here is no evidence that less corrupt governments receive more foreign aid.”⁵⁷

As noted earlier, aid has failed to bring about a meaningful increase in GDP per capita in almost all cases. Significantly, there is no persuasive evidence that corruption is the cause of this failure: “[c]orruption neither accounts for all that is bad, nor cancels out all that is good, in any society.”⁵⁸ We need to deal with this reality. We must focus on making aid more effective; reducing corruption would have some impact on this. It is well to acknowledge, however, given the research discussed in Part II, that only a modest improvement in the effectiveness of aid may be expected by reducing corruption at the political or grand level.

C. *Imposing Good Policies Through Conditionality*

In the wake of numerous empirical studies confirming the many shortcomings in existing aid policies and practices, a new approach to aid—conditionality—was crafted in the early 1990’s. Conditionality required aid-receiving nations to agree to implement specific changes in domestic policies and practices if the aid was to be disbursed. The rationale for the new approach was straightforward: “[i]f overseas aid lack[ed] conditionality it [will] simply postpone painful decisions by masking underlying problems that would produce a crisis in less fortunate countries.”⁵⁹ Conditionality was to work as follows: the provider of aid first secured appropriate undertakings from the receiving nation regarding the policies, programs and uses for the aid desired by the provider. An initial tranche of the promised aid was then made available. The theory was that the aid receiving nation would then comply with the agreed upon conditions before successive tranches of the aid were released.

In practice this almost never happened. Aid recipients quickly learned that the aid agencies are in the business of providing aid; their success is measured by the amount of aid they disburse, not by the effectiveness of this aid.⁶⁰ As a World Bank study concluded, “[t]he conditionality principle does not seem to work because of the lack of credibility of the punishment.”⁶¹ Even when receiving nations failed to satisfy the pre-

57. Alesina & Weder, *supra* note 57, at 1136.

58. Johnston, *supra* note 56, at 4.

59. ROSE-ACKERMAN, *supra* note 40, at 213–14.

60. Vasquez, *supra* note 26, at 284.

61. Djankov, *supra* note 29, at 24.

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conditions for aid, the second tranche was still disbursed.⁶² Despite the conditionality, “ultimately the need to lend will overcome the need to insure that those conditions are . . . met.”⁶³

D. *Selectivity*

An early empirical study concluded that aid appeared to be effective when provided to nations which followed policies that foster economic growth.⁶⁴ However, limiting aid to countries following such policies—a method known as “selectivity”—has not proven a viable solution. The amount of policy change sufficient for the next tranche is, by nature, subjective. Furthermore, as mentioned above, aid agencies have an incentive to disburse aid regardless of a nation’s policies.⁶⁵ The policy of selectivity has hardly proved a boon: “[c]ountries following good policies are helped by foreign assistance, but the probability that a country adopts ‘good’ policies is not influenced by the amount of foreign aid received.”⁶⁶

To deny aid because the receiving nation is corrupt or incapable of implementing projects necessary for economic growth is a major diplomatic decision. It gives the impression that the aid provider seeks to maintain poverty. However, providing aid under such circumstances, rewards embezzlement, corruption and policies that do not foster long-term economic growth. Adding to this dilemma is a more recent empirical work, which concluded, “we no longer find that aid promotes growth [even] in good policy environments . . . [A]dding additional data to the . . . study of aid effectiveness raises new doubts about the effectiveness of aid and suggests that economists and policy makers should be less sanguine about concluding that foreign aid will boost growth in countries with good policies.”⁶⁷ In other words, even where policies we believe should foster growth are faithfully implemented, aid simply does not work.

Neither conditionality nor selectivity has served to make aid more effective or reduce corruption. And yet, corruption is not discouraged

62. Vasquez, *supra* note 26, at 281.

63. Gustav Ranis, *On Fast-Disbursing Policy-Based Loans*, Background Paper prepared for the Task Force on the United States and Multilateral Development Banks 6 (1996).

64. Craig Burnside & David Dollar, *Aid, Policies, and Growth*, 90 AM. ECON. REV. 847 (2000).

65. Vasquez, *supra* note 26, at 284.

66. Alesina & Weder, *supra* note 57, at 1127 (citing Burnside & Dollar, *supra* note 69).

67. William Easterly et al., *New Data, New Doubts: A Comment on Burnside and Dollar’s “Aid, Policies, and Growth”* (2000), 5–6, (Nat’l Bureau of Econ. Research, Working Paper No. 9846, 2003).

through a reduction in aid.⁶⁸

E. *Realities of the "Aid Industry"*

Aid has not always been granted with the best interests of the receiving nation in mind. For example, the disproportionate political influence of those involved in the domestic agriculture industry in the United States and in Europe can hardly be overstated. Both the United States and the European Union ("E.U.") insist upon exporting food to aid-receiving economies, despite the fact that such countries may have only an agricultural base. The rationale given in both the U.S. and the E.U. is "food security." However, it is obvious that such agricultural exports can only damage the development of a viable agricultural sector in nations receiving such "aid." Can we even call this "aid?" We do not call this "corruption," although its impact seems comparable. Sugar and cotton, crops important to several African economies, are outrageously subsidized by developed nations. The subsidies total approximately \$4 billion to U.S. and E.U. farmers.⁶⁹ As a point of comparison, annual U.S. aid to all of Africa totals approximately \$9 billion.⁷⁰ Meanwhile, the E.U.'s Common Agricultural Policy provides more than \$60 billion in annual direct farm subsidies. As the Chief Economist of the World Bank has noted, the E.U. agricultural subsidies include \$2.50 per E.U. cow per day, which is more than millions in Sub-Saharan Africa have to live on.⁷¹

Two decades into the post-Cold War era, the policies of aid-providing nations and institutions continue to have political motives and agendas beyond economic growth and poverty reduction. The following are a few examples from the economic research on aid:

- "Of course, growth is not the only goal of foreign aid. Political objectives like purchasing security or promoting democracy and human rights have often been part of foreign assistance."⁷²

68. Alesina & Weder, *supra* note 57, at 1126.

69. See Gumisai Mutume, *Mounting Opposition to Northern Farm Subsidies*, 17 AFRICA RECOVERY 18 (2003), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol17no1/17agri4.htm> for a discussion of the hypocritical aspects of the "aid" policies of the U.S. and the E.U. with respect to agriculture.

70. Michael A. Fletcher, *Bush Has Quietly Tripled Aid to Africa*, WASH. POST, Dec. 31, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000941.html>.

71. See Mutume, *supra* note 69.

72. Vasquez, *supra* note 26, at 276.

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- “Wealthy nations do not necessarily have purely unselfish motives when helping poorer countries through financial aid.”⁷³
- “U.S. aid flows can be explained by military and strategic factors. [For the] British and French aid goes to countries that were former colonies, and countries where these donors have historically strong trade relations and investment interests. OPEC aid is given to neighboring countries and favors members of the Arab League.”⁷⁴
- “Despite the popular belief that aid is primarily motivated to assist the poor, substantial evidence points to political, strategic and welfare interests of donor countries as the driving force behind aid programs.”⁷⁵

The sheer proliferation in sources of aid—national and multilateral programs and thousands of non-governmental organizations—generates its own set of inefficiencies and barriers to optimal aid effectiveness.

- “Donors compete to provide funds in the international aid market.”⁷⁶
- Donors compete for attractive projects which are consistent with their unique donor country priorities. They compete for the attention of senior government ministers, thus requiring the donee country to incur high transaction costs and inefficiencies accommodating different languages, policies, procedures and donor priorities. Because there are no traditional costs associated with receiving aid, the donee government has no incentive to refuse any aid.⁷⁷ Indeed, leaders of some aid-dependent countries are experts at securing aid. One could speculate that their incentives are to make aid as ineffective as possible, surely a form of corruption, in order to secure further aid. This eliminates any need to raise domestic taxes, always a difficult, unpopular move in any society.
- Donors are competitive, fashion-driven, and influenced by their own governments’ agendas.⁷⁸ In addition, the World Bank’s mission is to lend! In analyzing whether and how aid could be effective in promoting economic growth, one study describes the issues

73. Ovaska, *supra* note 28, at 175.

74. Boone, *supra* note 35, at 306.

75. *Id.*

76. Djankov, *supra* note 29, at 22.

77. *Id.* at 23.

78. Alan Doig & Heather Marquette, *Corruption and Democratisation: the Litmus Test of International Donor Agency Intentions?*, 37 *FUTURES* 199–213 (2005).

raised by a recent “proliferation of aid donor organizations,” which leads to a “very large increase in transaction costs for the recipient governments.”⁷⁹

- “My empirical results are consistent with a model where politicians maximize welfare of a wealthy elite”⁸⁰
- The political reality of our democracy, and perhaps of liberal democracy generally, includes the following:
 - Aid agencies of all kinds have a need to disburse aid. Even when it is clear that some proportion of such aid will be embezzled or otherwise diverted from its intended purposes, such aid is often disbursed;
 - There is an “aid industry” comprised of (i) farmers who export, (ii) Washington, D.C. consultants who profit by securing and administering overseas aid contracts, and (iii) academics and consultants who believe they know what is best for aid-receiving nations and are paid to provide such advice;
 - We have what Africa’s own Dambisa Moyo labels “liberal constituencies with ‘altruistic’ intentions to allay,”⁸¹ who do so by advocating for more aid regardless of its effectiveness;
 - Denial of or a conscious failure to recognize that almost all economic development in post-colonial underdeveloped nations has occurred under political regimes which were not liberal democracies.⁸²

IV. WHERE HAS AID BEEN EFFECTIVE?

The key drivers of aid effectiveness may perhaps be discerned by examining nations that have successfully established self-sustaining economic growth. While economists have had little success determining the key to aid effectiveness, they have determined that corruption is not a strong obstacle to economic development. Economic growth has been successfully established in some nations, including the “Asian Tiger” economies of Hong Kong, Singapore, South Korea and Taiwan. More recently, Malaysia, Indonesia, Thailand and China have also

79. Djankov, *supra* note 29, at 22.

80. Boone, *supra* note 35, at 322.

81. DAMBISA MOYO, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA 148 (Farrar, Straus and Giroux 2009).

82. See, *infra*, Part III.

emerged as rapidly developing economies. In these jurisdictions, the principal goal of development aid—the alleviation of extreme poverty—has been met or substantial progress towards that goal has been achieved. If we consider their relative levels of corruption, we note that although the small island jurisdictions of Singapore and Hong Kong have been uniquely successful in overcoming high levels of corruption, the remaining six continue to have high levels of perceived corruption as reported in the TI Corruption Perception Index (“CPI”) for 2009.⁸³ On the TI scale of 1 to 10, where 10 is the best rating, indicative of the lowest levels of perceived corruption, South Korea and Taiwan have CPI scores of 5.5 and 5.6, respectively. The remaining nations have ratings below 5.0 on this scale: China (3.6), Indonesia (2.8), Malaysia (4.5), and Thailand (3.4). Whatever we may ultimately be able to conclude about how to make aid more effective, these results make clear that corruption, at least as measured by TI’s CPI, is not a major obstacle to economic development.

Economists and other scholars have looked closely at the rise of the East Asian economies despite corruption and an obvious lack of liberal democracy. No definitive conclusions will likely ever achieve widespread acceptance or consensus. Some of the findings of these scholars are interesting, however:

- Perversely perhaps, a World Bank study reveals that development efforts in Taiwan and South Korea accelerated when aid was cut.⁸⁴
- Several studies have shown that growth rates in Africa have been tragically low, in part because of ethno-linguistic fractionalization arising out of the deep ethnic and tribal divisions and significant linguistic heterogeneity which are artifacts of the colonial period. In East Asia, we may have somewhat more cohesive societies than in Africa where European powers arbitrarily set national boundaries in the 19th century.⁸⁵
- “In late 1995 ex-president Roh Tae Woo [of South Korea] admitted that he alone had accumulated a personal fortune of around \$650 million over a five year period in office. While Roh’s behaviour had . . . serious political repercussions in South Korea, it was difficult to argue that economic performance had been seriously

83. Corruption Perceptions Index Table 2009, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (last visited June 5, 2010).

84. Heckelman & Knack, *supra* note 59, at 4.

85. William Easterly & Ross Levine, *Africa’s Growth Tragedy: Policies and Ethnic Divisions*, 112 Q.J. ECON. 1203 (1997).

undermined as a result.”⁸⁶ In countries with a clientelist patron-client network, economic growth “is related not to the extent of corruption but rather to the political structures which sustain different processes through which rights are created and reallocated.”⁸⁷

- “By the end of President Suharto’s 30-year rule in 1998, Indonesia ranked as one of the half-dozen most corrupt economies on the planet, according to Transparency International (TI). Yet in those three decades, the country also experienced growth in per capita income of 6 percent per year, a rate almost unparalleled in recorded human history. The past 30 years have seen comparable economic progress in China: since the 1976 death of Mao Zedong, the Chinese economy has eclipsed even Suharto-level growth rates despite also holding position 79 in TI’s latest ranking, tied with Burkina Faso.”⁸⁸

The “vast and inconclusive literature”⁸⁹ on the results of more than half a century of aid confirm a verdict of “indeterminacy” as to what makes aid work. Whatever else may be found to be true about the conditions that contribute to aid effectiveness, few can argue that corruption is the reason aid has failed. Nevertheless, “[t]here is no doubt about the overall verdict: corruption is bad for development.”⁹⁰

V. HOW IS GRAND CORRUPTION TO BE ADDRESSED?

Grand corruption is undeniably associated with development aid, but aid programs have fundamental problems apart from corruption. The empirical research has not found that corruption is a major impediment to the effectiveness of economic development aid. Decades of research into the effectiveness of such aid reveals the awkward,

86. Mushtaq Khan, *The Efficiency Implications of Corruption*, in DEVELOPMENT: CRITICAL CONCEPTS IN THE SOCIAL SCIENCES, VOL. IV, STATES, POLITICS AND CIVIL SOCIETY 299 (Stuart Corbridge ed., Routledge 2000). The Roh scandal was part of a much larger scandal involving twenty-four of the country’s chaebol, including the four largest, Hyundai, Samsung, Daewoo and [LG]. The chaebol involved were referred to in the Financial Times as a ‘roll-call of Korean Industry.’ *Id.* at 301.

87. *Id.* at 313.

88. Ray Fisman, argument, *The Bad Kind of Corruption*, FOREIGN POLICY, Mar. 24, 2010, available at http://www.foreignpolicy.com/articles/2010/03/24/the_bad_kind_of_corruption#comment-151166 (last visited June 5, 2010).

89. William Easterly, *Introduction: Can’t Take It Anymore?*, in REINVENTING FOREIGN AID 1, 18 (William Easterly ed., MIT Press 2008).

90. ALAN BEATTIE, FALSE ECONOMY: A SURPRISING ECONOMIC HISTORY OF THE WORLD 230, 226 (Riverhead Books 2009).

inconvenient and inescapable conclusion that current programs of administering and delivering aid do not produce sustainable economic growth. As discussed in Part IV(C), *infra*, major efforts to redesign aid programs are now underway. Reducing grand corruption remains a worthwhile goal. Less corruption means that more funds are available for economic development. Whether more aid is part of the solution to its ineffectiveness is the subject of much debate.⁹¹ I next consider the means available for addressing grand corruption in the aid context.

A. *Fighting Grand Corruption: The Inadequacies of Current Statutes and Conventions*

Despite the failure of aid efforts, America can be proud of its seminal role in initiating and leading the global fight against corruption in private commercial activities. The Foreign Corrupt Practices Act (“FCPA”),⁹² signed into law by President Jimmy Carter in 1977, had its origins in Congressional reaction to President Richard Nixon and the Watergate scandal.⁹³ For more than three decades, the FCPA has required companies to maintain accurate books and records of all payments and accounts held or controlled by them.⁹⁴ More significantly, the FCPA makes payments to foreign government officials to “obtain or retain business”⁹⁵ a federal offense.⁹⁶

The FCPA was not easily received by American businesses. Its pleas that “everyone is doing it” and “that is how business is done over there” failed to dissuade Congress from its mission to impose a new morality on international business. For two decades, American companies were subject to the FCPA’s restrictions on bribing foreign government officials while their international competitors were not. Twenty years of diplomatic shoving and pushing finally led to the adoption of the similar, although not identical, Organization for Economic Coopera-

91. See Part IV C and the text accompanying notes 138 through 146 *infra*.

92. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)).

93. An elaborate description of the genesis of the FCPA is found in an article by Stanley Sporkin, Head of Enforcement at the Securities and Exchange Commission when the FCPA was drafted. Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 Nw. J. INT’L L. & BUS. 269 (1998).

94. 15 U.S.C. § 78m(b)(2)(A) (1994).

95. 15 U.S.C. § 78dd-1 (1994).

96. *Id.*

tion and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Anti-Bribery Convention") in 1997.⁹⁷ There are now thirty-eight parties to the OECD Anti-Bribery Convention.⁹⁸

The FCPA and, later, the OECD Anti-Bribery Convention, broke new ground and established an entirely new approach to fighting corruption. The FCPA creates a federal criminal offense for acts which may be done entirely outside of the United States by persons who may not be U.S. citizens nor have ever visited the United States.⁹⁹ Like the FCPA, the OECD Anti-Bribery Convention requires the parties thereto to enact criminal statutes outlawing the overseas bribery of government officials.

While the enactment of the FCPA and the successful negotiation of this Convention created a new front in the "war against corruption," neither the FCPA nor the OECD Anti-Bribery Convention applies to grand corruption where the aid funds are provided by a government or a multilateral aid agency. The FCPA and the OECD Anti-Bribery Convention criminalize only the actions of private parties and legal entities that pay or offer to pay bribes;¹⁰⁰ they do not apply to the intended bribe recipient. In an important FCPA prosecution, a case was brought against both the alleged bribe payers and the foreign government officials who profited. In *U.S. v Castle*,¹⁰¹ the Fifth Circuit concluded that Congress did not intend for the FCPA to reach bribe-receiving foreign officials, either directly or as parties to a conspiracy to violate the FCPA. Thus, the FCPA has been limited to bribe payers and does not impact the foreign government officials accused of receiving a

97. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, November 21, 1997, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (last visited June 5, 2010).

98. The following are the thirty OECD members and eight additional parties (marked with an asterisk) to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention entered into force on February 15, 1999. *Argentina, Australia, Austria, Belgium, *Brazil, *Bulgaria, Canada, *Chile, Czech Republic, Denmark, *Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, *Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, *Slovenia, *South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

99. Press Release, Department of Justice, Former Alcatel Executive Pleads Guilty to Participation in Payment Of \$2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 7, 2007), http://www.justice.gov/opa/pr/2007/June/07_crm_411.html.

100. 15 U.S.C. § 78dd-2(a) (1994).

101. *U.S. v. Castle*, 925 F.2d 831 (5th Cir. 1991).

bribe. Similarly, the OECD Anti-Bribery Convention targets business bribe payers without reaching the government officials who profit from such bribes.

B. *Pushing on a String: Deterring Corruption at the Top*

Following the adoption of the FCPA and the OECD Anti-Bribery Convention, further diplomatic and political efforts led the United Nations to adopt the United Nations Convention Against Corruption (the “UNCAC”)¹⁰² in October 2003. The UNCAC entered into force on December 14, 2005.¹⁰³ Unlike the FCPA and the OECD Anti-Bribery Convention, the UNCAC requires parties thereto to criminalize the embezzlement of public funds by government officials.¹⁰⁴

The UNCAC has broad reach. Unfortunately, it fails to effectively address grand corruption in the aid context. Assuming all 143 parties to the UNCAC enacted laws criminalizing embezzlement and diversion of aid, there is little reason to believe that grand corruption would be impacted given that prosecutions under such laws would have to be initiated by these very officials. There exists no procedure for the United States, for example, to require or force a foreign sovereign to prosecute a senior government official, even where it was clear beyond peradventure that he has stolen millions or even billions of dollars in aid.

In the fall of 2007, the World Bank and the United Nations Office of Drugs and Crime (“UNODC”) began to address this issue by commencing an initiative to recover assets stolen by corrupt political figures. The Stolen Asset Recovery (StAR) Initiative¹⁰⁵ will seek to assist states to recover funds lost through crime, corruption, and tax evasion. The efforts to recover assets prior to the establishment of the StAR Initiative

102. Informal Preparatory Meeting of the Ad Hoc Committee on the Negotiation of a Convention against Corruption <http://www.unodc.org/unodc/en/treaties/CAC/background/adhoc-preparatory.html> (last visited June 5, 2010).

103. G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

104. *Id.* at art. 17. *Embezzlement, misappropriation or other diversion of property by a public official.* Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

105. STOLEN ASSET RECOVERY (STAR) INITIATIVE: CHALLENGES, OPPORTUNITIES, AND ACTION PLAN (United Nations Office of Drugs & Crime & the World Bank 2007), <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf>.

have been absurdly meager and outrageously lengthy. The Philippines recovered \$624 million from Swiss bank accounts established by Ferdinand Marcos, but the process extended over 18 years!¹⁰⁶ Of the \$3 to \$5 billion believed to have been taken from Nigeria by General Sani Abacha,¹⁰⁷ Nigeria recovered only \$505 million from Swiss banking authorities after a five-year battle.¹⁰⁸

The International Criminal Court does not take jurisdiction over cases involving theft or embezzlement.¹⁰⁹ This is true even for multi-billion dollar crimes, which delay development, cause starvation, or prevent construction of desperately needed development projects. Although well beyond the scope of this article, there are efforts underway to establish grand corruption as a universal crime or a crime under international law.¹¹⁰ With political will and determined leadership, the international community will one day acknowledge that grand corruption is a crime under international law and subject violators to prosecution wherever they may be found and regardless of where the corruption occurred.

1. Private Right of Action for Grand Corruption

Ever since Justice Clark made the surprising leap in *J.I. Case v. Borak*¹¹¹ to establish a private right of action under Section 14(a) of the Securities

106. The World Bank, FACT SHEET ON STOLEN ASSET RECOVERY, <http://search.worldbank.org/all?qterm=stolen%20asset%20fact%20sheet> (follow "News & Broadcast - Fact Sheet on Stolen Asset Recovery" hyperlink).

107. See Ignasio Jimu, *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan* 8 (Basel Inst. of Governance's Int'l Centre for Asset Recovery, Working Paper No. 06, 2010), http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf.

108. See *id.* at 6.

109. See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998), available at http://untreaty.un.org/cod/icc/statute/99_cort/cstatute.htm.

Article 5 Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

110. See Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Corruption to a Crime Under International Law*, 34 INT'L LAW. 149 (2000).

111. See *J.I. Case Co. et al. v. Borak*, 377 U.S. 426 (1964).

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Exchange Act, plaintiffs have sought to establish such rights in other areas. The standards for finding such a private right of action are now set out in *Cort v. Ash*.¹¹² While the FCPA has been found to support a limited number of ancillary claims (*e.g.*, a FCPA violation may serve as a predicate offense in an action brought under the Racketeer Influenced and Corrupt Organizations Act (“RICO”)¹¹³ in certain circumstances),¹¹⁴ there is no general right for a private party to bring a claim for a violation of the FCPA.¹¹⁵ The Foreign Business Bribery Prohibition Act of 2009, HR 2152, was introduced to the House of Representatives in April 2009 by Representative Ed Perlmutter, a Democrat from Colorado.¹¹⁶ This bill had also

112. See *Cort et al. v. Ash*, 422 U.S. 66 (1975).

113. See 18 U.S.C. § 1961–68 (2009).

114. *Environmental Tectonics v. W.S. Kirkpatrick Inc.*, 847 F.2d 1052 (3rd Cir. 1988) (violations of the FCPA accepted as predicate act under RICO), *aff’d on other grounds*, 110 S.Ct 701 (1990).

115. See *Lamb v. Philip Morris Inc.*, 915 F.2d 1024, 1030 (6th Cir. 1990).

116. See Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Congress (2009).

To authorize certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations by foreign concerns that damage domestic businesses.

IN THE HOUSE OF REPRESENTATIVES April 28, 2009

A BILL To authorize certain private rights of action under the Foreign Corrupt Practices Act of 1977 for violations by foreign concerns that damage domestic businesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Foreign Business Bribery Prohibition Act of 2009.’

SEC. 2. ACTIONS AUTHORIZED.

Section 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-3) is amended—

- (1) by redesignating subsection (f) as subsection (g); and
- (2) by inserting after subsection (e) the following:
 - (f) Private Rights of Action Authorized-

(1) **AUTHORIZED PLAINTIFFS-** Any foreign concern that violates subsection (a) shall be liable in an action brought in accordance with this subsection in any court of competent jurisdiction to any issuer which is subject to section 30A of the Securities Exchange Act of 1934, domestic concern which is subject to section 104 of this Act, or other United States person that is damaged by the violation of subsection (a) of this section for damages caused to such issuer, domestic concern, or other person by the violation.

(2) **PROOF OF DAMAGES-** For purposes of this subsection, a plaintiff in an action under this subsection must allege and prove that—

been introduced in earlier sessions of Congress but has never been reported out of committee.¹¹⁷ Were it to be enacted in its present form, HR 2152 would apply only to private parties who could establish that

-
- (A) the defendant foreign concern violated subsection (a); and
 - (B) the defendant foreign concern's violation of subsection (a)—
 - (i) prevented the plaintiff from obtaining or retaining business for or with any person; and
 - (ii) assisted the foreign concern in obtaining or retaining such business.

(3) MEASURE OF DAMAGES-

(A) IN GENERAL- The damages which a plaintiff may obtain in an action under this subsection may be equal to the higher of the two following amounts that are established by the plaintiff's allegations and proof:

- (i) The total amount of the contract or agreement that the defendant gained in obtaining or retaining business by means of the violation of subsection (a).
- (ii) The total amount of the contract or agreement that the plaintiff failed to gain because of the defendant's obtaining or retaining business by means of the violation of subsection (a).

(B) TREBLE DAMAGES- In assessing damages under subparagraph (A), the court shall enter judgment for three times the amount determined under clause (i) or (ii) of such subparagraph (whichever is greater), together with a reasonable attorney's fee and costs, for any violation of subsection (a).

(4) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION- The exception in subsection (b) shall apply to an action under this subsection.

(5) AFFIRMATIVE DEFENSES- The affirmative defenses in subsection (c) shall apply to an action under this subsection.

(6) CONTRIBUTION- Every person who becomes liable to make payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(7) STATUTE OF LIMITATIONS- No action shall be maintained to enforce any liability created under this subsection unless brought within three years after the discovery of the facts constituting the cause of action and within six years after such cause of action accrued.

(8) DEFINITIONS-

(A) FOREIGN CONCERN- For purposes of this subsection, the term 'foreign concern' means any person other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934, a domestic concern which is subject to section 104 of this Act, or another United States person.

(B) UNITED STATES PERSON- The term 'United States person' has the meaning given such term in section 104(i)(2) of this Act.

117. H.R. 2152 has been referred to the House Committee on Energy and Commerce, House Committee on Judiciary, and the House Committee on Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. See Govtrack.us, H.R. 2152 Foreign Business Bribery Prohibi-

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another party violated the FCPA and that such violation damaged the plaintiff. HR 2152 does not directly address the diversion or embezzlement of aid funds by senior government officials in aid-receiving nations. However, HR 2152 deserves support since under limited circumstances, it could serve to deter some instances of aid-related grand corruption where private parties subject to the FCPA are involved in the aid program.

2. Financial Privacy for Senior Government Officials

Should heads of state and other government officials be afforded financial privacy? If the president of the United States suddenly had \$30,000,000 deposited into his or her account, citizens would certainly like to know. Many nations have financial disclosure laws. Unfortunately, these can be avoided through the use of bank accounts in jurisdictions that have extensive “bank secrecy” laws. One effective step toward eliminating grand corruption would be to deny secret bank accounts to heads of state and other senior government officials. “Private banking” for the extremely wealthy is an immensely profitable and attractive business. In recent decades, many nations have enacted elaborate anti-money laundering and counter terrorist financing laws.¹¹⁸ And while there have been repeated violations of these laws by American banks, with some settlements involving penalties of hundreds of millions of dollars,¹¹⁹ banks have not abandoned such business opportunities.

The world is well aware of the special place Swiss bank secrecy laws have in the hearts of the super-wealthy. One reason for a non-resident of Switzerland to place funds in Swiss banks is to avoid paying taxes

tion Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2152&tab=committees> (last visited Jun. 2, 2010).

118. See Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956–1957 (2009); International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 296 (codified as amended in scattered sections of 31 U.S.C.).

119. Major banks have settled for money laundering violations which, according to publicly available information, almost certainly had to be known to bank officials but nevertheless continued over long periods of time. See, e.g., Vikas Bajaj, *Iran Moved Billions via U.S. Banks*, N.Y. TIMES, Jan. 9, 2009, at B1 (reporting a \$350 million settlement agreed to be Lloyds TSB Group); John Elignon, *As Reign Dwindles, Morgenthau Ponders What Comes Next*, N.Y. TIMES, Dec. 27, 2009, at A 20 (reporting a \$536 million settlement with Credit Suisse); Timothy L. O'Brien, *Bank Settles U.S. Inquiry Into Money Laundering*, N.Y. TIMES, Nov. 9, 2005 (reporting a \$38 million settlement, including fines, paid by Bank of New York); *Wachovia Bank, N.A. Settles Previously Disclosed Compliance Matters*, MARKET WATCH, Mar. 17, 2010, http://www.marketwatch.com/story/wachovia-bank-na-settles-previously-disclosed-compliance-matters-2010-03-17?reflink=MW_news_stmp (reporting a March 2010 \$160 million settlement by Wachovia Bank, N.A.).

back home. Another reason is that Swiss bank secrecy laws create an excellent hiding place for stolen millions or billions.¹²⁰ Over the past few years there have been several attacks on Switzerland's rule of absolute secrecy for holders of Swiss bank accounts.

For example, after many months of negotiation, the United States and Switzerland arrived at an arrangement whereby the details of thousands of Swiss bank accounts held by Americans were to be disclosed to U.S. government authorities.¹²¹ In addition, the Geneva office of HSBC, the largest bank in Europe, reported that information on 15,000 accounts had been stolen by an employee and made available to French tax authorities.¹²² In Germany, authorities recently paid more than \$3.4 million for data on 1,500 accounts taken from Credit

120. General Sani Abacha, who ruled Nigeria for just five years, is believed to have stolen more than \$3 billion, much of which was sequestered in Swiss banks. The Nigerian case involves a different form of corruption since the grand corruption there involved theft of hundreds of billions in oil revenues which otherwise would have been available for economic development. See Paul I. Adujie, *Swiss Banks: Demands By America & Nigeria*, NIGERIAN VILLAGE SQUARE, <http://www.nigeriavillagesquare.com/articles/paul-adujie/swiss-banks-demands-by-america-a-nigeria.html> (last visited June 5, 2010). Haitian dictator Jean-Claude Duvalier, who left Haiti in 1986, had similarly hidden funds in Swiss accounts. Litigation in Switzerland seeking to return the funds back to the Haitian government failed in January 2010. See *Swiss Court Reverses Award of Duvalier Millions*, N.Y. TIMES, Feb. 3, 2010, available at <http://www.nytimes.com/2010/02/04/world/americas/04duvalier.html>. The Swiss government has apparently been seeking to "shed its image as an investment haven for the world's dictators." See *id.*

121. See Sen. Carl Levin, Statement of Sen. Carl Levin on Disclosure of Annex to the U.S.-Swiss Settlement Agreement in the UBS Case (Nov. 17, 2009) in Government Statement, Financial Integrity & Economic Development, <http://www.financialtaskforce.org/2009/11/17/statement-by-senator-carl-levin-on-us-swiss-annex-in-ubs-case> (last visited June 5, 2010).

While it is good to know that 14,700 people have now disclosed previously hidden offshore bank accounts, the U.S.-Swiss Annex disclosed today, designed to compel disclosure of the names of U.S. persons with Swiss accounts at UBS, is very disappointing. It complicates and muddies what should have been a straightforward agreement by UBS and the Swiss Government to disclose Swiss accounts hidden from the United States by U.S. accountholders. UBS admitted last year that it "participated in a scheme to defraud the United States" out of tax revenue. Since then, UBS has been prohibited by its government from simply turning over the names of the 52,000 U.S. clients suspected of participating in that tax evasion scheme with UBS. Instead, the tortured wording and the many limitations in this Annex shows the Swiss Government trying to preserve as much bank secrecy as it can for the future, while pushing to conceal the names of tens of thousands of suspected U.S. tax cheats. It is disappointing that the U.S. government went along.

122. See Dylan Griffiths & Warren Giles, *HSBC's Private Bank Reports Data Theft on 15,000 Swiss Accounts*, BLOOMBERG BUSINESSWEEK, Jun. 3, 2010, <http://www.businessweek.com/news/2010-03-11/hsbc-private-bank-suisse-says-15-000-affected-by-data-theft.html>.

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Suisse, a major Swiss bank.¹²³ Announcement of the acquisition of this data by German tax authorities has, according to press reports, led more than 10,000 German taxpayers to voluntarily reveal their Swiss accounts and pay back taxes and fines to avoid prosecution for tax evasion.¹²⁴ In 2008, Germany paid for similar data stolen from the largest bank in Liechtenstein.

Despite strident protests from the Swiss, there is no defensible policy reason that the Swiss, or any other sovereign, should be allowed to protect account details or the names of account holders who deposit stolen funds. Anti-money laundering and counter terrorism financing laws need strengthening to prevent heads of state and others from sequestering the proceeds of bribes, embezzlement and theft.¹²⁵ The UNODC StAR Initiative, if successful, would be a start. Changes in U.S. law made in March 2010 may also have a positive impact, particularly if other nations follow with comparable legislation.¹²⁶

C. *Resetting the Aid Agenda*

The long-standing ineffectiveness of aid is not being ignored. Recent books have proposed new approaches, which, it is hoped, will improve aid efficacy. Glenn Hubbard and William Duggan recently published, *The Aid Trap: Hard Truths About Ending Poverty*.¹²⁷ William Easterly has edited *Reinventing Foreign Aid*¹²⁸ and previously published *The Elusive*

123. See Edward Taylor, *Credit Suisse Clients, Staff Face German Tax Probe*, REUTERS, Mar. 19, 2010, <http://www.reuters.com/article/idUSLDE62I1MK20100319>.

124. See Adam Sage, *Crédit Suisse Clients Accused of Tax Evasion*, TIMES ONLINE, Mar. 20, 2010, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article7069146.ece.

125. While the FATF is the source of Anti-Money Laundering and Counter Terrorist Financing recommendations, the United Nations Office of Drugs and Crime is leading an effort, the StAR Initiative, which may well be able to make progress. See *supra* text accompany notes 115-18.

126. Under cover of the media storm over negotiating "health reform" legislation, on March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment ("HIRE") Act, H.R. 2847. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat 71 (codified as amended in scattered sections of U.S.C.). The HIRE Act includes a Title V, which requires foreign financial and nonfinancial institutions to withhold 30% of payments made to such institutions by U.S. individuals unless such institutions agree to disclose the identity of such individuals.

127. R. GLENN HUBBARD & WILLIAM DUGGAN, *THE AID TRAP: HARD TRUTHS ABOUT ENDING POVERTY* (2009).

128. William Easterly, ed., *Reinventing Foreign Aid* (The MIT Press 2008).

Quest for Growth,¹²⁹ in which he decries the inability of donor nations to acknowledge the shortcomings of long-established aid policies. Hubbard and Duggan note the success of Muhammad Yunus, the Bangladeshi Nobel laureate who created “micro lending,” through which millions have been enabled to start viable, sustainable businesses, thus working their way out of poverty.¹³⁰ Dambisa Moyo, the Zambian economist, has condemned the “vicious cycle of aid” evident in Sub-Saharan Africa both in Op-ed pieces¹³¹ and in a book published in 2009, *Dead Aid: Why Aid Is Not Working and Why There Is a Better Way for Africa*.¹³² Her prescription links corruption to the failure of aid but her solution is trade focused; she applauds the progress China has made in increasing trade with Africa. As she has said: “If the [W]est wants to be moralistic about Africa’s lack of development, trade is the issue it ought to address.”¹³³

Defying the numerous studies that suggest a negative correlation between aid and per capita GDP, Jeffrey Sachs, former head of the United Nations’ Millennium Development Project, has produced an extensive report¹³⁴ outlining how the United Nations can attempt to meet its eight Millennium Development Goals, one of which is to eliminate severe poverty by 2014. Sachs proposes vastly increased grant aid to Africa in another effort to achieve “*The End of Poverty: Economic Possibilities for Our Time*,” the title of his 2005 book.¹³⁵ These and other books contribute to the conversation about the effectiveness of aid. Unfortunately, given the lack of agreement among these authors, it is

129. WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH : ECONOMISTS’ ADVENTURES AND MISADVENTURES IN THE TROPICS* (2002).

130. Hubbard, *supra* note 139, 82–84.

131. Dambisa Moyo, *supra* note 34.

132. Moyo, *supra* note 89, at 49.

Foreign aid props up corrupt governments – providing them with freely usable cash. These corrupt governments interfere with the rule of law, the establishment of transparent civil institutions and the protections of civil liberties, making both domestic and foreign investment in poor countries unattractive. Greater opacity and fewer investments reduce economic growth, which leads to fewer job opportunities and increasing poverty levels. In response to growing poverty, donors give more aid, which continues the downward spiral of poverty.

This is the vicious cycle of aid.

133. *Id.* at 119.

134. See JEFFREY SACHS, U.N. MILLENNIUM PROJECT, *INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS* (2005), available at <http://www.unmillenniumproject.org/reports/fullreport.htm>.

135. See JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005).

likely this conversation will merely carry on with little tangible result.

VI. CONCLUSIONS

A. *Hypocrisy*

In the nearly four centuries since the highly motivated Puritans stepped on Plymouth Rock, we have not succeeded in eliminating corruption. Neither have we succeeded in eliminating poverty in our own land, although we are wealthy enough that no one needs to live on less than \$2.00 per day. We are not told that the more than \$2.5 trillion in total aid allocated to the underdeveloped world has not been particularly successful in reducing, much less eliminating, global poverty. Despite innumerable studies demonstrating that long-term economic development aid has been counter-productive, governments continue to allocate billions in programs that do little good in the receiving nations and permit a few senior officials in aid-receiving nations to enrich themselves at the expense of their own citizens.

During the Cold War, corruption by senior officials was overlooked in our effort to secure the cooperation of nations led by truly corrupt figures. Unfortunately, in the decades since the fall of the Berlin Wall, there has been almost no meaningful progress in tightening aid standards to reduce such corruption.¹³⁶ Even today, the United States government deals with corrupt senior officials of select nations despite overwhelming evidence that their conspicuous wealth was not acquired legitimately.¹³⁷

Major banks in the United States and Europe, particularly Switzer-

136. Alesina & Weder, *supra* note 57, at 1136.

137. See Ian Urbina, *Taint of Corruption is No Barrier to U.S. Visa*, N.Y. Times, Nov. 16, 2009, at A1.

Several times every year, Teodoro Nguema Obiang arrives at the doorstep of the United States from his home in Equatorial Guinea, on his way to his \$35 million estate in Malibu, Calif., his fleet of luxury cars, his speedboats and private jet. And he is always let into the country. The nation's doors are open to Mr. Obiang, the forest and agriculture minister of Equatorial Guinea and the son of its president, even though federal law enforcement officials believe that "most if not all" of his wealth comes from corruption related to the extensive oil and gas reserves discovered more than a decade and a half ago off the coast of his tiny West African country, according to internal Justice Department and Immigration documents.

Again, this particularly egregious bit of hypocrisy relates to a senior official who has apparently acquired oil wealth from his nation's natural resources and did not acquire his millions diverting aid.

land, maintain their private banking relationships with what the OECD's Financial Action Task Force labels "Politically Exposed Persons."¹³⁸ An Asian Development Bank report notes that despite (i) being caught protecting funds stolen by senior government officials and (ii) conceding liability, publicly traded banks exposed for aiding grand corruption do not suffer in the securities markets and apparently are not easily persuaded to stop accepting deposits from questionable parties.¹³⁹

B. *Hyperbole*

Notwithstanding the political rhetoric and hyperbole, we shall not defeat, conquer, eradicate or cure corruption. Corruption is a regrettable but normal characteristic of organized human society. Accepting that we shall not eliminate corruption, we nevertheless should implement new policies, which could work to reduce, suppress, discourage and deter corruption.

C. *Hubris*

Our prosperity, favorable ratings on the TI perceptions of corruption indices, and relative lack of poverty seem to have convinced us that we are the economic and political role model for the world. America's aid programs require aid-receiving nations to adopt economic and political policies that we, as a highly developed post-industrial nation, espouse, rather than policy packages which have been shown to be effective in developing countries. Similarly, our focus upon instituting liberal democratic reforms in aid-receiving countries is inconsistent with the disturbing, yet incontrovertible, observation that where sustainable economic growth has successfully been established, it has been under governments which cannot be described as liberal democratic.

138. The Financial Action Task Force defines "Politically Exposed Persons" (PEPs) as "individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories." THE FORTY RECOMMENDATIONS 11 (The Financial Action Task Force ed., 2003), available at <http://www.fatfagafi.org/dataoecd/42/43/33638117.pdf>.

139. See Jason Sharman, ABD/OECD ANTI-CORRUPTION INITIATIVE FOR ASIA & THE PACIFIC, POLITICALLY EXPOSED PERSONS 4-5 (2009), available at <http://www.oecd.org/dataoecd/49/28/44442190.pdf>.

D. *Humility*

The results of development aid over recent decades have been negative in many instances. GDP per capita has actually fallen even as aid was delivered. After more than 60 years and \$2.5 trillion in aid, there are many nations where poverty continues or has become worse. Given the embarrassingly poor record of aid in effecting long-term economic growth, a great deal of humility is called for. As the academic studies described in Part II have established, the "Inconvenient Truth" is that long-term economic development aid has not eliminated, but has exacerbated, extreme poverty in the undeveloped world.

So long as traditional notions of sovereignty remain the foundation of international law and diplomatic relations, the decision to prosecute heads of state and senior government officials who are responsible for the theft of aid funds will remain in the hands of those very officials. Alleviating extreme poverty remains a worthy goal for the planet. To an indeterminate extent, this goal may be fostered by aid. While humanitarian and emergency aid provided by international institutions, wealthy nations, and NGOs has been effective, if not always efficient, aid intended to foster conditions that will promote long-term, self-sustaining economic growth in underdeveloped nations has not been successful. Grand corruption in the form of diversion, embezzlement and theft of aid is one of the mechanisms responsible for a small, but undetermined portion of the failure of this aid. Rethinking the ways aid is administered and delivered and encouraging international cooperation could reduce the absolute amount of grand corruption and eliminate poverty. If the political will and leadership could be mustered, grand corruption might be added to the short list of internationally recognized crimes, which are capable of being prosecuted under universal jurisdiction. Unfortunately, given that narrow political interests drive our democracy, I am not optimistic that poverty will be eliminated even with another six decades of aid.

