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United States v. Lazarenko: Filling in Gaps in Support and Regulation of Transnational Relationships

Abstract

The prosecution in the United States of Pavlo Lazarenko for corruption merits study for two reasons. First, it provides case study of the use of local laws to deal with a transnational act. Law should support and regulates interaction within communities; local laws that stop at the borders do little to support transnational communities and international law, which does not recognize most transnational persons as legitimate subjects of international law, does even less. The court that tried Lazarenko could not therefore rely solely on its local law nor could it turn to nonexistent transnational law; instead it cobbled together local U.S. law and Ukrainian law. At different times in the process, the court exhibited skill and a lack of sensitivity to the process.

In cobbling together local laws, the court also created a tool for controlling transnationally corrupt public officials. Corruption presents a significant obstacle to global and local development and growth. The creation of a tool to combat transnational corruption offers possible amelioration for many more who suffer the degradations of corruption.

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Comments

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University of Pennsylvania

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United States v. Lazarenko: Filling in Gaps in Support and Regulation of Transnational Relationships

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United States versus Lazarenko: Filling in Gaps in Support and Regulation of Transnational Relationships

Philip M. Nichols*

Summary

The prosecution in the United States of Pavlo Lazarenko for corruption merits study for two reasons. First, it provides case study of the use of local laws to deal with a transnational act. Law should support and regulates interaction within communities; local laws that stop at the borders do little to support transnational communities and international law, which does not recognize most transnational persons as legitimate subjects of international law, does even less. The court that tried Lazarenko could not therefore rely solely on its local law nor could it turn to nonexistent transnational law; instead it cobbled together local U.S. law and local Ukrainian law. At different times in the process, the court exhibited skill and a lack of sensitivity to the process.

In cobbling together local laws, the court also created a tool for controlling transnationally corrupt public officials. Corruption presents a significant obstacle to global and local development and growth. The creation of a tool to combat transnational corruption offers possible amelioration for many more who suffer the degradations of corruption.

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In August of 2006, a United States District Court in San Francisco sentenced Pavlo Lazarenko, the former Prime Minister of Ukraine, to serve nine years in prison.¹ Pavlo Lazarenko stood convicted of corrupt acts, including money laundering, wire fraud, and transportation of stolen property.² Lazarenko certainly does not stand alone as a convicted corrupt politician.³ His conviction is unique, however, as the first in the United States of a foreign leader based in part on the violation of laws in that leader’s home country.⁴

The particulars of Lazarenko’s case are provocative. Lazarenko inflicted a tremendous amount of damage on Ukraine and the Ukrainian people. He subverted the transition of a nation emerging from years of occupation. He manipulated banks and financial institutions in a number of countries.⁵ In the particulars, his conviction constitutes justice.

Even more important than the particulars of Lazarenko’s actions, however, although not as sensational, is the manner in which the trial court used laws. Lazarenko did not conform his malfeasance to the borders of a single country; like many corrupt officials his actions took place across political boundaries. Lazarenko was an internationally corrupt person. The traditional theory of international law, however, does not recognize Lazarenko as an international actor, and therefore does not provide a means to control him.

¹ See Jesse McKinley, *9 Years In U.S. Prison For Ex-Premier*. N.Y. TIMES, Aug. 26, 2006, at A3 (describing sentence and noting that this was the first conviction of a former leader since that of Manuel Noriega of Panama).

² See *United States v. Lazarenko*, 469 F.3d 815, 818 (9th Cir. 2006), *reprinted as am’d United States v. Lazarenko*, 2007 U.S. App. LEXIS 2623 (9th Cir. Feb. 7, 2007), *am’d, rehear’g denied, rehear’g en banc denied*, *United States v. Lazarenko*, 2007 U.S. App. LEXIS 2612 (9th Cir. Feb. 7, 2007) (describing the conviction).

³ See Peter W. Schroth, *Corruption and Accountability of the Civil Service in the United States*, 54 AM. J. COMP. L. 553, 553-568 (2006) (providing examples of corruption proceedings in the United States); see generally John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293, (2000) (book review) (discussing corruption in the United States).

⁴ Manuel Noriega was convicted of violations of U.S. laws. See *Recent Case – Separation of Powers – Head-of-State Immunity – Eleventh Circuit Holds That the Executive Branch’s Capture of Noriega Exempts Him from Head-of-State Immunity*, 111 HARV. L. REV. 849, 849 (1998) (noting that the United States charged Manuel Noriega with violation of U.S. drug laws).

⁵ See *infra* notes 59-73 and accompanying text.

The failure of international law does not mean that Lazarenko's behavior should escape punishment.⁶ Corruption presents perhaps the greatest obstacle to social and economic development throughout the world.⁷ The world is increasingly comprised of transnational communities, but international law fails to support or to regulate these transnational communities, particularly with respect to the control of corruption.⁸ Until international law catches up to the world, some other means of supporting or controlling transnational behaviors must be devised. Cobbling together local laws so that they roughly fit transnational behaviors provides one interim solution. That is precisely what occurred in the conviction of Pavlo Lazarenko: a United States District Court cobbled together two sets of local laws to create a viable and fair mechanism for trying a transnational criminal.

The conviction of Pavlo Lazarenko is meaningful because justice always matters, and a bad person has earned his dues.⁹ The trial of Pavlo Lazarenko, however, is perhaps even more noteworthy as a case study of the cobbling together of local laws. As with any case study, it supplies lessons regarding best and worst practices.¹⁰ The trial of Pavlo Lazarenko also suggests a new and potent tool for combating the devastating phenomenon of transnational corruption. For these reasons, any person interested in either transnational communities in general or corruption in particular must examine this case.

This paper begins with an exposition of the general failure of international law.¹¹ It then briefly recounts the actions of Pavlo Lazarenko, and explains how corruption damages societies

⁶ See Patrick Donahue, *Corruption Watchdog Downgrades U.S.: Scandals Hurt America's Standing*, WASH. POST, Nov. 8, 2006, at A25 (quoting the executive officer of Transparency International as emphasizing a need for some device for prosecuting transnationally corrupt actors).

⁷ See Alexandru Grigorescu, *The Corruption Eruption in East-Central Europe: The Increased Salience of Corruption and the Role of Intergovernmental Organizations*, 20 E. EUR. POL. & SOC. 516, 519 (2006) (Corruption "is now seen as one of the greatest threats to the survival of new democracies around the world.").

⁸ See *infra* notes 49-51 and accompanying text; Antonin Cohen, *Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s)*, 32 LAW & SOC. INQ. 109, 109-110 (2007) (describing the creation of a transnational community not aided by local legal systems); Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 261-269 (1999) (discussing transnational communities).

⁹ See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1443 (2001) ("doing justice is an important value in its own right").

¹⁰ See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 656 (1998) (using the "case study" of a Moscow storefront to find insights into the role of law in a transition economy); Robert A. Katzmann, *Making Sense of Congressional Intent: Statutory Interpretation and Welfare Policy*, 104 YALE L.J. 2345, 2353 (1995) ("case studies have important implications for scholars interested in the role of courts in the policy process").

¹¹ See *infra* notes 16-58 and accompanying text.

such as Ukraine's.¹² The paper then examines the trial of Pavlo Lazarenko through analysis of two orders issued by the trying court.¹³ The paper looks at what was done well and what was not done well in those orders, and the interplay between a trial of this type and issues surrounding sovereignty.¹⁴ Finally, the paper fixes the technique exemplified by the trial of Lazarenko into the network of tools available for dealing with transnational corruption.¹⁵

1. *Criticisms of International Law*

Criticisms of international law abound.¹⁶ The predominant theory of international law, and thus the primary target of such criticism, traces its philosophical roots to Aristotle, its primary assumptions regarding international actors to the Treaty of Westphalia, and its principle tenets to Grotius and Leibniz.¹⁷ Other theoretical frameworks with roots in other places, such as Vedic tenets¹⁸ or the Ikh Yasa of the vast Mongolian empire¹⁹ or rules of the African

¹² See *infra* notes 59-73 and accompanying text; see also notes 74-128 and accompanying text (discussing damage caused by corruption)

¹³ See *infra* notes 129-206 and accompanying text.

¹⁴ See *infra* notes 207-269 and accompanying text.

¹⁵ See *infra* notes 270-302 and accompanying text.

¹⁶ See David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 417, 418 (1994) (noting "a dramatic increase during the past two decades in the volume of scholarly work that aims to rethink the foundations of international law and to respond to recent trends in political, social, and legal theory"); Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L.J. 399, 404 (1994) (discussing criticism of the concept of sovereignty).

¹⁷ See JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 7-14 (9th ed. 1984); see also Ann-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 721-22 (1995) (noting that the realist school dominated international relations theory for "virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau").

¹⁸ See VED P. NANDA & SURYA PRAKASH SINHA, HINDU LAW AND LEGAL THEORY (1996); S.N. Al Habsy & Kishor Uprety, *Cooperation for Nominal Development or Politics for Actual Survival? South Asia in the Making of International Law*, 12 J. TRANSNAT'L L. & POL'Y 19, 23-24 (2002) (discussing the role of South Asia on the formation of international law). Hindu principles of international law differ from European tenets in that ancient Hindu rules governing the interactions among sovereigns were based on Dharma rather than on consensus. See Ved P. Nanda, *International Law in Ancient Hindu India*, in THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 51 (Mark W. Janis ed., 1991). Similarly, "Islamic law, and hence Islamic international law, simply holds a different conception of law than does Western law, and hence public international law. . . . Islamic law draws its legitimacy from God, not from agreement. Therefore Islam cannot adduce consent, as does public international law, as the justification for public order." David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 870, 877-78 (1993) (footnotes omitted).

kingdoms,²⁰ were ground to dust or overwhelmed during the European period of colonization.²¹ More recent theories of international law based on other intellectual paradigms, such as that propounded by socialist systems²² or by critical legal studies,²³ have had nowhere near the influence of the dominant theory of international law.²⁴

¹⁹ See JACK WEATHERFORD, *GENGHIS KHAN AND THE MAKING OF THE MODERN WORLD* xix (2004) (describing rules governing relations among different cultures in Mongolian Empire); Denise I Aigle, *Le Grand Jasaq de Gengis-Khan, l'empire, la Culture Mongole et la Shari'a*, 47 J. ECON. & SOC. HIST. ORIENT 31, 31-60 (2004) (discussing content of the law and the distinction between written law and customary law). Saul Levmore describes the Ikh Yasa without focusing on the manner in which it organized relations between cultures. See Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 280-85 (1986); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 924-28 (1986). Weatherford points out that many aspects of the Mongolian ordering of international relationships continue to exist in the modern system – including diplomatic immunity. WEATHERFORD, *supra*, at xix.

²⁰ See David N. Edwards, *Meroe and the Sudanic Kingdoms*, 39 J. AFR. HIST. 175, 176-90 (1998) (discussing the relationships between the Kushite States and Sudanic Kingdoms); Richard Reid, *Mutesa and Mirambo: Thoughts on East African Warfare and Diplomacy in the Nineteenth Century*, 31 INT'L J. AFR. HIST. STUD. 73, 73-81 (1998) (discussing rules and relationships between the Bugando Kingdom and the Nyamwezi Empire in the second half of the nineteenth century).

²¹ Christopher Blakesley states:

The international law of today does not show distinct linkages to ancient Oriental and African practices. Even the modern descendants of very old Oriental cultures accept international law as the product of Western evolution. Ignorance and neglect in the West of the history of law and related institutions in the East constitute the most likely explanation of this omission. Scholars in some of the modern States that have evolved from the Oriental historical matrix sometimes chide the West for this inattention and threaten (usually mildly) to set the matter aright sometime. New States in Africa sometimes are heard in similar vein.

CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1432 (5th ed. 2001): see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1-2 (1999) (“The universalization of international law was principally a consequence of the imperial expansion that took place towards the end of the ‘long nineteenth century.’ . . . By 1914, after numerous colonial wars, virtually all the territories of Asia, Africa, and the Pacific were controlled by the major European states, resulting in the assimilation of all these non-European peoples into a system of law that was fundamentally European in that it derived from European thought and experience.”).

²² See THEODOR SCHWEISFURTH, *SOZIALISTISCHES VOLKERRECHT?* 272-85 (1979) (the “highest principles” of international law include close cooperation, mutual assistance, brotherly friendship, and unity and compactness); Francis A. Gabor, *A Socialist Approach to Codification*

The complexity of any school of thought defies simple explanation;²⁵ nonetheless, put simply traditional international law positions itself as a set of rules through which nations interact with one another.²⁶ Nations are the principal international actors, with some recognition of international organizations created by those nations.²⁷ A foundational principle of international law is that international law concerns itself only with the relations among the nations and not with the internal processes within those nations.²⁸ Thus, it could be said that “international law is the law of nations.”²⁹

European international law’s preoccupation with sovereign nations as the only legitimate international actors, however, is more a historical accident than a discovery of an immutable truth.³⁰ Indeed, Grotius, who most credit with the first modern compilation of western international rules in *De Jure Belli ac Pacis Libri Tres*,³¹ did not concern himself with the nature

of Private International Law in Hungary: Comments and Translation, 55 TUL. L. REV. 63 (1980) (discussing socialist principles of transnational law).

²³ See Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT’L L.J. 81 (1991) (suggesting a theory of international law that rejects states as primary international actors, rejects the possibility of objective consensus, and rejects the idea of determinate international legal obligations and rules).

²⁴ See BLAKESLEY ET AL., *supra* note 21, at 1432 (“Classical, scholarly Marxists, and many who are non-Marxist, deprecate the system of customary international law because it seems to them unavoidably to state, as law, rules and principles fostering the interests of the power elites asserting them. The socialist States of the former Second World, however, came in practice to accept the system and many of its most conventional rules and principles, while selectively seeking to deny status as law to other rules and principles because they are contradictory to national ideological or other preferences.”).

²⁵ Slaughter cautions against oversimplifying the corpus of traditional international law. Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U.J. INT’L L. & POL’Y 717, 727 (1995).

²⁶ See LOUIS OPPENHEIMER, *INTERNATIONAL LAW* 20 (4th ed. 1928) (stating that nations are the actors in international law).

²⁷ See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 415 (2000) (stating that nations have ceded some place in international law to international organizations).

²⁸ See OPPENHEIMER, *supra* note 26, at 20-21 (setting out the principles of traditional international legal scholarship); Hersch Lauterpacht, *Spinoza and International Law*, 8 BRIT. Y.B. INT’L L. 89, 106-07 (1927) (same); see also Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemma of Neo-Liberalism*, 17 J. INT’L L. & BUS. 1014, 1018 (1996) (discussing the relationship between traditional international law and the realist school of international relations and noting that both are state centered).

²⁹ Egon Guttman, *The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907*, 14 AM. U. INT’L L. REV. 55, 58 (1998).

³⁰ See PHILLIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 249 (1990) (“The misconceiving of international society as a system of closed sovereignties, externalized state-systems, undemocratized and unsocialized, spread throughout the world.”).

³¹ See Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 20 (1966).

the international actor.³² That task was undertaken by Grotius's intellectual descendant Gottfried Wilhelm Leibniz, a diplomat for and advisor to various rulers of German principalities;³³ Leibniz spent his life balancing the overarching rule of the Holy Roman Empire against the independence of his employers.³⁴ Of necessity Leibniz found that sovereigns (his employers) and the polities they ruled were legitimate international actors.³⁵ Samuel Pufendorf, who followed Leibniz, also wrestled with the need to legitimize independent states as they freed themselves from the weakened Holy Roman Empire.³⁶ He posited that independent states "and supreme sovereignty come from God as the author of natural law,"³⁷ thus providing a foundation upon which the independent states could place themselves on equal footing with the empire – an argument based on their divine right to international personhood. The concepts born of the exigencies of Leibniz and Pufendorf became dogma as generations of international legal scholars – from Wolff through

³² See Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 21-22 (1946) ("The significance of the law of nature in his [Grotius'] treatise is that it is the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations."). Thomas Hobbes is also sometimes credited with contributing to the intellectual roots of modern European international law, even though he himself did not believe in international law. Precisely because he did not believe in international law he also did not concern himself with the nature of international actors. See John P. Humphrey, *On the Foundations of International Law*, 39 AM. J. INT'L L. 231, 233 (1945) (noting Hobbes' belief that "[e]ither a state is sovereign, in which case it cannot be bound by any law higher than its own, or it is bound by law, in which case it ceases to be sovereign"); Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377, 435 (2006) (noting Hobbes belief that there was no authority binding sovereigns).

³³ JANNE ELISAPETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 29 (2004) (stating that Leibniz was the first writer to use the term "international legal person" and noting that he was an intellectual successor to Grotius and Hobbes).

³⁴ E.J. AITON, *LEIBNIZ: A BIOGRAPHY* (1985); see Carl Friedrich, *Philosophical Reflections of Leibniz on Law, Politics and the State*, in *LEIBNIZ: A COLLECTION OF CRITICAL ESSAYS*, 47, 47-51 (Harry Frankfurt ed., 1972) (discussing the historical and intellectual background of Leibniz's work).

³⁵ See NIJMAN, *supra* note 33, at 36-38 (discussing the relationship between Leibniz's occupation and his writings on international law)

³⁶ Leibniz, Pufendorf and others also wrote in the shadow of the brutal Thirty Years War. See Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483, 527 (2004) ("[J]us gentium earned its international appeal after the Thirty Years War devastated several centuries' brilliant civilizational achievements in Europe. After witnessing the misery of the war, pioneering philosophers and legal scholars strived to achieve a mutually supportive and peaceful human community. These innovators attempted to tame and regulate brutal and irrational human behaviors – often committed in the name of sovereignty – through jus gentium.").

³⁷ SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* Book VII.III 1 and 2, p.1000-1 (transl. & ed. Classics of International Law 1934).

Vattel and Kant to Kelsen – preoccupied themselves with this conception in international legal personhood and developed rules for interaction between those international persons.³⁸

For many years this accidental body of law was criticized as sterile and positivist, little more than a description of the ways in which nations interacted.³⁹ The most significant refinement of international law in the recent era responded to this criticism: the New Haven school inserted international politics into international law and endowed international law with purpose as a tool for policy objectives.⁴⁰ These changes were lauded as significant, but most of the basic contours and assumptions remained untouched, including the focus on the nation as the only legitimate international actor.⁴¹

The event that most clearly demonstrated the shortcomings of international law theory in the twentieth century was the atrocity of the second world war.⁴² The fact that international legal theory had no basis for condemning the internal acts of brutal governments startled many scholars and lay people, and led to two significant developments: the infusion of natural law principles into international law, and a growing realization that international law not only enables international interaction but also imposes some strictures on the behaviors of individual nations.⁴³

³⁸ See NIJMAN, *supra* note 33, at 84-85 (discussing the influence of Leibniz and Pufendorf on succeeding generations of international law scholarship).

³⁹ See, e.g., Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in THE RELEVANCE OF INTERNATIONAL LAW 133, 138 (Karl W. Deutsch & Stanley Hoffman eds., 1968) (criticizing international law as a “repository of legal rationalizations”); Roscoe Pound, *Philosophical Theory and International Law*, I BIBLIOTECA VISSERIANA 73, 87-88 (1923) (vigorously attacking positivism in international legal scholarship); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 819 (1990) (criticizing “sterile positivism” in international law scholarship).

⁴⁰ See Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 1992 (1995) (book review) (noting that the New Haven School “breaks radically” from positivism); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 819-820 (1990) (“Connecting law with context and policy, the approach [the New England School] shows that legal decisions involve choice.”).

⁴¹ Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law*, 42 KAN. L. REV. 557, 593-94 (1994); see LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 10 (1989) (an advocate of the New Haven School suggests that there is too much emphasis on the state).

⁴² David J. Bederman, *The New International Law in an Old Age of Indeterminacy*, 81 TEX. L. REV. 1521, 1527-28 (2003) (book review); William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U.J. INT’L L. & POL’Y 227, 227-29 (1997); see Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 207-20 (1993) (reviewing development of international legal scholarship following the second world war).

⁴³ Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1135 (1985) (discussing the changes in the conceptualization of international law as reactions to the second world war and the Nuremburg Trials).

In the twenty-first century, the event that so far most clearly demonstrates the shortcomings of international law is the undeniable phenomenon underlying the much abused term “globalization,” although how international law will react has yet to be seen. Globalization means many things to many people.⁴⁴ The least satisfying of the many theories or definitions simply observes that more business now occurs across borders than did a few years ago.⁴⁵ More troubling theories of globalization invest those relationships with some form of animus, an attempt by those who possess power to take advantage of those without.⁴⁶ The more interesting definitions try to explain the increase in transborder relationships, whether through changes in technology or changes in attitude.⁴⁷ For the purposes of this paper, the superiority of one definition over another is not relevant.⁴⁸ What is relevant is the observable and indisputable fact underlying the theoretical cacophony – more people are entering into more relationships, without reference to political boundaries.⁴⁹

These relationships highlight an axiological criticism of international law theory and practice. The theory of international law simply does not explain reality.⁵⁰ Traditional

⁴⁴ See ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* 8-32 (1992) (discussing the disagreements over the definition of globalization).

⁴⁵ Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT’L L. 329, 337 (2004) (defining globalization as “freer movement of capital and goods”).

⁴⁶ See Jamie Doucette, *APEC: The Long March Through the Inquiries; Inquiry Into Policing of Demonstrations at 1997 Meeting of Asia-Pacific Economic Cooperation*, CANADIAN DIMENSION, Nov. 1, 2001, at 35 (“We may even assist other complacent westerners in recognizing and publicizing the history of antidemocratic schemes that have been used to implement neoliberal globalization worldwide.”); Richard Sanders, *GATS: The End Of Democracy?*, AUSTRALIAN FIN. REV., June 15, 2001, at 6 (arguing that the World Trade Organization is undemocratic and is the secret instrument of global corporate interests).

⁴⁷ Anthony Giddens, for example, notes that technological changes have compressed time and space, a phenomenon he refers to as “distanciation,” and suggests that as a consequence relationships have been “disembedded” from the local context and restructured “across indefinite spans of time-space.” ANTHONY GIDDENS, *CONSEQUENCES OF MODERNITY* 14, 21 (1990). Roland Robertson similarly acknowledges the impact of technological changes but suggests they have led to a change in the way that people understand the world, a “simultaneity and the interpenetration of what are conveniently called the global and the local.” ROLAND ROBERTSON, *GLOBAL MODERNITIES* 35 (1995).

⁴⁸ The author has reviewed theories of globalization elsewhere. See Nichols, *supra* note 8, at 261-264.

⁴⁹ See Jessica Matthews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50, 50 (noting that relationships are now created with little regard for political boundaries); Barney Warf, *International Competition Between Satellite and Fiber Optic Carriers: A Geographic Perspective*, 58 PROFESSIONAL GEOGRAPHER 1, 5 (2006) (describing at length “the rapid expansion of demand for international telecommunications, itself driven by the steady growth of multinational corporations, global business travelers, international tourism, mounting transcontinental telephony, and cross-border sales of television shows”).

⁵⁰ Hector Fix-Fierro and Sergio Lopez-Allyan suggest that traditional jurisprudential thought is ill-prepared to deal with the broad concept of globalization because traditional jurisprudence was formed within the concept of the nation/state system. Hector Fix-Fierro & Sergio Lopez-Allyan,

international law posits a handful of actors in a single, albeit complex, arena. For the most part the theory treats other entities as having only one important relationship – the relationship with the nation that represents them in international law as determined through internal processes within that nation, internal processes that for the most part lie outside the bounds of international law.

In reality, however, the vast, vast majority of transnational actors are individuals. Individuals enter into thousands of relationships across political borders every day.⁵¹ Moreover, an individual may belong to several communities, some existing solely within the political borders of one country, some explicitly crossing borders, and some with no reference to nations at all. With rare exceptions these groups must create rules and institutions to facilitate their relationships. International law, however, does not recognize let alone explain or make predictions regarding these rules and institutions. International law, therefore, fails as a theoretic for the bulk of transnational activity.⁵²

International law is equally inadequate in practice. Law constitutes a critical element in creating and supporting relationships, and in regulating behaviors inimical to relationships and to groups.⁵³ International law, with its focus on only a handful of transnational actors, does not

The Impact of Globalization on the Reform of the State and Law in Latin America, 19 HOUS. J. INT'L L. 78, 786 (1997).

⁵¹ See Steven R. Salbu, *Regulation of Borderless High-Technology Economies: Managing Spillover Effects*, 3 CHI. J. INT'L L. 137, 149 (2002) (“the Internet magnifies the speed and quantity of potential international transactions exponentially”); Richard S.J. Tol, *The Impact of a Carbon Tax on International Tourism*, 12 TRANSPORTATION RESEARCH: PART D 129, 129 (2007) (“International aviation is the fastest growing part of transport and it is more difficult to regulate than domestic transport, *inter alia* because it is outside the jurisdiction of a single country.”); Warf, *supra* note 49, at 9 (noting that between 1988 and 2003 transatlantic cable capacity increased by 103,000 percent and transpacific capacity by 1.6 billion percent).

⁵² A theory causally explains observable phenomenon and predicts future observations. STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME* 9 (1988); see JAMES DOUGHERTY & ROBERT PFALTZGRAFF, JR., *CONTENTING THEORIES OF INTERNATIONAL RELATIONS, A COMPREHENSIVE STUDY* 16-17 (3d ed. 1990) (a theory is “an intellectual tool that helps us to organize our knowledge, to ask significant questions, and to guide the formulation of priorities in our research as well as the selection of methods to carry out research in a fruitful manner”); William J. Aceves, *Institutional Theory and International Legal Scholarship*, 12 Am. U. J. INT'L L. & POL'Y 227, 231 (1997) (“A theory seeks to provide causal explanations of observable phenomenon and to provide a basis for predicting future behavior.”). With respect to legal scholarship, some suggest that legal theory also has a prescriptive component, see Edward L. Rubin, *Law and the Methodology of Law*, 1997 WISC. L. REV. 521, 522 (arguing that legal scholarship “frames recommendations, or prescriptions, to legal decisionmakers”), although others caution that legal writing too often is advocacy masquerading as scholarship, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (criticizing advocacy scholarship).

⁵³ See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* at xi-xii (1975) (noting that markets require institutions); Neil Fligstein, *Markets as Politics: A Political-Cultural*

provide a structure, nor does it itself regulate most inimical behaviours. The scholarship of Douglass North and other institutional economists,⁵⁴ of Robert Putnam and other development theorists,⁵⁵ and of Neil Fligstein and other business sociologists,⁵⁶ clearly demonstrate the necessity of rules and institutions in effectuating relationships. International law provides no such support or regulation.

In the absence of laws that transcend national borders in the same way as relationships, transnational groups could create their own extralegal body of rules.⁵⁷ Such rules, however, impose maintenance costs on the group and on society and do not lend themselves to easy enforcement.⁵⁸ The prosecution of Pavlo Lazarenko represents an alternative interim solution: the cobbling together of extant local laws to reach and regulate the behaviors of a transnational actor.

Approach to Market Institutions, 61 AM. SOC. REV. 656, 656 (1996) (noting that markets are inseparable from institutions).

⁵⁴ E.g., DOUGLASS C. NORTH, CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS TO AN UNDERSTANDING OF THE TRANSITION PROBLEM (1997) (discussing the relationship of institutions to relationships within emerging economies); Douglass C. North, *Dealing with a Non-Ergodic World: Institutional Economics, Property Rights, and the Global Environment*, 10 DUKE ENVTL. L. & POL'Y F. 1, 3 (1999) (discussing law as a necessary institution); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 562 (2005) (acknowledging theoretical groundwork on North in respect to the interaction between law, institutions and relationships); Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044, 1069-70 (book review) (describing North's and other's work).

⁵⁵ E.g., ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000); ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NANETTI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993); see Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT'L L. 389, 436 (2002) (discussing Putnam and other theorists); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 504 (2002) (discussing concern over a decline in social institutions as described by Putnam); John Wilson & Marc Musick, *The Effects of Volunteering on the Volunteer*, 62 LAW & CONTEMP. PROB. 141, 142 (1999) (discussing Putnam's theories); see also Sidney Tarrow, *Making Social Science Work Across Space and Time: A Critical Reflection on Robert Putnam*, 90 AM. POL. SCI. REV. 389 (1996) (discussing the impact of Putnam and especially the concept of institutions).

⁵⁶ E.g., Neil Fligstein, *Sense Making and the Emergence of a New Form of Market Governance*, 49 AM. BEHAV. SCIENTIST 949 (2006) (describing the use of institutional heuristics by economic entities); Neil Fligstein, *Markets from Networks: Socioeconomic Models of Production*, 32 CONTEMP. SOC. 673 (2003); see Mauro F. Guillén, *The Economic Sociology of Markets, Industries, and Firms*, 32 THEORY & SOCIETY 505 (2003) (describing economic sociology's attempt to integrate multiple phenomenon and noting Fligstein and other economic sociologists); Rudolph J. R. Peritz, *History as Explanation: Annals of American Political Economy*, 22 LAW & SOC. INQUIRY 231, 243 (1997) (discussing Fligstein and other economic sociologists).

⁵⁷ See *infra* notes 76-82 and accompanying text (discussing the creation of parallel institutions).

⁵⁸ See *infra* notes 83-85 and accompanying text (discussing disadvantages to parallel institutions).

2. Pavlo Lazarenko

In June of 1996, Ukrainian President Leonid Kuchma appointed Pavlo Lazarenko – a former Soviet agricultural boss, governor, government minister, and Ukrainian vice-premier – as Prime Minister of the recently liberated nation of Ukraine.⁵⁹ Shortly before assuming the post of Prime Minister, Lazarenko had served as Energy Minister. Although his supporters argue that Lazarenko brought law and order to the sector, his reforms had loopholes through which certain individuals could and did profit. Most notable among these individuals was Lazarenko himself. During his tenure as Energy Minister, Lazarenko accrued large quantities of money purchasing and selling state energy contracts. Lazarenko used his control of state petroleum firms to buy natural gas at a subsidized rate, which he then sold at world market prices. Some reports claim that he accumulated more than 700 million U.S. dollars through this scheme. To move and launder his illgotten fortune, Lazarenko developed an elaborate network of financial institutions in a number of countries. Domestically, Lazarenko laundered his gains Ukraine's barter-based economy. Natural gas is the most vital commodity to Ukrainian industry, which often procures necessary gas through barter. Lazarenko therefore was able to leverage illegally procured gas into virtually any commodity through unregistered barter transactions; he could then trade the goods on the open world market.⁶⁰

During Lazarenko's tenure as Energy Minister, he developed close relationships with leaders of various energy industries, including Yulia Tymoshenko, the President of United Energy Systems of Ukraine. These allies profited from their relationships with Lazarenko. Lazarenko awarded Tymoshenko's United Energy Systems contract to supply one third of Ukraine natural gas needs. United Energy Systems benefited further from Lazarenko's patronage when, as Prime Minister, he partitioned Ukraine's energy market into separate sectors, awarding single energy firms monopoly rights in specific regions. Lazarenko facilitated the award to United Energy Systems of the most profitable contract rights, those of the industrial oblasts. The business associated with these monopolies accrued revenues equal to one fifth of the Ukrainian gross domestic product for that year. Lazarenko allegedly received payments from

⁵⁹ PAUL KUBICEK, UNBROKEN TIES: THE STATE, INTEREST ASSOCIATIONS, AND CORPORATISM IN POST-SOVIET UKRAINE 58 (2000); Anders Åslund, *The Ancien Régime: Kuchma and the Oligarchs*, in REVOLUTION IN ORANGE: THE ORIGINS OF UKRAINE'S DEMOCRATIC BREAKTHROUGH 9, 12 (Anders Åslund & Michael McFaul eds. 2006); Charles R. Wise & Volodymyr Pigenko, *The Separation of Poses Puzzle in Ukraine: Sorting Out Responsibilities and Relationships between President, Parliament, and the Prime Minister*, in STATE AND INSTITUTION BUILDING IN UKRAINE 25, 47 (Taras Kuzio, Robert S. Kravchuk & Paul D'Anieri eds. 1999).

⁶⁰ ANDREW WILSON, UKRAINE'S ORANGE REVOLUTION 10, 19, 23, 39-40 (2005); Charles Clover, *Swiss Investigate the Profits from Unaccountable Ukrainian Gas*, FIN. TIMES, Dec. 9, 1998, at 2; Richard C. Paddock, *Ukraine's Abyss of Despair*, LOS ANGELES TIMES, Apr. 9, 1999, at A1; Knut Royce, *San Francisco Bank Linked to Laundering Probe at Bank of New York*, THE PUBLIC, Nov. 9, 1999, at i, available at http://www.public-i.org/story_01_1100999.htm.

various energy companies in exchange for the award of monopolies and in the case of United Energy Systems also owned shares.⁶¹

During his tenure as Prime Minister, President Kuchma awarded Lazarenko medals for his service to the government. As foreign governments and the Ukrainian parliament voiced increasing concern over the level of corruption in the Ukrainian government, however, Kuchma's support waned.⁶² In the summer of 1997, President Kuchma forced Prime Minister Lazarenko from office.⁶³ Once out of office, Lazarenko became a Kuchma opponent and formed his own opposition party, named "Hromada." Working closely with Yulia Tymoshenko, he set out to defeat the Kuchma administration in the next series of elections.⁶⁴ The use of media illustrates the tenor of the political contest. Hromada contracted to have an offshore company buy 500,000 subscriptions to *Pravda*, a Ukrainian paper with a 35,000 subscription base, and entered into a similar deal with *Vseukrainskiye Vedimosti*. Not surprisingly, those publications portrayed Lazarenko quite favorably.⁶⁵

Kuchma responded fiercely. He had the United Energy System's trading licenses revoked and sent auditors to examine United Energy System's financial records; its bank accounts were frozen. *Pravda* and *Vseukrainskiye Vedimosti* were shut down. The Office of the Prosecutor General of Ukraine made representations to Parliament about obtaining an agreement to institute criminal proceedings against People's Deputy of Ukraine Pavlo Lazarenko for commission of crimes involving corruption. Lazarenko had hoped for Hromada to catapult him into the Ukrainian Presidency. Instead, probes into Lazarenko's illegal activities compelled the former Prime Minister to flee from Ukraine in 1998. With the Prosecutor General hunting him, Lazarenko fled to Geneva. The day after Lazarenko fled the country, prosecutors filed embezzlement charges against him.⁶⁶

In Switzerland, the former Prime Minister was arrested for attempting to cross the border using a false Panamanian passport. The Swiss then charged him with money laundering and set his bail at US\$2.6 million. Lazarenko posted bail and promptly fled the country, attempting to

⁶¹ WILSON, *supra* note 60, at 19-23, 39-40; Åslund, *supra* note 59, at 12; Andrew Wilson, *Ukraine in Post-Soviet Europe: Consolidation or Renewed Reform?*, in DEVELOPMENTS IN CENTRAL AND EAST EUROPE POLITICS 3, at 92, 98-99 (Stephen White, Judy Batt & Paul G. Lewis eds. 2003)); Clover *supra* note 60, at 2; Roman Kupinchsky, *The Case of Pavlo Lazarenko: A Study of High Level Corruption*, Radio Free Europe/Radio Liberty (Feb. 17, 2002), at <http://www.ukrweekly.com/Archive/2002/070206.shtml>; Paddock, *supra* note 60, at A1; Royce, *supra* note 60, at 1; James Rupert, *Regional Tensions Trip Up Ukraine's Quest of Stability*, WASH. POST, Oct. 27, 1996, at A31.

⁶² PAUL D'ANIERI, ROBERT KRAVCHUK & TARAS KUZIO, POLITICS AND SOCIETY IN UKRAINE 201 (1999); Wilson, *supra* note 61, at 99; Wise & Pigenko, *supra* note 59, at 47.

⁶³ Wilson, *supra* note 61, at 99. Officially, Kuchma attributed Lazarenko's departure to "poor health."

⁶⁴ Åslund, *supra* note 59, at 12; Wilson, *supra* note 61, at 99. "Hromada" translates into English as "group" or "community."

⁶⁵ Jaroslaw Koshiw, *The Dogs of Ukraine's Clan Wars*, KYIV POST (Oct. 20, 1998).

⁶⁶ WILSON, *supra* note 60, at 40; Taras Kuzio, *When Oligarchs Go Into Opposition: The Case of Pavlo Lazarenko*, 2:11 RUSSIA & EURASIA REV. 3 (May 27, 2003), at http://www.jamestown.org/publications_details.php?volume_id=16&issue_id=623&article_id=4529; Wilson, *supra* note 61, at 99; Clover, *supra* note 60, at 2; Koshiw, *supra* note 65.

enter the United States. Once again, Lazarenko was arrested for using false identification documents to enter a country. While in the custody of U.S. authorities, Lazarenko requested asylum, claiming he suffered political persecution in Ukraine. This motion was eventually denied by the United States, which instead filed its own charges against the former Prime Minister.⁶⁷

Ukraine's initial concern with Lazarenko undoubtedly was driven in large part by Kuchma's anger at the betrayal of a former political ally. Leonid Kuchma's presidency, however, did not survive the political turmoil of Ukraine. In 2000, a popular journalist was kidnapped and murdered. Evidence, including audio tapes, linked Kuchma to that crime. By 2003, tens of thousands of people demonstrated against rigged elections, corruption, and other undemocratic aspects of the Kuchma regime. In 2005, after a series of contested elections, demonstrations and court rulings, Viktor Yushenko – the leader of the party opposed to Kuchma – became the President of Ukraine.⁶⁸ Yushenko appointed Yulia Tymoshenko as Prime Minister.⁶⁹ Tymoshenko, of course, is the former President of United Energy Systems and an alleged co-conspirator with Pavlo Lazarenko. Tymoshenko, in turn, was dismissed by Yushenko along with her cabinet and senior Presidential aides amidst charges of corruption and discordance.⁷⁰ Tymoshenko continues to play an active role in Ukrainian politics, almost regaining the position of Prime Minister and continuing to lead a large opposition party.⁷¹

Lazarenko has caused incalculable damage to Ukraine and its people. Even by the standards of Ukraine, a political system described at that time as enduring “widespread [corruption] at all levels,” Lazarenko engaged in astonishing degrees of corruption.⁷²

⁶⁷ Wilson, *supra* note 61, at 40; Royce, *supra* note 60, at 1; *U.S. Detains Former Ukraine Prime Minister Under Corruption Investigation*, INT'L ENFORCEMENT L. REP., Apr. 1999, at 2, 2.

⁶⁸ These events have been named the “Orange Revolution” after the colors worn by supporters of Yushenko. The complexity of events and courage of actors defies explanation in this paper, differing accounts are given in PAUL D'ANIERI, UNDERSTANDING UKRAINIAN POLITICS: POWER, POLITICS, AND INSTITUTIONAL DESIGN (2007); ASKOLD KRUSHNELNYCKY, ORANGE REVOLUTION: A PERSONAL JOURNEY THROUGH UKRAINIAN HISTORY (2006); WILSON, *supra* note 60, *passim*; see also Adrian Karatnycky, *Meltdown in Ukraine*, FOR. AFF., May/June 2001, at 73, 75-78 (describing tape recordings made of Kuchma).

⁶⁹ Taras Kuzio, *The Orange Revolution at the Crossroads*, 14 DEMOKRATIZATSIYA 477, 484 (2006); Brett Forrest, *Orange Devolution*, FORTUNE, Apr. 3, at 39, 39-40.

⁷⁰ Kuzio, *supra* note 69, at 484.

⁷¹ See Peter Finn, *Defeated Candidate Reemerges in Ukraine: Ousted Pro-Moscow Figure Set to Become Prime Minister as Orange Revolution Coalition Crumbles*, WASH. POST, July 8, 2006, at A11; *Up for Grabs: Ukraine's Politics*, ECON., Nov. 4, 2006, at 15.

⁷² FREEDOM HOUSE, NATIONS IN TRANSIT 1999-2001, at 678 (2002), available at <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan008174.pdf>. Anders Åslund explains at length the structural, economic, and historic factors that made and continue to make Ukraine susceptible to corrupt manipulation by political leaders. Anders Åslund, *Problems with Economic Transformation in Ukraine* (presented at The Fifth Dubrovnik Conference on Transition Economies, June 23-25, 1999), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=60&prog=zgp,zru>; see also TODD S. FOGLESONG & PETER H. SOLOMON, JR., CRIME, CRIMINAL JUSTICE, AND CRIMINOLOGY IN POST-SOVIET UKRAINE 38-42 (discussing the historical causes of corruption in Ukraine).

Transparency International, a respected nongovernmental body that studies corruption, ranked Pavlo Lazarenko as the eighth most corrupt political leader in the entire world.⁷³ The anger that Ukrainians felt in response to the corruption of the Kuchma regime, the anger that caused tens of thousands of Ukrainians to protest in the streets, is entirely understandable. Corruption causes immeasurable damage, particularly to emerging countries such as Ukraine. In order to fully understand the import of the criminal proceedings against Pavlo Lazarenko, the damage caused by corruption must first be examined.

3. *Corruption Damages Emerging Economies Such as Ukraine*

Corruption affects any polity in a negative manner, but its effects are particularly acute in emerging economies. As a country only recently emerging from an authoritarian period, in the nascent stages of its commercial and social relationships with Europe and the rest of the world, Ukraine fits within both the technical definition and the real world experience of an emerging economy.⁷⁴

Selçuk Akçay succinctly and chillingly summarizes empirical research on the effects of corruption:

It reduces economic growth, retards long-term domestic and foreign investments, enhances inflation, depreciates national currency, reduces expenditures for

⁷³ *Suharto Tops List of Embezzling Leaders*, N.Y. Times, Mar. 26, 2004, at A6; see Åslund, *supra* note 59, at 12 (“Lazarenko stood out as the most corrupt Ukrainian politician to date Even the Ukrainian establishment was stunned by his greed”); Adrian Karatnycky, *Ukraine’s Orange Revolution*, FOR. AFF., Mar./Apr. 2005, at 35, 35 (describing Lazarenko as the “greediest of the crew” who stole and extorted hundreds of millions from Ukraine); Wilson, *supra* note 61, at 98 (corruption “exploded” under Lazarenko as he “tried to bring whole swathes of the economy, particularly the energy sector, under his personal control”); see also Justin Mellor, *The Negative Effects of Chernobyl on International Environmental Law: The Creation of the Polluter Gets Paid Principle*, 17 WIS. INT’L L.J. 65, 69 (1999) (noting that Lazarenko’s corruption contributed to the collapse of the energy sector).

⁷⁴ See Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT’L L. 229, 278-86 (1999) (providing a theoretical definition of emerging economies); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 119 (2005) (stating that Ukraine is considered a developing country by international organizations). Neil Robinson describes the extreme difficulties imposed on Ukraine in transitioning from the command economies of the Soviet Union (and Russian hegemony) to membership in the global market economy. Neil Robinson, *Path Dependency, Global Economy and Post-Communist Change*, in REFORGING THE WEAKEST LINK: GLOBAL POLITICAL ECONOMY AND POST-SOVIET CHANGE IN RUSSIA, UKRAINE AND BELARUS 106, 106-24 (Neil Robinson ed. 2004); see Pamela Abbott & Roger Sapsford, *Life-Satisfaction in Post-Soviet Russia and Ukraine*, 7 J. HAPPINESS STUD. 251, 253-67 (2006) (discussing satisfaction with life of people in Ukraine during the transition); Victo Stepanenko, *Civil Society in Post-Soviet Ukraine: Civic Ethos in the Framework of Corrupted Sociality?*, 20 E. EUR. POL. & SOCIETIES 571, 592-97 (2006) (discussing weakness of and challenges to civil society in Ukraine as it transitions).

education and health, increases military expenditures, misallocates talent to rent-seeking activities, pushes firms underground, distorts markets and the allocation of resources, increases income inequality and poverty, reduces tax revenues, increased child and infant mortality rates, distorts the fundamental role of the government (on enforcement of contracts and protection of property rights), and undermines the legitimacy of government and of the market economy.⁷⁵

Of these, four deserve special attention with respect to emerging economies such as Ukraine: the creation of parallel institutions, the decrease in economic growth and investment, the distortion of public decisions, and the undermining of support for government and reforms. To put the matter as succinctly as does Akçay, Ukraine and countries like Ukraine have every right to be tremendously concerned about corruption.

3.1 *Parallel Institutions*

Corruption leads to the creation of parallel institutions. Parallel institutions are institutions created informally to perform the same functions as “official” or existing institutions.⁷⁶ In lay terms, parallel institutions include institutions such as “black markets” or “loan sharking.”⁷⁷

Parallel institutions often come into existence as a reaction to failures in state sanctioned institutions, as people attempt to concoct means of getting done that which the state cannot or will not do for them.⁷⁸ Patently failed states, such as the rump states of the former Yugoslavia for

⁷⁵ Selçuk Akçay, *Corruption and Human Development*, 26 CATO J. 29, 29-30 (2006).

⁷⁶ See M. Michael Rosenberg & Jack Jedwab, *Institutional Completeness, Ethnic Organizational Style and the Role of the State: The Jewish, Italian and Greek Communities of Montreal*, 29 CANADIAN REV. SOC. & ANTHROPOLOGY 265, 266-67 (1992) (describing parallel institutions). Michael Newsom provides an interesting description of parallel institutions created by Catholics in the United States as a reaction to “Protestantization” of formal institutions in the 1800s and particularly as a reaction to concerns about the affect of Prohibition on the use of wine in religious services. Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act’s Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739, 783 (2005).

⁷⁷ Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. CHI. L. REV. 63, 71-72 (2006) (describing the use of loan sharks in the United States by workers who have no recourse to formal lending institutions); Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 535 n.181 (1998) (discussing creation of a black market in the Soviet Union).

⁷⁸ George Priest describes, in great detail, the creation of various types of black markets as responses to failures in formal markets. George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259, 2259-88 (1998); see also Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1298-1300 (1998) (describing the creation of black markets in cigarettes as a response to overregulation of the formal market). Similarly, Regina Austin describes the creation of a market for loansharks when needy persons do not have access to formal sources of credit. Regina Austin, *Of Predatory Lending and the Democratization of*

example, engender numerous parallel institutions.⁷⁹ Corruption also engenders the creation of parallel institutions because corrupt institutions are dysfunctional.⁸⁰ Corrupt institutions often do not work, or work in ways counter to their stated purpose; people do not trust corrupt institutions and will not use them if it is possible not to do so.⁸¹ The creation of parallel institutions provides an escape mechanism from corrupt institutions.⁸²

Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions, 53 AM. U.L. REV. 1217, 1238-39 (2004); *see also* *Perez v. United States*, 402 U.S. 146, 157 (1971) (describing loan sharking as a national problem in the United States).

⁷⁹ Elizabeth Abraham, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Missions in Kosovo*, 52 AM. U.L. REV. 1291, 1323 (2003) (describing the creation of parallel institutions by ethnic Albanians in Kosovo and noting the “knowledge gap” between those who worked in the formal sector and those who worked in the informal sector); Jeffrey S. Morton, *The Legality of NATO’s Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law*, 9 ILSA J. INT’L & COMP. L. 75, 77 (2002) (describing parallel institutions created by repressed Albanians in Kosovo); Henry H. Perritt, *Untying the Gordian Knot: Final Status for Kosovo*, 80 CHI.-KENT. L. REV. 3, 15 (2005) (describing parallel institutions in Kosovo); Adam Raviv, *Jigsaw Sovereignty: The Economic Consequences of Decentralization in Post-Dayton Bosnia*, 37 GEO. WASH. INT’L L. REV. 109, 113-16 (2005) (describing the creation of “pseudo-governmental structures,” “para-states,” and “ghost municipalities” in Croatia and Hercegovina and noting that “[t]he continuing existence of parallel institutions, and the accompanying corruption that is endemic to them, can serve as a barrier to foreign investment”); Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT’L L. 46, 56 n44 (2001) (describing the creation of parallel institutions among ethnic Albanians in Kosovo, including the creation of an underground school of law).

⁸⁰ *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1915 (1996) (describing corruption as dysfunctional); Angel Ricardo Oquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT’L L. 475, 488 (1999) (“Moreover, it is precisely the culture of corruption that, to a significant extent, renders them dysfunctional and illegitimate.”).

⁸¹ Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 44 (Kimberly Ann Elliott ed., 1997) (discussing the disengagement of people from state institutions because they mistrust corrupt institutions); James M. Cooper, *Access to Justice*, 30 CAL. W. INT’L L.J. 429, 430 (2000) (discussing the withdrawal of Latin Americans from use of the judicial system because it is corrupt); Jerold S. Kayden, *Market-Based and Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 573 (1992) (“Why should some individuals observe the law when others can pay to elude it? If the rule of law isn’t the rule of law, can anarchy be far behind?”).

⁸² *See* Manash Ranjan Gupta & Sarbajit Chaudhuri, *Formal Credit, Corruption and the Informal Credit Market in Agriculture: A Theoretical Analysis*, 64 ECONOMICA 331 (1997) (noting that when farmers have to bribe officials to get loans they go the loansharks); Joachim J. Savelsberg, *Contradictions, Law, and State Socialism*, 25 LAW & SOC. INQUIRY 1021, 1033-34 (2000) (describing relationship between corruption, market failure and the creation of black markets in

In some ways, parallel institutions provide a service by allowing people to do that which the state will not let them do.⁸³ The creation and maintenance of institutions, however, imposes costs on a state or society.⁸⁴ The existence of a parallel institution essentially means that a country is paying double what it would pay if the official institution worked; the money diverted to the parallel institutions is money that is not spent on infrastructure or development.⁸⁵

3.2 *Corruption Negatively Affects Economic Growth and Performance*

Numerous studies find that corruption negatively affects economic growth and performance.⁸⁶ George Abed and Hamid Davoodi, Cooper Drury, Jonathan Kreickhaus, and Michael Lusztig, Carlos Leite and Jens Weidmann, Paulo Mauro, and Vito Tanzi and Hamid Davoodi all find a negative correlation between corruption and economic growth.⁸⁷ Indeed, Pak Hung Mo finds that a one percent increase in levels of corruption decreases growth in gross domestic product by almost three quarters of a percent.⁸⁸

Corruption decreases foreign investment. Paulo Mauro conducted the most well known empirical research demonstrating this effect, finding a “negative association between corruption

the Soviet Union); *see also* Ariel Porat, *Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship Between Public and Private Orders: A Reply to McMillan and Woodruff*, 98 MICH. L. REV. 2459, 2478 (2000) (“Hence, if legal systems are dysfunctional due to the corruption of the judges, we may expect all forms of the private order to emerge: relational contracts, arbitration, business networks, trade associations, and social networks.”).

⁸³ *See* Priest, *supra* note 78, at 2288.

⁸⁴ *See* WORLD BANK, *THE STATE IN A CHANGING WORLD* 13-14 (1997) (finding that emerging economies spend a disproportionate amount of their budget on institutions); Marina Ottaway & Theresa Chung, *Toward a New Paradigm*, 10 J. DEMOCRACY 99, 99 (1999) (stating that institutions are expensive, and questioning whether some developing countries can afford the institutions that support democracy); Montrose M. Wolf, *The Development of the Teaching-Family Model*, 30 J. APPLIED BEHAVIOR ANALYSIS 381, 381-82 (1997) (comparing the costs of different models of institutions).

⁸⁵ *See* Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 185 (1995) (noting the effect that money spent to work around corrupt courts has on the ability to develop other institutions in Latin America).

⁸⁶ *See* A. Cooper Drury, Jonathan Kreickhaus & Michael Lusztig, *Corruption, Democracy and Economic Growth*, 27 INT’L POL. SCI. REV. 121, 122 (2006) (“The predominant, although not exclusive, view of corruption is that it is damaging to economic performance as both a tax on productivity and a market distortion.”).

⁸⁷ GEORGE ABED & HAMID DAVOODI, *CORRUPTION, STRUCTURAL REFORMS AND ECONOMIC PERFORMANCE IN THE TRANSITION ECONOMIES* (IMF, Working Paper no. 132, 2000); CARLOS LEITE & JENS WEIDMANN, *DOES MOTHER NATURE CORRUPT – NATURAL RESOURCES, CORRUPTION, AND ECONOMIC GROWTH* (IMF, Working Paper no. 85, 1999); PAULO MAURO, *THE EFFECTS OF CORRUPTION ON INVESTMENT, GROWTH AND GOVERNMENT EXPENDITURE* (IMF, Working Paper no. 98, 1996); VITO TANZI & HAMID DAVOODI, *CORRUPTION, PUBLIC INVESTMENT, AND GROWTH* (IMF, Working Paper no. 139, 1997); Drury, Kreickhaus & Lusztig, *supra* note 86, at 131.

⁸⁸ Pak Hung Mo, *Corruption and Economic Growth*, 29 J. COMP. ECON. 29, 75 (2001).

and investment, as well as growth, [that] is significant in both a statistical and an economic sense.”⁸⁹ Mohsin Habib and Leon Zurawicki, and Shang-Jin Wei also find that corruption decreases foreign investment.⁹⁰ Edgardo Campos and others find that while “predictable” government corruption yields less of a negative effect, it still yields a negative effect.⁹¹ Alberto Ades and Rafael Di Tella, Mauro, and Tanzi and Davoodi also find a negative relationship between corruption and domestic investment.⁹²

Other indicators suggest that corruption negatively affects economic performance. Fahim Al-Marhubi finds a positive relationship between corruption and inflation.⁹³ Mohsen Bahmani-Oskooee and A.B.M. Nasir find that corruption depreciates national currency as measured by real exchange rates.⁹⁴ Dilip Mhookerjee and Ivan Png start, in an interesting exercise, with an assumption of no social costs and ignore all transfer costs and are still able to prove that “[f]or every outcome when bribery is profitable, there exists another in which bribery is not profitable, that yields higher welfare.”⁹⁵ In other words, in the aggregate corruption always imposes economic costs.

The economic costs imposed on emerging economies can be quite high. Hrishikesh Vinod finds that “[i]n many developing countries, a dollar's worth of corruption causes a \$1.67 worth of a burden on the economy.”⁹⁶ Ukraine almost certainly suffers, and in particular suffered during Lazarenko’s reign.⁹⁷

⁸⁹ Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705 (1995); see also Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 24, at 83, 91 (finding that a measurable decrease in corruption in a country would increase its investment to gross domestic product ratio by almost 4% and the annual growth of its gross domestic product per capita by almost half a percent).

⁹⁰ Mohsin Habib & Leon Zurawicki, *Country-Level Investments and the Effect of Corruption: Some Empirical Evidence*, 10 INT’L BUS. REV. 687, 696 (2001); Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 9 (2000).

⁹¹ J. Edgardo Campos et al., *The Impact of Corruption on Investment: Predictability Matters*, 27 WORLD DEV. 1059, 1065 (1999).

⁹² MAURO, *supra* note 87; TANZI & DAVOODI, *supra* note 87; Alberto Ades & Rafael Di Tella, *The New Economics of Corruption: A Survey and Some New Results*, 45 POL. STUD. 496, 510 (1997).

⁹³ Fahim A. Al-Marhubi, *Corruption and Inflation*, 66 ECON. LETTERS 199, 199 (2000).

⁹⁴ Mohsen Bahmani-Oskooee & A.B.M. Nasir, *Corruption, Law and Order, Bureaucracy, and Real Exchange Rates*, 50 ECON. DEV. & CULTURAL CHANGE 397, 398 (2002).

⁹⁵ Dilip Mookherjee & I.P.L. Png, *Corruptible Law Enforcers: How Should They Be Compensated?*, 105 ECON. J. 145, 150 (1995).

⁹⁶ H.D. Vinod, *Statistical Analysis of Corruption Data and Using the Internet to Reduce Corruption*, 10 J. ASIAN ECONOMIES 591, 601 (1999). Vinod expands on a model used by Andrei Schliefer and Robert Vishny, which compares corruption to an illegal tax. See Andrei Schliefer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993).

⁹⁷ While it does not quantify the damage done to the economy by corruption, the Heritage Foundation’s Index of Economic Freedom country report on Ukraine makes clear that corruption plays a significant role in holding back Ukraine’s economic development. See THE HERITAGE

3.3 Corruption Distorts Decisionmaking by Public Officials

Corruption distorts decisionmaking in two profound ways: by distorting the parameters by which decisions are made, and by distorting the pool of decisionmakers. The consequences of a distorted decisionmaking process are severe. As Josef Zieleniec, former Foreign Minister of the Czech Republic, observes:

[C]orruption usurps and replaces other standard selection mechanisms – and thus puts the economy in a dangerously irreversible position – one in which reducing corruption might actually destabilise the economy. If a large number of public servants are corrupt, a closed system is created, which prevents the country from progressing normally. Suddenly, alternative, honest forms of decisionmaking are threatened with extinction.⁹⁸

Corruption distorts the process of decisionmaking in two ways. The most straightforward involves the results of economic decision. Corruption, and especially bribery, often involves economic decisions.⁹⁹ In a rational market system, decisions about which good or service to purchase are made on the basis of price and quality.¹⁰⁰ A corrupt decisionmaker, on the other hand, does not consider price or quality but instead makes a decision based on the size and quality of a bribe.¹⁰¹ At best, the product of such decisionmaking is lower quality goods and services; at worst the product is large scale misallocation of the limited resources of the polity.¹⁰² Empirical studies bear out this prediction: Sanjeev Gupta, Luiz de Mello and Raju Sharan find a link between corruption and disproportionate military spending,¹⁰³ while Tanzi and Davoodi find a negative relationship between corruption and the percentage of paved roads in good condition

FOUNDATION, 2006 INDEX OF ECONOMIC FREEDOM: UKRAINE (2007), *available at* <http://www.heritage.org/research/features/index/country.cfm?id=Ukraine>.

⁹⁸ Josef Zieleniec, *Corruption is a Matter of Perception*, NEW PRESENCE: PRAGUE J. OF CENT. EUR. AFF., Autumn 2006, at 12,13.

⁹⁹ A striking example particularly pertinent to many emerging economies is the process of privatization. See Kjetil Bjorvatn & Tina Søreide, *Corruption and Privatization*, 21 EUR. J. POL. ECON. 903, 903-905 (2005) (describing decisions in privatization and possible distortions).

¹⁰⁰ See Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983).

¹⁰¹ *Id.*

¹⁰² See Drury, Kriekhaus & Luzstig, *supra* note 86, at 123 (“policy makers may promote initiatives . . . not to satisfy social need, but because such projects increase opportunities for bribes”); René Véron, et al., *Decentralized Corruption of Corrupt Decentralization? Community Monitoring of Poverty Alleviation Schemes in Eastern India*, 34 WORLD DEV. 1922, 1925 (2006) (warning of “less effective and less well targeted” decisions).

¹⁰³ Sanjeev Gupta, Luiz de Mello & Raju Sharan, *Corruption and Military Spending*, 17 EUR. J. POL. ECON. 749, 750 (2001).

and Mauro finds a negative relationship between levels of corruption and the ratio of both public education spending and public health spending to gross domestic product.¹⁰⁴

Corruption also affects the decisionmaking process by creating an incentive for public officials to delay, obfuscate or hide information.¹⁰⁵ This effect encompasses both poor decision outcomes and an inefficient decisionmaking process. A study of the issuance of driving licenses in Delhi, India by Marianne Bertrand, Simeon Djankov, Rema Hanna, and Sendhil Mullainathan found both affects of corruption.¹⁰⁶ In an endemically corrupt setting, the investigators found that seventy percent of those issued driving licenses did not even take a driving examination, and that thirty percent of those given licenses could not drive.¹⁰⁷ At the same time, the investigators found that bureaucrats created artificial barriers and delays, probably for the purpose of extracting illegal payments from applicants.¹⁰⁸

Corruption not only causes bad decisions to be made, but it also degrades the pool of public officials who make decisions. “[T]he pervasiveness of corruption contributes to its persistence in a significant way”¹⁰⁹ by causing capable and honest persons to avoid corrupt bureaucracies.¹¹⁰ At the same time, corrupt systems tend to attract corrupt actors, and the “‘corruption field’ of social interaction is constantly replenished as new ‘members of the cast’ are added to it.”¹¹¹ Honest people tend to leave, dishonest people tend to join, and the bureaucracy suffers.

¹⁰⁴ TANZI & DAVOODI, *supra* note 87 at 2; Paulo Mauro, *Corruption and Composition of Government Expenditure*, 69 J. PUB. ECON. 263, 274 (1998). In a brilliant study in which engineers reviewed the quality of roads constructed in Indonesia, Benjamin Olken found a direct correlation between corruption and low quality roads. BENJAMIN A. OLKEN, MONITORING CORRUPTION: EVIDENCE FROM A FIELD EXPERIMENT IN INDONESIA (NBER Working Paper no. 11753, 2005), *available at* <http://papers.nber.org/papers/w11753.pdf>.

¹⁰⁵ See SUSAN ROSE-ACKERMAN, *THE POLITICAL ECONOMY OF CORRUPTION* 43 (2001); Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1321 (1997).

¹⁰⁶ Marianne Bertrand et al., *Obtaining a Driving License in India: An Experimental Approach to Studying Corruption* (November 2006), *available at* http://www.doingbusiness.org/documents/Driving+tables_022006.pdf.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ Ajit Mishra, *Persistence of Corruption: Some Theoretical Perspectives*, 34 WORLD DEV. 349, 350 (2005).

¹¹⁰ See Omotunde E.G. Johnson, *An Economic Analysis of Corrupt Government, With Special Application to Less Developed Countries*, 28 KYKLOS: INT’L REV. FOR SOC. SCI. 47, 57 (1975) (observing that capable and honest persons avoid government work for moral reasons when corruption is pervasive); Vito Tanzi, *Corruption, Governmental Activities, and Markets*, FIN. & DEV., Dec. 1995, at 26 (observing that people will seek jobs that pay good bribes rather than jobs for which they are qualified); Francisco E. Thoumi, *Some Implications of the Growth of the Underground Economy in Columbia*, 29 J. INT’L STUD. & WORLD AFF. 35, 44 (1987) (stating that over time an honest individual in a corrupt system adapts and becomes more dishonest).

¹¹¹ Elena Nikolaevna Kofanova & Vladimir Vasilievich Petunkhav, *Public Opinion of Corruption in Russia*, RUSSIAN SOC. SCI. REV., Nov.-Dec. 2006, at 23, 23. While studying the Irrigation Department of a State in southern India, Robert Wade found that corrupt senior

3.4 Corruption Degrades the Quality of Life and Corrodes Support for Reform

As should be expected of a process that misallocates public and private resources, corruption degrades the quality of life for persons living in endemically corrupt polities. Scholars have measured several of the ways in which corruption degrades life. Sanjeev Gupta, Hamid Davoodi and Erwin Tiongson, for example, find that corruption increases child mortality rates, lowers child birthweight, and increases the dropout rate of children from primary school;¹¹² similarly, Maureen Lewis finds strong negative relationships between corruption and the performance and viability of healthcare systems.¹¹³ Lorenzo Pellegrini and Reyer Gerlagh find that corruption negatively affects environmental policy and the quality of the environment.¹¹⁴ Nejat Anbarci, Monica Escaleras and Charles Register even find a relationship between corruption and increases in traffic fatalities.¹¹⁵

Bad government and degradation of the quality of life breed cynicism and corrode support for government and economic reforms.¹¹⁶ Indeed, many social scientists consider corruption to be the single greatest threat to the development of democracy in emerging economies.¹¹⁷ Corruption vitiates support for market and economic reform,¹¹⁸ and – when it

officials sold government posts to junior officials who desired those positions because such positions allowed them to extract bribes, thus perpetuating the entry into bureaucratic service of dishonest and incapable persons and the exclusion of honest decisionmakers. Robert Wade, *The Market for Public Office: Why the Indian State Is Not Better at Development*, 13 *WORLD DEV.* 467, 474-80 (1985) (describing the sale of offices in a south Indian state).

¹¹² SANJEEV GUPTA, HAMID DAVOODI & ERWIN TIONGSON, CORRUPTION AND THE PROVISION OF HEALTH CARE AND EDUCATION SERVICES 23-24 (IMF, Working Paper no 116, 2000), available at <http://www.imf.org/external/pubs/ft/wp/2000/wp00116.pdf>; see TARYN VIAN, CORRUPTION AND THE HEALTH SECTOR (USAID: Sectoral Perspectives on Corruption, 2002), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/ac/sector/health.doc (discussing the relationship between corruption and poor medical service).

¹¹³ MAUREEN LEWIS, GOVERNANCE AND CORRUPTION IN PUBLIC HEALTH CARE SYSTEMS 44-45 (Center for Global Development, Working Paper no. 78, 2006), available at http://www.cgdev.org/files/5967_file_WP_78.pdf.

¹¹⁴ Lorenzo Pellegrini & Reyer Gerlagh, *Corruption, Democracy, and Environmental Policy: An Empirical Contribution to the Debate*, 15 *J. ENVT. & DEV.* 332, 333 (2006).

¹¹⁵ Nejat Anbarci, Monica Escaleras & Charles Register, *Traffic Fatalities and Public Sector Corruption*, 59 *KYKLOS* 327 (2006); see *supra* notes 106-108 and accompanying text (discussing the issuance of driving licenses to unqualified drivers by corrupt public officials).

¹¹⁶ Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 *SW. J. L. & TRADE AM.* 179, 184 (1996) (“Perhaps the greatest casualty of . . . corruption has been the erosion of public trust in public institutions and leaders, the foundation of democracy.”); A.W. Cragg, *Business, Globalization, and the Logic and Ethics of Corruption*, 53 *INT’L J.* 643, 654 (1998) (noting that respect for law and legal institutions is a “casualty” of bribery).

¹¹⁷ See, e.g., LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 92 (1999) (stating that corruption poses a serious threat to the consolidation of democracy); Grigorescu, *supra* note 7, at 519 (stating that corruption “is now seen as one of the greatest threats to the survival of new democracies around the world”); Mitchell A. Seligson, *The Measurement and*

accompanies democratic reform – perversely legitimizes the previous authoritarian regimes and even creates a nostalgic longing for those regimes.¹¹⁹

Susan Rose-Ackerman powerfully summarizes the social affects of corruption: “Corruption undermines the legitimacy of governments, especially democracies . . . Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that the government is substituting democratic values for decisions based on ability to pay. It can lead to coups by undemocratic leaders.”¹²⁰

3.5 Corruption Degrades Ukraine

Corruption has degraded Ukraine in each of these ways. Corruption clearly contributed to disengagement by Ukrainians from the government and process of government.¹²¹ The informal market surpassed the formal market in size.¹²² Corruption stalled or reversed economic

Impact of Corruption Victimization: Survey Evidence from Latin America, 34 WORLD DEV. 381, 381 (2005) (“Widespread corruption is increasingly seen as one of the most significant threats to deepening democratization in Latin America (and indeed much of the democratizing Third World).”).

¹¹⁸ See Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 32 COLUM. J. TRANSNAT’L L. 1, 27 (1995) (“Charges of bribery and corruption can easily erode popular support for economic reform in general, and foreign investment in particular.”); Karl M. Meessen, *Fighting Corruption Across the Border*, 18 FORDHAM INT’L L.J. 1647, 1647 (1995) (“Corruption both in government and in private business has no little role in discrediting freshly installed democratic procedures and freshly installed free market systems.”).

¹¹⁹ See Grigorescu, *supra* note 7, at 519 (discussing the corrosion of support for democracy and the nostalgia for authoritarian regimes engendered by corruption); Seligson, *supra* note 117, at 382 (discussing the erosion of support for democratic reforms and the use of public disgust with democracy by authoritarian leaders). Several studies empirically measure the decrease in support for democracy that accompanies increases in corruption in emerging economies. *E.g.*, Christopher J. Anderson & Yuliya Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 47 AM. J. POL. SCI. 91 (2003); William Mishler & Richard Rose, *What Are the Origins of Political Trust?: Testing Institutional and Cultural Theories in Post-Communist Societies*, 34 COMP. POL. STUD. 30 (2001).

¹²⁰ SUSAN ROSE-ACKERMAN, *supra* note 105, at 44.

¹²¹ See Roman P. Zyla, *Corruption in Ukraine: Between Perception and Reality*, in STATE AND INSTITUTION BUILDING IN UKRAINE, *supra* note 59, at 245, 259 (reporting that corruption has lead people to disconnect from government).

¹²² See Claire Wallace & Rossalina Latcheva, *Economic Transformation Outside the Law: Corruption, Trust in Public Institutions and the Informal Economy in Transition Countries of Central and Eastern Europe*, 58 EUROPE-ASIA STUD. 81, 88 (2006) (reporting that more than half of economic activity in Ukraine is informal); Zyla, *supra* note 121, at 259-60 (attributing a relationship in Ukraine between corruption and the informal market, and stating that the informal market grew in size from 15% of the total economy in 1989 to 40-60% in 1997).

growth and has left the energy sector in shambles.¹²³ Foreign investors shunned Ukraine.¹²⁴ Political leaders made patently bad decisions for very selfish reasons.¹²⁵ Support for markets and reforms diminished substantially, prior to the euphoria that accompanied the ouster of Kuchma.¹²⁶ Corruption has degraded the quality of life in Ukraine in countless ways.¹²⁷

Attitudes in Ukraine toward corruption are complex, but in general people in Ukraine condemn corruption.¹²⁸ They should. As Martin Davies notes, “We delude ourselves if we think

¹²³ See FREEDOM HOUSE, *supra* note 72, at 648; Margarita M. Balmaceda, *Ukraine’s Persistent Energy Crisis*, 51 PROBLEMS OF POST-COMMUNISM 40, 43-44 (Jul./Aug. 2004) (discussing the relationship between corruption and lack of energy security, as well as broader economic harms); Mellor, *supra* note 73, at 69 (stating that Lazarenko’s corruption destroyed Ukraine’s energy sector).

¹²⁴ See FREEDOM HOUSE, *supra* note 72, at 647; Vladimir Kvint, *We Forgive You*, FORBES GLOBAL, July 21, 2003, at 34, 34 (describing economic devastation and lack of foreign investment due to corruption); Jane Perlez, *I.M.F. Team Backs a \$2.2 Billion Loan for Hard-Up Ukraine*, N.Y. TIMES, Aug. 1, 1998, at A5 (reporting statements by International Monetary Fund that corruption reduced foreign investment into Ukraine to a trickle).

¹²⁵ See Lucan A. Way, *Rapacious Individualism and Political Corruption in Ukraine, 1992-2004*, 38 COMMUNIST AND POST-COMMUNIST STUD. 191, 194-97(2005) (characterizing the period as one of “rapacious individualism”); Wilson, *supra* note 61, at 99 (describing poor decisionmaking).

¹²⁶ See Anna M. Kvizmik, *Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 HARV. INT’L L.J. 611, 616 (1993) (“The public perception of corruption and the poor quality of the judiciary have made judicial reform in Ukraine difficult.”); Zyla, *supra* note 121, at 260 (stating that corruption has reduced support for reform in Ukraine).

¹²⁷ See Bohdan Harasymiw, *Policing, Democratization and Political Leadership in Postcommunist Ukraine*, 36 CAN. J. POL. SCI. 319, 320-21 (2003) (stating that corruption took Ukraine to the verge of a repressive police state); Donna M. Hughes & Tatyana A. Denisova, *The Transnational Political Criminal Nexus of Trafficking in Women from Ukraine*, 6 TRENDS IN ORGANIZED CRIME 43, 43-44 (2001) (describing the relationship between corruption and the trafficking of 400,000 Ukrainian women into forced sexual exploitation); Mary Layne, Mykola S. Khruppa & Anatoly A. Muzyka, *The Growing Importance of Ukraine as a Transit Country for Heroin Trafficking*, 6 TRENDS IN ORGANIZED CRIME 77, 79 (2001) (discussing the relationship between corruption and the increase in narcotics trafficking in and through Ukraine, and noting that Ukraine has become a major transit route for opium); Alla Yaroshinskaya, *Chernobyl at 20: Mired in Corruption*, CURRENT DIGEST OF THE POST-SOVIET PRESS, May 24, 2006, at 1 (discussing corruption that has diverted funds intended to secure the still dangerous Chernobyl nuclear facility and funds intended to compensate victims of the Chernobyl disaster).

¹²⁸ See William L. Miller, *Corruption and Corruptibility*, 34 WORLD DEV. 371, 372 (2005) (reporting that 58% of Ukrainians surveyed think corruption is bad and another 31% think it is bad but avoidable, totaling 89% who think it is bad); Zyla, *supra* note 121, at 263-64 (noting that the pertinent change may be an increase in the perception of corruption rather than an actual increase in corruption). Miller notes that attitudes toward corruption are complex. Miller, *supra*, at 373.

bribery to be purely economic conduct incapable of leading to fear, cruelty and humiliation.”¹²⁹ The control of behaviors such as those engaged in by Lazarenko constitutes a matter of import to the people of Ukraine, the United States, and the global community in general. Finding a means of controlling the behaviors of transnational malfactors, such as Pavlo Lazarenko, therefore acquires special consequence.

4. *United States v. Lazarenko: Decisions on Motions and a Verdict*

Pavlo Lazarenko engaged in corrupt activity in Ukraine, while serving as a government official, and then transferred the proceeds of that corrupt activity to several places outside of Ukraine to hide and to launder. Because his actions crossed political borders, full criminal prosecution of his acts would be unlikely in a system in which prosecuting governments concerned themselves only with activities that occurred within their sovereign territory. Such a construction essentially liberates a transnational actor such as Lazarenko from any constraints, and fails to recognize the realities of transnational relationships.

A piece of Lazarenko’s activities occurred within the United States. Lazarenko allegedly transferred more than one hundred million U.S. dollars through various U.S. banks;¹³⁰ the fact that this activity occurred within the United States gave U.S. prosecutors an opening. The United States charged Pavlo Lazarenko with money laundering, wire fraud, transportation of stolen property, and conspiracy.¹³¹

The prosecution of Pavlo Lazarenko is remarkable in a narrow sense as the first time the United States has prosecuted a foreign leader in part for crimes committed in that leader’s country.¹³² In a broader and more interesting sense the prosecution cobbles together local laws to regulate transnational behavior. The process of cobbling together local laws to regulate transnational actors raises several questions, ranging from the role and administration of those local laws to the balancing of sovereignty. Indeed, the trial of Pavlo Lazarenko was delayed for several years, in part because a number of the witnesses were abroad and not available but also in part because of the complexity of the case.¹³³ In the pre-trial stages, the Federal District Judge issued two orders that illustrate the complexity of these issues and that merit scrutiny.

4.1 *The First Order: The Role of Ukrainian Law*

In response to differing postures adopted by the government and the defense, the court asked for briefs and issued an order on the role of Ukrainian law in the prosecution of Lazarenko. The government suggested that Ukrainian law should play only a limited role, whereas the

¹²⁹ Martin Davies, *Just (Don’t) Do It: Ethics and International Trade*, 21 MELBOURNE U. L. REV. 601, 614 (1997).

¹³⁰ Including Hambrecht & Quist, Merrill Lynch, Bank of America, Robertson & Stephens, Pacific Bank, Fenner & Smith, and Commercial Bank of San Francisco. Thomas Catan, *Ukraine’s Former Premier to Face US Trial*, FIN. TIMES, June 2, 2000, at 2.

¹³¹ *United States v. Lazarenko*, No. 06-10273, 2007 U.S. App. LEXIS 2623, at *3 (Feb. 7, 2007 9th Cir.)

¹³² Matthew J. Spence, Comment, *American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114 YALE L.J. 1185, 1185 (2005).

¹³³ Wilson, *supra* note 61, at 40.

defense argued that Ukrainian law played a central role. The court adroitly addressed the relationship between the two sets of local laws with respect to money laundering and the transportation of stolen property, but displayed far less care with respect to the issue of wire fraud.

4.1.1. *Money Laundering*

The indictment charged Lazarenko with nine counts of money laundering. Money laundering involves a downstream financial transaction intended to conceal the proceeds of a known unlawful activity.¹³⁴ The unlawful activities alleged by the government consisted of foreign extortion, wire fraud, and receipt of stolen property. The charge of foreign extortion was supported by 18 U.S.C. §1956(c)(7)(B)(ii), which listed at that time¹³⁵ as predicate crimes “an offense against a foreign nation involving . . . extortion.”¹³⁶

The phrase “offense against a foreign nation” could be interpreted as meaning that the foreign state must be the victim of the alleged act. In *United States versus One 1997 E35 Ford Van*,¹³⁷ however, the Federal District Court for the Northern District of Illinois specifically rejected such an interpretation, holding that it “would unduly limit the ability of the federal government to prosecute those who launder money for the purpose of promoting serious criminal activity in a foreign country.”¹³⁸ Such an interpretation clearly comports with the general understanding of crime as an offense against the state.¹³⁹ The interpretation, however, also

¹³⁴ See Michael McGuinn, *Money Laundering*, 43 AM. CRIM. L. REV. 739, 739-61 (2006) (providing a comprehensive review of money laundering).

¹³⁵ The actions for which Lazarenko was prosecuted occurred before Congress amended the money laundering statute to include “bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official.” 18 U.S.C. §1956(c)(7)(B)(iv); see W. Clifton Holmes, *Strengthening Available Evidence-Gathering Tools in the Fight Against Transnational Money Laundering*, 24 NW. J. INT’L L. & BUS. 199, 203 (2003) (discussing this amendment to the money laundering statute).

¹³⁶ Section 1956(c)(7)(B)(ii) also lists offenses against a foreign nation involving murder, kidnapping, robbery, and the destruction of property by fire or explosion as predicate crimes.

¹³⁷ *United States v. One 1997 E35 Ford Van, et al.*, 50 F. Supp. 2d 789 (N.D. Ill 1999).

¹³⁸ 50 F. Supp. 2d at 802. While *One 1997 E35 Ford Van* has been mentioned in some scholarly discussion, the case is only peripheral to the subject matter of their discussions and no scholar has addressed the apparently unremarkable characterization of criminal law by that court. See, e.g, Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL’Y 75, 97 (2001) (discussing the factual circumstances surrounding the decision).

¹³⁹ See Lynne Henderson, *Revisiting Victim’s Rights*, 1999 UTAH L. REV. 383, 392.

Whether one grounds the argument for the social contract embodied in the [U.S.] Constitution on Hobbes, Locke, Nozick, Rawls, and other political philosophers, the theory is that we cede our right to exact revenge or restitution to the state and to the law in return for the state's protection and enforcement of the law. Accordingly, the state and federal governments of hold a formal constitutional monopoly on the use of force. The criminal law, enacted by the legislatures, is

imposes on the prosecution the requirement of demonstrating that the underlying activity of the defendant is in fact an offense against the state, that is, that it violates the laws of the country in which it occurred. Indeed, in its order the District Court ordered that the prosecution had the burden of proving that the extortive acts alleged to have been engaged in by Lazarenko violated Ukrainian law.¹⁴⁰ This order represents a significant cobbling together of local laws. The U.S. District Court tried Lazarenko for violation of U.S. laws. However, because his actions were transnational in nature, they involved the laws of another country. By joining together the two sets of laws, the court devised a way to regulate a transnational act even in the absence of a transnational authority.

4.1.2. *Wire Fraud*

The indictment of Lazarenko alleged twenty-two counts of wire fraud. Successful prosecution of a wire fraud charge requires proof of “(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme, and (3) a specific intent to deceive or defraud.”¹⁴¹ A scheme to defraud may include the deprivation of honest services,¹⁴² and the prosecution did allege that Lazarenko deprived the Ukrainian people of honest services.

Prosecutor’s typically charge deprivation of honest services in cases of public corruption.¹⁴³ In spite of its frequent use, however, the statute allowing prosecution for deprivation of honest services does not precisely define “honest services.”¹⁴⁴ Nonetheless, to

part of that monopoly. Crimes are legally defined as offenses against the state and the community, even if those offenses involve the individual victims.

Id.; see also MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 2 (1994) (the prevailing theory of criminal law is that crime is an offense against the state); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1261 (1994) (same). Although much of this literature is critical of the affects of this theory of crime, Miriam Aukerman points out that even in different criminal justice paradigms, such as restorative justice, an important component of crime is that it constitutes an offense against the rules and norms of a society. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 78 (2002)

¹⁴⁰ United States v. Lazarenko, No. CR 00-284 MJJ, 2003 U.S. Dist LEXIS 25940, at *12 (N.D. Cal. Sept. 10, 2003).

¹⁴¹ United States v. Garlick, 240 F. 3d 789, 792 (9th Cir. 2001); see Skye Lynn Perryman, *Mail and Wire Fraud*, 43 AM. CRIM. L. REV. 715, 715-38 (2006) (providing a comprehensive overview of wire fraud).

¹⁴² 18 U.S.C. §1346.

¹⁴³ Adam Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 397 (1989).

¹⁴⁴ See Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 719 (2000) (referring to the phrase as “amorphous”). Aphorisms such as Cervantes’ famous maxim “honesty is the best policy” do not help. MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE DE LA MANCHA pt. 2, book 3, ch. 33 (1615); see

borrow from a court's examination of a slightly different relationship, the "language is no more general than such terms as 'due process,' 'seaworthiness,' 'equal protection of the law,' 'good faith,' or 'restraint of trade,' which courts interpret every day."¹⁴⁵ Indeed, courts have spent several decades elucidating the phrase "honest services."¹⁴⁶

The majority of courts evaluating a claim of deprivation of honest services by a public official apply a fairly broad definition involving a violation of the relationship between that official and the public.¹⁴⁷ Public officials inherently bear a responsibility to make decisions in the public's best interest and to disclose any conflict of interest in doing so.¹⁴⁸ This duty "need not be based upon the existence of some statute prescribing such a duty" because an official is a "trustee for the citizens and the state . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty."¹⁴⁹ Therefore, any "undisclosed, biased decision making for personal gain, [regardless of] tangible loss to the public . . . constitutes a deprivation of honest services."¹⁵⁰ As John Coffee notes, "[t]he key idea in this now sizable body of law is that a public decision-maker must disclose any conflict of interest in a transaction or decision that could result in personal gain to the decision-maker. In addition, any receipt of a gratuity may

Harold H. Punke, *Honesty as the Best Policy*, 41 J. PHIL. 141, 141 (1944) (critically examining Cervantes' statement).

¹⁴⁵ *Saipan v. United States Dep't of Interior*, 502 F.2d 90, 99 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (determining that the trust agreement between the United States and the United Nations regarding the Trust Territories of the Pacific is not too vague); *see infra* note 201 and accompanying text (using international trust agreements to illustrate the universal nature of the concept).

¹⁴⁶ The development of law regarding deprivation of honest services experienced a brief interruption when the Supreme Court declined to find a cause of action in the wire fraud statute for harm to intangible rights, stating "we read [the mail fraud statute] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *McNally v. United States*, 483 U.S. 350, 360 (1987). Congress promptly answered this challenge, passing section 1346 as part of the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 7603(a), 102 Stat. 4508 (1988). The Senate Judiciary Committee explicitly stated: "This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

¹⁴⁷ *See* George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U.L. REV. 403, 437 (2005) ("*Lukis-Lopez* dictates a broad reading of the term honest services with respect to a public official"); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 9 (1998) (suggesting that the honest services provision "depend[s] on the existence of a special relationship between the parties").

¹⁴⁸ *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997).

¹⁴⁹ *United States v. Mandel*, 591 F.2d 1347, 1363, *rev'd on other grounds on reh'g en banc*, 602 F.2d 653 (4th Cir. 1979) (per curiam).

¹⁵⁰ *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

also require disclosure, at least when the decision-maker possesses discretionary authority and the payor has an incentive to influence the public official.”¹⁵¹

Some scholars criticize the phrase “honest services” as vague and imprecise.¹⁵² These scholars question not only the constitutionality of an imprecise phrase – notwithstanding the myriad general phrases interpreted by courts – but also whether it provides sufficient instruction to public officials as to how they must act – or more precisely how they may not act.¹⁵³ Related to these concerns, one strand of cases, very thin but discernable, holds that deprivation of honest services occurs only through violation of a specific law. According to this interpretation of honest services, “a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official’s employer under state law.”¹⁵⁴

John Coffee, who himself has raised questions regarding vagueness, vigorously condemns this approach to honest services.¹⁵⁵ He points out that the requirement of a violation of a law “could have a devastating impact on the public fiduciary context” and would overturn the existing standards regarding honest services “because the common law has never developed a substantial body of precedents dealing with the disclosure obligations of the public official.”¹⁵⁶ The effect has even more profound effects in civil law systems, in which principles developed by courts are respected but not codified as part of the law.¹⁵⁷

Requirement of violation of a specific law vitiates comprehensive attempts to control corruption. Corruption manifests itself in many forms.¹⁵⁸ In general, corruption is the use or

¹⁵¹ John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 453 (1998).

¹⁵² See John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the “Evolution” of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 27 (1983) (stating that intangible rights are too broad and suggesting that they be narrowed by statute); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 440 (1995) (criticizing the statute as imprecise); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1181 (1997) (asking for “specific federal legislation that closely defines prohibited conduct”).

¹⁵³ See John C. Coffee, Jr., *Does “Unlawful Mean “Criminal””? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 207 (1991) (stating that the vagueness of honest services raises constitutional question regarding notice and fairness); Brown, *supra* note 147, at 473 (stating that the honest services statute does not provide precise guidance to government actors).

¹⁵⁴ *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir.), *cert. denied*, 522 U.S. 1028 (1997).

¹⁵⁵ Coffee, *supra* note 152, at 447-54.

¹⁵⁶ *Id.* at 453. Coffee points out that “the mail and wire fraud statutes were the principal vehicle for the development of this law.” *Id.*

¹⁵⁷ See Pierre-Emmanuel Moysse, *La nature du droit d'auteur: droit de propriété ou monopole?*, 43 MCGILL L.J. 507, 534 (1998) (discussing and using court developed principles not codified in French law).

¹⁵⁸ See SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 4 (1978) (discussing varieties of corruption); see also Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT’L L. REV. 1021, 1021 (1998) (“Although most, if not all, states confront corruption . . . , corrupt practices are extremely difficult to define.”); see also Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of*

misuse of public office or trust for self rather than public interest.¹⁵⁹ The specific iterations of this concept probably defy statutory listing: the methods of abusing trust or office are as infinite as the human mind.¹⁶⁰ Therefore, to prosecute only those methods contained on a statutory list would eviscerate the state's ability to control abusive behavior and would give free reign to creative corrupt officials.

Requiring violation of a specific law also confuses legal compliance with honesty. Lynn Paine accurately describes the relationship between law and ethics as “dynamic and interrelated” rather than as exactly correspondent or completely separate from one another.¹⁶¹ Paine suggests that “in truth, the relationship between [legal behavior and ethical behavior] is in flux: the prescriptions of law and the prescriptions of ethics . . . coincide to different degrees at different times and in different societies.”¹⁶² To conflate “honest services” with simple obedience to a law demeans the concept of honesty.¹⁶³

The court hearing motions on Lazarenko's prosecution recognized that misuse or abuse of a Ukrainian office must be determined on Ukrainian terms.¹⁶⁴ Unfortunately, in the prosecution of Lazarenko the court ordered that “to prove honest services fraud, the government must establish that Lazarenko's conduct violated the local, state or common law of Ukraine, or

Politics, 32 UCLA L. REV. 784, 788, 798-805 (1985) (describing difficulties in creating a specific list of corrupt acts).

¹⁵⁹ See Saladin Al-Jurf, *Citizens, National Governments, and International Financial Institutions: Changing Conceptions of Development in the 1990s*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 193, 196 (1999) (stating that the World Bank's definition of corruption is “[t]he abuse of public office for private gain”); David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719, 720 (1966) (Corruption is the “misuse of authority as a result of considerations of personal gain, which need not be monetary.”); Philip B. Heymann, *Democracy and Corruption*, 20 FORDHAM INT'L L.J. 323, 325 (1996) (describing “[c]orruption, as secretly receiving private benefits to affect a decision that is supposed to be made in the interests of others and uninfluenced by private gain. . . .”); Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967).

¹⁶⁰ For this reason, Chief Justice Burger praised the mail fraud statute as a front-line defense against new and evolving forms of fraud. *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

¹⁶¹ Lynn Sharp Paine, *Law, Ethics and Managerial Judgment*, 12 J. LEGAL STUD. EDUC. 153, 165 (1994).

¹⁶² *Id.* Indeed, Paine notes that “law is most often a lagging indicator of social ethics.” *Id.* at 167.

¹⁶³ See Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 275-76 (2005) (noting that the Security Exchange Commission has adopted a simple definition of Rule 406, 17 C.F.R. § 229.406(b) (2006), and that “the Commission's definition, tracking the language of the statute, directs that a corporate code of ethics should promote ‘honest and ethical conduct’ and not simply compliance with the law”); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1283 (1995) (warning of the danger of requiring legal compliance rather than honesty).

¹⁶⁴ *United States v. Lazarenko*, No. CR 00-284 MJJ, 2003 U.S. Dist LEXIS 25940, at *21 (N.D. Cal. Sept. 10, 2003); see Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 629 (2000) (observing that although a general understanding of corruption exists, its local manifestations may vary).

that he knew others were doing so on his behalf.”¹⁶⁵ In doing so, the court seems to abandon the principle that “[n]o trustee has more sacred duties than a public official and any scheme to obtain an unfair advantage by corrupting such a one must in the federal law be considered a scheme to defraud.”¹⁶⁶

The court’s reference to “common law” is puzzling but could have opened the door to a more commonsense understanding of the responsibility of a public official. Ukraine is not a common law country,¹⁶⁷ a fact of which the court seemed aware.¹⁶⁸ If one substitutes the word “principles” for the phrase “common law,” the instructions of the court would make more sense and would also protect the relationship between government and the public. The court, however, did not follow this more sensible path.

When cobbling together local laws to regulate transnationally corrupt behavior, a basic question when examining allegedly corrupt acts in other countries should be whether the act is in fact corrupt in that jurisdiction. That question, however, should start from the premise that corruption consists of the misuse or abuse of power for personal gain, rather than the misconception that corrupt acts must be found on a statutory checklist. George Brown professes dismay that “an extraordinary range of corrupt practices, including but not limited to, various forms of bribery and failure to disclose breaches of fiduciary duty have been construed to fit within the concept of honest services.”¹⁶⁹ To average citizens, of either the United States or Ukraine, it would probably be far more astonishing if bribery or the breach of fiduciary duties were *not* considered an abrogation of the honest services expected from a public official. To construe the law in any other way would not give effect to the intentions of Congress, and would sterilize the law.

4.1.3. *Transportation of Stolen Property*

The indictment also charged Lazarenko with twenty-three counts of interstate transportation of stolen property.¹⁷⁰ Successful prosecution of this charge requires proof of two

¹⁶⁵ United States v. Lazarenko, No. CR 00-284 MJJ, 2003 U.S. Dist LEXIS 25940, at *21 (N.D. Cal. Sept. 10, 2003). The court took an interesting journey to this conclusion. The court started by acknowledging that the “fiduciary duty to disclose information the public would want to know. . . is *often* defined by state and local ethics laws.” *Id.* at *21 (emphasis added). The court then makes reference to a case, from another circuit, in which a court used a violation of local law to support the finding of a breach of the fiduciary duty. *Id.* at *21 (citing United States v. Antico, 275 F.3d 245, 263 (3d Cir. 2001)). From this, the court concludes that the prosecution must prove a violation of Ukrainian law. *Id.* at *22.

¹⁶⁶ Shushan v. United States, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

¹⁶⁷ See Kim Ratushny, *Toward the “Independence . . . of Judges” in Ukraine?*, 62 SASK. L. REV. 567, 569-70 (1999) (noting that Ukraine is not a common law country and discussing differences between common law and former socialist law systems).

¹⁶⁸ See United States v. Lazarenko, No. CR 00-284 MJJ, 2003 U.S. Dist LEXIS 25940, at *21 (N.D. Cal. Sept. 10, 2003) (recognizing that Ukraine does not share a common law background with the United States).

¹⁶⁹ Brown, *supra* note 147, at 437.

¹⁷⁰ The criminalization of the interstate transportation has special relevance to the regulation and control of corrupt activities that cross national borders. The Supreme Court of the United States

elements: (a) that the property in question was stolen, converted, or taken by fraud,¹⁷¹ and (b) transportation of that property over a state line.¹⁷² Curiously, the word stolen “has no accepted common law meaning.”¹⁷³ Rather than relying on a common law meaning, courts instead look to the purpose and intent of a statute containing the word “stolen,”¹⁷⁴ although the United States Supreme Court notes that “through the years, [‘stolen’] became the generic designation for dishonest acquisition” of property.¹⁷⁵

observed that the purpose of such legislation is to reach malfeasors who might otherwise escape prosecution simply by crossing a border. *United States v. Sheridan*, 329 U.S. 379, 384 (1946) (the legislation “contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent”).

¹⁷¹ Because the statute requires knowledge rather than belief of theft or fraud, theft or fraud must actually have occurred. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 541 (1992) (“When a legal standard requires knowledge, not simply belief, then the standard imposes an additional non-mens rea requirement, namely, that the proposition believed is true. This is simply an explication of the concept of knowledge. For example, to be guilty of the crime of knowingly receiving stolen property, one must believe that the property is stolen, and the property must indeed be stolen. But the mental state is essentially the same whether or not the property is actually stolen.”).

¹⁷² 18 U.S.C. § 2314; see Jorge C. Gonzalez, *Punishing the Causer as the Principal: Mens Rea and the Interstate Transportation Element of the National Stolen Property Act*, 38 SAN DIEGO L. REV. 629, 629 (2001) (discussing and defining the elements of the crime). Courts do not concern themselves over the defendant’s knowledge regarding the transportation of the property. See *United States v. Roselli*, 432 F.2d 879, 891 (9th Cir. 1970) (“Section 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation.”). Rather, the critical element is the defendant’s knowledge of the theft, conversion or fraud and the fact that theft, conversion or fraud did occur. See Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1386 (2002). Weiss notes that “the strict liability element is the element conferring federal jurisdiction – converting a state offense into a federal offense. This sort of jurisdictional element is typically a strict liability element. The jurisdictional element is usually one of strict liability, precisely because it is not what makes the conduct criminal, but rather what makes it criminal under federal, rather than only state, law.” *Id.* at 1387.

¹⁷³ *United States v. Turley*, 352 U.S. 407, 411 (1957); see Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims In The Antiquities Market*, 97 YALE L.J. 466, 473 (1988) (reporting that Turley promotes an expansive definition of ownership and suggesting that an expansive definition is particularly appropriate when considering ownership and theft in the context of multiple jurisdictions).

¹⁷⁴ *Turley*, 352 U.S. at 413 (directing courts to “give ‘stolen’ the meaning consistent with the context in which it appears”); see Susan E. Brabenec, *The Art of Determining “Stolen Property:” United States v. Portrait of Wally, a Painting by Egon Schiele*, 69 U. CIN. L. REV. 1369, 1393 (2001) (stating that *Turley* asks courts to look at the intent and purpose of statutes using the term “stolen”).

¹⁷⁵ *Turley*, 352 U.S. at 412.

Placing the meaning of “stolen” within the context of the federal statute in which it appears gives the word the color of federal law. Indeed, the court hearing motions in Lazarenko’s case ruled that “federal law controls the question of whether an item is ‘stolen.’”¹⁷⁶ The court also noted, however, that a determination of theft depended on a property interest. Finding a property interest becomes interesting when cobbling together local laws.

As Emmanuel Kant noted, “the origin of ownership is difficult to comprehend.”¹⁷⁷ Nonetheless, while an inchoate natural right to property may exist,¹⁷⁸ law gives expression to the right and ability to own property.¹⁷⁹ Thus, the law determines what is owned and what is stolen.¹⁸⁰ Because laws and legal systems differ, however; what a person can own and how ownership is perfected or violated vary from place to place.¹⁸¹

¹⁷⁶ United States v. Lazarenko, No. CR 00-284 MJJ, 2003 U.S. Dist. LEXIS 25940, at *31 (N.D. Cal. Sept. 10, 2003) (citing United States v. Portrait of Wally, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); see Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT’L L.J. 239, 250-253 (2004) (discussing *Wally*); Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT’L L. 297, 306-311 (2001) (discussing *Wally*).

¹⁷⁷ B. Sharon Byrd & Joachim Hruschka, *The Natural Law Duty to Recognize Private Property Ownership: Kant’s Theory of Property in his Doctrine of Right*, 56 U. TORONTO L.J. 217, 217 (2006) (quoting Emmanuel Kant: “*Der Anfang des Eigentums ist schwer zu begreifen*”).

¹⁷⁸ O. Lee Reed, *What Is “Property”?*, 41 AM. BUS. L.J. 459, 461 (2004) (describing natural law theory of property); see also Karen Clay & Gavin Wright, *Order Without Law? Property Rights During the California Gold Rush*, 42 EXPLORATIONS ECON. HIST. 155, 159-163 (2005) (describing the creation of property rights in the legal vacuum of California gold rush).

¹⁷⁹ See Byrd & Hruschka, *supra* note 177, at 220 (observing that law gives expression to the right to own property); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 357-58 (2001) (describing a predominant theory of property: “Property is a composite of legal relations that holds between persons . . .”). Merrill and Smith suggest two competing theories of property, both of which depend on law. Merrill & Smith, *supra*, at 397-98.

¹⁸⁰ See Merrill & Smith, *supra* note 179, at 362 (“property is important because it gives legal sanction to the efforts of the owner of a thing to exclude an infinite and anonymous class of marauders, pilferers and thieves”).

¹⁸¹ See HIROYUKI YANAGIHASHI, *HISTORY OF THE EARLY ISLAMIC LAW OF PROPERTY: RECONSTRUCTING THE LEGAL DEVELOPMENT, 7TH-9TH CENTURIES* (2006) (describing different property system); Lord Hope of Craighead, *The Place of a Mixed System in the Common Law World*, 35 ISR. L. REV. 1, 17 (2001) (noting that common and civil law differ markedly in the perfection of property rights); George L. Gretton, *Reception Without Integration? Floating Charges and Mixed Systems*, 78 TUL. L. REV. 307, 310 (2003) (describing property law as “fragmented” between nations); Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT’L L. 435, 474 (2006) (observing that property laws and societal goals regarding property differ in different jurisdictions); Michael J. Whincop, *Conflicts in the Cathedral: Towards a Theory of Property Rights in International Law*, 50 U. TORONTO L.J. 41, 46 (2000) (noting that property laws differ among jurisdictions).

The Lazarenko court recognized the local nature of property. Thus, even while recognizing that U.S. federal law governs “stolen,” the court ruled that Ukrainian law mattered with respect to property rights.¹⁸² Again, in cobbling together a means of reaching a transnational actor, the court adroitly joined together two sets of local laws.

4.1.4. *Finding Fact and Finding Law*

The consistent reference to Ukrainian law left one last question in the proceeding. The court ruled that it, as the determiner of law, would rule on the content of Ukrainian law and that the jury, as trier of fact, would pass verdict on whether Lazarenko had violated that law.¹⁸³ Phrased so starkly, it is difficult to gainsay that allocation of responsibilities.¹⁸⁴ Moreover, it is singularly unremarkable for U.S. courts, or any domestic court, to rule on the content of another country’s laws.¹⁸⁵ Such determinations are made as a matter of course.¹⁸⁶ The fact that law may change rapidly and unpredictably in an emerging economy may make this task difficult, but difficulty does not relieve a court of its responsibilities.¹⁸⁷

4.2 *The Second Order: Dismissing Charges*

Immediately following the prosecution’s presentation of its case in chief, the defense moved for dismissal of the charges on the (predictable) grounds that the prosecution had failed to produce evidence to support the charges. The court granted this motion in part and denied in

¹⁸² United States v. Lazarenko, No. CR 00-284 MJJ, 2003 U.S. Dist. LEXIS 25940, at *32-*33 (N.D. Cal. Sept. 10, 2003).

¹⁸³ *Id.* at *34.

¹⁸⁴ See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 698 (2007) (stating that judges find law and juries find fact); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 69, 80 (2003) (stressing the fundamental role of jury as factfinder and judge as law finder).

¹⁸⁵ See Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private international Law*, 12 ARIZ. J. INT’L & COMP. L. 225, 225 (1995) (“Application, proof, and interpretation of foreign law are interrelated subjects that sit at the core of international conflict of laws, or, as known in the civil law system, private international law.”); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 293 n.175 (1990) (“The power of parties to rely on foreign law with respect to interpreting their contract is uncontroversial.”).

¹⁸⁶ See Dolinger *supra* note 185, at 230-32 (noting that France, for example, litigates extensive amounts of foreign law in its courts).

¹⁸⁷ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1170 (1999) (stating that the proper question is not whether the task is difficult but instead whether the task is beyond the court’s competence). Specifically in reference to discerning international customary law, Judge Edwards stated: “That the task might be difficult should in no way lead to the conclusion that it should not be accomplished.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 797 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

part.¹⁸⁸ While the granting of a motion to dismiss rarely elicits notice, this particular order highlights the serious problems created by this court's attenuated definition of honest services.

The wire fraud case forced upon the prosecution by that definition did not simply involve deprivation of honest services but instead demanded proof of violation of a specific provision of the Ukrainian Commercial Code.¹⁸⁹ This provision requires an official act, taken for mercenary gain, contrary to the interest of service, which causes material harm.¹⁹⁰ The affects of this very strange use of a statute illustrate the problems caused when officials are asked to comply with a statutory list rather than held to a standard of honesty.¹⁹¹

The court dismissed several charges against Lazarenko because in its mind "[t]he government [] utterly failed[ed] to establish material harm."¹⁹² While this conclusion may make sense in the context of section 1665 of the Ukrainian Commercial Code, it sounds bizarre juxtaposed against the mountain of empirical evidence condemning corruption as utterly harmful.¹⁹³ Lazarenko diverted nearly a billion dollars into his own pocket, he and his cronies savaged the energy market in Ukraine, he stunted the development of the industries from which he extorted goods and monies, and he and his cronies contributed to a sense of despair and futility throughout the country.¹⁹⁴ In every sense of the phrase other than, perhaps, that extrapolated from a provision of the Commercial Code, Pavlo Lazarenko deprived the citizens of Ukraine of honest services, a deprivation for which they suffered.

The court's reliance on a specific, obscure statutory provision is also troubling because it displays both legal ignorance and cultural arrogance. First, the court ignores the fact that tribunals in civil law countries use principles just as much as tribunals in common law countries.¹⁹⁵ Indeed, the principles of *honeste vivere*, *suum cuique tribuere*, and *alterum non*

¹⁸⁸ United States v. Lazarenko, No. CR 00-284 MJJ, 2004 U.S. Dist. LEXIS 19660, at *14 (N.D. Cal. May 7, 2004).

¹⁸⁹ *Id.* at *8. The court's use of the Ukrainian Commercial Code is odd, because the Commercial Code did not come into effect until January of 2004 whereas Lazarenko's acts occurred prior to 1998. See IRINA PALIASHVILI, LEGAL FRAMEWORK FOR BUSINESS OPERATIONS: SUMMARY OF RECOMMENDATIONS AND ISSUES FOR DISCUSSION 2 (Roundtable on Enterprise Development and Investment Climate in Ukraine June 13, 2006) (stating that the Commercial Code came into effect on January 1, 2004 after several years of drafting).

¹⁹⁰ United States v. Lazarenko, No. CR 00-284 MJJ, 2004 U.S. Dist. LEXIS 19660, at *8 (N.D. Cal. May 7, 2004).

¹⁹¹ See United States v. Lamoreaux, 422 F.3d 750, 754-55 (8th Cir. 2005) (holding that the mere acts of bribery or kickbacks are sufficient to demonstrate deprivation of honest services).

¹⁹² United States v. Lazarenko, No. CR 00-284 MJJ, 2004 U.S. Dist. LEXIS 19660, at *8 (N.D. Cal. May 7, 2004).

¹⁹³ See *supra* notes 86-115 and accompanying text.

¹⁹⁴ Ukraine's gross domestic product in 2000 equaled US\$ 44.5 billion, making Lazarenko's heist equal to about two percent of the entire country's product.

¹⁹⁵ See ATHANASSIOS N. YIANNOPOULOS, CIVIL LAW SYSTEM: LOUISIANA AND COMPARATIVE LAW 96 (2d. ed., 1999) ("in civil law countries judges and lawyers alike start their judicial reasoning from statutes as embodying general principles capable of covering any conceivable fact situation"); Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 910-911 (1999) (discussing the inevitability of a body of unofficial precedence in civil law countries).

laedere are foundational in civil legal systems.¹⁹⁶ Peter Lindseth succinctly explains the use of principles in civil law systems:

Codes can be notoriously vague – the French tort provisions are the favorite example of teachers of comparative law – requiring extensive judicial elaboration. The current meaning of French tort law has much more to do with well-settled precedent – *la jurisprudence constante*; e.g. relating to strict products liability – than the Code’s original references to delictual responsibility for “*une faute*.” Codes must also be, by definition, sufficiently general to handle a variety of unforeseen circumstances (“*feconde en ses consequences*,” as the French put it). Therefore, the prevailing method of interpretation, to use your terminology, is purposive and dynamic (the so-called “teleological method of interpretation”).¹⁹⁷

To assume that a Ukrainian court faced with the question “did Pavlo Lazarenko deprive our citizens of honest services” would rely on an obscure provision from the Ukrainian Commercial Code is patently ludicrous.¹⁹⁸ Sadly, the court was forced into that corner by its own misinterpretation of “honest services.”

The court’s finding of no material harm also borders on cultural arrogance. The finding implies at least the possibility that the relationship between the Ukrainian government and Ukrainian peoples is somehow lower in nature than a similar relationship in a common law jurisdiction. This is not true. Ndiva Kofele-Kale artfully demonstrates the existence of a general duty of care by public officials to the public.¹⁹⁹ He explains that

¹⁹⁶ Live honestly, do not hurt others, and give to each their due. JUSTINIAN’S INSTITUTES 1.1; see Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 310-11 (1998) (“In my judgment, the principles of mutual respect and cooperation for the common good underlie the entire Civil Code. I think of them as being the essence of what Justinian meant by his first precept of the law, *honeste vivere* . . .”); Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT. L. REV. 521,533 (2004) (referring to *honeste vivere*, *suum cuique tribuere*, and *alterum non laedere* as “fundamental” principles of civil law systems); see also Judith K. Schafer, “*Details of a Most Revolting Character*”: *Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT. L. REV. 1283, 1301 (1993) (referring to civil law case in which *honeste vivere* was incorporated by the court into duties of a manager (*Dwyer v. Cane*, 6 La. Ann. 707, 707 (1851))).

¹⁹⁷ E-mail letter from Peter Lindseth, Associate Director, European Legal Studies Center, Columbia University, to Peter L. Strauss, Betts Professor of Law, Columbia University (Apr. 14, 1998), quoted in Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 236 (1998).

¹⁹⁸ See Natalie Prescott, Note, *Orange Revolution in Red, White, and Blue: U.S. Impact on the 2004 Ukrainian Election*, 16 DUKE J. COMP. & INT’L L. 219, 240-41 (2006) (reporting the use of principles and movements toward the informal use of *stare decisis* and other aspects of common law in Ukraine).

¹⁹⁹ Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT’L L. 48, 95-101 (1995).

an important distinction can be drawn between leaders holding public office and the citizens they serve. Political leaders hold greater power and, therefore, bear far greater moral responsibility than ordinary citizens. A state's wealth and resources are passed down to the citizens and political leaders as the natural legacy from previous generations. Accordingly, a state's wealth and resources are to be held in trust for the present generation of citizens and for those not yet born.²⁰⁰

Kofele-Kale points out that the concept of trust has international recognition, regardless of the system of law, as evidenced by the responsibilities allocated by the United Nations through its International Trusteeship System.²⁰¹ It is true that in common law jurisdictions the trust relationship often uses the specialized nomenclature of "fiduciary duties," but the lack of the term fiduciary does not mean that other systems do not impose similar duties.²⁰²

Ukrainians in specific also consider the relationship between public officials and the public to carry with it duties and standards of care. The Constitution of Ukraine requires each incoming Deputies to swear an oath to "execute my duties in the interests of all fellow countrymen."²⁰³ Surveys conducted in Ukraine find that Ukrainians consider freedom from corruption an important aspect of democracy, and find disappointment with corrupt officials.²⁰⁴ The tens of thousands of persons who bore the privations of Ukraine's winter to protest Leonid Kuchma's corruption each bear witness to the fact that Ukraine society, just as that of the United States, places a duty on public officials that includes honesty and fair dealing. To say that Lazarenko did not deprive the people of Ukraine of honest services is to engage in the most incapacious of reasoning.

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²⁰⁰ *Id.* at 97.

²⁰¹ *Id.* at 100-101. In the case of Lazarenko, he would be found to violate the basic "public trust doctrine . . . that the state owes its citizens special duties of care, or stewardship, with respect to certain 'common property' public resources that comprise the wealth of the state." *Id.* at 96.

²⁰² See Andrei A. Baev, *Civil Law and the Transformation of State Property in Post-Socialist Economies: Alternatives to Privatization*, 12 UCLA PAC. BASIN L.J. 131, 156-157 (1993) (discussing analogs to fiduciary responsibilities in socialist legal systems); Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460, 466-67 (2006) (recognizing differences between common law fiduciary principles and civil law systems, but stating that civil law does many of the same things – "they're just not labeled as fiduciary duties").

²⁰³ UKRAYNSKA KONSTITUZIYA (constitution) ch. IV, art. 79 (Ukr.), available in English at <http://www.brama.com/ua-gov/conste.html>. Ukraine adopted its constitution in 1996, shortly before Lazarenko took office as Prime Minister. See generally Richard C.O. Rezie, Note, *The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions*, 31 CASE W. RES. J. INT'L L. 169, 169-210 (1999) (discussing and explaining the Constitution of Ukraine).

²⁰⁴ RAKESH SHARMA, ATTITUDES AND EXPECTATIONS: PUBLIC OPINION IN UKRAINE 4-5 (2003).

The jury heard the defense's case on the charges that were not dismissed. The jury convicted Pavlo Lazarenko on all counts.²⁰⁵ The United States Court of Appeals for the Ninth Circuit dismissed Lazarenko's appeal, sentenced Lazarenko to serve nine years in prison, and fined him ten million U.S. dollars.²⁰⁶ The conviction of one of the most avaricious of former leaders of a country signals the possibility of a potent new tool in the effort to combat corruption. It also demonstrates the need for, and the difficulty in, cobbling together local laws to reach transnational actors.

5. Cobbling Together Local Laws in a Sovereign World

The acts that lead to Lazarenko's conviction occurred in part while he sat as the Prime Minister of Ukraine. His prosecution and conviction inevitably lead to questions about sovereignty. "Sovereignty" is a phrase at least as abused and maligned as "globalization." Although the term elicits frequent invocation and engenders regular debate, no clear definition of sovereignty exists.²⁰⁷ Broadly, the term sovereignty conveys a degree of independence and self-determination, but even this usage encompasses a wide number of usages.²⁰⁸

Stephen Krasner groups the many uses of the term into four basic categories: domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty.²⁰⁹ Domestic sovereignty refers to the amount of authority and control a polity has within its own political organization and how that authority is manifested and organized – how effective the polity is as a state.²¹⁰ Interdependence authority refers to the amount of control that

²⁰⁵ WILSON, *supra* note 60, at 40.

²⁰⁶ *United States v. Lazarenko*, 469 F.3d 815 (9th Cir. 2006) *amended, rehearing denied, rehearing en banc denied*, *United States v. Lazarenko*, 2007 U.S. App. LEXIS 2612 (9th Cir. Feb. 7, 2007).

²⁰⁷ As Oppenheim noted more than a century ago, "[t]here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon." 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 103 (1905); *see also* Hurst Hannum, *Sovereignty and its Relevance to Native Americans in the Twenty-First Century*, 23 *AM. INDIAN L. REV.* 487 (1998/1999) ("Despite its fundamental nature, however, there is no commonly accepted definition of sovereignty.").

²⁰⁸ *See* Hannum, *supra* note 207, at 487 ("sovereignty may be understood as constitutional or legal independence");

²⁰⁹ Stephen D. Krasner, *Problematic Sovereignty*, in *PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES* 1 (Stephen D. Krasner ed., 2001).

²¹⁰ *Id.* at 7-8. In the United States, for example, ultimate authority lies with the people, who delegate that authority to a system of government divided into three branches. *See* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 *AM. U.L. REV.* 1, 1 (2003) (stating that the people are the sovereign, noting confusion around the delegation of their sovereign powers, but finding that "[t]he separation of powers operates in a more apparent and specific way at what we might identify as a level of 'fundamental sovereignty.'). Domestic sovereignty has no dispositive role in other types of sovereignty: a lack of effectiveness would not render a state as something other than a state. Krasner points out

a state has over transborder movement.²¹¹ International legal sovereignty refers to the recognition of a state by other states or international actors.²¹² What Krasner calls Westphalian sovereignty is the most problematic: it holds that states are independent and autonomous and that “external authority structures should be excluded from the territory of a state.”²¹³

The criticism of most legal scholars is leveled at Westphalian sovereignty;²¹⁴ indeed, most legal scholarship does not contemplate the other uses of the term sovereign. This usage of the term “sovereignty” engenders a criticism very similar to that of international law: that it does not describe the world as it actually exists.²¹⁵ As David Kennedy points out, states have always

that “failed states” still act as states within the international system and are still accorded the dignity of a state by other states. Krasner, *supra* note 209, at 7.

²¹¹ Krasner, *supra* note 209, at 8-9. Many legal scholars offer control of borders as a foundational aspect of sovereignty, although usually in the context of discussions involving immigration. See JAMES G. GIMPEL & JAMES R. EDWARDS, THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 5 (1999) (arguing that control of borders is a fundamental aspect of sovereignty); James A. Casey, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 419 (1994) (supporting fundamental notion that sovereignty controls borders); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT. L. REV. 1087, 1105 (1993) (noting the “basic right” of a sovereign to control its borders); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 6 (1984) (control of borders is inherent in sovereignty). Of course, states that do not have significant levels of control over transborder movement can still hold the status of a state. Lichtenstein, for example, acts as a state even though it has ceded control of its borders to Switzerland.

²¹² Krasner, *supra* note 209, at 9-10. The Supreme Court of Pakistan noted that recognition as a state is independent of other types of sovereignty. *Jilani v. Government of Punjab*, 1972 P.L.D. S. Ct. 139, 181 (Pakistan) (Hamoodur Rahman, C.J.) (“The recognition of a State under International Law has nothing to do with the internal sovereignty of the State . . .”); see Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT’L L. REV. 869, 875 (2000) (“A government is not a State.”). Alexander Aleinikoff, however, refutes Krasner’s distinctions between types of sovereignty, arguing that “[t] his ‘external’ sovereignty, based as it is on a norm of noninterference, depends upon the existence and well functioning of an international regime of states with the power to recognize those entities whose sovereignty must be respected and to maintain order within the regime.” T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91, 104 n.84 (2004).

²¹³ Krasner, *supra* note 209, at 10-12; see Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT’L L. 1075 (2004) (expounding upon concept of Westphalian sovereignty); Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT’L L.J. 651 (1997) (same).

²¹⁴ See, e.g., Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091 (2003); see also David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT’L L.J. 417 (1994) (providing a list of alternative and critical scholarship).

²¹⁵ See *supra* note 50 and accompanying text.

yielded to some degree of external authority.²¹⁶ Indeed, the very concept of jus cogens – peremptory norms that bind a state *because* the norm is peremptory rather than because the state has consented to those norms²¹⁷ – suggests the fallaciousness of this articulation of sovereignty.²¹⁸ Nonetheless, the Westphalian conception of sovereignty retains vitality in international law and merits attention. The prosecution of Paulo Lazarenko possibly challenges Westphalian sovereignty in two ways: first by breaching sovereign immunity, and second by imperialistically imposing the values of one polity on another.

5.1. Foreign Sovereign Immunity

²¹⁶ David Kennedy, *Theses About International Law Discourse*, 23 GERMAN Y.B. INT’L L. 353, 361 (1980) (noting that States “cannot be both internally absolute and externally social”).

²¹⁷ The Vienna Convention memorializes the principle of jus cogens:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344; *see* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988); M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law”*, 11 MICH. J. INT’L L. 768, 801-09 (1990) (discussing at length the principles of jus cogens). National and international tribunals use the concept regularly. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1085 (9th Cir. 2006) (reversing dismissal of a complaint because, among other things, the district court did not properly consider jus cogens); *Almog v. Arab Bank, PLC*, Nos. 04-CV-5564 (NG)(VVP), 05-CV-0388 (NG)(VVP), 2007 U.S. Dist. LEXIS 5826, at *52 (E.D. NY Jan. 29, 2007) (discussing jus cogens in context of financing of terrorist acts); *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, para. 101 (Inter-Am. Ct. H.R. Sept. 17, 2003) *available at* http://www.corteidh.or.cr/juris_ing/index.html (finding that principles of equality and nondiscrimination enjoy the status of jus cogens).

²¹⁸ *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 53 (1988) (“Jus cogens is capable of invalidating not only conflicting rules drawn from treaties but also rules that would otherwise be part of customary international law.”); M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROB. 63, 67 (1996) (“a jus cogens norm holds the highest hierarchical position among all other norms and principles”); David S. Mitchell, *The Prohibition of Rape in International Humanitarian law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT’L L. 219, 228 (2005) (“Peremptory norms represent the top of the international legal hierarchy and take precedence over national law at the international level and other sources of international law.”).

Lazarenko's actions occurred while he occupied a role in the Ukrainian government, and therefore introduces the possibility that he deserves "the exemption of the person of the sovereign from arrest or detention within a foreign territory."²¹⁹ Lazarenko in the specific could not avail himself of immunity because both the United States and Ukraine favored his prosecution.²²⁰ Nonetheless, in general the prosecution of bureaucrats in foreign jurisdictions raises questions regarding foreign sovereign immunity.

Foreign sovereign immunity finds its roots in hoary concepts of sovereignty. Technically, the maxim *rex non potest peccare*²²¹ applies to the King only within his own jurisdiction. Under the Westphalian idealization of sovereignty, however, all sovereigns are equal and inviolate.²²² Therefore, if the sovereign is immune within its own jurisdiction, then equality requires immunity for all sovereigns – *par in parem imperium non habet*.²²³ Because in hoary times the sovereign enjoyed absolute immunity, equality required that foreign sovereigns also enjoy absolute immunity.²²⁴ Thus, when Justice Marshall introduced foreign sovereign immunity into U.S. jurisprudence in *The Schooner Exchange*, he described that immunity in absolutist terms.²²⁵

²¹⁹ *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812); see Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 50 (2003) (discussing *Schooner Exchange* and the development of the foreign sovereign immunities doctrine in the United States).

²²⁰ *Cf. United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (denying claim of foreign sovereign immunity because the United States sought prosecution and Panama declined to request immunity), *cert. denied*, 523 U.S. 1060 (1998).

²²¹ The King can do no wrong. See William R. Dorsey, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 257 (1997).

²²² See *supra* note 37 and accompanying text.

²²³ An equal has no dominion over an equal. See Manoocher Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 97 n.10 (1999); see also THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 5 (1970) (reciting this history of the concept of foreign sovereign immunity).

²²⁴ See JOSEPH M. SWEENEY, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* i (1963) (discussing the breadth of the concept of foreign sovereign immunity at its earliest inception).

²²⁵ See Mofidi, *supra* note 223, at 96-99 (discussing *The Schooner Exchange*). Michael Murray convincingly demonstrates that Marshall did not in fact lay out a doctrine of absolute immunity and that courts following *The Schooner Exchange* had some latitude. Michael D. Murray, *Jurisdiction under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Exploitation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 223, 228-29 (2003). Nonetheless, it cannot be gainsaid that the bulk of courts listening to Marshall's absolutist language felt compelled to apply a doctrine of absolute immunity. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 3 n.12 (1988) (listing cases adhering to an absolute theory of immunity attributed to *The Schooner Exchange*).

For many years courts applied foreign sovereign immunity in absolutist terms.²²⁶ Cracks began to appear as the commercial activities of states rose in prominence and in value.²²⁷ Indeed, the specter of absolute immunity from suit for commercial activities led most countries to the creation and application of a relative doctrine of foreign sovereign immunity.²²⁸ Having opened the door to prosecution of claims based on the commercial activities of sovereigns, prosecution soon became available for claims of violation of jus cogens, of human rights, and a growing list of other issues.²²⁹

This mutability of foreign sovereign immunity more accurately reflects its historical application than does a stylized Westphalian vision. Foreign sovereign immunity has never been

²²⁶ *E.g.*, *Berizzi Brothers Company v. The Steamship Pesaro*, 271 U.S. 562, 574 (1926) (applying immunity to political and commercial actions); *Kahan v. Pakistan Fed'n*, 2 K.B. 1003, 1013 (1951) (applying absolute immunity); *see* SWEENEY, *supra* note 224, at 20-21 (discussing the early application of absolute immunity in Europe).

²²⁷ *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 326-27 (4th ed. 1990) (stating that the absolute doctrine of foreign sovereign immunity prevailed until the rise in state commercial activity in the early twentieth century); Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 *YALE J. INT'L L.* 489, 497 (1992) ("[T]he enormous expansion in international commerce meant that most foreign state immunity cases concerned trading activities and contractual obligations, not royalty and their ships, diminishing the persuasiveness of 'dignity' as a rationale for foreign state immunity."). The musings of Lord Maugham represent typical concerns of that era: "Half a century ago foreign Governments very seldom embarked in trade with ordinary ships . . . but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute." *Compania Naviera Vascongado v The Cristina*, [1938] AC 485, 521 (Lord Maugham).

²²⁸ *See* SWEENEY, *supra* note 224, at 21 (discussing the causal relationship between state commercial activity and the application of relative immunity in Europe); Ved P. Nanda, *Human Rights and Sovereign Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity) – Some Reflections*, 5 *ILSA J. INT'L & COMP. L.* 467, 470 (1999) (discussing the commercial exceptions to foreign sovereign immunity).

²²⁹ *See* Andrea Bianchi, *International Decisions: Ferrini v. Federal Republic of Germany*, 99 *AM. J. INT'L L.* 242 (2005) (discussing Italian and Greek cases that limit the application of foreign sovereign immunity when violations of jus cogens are alleged); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 *BERKELEY J. INT'L L.* 273, 319 (2006) (stating that war crimes and heinous acts are not protected by foreign sovereign immunity); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 *YALE J. INT'L L.* 505, 513-515 (2003) (discussing statutes in several countries that exempt certain behaviors from foreign sovereign immunity); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 *NEW ENG. L. REV.* 363, 378-79 (2001) ("Further, it is now generally accepted that state officials are not protected from criminal prosecution by the doctrines of foreign sovereign immunity or head of state immunity when they commit international crimes such as genocide or crimes against humanity, since these are acts which cannot be properly considered as the official functions of a State.").

a requirement imposed on nations,²³⁰ at most it is a broad principle of customary international law²³¹ applied in domestic courts as “a matter of grace and comity.”²³² Foreign sovereign immunity is not memorialized in any widely accepted treaty. The Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels²³³ contains some provisions relating to sovereign immunity (for the most part limiting immunity) but was signed by fewer than twenty-five countries.²³⁴ Similarly, the European Convention on State Immunity²³⁵ has not been signed by the majority of European nations and it too limits rather than expounds sovereign immunity.²³⁶ The United Nations Convention on Jurisdictional Immunities of States and Their Property²³⁷ has opened for signature but has not yet entered into force; it too limits sovereign immunity.²³⁸

Foreign sovereign immunity does manifest itself as an articulated statute in the laws of most countries.²³⁹ From Canada to South Africa, from Pakistan to Singapore, each of these acts

²³⁰ See James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT’L L. 820, 820 (1981) (“Indeed, it has been denied that there is any international law rule at all on the subject, a view that would presumably leave each state free to formulate, or negotiate, its own rule.”).

²³¹ See Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH L REV. 2129, 2161-61 (1999) (stating that customary international law is the source of foreign sovereign immunity); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1839 (1998) (attributing origins of foreign sovereign immunity to customary international law). Patrick McFadden points out inconsistencies in its local application that call into question foreign sovereign immunity’s status as customary international law. Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 59 n.258 (1995).

²³² *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); see Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT’L L. 369, 389 (2001) (“While the Supreme Court has constitutionalized the law of jurisdiction over persons and property, it has always treated the law of jurisdiction over foreign states and their property as a matter of customary international law.”).

²³³ Brussels Convention of 1926 for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, Apr. 10, 1926, 176 L.N.T.S. 199.

²³⁴ See Robert Franck, *The New Law for the Seas*, 42 L.Q. REV. 308, 308-09 (1926) (discussing the convention); A.N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 TUL. L. REV. 1274, 1286-89 (1983) (discussing the convention).

²³⁵ European Convention on State Immunity, May 16, 1972, ETS No. 74, reprinted in 11 ILM 470 (1972).

²³⁶ See Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 757 (2003) (discussing the convention).

²³⁷ GA Res. 59/38 (Dec. 2, 2004).

²³⁸ David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT’L L. 194 (2005).

²³⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. a (1987); see ANDREW DICKINSON, RAE LINDSAY & JAMES P. LOONOM, STATE IMMUNITY:

embraces a relative rather than absolute theory of foreign sovereign immunity.²⁴⁰ The corpus of state laws, together with the skeletal body of treaty, clearly indicates that to the extent international custom with respect to sovereign immunity exists, that custom expresses itself as a relative doctrine.

The doctrine of foreign sovereign immunity, therefore, does not constitute a barrier to the prosecution of foreign officials for corruption. Legal scholars have already engaged in the debate regarding the prosecution of sovereign agents for human rights violations;²⁴¹ the expansion of their thinking to include corruption represents only an incremental change. Foreign sovereign immunity is at most a matter of comity between states, and as such it imposes a requirement of communication between states, of a coordination of judicial goals and foreign relations objectives, and of a balancing of values, rules and fairness.²⁴² The fact that this task is difficult does not mean that it is impossible, nor does it excuse courts from its undertaking.²⁴³

SELECTED MATERIAL AND COMMENTARY (2004) (providing legislation on sovereign immunity); Materials on Jurisdictional Immunities of States and Their Property, UN Doc. ST/LEG/Ser.B/20 (1982) (providing legislative material on sovereign immunity).

²⁴⁰ See Canadian State Immunity Act of 1982, R.S.C. 1985, c. S-18, *reprinted in* 21 I.L.M. 798 (1982) and South African Foreign Sovereign Immunities Act of 1981, Pakistani State Immunity Ordinance of 1981, Singaporean State Immunity Act of 1979, *each reprinted in* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 20, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982).

²⁴¹ Compare Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403 (1995) (suggesting that violations of jus cogens trumps application of foreign sovereign immunity) with Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks*, 16 MICH. J. INT'L L. 433 (1995) (disagreeing with Reimann on policy grounds).

²⁴² Joseph Glannon and Jeffery Atik are confident that US federal courts, for example, will craft rules that are fair and that comport both with the dictates of international law and the goals of the domestic polity. They suggest that

courts will likely impose limits on jurisdiction over foreign sovereigns similar to those imposed by the due process clause, as a matter of federal common law, so long as the [domestic legislation] does not clearly contemplate wider jurisdiction. However, once the political branches expressly authorize wider jurisdiction, these court-imposed limits will be superseded by their exercise of the foreign affairs power.

Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 696-97 (1999).

²⁴³ See Erwin N. Griswold, *The Supreme Court, 1959 Term – Foreword: Of Time and Attitudes – Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 82 (1960) (noting that courts have a “great and difficult task in our constitutional system of government”); Richard B. Stewart, *Regulation in a Liberal State The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1550 n.53 (1983) (noting that courts commonly undertake very difficult tasks).

5.2. Relativity and Imperialism

Criminal prosecution in one country for acts committed outside its borders sometimes raises questions of relativity, on the theory that conduct prohibited by the prosecuting country may be countenanced by the country in which the act occurred.²⁴⁴ The extraterritorial prosecution of corruption in particular has raised claims of cultural and legal imperialism.²⁴⁵ Indeed, Steve Salbu claims that imperialism is “an ineluctable reality” of the prosecution of extraterritorial corruption.²⁴⁶ Salbu, and others, argue that behaviors considered acceptable or even desirable by one culture might be considered corrupt by another, and that to impose one value system on another constitutes legal imperialism.²⁴⁷

The fact that every country in the world criminalizes corruption²⁴⁸ confounds a claim of legal imperialism. The routine extension of criminal rules across borders also diminishes the impact of a claim of legal imperialism. From accounting and financial misconduct²⁴⁹ to terrorist acts,²⁵⁰ from sex tourism²⁵¹ to elusion of taxes,²⁵² a variety of statutes around the world allow for

²⁴⁴ See Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 27 (1995) (noting criticism).

²⁴⁵ See Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT’L L. 495, 496 (1999) (stating that international anti-corruption efforts are “elitist, statist and Eurocentric”); David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT’L L. 455, 458 (1999) (stating that the anti-corruption regimes have overtones of colonialism); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 239 (1997) (stating that “efforts to control bribery in other nations constitute moral imperialism”).

²⁴⁶ Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT’L L. 223, 252 (1999).

²⁴⁷ See David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)*, 33 CORNELL INT’L L.J. 593, 611-15 (2000) (discussing the anecdotal, but persistent belief that corruption is accepted in some places).

²⁴⁸ See *id.* at 613 (noting that corruption is illegal everywhere).

²⁴⁹ See *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1989 Q.B. 728, 761 (1987) (stating that British courts will give extraterritorial effect to a foreign court order dealing with the international financial regime); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1162, 1269-75 (1987) (describing extraterritorial financial regulations).

²⁵⁰ See Madeline Morris, *Terrorism: The Politics of Prosecution*, 5 CHI. J. INT’L L. 405, 407 (2005) (“State-sponsored terrorism has led logically to an impetus toward some form of supranational or extraterritorial authority for the handling of terrorist offenses.”); Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 740-52 (describing a great number of extraterritorial provisions dealing with terrorism and noting that they are “nothing new”).

²⁵¹ Paul Michell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 23 YALE J. INT’L L. 141, 220 n.371 (1998) (describing Canadian extraterritorial laws to combat sexual exploitation of children); Nancy Beyer, Note, *The Sex Tourism Industry Spreads to Costa Rica and Honduras: Are These Countries Doing Enough to*

criminal prosecution of extraterritorial acts. Indeed, customary international law has for centuries recognized the universal jurisdiction of local courts to prosecute certain behaviors wherever those behaviors occurred, including piracy, slavery and war crimes.²⁵³ Clearly, the simple act of prosecuting extraterritorial actors or conduct does not always or even often raise concerns of legal imperialism.

The case at hand, however, does not involve a bad accountant or a sex tourist. Rather, it involves a foreign leader engaged in the process of rebuilding a country following a couple of centuries of occupation and the dismantling of many of the local institutions. Lazarenko's defense hints at accusations of imperialism; he claims that he engaged in these behaviors at a time when Ukraine was relatively lawless and freewheeling.

The fact a statute makes a particular act illegal does not necessarily mean that the polity prosecutes that act.²⁵⁴ Many countries formally recognize "prosecutorial discretion"; by any name the choices a polity makes regarding prosecution give effect to the norms of a society.²⁵⁵ In the United States, for example, various state laws technically criminalize many forms of social interaction: kissing other than in marriage, most forms of sexual contact, underage consumption

Protect Their Children from Sexual Exploitation?, 29 GA. J. INT'L & COMP. L. 301, 327 (2001) (reporting that more than twenty countries extraterritorially prosecute sexual exploitation of children); Recent Case, *Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad* – United States v. Clark, 435 F.3d 1100 (9th Cir. 2006), 119 HARV. L. REV. 2612, 2614 (2006) (reporting a holding that extraterritorial application of laws protecting children from sexual exploitation are legitimate).

²⁵² See New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937) (stating that extraterritorial taxation is "universally recognized" and noting it is "inseparable from responsibility for sharing the costs of government"); Michael S. Kirsch, *The Tax Cade as Nationality Law*, 43 HARV. J. ON LEGIS. 375, (2006) (noting the legality of extraterritorial taxation); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 378 (1987) ("The grant of some extraterritorial taxing authority to local governments is hardly a novelty.").

²⁵³ UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (ed. Stephen Macedo, 2004); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988), see also Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, 80 FOREIGN AFF., July/Aug. 2001.

²⁵⁴ See William J. Stuntz, *The Political Constitution of Criminal Law*, 119 HARV. L. REV. 780, 791 (2006) ("Laws need not be regularly enforced.").

²⁵⁵ See Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293 (2006) ("Prosecutorial discretion requires policy determinations about how best to implement a statutory program."); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985) ("What cases are important enough to pursue entails policy discretion of the broadest sort. When to withhold remedial sanctions or alternatively to make an example of some offender raises issues of basic moral and political values."); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996) (describing breadth and policy implications of prosecutorial discretion); Stuntz, *supra* note 254, at 791 ("Prosecutorial discretion is, if anything, even broader.").

of alcohol, and so on.²⁵⁶ These behaviors are rarely prosecuted. Indeed, extensive prosecution likely would result in social unrest.²⁵⁷ Arguably, societies exist in which corruption is illegal but no one anticipates its prosecution. Extraterritorial prosecution, therefore, would constitute some degree of encroachment.

The overwhelming mass of evidence suggests that prosecution of corrupt acts does not constitute imperialism. Each of the major religions or schools of moral thought condemn corruption: including Buddhism,²⁵⁸ Christianity,²⁵⁹ Confucianism,²⁶⁰ Hinduism,²⁶¹ Islam,²⁶²

²⁵⁶ See 18 PA CONS. STAT. § 1301 (defining many types of sexual contact as criminal); Sara Sun Beale, *From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747, 752 (2005) (“Approximately one fourth of the states, and the District of Columbia, retain laws making fornication and cohabitation a crime, and about half of the states, and the military, make adultery a crime.”); Peter Goodrich, *The Laws of Love: Literature, History and the Governance of Kissing*, 24 N.Y.U. REV. L. & SOC. CHANGE 183, 185-98 (1998) (discussing numerous laws affecting social interaction); Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333 (2006) (discussing the relationship between enforcement of drinking age laws and social policy).

²⁵⁷ See Kit Lively, *At Michigan State, A Protest Escalated into a Night of Fires, Tear Gas, and Arrests*, CHRON. OF HIGHER EDUC., May 15, 1998, at A46 (describing a riot by more than 3,000 college students protesting enforcement of alcohol laws); Leo Reisberg, *Some Experts Say Colleges Share the Responsibility for the Recent Riots*, CHRON. OF HIGHER EDUC., May 15, 1998, at A48 (describing student riots in response to efforts to enforce underage drinking laws at Iowa State University, Plymouth State University, the University of Connecticut, and Washington State University). These protests have involved significant amounts of violence. See Jane Hadley & Steve Miletich, *23 Officers Hurt in Clash at WSU: National Guard on Alert after Party Turns Violent*, SEATTLE POST-INTELLIGENCER, May 4, 1998, at A1 (describing injuries inflicted by students protesting enforcement of alcohol laws at Washington State University).

²⁵⁸ “Sila [morality] as practiced by the Buddha may be said to be the widest [moral principle] in scope. . . . The second moral precept of refraining from taking what is not given . . . involves abstinence from all deceptive practices such as bribery that lead to social disintegration.” U. Dhammaratana, *The Social Philosophy of Buddhism*, in THE SOCIAL PHILOSOPHY OF BUDDHISM 1, 17-18 (Samdhong Rinpoche ed., 1972).

²⁵⁹ *Exodus* 23:8 (“and you shall take no bribe . . . for a bribe blinds the officials”); *Ecclesiastes* 7:7 (“and a bribe corrupts the mind”); see David Neff, *When Economists Pray*, CHRISTIANITY TODAY, Apr. 9, 1990, at 13 (“Corruption ‘so undermines society that there is a virtual breakdown of legitimate order.’” (quoting Oxford Declaration on Christian Faith and Economics)).

²⁶⁰ See J.C. Cleary & Patrice Higonnet, *Plasticity Into Power: Two Crises in the History of France and China*, 81 NW. U. L. REV. 664, 669 (1987) (“principled Confucian officials often lamented that despite their best intentions, the entrenched corruption of the petty functionaries made it impossible to put into effect a truly moral administration.”).

²⁶¹ In reviewing organic works of the Hindu faith, Upendra Thakur notes that “a perusal of the Smrti works makes it clear that the earlier Smrti writers prescribe a much more drastic punishment for the bribe seeker [than for the bribe giver,] who finds a graphic mention in one of the early inscriptions. Manu and Visnu also ordain that the entire property of bribe-consuming officials should be confiscated by the king. Yajnavalkya, however, provides banishment for such social offenders. Kautilya, the astute observer of men and affairs, gives a graphic description of

Judaism,²⁶³ Sikhism,²⁶⁴ and Taoism.²⁶⁵ No empirical study has ever found a society that actually embraces corruption.²⁶⁶

To the extent that persons may not expect prosecution, it is more likely the result of cynicism than a feeling that corruption should not be prosecuted. In endemically corrupt polities, such as Ukraine while Kuchma was President, enforcement of criminal laws can be very difficult.²⁶⁷ The ability to bribe corrupt judges and prosecutors makes enforcement of corruption

measures to apprehend such an official, and like Yajnavalkya prescribes banishment for such officials.” UPENDRA THAKUR, CORRUPTION IN ANCIENT INDIA 14 (1979).

²⁶² See QORAN, *Sura* 2:184 (“Not to consume each others’ wealth unjustly, nor offer it to judges as bribes, so that, with their aid, you might seize other men’s property unjustly.”); *Sura* 28:77 (“Allah loveth not corrupters.”). “Islam as a religious doctrine has waged constant war against all forms of corruption. . . . According to Islam, corruption is a sin for which there is no atonement. The Quran in unmistakable terms has pointed out that all those who indulge in corruption will be subject to eternal chastisement. Corruption is an immoral activity which deserves universal condemnation.” SHAUKAT ALI, CORRUPTION: A THIRD WORLD PERSPECTIVE 49 (1985).

²⁶³ See *Deuteronomy* 16:19 (“neither shall you take a bribe”); 1 SÉFER HAHINUCH, THE BOOK OF EDUCATION 325 (1978) (“Among the laws of the precept, there is what our Sages of blessed memory said, that both the one who gives and the one who accepts [the bribe] violate a negative precept . . .”).

²⁶⁴ “The main object of Sikh polity, it may again be emphasized, is ‘righteous rule.’ This can be obtained either by transforming the existing corrupt rulers on moral and ethical lines of religion through peaceful persuasions, or by replacing their corrupt rule by a ‘just’ regime – if necessary, with the help of arms.” HARBANS SINGH, DEGH, TEGH, FATEH: SOCIO-ECONOMIC AND RELIGIO-POLITICAL FUNDAMENTALS OF SIKHISM 141(1986).

²⁶⁵ “The courts are all swept very clean; while the fields are full of weeds; and the granaries are all empty. Their clothing -- richly embroidered and colored; while at their waists they carry sharp swords. They gorge themselves on food, and of possessions they have plenty. This is called thievery! And thievery certainly isn’t the Way!” LAO TZU, TE-TAO CHING 22 (trans. Robert G. Hendricks 1989) (168 b.c.); see also ALI, *supra* note 262, at 38 (attributing statement “The more laws are promulgated the more thieves and bandits there will be” to Lao Tzu).

²⁶⁶ See Heymann, *supra* note 159, at 328-29 (“The people of every country hate corruption and feel cheated by it.”). Empirical research has found small segments of societies that embrace corruption. Research has also found societies in which a majority of people engage in corrupt activities, but as scholars from a variety of countries point out, this does not mean that people embrace or accept the practice. The author of this paper has conducted research in Africa, Central and East Asia, Europe, and Central America and has found universal condemnation of corruption.

²⁶⁷ See THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 13 (1997) (noting that official enforcement bodies in corrupt states are themselves susceptible to corruption); Celeste Boeri, *How to Solve Argentina’s Debt Crisis: Will the IMF’s Plan Work?*, 4 CHI. J. INT’L L. 245, 251 (2003) (“Dependence on [a] legally enforced strategy is likely to be ineffective.”); O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 467-68 (2001) (“Other problems have been caused by widespread corruption and an inadequate enforcement process to implement

laws particularly difficult.²⁶⁸ Daryl Levinson warns that weak enforcement agencies confronted with powerful corrupt actors will become corrupt themselves²⁶⁹ Corrupt agencies and a diminished expectation of enforcement do not constitute cultural acceptance of an illegal act.

6. *Lazarenko-type Prosecutions as a Tool to Fight Corruption*

Ukraine illustrates the sensitivity of this problem in fighting corruption. The election of Viktor Yushchenko represented progress toward a stable and open democratic process.²⁷⁰ The

laws, underscoring the need for a developed legal system to interpret and enforce rules and to settle disputes over owned resources.”); Stephen J. Toope, *Legal and Judicial Reform through Development Assistance: Some Lessons*, 48 MCGILL L.J. 357, 375 (2003) (stating that enforcement of corruption laws is impossible if enforcers are corrupt).

²⁶⁸ See Tarik Abdel-Monem, *Foreign Nationals in the United States Witness Security Program: A Remedy for Every Wrong?*, 40 AM. CRIM. L. REV. 1235, 1244 (2003) (“In a number of nations, formal institutions are undermined by corruption, violence, or other factors that counteract efforts of law enforcement authorities.”); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1185 (2003) (criticizing “corrupt politicians pressing to abolish or weaken regulations and cripple enforcement”); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1398 (2003) (noting that corruption impedes the enforcement of rules by state entities); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 825 (2003) (describing the difficulty of pursuing case of corruption against enforcement agencies).

²⁶⁹ Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 390-91 (2003); see Bruce L. Benson, *Corruption in Law Enforcement: One Consequence of ‘The Tragedy of the Commons’ Arising with Public Allocation Processes*, 8 INT’L REV. L. & ECON. 73 (1988) (discussing the corruption of entities charged with enforcing corruption standards); Hiram E. Chodosh, *Emergence from the Dilemmas of Justice Reform*, 38 TEX. INT’L L.J. 587, 601 (2003) (“Vague ethical norms, a poorly regulated and fragmented body of legal professionals, weak monitoring capacity, corrupted review systems, and ineffectual prosecution and enforcement substantially sustain systemic impunity for illicit practices.”).

²⁷⁰ See Anders Åslund, *The Economic Policy of Ukraine after the Orange Revolution*, 46 EURASIAN GEOGRAPHY & ECONOMICS 327-353 (2005) (discussing the economic policy of Ukraine following Yushchenko’s election, which although the author finds excessively populist is still much better than that of the authoritarian regime); Taras Kuzio, *From Kuchma to Yushchenko*, PROBLEMS OF POST-COMMUNISM, Mar./Apr. 2005, at 29, 29-40 (discussing the progress made following Yushchenko’s election); Sandra Day O’Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, (2006) (noting the “level of transparency atypical for the ex-Soviet world” that accompanied the struggle over the election of Yushchenko); Magdaleno Rose-Avila, *Transforming Social Justice: Stand Up for Your Rights*, 3 SEATTLE J. SOC. JUST. 575, 578 (2005) (“Viktor Yushenko and his supporters protested in the cold wintry streets of Kiev and brought the government to a halt. New elections were ordered and, in the end, Yushenko won. Ukrainians stood up for their rights and they succeeded in reaching their goals in spite of the enormous challenges that they faced.”); Hans van Zon, *Why the Orange Revolution Succeeded*, 6 PERSPECTIVES ON EUROPEAN POLITICS & SOCIETY 373-402 (2005) (explaining how the “orange

appointment of Yulia Tymoshenko raises questions. Tymoshenko accrued millions of dollars during her presidency of Ukraine Energy Systems.²⁷¹ In part, her success as president of that company emanated from her corrupt relationship with Pavlo Lazarenko.²⁷² During her brief tenure as Prime Minister she continued to request extradition of Lazarenko to Ukraine. Without casting aspersions on Ukraine, it is fair to question the efficacy of a corruption case against him in that country.

The tremendous amount of damage wrought by corruption, in tandem with the difficulty in eradicating corruption from endemically corrupt systems, has led to a global, albeit uncoordinated, effort to deal with corruption.²⁷³ Obviously, improvements to infrastructure, education, and the political process garner much attention in this effort.²⁷⁴ The aspect of the global effort most pertinent to the Lazarenko prosecution, however, regards adjudication of claims of corruption. This adjudication occurs pursuant to a patchwork of rules and agreements, ranging from international treaties to local laws.

6.1 *Treaties*

Several treaties, most promulgated within the last dozen years, focus on prosecution of corruption. The Organization for Economic Cooperation and Development has promulgated the most lauded of the international treaties in its Convention on Combatting Bribery of Foreign

revolution” succeeded and noting that “the Orange Revolution gives a unique opportunity to create a culture of democracy and to establish the rule of law.”).

²⁷¹ See MATTHEW BRZEZINSKI, *CASINO MOSCOW* (2001) (describing Tymoshenko as a billionaire and the only female oligarch in the post-Soviet countries).

²⁷² See Alex Rodriguez, *Ousted Premier Eyes Comeback*, CHICAGO TRIB., Oct. 9, 2005, at C3 (describing the relationship and noting that Tymoshenko was named in Lazarenko’s indictment); Andrey Slivka, *Bitter Orange*, N.Y. TIMES, Jan. 1, 2006, at mag. 24 (describing this relationship and stating that “[h]er rebranding of herself as a populist fighter, then, is one of the stranger stories in Eastern European politics”).

²⁷³ See Robert E. Lutz, *On Combating the Culture of Corruption*, 10 SW. J.L. & TRADE AM. 263, 267 (2004) (noting the “sea-change” in international attitudes toward corruption and stating that “the issue of official and business corruption has become a major focus of international cooperation”); Martin Wolf, *Corruption in the Spotlight*, FIN. TIMES, Sept. 16, 1997, at 23 (“[I]t is difficult to think of a significant international organization not looking at corruption.”).

²⁷⁴ The United States Department of Commerce’s Good Governance Program, for example, assists governments and businesses in strengthening institutions, developing business ethics, and developing strategies to cooperatively combat corruption. See Good Governance Program, <http://www.ita.doc.gov/goodgovernance/>. Similarly, the World Bank Institute’s Governance and Anti-Corruption program attempts to strengthen government institutions. See World Bank Institute, *Governance & Anti-Corruption*, <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/WBIPROGRAMS/PSGLP/0,,menuPK:461646~pagePK:64156143~piPK:64154155~theSitePK:461606,00.html>. See generally Philip M. Nichols, *Corruption as an Assurance Problem*, AM. U. INT’L L. REV. 1307 (2004) (describing business lead initiatives to combat corruption).

Government Officials in International Business Transactions.²⁷⁵ The treaty itself does not create regulations; it instead requires signatories to implement functionally equivalent laws.²⁷⁶ The treaty sets forth five requirements. First, the signatory must criminalize the payment of bribes to foreign public officials with respect to the conduct of transnational business.²⁷⁷ Second, it must take the size of the bribe or of its effects into account and make the bribe subject to seizure or provide for comparable penalties.²⁷⁸ Third, the signatory must impose penalties for bribing foreign public officials that are comparable to those imposed for the bribery of domestic officials.²⁷⁹ Fourth, with respect to jurisdiction, the signatory must provide for jurisdiction over

²⁷⁵ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD/DAFFE/IME/BR(97)16/FINAL (18 Dec. 1997), 37 I.L.M. 1 (1998), S. Treaty Doc. No. 105-43, entered into force 15 Feb. 1999 (“OECD Convention”); see Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485 (2000) (lauding the OECD Convention); Hess & Dunfee, *supra* note 247, at 602 (“The most significant advancement in the fight against corruption and the strongest demonstration of its universal condemnation is the [OECD Convention].”); Nii Lante Wallace-Bruce, *Corruption and Competitiveness in Global Business – The Dawn of a New Era*, 24 MELBOURNE U. L.R. 349, 368 (2000) (“Perhaps the most significant step in the efforts to combat corruption in global business was taken on 17 December 1997 in Paris, when members of the OECD signed the [OECD Convention].”); Jong Bum Kim, *Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption*, 17 UCLA PAC. BASIN L.J. 245, 254 (2000) (“the OECD Bribery Convention has built the most significant multilateral instrument in the fight against bribery and corruption”).

²⁷⁶ See Padideh Ala’i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT’L L. 877, 893-94 (2000) (“The aim is that the signatories, by national implementation, will provide clear and detailed rules that are functionally equivalent to one another in punishing and deterring bribery in international business.”).

²⁷⁷ OECD Convention, *supra* note 275, art. 1. Specifically, article 1 requires that the implementing legislation

take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business . . .

Id.

²⁷⁸ *Id.* art. 3. If criminal liability cannot be imposed on legal persons under the existing legal system of the implementing country, the Convention does not require that criminal liability be imposed. Instead, it requires that other “dissuasive” measures be taken, which might include civil monetary sanctions. *Id.* art. 3, para. 2.

²⁷⁹ *Id.* art. 3, para. 1.

all such acts committed in whole or in sufficient part within its territory, and if nationality jurisdiction is recognized by that country must also extend extraterritorial jurisdiction based on that principle.²⁸⁰ Fifth, the signatory must allow extradition of its nationals charged with the bribery of foreign public officials or must prosecute them itself.²⁸¹

The OECD's treaty is only one of many. In 1996 the Organization of American States promulgated a treaty that requires its members to take certain actions with respect to transnational bribery, including the criminalization of bribery of foreign officials.²⁸² The treaty also requires signatories to cooperate with one another in the prosecution of corrupt officials and bribe givers.²⁸³ The European Union has promulgated two instruments that deal with corruption. The Protocol to the Convention on the Protection of the Communities' Financial Interests requires member states to criminalize corruption that involves the financial interests of the European Union itself.²⁸⁴ The European Union has also promulgated a general treaty that, albeit in a limited way, requires member states to criminalize transnational bribery.²⁸⁵ The Council of Europe, a broader grouping than the European Union, has promulgated a treaty that imposes on its members requirements similar to those imposed by the OECD's convention on corruption.²⁸⁶ The MERCOSUR Treaty of Asuncion requires MERCOSUR members to impose

²⁸⁰ *Id.* art 4.

²⁸¹ *Id.* art. 10, para. 3.

²⁸² Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, art. 5; see Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison With the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 247-49 (1998) (discussing the requirement); see Bruce Zagaris, *Revisiting Novel Approaches to Combatting the Financing of Crime: A Brave New World Revisited*, 50 VILL. L. REV. 509, 573 (2005) ("The involvement by the OECD and the OAS in the implementation of anti-corruption laws have contributed positively to the identification of problems and education of states and interested parties.").

²⁸³ The treaty requires signatories to allow extradition of bribe givers and bribe-taking officials and contains a pledge that signatories will not invoke bank secrecy laws to impede investigations into corruption. Inter-American Convention Against Corruption, *supra* note 282, art. XIII (extradition), art. XVI (bank secrecy); see David P. Warner, *Law Enforcement Cooperation in the Organization of American States: A Focus on Remja*, 37 U. MIAMI INTER-AM. L. REV. 387, 393 (2006) (discussing requirements).

²⁸⁴ Council Act of 27 September 1996 Drawing up a Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 1.

²⁸⁵ Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C 195/1). The treaty requires members to criminalize bribery of European Union officials or of officials of member states. *Id.* art. 8; see Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 395-399 (2000) (explicating two European Union agreements).

²⁸⁶ Council of Europe, Criminal Law Convention on Corruption (Jan. 27, 1999), Europ. T.S. No. 173; see Jarmila Lajcakova, *Violation of Human Rights Through State Tolerance of Street-Level Bribery: Case Study, Slovakia*, 9 BUFF. HUM. RTS. L. REV. 111, 122, 130-31 (2003) (discussing Council of Europe Convention).

and harmonize criminal penalties for certain types of corruption.²⁸⁷ The African Union has set out a treaty that requires African states to criminalize corruption, to seize proceeds of corrupt relationships, and to cooperate in the prosecution of transnational corruption.²⁸⁸ In addition to regional treaties, the United Nations has set forth the Convention Against Corruption, which also requires criminalization of corruption and requires confiscation of illicitly acquired assets.²⁸⁹

In general, international treaties first impose on signatory nations a requirement to impose criminal penalties on their own residents who enter into corrupt relationships with foreign officials, and second coordinate enforcement among signatories. Treaties do not impose controls on the behaviors of local officials, including officials whose behavior crosses state borders.

6.2. *International Tribunals*

Although the organic documents of international criminal tribunals do not specifically confer subject matter over corruption, such jurisdiction certainly is conceivable.²⁹⁰ Many scholars suggest the International Criminal Court as the natural body for enforcing vigorous international norms prohibiting corruption.²⁹¹ Indeed, many countries supported the

²⁸⁷ Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay, Mar. 26, 1991, Annex II, art. 12, 30 I.L.M. 1041, 1057 (1991); see Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements*, 17 FLA. J. INT'L L. 59, 90 (2005) ("the Treaty of Asuncion reflects MERCOSUR's overwhelming sentiment to thwart corruption").

²⁸⁸ African Union Convention on Preventing and Combating Corruption, AU Assembly, 2d Ord. Sess. arts. 5, 19, 16(c)(1) (July 11, 2003), available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>; see Peter W. Schroth, *The African Union Convention on Preventing and Combating Corruption*, 49 J. AFRICAN L. 24 (2005) (explicating the convention).

²⁸⁹ Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/58/422 arts. 1, 51-59 (2003); see Herbert V. Morais, *Fighting International Crime and its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 588-590 (2005) (discussing the UN Convention).

²⁹⁰ See Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 200-204 (2000) (setting out a careful argument as to the jurisdiction of the International Criminal Court over corruption).

²⁹¹ See Judd Lawler, *Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1322 (1999) (noting that since the OECD Convention, there have been discussions about the creation of international courts of corruption). For excellent discussions of the development of rules, procedures and especially jurisdiction within the International Criminal Court both prior to and after its creation, see Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370 (2005) (discussing developments following the creation of the court); Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6

development of the court specifically because prosecution in corrupted local courts proved impossible.²⁹² At a minimum, it is likely that an international criminal tribunal could exercise jurisdiction to prosecute egregious cases of corruption, particularly if the corrupt acts were closely tied with other extreme abuses.²⁹³

International arbitral tribunals do not have the power to prosecute corrupt individuals. They do, however, have the power to negate or void transactions in which corruption has played a part. In ICC Case Number 1110, Judge Gunnar Lagergren opened the door for invalidation of corrupt contracts:

Finally, it cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for use before international arbitration tribunals that lack a “law of the forum” in the ordinary sense of the term.²⁹⁴

DUKE J. COMP. & INT’L L. 167 (1995) (discussing the issues and possibilities that preceded the creation of the court).

²⁹² See Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT’L L. 1, 23 (1998) (describing how 17 small nations asked the General Assembly to establish international criminal court to prevent corruption and avoid overwhelming state resources); see also Jennifer Llewellyn & Sandra Raponi, *The Protection of Human Rights Through International Criminal Law: A Conversation With Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 57(1) U.T. FAC. L. REV. 83, 96 (1999) (emphasizing the importance of an international body like the ICC in compensating for flawed or corrupt national prosecutions and failure to prosecute international crimes).

²⁹³ See Bruce Broomhall, *Looking Forward to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law*, 8 CRIM. L.F. 317, 332 n.47 (1997) (“Prosecutions might also be possible where corrupt officials, rogue elements, or scapegoats were involved.”).

²⁹⁴ ICC Award No. 1110, at ¶ 16, Jan. 15, 1963, 21 Y.B. COMM. ARB. 47, 51 (1996); see FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1486 (Emmanuel Gaillard & John Savage eds., 1999) (discussing the case); J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case. No. 1110*, 10 ARB. INT. 277 (1994) (thoroughly explicating the decision). Judge Lagergren’s language became standard. See, e.g., ICC Award No. 3916 (1981), 111 JOURNAL DU DROIT INTERNATIONAL 930, 933 (1984) (“l’arbitre s’est référé à un principe de droit généralement reconnu par les nations civilisées selon lequel des ententes violant sérieusement les bonnes mœurs où l’ordre public international sont nulles ou tout au moins ne peuvent pas donner lieu à exécution.” [The arbitrator makes reference to a principle of law which is generally recognized by civilized nations and which provides that agreements that are seriously violating moral rules or the ordre public international are null and void and may not give rise to the execution of contractual obligations.]).

Judge Lagergen excused himself on the grounds of jurisdiction, but following tribunals have more aggressively followed his lead.²⁹⁵ The unfolding of this doctrine over the last forty years is interestingly. While a plethora of reasons support an arbitral tribunal's avoidance of a contract on grounds of corruption,²⁹⁶ a clear doctrine has emerged that international law and international order have developed standards against corruption that an international tribunal must uphold.²⁹⁷

²⁹⁵ See A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, 1 TRANSNAT'L DISP. MGT. 1 (2004), available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm> (noting that international tribunals have decided at least twenty cases on the grounds of corruption following ICC Award No. 1110); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 998 (2005) (noting that rules against bribery are "applied with some degree of regularity").

²⁹⁶ Hans Baade explicates quire clearly:

A fairly typical example is an agency agreement by which the agent undertakes to procure a government contract for the principal through the payment of a bribe to a government official. This contract is likely to be void under the *lex fori* in a purely domestic setting, and the express selection of another law by the parties will not oust the applicability of local invalidating or penal rules, as these remain grounded in the *ordre public interne* in its original (first) meaning. If the government were foreign and the agency agreement were inadvertently governed by the law of that prospective third party, it would be void under the *lex causae* and unenforceable in the forum for that reason. The same result follows if the validity of the agency contract is expressly made subject to the anti-corruption laws of a third country other than the prospective contracting state, and if the law thus chosen invalidates the agency contract. In the still more unlikely event that the foreign *lex causae* would not invalidate the agency agreement, the forum might resort to its *ordre public international* to refuse it protection nevertheless.

Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 453-54 (1995) (footnotes omitted); see ICC Award No. 3913 (1981), Sigvard Jarvin & Yves Derains, COLLECTION OF ICC ARBITRAL AWARDS 1974-1985, at 497 (1990) (stating that a contract involving corruption was void not only under French law but also on grounds of public international order).

²⁹⁷ See ICC Award No. 8891 (1998), 127 JOURNAL DU DROIT INTERNATIONAL 4 (2000) (strongly condemning corruption and reaffirming arbitrators' duty to negate corrupt contracts); ICC Award No. 3916 (1982), 111 JOURNAL DU DROIT INTERNATIONAL 930 (1984) (stating that corruption is a breach of acceptable standards of behavior, even if it is considered in a particular country as a regular means of conducting business); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 294, at 823-24 (describing the development of the doctrine that contracts involving bribery are void as against international public policy); Rogers, *supra* note 295, at 998-99 ("[International public policy] is applied with some degree of regularity to void contracts for bribery, even if bribery would not invalidate the contract under the law chosen by the parties and the issue of bribery was not raised by either party. These doctrines and rules provide a meaningful, even if not impermeable, bulwark against erosion of the public realm in international arbitration." (footnote omitted)).

The growing number of international treaties that deal with corruption explicitly support the tribunals in this finding.²⁹⁸

6.3. Local Law

Local law also contributes to the web of rules regulating corrupt behaviors. Corruption is illegal in every country in the world.²⁹⁹ While the particulars of hundreds of local laws defy detailed explication, for the most part these laws impose criminal sanctions on persons who corrupt local officials, and on local officials for local corruption.³⁰⁰ Pursuant to international treaty obligations, many countries also impose criminal sanctions on private persons who engage in transnational bribery.³⁰¹ On the other hand, no similar treaty provision exists for the public analog to these private transnational actors; local laws can only reach part – at most – of an act that occurs throughout several jurisdictions. While the local portion of their corrupt actions may be actionable, the totality of their conduct escapes censure.

6.4. The Role of Lazarenko-type Prosecution

In the aggregate, these bodies of laws and rules create a network that regulates most corrupt behavior. Graphically, the network could be described as follows:

The Patchwork of Transnational Corruption Regulation		
What	Does What	To Whom
treaties	create expectations and requirements	of countries
tribunals	criminally prosecute significant events	by individuals
arbitration	negate major	transactions
local laws	criminally prosecute	local public officials
local laws	criminally prosecute	local private actors
local laws	negate	local transactions
local laws	ignore	transnational public officials
local laws	criminally prosecute	transnational private actors

This network, however, contains an obvious hole. Local laws, standing on their own, do not reach the full extent of official corruption that crosses borders. The Lazarenko prosecution fills in this hole. By cobbling together local laws from two jurisdictions, the Lazarenko court enabled

²⁹⁸ See Martin, *supra* note 295, at 3 (stating that the international treaties on corruption reflect international laws and order for the purposes of international arbitration); see also ICC Award No. 6248 (1990), 19 Y.B. COMM. ARB. 124 (1994) (“there does exist a principle of truly international or transnational public policy which sanctions corruption and bribery contracts”).

²⁹⁹ See FRITZ F. HEIMANN, TRANSPARENCY INTERNATIONAL, SHOULD FOREIGN BRIBERY BE A CRIME 2 (1994); Nii Lante Wallace-Bruce, *Corruption and Competitiveness in Global Business--The Dawn of a New Era*, 24 MELBOURNE U. L.R. 349, 352 (2000).

³⁰⁰ Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 20 (2003) (noting that bribery of domestic officials is universally criminalized).

³⁰¹ See *supra* notes 275-289.

consideration of Lazarenko's actions. Rather than ignoring misconduct that occurred in another jurisdiction, on a theory that whatever occurs in another jurisdiction must be outside the purview of its scrutiny,³⁰² the court not only allowed for consideration of Ukrainian law but also undertook the task of determining that law and factually evaluating whether that law was violated. In doing so, the court developed a technique that fills in the gap in the network of rules controlling corruption; a technique that other courts can easily replicate.

Conclusion

Law supports and regulates interaction within communities. Communities within nations are very important. They are hardly, however, the only types of communities that people may form. Changes in technology and changes in mindsets allow the formation of communities with little reference to political borders. Local laws that stop at the borders do little to support these communities. International law, which does not recognize most transnational persons as legitimate subjects of international law, does even less.

Pavlo Lazarenko provides a glaring example of the potential abuse of the holes created by the failure of international law. Lazarenko created a network that moved illegally acquired monies across several borders. Lazarenko's activities are especially damaging because he violated the trust placed in him by the people of Ukraine, and in doing so caused extraordinary damage to that country. The behaviors of Pavlo Lazarenko and other corrupt officials necessitate control. Again, however, if local law stops at the border and international law does not recognize corrupt officials, then law will not reach the full extent of their actions.

The prosecution of Pavlo Lazarenko demonstrates one means of controlling transnational corruption, and provides an interesting study of the cobbling together of local laws to deal with transnational actions in general. In order to prosecute Lazarenko in a U.S. court, the court melded together the laws of Ukraine and the laws of the United States. In order to prove its case, the prosecution not only had to prove violation of U.S. laws but also had to prove violation of Ukrainian laws. The jury considered the case and rendered a verdict.

This court's adroit melding of laws demonstrates the possibilities attainable by the use of local laws. The court's clumsy treatment of the honest services required of a Ukrainian official, on the other hand, also evince the need for a thoughtful and sensitive approach to the application of local laws to an act that crosses borders.

Cobbled-together local laws are not a perfect substitute for laws propagated by a transnational community itself. While the Westphalian bestowal of a monopoly in international relations to nations does not withstand factual scrutiny, concepts of sovereignty retain vitality both in law and in the ordering of transnational relations. Thus, care must be taken not to transgress the law of nations while controlling the actions of individuals. The prosecution of corrupt officials can be accomplished without violating those rules.

The prosecution of corrupt officials comprises a critical element of growth and development, whether at the global or individual level. Corruption presents a significant obstacle to the enhancement of democratic institutions, and corruption imposes tremendous costs on societies and the individual people who make up those societies. The prosecution of Pavlo Lazarenko marks a degree of justice for those who have suffered in Ukraine. The creation of a

³⁰² A theory that resonates with doctrinal international law. *See supra* note 28.

tool to combat transnational corruption offers possible amelioration for many more who suffer the degradations of corruption.